06-20885

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY K. SKILLING,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT JEFFREY K. SKILLING

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division
Crim. No. H-04-25 (Lake, J.)

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel for Defendant-Appellant Jeffrey Skilling certifies that the following persons and entities have an interest in the outcome of this appeal, No. 06-20885:

1. United States of America, Plaintiff-Appellee;
2. Department of Justice, Counsel for Plaintiff-Appellee (Steven Tyrrell, Joseph Douglas Wilson, Sean Berkowitz, Kathryn Ruemmler, John Hueston, Cliff Stricklin, Leo Wise, Robb Adkins);
3. Jeffrey Skilling, Defendant-Appellant;
4. O'Melveny & Myers LLP, Counsel for Defendant-Appellant Jeffrey Skilling (Daniel Petrocelli, Walter Dellinger, Randall Oppenheimer, Jonathan Hacker, Matthew Kline, David Marroso, Brian Devine, and Meaghan McLaine); and
5. Ronald Woods, Counsel for Defendant-Appellant Jeffrey Skilling.

Respectfully submitted,

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Daniel M. Petrocelli
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STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellant Jeffrey Skilling requests oral argument. This case is perhaps the most prominent and publicized white-collar case ever prosecuted. But with certainty, it is the most misunderstood case, enveloped from the outset by perceptions and myths that bear little resemblance to the actual facts. Almost everyone believes, for instance, that Skilling was indicted, tried, and convicted for causing the 2001 bankruptcy of Enron Corporation and its devastating effects on thousands of Enron employees and shareholders. As the government itself conceded, however, the case against Skilling had nothing to do with Enron's collapse.

Profound, inherent weaknesses in the government's case—not just gaps in its evidentiary proof, but doubts about its basic theories of criminality—motivated the government to resort to novel and incorrect legal theories, demand truncated and unfair trial procedures, and use coercive and abusive tactics. Skilling submits that oral argument is essential to assist the Court's understanding of the remarkable record in this case, including the multiplicity of substantial legal and procedural errors that have put Skilling in prison for 24 years not only for crimes that he did not commit, but for acts of business judgment that are not crimes at all.

JURISDICTIONAL STATEMENT

Defendant-Appellant Jeffrey Skilling appeals from a judgment of conviction (one count of conspiracy, 12 counts of securities fraud, five counts of false statements to auditors, and one count insider trading) and commitment order entered by the Honorable Sim T. Lake III of the U.S. District Court for the Southern District of Texas on October 25, 2006. R:41917-24.[1] Skilling filed a timely notice of appeal from this order on October 31, 2006. R:42193. This Court has jurisdiction under 28 U.S.C. §1291.

[1] All emphases in this brief have been added unless otherwise noted. Citations are made as follows unless otherwise noted: "R:123" refers to the Record on Appeal, page 123; "SR1:123" refers to Supplemental Record #1; "SR2:123" refers to Supplemental Record #2; "SR3:123" refers to Supplemental Record #3; "GX100:123" refers to Government Trial Exhibit 100, page 123; "DX100:123" refers to Defense Trial Exhibit 100, page 123; "RE-1:123" refers to Skilling's concurrently-filed Record Excerpts, Tab 1, page 123; and "JKS-1:123" refers to Skilling's concurrently-filed Motion to Supplement the Record on Appeal, Tab 1, page 123. Sealed documents are cited by date and title, and identified as "sealed."

INTRODUCTION

In 2001, the seventh largest corporation in America—Enron Corporation—went bankrupt in a matter of weeks. With almost no information about what actually happened at Enron, it was widely assumed that such a rapid collapse could be caused only by financial crimes of great magnitude. Long before any trial was convened, newspapers around the country, politicians in Washington, and an inflamed public all were demanding prison sentences for Enron's managers, especially its top officials, CEO Jeff Skilling and Chairman Ken Lay. In Houston, such calls rung out daily with venomous emotion, wrought from the pain so many Houstonians suffered when Enron was driven out of business. The sentiment was pervasive and palpable: someone had to pay for what Enron's demise did to the people, community, and legacy of Houston.

Under unprecedented public and political pressure, the President appointed a special team of investigators and prosecutors—the Enron Task Force—to conduct a virtual autopsy of Enron in search of crimes and criminals. But there were two obstacles the Task Force soon confronted. There was no clear indication of crime at Enron. It is not a crime to make controversial business judgments about risks and returns—even if those judgments appear erroneous in hindsight. Such a case requires proof that the executive *knowingly* engaged in acts of *criminal misconduct*, such as embezzling money or appropriating information belonging to his company.

Even more problematic, there was *no tangible evidence* Skilling committed such acts. Although CFO Andrew Fastow's secret thievery came publicly to personify the Enron story, the Task Force knew that Skilling had *nothing* to do with Fastow's embezzlement. In complete contrast, Skilling had tried to *save* Enron when it was on the brink of collapse, by offering to invest tens of millions of dollars—effectively his entire net worth—to keep Enron operating as panicking creditors and traders drained the company of cash in late 2001.

The Task Force also knew Skilling's conduct bore none of the hallmarks or indicia of criminality. Skilling did not steal or divert money from Enron; did not engage in self-dealing; did not act out of greed, avarice, or financial duress; did not destroy evidence; did not "cover up" conduct by him or others; did not tell anyone to lie, cheat, or break the law; and did not approve deals or make statements without consulting scores of colleagues, lawyers, accountants, and other professionals. As the Task Force's own witnesses said at trial, Skilling was loyal and dedicated to Enron and worked tirelessly to advance and protect its interests. In the end, the Task Force conceded the point in closing: Skilling "loved Enron."

Given the facts, the Task Force could indict and prosecute Skilling *only* by cutting corners and bending the rules—and that is *exactly* what happened. Prosecutors invoked unfounded legal theories aimed at criminalizing business judgments and actions. They exploited lay misunderstandings about how public corporations like Enron are managed and governed. And they built a case based not on proof that Skilling did or directed others to do illegal things, but on the reinterpretation of business decisions, judgments, and actions—years after the fact—as told by former members of Enron's management now testifying under the compulsion of harsh, and even unlawful, plea agreements. As the Statement of Facts below shows, even viewing the evidence in the light most favorable to the government, the case against Skilling was, at best, exceedingly tenuous.

But the significance of the facts in any criminal trial ultimately depends on the law applied to them, the jurors who find them, and the evidence available to establish them. Key trial court errors—in applying the operative law, selecting the venue and jury, and denying Skilling access to critical witnesses and documents—proved too much to overcome. They effectively assured convictions in spite of the profound weakness of the government's case.

This brief details four distinct categories of legal error that produced Skilling's erroneous convictions:

1. *Erroneous Theory Of Fraud.* From the outset, the Task Force's case against Skilling was rooted in an untenable theory of "honest services" fraud. The government posited that a corporate executive can be held liable for defrauding his employer even where—as the government conceded to be true here—the executive's acts are intended to benefit his employer. This Court denounced this

theory of prosecution in another Enron case decided shortly after Skilling was convicted. *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006). This Court's opinion in *Brown* has compelled other courts, and the government itself, to dismiss numerous fraud counts against Enron-related defendants. In ruling on Skilling's motion for bail pending appeal, Judge Higginbotham foresaw the same result here, for at least 14 counts of conviction. As we show below, the remaining five counts are equally infected by the flawed theory of honest-services fraud, requiring reversal of all 19 counts and remand for a new trial.

2. <u>*Erroneous Jury Instructions.*</u> The Task Force sought and obtained jury instructions that gave the jury an incomplete, misleading, and inaccurate understanding of the legal principles underlying the government's case and Skilling's defense. These instructions—especially given the paucity of evidence that Skilling intended or committed any criminal acts—misguided jurors' determinations on crucial issues of fact relating to both state of mind and actual conduct. The instructional errors included:

a. <u>Deliberate Ignorance.</u> Without finding actual guilty knowledge, the jury was invited to infer it, pursuant to the trial court's instruction that such knowledge could be assumed if it found Skilling deliberately contrived to make himself ignorant of conduct he strongly suspected to be criminal. Because such "deliberate ignorance" instructions tend to confuse jurors into convicting merely for negligence, they are strongly disfavored in this Circuit, and may *only* be given when the record supports an inference that the defendant both suspected criminal wrongdoing and acted wrongfully to avoid confirming his suspicions. The record showed *neither*. This is not surprising, since the Task Force's position was that Skilling masterminded and directed the entire criminal enterprise. This instruction was especially unwarranted because Skilling never asserted an "ostrich" defense. From the opening of the trial, Skilling told the jury he was an active, hands-on executive who prided himself in being informed about the company's affairs.

Even the Task Force recognized the potential for error when it sought to modify the instruction to clarify that the jury could find deliberate ignorance as to one defendant (*i.e.*, Ken Lay), but not the other (*i.e.*, Skilling). The trial court refused this modification, despite authorities from this Court encouraging such "balancing" instructions. Reversal on all counts is required given the impermissible risk, present here, that the jury improperly relied on the deliberate ignorance instruction to convict Skilling on a civil, "should have known," standard of liability.

b. <u>Materiality.</u> The court refused to instruct the jury on accepted principles of materiality that govern claims of fraud involving, as here, corporate filings and communications to the public. Jurors were instructed merely to decide whether a statement was "important," a misleading and even meaningless standard in the context of this case. This Court has recognized that lay notions of "justice and fair play," especially in cases involving Enron, do not always square with the rigid rules of the securities laws. *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 393 (5th Cir. 2007). Many elements of the securities laws, such as what is "material," are terms of art defined by statute and case law. *Id*. at 385-87. There can be no confidence that properly instructed jurors would have reached the same materiality conclusions as the misinformed jury below. Indeed, were this a civil case, many of the statements underlying the convictions would have been dismissed at the pleading stage as legally immaterial. This, in fact, is what occurred in one of the civil suits against Skilling and others arising out of the collapse of Enron's water business: nearly identical statements were dismissed—by the same district judge. *In re Azurix Corp. Sec. Litig.*, 198 F.Supp.2d 862 (S.D. Tex. 2002). That a jury was allowed to convict Skilling criminally for statements for which he could not be held liable civilly not only reveals the instructional error requiring reversal, but underscores the profound unfairness of this entire case.

c. <u>Oral Side Deals.</u> Perhaps the most vivid example of its determination to extend the boundaries of criminal liability concerned what the Task Force called "secret oral side deals." This was a central piece of the government's case against Skilling, and it was fraught with serious error. Relying almost entirely on the testimony of Fastow, the side deal theory was constructed as follows: Fastow said he had conversations with Causey—and a few with Skilling—concerning financial transactions between Enron and a private equity fund called LJM, which Fastow managed. There was nothing inherently wrong with these transactions themselves, Fastow explained. But, in connection with a few of them, Fastow said he interpreted statements Skilling made to create oral guarantees for LJM's benefit, which were then kept secret from the outside accountants. Fastow said these oral guarantees eliminated risk to LJM in the underlying transactions. Fastow concluded that this elimination of risk, in turn, vitiated Enron's accounting treatment of the transactions and made its financial statements inaccurate.

Despite the centrality of this side-deal theory to *every count* in the case, the trial court refused to give an instruction requested by Skilling that would have advised jurors how to determine whether such deals existed and, if they did exist, whether they had any operative adverse effect on Enron's financial statements. This is a complex issue requiring application of contract, accounting, and SEC disclosure rules. The court's instructions to the jury, however, gave *no* guidance whatsoever on how to make these judgments. Given the weak evidence regarding these side deals—resting almost entirely on Fastow's contradictory testimony—it is impossible to know whether a properly instructed jury would have found all, some, or any of the oral statements in question created the type of actual risk-eliminating guarantee required to invalidate Enron's underlying accounting treatment. Absent such a guarantee, there was no irregularity in Enron's accounting treatment, no error in its financial reports, no omissions in its public disclosures, no false statements to its auditors—in short, no violation of the law. The failure to properly instruct the jury on this lynchpin issue affects and requires reversal of every count of conviction.

d. Good Faith Reliance. The trial court also refused an instruction requested by Skilling explaining his reliance on the institutional advice of Enron's professional advisors. In its place, the jurors received an inapposite instruction, limited to whether Skilling *personally* received and relied on advice from *his own* attorneys and accountants. As president of a large, multinational corporation, Skilling did not and could not receive and act on advice that way. Skilling explained at trial that he relied on Enron's organization, structure, and governance system to manage its affairs. The jury should have been given an instruction conforming to this evidence. The refusal to give such an instruction, which found ample basis in the law, was tantamount to an outright rejection of Skilling's good-faith reliance defense, requiring reversal.

3. *Community Prejudice and Truncated Voir Dire.* The foregoing legal errors are clear and dispositive, but were only magnified by the manifest error in the trial court's twin decisions (a) not to move the trial to a venue other than Houston, a community grievously wounded by Enron's collapse and openly

thirsting for vengeance, and (b) not to weed through the rampant animus in the jury pool by a careful and deliberate process of voir dire.

If ever a case demanded a venue change, this was it. The problem was not merely pervasive publicity in Houston—it was the pervasive view that *Houston itself* was the victim of crimes by Enron's leadership. Virtually everyone in the community knew someone who was affected by Enron's collapse, including lost jobs, lost retirement savings, lost business in the community, lost funding for charity, medicine, and the arts, and perhaps, above all, lost pride. Houston felt disgraced by Enron. It might have been possible in theory, given a thoughtful, careful voir dire, to find 12 unaffected jurors, but it was an unprecedented challenge. Indeed, the entire U.S. Attorney's Office in Houston recused itself from the case. The court asked far too much of lay Houstonians to put aside their deepest biases, when these sworn officers of the court could not.

Compounding the error, the trial court did not give Skilling a fair chance to identify those jurors—if any existed—who might be capable of setting aside their biases. These biases were documented by jurors themselves in answers to written questionnaires submitted one month before the trial. Nevertheless, the trial judge imposed a voir dire process that took only *five hours* and screened only 46 jurors—only *eight jurors* more than the minimum necessary to empanel a jury after the parties had exercised their peremptory strikes. Even this short-circuited voir dire could not hide the hostility both in the venire generally and the jury seated—though it did serve to mask, if only somewhat, the utter error of the decision to try the case in Houston. Granted, it is the rare case that is reversed on community prejudice grounds. But if the right to a fair venue is to have any meaning, this must be such a case. Skilling's convictions must be reversed with directions to change venue for any retrial.

4. *Prosecutorial Misconduct.* The Task Force crossed the line in skewing the evidence in this case. It obstructed Skilling's access to witnesses and documents. It withheld crucial exculpatory evidence. It coerced and threatened witnesses. It secured unlawful plea agreements. It destroyed documents that would have revealed the varied and conflicting statements of its principal witnesses, Andrew Fastow. It affirmatively misled the jury about Fastow's motive to give false testimony against Skilling. These are not perfunctory complaints. This was a systematic suppression of evidence, sanctioned by the highest officers of the Task Force, revealed by their own documents. It was an indispensable part of the prosecution of this case, and it prevented Skilling from mounting a full and fair defense. Skilling's convictions must be reversed.

* * *

Skilling's claims of serious error did not occur in a vacuum. They are the product of a lapse of reason, wisdom, and fairness that has propelled the government's criminalization of Enron's collapse. The Enron Task Force's first prosecution resulted in the conviction of Arthur Andersen. This conviction was reversed unanimously by the Supreme Court because, *as here*, the Task Force secured a jury instruction that effectively eliminated the mens rea element. *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005). The Task Force's second prosecution also produced convictions—against four Merrill Lynch executives and one executive at Enron (who chose not to appeal). These convictions were reversed by this Court because the Task Force, *as here*, rested its case on an improper theory of wire fraud. *Brown*, 459 F.3d at 513. The *only* other Enron convictions tested following trial were those against Enron Broadband Services employee Kevin Howard. His convictions were vacated because, *as here*, an improper "honest services" theory infected every count in the case. *U.S. v. Howard*, 471 F.Supp.2d 772 (S.D. Tex. 2007) (appeal pending, No. 07-20212).

Skilling's convictions rest on far greater errors infecting both the underlying theory of liability and proceedings at trial. Because the convictions so clearly must be reversed and remanded for a new trial, we need pause only briefly to say that the sentence of imprisonment imposed for those wrongful convictions was also erroneous. Skilling's 24-year sentence is four times longer than any other Enron executive, two to three times longer than similarly situated white-collar defendants, and six years longer than the average federal sentence for murder. Even the former

Director of the Task Force called it "too severe." Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007). Skilling's unreasonable sentence derived from the trial court's failure to make an individualized sentencing decision, choosing instead to adhere rigidly to the sentence recommended under generic Guidelines factors. Even then, the trial judge misapplied key factors to produce the recommended sentence. If this Court does not reverse all of Skilling's counts of conviction, it should address errors in his sentence and order a new sentencing.

In sum, the government's zeal to bring a criminal case against Jeff Skilling, and prosecute and try him in Houston, Texas, required a process and produced a result that was flawed throughout, from the erroneous theory underlying the indictment through to his severely harsh sentence. That final error ultimately satisfied what many were demanding long before anyone knew what happened at Enron: no matter what the facts and whatever the law, someone would have to pay for Enron's failure. That someone was Jeff Skilling—the last man standing when the court meted out its punishment. His conviction and imprisonment, it is said, have helped bring closure to a national tragedy. That is profoundly wrong, for there is no closure—and certainly no justice—in denying a man his right to a fair and just trial. The convictions must be reversed.

QUESTIONS PRESENTED

I. Whether this Court's decision in *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006), invalidates Skilling's counts of conviction.

II. Whether the district court's jury instructions on deliberate ignorance and its refusal to give requested instructions on materiality, reliance, and "oral side deals" were erroneous and prejudicial.

A. Whether the district court erred in not dismissing Counts 23 and 24, which were wholly premised on alleged false statements that were immaterial as a matter of law.

B. Whether the district court erred in not dismissing every count in the indictment as premised on a legally meaningless and factually unsupported "oral side deal" theory of fraud.

III. Whether Skilling's right to a fair trial was infringed because of presumed or actual prejudice among members of the jury.

IV. Whether multiple acts of prosecutorial misconduct—alone or in combination—violated due process and prejudiced Skilling's defense.

V. Whether Skilling's 24-year sentence was unreasonable, inconsistent with the Guidelines and federal sentencing statutes, and ultimately unconstitutional.

STATEMENT OF THE CASE

At its peak, Enron was "The World's Leading Energy Company." DX30694. It had four major businesses: *Wholesale*, which bought, sold, and delivered natural gas, electricity, and other commodities; *Transportation & Distribution*, which owned an expansive natural gas pipeline network and an electric utility; *Retail* ("Enron Energy Services" or "EES"), a start-up that sold gas, electricity, and energy management services to end-users; and *Broadband* ("Enron Broadband Services" or "EBS"), another start-up, which bought and sold bandwidth capacity and transported data. R:15075-83; GX996:1161-71; GX4311:7.

Through 1996, Skilling led Enron's Wholesale business, which he founded in 1990 as its first and only employee. In 1997, Skilling became Enron's President and Chief Operating Officer, and joined the Board of Directors. In February 2001, he became Enron's CEO. On August 14, 2001, he resigned from Enron.

Skilling was indicted in 2004 along with former Enron Chairman and CEO Ken Lay and former Enron Chief Accounting Officer Richard Causey. R:119-78, 842-909; RE-3. On December 28, 2005, just weeks before trial, Causey pled guilty to one count of securities fraud. R:12270-73. Skilling and Lay's trial began in Houston on January 30, 2006. On May 25, the jury convicted Skilling on 19 counts: one count of conspiracy to commit securities or wire fraud (18 U.S.C. §371); 12 counts of securities fraud (15 U.S.C. §§78j, 78ff, 17 C.F.R. §240.10b-5);

five counts of false statements to auditors (15 U.S.C. §§78m, 78ff, 17 C.F.R. §240.13b2-2); and one count of insider trading (15 U.S.C. §§78j, 78ff, 17 C.F.R. §240.10b-5). The jury acquitted Skilling on nine counts of insider trading. Skilling was sentenced to 292 months in prison (which he is serving in Waseca, Minnesota), and ordered to pay $45 million in restitution. R:41917-24; RE-5.

STATEMENT OF FACTS

I. SEPARATING FACT FROM FICTION

Popular myth shrouds Enron and its collapse. Any fair understanding of this case, and Skilling's arguments on appeal, first requires shedding its lore.

Debunking Myth No. 1. This case is not about Enron's bankruptcy, and never was. Skilling resigned months before scandal and bankruptcy befell the company, when—even according to government witnesses—the prospect of bankruptcy was inconceivable. R:15935, 19102, 24456; SR3:3632. The Task Force acknowledged this in closing:

> *This case is not about what caused the bankruptcy of Enron*. You don't have to worry about that. You don't have to think about that during your deliberations. *It's not about what caused the bankruptcy*.
> R:36449; *see also* R:18607-08.

Skilling was charged not with causing the bankruptcy, but misrepresenting Enron's condition during the two years preceding his August 2001 resignation. The company's financial failure months after he left was irrelevant.[2] In fact, contrary to the widely held misperception that Enron was a "house of cards" and desperate for revenues and earnings when Skilling presided over it, one of the Task Force's key allegations was that Enron made *too much money* while Skilling was at the helm and hid it: "[b]y early 2001"—in the middle of the alleged conspiracy—"[Enron's] reserves contained *over $1 billion* in *unreported earnings*." R:863-65.

Debunking Myth No. 2. Unlike Andrew Fastow, Skilling did not steal from Enron, nor was he accused of doing so. At trial, Fastow admitted he concealed his thefts from Skilling. R:21622-27, 21685, 21690, 21720-25, 21771. No one accused Skilling of sabotaging Enron's interests to further his own. Just the opposite, the Task Force's own witnesses openly acknowledged Skilling "loved the company," "was very committed" and "dedicated" to it, and "had the best interests of Enron in mind." R:15954, 18024-25, 22986, 24548-49, 36441.

[2] To dispel deeply held misconceptions to the contrary, defendants sought to show that nothing they did—or were even accused of doing—caused Enron's demise. R:14881-84, 14939-53. Skilling argued that Enron was a fundamentally sound company that suffered a classic "run-on-the-bank," a liquidity crisis triggered by unfounded fears about Enron's financial health. R:28192-97. But the Task Force contended that the cause of the bankruptcy was irrelevant and, on that basis, largely frustrated defendants' efforts to explain its actual cause. R:15060-63, 36449, 16839-40, 18607-08, 29762, 34402-03. Then in the *rebuttal* portion of its closing argument—when Skilling could not respond—it argued: "Let's not forget that Enron went bankrupt when we're considering the credibility of these people, all right? This was the seventh largest company in the country, and it went bankrupt in a matter of months." R:36999-01.

Debunking Myth No. 3. Skilling did not act out of greed. As the Task Force was forced to concede at the close of trial: "It's not a case about greed." R:37006-07, 37065. The evidence of Skilling's devotion to Enron—even to his personal and financial detriment—was irrefutable. For instance, shortly before the alleged conspiracy began, Skilling declined *$50 million* to which he was contractually entitled, because he wanted to set an example for management. As he told the jury, "it was the right thing to do" for Enron. R:28481-86. When Enron began to encounter difficulties following his departure, Skilling offered to return to the company and tried to raise liquidity for it, including *$70 million* of his own funds—virtually his entire net worth. R:28241-42.[3] The $120 million Skilling was willing to forgo was roughly *double* the amount Skilling was accused of making through his alleged pump-and-dump scheme. R:899-901; RE-3 (alleged insider-trading proceeds: $62 million).

Debunking Myth No. 4. Skilling destroyed no evidence and covered up nothing.[4] When questions about Enron surfaced in October 2001, Skilling urged Fastow and others to "get the facts out" and "let them know everything"; he even

[3] One lead prosecutor has since admitted this was "seemingly inconsistent with alleged criminal intent." John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 AM. CRIM. L. REV. 197, 198 (2007).

[4] Arthur Andersen was prosecuted for document shredding (its conviction, of course, was overturned, *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005)), and Fastow admitted destroying evidence of his secret embezzlement. R:21623-24, 21639-40, 22299, 22394-95.

offered to return to the company to help. R:28211-29; *see also* R:22294-99, 22492-93; DX8137; DX21189. After the bankruptcy, he voluntarily testified before the SEC, Congress, other federal investigators, company investigators, and at trial. R:28249-59.

Debunking Myth No. 5. The main challenge for the Task Force was not determining what conduct occurred at Enron, it was determining whether any of the conduct was *criminal*—and not just exercises of business and accounting judgment or statements of optimism that in the wake of Enron's bankruptcy looked wrong in hindsight.[5] As prosecutors tried to explain, Enron was not a "traditional book cooking" case, but raised "fundamental questions of accounting and financial reporting." R:13295-96. Lawyers and accountants had been "all over these deals," requiring the Task Force to "navigate around serious advice of counsel issues and some serious reliance on auditors issues." R:13286-87.

The case against Skilling, prosecutors admitted, was plagued by "fundamental weaknesses," because Skilling "took steps seemingly inconsistent with alleged criminal intent"; there were "no 'smoking gun' documents," despite

[5] *E.g.*, R:13292 (Task Force Prosecutor quoted in *Houston Chronicle*: "Defendants and suspects understand that if you're selling drugs or if you rob somebody or if you take their car, that that was wrong…. *But the issue we face first in Enron is, was this conduct criminal?* When dealing with violent crime cases or even narcotics cases, that's never a question. That's always very, very black and white. *Here we have to spend a lot of time figuring out what was done and figuring out whether that was a violation of the criminal law.*").

hundreds of millions of pages of email, memos, contracts, and untold other documents; and cooperators—on whom the Task Force's case was built—had "only marginal credibility" because they were "subject to vicious impeachment" as witnesses who were "merely 'singing for [their] supper.'" Hueston, *supra*, at 197-98, 201. There were no secret discussions about deceiving investors; no orders to break the law; and no cover-up to avoid getting caught. *E.g.*, R:15894-96, 15966-67, 19093-94, 21009-10, 22492, 24437-38; SR3:3623-24; DX8137; DX21189.

Instead, the Task Force relied chiefly on its cooperators to offer after-the-fact interpretations and opinions about Skilling's statements (*e.g.*, "I *think* it was misleading"; "I don't *think* it was complete"; "what did you *interpret* him to mean?"). R:15557-59, 15579, 21280; *see also* R:15642, 16203, 17586, 19982, 20276-77. All these witnesses had powerful incentives to now characterize differently the meaning and impressions of Skilling's words and actions. But even then, key cooperators and other witnesses admitted they did not think Skilling acted criminally, Skilling never asked them to conspire or do something unlawful, and Skilling likely believed in what he was saying and doing. R:15894, 15954, 18024-25, 19086-91, 19091-93, 20856. For example, one prominent government cooperator and witness was Paula Rieker, the second-in-command of Investor Relations for Enron and self-proclaimed "key architect" of Enron's allegedly fraudulent message. R:19063-67; DX19914. When Ms. Rieker was asked flat-out whether she entered into a conspiracy with Skilling and made an agreement to break the law, she said, "no." R:19086-91. When Mark Koenig, the head of Investor Relations, took the stand as the Task Force's first witness, Skilling's counsel challenged him to review an entire videotape of an Enron analyst conference and write down any statements Skilling made that Koenig believed were lies. Koenig wrote down *nothing* Skilling said, even though the Task Force alleged Skilling's statements were rife with fraud. R:16322-27; DX30720.

* * *

On appeal, all factual disputes are resolved in favor of the Task Force and consistent with the verdict. *U.S. v. Moreno*, 185 F.3d 465, 471 (5th Cir. 1999). But even when viewed through that lens, the evidence here was weak and inherently suspect. Those weaknesses explain why the Task Force found it necessary to pursue not only every permissible legal and procedural advantage, but to the point here, many that were not permissible and led to serious error in the proceedings below. Before identifying these errors and their effect on the verdict, we detail the facts of the case, starting with the indictment.

II. THE INDICTMENT

The foundation of the indictment, a copy of which was given to the jury for their deliberations, was Count One. It alleged that, starting in late 1999, Skilling spearheaded a massive conspiracy to deceive investors about Enron's financial health, by manipulating the company's financial results and lying about the performance of its businesses. R:844, 848, 877-78; RE-3. According to the Task Force, this conspiracy included almost 125 people from Enron's senior management to entry level employees to professionals at some of the most prestigious institutions in law, banking, and finance. Govt. Statement in Compliance with Court's Order Dated Nov. 2, 2004 (Nov. 19, 2004) (including sealed co-conspirator list); R:10738-59. The conspiracy spanned over two years, and touched every major business segment of the company. R:852-53, 877-78; RE-3. The conspiracy's ultimate objective was to promote Enron's stock price artificially—by consistently reporting earnings that met or exceeded Wall Street analysts' expectations, touting Enron's successes, and concealing Enron's failures. R:848-49, 36441; RE-3.

The means allegedly used to carry out the conspiracy were varied. They included manufacturing earnings, hiding losses, hiding *profits*, and making false statements in analyst conference calls, press releases, and Enron's Form 10-Q and 10-K filings. R:852-77, 10738-59; RE-3. The Task Force alleged that Skilling and his co-conspirators targeted five areas of fraud, RE-3:

- <u>LJM</u>: manufactured earnings and hid losses through fraudulent transactions with an investment partnership called LJM, whose general partner was Enron CFO Andrew Fastow, R:853-59;
- <u>Reserves</u>: manipulated reserve accounts (raiding reserves in one quarter, taking extra reserves in another) to report earnings

consistent with analysts' expectations, R:864-865;

- Wholesale: misrepresented the nature of the Wholesale business as a "logistics company" that yielded stable, sustainable earnings, when it was really a risky "trading company" whose profits depended on speculative bets on energy prices, R:869, 10753;

- Retail/EES: concealed the failure of the Retail business by using a "resegmentation" to shift Retail's losses into Wholesale, then stating EES was "firmly on track," R:871-72, 10752; and

- Broadband/EBS: concealed the failure of the Broadband business by falsely stating it was healthy and "growing fast," R:870, 10749.

Every one of the other 27 counts was derivative of the conspiracy count. Counts 2, 14, 16-20, and 22-26 charged Skilling with securities fraud, for allegedly false financial reports and statements made in 10-Qs, 10-Ks, and conference calls with stock analysts. R:881-890, 3107-34, 10739-55, 14045-63; RE-3. Counts 31-32 and 34-36 charged Skilling with making false statements to Arthur Andersen. R:890-94; RE-3; GX1743; GX4602-4604; GX5001-5003. Counts 42-51 charged Skilling with insider trading for selling Enron stock during the alleged conspiracy. R:899-901; RE-3.

III. THE PROOF AT TRIAL

At trial, the Task Force's primary argument was that Skilling "told lie after lie" and used "accounting trickery" to prop up Enron's stock price, in violation of his fiduciary duties of "honesty," "candor," "loyalty," and "honest services" owed to Enron's shareholders. 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. In response, Skilling argued his statements were true, the company's decisions and actions were appropriate, and Enron was in strong financial health through the time he left the company. His defense was *not* that he was unaware of fraud, but that there was no fraud. As we told the jury in opening statement: "This is not a case of hear no evil, see no evil. This is a case of there was no evil." R:14802-03.

A. Conspiracy & Securities Fraud

1. *The Origins Of The Conspiracy*

The Task Force offered no evidence to explain how the conspiracy began, why it began, when it began, who started it, how it functioned, or how it was kept a secret by 100-plus people for two years. There was no evidence Enron had fallen on hard times and needed to manufacture profits. There was no evidence Skilling was under financial duress or motivated by greed. The Task Force did not dispute that both Enron and Skilling were highly successful between 1990 and 1999.

In 1990, Enron was primarily a pipeline company; it had 3,000 employees, a market capitalization of $3 billion, and revenues of $5 billion. R:28454-55; DX16704:3541, 3565. By 1999, it had 18,000 employees, offices in 30 countries, market capitalization of $22 billion, and revenues over $40 billion—nearly 90% of which came from Skilling's Wholesale business. R:28457-60; DX16704:3541, 3546, 3565, 3571; DX11779:1-2; DX11803; GX1026. Enron's shareholders received an almost 500% return on their investments over that span. DX16704:546. In addition to countless other awards, Enron was *Fortune*'s "Most Innovative Company in America" four years in a row. R:14831-32, 28454.

Neither Skilling nor Enron had any motive to start committing fraud in 1999. Enron was the #1 marketer of natural gas, the #1 marketer of electricity, and had the largest energy supply and transportation network in North America by a wide margin. R:28306-12, 28468-69; DX16704:3547-48. Its transaction volumes were *double* those of the nearest competitor, and in its first year, Enron's online platform did *10 times* as much business as all of its competitors *combined*. R:28468-69; DX16704:3547-48. At age 46, Skilling was Enron's Chief Operating Officer, worth $100 million, and had been named one of the *100 Most Influential People of the Petroleum Century*, alongside giants like Henry Ford, John D. Rockefeller, Winston Churchill, and J. Paul Getty. R:28491-93; DX20116.

Yet, according to the indictment, this is when nearly 125 people—senior executives, new employees, members of various business units, accountants, lawyers, and outside professionals at respected banks and law firms—many of whom never met, and none of whom ever committed a crime before—embarked on an organized criminal conspiracy to mislead investors about Enron's financial health. R:846-47; RE-3. And they somehow managed to keep this sprawling criminal enterprise secret for the entire life of the conspiracy—despite constant, intense scrutiny by the Board of Directors, Arthur Andersen, outside lawyers, the SEC, IRS, other federal and state regulators, Wall Street analysts, investors, and the media.

2. *LJM*

LJM was a third-party private equity fund that did business with Enron. Fastow, Enron's CFO, was the general partner. According to myth, LJM—including Fastow's role in it—was some small, secret, back-room partnership. In fact, it was a constituency of major institutional investors with invested capital of nearly one-half billion dollars, represented by independent, national law and accounting firms. R:21776 (Kirkland & Ellis; KPMG). The limited partners included the most sophisticated financial institutions in the world. JKS-5:39; DX8080; DX8294; DX8304; GX1445 (Citigroup, AIG, GE Capital, JP Morgan Chase). In short, it was a bona fide, entirely lawful, investment firm. The partnership—and particularly Fastow's role and participation in it—were discussed, debated, and approved by Enron's Board, Enron accountants and attorneys, and Andersen. R:22089-92; GX511; GX2280. Enron's public filings disclosed Fastow's role, the terms of Enron's transactions with LJM, and the effects of those transactions on Enron's financial results. GX995:59; GX996:48-49; GX1023:14-15; GX1024:16; GX1025:34; GX1026:101-02; GX1027:13; GX1029:14-15;

GX1031:27; GX1032:76-77; GX1033:2503; GX1034:13; JKS-1. Fastow himself testified that LJM "was legal … and did many legal deals." R:21367.

The LJM-related allegations against Skilling reduced to four specific transactions: *Cuiaba*, LJM's purchase of an interest in a Brazilian power plant; *Nigerian Barges*, LJM's purchase of an interest in power-generating barges moored in Nigeria; *Raptors*, structured finance vehicles used to hedge Enron investments; and *Global Galactic*, which concerned various alleged agreements between Enron and LJM. R:854-59, 36537-49; RE-3. For each, the Task Force argued that Skilling made, or had knowledge of, "secret oral side deals" that violated the accounting rules and manipulated Enron's financial condition.

a. Cuiaba & Nigerian Barges. For Cuiaba and Barges, the issue was simple: Was there a transfer of risk to LJM? Fastow testified that Skilling orally told him LJM would not lose money on either transaction. Fastow admitted Skilling did not use the word "guarantee" in making these assurances, but said something like: "Don't worry. I'll make sure you're all right on the project. You won't lose any money." Fastow *interpreted* these statements, which he called "bear hugs," to be guarantees. R:21298-303, 21962-63, 21280, 22041-42. As such, Fastow opined the Cuiaba and Barges deals were not true sales, and Enron's recognition of earnings from them was improper. R:21927-28.

Even so, Fastow could not help but admit that LJM *was* at risk in both the Cuiaba and Barges deals.[6] The underlying written contracts included no mention of the "bear hugs" and contained integration clauses, which expressly disclaimed "all prior agreements and understandings, oral or written." R:21978-81; DX8756; DX8826. Fastow conceded that Skilling's alleged "guarantee" was legally unenforceable. R:21818-20, 21922-23, 21978-81, 22271, 22440.[7] He claimed there was "very little" risk (since he expected Skilling to keep his word), but acknowledged "*there was some risk.*" R:21269. If LJM lost money on the deals, Fastow explained, LJM could not hold Skilling or Enron accountable under the alleged oral guarantee. Rather, LJM's only recourse was to stop doing deals with Enron. R:21818-20, 22439-40.

On its face, Fastow's account did not establish impropriety in Enron's reporting of the Cuiaba and Barges transactions. As Judge DeMoss recognized in *Brown*, such oral discussions "are simply the heart and soul of business negotiations…. [They] are not evidence of the actual nature of the deal because there was no legally enforceable take-out promise in the final written agreement." *Brown*, 459 F.3d at 535 (DeMoss, J., dissenting in part).

[6] R:21268-69, 21280, 21290, 21308, 22437-39 ("virtually" risk-free); R:21818-20 ("very little" risk); DX4399 (Cuiaba risk matrix); R:21972-81 ("people were evaluating the risks"); DX18576 (Barges risk matrix); R:22059-60 (their job was to evaluate risks); R:22062 ("very little risk"); R:21268-69.

What is more, Fastow was not an accountant; he merely gave his *lay opinion* that, in spite of the risk transfer, Skilling's few words invalidated the transactions and meant Enron's earnings were fraudulent. R:21538, 21808, 21927-28, 22086, 22377. The Task Force called no accountant to testify to the effect of Skilling's words (Arthur Andersen auditor Tom Bauer merely testified that legally unenforceable guarantees *might* affect the accounting). R:23540-42. The Task Force never introduced the actual accounting rules; nor was the jury instructed on them (despite Skilling's request). R:35949-50, 36393-439.

Fastow's testimony was the only evidence Skilling gave a guarantee. No document corroborated it. R:21908, 21918-20, 22154-55, 22694, 24437-38. No witness corroborated it. Both LJM employee Chris Loehr and Enron Treasurer Ben Glisan testified to hearing second-hand about verbal assurances on the deals, but *neither implicated Skilling*. R:22600-03, 22615, 22628-29, 22663-65, 22693-95, 24326-46, 24617-18, 24622. In fact, Glisan specifically testified that other people—*not Skilling*—provided assurances. R:24326-27, 24337, 24342, 24617, 24622, 24654. During his own testimony, Skilling was emphatic that he never gave—nor had reason to give—Fastow a guarantee on any transaction. R:28700-05, 28708-21, 28815-21.

b. <u>Raptors.</u> The Raptors were four structured finance transactions used to

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[7] The Task Force conceded this in closing. R:36538 ("of course [they] don't

hedge—or offset the risk in—various Enron investments. Each Raptor was capitalized by $400 million in Enron stock and a $30 million investment by LJM. DX8662; DX8666; DX8668-8669.[8] To invalidate Enron's accounting on the Raptors transactions, the Task Force sought to prove that LJM was not in control of the vehicles and its capital was not at risk. R:21378-81, 21403-04, 24269-72.

Again, Fastow testified there was a "secret oral side deal": LJM was to receive its $30 million investment back, plus $11 million in profits, before any hedging could begin. Having "no skin in the game," Fastow would then let Enron control the Raptors and hedge any asset at any price. R:21375-82. Fastow said he struck this deal with Chief Accounting Officer Rick Causey, and discussed it with Skilling. R:21374. To get LJM its return, Enron paid LJM $41 million to purchase a "put" on the Enron stock contributed to capitalize each Raptor. Fastow claimed this put was established only to give LJM the agreed-upon profit.[9] Both Fastow and Loehr testified that this "quid pro quo" was not disclosed to Enron's Board of Directors and Arthur Andersen. R:21375.

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have [the] force of law").

[8] One Raptor was capitalized by New Power stock, not Enron stock, but the basic structure of the vehicle was the same.

[9] A "put" is an option contract that gives the holder the right to sell a certain quantity of an underlying security to the writer of the option, at a specified price (strike price) up to a specified date (expiration date).

Skilling testified that the Raptors were a self-insurance structure that protected the value of the assets hedged by Enron: if Enron's stock in the Raptors went up, the hedging vehicles (or self-insurance policy) would be capitalized with gains on Enron's stock; if Enron's stock went down, Enron's stock contribution to the vehicles would be protected through the proceeds from the put. R:28821-26. The Raptors were the product of significant review, analysis, and discussion among scores of people inside and outside Enron. R:22102, 24558-59, 28825-26. Skilling was also told the Raptors had been reviewed and approved by Andersen's technical accounting group in Chicago, Illinois. R:28830-32. Skilling's decision to support the structures was based on presentations made to him and to the full Board, which voted to approve the structures. R:28827-33. Skilling testified he was never told the vehicles were improper and reiterated he never had a side deal with Fastow. R:28826, 28833-36.

The testimony of Enron Treasurer Ben Glisan—a major government witness, who was the architect of the Raptors and worked closely with Fastow at Enron—undermined Fastow's testimony in critical respects. First, he confirmed that LJM was *not guaranteed* any profit up front; it merely had the *opportunity* to profit, through the put purchased by Enron. LJM was truly at risk, because if Enron's stock price dropped far enough below the put's strike price, LJM could have lost both the $41 million premium *and* its $30 million initial investment. R:24591-95.

Second, Glisan explained that even after the $41 million distribution, LJM still had capital at risk in each Raptor; in fact, LJM later recovered some of that money when the vehicles were unwound. *Id*. Finally, he testified that Andersen *knew* the purpose of the put was to give LJM an opportunity to get its money back before hedging began—that was not hidden, like Fastow and Loehr claimed—and Andersen still approved it. R:25008-09.

Nevertheless, Glisan opined the Raptors were not proper, saying they were designed to achieve "an accounting benefit, not an economic benefit"—a dubious opinion given his admission that LJM was at risk for loss. R:24578; *see also* R:24260-62, 24497-98, 24583. Glisan acknowledged, however, that others disagreed with this opinion. R:24584. Causey, other internal Enron accountants, and Andersen all believed the Raptors were proper under the accounting rules. R:24263-64. Inside counsel, outside counsel, and Enron's Board all approved them. R:24266, 25006-07; DX8850; GX137; GX147; GX190; GX196. Most importantly, Glisan admitted his opinion about Raptors was never shared with Skilling or the Board; he *conceded* that he never told Skilling he thought the structures were fraudulent, criminal, or improper in any way. R:24571-72, 24578-79, 24898-901. Instead, he recommended their approval. R:24571-72, 24578-79.

The Raptor structures—including the $41 million puts—were disclosed in detail in Enron's public filings. GX995-996; GX1023-1029; GX1031-1034.

Refuting Fastow's testimony that their purpose was to "hide losses," Enron disclosed *both* the amount of revenues owing to the Raptors and the losses the Raptors offset. R:21367, 21373, 24614-14; GX1032.

c. Global Galactic. "Global Galactic" is a term Fastow used to describe three pages in his handwritten notes that he claimed documented oral side deals with Causey. R:858-59, 1888; RE-3. Prior to trial, the Task Force took the position, consistent with the indictment, that the Global Galactic allegations were only directed to Causey. R:1888 ("The Indictment does not charge Mr. Skilling with being a part of the Global Galactic Agreement."). On the eve of trial, the Task Force negotiated an agreement with Causey requiring him to plead to a single count—*not* related to Global Galactic. The Task Force promptly switched positions and began arguing Global Galactic against Skilling. R:21312-19, 36537-41, 37021-24. The document contains no mention of Skilling, no initials by Skilling, and no handwriting of Skilling. GX1298.

At trial, there was considerable confusion over what Global Galactic really was. Fastow said it was a "tally sheet" listing various side deals between Enron and LJM; it was *not*, he explained, an agreement or transaction itself. R:14778, 21312-19, 21907. Fastow testified that GX1298—*a copy* of the three handwritten pages, which he claimed to have initialed with Causey—was the Global Galactic list. R:21312-19. This, too, was uncorroborated; no other witness recognized or had ever seen the document. R:22630, 23532, 24350, 24637-39. The words "Global Galactic" appeared nowhere on the three pages. GX1298.

Skilling challenged the authenticity of GX1298, because there was no original and the circumstances surrounding its emergence were highly suspicious. Fastow testified he created the pages and made a copy of them in 2000; in 2001, he destroyed the original, searched for the copy, but could not find it. R:21317-18, 21929, 21822-25; DX21136. During initial interviews with the Task Force, Fastow never mentioned the copy or his search for it. Def.'s Mot. Re: the Task Force's Andrew Fastow Jencks Production, Ex. C at 65, Ex. D at 21 (Dec. 16, 2005) (under seal). Only in April 2004—shortly after a district court judge rejected the initial guilty plea of Fastow's wife, and while she was negotiating a new deal with the Task Force—did a copy of the document suddenly emerge from his family's safety deposit box. R:21822-25, 21939-40, 21943-47; DX21136. Inexplicably, although Fastow's wife had gone into the box half a dozen times since 2001, including with her criminal defense attorney, neither she nor the attorney ever saw the document. R:21944-47; DX21136. When the Task Force changed trial strategy to tie Skilling to Global Galactic, we sought to have GX1298 forensically analyzed; the Task Force objected as untimely, and the district court refused to allow an examination. R:13691-97, 14171-72.

Once again, Glisan's account contradicted Fastow's. Glisan testified that "Global Galactic" was used to describe the process of "open and continuous negotiation" between Fastow and Causey on various deal points between LJM (Fastow) and Causey (Enron), leading to an "agreement."[10] Glisan did not characterize these negotiations as "secret side deals"; to the contrary, he expected that they would be fully documented by the business units. R:24636-37, 24649-52. He testified that Fastow eventually said he reached a written agreement with Causey, but he never saw it. R:24349. When shown GX1298, Glisan did not know what it was. R:24637-39. Moreover, there were inconsistencies between GX1298 and contemporaneous notes that Glisan made reflecting the negotiations between Fastow and Causey.[11]

Whatever it was, the connection between Global Galactic and Skilling was remote, at best. Fastow admitted he never showed the pages to Skilling, R:21315, 21813, and aside from Cuiaba and Barges, Fastow said he never talked to Skilling about any of the deals in the pages. R:21905-06, 21917-18, 22004. According to Fastow, *Causey* said he confirmed the "list" with Skilling—but the Task Force did

[10] R:24348-49, 24620-21; GX7603 ("Ben and Michael re: Global Galactic *deal*"); GX7607 ("Rick Causey re: Global Galactic *Deal*"); GX7609 (Andy, Michael / re: Global Galactic *Deal*"); GX7640 ("Andy Global Galactic *deal*").

[11] For instance, GX1298 had one term with a July 2000 deadline, suggesting the document was created before July 2000. Yet Glisan's notes indicated that the negotiations remained "open" and ongoing well into August. R:24641-46; GX4150:11451, 11470.

not call Causey. R:21314-16, 21815-16, 21910-11, 22031-32. According to Glisan, Causey reviewed the terms of the "negotiations" with Skilling—but Glisan "didn't see anything inappropriate about that." R:24647-48.[12]

3. *Reserves*

The Task Force argued that reserves were manipulated to hit earnings targets in three separate quarters: 4Q 1999; 2Q 2000; and 4Q 2000.

a. 4Q 1999. Investor Relations executives Mark Koenig and Paula Rieker both testified that, in 4Q 1999, Enron's earnings were improperly increased by a penny to meet a last-minute change in analyst expectations. As they described the events: on the morning of January 17, Enron's earnings were at 30 cents per share; that afternoon, the analysts' consensus estimate changed from 30 to 31 cents; they informed Causey and Skilling that Enron was going to miss the estimate; a few hours later, they received new numbers from accounting showing earnings of 31 cents; and, on January 18, Enron publicly reported earnings of 31 cents per share. R:15149-65, 18368-78; GX1003-1004; GX4404; GX4464; GX4613.

The Task Force presented no evidence showing how the extra penny was derived, if it was derived fraudulently, or who was involved in deriving it. R:36517 (Task Force closing: "Have you been presented evidence of exactly where

[12] Despite all the shortcomings of GX1298, one Task Force prosecutor called it the "prosecution's most incriminating document," Hueston, *supra*, at 197, and said it played a "critical part" in convicting Skilling. R:41434-35.

that extra penny came from? No, you haven't."). Koenig and Rieker had no role in calculating the numbers. R:16119-20, 16122-23, 16130, 16140-41, 19177-80. *No one* from accounting testified that the penny was generated illegally. In fact, Koenig and Rieker merely expressed *opinions*—with no foundation—that something wrong had occurred. R:15160-61 ("*I think* that's wrong"); 18377 ("*I felt* it was wrong"). Rieker testified accounting told her the number *could* be changed, and Andersen was expected to sign off—and, in fact, it *did* sign off on 31 cents. R:16123-24, 19179-80, 33919; DX28709:2. In short, there was no evidence that the reported earnings of 31 cents per share were inaccurate.

Skilling testified he did not recall the last-minute change. R:28539-50. Consistent with his recollection, the defense introduced documents—from the Task Force's own exhibit list—indicating that Enron's earnings were at 31 cents even *before* the analysts' estimate shifted. GX28709:3; GX2810; JKS-2:18-21. Defense accounting expert Walter Rush analyzed the relevant accounting materials and confirmed that Arthur Andersen was projecting 31 cents as early as *January 14*, three days *before* the alleged incident. R:33916-20; GX28709.

This allegation of a last-minute penny to close 4Q 1999 was sprung on Skilling. R:18364-65; Mot. to Strike and Preclude Evidence on Subject Matters Outside the Scope of the Indictment at 18 (Feb. 21, 2006) (sealed). It appeared nowhere in the various iterations of the indictment or bill of particulars. More troubling, in the Nigerian Barges (*Brown*) case, the Task Force argued—both to the trial court and this Court—that the 31st penny in 4Q 1999 came, not from reserves, but from the *Nigerian Barges transaction*. That the Task Force switched *facts* for Skilling's trial not only surprised Skilling, but no doubt shocked the *Brown* defendants, who were sitting in jail at the time on a factual theory the Task Force repudiated to convict its more prominent target.[13]

b. 2Q 2000. As of July 17, 2000, Enron was projecting second quarter earnings of 33 cents per share—one penny *ahead* of the consensus estimate of 32 cents. R:15939-40; DX5172; DX30695; JKS-2:23-24. That morning, after an extended vacation and a briefing that the business was doing better than expected, Skilling met with Causey and stated a "preference" to report 33 or 34 cents, one or two cents more than the consensus estimate. GX2987; R:15166-77, 18368-87, 19328-38, 28551-69. Wholesale accountant Wes Colwell sent an email to Dave Delainey, reporting: "I understand Causey spoke with Skilling today and this was his preference." GX2987. Colwell testified that he adjusted a litigation reserve account from $70 million to $56 million between July 17 and 19, releasing an extra

[13] Br. for U.S. at 8-10, 36-38, *U.S. v. Brown*, No. 05-20319 (5th Cir. Oct. 11, 2005) (Task Force arguing that last-second Barges deal done to "meet 31 cents" target and that "had they not done it, they would have missed by a penny"; "Without the earnings booked from the barge transaction, Enron would have fallen short of the [$0.31] forecast, with earnings per share of $0.30."); *U.S. v. Brown*, 459 F.3d 509, 514 (5th Cir. 2006) (transaction "would allow Enron as a whole to meet the company's forecasted earnings for the final quarter of 1999").

penny of earnings. R:19310-32; GX2982; GX2997; GX2999. On July 24, Enron publicly reported earnings of 34 cents per share. GX1007-1008; GX1028:4.

According to the government, this was unlawful for two reasons. The first was timing. Andersen auditor Tom Bauer testified the adjustment was "too late," because it was weeks after quarter-end and the books were supposedly "closed." R:14773-75, 23521-22, 36519-20, 37016. Colwell, however, disagreed, stating "[t]he timing … was not an issue with the changes." R:19589-90, 19598. Other witnesses agreed with Colwell, explaining it took weeks to close the books for all the world-wide business units and it was normal for earnings figures—at Enron or any company—to be constantly changing and updating between quarter-end (June 30) and the final earnings release (July 24). R:15942-43, 18183-84, 18318-19, 18329-30, 19589-90, 19589, 28544-50, 33916-17. Furthermore, Andersen tracked the changes as they were made, knew they related to a litigation reserve adjustment, and did not object. R:23566-71; DX21319.

Second, Bauer and Colwell opined it was improper to change a reserve estimate in order to hit an earnings target—even if the new estimate was correct. R:19310-12, 19320-21, 21750, 23521-24, 23531-32. They said reserves must be based purely on management estimates of liability, without regard to earnings considerations. *Id*. Accounting expert Rush refuted their opinion. As he explained, the only requirement is to get the reserve estimate right; as long as it is a reasonably correct estimate of the potential liability, it does not matter if the number was chosen to hit an earnings target. R:33927-30. Regardless of their differing opinions about the process, both Task Force (Bauer) and defense (Rush) witnesses agreed on the critical issue: $56 million was an appropriate estimate for the reserve at issue. In other words, Enron's earnings were *accurately reported for the quarter*. R:23555-56, 23559-60, 33920-23, 34029-31. The accuracy of this reserve was corroborated when the litigation later settled for almost the exact amount set aside in the reserve. R:20506, 23577.[14]

In essence, the Task Force argued that Skilling's "preference"—or, at worst, directive—to report 34 cents was a crime, even though the reported earnings were accurate and even though Skilling did not request or know about the misuse of a reserve to achieve his preference. R:36518-23, 37015-17. As Colwell admitted, neither Skilling nor anyone else told him to release the reserve, and he never told anyone—including Skilling—he did anything improper. R:19599-601.

This is yet another example of the Task Force's endeavoring to criminalize a business practice. It is also an example that was recently rejected even in a civil context: "[M]anagement's desire to close the anticipated gap between revenue and analyst consensus expectations," without more, is not enough to establish scienter—in fact, it is "common and sound business practice." *S.E.C. v. Todd*,

[14] Even if it was not accurate, Colwell conceded that the $14 million adjustment

2006 WL 1564892, *7 (S.D. Cal.).

c. <u>4Q 2000.</u> The issue in 4Q 2000 was the same. Enron set a $369 million gas and power valuation reserve to account for unprecedented volatility in energy prices. R:21729-30, 21738-39, 23526-28, 23578-80; GX4643; DX4126:5797; DX4893:68450. The size of the reserve was justified in a memo from Enron to Arthur Andersen; Andersen, including Bauer, audited it and approved the amount; and not a single witness offered a different, more accurate number. GX4643; DX4126:5797; R:21734-36, 21740-41, 33932-33.

Again, the Task Force argued the process was wrong—even though the reserve amount was *right*. Colwell testified the reserve was reverse-engineered to help produce a desired level of earnings, based on where Skilling wanted to "land the quarter." R:19345-47, 19350-61, 19363-65; GX4517. Colwell and Bauer claimed it was improper to estimate a reserve with earnings targets in mind. R:19358-61, 19365-67, 23528-31. Rush, meanwhile, explained that "backing" into a reserve was permissible, *if* the final reserve amount was reasonable—which *everyone agreed it was*. R:33429-36.

Task Force witnesses testified that Skilling viewed this volatility reserve as a "cookie jar" to stash away excess earnings for use in future quarters. R:19814-17,

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was immaterial under accounting standards. R:21742-45, 33923-24, 33926-27.

20482-84, 21433-36, 24160-63.[15] Unsurprisingly, there was no evidence of improper earnings releases from the "cookie jar." Rush analyzed the reserve over its lifetime and concluded it "did not behave like a cookie jar reserve." Instead, the reserve decreased as price volatility decreased, consistent with its stated purpose. R:33937-39.

4. *Wholesale*

Enron's Wholesale business was a spectacular success that generated most of the company's profits. It alone destroyed the myth that Enron was a house of cards. R:28306-12, 28468-69; DX16704:3547-48. Unable to find fault with the business, the Task Force criticized Skilling's frequent discussions and descriptions of it as a "a logistics company," whose earnings were "stable," "sustainable," and generally unaffected by price swings. GX984:15, 21. Given Enron's extensive pipeline networks, the power plants it owned, and its enormous logistic capabilities to deliver energy anywhere in the country on a moment's notice, it was not a mere "trading company," akin to Wall Street trading firms. R:28310-15; JKS:5-12.

The Task Force took issue with Skilling's description of the business, even though Skilling created, built, and knew it better than anyone else, saying the description was misleading because Enron was making large speculative bets on

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[15] The "cookie jar" allegation made no sense; if true, Enron was "hiding" massive profits in reserves while simultaneously "manufacturing" false profits through LJM. R:14866, 28863-65, 36751-52.

energy prices, and its earnings were heavily exposed to price risk. R:864, 869, 36509-13, 37036-39. According to the Task Force, Skilling concealed this risk to secure a higher price-to-earnings multiple for Enron's stock. R:15616-19, 18393.

The Task Force made this claim even though it knew, as revealed at trial, that Enron *fully disclosed* its "VaR"—literally, "*Value-at-Risk*"—in all its public filings. [illegible], GX994:1150; GX995:1120; GX996:1180; GX1021:1549-50; GX1022:1740; GX1023:1782-83; GX1024:1826; GX1026:1927-28; GX1027:2108; GX1028:2141; GX1029:2179; GX1032:2346-47; JKS-2:30. Widely used among financial institutions, VaR is a statistical metric and representation of how much risk a company is taking. R:15882-83, 16449-50, 18776, 19725-27, 20094-96, 22976-77, 28987-92. As Wholesale trader (and Task Force cooperating witness) Tim Belden explained, "[i]t quantified the risks of trading…. The VaR is a calculation of the amount that I have at risk." R:20094-96. Thus, an empirical measure of Enron's risk was openly disclosed in *every* 10-Q, 10-K, and Annual Report.

Unable to address VaR, the Task Force, as it did throughout the trial, elicited anecdotal opinions from witnesses not competent or prepared to discuss the actual facts. For example, in lieu of presenting hard data showing Enron's actual trading positions—all of which were in the possession of the Task Force—government witnesses gave conclusory testimony at the highest level of generality:

- Koenig, who was not a trader, testified that he "thinks" Skilling's message was "in some ways" misleading, but admitted he had no knowledge of Enron's actual trading data and could not explain how Enron calculated its risk positions (the government even objected to that line of questioning). R:15616, 15629-30, 16438-43, 1645-51.

- Fastow, who was not a trader, testified he "believe[d]" Enron made large speculative bets, but had no proof. R:21431, 22389.

- Glisan, who was not a trader, testified Wholesale was taking "an enormous amount of risk," but offered no documents to support his claim. R:24172-80.

- Belden, who was a trader, testified that his West Power desk made lots of money betting on energy prices, but acknowledged that he *always* stayed within his VaR limits and that his desk was only one part of Enron's overall portfolio. He had no role in managing Enron's *overall* risk, and did not know (nor was it his job to know) if his positions in West Power were offset by other positions in the company. R:19708-14, 20102-04, 20116-19.

- Dave Delainey, the former CEO of Enron Wholesale, testified "the majority of the [unit's] profits" came from "very large" speculative positions, but, again, he offered no specifics or documents to show what those positions were. R:19807-12, 19821-33. R:22823-23025, 30792-94; GX952:45-46.

- The one Task Force witness who did have knowledge about Enron's trading risks was risk control expert Vince Kaminski, of Enron's Risk Analysis & Control group. Yet the Task Force did not ask him a single question on the subject. For good reason: Kaminski wrote an article explaining that Enron's "trading operation does *not* make bets on the direction of the market prices." When Skilling sought to ask Kaminski about his article, the Task Force successfully objected. R:22823-23025, 30792-94, 23005-07; GX952:45-46.

Skilling, like Kaminski, knew Enron's trading business in detail. He pointed the jury to Enron's Daily Position Reports to show *actual* daily, monthly, and quarterly positions; *actual* profits and losses; and *actual* Value-at-Risk. *E.g.*, R:19566, 28878, 30781; DX5262-80; DX5327; DX5337-43; DX5345-50; DX5356. These reports showed that Enron's "open" positions (*i.e.*, those exposed to price risk) and overall VaR were fully disclosed and modest—demonstrating that Enron was *not* making large speculative bets on energy prices. *E.g.*, R:288907-11; JKS-3; DX5194; DX5216; DX5235; DX5253; DX5262-80. With this data, Skilling explained how Enron's Wholesale business was a "logistics" or "intermediation" company, not a "trading" company, R:28866-916, and described the longstanding policies and procedures put in place to monitor and control Enron's risk exposure, such as VaR limits, which were approved and monitored by Enron's Board. R:28887-92; DX15285. The Daily Position Reports proved these limits were strictly observed. *E.g.*, DX5200; DX5250; DX5300; DX5500; DX5565. Skilling described how the company's precise risk level was disclosed and publicly available. R:28898-900, 30433-45. This testimony was unrebutted.

5. <u>*Retail/EES*</u>

The Task Force alleged Skilling concealed the failure of Enron's relatively new Retail unit, Enron Energy Services, by moving hundreds of millions in alleged losses from Retail to Wholesale. R:860-61, 871; RE-3. On its face, this claim had nothing to do with the accuracy of Enron's company-wide financial reports; it involved only segment reporting, *i.e.*, whether certain items were reflected in the

Retail or Wholesale segments. R:16151-52, 20308-09, 29013, 33987.

The Task Force's primary witness was Dave Delainey, who became CEO of EES in early 2001. Delainey testified EES was "a basket case," needed "several quarters to get … back to health," had control and risk management problems, and $100-150 million in contract valuation losses were found in 1Q 2001. R: 19921, 19967-68, 19948-50. Despite these growing pains, Delainey still believed EES would hit its earnings target for the quarter. R:19964-65.[16]

According to Delainey, that changed on March 27. That day, he said, the State of California imposed a power surcharge that resulted in "an immediate and dead loss of approximately $200 million to EES." After learning of the surcharge, he and others ran to an emergency meeting with Causey to inform him of the problem, since the end of the quarter was just days away. At the meeting, Colwell proposed transferring the Retail risk management function to Wholesale—which (said Delainey) would "hide" the $200 million loss in Wholesale's large profits, and allow EES to hit its segment earnings target. R:19974-78.

On March 29, Delainey, Causey, and others met with Skilling to apprise him of the transfer. Delainey testified he got "cold feet," and told the others the transfer "lacked integrity." Causey got angry, and insisted it was "a bona fide operational change." The Task Force then asked Delainey for Skilling's reaction:

A. He looked at me and said, "What do you want to do?"

Q. And *what did you take him to mean* by "What do you want to do?"

A. Get in line. R:19979-82.

After this meeting, the Retail risk management function was transferred to Wholesale. Delainey testified that the sole purpose of the transfer was "to conceal roughly $200 million in the [California] surcharge." "[C]onveniently," Delainey said, it also shifted contract valuation losses to Wholesale. *Id*.

Delainey's reinterpretation of the events was directly refuted by the evidence at the time, including videotaped presentations when the transfer occurred. But even accepting Delainey's trial testimony, the transfer—and its disclosure—did not violate the law. Enron complied with specific accounting and disclosure rules on how to report segment changes. Delainey conceded both Causey and Colwell, Enron's top two accountants, told him the accounting was "rock solid." R:19976-78, 20277-79. Skilling was also told the accounting and disclosures were appropriate. R:20277-79, 28996, 29009, 29323-29. Andersen reviewed and approved the transfer and disclosure. R:20277-79, 33965, 33972, 33985-86. Defense expert Rush described the applicable rules, and concluded Enron complied with all of them. R:33942-88. No Task Force witness testified otherwise. Delainey said the transfer was Colwell's idea. Although the Task Force called

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[16] Delainey testified his plan to "bleed out the contract issues over time" was "inappropriate," but did not testify to telling *Skilling* it was improper. R:19964-65.

Colwell to the stand, he was not asked a single question about it. R:19300-72.

Because no rules were violated, the Task Force claimed it was Enron's intent that created criminal liability. Both Delainey and the Task Force claimed the transfer was improper because it was done with a bad intent "to hide losses." R:19979-80, 17733-34. In explaining the actual accounting rules, however, Rush testified that good or bad intentions are beside the point; management can organize its business any way it chooses. R:33943-44, 33947-48, 33986-87, 34105-06. If losses (or profits) exist, they do not disappear; they are transferred and must be reflected in the new segment, which is exactly what Enron did. *Id*.

The Task Force could not dispute this. Instead, it argued Enron should have reconstructed and disclosed EES's results in its configuration prior to the reorganization. R:14766-67. However, as Rush explained, not only was such a backward-looking disclosure not required, it would have been far less meaningful to investors than the disclosure actually provided by Enron, which gave investors a forward-looking outlook of the newly organized division. R:33973-75, 34100-01, 34107. No Task Force witness contradicted that testimony.

The Task Force also claimed Skilling misled analysts by failing to tell them that the real purpose of the reorganization was to hide losses, instead telling them it was done for efficiency—"to get the best hands working risk management." R:29014-23; DX20603:6, 19-20; DX20605:23. Even the government's witnesses conceded, however, the resegmentation resulted in improvements and efficiencies. R:16559, 19445, 20193-94, 21209, 26711; DX20670; DX25067.

In addition, videotapes, computer metadata records, and other contemporaneous documents betrayed Delainey's recharacterization of the resegmentation as a way to hide losses. Delainey said he learned of the surcharge *after* an all-employee meeting on March 27, creating a sudden crisis. In reality, as captured on videotape, he was asked a question about the surcharge *at the meeting*, and said that EES was analyzing its impact, had reserved for it, and had already accounted for it in its models. R:19975; DX69:31-32. Delainey said he went straight up to Causey's office to inform him of the problem; in reality, computer metadata proved this "emergency" meeting had been scheduled a week earlier. R:19975-76, 30753-56; DX22380-22383.

Finally, using Daily Position Reports and accounting records, both Rush and Skilling demonstrated that the "losses" claimed by Delainey and the Task Force were not losses at all. R:28898-906, 30772-79, 33975-85, 34321-23. For instance, the California surcharge was not recorded as "an immediate and dead loss"; it was recorded as a reserve, to cover a *potential* loss. As it turned out, the final surcharge did not apply to most of Enron's customers, and much of the reserve was released back into earnings. R:29336-41, 34322-27; DX20693:32.[17]

[17] Delainey also testified that EES improperly transferred to Wholesale a

6. *Broadband/EBS*

The final major allegation was that Skilling concealed failures of Enron's start-up Broadband unit, Enron Broadband Services. The Task Force said Skilling misrepresented the outlook of EBS's business and the sources of its revenues.

a. The Health of EBS. EBS had two primary businesses. It had a bandwidth intermediation business that sought to replicate Enron's success in pipelines and energy trading by creating a network and trading platform that would allow users to send large amounts of data around the world. It also had a content services business that targeted high-end clients like movie studios, who wanted to deliver mostly video content to retail customers over the Internet. R:17208-09.

The Task Force accused Skilling of making false statements to investors, in 2000 and early 2001, about EBS's financial health. The principal way it attempted to prove this was to compare Skilling's audiotaped remarks made at a March 23 analyst conference with videotaped statements he made a week earlier when meeting with a group of EBS employees in Portland, Oregon. The Task Force argued that Skilling presented "two incredibly different messages": truth for the

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"significant receivable of questionable legitimacy and collectibility," known as the "negative CTC." R:19935. Delainey said the receivable was shifted so Wholesale could absorb the loss if debtors failed to pay. R:19941-42. However, the EES employee who personally managed the account testified that she both "was confident [Enron] would collect," and that Enron *did* collect much of what was owed. R:26668, 26671-72, 26683. Skilling testified the receivables belonged in Wholesale because the risks that caused them (*i.e.*, fluctuations in Wholesale employees, and lies for the analysts. R:14760-63, 36502.

> <u>3/15 (Employees)</u>: "And so the whole revenue opportunity that we saw is gone…."
> <u>3/23 (Analysts)</u>: "So EBS is coming along just fine."
>
> <u>3/15 (Employees)</u>: "The revenues are gone. I mean, it's bad."
> <u>3/23 (Analysts)</u>: "EBS is looking good."
>
> <u>3/15 (Employees)</u>: "This is unbelievably bad, particularly in the bandwidth business."
> <u>3/23 (Analysts)</u>: "I'm feeling very good about the position of bandwidth right now."

DX20602:7, 14; GX3046:19.

This misimpression, however, was entirely the product of selective editing. The full tapes reveal that Skilling presented the same message to both analysts and employees: there was a "meltdown" in prices and in the overall industry, it would affect EBS's strategy, but EBS was well-positioned for the future. DX20602:13; GX3046:8. As Skilling explained, the change in industry conditions was bad news for the Portland office: its telecom customers were in dire straits, and Enron would be cutting back substantially on capital expenditures to build out its fiber-optic network—which directly affected the Portland employees. However, the downturn in the market was good news for EBS overall, because it meant more need for its intermediation services, the ability to focus on large institutional customers, and more opportunity to buy cheap network access rather than build it at significant expense. R:29207-08, 29219-31; DX20602:5-7; GX3046:8-13. These were the

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energy costs) were the responsibility of Wholesale risk managers. R:28992-93.

same type of market conditions that fueled the rapid growth of Enron's wholesale business, as Skilling repeatedly explained to analysts.

> 3/15 (Employees): "[T]he market is in absolute meltdown …."
> 3/23 (Analysts): "[T]his marketplace is going through a very tough time … there is a meltdown in prices."
>
> 3/15 (Employees): "This is like the natural gas business in the mid '80s all over again … that's where we really grew the business … during the meltdown."
> 3/23 (Analysts): "I look at this as the natural gas business in the mid '80s all over again …. I think this is going to accelerate the opening of the market."
>
> 3/15 (Employees): "There's gonna be a big intermediation trading market for bandwidth …. [W]e're ramping up faster in this business than we did in electricity … so it's looking good."
> 3/23 (Analysts): "We have an enormous lead over the other players in this industry." DX20602:5, 13-14; GX3046:8, 35, 38-39.

There was no evidence that investors were deceived by Skilling's statements. The industry meltdown was well known, as were its effects. After the March 23 call, one analyst wrote that EBS's market value had been "wiped out," DX10587, and Ken Rice, the CEO of EBS and a government cooperator, conceded he "did not think there was very much value embedded in the price of Enron stock for EBS," R:17351. After an April 17 call on which Skilling delivered similar news, another analyst lowered his forecast for Enron stock, "to reflect lower valuation for [Enron's] telecom business." DX30728.

b. The Source of EBS's Revenues. The Task Force called Rice, EBS COO Kevin Hannon, and Investor Relations executives Mark Koenig and Paula

Rieker—all cooperators—to opine that statements Skilling made about EBS on analyst calls were misleading.[18] *None* testified that Skilling knowingly lied on the calls. *E.g.*, R:16213-17, 162221-22. Instead, they picked out selected excerpts among countless statements Skilling made or approved—and criticized their accuracy or opined they were misleading.[19]

For instance, the cooperators testified EBS was generating little or no revenues from its two main businesses, bandwidth intermediation and content services. Instead, they said, most revenues came from "one-time transactions" like contract monetizations and sales of portions of EBS' network—so-called "dark-fiber sales." R:15246-48, 15303-04, 15537-38, 17243-54, 17322-23, 17340-42, 17362-65, 20663-66. "In [their] view," EBS was not "looking good" or "coming along just fine," as Skilling had said. R:17344-46, 20697-98.

But they all knew, as did all the analysts, that EBS was a start-up business whose financial plans projected large *losses*. As Skilling explained, the primary

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[18] R:15273-74 ("*I didn't feel* that the business was looking good"); R:17338-51 ("*in [my] view*" meltdown not good news); R:20694-99 ("[redeployments] was not very good news, *in my opinion*").

[19] Indeed, Hannon admitted that, while he disagreed with some of Skilling's optimistic views, "*I assume it is what he believed*." R:20856. Concessions like these—which recurred throughout the trial—were utterly inconsistent with the notion that Skilling orchestrated a conspiracy to deceive investors. Other cooperators were forced to retreat from similar efforts to prove Skilling a liar. For example, Koenig testified that EBS's operating expenses were concealed from the public; Koenig retracted this claim when confronted with Enron's Annual Report, which disclosed EBS's operating expenses. R:16256-60.

barometer of its start-up success was *not* earnings or revenues, but the output of EBS's two businesses, measured in trading volumes (for bandwidth intermediation) and total contract value (for content services). R:16167-711, 16176-86, 20842-43, 20900, 29040-46, 36497; DX979:186-187; DX33470:64-65. The business model—with which Hannon said he agreed—contemplated that growing those two outputs would lead to long-term profits as the new broadband market matured. R:17651, 17981, 20849-50, 29414.

Judged by these metrics, EBS was on track—in fact, surpassing its targets in 2000. R:29189-92; DX6595:66; DX30297:86. Then, in 1Q 2001 alone, bandwidth intermediation generated more business than in all of 2000, with volumes up 321%, trades up 640%, and counterparties up 404%. DX22268; DX6603; DX20604:7-8; R:17979, 17981. The total contract value of content services also increased. GX1013:1304. Skilling viewed this rapid growth as a strong indicator of EBS's long-term prospects for success; he saw monetizations and dark fiber sales as necessary and standard methods to offset start-up costs, not as a sign of failure. R:29050-51. Even Rice and Hannon admitted they were "optimistic about EBS's chances for long-term success." R:17628, 17648, 17650, 17659, 20823-24.

EBS's sources of revenue were regularly disclosed. For example, in 1Q 2000, Skilling told analysts that EBS broke even "because of significant fiber sales." R:29069-70; DX20597:14. In 3Q 2000, he said EBS's costs were "largely offset" by "revenues from … [its] investments." R:16256; DX20599:11. In 1Q 2001, Enron's earnings release said revenues related "primarily" to a monetization. R:16307; GX1013:3. Dark fiber sales, monetizations, and investments were regularly disclosed in Enron's 10-Qs and 10-Ks. R:16200-02, 17917, 17920-21, 20999; GX1032:2319, 2341; GX1033:2510; GX1034:2535. Even Rice admitted it was "no secret" that EBS, like other start-up companies, relied on such transactions as part of their ordinary business to generate revenues and offset costs. R:17651-52, 17917, 17919-21, 17941, 17945; *see also* R:15531, 16191-94, 16200-02.

Finally, the thesis that Skilling would lie about EBS's prospects or approve sham transactions to prop it up was thoroughly refuted by one example alone. As of 2Q 2001, the broadband markets were continuing to decline, EBS's customers were going bankrupt, and revenue opportunities were diminishing. Skilling was open and candid with employees and analysts about the industry's continuing downturn and the problems it posed for EBS. R:29300-06; DX20603:6, 10, 13, 24, DX20605; DX21660; DX30741. EBS reported a $102 million loss for the quarter, missing its projected loss target by a wide margin. GX1015:1314; GX1016:1322. Skilling could have *eliminated* this loss by accepting the recommendation to enter into a proposed transaction with Qwest to sell a significant part of EBS's network. But as even Rice explained, Skilling refused to approve the deal—even though it meant badly missing the quarterly target—because he felt it was not in EBS's long-term strategic interests. R:17990-95.[20]

B. False Statements To Auditors

In 2002, the Task Force prosecuted Arthur Andersen and argued the firm was complicit in Enron's fraud and destroyed documents to cover it up. In this case, however, the Task Force adopted precisely the opposite theory: Andersen was not a co-conspirator, but a victim.

The basis for these counts was five management representation letters signed by Skilling and others. R:890-94; RE-3; GX1743; GX4603-04; GX5001-02. These are standard letters that set forth general representations requested by auditors: the financial statements were prepared in accordance with GAAP; all representations in the financial statements were true; there has been no material fraud; all guarantees, written or oral, have been properly recorded; all related party transactions have been properly recorded; and all financial records were made available to Andersen. R:890-94; GX1743; GX4603-04; GX5001-02; JKS-4:3

[20] The Task Force also claimed that Skilling lied about EBS's health when he stated, in March 2001, there were no "layoffs" in EBS, but rather a "redeployment" of employees to other areas at Enron. R:870, 14761-62, 17329-32; RE-3. Rice testified Skilling wanted to pitch the layoffs as a redeployment, but "in [Rice's] mind," they were layoffs. R:17329-32. Hannon contradicted Rice, testifying it "was a real redeployment." R:20835-36. Rieker did, too, stating in an email: "[t]here is no layoff." DX6688. Defense witnesses Marla Barnard (the head of human resources at EBS) and Sarah Davis confirmed the redeployment. R:26815-941, 27032-56.

The Task Force's direct proof of these counts amounted to only a few minutes of its nine-week case-in-chief. It consisted of a handful of questions to *one* witness—Andersen auditor Tom Bauer, who authenticated the letters, read portions of them, and testified they are "important." R:23536-46, 23839-40. No other Task Force witness testified about the letters, their accuracy, their connection to Skilling, or Skilling's knowledge or state of mind when signing them.

In response, Enron General Counsel James Derrick explained the process by which the letters were reviewed and signed. Each letter was drafted by Andersen, sent to Enron, and reviewed by senior Enron accountant Bob Butts. Butts would then initial the letter and send it to Causey for his review. Causey would initial it when he approved it. As accounting executives, Butts and Causey were integral to the process, since the letter concerned matters of accounting, including representations whether items were properly "recorded" or "disclosed" under accounting rules. Next, Enron's securities lawyer and disclosure expert Rex Rogers would review and initial, followed by Derrick. R:23743, 27483-88; GX1743; GX4603-04; GX5001-02. Skilling would only sign the letter after it was reviewed and approved by the others, as evidenced by their signatures or initials. *Id.*; R:28851-54. There was no evidence to rebut Skilling's reliance in signing these letters; to the contrary, Bauer testified he *presumed* Skilling was relying on others. R:23746-47.

C. Insider Trading

The alleged "material non-public information" underlying the insider trading counts was the existence of the conspiracy itself. During closing, the Task Force told the jury: "[Y]ou can conclude, *based on the evidence of the conspiracy that's been presented to you*, at key periods in time whether Mr. Skilling had information that he used to sell his stock." R:37009.

In defense, Skilling demonstrated that his trading pattern did not fit that of insider trading. First, he sold only a portion of his holdings between the beginning of the alleged conspiracy and when he left the company. R:29376-96, 30567; JKS-5:48-51. His holdings *increased* over the course of the alleged fraud. R:29381. Second, in 2000, he endorsed and joined a Rule 10b5-1 sales plan in which his shares were automatically sold; he withdrew from the plan in June 2001, because he thought the stock price was *too low*. R:29374-80; DX8613. Third, with one exception, he sold no Enron stock thereafter. R:30549. The sole exception was his sale of 500,000 shares on September 17, 2001, the day the market opened after an unprecedented four-day closure on account of the September 11 tragedy. R:29380-88, 36787-88. Finally, in November 2001, Skilling was willing to risk *$70 million* of his own funds—significantly *more* than the proceeds of his alleged insider trading—in an effort to help Enron. R:899-901, 28241-43.

IV. VERDICT & SENTENCING

On May 25, 2006, the jury convicted Skilling of conspiracy, securities fraud, false statements to auditors, and one count of insider trading (the September 17 sale). R:37189-94; RE-4. It acquitted him of the remaining nine counts of insider trading. R:37192-93; RE-4. Skilling requested the use of a special verdict form, but the district court declined. R:36020, 38599. Because of the general verdict, there was no indication of what specific statements, transactions, or legal theories the jury accepted to convict. R:37189-94; RE-4. On October 23, 2006, the trial court sentenced Skilling to 292 months in prison. R:41917-24; RE-5.

SUMMARY OF ARGUMENT

I. The government's entire case against Skilling rested on the "honest services" theory of wire fraud this Court squarely rejected in *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006). Through testimony, instructions, and argument, the Task Force explicitly linked its defective theory to each and every count on which Skilling was convicted. Because *Brown* error infected every count, *Brown* alone compels a complete reversal in this case.

II. The government's case was also infected by legal errors in the rules the jury was instructed to apply in making its guilt determinations. The jury was inaccurately or insufficiently instructed on the rules governing mens rea, materiality, the so-called "side deals," and Skilling's reliance defense. Because of the inadequate and erroneous instructions, the jurors lacked the tools necessary to analyze the conflicting evidence and evaluate the government's exceedingly thin factual case.

III. Whatever legal principles were properly applicable here, this case never should have been tried in Houston. The Task Force urged the trial court to deny a change of venue, promising that careful voir dire would identify 12 impartial jurors among the more than four million people in Houston. That careful voir dire never happened. As a consequence, the jury seated was demonstrably prejudiced against Skilling. Community animus dominated Skilling's trial and directed its outcome. Skilling is entitled to retrial in a new venue that does not perceive itself as a victim of Enron's collapse.

IV. The Task Force unlawfully denied Skilling access to available evidence, threatened witnesses, and withheld critical exculpatory and impeachment evidence.

V. Finally, and only if it does not reverse all of Skilling's counts of conviction, this Court should address errors in his sentence and order a new sentencing. Skilling's 24-year sentence was unreasonable, inconsistent with the Guidelines, contrary to the federal sentencing statutes, and ultimately unconstitutional.

ARGUMENT

I. THE "HONEST SERVICES" WIRE FRAUD THEORY PURSUED IN THIS CASE WAS LEGALLY INVALID AND REQUIRES REVERSAL OF ALL COUNTS.

Each of Skilling's convictions rests on a legal theory of "honest services" fraud that has been definitively rejected. In *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006), this Court held that a corporate employee does *not* unlawfully deprive his employer of his "honest services" when the charged conduct was committed *in pursuit of the employer's own stated goals*. As this Court summarized the rule in *Brown*, an employee's conduct is "beyond the reach of the honest-services theory of fraud" where:

> [1] an employer intentionally aligns the interests of the employee with a specified corporate goal, [2] the employee perceives his pursuit of that goal as mutually benefiting him and his employer, and [3] the employee's conduct is consistent with that perception of the mutual interest.

459 F.3d at 522. If those conditions are satisfied, even where the employee's act could be described as "dishonest, fraudulent, wrongful, or criminal," the act nevertheless "is not a federal crime *under the honest-services theory of fraud specifically*." *Id.* at 523 (emphasis in original).

The Task Force has already conceded *Brown* requires the dismissal of numerous charges it brought against other Enron-related defendants prosecuted as part of the same conspiracy alleged here. *Infra* at 66-67. Indeed, in the trial below—held before *Brown* was decided—the Task Force conceded that each of the *Brown* conditions is satisfied in this case: Enron encouraged its officers to pursue the goal of maximizing share value and revenue; Skilling perceived his conduct to be in pursuit of Enron's interests; and his conduct increased Enron's revenue, profits, and share value. As Judge Higginbotham already observed, *Brown* creates "serious frailties" in 14 of the 19 counts of conviction—all interrelated counts for conspiracy, securities fraud, and insider trading. Order at 2, *U.S. v. Skilling*, No. 06-20885 (5th Cir. Dec. 12, 2006).

That is an understatement—those 14 convictions are indefensible in light of *Brown*. So are the remaining five counts for making false statements to Enron's auditors. As explained below, the thrust of the five false statement counts was that Skilling signed a letter to Andersen representing that "no fraud" was occurring at Enron, when, in fact, he was directing and organizing a criminal conspiracy to commit the "honest services" fraud detailed in Count One of the indictment—the discredited conspiracy count. *Brown*, thus, requires reversal of all counts.

A. A Defendant Cannot Be Convicted Of "Honest Services" Fraud Where The Defendant's Conduct Advances A Stated Goal Of The Employer.

The original language of the mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, criminalized only the fraudulent deprivation of tangible property or money, not deprivation of an employer's intangible right to an employee's honest services.

For a time federal prosecutors nevertheless convinced courts to read the statutes broadly to encompass so-called "honest services" fraud, but the Supreme Court rejected that reading in *McNally v. U.S.*, 483 U.S. 350, 360 (1987).

Congress responded to *McNally* by enacting 18 U.S.C. §1346, which explicitly extended the mail and wire fraud statutes to include deprivations of "the intangible right of honest services." *Brown*, 459 F.3d at 518. Because Congress did not define the phrase "honest services," however, courts have looked to pre-*McNally* case law to delimit the statute's boundaries. *Id.* at 519.

In *Brown*, this Court conducted a comprehensive review of the honest-services case law and identified a clear line distinguishing the type of self-dealing conduct criminalized by the statute from other conduct that, while arguably wrongful, unethical, or dishonest, is not the federal crime of honest-services fraud. *Id*. at 519-21. According to *Brown*, an "honest services" fraud prosecution will not lie where—as here—the defendant's allegedly "dishonest conduct" is not "bribery or self-dealing" at the company's expense, but instead is "associated with and concomitant to the employer's own immediate interest." *Id*. at 522.

The facts in *Brown*, assumed true by the Court, were that Merrill Lynch executives conspired with Enron executives to make a sham purchase of Nigerian power barges from Enron for the knowingly improper purpose of helping Enron inflate quarterly earnings. *Id*. at 513, 520. The Task Force asserted three distinct theories of wire fraud, including the theory that defendants' conspiracy deprived Enron of its intangible right to the honest services of its employees. They did so by acting dishonestly, causing Enron to spend money it otherwise would not have spent, and receiving personal benefits in the form of increased bonuses. *Id.* at 518-20. The jury returned a general verdict, convicting most of the defendants of wire fraud, without specifying which of the three fraud theories it adopted. *Id.* at 518.

Noting that, because of the general verdict, the convictions could not stand if any one of the prosecution's three fraud theories was legally defective, *id.* (citing *Yates v. U.S.*, 354 U.S. 298 (1957)), this Court rejected the prosecution's honest-services theory and vacated all the conspiracy and fraud convictions. *Id.* at 521-23.

The honest-services fraud theory had no application in the case, this Court explained, because the conspirators' alleged actions were *not divergent from Enron's interests*. The Court's analysis started from the crucial proposition, informed by the rule of lenity, that not every breach of fiduciary duty by an employee is a criminal deprivation of honest services. *Id.* at 521-23. Were the rule otherwise, the scope of criminal conduct would be defined not by the federal criminal statute itself, but instead by amorphous and shifting state-law conceptions of fiduciary duty as construed by courts, transforming federal mail and wire fraud into common-law crimes, violating the fundamental rule that "legislatures and not courts should define criminal activity." *U.S. v. Bass*, 404 U.S. 336, 348 (1971).

As the Supreme Court emphasized in *McNally*, "'[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.'" 483 U.S. at 360 (quoting *Fasulo v. U.S.*, 272 U.S. 620, 629 (1926)); *U.S. v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) ("The rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." (quoting *U.S. v. Liparota*, 471 U.S. 419, 427 (1985))); *U.S. v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) ("federal common-law crime" is "a beastie that many decisions say cannot exist").[21]

Brown therefore held that an employee commits honest-services fraud not by simply breaching common-law fiduciary duties, but by committing acts that are knowingly contrary to the *interests of his employer*. Most honest-services convictions before and after *McNally* fit comfortably within that rubric, *Brown* explained, because they "can be generally categorized in terms of either bribery and kick-backs or self dealing." *Id.* at 521. In such cases there is typically "no question that the defendant understood the benefit to him resulting from his misconduct to be at odds with the employer's expectations." *Id.* at 522. Outside these "paradigmatic cases of honest services fraud," however, an act does *not* constitute honest-services fraud—even though it might be described as a fiduciary

[21] If section 1346 were not narrowly interpreted as in *Brown*, it would be unconstitutionally vague. Skilling argued below that section 1346 should be invalidated as unlawfully vague on its face. R:7323. Skilling hereby preserves

breach at common law—where the employer offers incentives to pursue a certain goal, the employee perceives the goal as beneficial for the employer, and the employee's conduct reflects pursuit of the goal. *Id.* at 521-22. Whatever else may be said about the employee's conduct in that situation—be it unscrupulous, immoral, or even criminal under some other statute—it is *not* the federal statutory crime of honest-services wire or mail fraud. *Id.* at 523. In the Task Force's own words, *Brown* holds that the wire fraud statute "does not encompass schemes in which a corporate employee engages in fraud with the intent to benefit his employer." Reply Br. of the U.S. as Appellant at 11, *U.S. v. Howard*, Case No. 07-20212 (5th Cir. Aug. 24, 2007) ("Govt. Reply in *Howard*").

Cases from other circuits are to similar effect. Other than *Brown*, the most comprehensive analysis of honest-services case law is *U.S. v. Rybicki*, 354 F.3d 124, 141-42 (2d Cir. 2003) (en banc), discussed at length in *Brown*. In upholding the honest-services fraud statute against a constitutional vagueness challenge, *Rybicki* held that it can be applied only where an officer or employee *purports* to act in pursuit of the employer's interests but *instead* acts secretly for his own benefit and *against* his employer's interests:

> [A] "scheme or artifice to deprive another of the intangible right to honest services" in section 1346, when applied to private actors, means a scheme or artifice … to enable an officer or employee of a private entity … *purporting to act for and in the interests of his or her*

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that argument, but this Court need not reach it in light of *Brown*.

> *employer … secretly to act in his or her or the defendant's own interests instead*, accompanied by a material misrepresentation made or omission of information ….

Id. at 141-42. Similarly, in *U.S. v. Thompson*, 484 F.3d 877 (7th Cir. 2007), the Seventh Circuit reversed an employee's honest-services fraud conviction where the only "private gain" the employee allegedly expected was *job approval* from her employer and potential increases in her compensation.

> [While] it is linguistically *possible* to understand "private gain" as whatever adds to the employee's income or psyche … the Rule of Lenity counsels us to not to read criminal statutes for everything they can be worth. The history of honest services prosecutions is one in which the "private gain" comes from third parties who suborn the employee with side payments, often derived via kickbacks ….

Id. at 884 (emphasis in original). *Rybicki* and *Thompson* underscore *Brown*'s simple lesson: when an employee is actually working to advance his employer's stated goals and interests, he has not defrauded his employer, even if the act is wrongful or dishonest or unlawful in some other respect. Skilling's convictions cannot be reconciled with that basic rule.

B. Skilling's Convictions All Rest On The Honest-Services Fraud Theory Rejected In *Brown.*

1. *The Government Prosecuted Skilling For Acting To Promote Enron's Interests On A Theory Of Breach Of Fiduciary Duty.*

In most of its Enron-related prosecutions—including *Brown* itself—the Task Force pursued the same honest-services fraud theory—*i.e.*, the corporate-executive defendant deprived Enron of his honest services by committing dishonest acts to inflate Enron's earnings and stock price. And in every case since *Brown*—except this one—the government has conceded that *Brown* requires dismissal of honest-service charges against executives for participating in deals that allegedly falsely inflated Enron earnings. *U.S. v. Howard*, 471 F.Supp.2d 772, 775 (S.D. Tex. 2007); *U.S. v. Calger*, JKS-9:1; Govt. Reply in *Howard* at 6 ("under this Court's decision in *Brown*, it is now clear that the government erred in including honest services allegations in the conspiracy and wire fraud counts and that the district court erred in instructing the jury on an honest services theory").

This case was no different from *Brown* and the other cases. As in *Brown*, Skilling was charged with a conspiracy to commit "honest services" wire fraud against Enron. R:877-78, 36406-08; RE-3. As in *Brown*, the alleged conspiracy was designed to *benefit* Enron by bolstering its financial reports and stock price, not to promote Skilling's interests at Enron's expense.

The indictment, trial evidence, jury arguments, and legal positions advanced by the Task Force all make clear this congruence of interests. Skilling's indictment alleged a conspiracy "to deceive the investing public … about the true performance of Enron's businesses." R:844, 848; RE-3. The "objectives" of the alleged scheme were to increase reported earnings, reduce reported losses, maintain an investment-grade credit rating, and improve the price of Enron's stock. R:848-49, 852-853; RE-3. As in *Brown*, in claiming these objectives were accomplished by fraudulent *means*, the Task Force contended the *goal* was to advance *Enron's* interests—not Skilling's, RE-3:

- LJM was described as an entity used "to achieve [Enron's] desired financial reporting results," "so that Enron could present itself more attractively." R:853-54.
- The Raptors were described as vehicles created "to protect Enron" from having to report losses. R:854-55.
- The Nigerian Barges, Coyote Springs, and Braveheart deals—the subjects of the Task Force's *Brown*, *Calger*, and *Howard* prosecutions, respectively—were allegedly done to "generate earnings and cash flow," "ensure that Enron met analysts' expectations," "recognize earnings immediately," and "manufacture[] earnings." R:856-58, 863.

The same was true of all the allegations in the indictment. Every single fraudulent act was allegedly undertaken "to report … higher earnings" and "boost Enron's stock price." R:860-65, 866-72; RE-3. According to the indictment, the benefits Skilling received "as a result of the scheme" were "salary, bonuses, grants of stock" earned as part of his Enron compensation, R:847—the very same "gains" *Brown* and *Thompson* rejected as non-actionable under the wire fraud statute.

At trial, there was no evidence that Skilling engaged in embezzlement, bribery, or self-dealing. Only Fastow engaged in such conduct, which he admitted to concealing from Skilling and Enron management. R:22303-04. Not a single witness testified that Skilling pursued his own interests instead of Enron's. The government's own witnesses affirmed Skilling's loyalty and dedication to Enron.[22]

If anything, Skilling put Enron's interests ahead of his own—like when he sacrificed roughly *$50 million* to which he was legally entitled under a stock option plan because "it was the right thing to do" for the company, R:28480-84, 36691-92, or when a few years later he offered to return to Enron and inject virtually all of his net worth into the company to provide liquidity, R:28237-43.

In closing arguments, prosecutors did not dispute that Skilling's interests were fully aligned with Enron's. They admitted Skilling was not motivated by personal enrichment: "It's not a case about greed, ladies and gentlemen." R:37065. They acknowledged that Skilling "loved Enron," and his "identity," "personal fortune[]," and "ego[]" were "all wrapped up in the Enron stock price and the Enron story." R:36441. The "mutual interest," *Brown*, 459 F.3d at 522, between Skilling and Enron could not be more explicit, and it could not more definitively prohibit an honest-services fraud conviction under *Brown*.

From the outset, the Task Force prominently featured honest-services fraud as a path to criminalize Skilling's alleged breaches of fiduciary duty. In its

[22] *E.g.*, R:15954 (*Koenig*: Skilling "was a true believer in Enron"); R:18025 (*Rice*: Skilling "was very committed to the company"); R:22986 (*Kaminski*: Skilling was "[r]eally dedicated to the company"); R:24548-49 (*Glisan*: "Q. [A]s long as you knew Mr. Skilling and you knew Mr. Lay, you knew that they had the

opening statement, it argued that Skilling violated his duties of "honesty and candor," "loyalty to [Enron's] employees and to investors," and "trust placed in [him]." R:14757-58, 14784, 14799-800. During Skilling's cross-examination, the government told the jury the entire case was premised on such violations:

> Q. And you understand, don't you, that this case is about you and Mr. Lay and about whether, as captains of this ship, you breached your duties and obligations to those shareholders and employees? *You understand that's what we're here to decide?*

R:29610-11. The government emphasized this point with respect to other witnesses and documents.[23] In closing argument, the prosecution urged the point, saying Skilling was guilty because he violated his fiduciary duties:

> [M]ake no mistake, they got wealthy…. And in exchange for that money, they owed their employees a duty, a duty of good faith and honest services, a duty to be truthful, and a duty to do their job, ladies and gentlemen, to do their job and to do it appropriately.

R:37065.

And when it came time to charge the jury, the Task Force could not have been more clear about its theory of the case. The district court proposed including

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best interests of Enron in mind, didn't you? They were fighting for their company…. A. I think that is a fair statement for a lot of us.").

[23] *E.g.*, R:15114-15 ("duty" of honesty); R:15864-67 (Enron Code of Ethics required "honesty, candor, fairness"); R:21224-25 ("fiduciary responsibility"); R:22769-70 ("honesty and candor"); R:29610-11 (duties of "honesty," "candor"); R:32262-64 (duty of "honesty, candor, fairness"); R:36568 ("duty" of "honest services"); R:37013-14, 37043 (duties of "loyalty," "honesty," "honest services").

the phrase "something close to bribery" in describing a denial of "honest services," R:36022, but the government successfully objected to the addition:

> [*T*]*he indictment does not allege, and the government's evidence did not show, that defendants engaged in bribery*. Instead, the government's evidence shows that defendants committed (or conspired to commit) honest services fraud *by breaching their fiduciary duties to Enron and its shareholders*.

R:41327-28; R:36022 ("by singling out bribery and saying [the government must] show something close to bribery, we think that's setting the bar a little bit high for honest services violations").

In short, there is no question—none—that the government's entire prosecution was directly at odds with *Brown*.

2. <u>*The Flawed Honest-Services Fraud Theory Infects Every Count Of Conviction.*</u>

Skilling was convicted on 19 counts. Judge Higginbotham recognized *Brown* raises "serious frailties" regarding 14 counts—for "conspiracy, securities fraud, and insider trading." Bail Order, *supra*, at 2. The same conclusion applies equally to the remaining five counts alleging false statements to auditors.

a. <u>Conspiracy (Count 1).</u> Skilling's conspiracy count is *identical* to the conspiracy count overturned in *Brown*. Skilling's indictment alleged three possible objects of the conspiracy: "honest services" wire fraud; "money or property" wire fraud; or securities fraud. R:877-78; RE-3; *Brown*, 459 F.3d at 518. The jury was permitted to convict on any theory, including the legally untenable honest-services one. R:36406-09, 36424-26. Because of the general verdict, there is no way to know which theory the jury selected, and the conspiracy conviction must be reversed. *Brown*, 459 F.3d at 518; *Zant v. Stephens*, 462 U.S. 862, 881 (1983) ("general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground").

b. <u>Insider Trading (Count 51).</u> Skilling's insider trading count is wholly derivative of the invalid conspiracy count. According to the indictment, trial evidence, and jury arguments, the "material non-public information" on which Skilling ostensibly traded was his alleged knowledge of the conspiracy itself. R:844, 899-900, 7692-93, 11908; RE-3. Indeed, as the prosecution urged in closing argument, the jury was allowed to convict Skilling of insider trading based solely on the conspiracy count: "[Y]ou can conclude, *based on the evidence of the conspiracy* that's been presented to you, at key periods in time whether Mr. Skilling had information that he used to sell his stock." R:37010. Once again, given the general verdict, it is impossible to know whether the insider trading conviction rests on any legally valid theory. That conviction cannot stand.

c. <u>Securities Fraud (Counts 2, 14, 16-20, 22-26).</u> Skilling's convictions for securities fraud were also inextricably intertwined with his conspiracy conviction, through a *Pinkerton* instruction. *Pinkerton v. U.S.*, 328 U.S. 640 (1946). That instruction—given over Skilling's objection, R:25880-82—charged the jury that, if it found him guilty of conspiracy, Skilling also could be held vicariously liable for securities fraud committed by his co-conspirators, even if he did not commit any underlying acts of securities fraud himself. R:36408-09. In closing argument—and relying on that instruction—the Task Force insisted the jury should convict Skilling of securities fraud based on the acts of co-conspirators; to drive home this point, they deployed demonstrative exhibits tying *every* securities fraud count directly to the conspiracy count. R:37018; JKS-10:12-13, 15; JKS-4:6, 24, 25.

The reversal of a conspiracy conviction, of course, "precludes the imposition of [*Pinkerton*] vicarious liability" based on that conviction. *U.S. v. Kaiser*, 660 F.2d 724, 732 (9th Cir. 1981). In response, the Task Force argues that Skilling's securities fraud convictions can survive, because in addition to the *Pinkerton* vicarious liability theory, there was *also* evidence showing Skilling himself committed securities fraud. U.S. Resp. to Appellant's Mot. for Bail Pending Appeal at 18-19, *U.S. v. Skilling*, No. 06-20885 (5th Cir. Nov. 27, 2006).

The Task Force is wrong. When a general verdict of conviction rests on two or more theories, one of which is *legally* erroneous (as opposed to *factually* insufficient), it cannot be assumed the jury relied only on the legally valid one. The conviction must be set aside, no matter how strong the evidence supporting the legally valid theory. *U.S. v. Tomblin*, 46 F.3d 1369, 1385 (5th Cir. 1995) ("[if] the challenge is legal and any of the theories was legally insufficient, then the verdict must be reversed"); *Yates*, 354 U.S. at 298; *U.S. v. Griffin*, 502 U.S. 46, 59 (1991); *U.S. v. Hanafy*, 302 F.3d 485, 487 (5th Cir. 2002); *U.S. v. Smithers*, 27 F.3d 142, 146-47 (5th Cir. 1994). Because the Task Force cannot rule out the possibility the jury relied on a legally deficient conspiracy conviction to hold Skilling vicariously liable for securities fraud committed by others—as the Task Force argued and the jury instructions allowed—the securities fraud convictions must be reversed.

d. <u>False Statements To Auditors (Counts 31, 32, 34-36)</u>. The erroneous honest-services theory also requires reversal of the remaining five counts—all for making false statements to Arthur Andersen. The jury was instructed to convict on these five counts if it found that any one of the statements made in the management representation letters sent to Andersen was "false." R:36427-29. Among the statements in each letter challenged as false, was the following:

> There has been no:
>
> a. Fraud involving management or employees who have significant roles in internal control;
>
> b. Fraud involving others that could have a material effect on the financial statements.

GX4603:2; GX1743:2; GX5001:3; GX5003:3; GX5002:2. The indictment, which the jury was given during deliberations, expressly alleged these representations were false. R:890-94; RE-3. Likewise, the prosecution showed the jury a demonstrative exhibit during closing argument that said Skilling could be convicted of Counts 31, 32, 34, 35, and 36 for making the following false statements to Andersen, among others: "*No material fraud* or other irregularities involving management." JKS-4:3; R:37025.

Because the Task Force prosecuted Skilling on an erroneous "honest-services fraud" theory, the jury could have found that Skilling or his co-conspirators committed "honest-services fraud," and then convicted him of falsely representing to auditors that there was "no fraud" at Enron. Despite Skilling's objections, the district court refused to employ a verdict form requiring the jury to specify which representation, among those the Task Force identified, it found to be false. R:35886-87, 37189-94; RE-4.

Even though the government challenged other statements in the management representation letters, given the general verdict, it is impossible to know which of the statements the jury found false and whether one—perhaps the only one, given the Task Force's emphasis throughout trial—was that there was "no fraud at Enron." As discussed above, where convictions *could* have rested on an incorrect legal theory, they cannot stand. *Supra* at 74-75. *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995), is on point. In *Barona*, the government presented the jury with a list of 12 possible "supervisees" to prove defendants were "supervisors" of a criminal enterprise. "The problem [was] that, among the list of [supervisees] … there existed individuals [whom] the jury was not allowed to choose as a matter of law." *Id.* at 1096-98. Likewise, the problem here was that among the possible false statements in the representation letters, there included at least two whose alleged falsity rested on a legal theory the jury was not allowed to choose as a matter of law. Because all five false statement convictions thus could have been premised on the legally flawed honest-services theory they must be reversed.[24]

C. There Is No Basis To Distinguish *Brown*.

Brown is controlling here, as the Task Force once urged. R:7670-71 (before *Brown* appellate ruling handed down, government citing district court ruling in *Brown* as "direct example" rejecting Skilling's argument that honest-services wire fraud theory did not apply here). Now that the Enron-related convictions in *Brown* have been reversed, the government has reversed field and argues *Brown* is irrelevant. Its arguments are devoid of merit.

To avoid *Brown*, the Task Force says the wire fraud statute implicitly contains a silent, undefined distinction among corporate executives for purposes of honest-services liability. Skilling is not covered by *Brown*, the Task Force says,

[24] Although they must be reversed because of legal error, the false statement counts, it bears repeating, were among the most tenuous in the case. The charges were aimed at Rick Causey, who—unlike Skilling—dealt directly with Andersen on a regular basis. Once Causey pled guilty, the proof at trial on these counts consumed a few minutes of the Task Force's case. R:23536-46, 23839-40. Just *one* witness—Andersen accountant Tom Bauer—testified about the letters, and did so in perfunctory fashion. He authenticated the letters, read portions of them, and said they were "important." R:23536-46, 23839-40. He had no personal

because he was "part of Enron's management," "defined the Enron 'message,'" and set "improper and fraudulent corporate goals," while the *Brown* defendants merely pursued them. U.S. Resp. to Skilling's Mot. for Bail Pending Appeal at 14-15 (Oct. 18, 2006) (sealed). *Brown*, the argument goes, applies only to lower-level corporate executives. *Id*. at 12-16. Neither the district court nor Judge Higginbotham credited this argument. R:41894-98; Bail Order, *supra*, at 2. Neither should this Court.

To start, even indulging the Task Force's distinction, it could not salvage Skilling's conviction. Because of the *Pinkerton* instruction, the jury was allowed to find Skilling guilty for the criminal acts of his alleged co-conspirators—most of whom were employees who did not devise Enron's strategy, set its goals, or define its message. In other words, they were the type of employees to whom the government concedes *Brown* applies. At trial, the government implicated a number of such individuals who participated to deprive Enron of their honest services.[25] The jury may well have decided—impermissibly—that some or many of these employees committed crimes of honest-services fraud, and then held Skilling vicariously liable for those crimes through *Pinkerton*.

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knowledge of the letters' accuracy, and knew nothing about Skilling's role in preparing them. R:23536-46, 23743-47, 23761-62.

[25] To take just a few examples: Michael Kopper and Ryan Siurek, a managing director and accountant, respectively, in Enron Global Finance, R:22111-12,

In any event, *nothing* in *Brown* or the statute supports the Task Force's proposed distinction between senior executives and those "not senior enough" to commit honest-services fraud. *Brown* was not premised on the conspirators' job titles, their role in setting corporate policy, or the notion that they were "following orders." *Brown* held that the alleged scheme fell outside of §1346 because—unlike bribery, kickbacks, or self-dealing—it furthered the "mutual interest" of employer and employee. 459 F.3d at 519-23. What matters under *Brown* is the *nature and objectives of the conduct*, not the employee's level of authority.

Nor is it plausible even in theory to distinguish between corporate executives based on relative seniority for purposes of *Brown* and §1346. The rule of lenity requires courts to construe federal criminal statutes to provide *clear* definitions of the acts being criminalized. *Supra* at 64-65. The Task Force does not and could not offer a coherent specification of exactly (or even generally) which executives risk prosecution for honest-services fraud under §1346 and which would not. How much corporate responsibility is enough to create liability under a "seniority exception" to *Brown*? Could one executive be potentially liable for some acts under *Brown* but not for others? Could one executive's potential liability under *Brown* evolve over time as her corporate responsibilities evolved? The answers to such questions are critical to defining the scope of the statute and providing the

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22639-40; Chris Loehr, an entry-level employee at Enron and LJM, R:22674-78;

required clear notice of potential criminal liability, but the government does not even pretend to have them. It has no answers because its "seniority" distinction has no basis in §1346, *Brown*, or any of the hundreds of honest-services cases decided before and after *McNally*. It is concocted from nothing. *U.S. v. Ratcliff*, 488 F.3d 639, 649 (5th Cir. 2007) ("[W]e resist the government's reading of §1341 … because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.").[26]

Skilling's convictions—all of them—must be reversed.

II. THE JURY INSTRUCTIONS WERE ERRONEOUS AND HIGHLY PREJUDICIAL.

This Court reviews alleged instructional error "by assessing whether the court's charge is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." *U.S. v. Pompa*, 434 F.3d 800, 805 (5th Cir. 2005). The charge must be both

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and Georgeanne Hodges, an accountant at Enron North America, R:19362-67.

[26] Even if the government's theory had support in the statute, precedent, or logic, it would not apply here as a matter of fact, because Skilling plainly did *not* set "improper and fraudulent corporate goals." According to the indictment, the "goals" of Skilling's alleged conspiracy were exactly the same as the "goals" of the scheme in *Brown*: to increase Enron's earnings and stock price. There is nothing improper about those goals—every public company pursues those objectives. As discussed, using improper *means* to achieve valid corporate goals of increased earnings and stock price may be securities fraud, or some other civil wrong, or even some other crime—but it is *not* honest-services fraud. *Brown*, 459 F.3d at 522 n.13 (under Task Force's view, §1346 would "reach all manner of accounting

"legally accurate" and "factually supportable," *i.e.*, "the court may not instruct the jury on a charge that is not supported by evidence." *U.S. v. Mendoza-Medina*, 346 F.3d 121, 132 (5th Cir. 2003). A court is also *required* to give a requested charge if it is "(1) a correct statement of the law, (2) not substantially covered in the charge as a whole, and (3) concern[s] an important point in the trial such that the failure to instruct the jury on the issue seriously impair[s] the defendant's ability to present a given defense." *U.S. v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996).

As shown below, the jury's instructions included a prejudicial instruction unsupported by the record and improperly omitted three other instructions critical to the jury's evaluation of the conflicting factual record.

A. The Deliberate Ignorance Mens Rea Instruction Was Impermissible.

All the crimes of which Skilling was convicted required proof that he had knowledge of the charged unlawful conduct.[27] Yet the jury was instructed it could convict Skilling on any count even if he did *not* have actual knowledge of the

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fraud and securities fraud, which have not generally been prosecuted as honest-services fraud and are heavily regulated under other statutes").

[27] The conspiracy count required that Skilling "knew the unlawful purpose of the agreement." R:36407-08. The securities fraud counts required that he "knowingly" engaged in a "fraud or deceit." R:36416. The false statements to auditors counts required that Skilling "knowingly" made materially false statements or omitted material facts. R:36428. And the insider trading counts required that he "knowingly employed a device, scheme, or artifice to defraud," by trading on inside information. R:36433.

criminal conduct. That charge stated: "You may find that a Defendant had knowledge of a fact if you find that the Defendant deliberately closed his eyes to what would otherwise have been obvious to him." R:36410. The use of that instruction was erroneous and prejudicial.

1. <u>*Deliberate Ignorance Instructions Are Inherently Dangerous And May Be Given Only In Rare, Strictly Defined Circumstances.*</u>

This Court and others recognize that allowing juries to find "deliberate ignorance" as a substitute for actual knowledge creates a "danger of confusing the jury" as to the required mens rea, *Mendoza-Medina*, 346 F.3d at 134, and thereby facilitates improper convictions. "Because the instruction permits a jury to convict a defendant without a finding that the defendant was actually aware of the existence of illegal conduct, the deliberate ignorance instruction poses the risk that a jury might convict the defendant on a lesser negligence standard—the defendant *should* have been aware of the illegal conduct." *U.S. v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990); *U.S. v. Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993) ("deliberate ignorance instruction creates a risk that the jury might convict for negligence or stupidity"); *Mendoza-Medina*, 346 F.3d at 132; *U.S. v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992); *U.S. v. Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994).

For that reason, this Court has "often cautioned against the use of the deliberate ignorance instruction," *Mendoza-Medina*, 346 F.3d at 132, and has repeatedly emphasized that “[t]he circumstances which will support the deliberate ignorance instruction are rare,” *Lara-Velasquez*, 919 F.2d at 951; *Cartwright*, 6 F.3d at 301; *Ojebode*, 957 F.2d at 1229. To avoid juror confusion, a deliberate ignorance instruction is permissible *only* when the trial evidence, viewed most favorably to the government, “raise[s] two inferences”:

> (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and
> (2) the defendant purposely contrived to avoid learning of the illegal conduct.

Lara-Velasquez, 919 F.2d at 951.

This two-prong test is designed to preclude use of the instruction in cases where the only real choice from the record is either actual knowledge or no knowledge, since the jury in such a case might mistakenly rely on the instruction to convict for negligent passivity in the face of potentially unlawful conduct. *Id*.; *Mendoza-Medina*, 346 F.3d at 133. By requiring that the defendant must have “*subjectively*” known that illegal acts almost certainly were being committed, the first prong “prevents the Government from establishing that a defendant had the requisite guilty knowledge merely by demonstrating that a *reasonable person* would have been aware of the illegal conduct.” *Lara-Velasquez*, 919 F.2d at 952. The second prong enforces the “*sine qua non* of deliberate ignorance,” which is “the *conscious action* of the defendant—the defendant *consciously attempted* to escape confirmation of conditions or events he strongly suspected to exist.”

Mendoza-Medina, 346 F.3d at 133. Because criminal fraud liability cannot be premised on "reckless disregard for the truth or a negligent failure to inquire," *Hilliard*, 31 F.3d at 1516, mere passivity in the face of potentially suspicious activity is not enough—active and purposeful avoidance is required, *id*.[28]

As one leading precedent explains, deliberate ignorance instructions raise the greatest concerns in cases involving complicated business transactions governed by detailed and technical civil regulations. *Hilliard*, 31 F.3d at 1516-17. In *Hilliard*, the evidence showed that a savings bank officer had been aware of, but explicitly ignored, federal banking agency directives concerning the treatment of certain tax liabilities. The officer did not deny knowledge of the regulator's position, but testified he disagreed with it and thought the tax liabilities should be treated differently, given the advice he received from the bank's accountants and counsel. *Id.* at 1515. The evidence also showed that a separate commercial transaction had been misstated on the bank's books, and that the officer had failed

[28] Cases upholding deliberate ignorance instructions illustrate their proper role: defendants in such cases engaged in obvious and aggressive efforts to avoid knowledge of criminal activity notwithstanding suspicions of its existence. *E.g.*, *U.S. v. Gray*, 105 F.3d 956, 967 (5th Cir. 1997) (defendant prevented others from inquiring into company's activities, told cover-up story, dissuaded customers from taking action against company); *U.S. v. Inv. Enters.*, 10 F.3d 263, 269 (5th Cir. 1994) (defendant never attended board meetings of company that distributed obscene materials for which he printed packaging, visited company's premises only twice a year, never met president at company's headquarters, sent others to collect payments); *U.S. v. Ebbers*, 458 F.3d 110, 125 (2d Cir. 2006) (defendant

to identify and disclose the true nature of the transaction. *Id.* at 1516. The trial court held that a deliberate ignorance instruction was justified with respect to both transactions because even if the officer did not have actual knowledge they were unlawful, the jury could still charge him with knowledge because he failed to communicate directly with the agency about its position on the tax liabilities and failed to inquire into the details of the other transaction. *Id.*

The Tenth Circuit reversed. With respect to the tax liability issue, the court noted that the officer had relied on various experts in concluding that the bank's statements were correct, but "[m]ore to the point," the court emphasized, the officer "was not on trial for civil banking violations, but rather criminal bank fraud." *Id.* at 1515. "Because a significant portion of the trial was devoted to the civil regulatory issue of deferred tax payments as loans, … the deliberate ignorance instruction made it a real possibility that the jury could have convicted Mr. Hilliard for negligence in failing to heed the [agency's] regulatory position." *Id.* at 1516. Similarly, while the evidence clearly showed one transaction was misstated on the bank's books, and the jury was entitled to disbelieve the officer's testimony that he thought the mistake had been corrected, a deliberate ignorance instruction was not justified because there was no evidence that he had "purposefully contrived to avoid learning the true state of the transaction … and the potential criminal

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claimed to have thrown a management report in trash without reading it and not to conduct flowing from reporting it otherwise." *Id*. Delivering the instruction merely because the officer concededly did not investigate the transaction himself, the court held, "is too close to premising criminal liability upon a reckless disregard for the truth or a negligent failure to inquire." *Id.*

"The danger in giving the instruction where there is direct evidence of knowledge but no evidence of avoidance of knowledge," *Hilliard* concluded, "is that the jury could still convict a defendant who merely should have known about the criminal venture." *Id.* at 1517. The problem is especially acute where the jury is faced with "somewhat complicated financial transactions combined with professional legal and accounting advice of varying quality, some of which was heeded, and some of which was not," resulting in substantial evidence that a corporate officer was *at least* aware of civil regulatory violations. *Id.* at 1516. Because that evidence could be taken by the jury—improperly—as sufficient proof in itself that the officer deliberately blinded himself to "the *criminal* offenses charged," *id.* at 1517, a jury cannot be authorized to make that leap (where the record shows no conscious acts of avoidance), but instead must be instructed to find that the defendant *actually knew* that criminal conspiracy and fraud was afoot.

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have read or fully understood documents he signed).

2. *The Evidentiary Record Did Not Support Use Of The Instruction Here.*

The principles enunciated in this Court's deliberate ignorance precedents and applied by the Tenth Circuit in *Hilliard* compel the same result here. "Appellate review of a deliberate ignorance instruction is necessarily a fact-intensive endeavor. To determine the validity of the instruction, this Court must carefully examine the totality of the evidence." *Lara-Velasquez*, 919 F.2d at 952. A review of the record below shows that the instruction was wholly unwarranted and highly prejudicial.

To begin, there was no evidence that Skilling had suspicions about unlawful conduct, which he then actively contrived to avoid. In the typical deliberate ignorance case, the defendant denies actual knowledge of the facts establishing the unlawful acts, but there is evidence that he blinded himself to the existence of the acts. *E.g.*, *Lara-Velasquez*, 919 F.2d at 949 (defendant denied knowing that the truck he drove concealed marijuana); *U.S. v. Farfan-Carreon*, 935 F.2d 678, 679 (5th Cir. 1991) (defendant denied that he knew about the 324 pounds of marijuana in truck when he drove them across the Mexican border); *Ebbers*, 458 F.3d at 124 (defendant CEO denied knowing the company's CFO was cooking the books). But here, as in *Hilliard*, Skilling never denied knowledge of the relevant underlying acts. The issue, rather, was whether those acts were *unlawful at all*, including whether Skilling actually intended such acts to deceive or otherwise further an unlawful design. There was no theory—and certainly no evidence—that Skilling took affirmative steps to avoid knowledge of acts alleged to be illegal.

Indeed, the central point pressed below by the Task Force was exactly the opposite: Skilling, it argued, *sought to know everything*. The government's witnesses stressed that Skilling was an "active," "involved," and "well-informed executive" who "kept abreast of what was going on in the company as best he could." R:16312-13. In its opening statement, the government asserted that Skilling kept himself "informed of the developments, issues, and problems at Enron," had "one on one meetings" with "top lieutenants," helped review SEC filings, "participated in board presentations, finance committee presentations, audit committee presentations," and "reviewed critical documents." R:14755-56. Skilling "had his hands firmly on the wheel"; he was as "extraordinarily hands-on," "thorough," "attentive," and "detail oriented." As prosecutors told the jury in closing, "he wanted to know everything that was going on at the company." R:14755-56, 16313, 19840, 30022, 30037, 30905-06, 30917-18, 36531, 36534.

Skilling *agreed*. R:14802-03, 14828, 28333. His defense was *not* that he was unaware of fraud, but that there was no fraud. *E.g.*, R:14802-03 ("This is not a case of hear no evil, see no evil. This is a case of there was no evil."). His defense, as in *Hilliard*, was that he believed the company's actions and statements were appropriate, not only because numerous professionals, executives, employees, and advisors had a hand in them, but also because they were consistent with his own knowledge and belief. *Supra* at 84-86. Neither side argued Skilling subjectively *suspected* criminal behavior but *purposely contrived* to avoid learning about it. In these circumstances, a deliberate ignorance instruction is impermissible. *Mendoza-Medina*, 346 F.3d at 133; *Lara-Velasquez,* 919 F.2d at 952.

It was only at the very last minute that the government introduced deliberate ignorance into the case against Skilling. Evidently concerned about its proof—and unwilling to take any chances—the government asked for a deliberate ignorance charge as to Skilling. R:25536. But having tried an entirely different case, the Task Force could not point to evidence supporting this counterfactual theory. It could not show that Skilling subjectively knew there was a high likelihood that others were engaging in criminal acts. Andrew Fastow's criminal looting of Enron was actively and successfully concealed from Skilling, as Fastow and the government conceded. *Supra* at 17. As to the many other acts of which Skilling *was* aware (such as the resegmentation of EES, the Raptor hedging vehicles, or other LJM transactions), the uncontroverted evidence showed that Skilling—like the defendant in *Hilliard*—relied on a large number of highly qualified people, including accountants, lawyers, and the Enron Board, in making or approving decisions. *Supra* at 31, 46-47. Although the Task Force argued the advice Skilling received itself was incorrect, the first prong of the test for a deliberate ignorance instruction requires evidence establishing that Skilling was highly *suspicious* that criminal wrongdoing was afoot, and on that score the record was barren.

The government also failed to show that Skilling *purposely contrived* to blind himself to suspected illegality. Virtually all the acts charged against Skilling were business actions that involved a wide variety of people inside and outside of Enron, including Skilling himself. The other charged acts, alleged conversations with Fastow, involved Skilling engaging in conduct on his own. Either way, there was no evidence Skilling tried to avoid suspected wrongdoing, blinded himself to transactions or business problems, or conveyed the message, "in effect, 'Don't tell me, I don't want to know.'" *Lara-Velasquez*, 919 F.2d at 951.[29]

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[29] When Skilling objected to its proposed instruction, the Task Force scoured the four-month trial record and came up with just six random and irrelevant snippets of evidence from the voluminous trial record that it claimed justified an "ostrich" instruction directed toward Skilling. R:34577-87.

- Two concerned a memo Skilling never received (and did not try to avoid), R:22838-47, 22996, 28616, 27721-24, 28685-88, and a conversation to which he was not a party, R:22838-47, 22996, 28616.
- One concerned a witness who said, *no*, when asked if he believed Skilling ever did anything illegal at Enron. R:23005.
- All six concerned issues that Skilling and many others actively vetted and discussed: how the Raptors worked; Fastow's LJM compensation; Fastow's lawful, Board-approved, and publicly disclosed conflict as both Enron CFO and LJM general partner; and the Rhythms transaction, which was a minor focus of the trial. (Conflict: R:21367, 21710-12, 27518-24, 28645-48, 31158; GX209:2; GX210:1123; R:22096-98; GX1025:863; GX1031:269); (Raptors: R:19885-91, 20475-77, 24254-57, 30069-113); (Compensation: R:28666, 29865-66); (Rhythms: R:22838-47, 22996, 28616).

See also R:34762-68, 38010-27, 41492-502, Skilling's Mot. for Bail Pending Appeal at 6-14, *U.S. v. Skilling*, No. 06-20885 (5th Cir. Nov. 16, 2006); Skilling's

3. *Use Of The Instruction Was Not Harmless Error.*

In the end, the government has no serious argument that a deliberate ignorance instruction was proper. Its position at trial was that Skilling organized a criminal conspiracy and participated in it, *not* that he suspected some wrongdoing by others and willfully closed his eyes to it. On that record, a deliberate ignorance instruction was as prejudicial as it was unwarranted.

The government bears the burden of proving that erroneous use of the instruction was harmless beyond a reasonable doubt. *U.S. v. Wells*, 262 F.3d 455, 463 n.9 (5th Cir. 2001). It cannot possibly carry that burden. As in *Hilliard*, this case involved many financial transactions, business decisions, regulatory and code of conduct issues, and Skilling's defense was that he was aware of these matters and relied on the assistance of others in dealing with them. The question before the jury was not whether Skilling had knowledge of the events the government charged to be crimes; it is whether he had *guilty* knowledge—an actual understanding that fraud was involved. *Lara-Velasquez*, 919 F.2d at 952. But the deliberate ignorance instruction, coupled with the government's emphasis on breach of fiduciary duty, including specifically cross-examining Skilling about his allegedly "breaching duties," *supra* at 71, dangerously invited the jury to convict

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Reply in Support of Mot. for Bail Pending Appeal at 3-7, *U.S. v. Skilling*, No. 06-20885 (5th Cir. Nov. 29, 2006).

on the ground that "guilty" knowledge followed from the fact that he "should have known" the advice he was receiving was suspect.

As *Hilliard* explains, where the evidence shows not that the defendant avoided knowledge of criminal wrongdoing, but that he knew a great deal about the transactions—including that they had been approved by experts inside and outside the corporate structure—there is a great danger that post hoc evidence that the transactions were *not* proper will lead the jury to conclude that the defendant's reliance on advice was unwise, and that a prudent officer would have sought out different advice, or otherwise would have known the transactions were wrongful. 31 F.3d at 1517. Because "unwise decisions alone are not necessarily indicative of the requisite criminal intent," a deliberate ignorance instruction facilitating a conviction on that basis is prejudicial. *Id.*

As in *Hilliard*, one might argue Skilling's decisions were "unwise" in retrospect; even he would not approve LJM if he had to do it all over again, he testified. R:28855-56. But, as in *Hilliard* and *Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 705-06 (2005), Skilling's conviction must be reversed because there is a danger he was convicted for being negligent or for relying on the wrong advice—*not* for willfully breaking the law. Thus, for example, instead of finding Skilling guilty of having knowingly used the Raptors transactions to defraud the public, R:36414-16 (Count 2), the jury may well have decided he *should have known* the transactions were fraudulent or merely *should have known* they were bad business decisions. That is not the standard of liability imposed by the criminal law. The use of the deliberate ignorance instruction was wrong, and it was prejudicial. Skilling's convictions must be reversed.[30]

4. *The Court's Refusal To Give A "Balancing" Instruction Was Itself Reversible Error.*

Although the Task Force now defends the deliberate instruction, in the charging phase it all but conceded the evidentiary record did not justify the instruction. In initial meet-and-confer meetings, the Task Force requested the instruction *only as to Lay*, who was not so intimately involved in Enron's day-to-day operations. R:38020-21. Later, in its formal proposed instructions, it sought the instruction against both Lay and Skilling. R:25536. But after Skilling objected and filed briefs demonstrating the instruction had no basis in the government's theory and proof as to him, the *Task Force* asked the court to add an important caveat to the instruction: "You may find that this instruction *does not apply to*

[30] It is unnecessary for Skilling to show the jurors *actually* applied a negligence mens rea standard, but it is clear many of them did. In public comments after the trial, several jurors commented they liked Skilling, did not believe he acted out of greed or malice, but concluded he "should have known" about crimes at Enron. *E.g.*, R:38936-38 (Juror: "In my opinion, I think if they didn't know, they should have found out somehow what was going on."); R:40906-07 (Juror: "It's hard to believe someone, such a hands-on individual, could not possibly know some of the things going on in the company."); R:40908 (Juror: "[I]t was their duty to know what was going on.").

either of the defendants or that it applies to both of them *or that it applies to one of them but not the other*." R:38062-63.

That caveat is called a "balancing" instruction and is encouraged in precisely this situation, *i.e.*, where there are multiple defendants but the record shows them to be differently situated vis-à-vis the charged conduct. 2001 Fifth Circuit Criminal Jury Instruction 1.37 note. Skilling provisionally agreed to the Task Force's proposed addition, reserving his general objection. R:38059.

Without explanation, the trial court *refused* the parties' joint request, and delivered the deliberate ignorance instruction unchanged. That was error, as this Court's pattern instructions make clear:

> If a deliberate ignorance instruction is given, a "balancing" instruction should be considered upon request of defendant. *See U.S. v. Farfan-Carreon*, 935 F.2d 678 (5th Cir. 1991)…. When a deliberate ignorance instruction is appropriate only with respect to one of a group of co-defendants, the Fifth Circuit has approved the giving of the instruction accompanied by a statement that the instruction may not apply to all of the defendants. *U.S. v. Reissig*, 186 F.3d 617 (5th Cir. 1999).

2001 Fifth Circuit Criminal Jury Instruction 1.37 note at 50-51. Because a balancing instruction would have facilitated the jury's appreciation of the distinction between the different states of mind of Lay and Skilling, the omission of a balancing instruction prejudiced Skilling and requires reversal.

B. The Jury Was Denied Adequate Guidance On The Legal Meaning Of "Materiality" In This Context.

All the charges against Skilling were based on alleged false statements and reports about Enron, and all required the jury to find that the statements involved were "material." Materiality is a term of art with a specific legal meaning that does not necessarily comport with lay notions of "justice." *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 385-87, 393 (5th Cir. 2007).

In a civil shareholder suit related to the collapse of Enron's water business, the district judge below dismissed claims against Skilling and others under the securities laws for making immaterial statements, such as corporate cheerleading and puffery. But in the criminal trial, the same district judge not only allowed such claims to be heard by the jury, but refused to instruct the jury on clear and settled rules that draw a line between material and immaterial statements.

Absent that crucial guidance, the jury could not be expected to understand materiality in context or apply the concept. Unsurprisingly, the jury returned convictions on two counts based entirely on statements that are demonstrably immaterial as a matter of law. Beyond those two counts, all the convictions must be reversed and remanded for trial, because it is impossible to know whether a jury fully instructed on the law would have convicted Skilling on any count.

1. *<u>Optimistic, "Puffery" Statements About A Company's Performance Are Immaterial As A Matter Of Law.</u>*

Certain positive statements about a company's present performance or its future prospects—even when false—are not actionable because they are immaterial as a matter law. Because reasonable investors "rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen," *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993), characterizations that are "squishy" and "untethered to anything measurable" do not "communicate anything that a reasonable person would deem important to a securities investment decision," *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 387 F.3d 468, 489 (6th Cir. 2004). Immaterial puffery includes "generalized, positive statements" about the company's "future prospects" and "competitive strengths." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 865 (5th Cir. 2003).[31] Common

[31] *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004) ("Statements that are mere puffing or corporate optimism may be forward-looking or generalized statements of optimism that are not capable of objective verification."); *Searls v. Glasser*, 64 F.3d 1061, 1066 (7th Cir. 1995) (statements that lack specificity "contain[] no useful information upon which a reasonable investor would base a decision to invest," and so are merely "optimistic rhetoric"); *In re Sec. Litig. BMC Software, Inc.*, 183 F.Supp.2d 860, 888 (S.D. Tex. 2001) ("puffery," or "[v]ague, loose optimistic allegations that amount to little more than corporate cheerleading," are not actionable).

statements held to be puffery include claims that a company is "strong," "healthy," "robust," and "on target," or "on track" for growth projections.[32]

2. *<u>The Court Erroneously Refused To Instruct The Jury On The Rules Of Materiality Applicable To The Statements At Issue In This Case.</u>*

Although the rules of materiality that make puffery non-actionable apply in civil and criminal cases alike, *e.g.*, *U.S. v. Peterson*, 101 F.3d 375, 380 (5th Cir. 1996), the Task Force was permitted to try Skilling criminally for statements that would not have survived in any civil case. The dismissal by the district judge below of many such statements in *In re Azurix Corp. Sec. Litig.*, 198 F.Supp.2d 862 (S.D. Tex. 2002) (Lake, J.), *aff'd sub. nom. Rosenzweig*, 332 F.3d 854,

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[32] *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 377 (5th Cir. 2004) ("[T]he first quarter of 1998 was extremely significant for INSpire Insurance Solutions"); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) (test results were "positive"); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1121-22 (10th Cir. 1997) ("substantial success" in integrating sales forces); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1219 (1st Cir. 1996) ("DEC was a very healthy company," and "basically on track"); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 807, 811 (2d Cir. 1996) ("[w]e expect 1993 to mark another year of strong growth in earnings per share"); *Hillson Partners L.P. v. Adage, Inc.*, 42 F.3d 204, 212 (4th Cir. 1994) (company is "on target toward achieving the most profitable year in its history"); *Raab*, 4 F.3d at 290 (prediction of "twenty-five percent growth" immaterial because it "will almost always prove to be wrong in hindsight" and "[i]f growth proves less than predicted, buyers will sue; if growth proves greater, sellers will sue"); *In re MCI WorldCom, Inc. Sec. Litig.*, 191 F.Supp.2d 778, 785-86 (S.D. Miss. 2002) ("1999 was an outstanding year"); *In re Splash Tech. Holdings Inc. Sec. Litig.*, 160 F.Supp.2d 1059, 1077 (N.D. Cal. 2001) ("strong," "healthy," "robust," "well positioned," "solid"); *In re Eng'g Animation Sec. Litig.*, 110 F.Supp.2d 1183, 1187 n.6 & 1195 (S.D. Iowa 2000) ("strong financial condition and [its] business prospects remain excellent").

illustrates this point. Below, several of the statements for which Skilling was prosecuted are compared with statements the district judge held were non-actionable in *Azurix*:

Skilling:	"Overall, though, great quarter. Second quarter results are outstanding. *Business fundamentals remain strong*." "[W]e continue to see *very strong dynamics and fundamentals for our business* …." DX20605:7, 19.
Azurix:	"[Azurix's] *fundamentals are strong*." 198 F.Supp.2d at 872, 886-87.

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Skilling:	"But essentially, *strong growth* on the intermediation side, *strong growth* on the Content Services side, in terms of people[,] budgets, the whole thing"; "We think the business is *very strong* …. I think what we're saying is that we expect the kind of *strong growth* that you've seen from Enron in the past will continue …." DX20602:33-34; DX20605:19.
Azurix:	"[Azurix has] assembled the core assets and capabilities for *strong growth* in our key markets." 198 F.Supp.2d at 887.

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Skilling:	"In our Bandwidth Intermediation Business, we are *making excellent progress* in creating a commodity market for bandwidth." DX20603:7.
Azurix:	"[Azurix is] *making steady progress* toward the Company's objectives …." 198 F.Supp.2d at 888.

Statements about both these companies (Enron's broadband and water businesses), viewed in retrospect by a lay jury, no doubt seem improper because of Enron's failure. But under the securities laws, failure is not a crime. Similar puffery statements have been held non-actionable in myriad precedents of this Court and others. *Supra* nn. 31-32 & accompanying text.

Skilling moved for dismissal of three counts that were based entirely on puffery statements, *infra* at 104-05, and also requested the jury be instructed to apply the well-settled rules of materiality.[33] The court denied both requests: "This is not a seminar on securities law," the court pronounced. "This is a criminal charge. The charge follows established Fifth Circuit precedent, and I'm not going to give those instructions." R:36023.

[33] The instruction, R:25440-41, read in full:

Statements Inherently Not Material – Certain statements are inherently not material. For example:

Forward-Looking Statements: General predictions about a company, not worded as guarantees, and generalized positive statements about a company's prospects are not material. Similarly, predictions about general economic conditions cannot be considered material.

Context Makes Statements Immaterial: Even if a forward-looking statement is shown to be false, it still cannot form the basis of a claim of securities fraud if other true statements, or other cautionary statements concerning the subject matter of the statements at issue, sufficiently nullify any potentially misleading effect.

Facts Already Known to the Market: If the truth about certain facts is known to the market, a false statement about the same facts is not material, and therefore cannot form the basis of a claim of securities fraud.

Non-Specific Puffery: Even if a statement is demonstrably false or misleading, it is not material, and therefore cannot support a claim of securities fraud, if it is "puffery" – so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find the statement important to the total mix of information he or she would consider when making an investment decision. For example, a corporation's commonly-heard self-praise, corporate cheerleading, and mere expressions of optimism are not considered seriously by the marketplace and investors in assessing a potential investment, and thus, such statements are not material.

The trial court's charge on materiality merely said a statement is material so long as a reasonable shareholder would consider it "important" in making an investment decision. R:36434 (insider trading). The jury was told to consider "all the circumstances, including the total mix of information made available," and that the charge did not cover "minor or meaningless or unimportant misstatements or omissions." R:36419 (securities fraud).

That instruction was grossly inadequate and misleading in the context of this case and helped assure that the jury's materiality findings did not follow the law. The Tenth Circuit's decision in *U.S. v. Lake*, 472 F.3d 1247 (10th Cir. 2007)—arising from the collapse of Westar, the so-called "Enron of Kansas"—illustrates the error in refusing to prove a more specific instruction on materiality. The corporate officers in *Lake* were charged with various fraud-related crimes for having failed to disclose in SEC filings "perks" they had received in the form of travel on corporate jets. The defendants proposed instructions describing the relevant SEC rules, which do not require disclosure of such perks when their marginal cost to the corporation is negligible (*e.g.*, the marginal cost of the CEO's spouse sharing a flight the CEO is already taking). *Id.* at 1258, 1263. The government, however, successfully objected to these instructions, *id.* at 1262-63, enabling prosecutors to focus on the millions of dollars it would have cost "ordinary" people to arrange and enjoy such trips, *id.* at 1253. Defense lawyers were reduced to calling witnesses on the SEC rules and arguing that the government was not viewing the costs correctly under the applicable rules.

Forcing defense lawyers to argue the law, when the law clearly provides their clients a defense, is profoundly prejudicial. For that reason, the court of appeals in *Lake* overturned defendants' convictions. "When a defendant's defense is so dependent on an understanding of an applicable law," the court explained, the trial court "has a duty to instruct the jury on that law, rather than requiring the jury to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument." *Id.* at 1263.

The same analysis applies here. Skilling's materiality defense depended heavily on the jurors' understanding of whether and when optimistic statements of belief and opinion are considered material to investors—and, more so, when they are *not* material as a matter of law. A lay juror who has never invested in stock in his or her life, or who has only limited experience doing so, may have a very hard time deciding what is an "important" fact without concrete examples with which to compare it.[34] And on the theory that the more information the better, a juror might

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[34] Indeed, one of the government's lead prosecutors publicly disclosed that the Task Force struggled to find evidence of materiality among investment professionals, so instead chose to exploit stories of "common investors" likely to appeal directly to the jurors' emotions:

> Concentrating first on the professional stock analysts who followed Enron on behalf of thousands of client investors, we anticipated that they would compellingly describe exhaustive efforts to determine the true

easily conclude that a reasonable investor would want to know as much as possible about a company—indeed, the Task Force's witness examinations *encouraged* the jurors to think about materiality this way.[35] But of course this is quite wrong as a matter of law: investors are only entitled to certain information about a company, *i.e.*, that which is *legally material*. As one court recently explained:

> A company is not required to disclose every financial fact…. [I]t is important to keep in mind the key phrase "total mix of information." This means not that a fact when viewed in isolation might have been important to an investor, but that when taken into account with all the other information available, it would have altered that "total mix." In other words, the question is not, "if a reasonable investor knew x, and only x, would that significantly affect her thinking about investing in this security?" The proper question in viewing materiality is "if a

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> financial state of the company, only to be misled by defendants' actions and words. Instead, we found that many Wall Street investors only occasionally perused Enron's public filings….
>
> Testimony from a small sampling of common investors, *though less compelling evidence of the materiality of the charged misstatements and omissions*, would provide a human perspective otherwise hidden from the jurors at trial…. These witnesses would portray a pool of victims much like the cross-section represented by the jurors themselves: a group with which they might identify, and about which they might conclude, "there but for the grace of God go I."

Hueston, *supra*, at 208-09.

[35] The Task Force persistently elicited testimony from witnesses speculating that investors "would have wanted to know" myriad details about Enron, as if this were the legal standard for materiality. R:15629-30, 18406-09, 18438, 18447, 18482-83, 18493, 19952, 22777, 22789, 23630. One witness was even allowed to opine that analysts and investors did not closely read 10-Qs, so unless *all* material facts are disclosed on *earnings calls* and in *earnings releases*, a company has committed securities fraud. R:19032-33.

> reasonable investor knew a, b, c, d, e, f, g, and now *also* x, would that significantly affect her thinking about investing in this security?"

SEC v. Todd, 2007 WL 1574756, *3 (S.D. Cal.).

Investors are not entitled to know everything about a company, and reasonable investors disregard all sorts information that a lay juror might mistakenly consider material, especially when viewed in hindsight and outside the context of the total mix of information then available to the market. *Id.* at *5-8 (emphasizing hindsight problem). Especially given Enron's after-the-fact bankruptcy, which surely would have provoked lay jurors to look with a jaundiced eye at *any* optimistic statement about the company's performance, it was especially critical that the jurors be advised as to the legal rules in this area, which do not always comport with lay conceptions. *Cf. Credit Suisse*, 482 F.3d at 393.[36]

Because the jury received no guidance from the court on legal rules of materiality applicable in this context, it was left to Skilling's counsel to try to explain through witness examination and jury argument why certain statements matter to reasonable investors and others do not. *E.g.,* R:19153-65, 28569-72. Jury factfinding, especially in a criminal trial, cannot work that way. Where a jury's resolution of a factual element such as materiality depends critically on how

[36] In addition, lay jurors easily could have interpreted the phrase "minor or meaningless or unimportant" in the court's instruction to mean only truly trivial facts, such as Enron sold 10 trillion cubic feet of gas, not 10 trillion and 1. This would be error. *Todd*, 2007 WL 1574756, *3, *5.

that element is legally defined, the jury cannot be required "to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument." *Lake*, 472 F.3d at 1263. It is the "duty" of the court to provide the jurors the guidance they need. *Id.* "It was error for the district court to abdicate its responsibility in this regard and let opposing counsel argue their competing theories, especially when defendants' view of the law [is] the correct one." *Id*.

Because it is impossible to tell whether the jurors would have found *any* of the challenged statements to be material had they been aware of the governing legal principles, all of Skilling's convictions must be reversed and remanded for trial before a properly instructed jury.[37]

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[37] For Counts 1, 14, 16-20, 22-26, 31-32, and 34-36, the jury could have convicted Skilling on the basis of statements that could have been deemed immaterial puffery by a properly informed jury. For example, in addition to Counts 23 and 24 discussed in the next section, there were such statements as:

- <u>Count 22:</u> "[W]e don't expect [earnings] to be significantly impacted [by California] moving forward in time." R:14053; RE-3.
- <u>Count 25:</u> EBS is "making excellent progress in creating a commodity [market] for bandwidth"; Enron "feel[s] very good about the intermediation business and the development of markets for bandwidth"; and EBS' content services "has tremendous upside potential for the future." R:14055-57; RE-3.
- <u>Count 26:</u> Enron had "a great quarter"; "[b]usiness fundamentals remain strong"; EES had "an outstanding second quarter"; and Enron is "well positioned for future growth." R:872, 14058-59; RE-3.

Similar statements underlie most counts in the indictment. R:7340-70. As explained above, *supra* at 74, it is impossible to tell from the general verdict whether the jury relied on such statements in convicting Skilling, and thus Counts 1, 14, 16-20, 22-26, 31-32, and 34-26 must all be reversed.

3. *<u>The Jury Improperly Convicted Skilling On Two Counts Solely Involving Legally Immaterial Statements.</u>*

Counts 23 and 24 each challenged particular statements made on specific occasions. Each challenged statement was plainly immaterial as a matter of law:

- <u>Count 23</u> (January 25, 2001 analyst presentation): EBS and EES are "strong franchises with sustainable high earnings power"; Enron is "not a trading business"; EBS has a "solid position."

- <u>Count 24</u> (March 23, 2001 analyst call): "Enron's business is in great shape"; EBS "is coming along just fine"; Enron "is very comfortable with the projections on volumes and the targets and the benchmarks that we set for EBS"; EBS's businesses are "growing fast"; EBS redeployment was "very good news"; EBS "is looking good," experiencing "strong growth"; "[we are] highly confident in our [EES] target for the year."

R:869-70, 889-90, 10748-50, 10753; RE-3. Each of these statements—"strong," "great shape," "coming along just fine"—is classic puffery. Like testimony about expensive rides on corporate jets, such statements about companies that subsequently went bankrupt for other reasons are sure to raise jury ire, but they are meaningless to reasonable investors. They are the type of garden-variety cheerleading statements that analysts hear every day, and that courts routinely dismiss as legally immaterial. *Supra* at 96-97. They are certainly *much* less specific than the predictive statements held to be legally immaterial in *Azurix*. 198 F.Supp.2d at 885 (prediction that company earnings "would approximate $500 million for the year 2000 and $800 million for the year 2001" not material).

That the jury found those statements to be material confirms its basic misunderstanding of materiality in this context. Skilling's convictions on these counts were wrong as a matter of law and should be reversed outright. But even if this Court were unwilling to pronounce these statements immaterial as a matter of law, it is impossible to say that properly instructed jurors *necessarily* would have found these statements to be material as a matter of fact. And so it is with all of the statements challenged by the government—whether they were material was a question ultimately for the jurors to decide, but it was a question jurors could not be expected to answer without knowing the rules.

C. Skilling's Proposed "Side Deal" Instruction Was Improperly Denied.

In allegations that underlie every count in the indictment, the Task Force alleged Skilling made or knew about "secret oral side deals" on certain transactions between Enron and LJM that eliminated LJM's risk, and thereby caused Enron's financial statements to be false. The question of risk transfer is not black and white; it is an inquiry that depends both on the specific facts and application of specialized accounting rules, SEC regulations, and principles of contract law. A pivotal issue in this analysis is whether the alleged "oral side deal" consists of general verbal assurances—which do not affect the accounting treatment—or constitutes an actual guarantee eliminating a buyer's risk—which does affect it. To educate the jury about this and other important distinctions, Skilling proposed a jury instruction, based on the applicable SEC regulation, providing the necessary guidance. Although the Task Force did not object, the district court denied the instruction without explanation. Given the importance of so-called "side deals" to the Task Force's case and the complexity of the rules governing the adequacy of risk transfer, the denial of that instruction was erroneous and prejudicial.

1. *The Task Force's Theory That Skilling Made Binding Side Deals That Eliminated LJM Risk Was Central To Its Entire Case.*

In opening, the government told the jury it would be brought "inside the doors of Enron" and hear about "secret side deals" that masked "phony sale[s]." R:14752-53, 14778. Every count of conviction embraced this theory:

a. Count 1: Conspiracy. The indictment explicitly identified "side deals" as a principal "device" Skilling and others utilized to further their scheme to defraud. R:852-53, 856; RE-3.

b. Count 2: Raptors Securities Fraud. The alleged Raptors securities fraud was premised on an alleged side deal. R:855, 881; RE-3. During opening statement, the Task Force told the jury the Raptors were "very complicated financial structures" and that "the accountants and the lawyers crawled all through those spider webs checking them out," but fortunately "you won't have to go into that spider web." The reason:

> It's a case about lies, folks. The lie, *the secret deal*, wasn't in the spider web. *The secret deal was what made this happen for Enron. What was that secret deal? It was a secret deal, once again, between*

> *Skilling and Fastow. The secret deal* was that Fastow and LJM were not supposed to act like true independent third parties. R:14781.

c. Counts 14, 16-20: False Financial Statements. According to the Task Force, the failure to disclose secret oral side deals rendered false and misleading every public financial statement Enron filed from the fourth quarter 1999—the start of the conspiracy—until Enron's bankruptcy. R:867, 887-88, 14045-53; RE-3.

d. Counts 22-26: False Statements to Analysts. The Task Force also contended that Skilling's failure to disclose the supposed side deals rendered false and misleading his statements to analysts concerning "Enron's financial results, the performance of its businesses, and the manner in which its stock should be valued." R:866-67, 889-890; RE-3.

e. Counts 31-32, 34-36: False Statements to Auditors. Paragraphs 106 and 108 of the indictment state: "SKILLING and CAUSEY falsely represented to Enron's accountants that … all related party transactions, including sales and guarantees (both oral and written), were properly recorded and disclosed." R:891-92; RE-3. In closing argument, the Task Force emphasized that Skilling's representation that there were no undisclosed guarantees was false—because of the alleged side deals—thereby making him criminally liable for lying to auditors:

> And he's representing to Arthur Andersen that he's responsible as management for the fair presentation, that the representations are true, that all agreements to repurchase are disclosed, all guarantees, written and oral, are disclosed, ladies and gentlemen. *He is telling Arthur*

> *Andersen that, and it's a lie, and it's a crime, and you can convict him on those because of LJM, ladies and gentlemen.*" R:37025-26.

f. Count 51: Insider Trading. Finally, the Task Force argued that Skilling's knowledge of the conspiracy, which included the alleged side deals, was the "inside information" on which Skilling illegally traded Enron stock. R:37009.

2. *The Jury Was Improperly Denied Guidance On The Legal Rules Governing The Adequacy Of Risk Transfer.*

The jury was given no ability to evaluate the evidence and arguments regarding the alleged side deals. They had no way to determine, for example, whether statements Skilling made to Fastow eliminated LJM's risk—by creating a *guarantee* that Enron would buy the assets at a certain price on a certain date so that LJM did not incur any risk from potential loss in the assets' value. *In re Triton Energy Ltd. Sec. Litig.*, 2001 WL 872019, *4 (E.D. Tex. 2001) ("[W]hether a transaction constitutes a sale depends in part on whether the putative seller relinquished control over the asset and on whether the seller is subject to post-transaction price risk"); *In re Bristol Myers Squibb Sec. Litig.*, 312 F.Supp.2d 549, 563 (S.D.N.Y. 2004) ("Under GAAP, revenue is recognized when substantially all the risks and rewards of ownership have transferred ….").

All three government witnesses on the so-called side deals—Fastow, Glisan, and Bauer—agreed that if there is no "guarantee" protecting the buyer from risk, then the risk has transferred and revenues can be recognized and booked accordingly. R:21926-28, 23540-42, 24346. The Task Force itself conceded the issue in evaluating "side deals" is "whether [LJM's investment] was ever *at risk*, such that it was an equity purchase and not a loan." Br. for U.S. at 229-230, *U.S. v. Brown*, No. 05-20319 (5th Cir. Oct. 11, 2005). Importantly, it also conceded that not all guarantees count, but only certain, specific kinds—*i.e.*, guarantees against loss. Guarantees that do not count include those to help a buyer remarket the purchased asset to a third party. As the Task Force acknowledged in the *Brown* (Nigerian Barges) case, these sorts of guarantees do not eliminate risk and therefore do not affect the accounting treatment. *Id*. at 230 n.87; JKS-11:4519-20.

Sorting this out is no easy task. There are few business negotiations that do not include statements designed to assure other parties that the deal is a good one for them. *U.S. v. Brown*, 459 F.3d 509, 535-36 (5th Cir. 2006) (DeMoss, J., dissenting). These types of assurances are the dealmaker's version of puffery: "This is a great deal for you." "You'll come out ahead." "No way you can lose." Likewise, parties routinely negotiate individual deals with an eye toward long-term relationships. The prospect of future deals often encourages businesses to cut prices, delay receipt of payments, and take on extra risk—actions they might not otherwise take in a one-off transaction.

At some point, such negotiations can reach the level of an actual guarantee that, in fact, the buyer literally *cannot lose* and the "future" is literally *now*—the seller is, right now, giving the buyer a genuine guarantee (*i.e.*, a binding promise to buy back the asset) that will protect the buyer from any risk of loss in this transaction. In that circumstance, there is no transfer of risk. SEC Financial Reporting Release 23, 17 C.F.R. Part 211, 50 F.R. 51671 (1985) (requiring disclosure when seller makes "material commitment which is in substance a guarantee"). The difficult question is identifying where that line is, and if and when it has been crossed.

To help the jury understand these principles—including most importantly how to evaluate whether Skilling's alleged statements to Fastow were mere "contract talk" or an actual guarantee to eliminate risk—Skilling requested an instruction addressing the government's side deal theory and the rules governing it. The proposed instruction read in full:

> The government alleges that "secret side deals" or "bear hugs" between Enron and LJM ruined the accounting treatment for certain structured finance transactions, including Nigerian Barges, Cuiaba, and Raptors, and rendered the public disclosures of Enron's financial statements fraudulent. Based on these "bear hug" allegations, the government accuses Mr. Skilling of conspiracy, securities fraud, and making false statements to auditors.
>
> Within the finance industry, there exists a hierarchy of protection one party can offer a counter-party. At the highest end of the spectrum is a written guarantee. Below that, in descending order, are legally enforceable oral guarantees, non-enforceable oral guarantees, letters of comfort, and finally verbal assurances not amounting to a definite guarantee or agreement.

> Written guarantees do affect the accounting treatment of sales transactions. *Oral guarantees, whether legally enforceable or not, can but do not always affect the accounting treatment of sales transactions. Letters of comfort and verbal assurances not amounting to a guarantee or agreement do not affect the accounting treatment of sales transactions*.
>
> Written guarantees and letters of comfort are not at issue in this case.
>
> *If you find that Jeff Skilling provided an oral guarantee to Andrew Fastow or LJM on deals such as the Nigerian Barges, Cuiaba, and Raptors you must assess that guarantee in the context of the transaction and determine if, in light of the evidence presented, the oral guarantee renders the transaction fraudulent. However, if you find that Jeff Skilling provided only verbal assurances not amounting to a guarantee or agreement, you must reject the government's side deal theory of liability on the conspiracy, securities fraud, and false statements to auditors counts.*
>
> Additionally, agreements to re-market, or re-sell, an asset—as opposed to a guarantee to repurchase it—do not affect the accounting or disclosures for transactions such as Nigerian Barges or Cuiaba. If you find that Enron agreed with LJM to re-market, rather than repurchase, then you must reject the government's side deal theory of liability on the conspiracy, securities fraud, and false statements to auditors counts for those transactions. R:35949-50.

This instruction was supported by evidence, consistent with applicable accounting and legal principles, and based on direct admissions the Task Force made regarding its side-deal theory. Notably, the instruction acknowledged, as does the law, that oral statements can be enforceable guarantees "under certain circumstances." SEC Release, *supra*. This instruction would have properly framed for the jury the essential question whether Skilling's alleged oral statements merely were general assurances that did not remove LJM's risk, or whether they created an actual guarantee protecting LJM from any risk of loss?

3. *The Lack Of A Full Jury Instruction On The Rules Governing The Adequacy Of Risk Transfer Was Especially Prejudicial In Light Of The Government's Weak, Internally Conflicting, And Misleading Testimony Concerning Side Deals*.

Skilling contended below, and contends here, that the government's evidence concerning "side deals," even if accepted as true, demonstrated, at best, dealmaker puffery of no legal consequence. It was insufficient to demonstrate that LJM had no risk of loss. *Brown*, 459 F.3d at 535-36 (DeMoss, J., dissenting) (evidence failed to establish sham in Nigerian Barges deal "because there was no legally enforceable take-out promise in the final written agreement" and thus "[a]ny oral assurances of a take-out offered to Merrill by any Enron employee would not have been legally binding on Enron").

But even accepting that the jury had sufficient evidence, there is still no way to credit their verdict, because they were told *nothing* about the different types and levels of assurances and guarantees under the applicable accounting and legal rules. For example, the jury might have concluded that Fastow and Skilling reached some sort of agreement on the Cuiaba or Barges deals and then concluded it was a fraudulent side deal, as the Task Force told them throughout the trial. But they would have done so without knowing from the trial court's jury instructions that the agreement reached might have been perfectly lawful remarketing agreement or verbal assurance to do more business together down the road. To be sure, the latter two options were far more the plausible and likely result, given the equivocal nature of Fastow's testimony on Skilling's assurances, and the fact that Cuiaba deal documents specifically included a remarketing agreement. R:22692-93, DX8756:9. To properly conclude that any side deal was fraudulent, the jury would have had to find that Skilling's alleged statements to Fastow constituted a risk-eliminating guarantee within the meaning of the operative rules—something they were not capable of doing because they were not given the rules by the court.

The problem is acute because the Task Force's factual showing on this issue was so thin and ambiguous. Complete and accurate instructions were critical if the jury were to have any chance of understanding the risk transfer issue and resolving the conflicting evidence fairly and correctly. Fastow himself claimed there was "very little" risk Skilling would not make him whole if LJM lost money on deals like Cuiaba or Nigerian Barges, but he acknowledged "*there was some risk*," even if a minor one. R:21269. He conceded that "custom and practice" in the banking and finance industries recognizes a hierarchy of "comfort" one party can offer another to encourage a transaction. Written guarantees are at the top of the spectrum, letters of comfort in the middle, and unenforceable verbal assurances at the bottom. R:21924-25. Fastow agreed that such assurances, which reduce or minimize but do not *eliminate* risk, are normal and part and parcel with negotiations and business relations and development. *Id*.

As to where on the continuum his discussion with Skilling fell, Fastow acknowledged Skilling *never* used the word "guarantee." Instead what Fastow described was the classic kind of dealmaker's puffery: "I'll make sure you're all right on the project," and "You won't lose any money." Fastow called these statements "bear hugs," but said he never used that term with Skilling. R:21298-303, 21962-63. Importantly, Fastow explicitly agreed these statements created no enforceable promise; if Enron did not make good on them, LJM's sole recourse would be to refuse, in the future, to do business with Enron. R:21818-20, 21922-23, 21978-81. Nevertheless, Fastow said he *personally* "interpret[ed]" the general assurances to be "guarant[ee]s," although he never shared his impression with Skilling. R:21280, 22271.[38] Fastow opined that Enron's failure to disclose these supposed "guarantees" made its financial statements false. R:21979-80, 22439-40.

Only two other witnesses testified about side deals, but they could not say that Skilling made statements amounting to risk-vitiating guarantees. Glisan

[38] This concession was especially problematic—or would have been, had the jury been properly instructed on the law—inasmuch as the law governing the formation of enforceable promises requires a meeting of the minds between both parties, not just one party's undisclosed perception of what the other party intended. *E.g.*, TEXAS PATTERN JURY CHARGES, PJC 101.1, 103.1 ("In deciding whether the parties reached an agreement, you may consider what they said and did in light of

testified that *if*, in fact, a "deal" existed on Cuiaba or Nigerian Barges where "Mr. Fastow couldn't suffer a loss," such a "guarantee" would "violate the accounting rules" and the "transaction should not have been recognized as a sale." R:24346. But Glisan never heard of any "side deal" involving Skilling, nor did he offer any view as to whether, under the circumstances described by Fastow, Skilling's alleged statements crossed the line from acceptable assurance to improper guarantee. R:24622, 24653-54.

Likewise, Andersen accountant Bauer testified only in the abstract that auditors would want to know about an "oral guarantee," even if not legally enforceable, because "the oral guarantee can also have an impact on the transaction and the disclosure of the transaction in the financial statements." R:23540-42. But on a key point, Bauer was even more equivocal than Glisan—he said oral guarantees "can" (not "would") impact how one disclosed the transaction. *Id.*; R:24346. Moreover, like Glisan, Bauer never heard of any guarantee from Skilling, and offered no view as to whether Skilling's alleged statements to Fastow would constitute a guarantee that did, could, or would affect Enron's accounting. R:23619-21. Fastow's testimony—and predominantly his interpretation of Skilling's state of mind—then, was all the jury had to decide the crucial question

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the surrounding circumstances, including any earlier course of dealing. *You may not consider the parties' unexpressed thoughts or intentions*.").

whether Skilling's statements crossed line.[39]

But, of course, it was not up to Fastow to declare whether Skilling's statements were intended to and did in fact constitute a risk-eliminating guarantee. That was the sole province of the jury. *Cf. Henderson Bridge Co. v. McGrath*, 134 U.S. 260, 275 (1890) ("It was for the jury to say whether the conversation was with a contractual intent or not."); *infra* n.38. And yet the jury was given no legal instruction—or guidance—even as to the existence of the continuum from assurances *to* immaterial guarantees *to* risk-vitiating guarantees, much less an instruction on how to determine where a given statement falls along that line.

Absent such an instruction, the jury was left only with Fastow—who played the role of the court and fact-finder—and explained both the nature of the continuum *and* where jurors needed to place Skilling's statements along it. Placing the jury's determination in Fastow's hands was especially improper given that his conclusion that a guarantee had been made was based solely on what he perceived to be Skilling's intent, which is a classic jury question, and given that Fastow

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[39] At Fastow's sentencing and in an article written about Skilling's case, one prosecutor boasted that Fastow's testimony on side deals was key to overcoming the "fundamental weaknesses" in its case against Skilling. Focusing on side deals, and *not* the actual accounting rules or Skilling's reliance on them, "provided a plain and simple fraud tied to Mr. Skilling, one that the jury could easily understand." Hueston, *supra*, at 199-200, 212-17; R:47434-35. Given this stated importance of Fastow and its side-deal theory to its case, the Task Force's significant misconduct to shield Fastow's credibility from attack was especially prejudicial and only compounds this instructional error. *Infra* Section IV.B.

undermined his own conclusion by acknowledging that Skilling's statements were not legally enforceable, LJM was exposed to some risk, and LJM's only recourse if Enron did not make it whole would be to stop doing business with Enron.

Lake, again, precludes this very type of circumstance. As here, the *Lake* jury had to determine criminal guilt concerning conduct governed by complicated SEC and accounting rules, but the trial court failed instruct on those rules, forcing the defense to argue against government witnesses about their nature and application. 472 F.3d at 1253, 1262-63; R:36721-22. As *Lake* held, where the defense turns on the jury's "understanding of an applicable" rule, law, or regulation, the court abdicates its duties where it fails to instruct on that law and instead allows "the jury to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument." 472 F.3d at 1263. The trial court's refusal to give the jury any guidance here—especially given how close the evidence was legally and factually—seriously prejudiced Skilling's defense on all counts. As in *Lake*, reversal is required.[40]

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[40] The court compounded the error by giving a separate instruction (over Skilling's objection) stating that whether Skilling "followed or deviated" from "certain civil regulations[] and various applicable accounting requirements" is "one circumstance you are entitled to consider and weigh in determining whether the defendants had the required specific intent to violate the criminal law as charged in the indictment." R:36331; R:35887-90. In doing so, the court encouraged the jury to consider Skilling's compliance with or deviation from SEC rules in assessing his intent, while giving jurors no direction to determine whether he complied. The court made matters worse by allowing Fastow to testify to the legal conclusion that

To be clear, for Skilling to prevail on this point, the Court need not conclude (although it could and should) that Fastow's testimony was legally insufficient to demonstrate that Skilling made a guarantee. This Court need only conclude that, given the nature and extent of Fastow's testimony, a jury given a full and accurate instruction might have *disagreed with Fastow* and decided that Skilling's statements were not, in fact, guarantees.

D. Skilling's Proposed Good Faith Instruction Was Improperly Denied.

"It is [] well established that a defendant is entitled to a separate instruction charging the jury on his theory of defense where he specifically and timely requests such an instruction and his theory has a 'legal and evidentiary foundation.'" *States v. Erwin*, 793 F.2d 656, 662 (5th Cir. 1986). Both versions of Skilling's proposed good faith instruction would have advised the jurors that a corporate officer may rely not only on advice personally received from his or her own personal attorneys, but may rely on advice provided by outside corporate lawyers, and may reasonably assume that subordinates and associates did the same with respect to transactions they oversaw.[41]

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a "guarantee" had been made and it violated the SEC rules. Such opinion testimony is impermissible, R:11555-58, Skilling objected to it, *id*., yet the court allowed Fastow to testify to this prejudicial and misleading legal conclusion.

[41] Skilling's initial proposed instruction provided:

> Reliance on the advice of attorneys—*whether employed by Enron or working for outside law firms and hired by Enron*—may constitute good

The court, however, rejected Skilling's proposals, and instead delivered an instruction that focused on whether Skilling *personally* sought and obtained the advice on which he relied.[42] Because Skilling never contended that he always received advice personally, but assumed that his subordinates and colleagues would have done so in the normal course of business, the district court's instruction effectively directed the jury to reject Skilling's good faith defense.

> faith. To decide whether such reliance was in good faith, you may consider whether Mr. Skilling, Mr. Lay, *or Enron* sought the advice of a competent attorney concerning the conduct at issue in this case, whether Mr. Skilling or Mr. Lay reasonably believed that the attorney had received all the relevant facts available at the time, whether Mr. Skilling or Mr. Lay received an opinion from the attorney *or were told or could reasonably assume legal counsel had approved the transaction*, whether Mr. Skilling or Mr. Lay believed the opinion was given in good faith, and whether Mr. Skilling or Mr. Lay reasonably followed the opinion given.
>
> *A defendant is not required personally to provide information to a company's attorney. It is sufficient that a defendant reasonably believed that a reliable and competent officer or employee of the company provided to the attorney the relevant facts known about a given topic at that time.*

R:25463-64. When the court expressed reluctance to give that full instruction, Skilling proposed limiting it to the final two sentences, but the court still refused. R:36027-31, 36286-87. The denial of both versions was improper.

[42] The instruction given provided:

> Reliance on the advice of an accountant or attorney may constitute good faith. To decide whether such reliance was in good faith, you may consider *whether the Defendant relied on a competent accountant or attorney* concerning the material facts allegedly omitted or misrepresented, whether the accountant or attorney had all the relevant facts known to the Defendant at the time, *whether the Defendant received an opinion from the accountant or attorney*, whether the Defendant believed that the advice was given in good faith, and whether *the Defendant reasonably followed the advice*.

The court's instruction was inappropriate, both legally and functionally. Enron was an Oregon corporation, R:27503-04, and as an director and officer, Skilling had the right under Oregon law to depend on the members of his staff to provide the information necessary for Enron attorneys and accountants to render reliable and accurate advice. OR. REV. STAT. § 60.357(2)(a) (2005). As long as red flags were not being raised in the process, Skilling was entitled to assume that the company's information, accountings, transactions, and business decisions had been properly vetted. Skilling's proposed reliance instructions simply, and accurately, described his rights under Oregon law.

The requested instruction also sought to describe hw reliance works in public corporations. In any company the size of Enron, executives necessarily rely on an infrastructure of subordinates, systems, and internal and outside advisors to ensure the proper structuring and vetting of business transactions and decisions. CEOs, as a matter of necessity and practice, rarely seek out personal accounting or legal advice. The standard instruction given by the court might be appropriate in a case, for example, involving individual tax fraud, but not where, as here, a corporate officer is being charged with criminal liability for a wide variety of actions taken by the company. Because such officers *must* be able to rely on subordinates and corporate advisors in their day-to-day operations, they should be

R:36405.

able to cite such reliance to prove that they lacked the required knowledge or intent to engage in criminal conduct.

The errors in the reliance instructions undermined Skilling's core mens rea defense. Former Enron Task Force director Leslie Caldwell publicly acknowledged the importance of lawyers and other experts to Enron's operations—and hence to Skilling's defenses against personal criminal culpability for corporate wrongdoing:

> Another big challenge of the Enron case that all will have is lawyers were all over these deals and so were auditors and accountants…. [T]he government is going to have to really navigate around some serious advice of counsel issues and some serious reliance on auditors issues.

R:13286-87. The way the government "navigated around" this issue was initially to oppose any reliance instruction, R:25748-51, then any meaningful instruction, R:36027-29. Skilling's defenses to all counts—but especially the Raptors and five false statements to auditors counts—were largely premised on his reliance on experts and professionals tasked with properly structuring and implementing the acts in question. *Supra* at 31, 57. The failure to give an instruction that reflected the actual facts of Skilling's reliance destroyed that defense.

III. COMMUNITY ANIMUS OVERWHELMED SKILLING'S TRIAL AND DENIED HIM HIS CONSTITUTIONAL RIGHTS.

"[T]here are cases in which only a change of venue is constitutionally sufficient to assure an impartial jury." 2 CHARLES A. WRIGHT, FEDERAL PRACTICE

& PROCEDURE: CRIMINAL §342 (3d ed. 1999). This is one such case: Skilling could not—and did not—receive a fair trial in Houston.

Under the Fifth and Sixth Amendments, all criminal defendants have the right to trial by "indifferent" jurors "free from outside influences," who will "base their decision solely on the evidence," undisturbed by personal prejudice or public passion. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Mayola v. Alabama*, 623 F.2d 992, 998 (5th Cir. 1980).

On appeal, there are two ways to show this right has been violated. First, reversal is required if *actual prejudice* "found its way into the jury box." *Calley v. Callaway*, 519 F.2d 184, 204 n.32 (5th Cir. 1975); *Mayola*, 623 F.2d at 996. Second, "evidence of pervasive *community prejudice* is enough for reversal, even without the showing of a clear nexus between community feeling and jury feeling." *Pamplin v. Mason*, 364 F.2d 1, 4-5 (5th Cir. 1966). In those cases, prejudice is "presumed." *Id*.; *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *Mayola*, 623 F.2d at 996-97.[43]

Skilling's convictions must be reversed on both grounds. In Houston, deep-seated biases permeated the entire community, warranting a strong presumption of prejudice for any Houston jury. Moreover, given the district court's refusal to

[43] The government can attempt to rebut this presumption by conclusively proving that a fair jury was actually empanelled. However, the government's

transfer venue and woefully inadequate voir dire, the selected jury was tainted by actual prejudice.

Presumed prejudice claims are reviewed *de novo*: "it is the duty of the appellate court to independently review the record," *Hale v. U.S.*, 435 F.2d 737, 746 (5th Cir. 1970), and "to undertake an independent evaluation of the facts," *U.S. v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975); *Sheppard*, 384 U.S. at 362 ("appellate tribunals have the duty to make an independent evaluation of the circumstances"); *U.S. v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998) (presumed prejudice reviewed "*de novo*").[44] Actual prejudice claims, however, are reviewed for abuse of discretion, *McVeigh*, 153 F.3d at 1179, since the trial court's assessment of jurors' demeanor and credibility at voir dire is "entitled to deference," *Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

A. There Was Overwhelming Community Prejudice In Houston.

Unlike most cases, the primary cause of community prejudice in Houston was *not* pretrial publicity; it was *the collapse of Enron itself*. In Houston, Enron's

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burden is "very difficult to carry," and "could not be satisfied merely by the jurors' assurances on voir dire of their own impartiality." *Mayola*, 623 F.2d at 1001.

[44] Narrow challenges to a district court's denial of a venue motion are reviewed for abuse of discretion. *U.S. v. Smith-Bowman*, 76 F.3d 634, 637-38 (5th Cir. 1996). However, when an appellant makes the broader constitutional claim that community prejudice "precluded a trial consistent with standards of due process"—challenging the overall fairness of the trial, not one discretionary decision by the district court—"it is the duty of a reviewing court to undertake an

bankruptcy was more than just a news story—it was a major community tragedy that left deep emotional, economic, and psychological scars throughout the city.

1. *<u>The Devastating Impact Of Enron's Bankruptcy</u>*

While Enron's bankruptcy affected the nation through stock market declines and macroeconomic forces, Houston's losses were severe, direct, and personal. On "Black Monday," over 4,000 Houston Enron employees lost their jobs. SR3:847, 1445. Thousands more lost jobs over time, until the company, once downtown's largest employer, had only enough employees to administer the bankruptcy. SR3:1197, 1229, 1899. Enron stock plummeted to zero, rendering many employees' 401(k) accounts worthless. For some, their life savings evaporated.

The effects went far beyond Enron employees: "the bankruptcy … created a severe economic downturn in Houston." SR3:1450. Arthur Andersen laid off 1,600 workers in its Houston office. SR3:1201. Vinson & Elkins, the city's largest law firm, lost nearly 10% of its business. SR3:1205. The entire energy trading industry fell into crisis, and Enron's competitors were forced to lay off hundreds of Houston employees themselves. SR3:864, 933, 1219-1225.

Enron emptied office space "roughly equivalent to a 30-story building" (and the newly built second Enron tower was no longer needed), increasing the vacancy rate for downtown office space by 400%. SR3:1219, 1229-33, 1240-43. Hotel

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independent evaluation of the facts." *Williams*, 523 F.2d at 1208 (distinguishing vacancies skyrocketed, as Enron generated 15,000-20,000 room nights annually from corporate travel. SR3:1219, 1249-51. Downtown businesses as diverse as restaurants, a barbershop, locksmith, dentist's office, shoeshine stand, and health club all expected substantial losses because of Enron's demise. SR3:1197, 1219, 1229, 1258, 1263. Enron's collapse also "left a $10 million crater in the local nonprofit community," as commitments to many arts and charitable groups went unfulfilled. SR3:1267-96.

Even in a city of four million, it seemed as if everyone knew someone affected by Enron's downfall. SR3:544. Indeed, connections to Enron ran so deep that the *entire* U.S. Attorney's Office for the Southern District of Texas recused itself from the investigation. SR3:608-10. In a poll conducted for Skilling's venue motion, *one in three* Houston respondents said they "personally know" someone harmed by Enron's collapse, two to three times as many as in alternative venues. R:2683-84, 2701, 2737-38, 2753.

The jury questionnaires further revealed the extent of the damage. *Almost half* (47%) of all jurors in the pool said they, their family, or friends had some connection to Enron or its bankruptcy. R:12058, 12375-82. Some worked for Enron (or Andersen), or knew someone who did. Def. Renewed Mot. to Change Venue Apps. C (Andersen: 16%), D (Enron: 24%) (Jan. 4, 2006) (sealed) ("Dkt-

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between due process challenge and challenge to denial of venue motion).

618”). Some (or their employers) did business with Enron. *Id.* App. E (13%). Many jurors knew someone—family, friends, neighbors, co-workers, clients, fellow churchgoers—who lost a job, lost money, or was otherwise hurt by Enron’s collapse. *Id.* Apps. F (owned stock: 20%), G (lost jobs/money: 31%), H (employer affected: 18%), I (otherwise hurt: 9%). Others lost money themselves; in some cases, thousands of dollars. *Id.* In open-ended responses, jurors noted “the far-reaching impact on the business community,” the “extremely negative impact on [Houston’s] charitable and arts organizations,” and the damage to “Houston[’s] real estate market.” *Id.* App. I. One juror said it best: “Was there anyone in Houston not affected in some way?” *Id.* App. H.[45]

For Houston, however, Enron’s bankruptcy was much more than a financial collapse—it was a “horrible betrayal of the city.” SR3:544, 917, 933, 1895. In Houston, Enron was not just another company. It was an “icon,” the “symbol of a renewed Houston, roaring back from the Oil Bust,” and “the most important company in the city, without any question.” SR3:907, 910, 1215.[46] Now it was a

[45] Houstonians’ many connections to Enron were also apparent during voir dire. R:14441-46, 14492-501, 14542-43, 14530-35, 14539-46, 14550-57, 14590-92, 14603-12, 14633-38, 14641-48, 14650-58, 14666-69, 14669-72, 14672-77. Notably, only one of these jurors was excused for cause. Two were selected as alternates. R:14687.

[46] SR3:903-39, 952, 1011 (Enron a “pillar[] of Houston’s economy and business leadership”; “psychologically, symbolically, Enron had no equal”; “there’s not a segment of this community that Enron hasn’t touched”; Enron “the pride of the town”); R:2863-64.

source of humiliation and disgrace. Many felt "the city's reputation has been bruised"; even people with no connection to the company were "ashamed of its behavior," and thought Enron "hoodwinked the entire city." SR3:917.[47] This, too, was evident in the jury questionnaires, as jurors wrote that "Enron gave Houston a black eye," "tarnished the image" of the city, and was "a stigma" and "an embarrassment." Dkt-618 Apps. N, O. As one potential juror put it, "we were betrayed by Enron." *Id.*

Even the Task Force concedes the magnitude of the tragedy. At sentencing, it argued that *the entire community* was a "victim" of Skilling's alleged crimes:

> I want to talk a little bit about … other *victims*, Your Honor. Vendors who sold their goods and services to Enron suffered. Other businesses who relied on Enron suffered. Local economies where Enron did business suffered. *Houston as a community was particularly hit hard by what happened at Enron*. R:42161.[48]

"[N]ot since the Kennedy assassination has a Texas city been so identified with such a devastating event with such far-ranging consequences." SR3:548.

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[47] SR3:522, 690, 933, 1021 (Houstonians "resent" damage to city's image); SR3:917, 948, 1024-54 (Houston Astros reclaimed naming rights to Enron Field because association "tarnished [team's] reputation").

[48] *Id.* at 42154 ("devastating impact" on "the community as a whole"); R:3211 ("Most anyone would concede that the Houston area was more directly affected by the collapse of Enron than any other area, particularly in light of the massive job loss"); Govt. Sentencing Mem. at 47 (Oct. 10, 2006) (sealed) (Houston "was particularly hard hit, both from an economic and psychological standpoint").

2. *Sympathy And Support For The Bankruptcy's Victims*

Enron's collapse evoked an emotional community response only seen in the wake of a natural disaster or an act of mass violence. Indeed, Houstonians compared Enron's sudden demise to the September 11 attacks. SR3:544. In news reports, the city was described as "the epicenter of the Enron blast," and the Enron building was called "a glass tombstone," "ground zero," and a "corpse … in the [city's] front yard." SR3:933, 1011, 1485.[49]

In response, all of Houston rallied to support those hurt. Organizations sponsored job fairs and offered networking events and training programs. SR3:1229, 1324-63. The Texas Workforce Commission set up "rapid response teams" to provide career resources and unemployment benefits, and a special job placement center was opened. *Id*. There were town hall meetings to discuss the crisis, and rallies to support the employees. SR3:1418-24, 1452-62.[50]

Community groups established relief funds to help employees pay for housing, healthcare, utilities, and groceries. SR3:1051, 1363-98.[51] Charities and businesses gave what they could: Enron workers were offered everything from discounts at retail stores to free food, Christmas trees and gifts, haircuts, opera

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[49] R:2647; SR3:715 ("this experience is eerily like being in a neighborhood devastated by a tornado"; "we mourn for those who are gone"), 1473, 1489.

[50] R:12435, 14012.

[51] SR3:1432-42 (politicians donate Enron campaign money to relief funds).

subscriptions, and health club fees. SR3:1229, 1293, 1331, 1356, 1401-15. The reason? "They are citizens of Houston, and we are concerned." SR3:1229.

Amplifying these feelings of sympathy, the *Houston Chronicle* featured scores of emotional stories on employees who "lost nearly everything." SR3:847; R:2995-97. There were heart-wrenching profiles of those affected ("The Faces of Enron"[52]); updates on their plight long after the fact;[53] poignant photographs;[54] and touching letters written by victims themselves ("I [am] now faced with selling the house, the car, and the dog just to survive").[55] Local television coverage also focused heavily on the victims. SR3:860, 1462; R:2970-71.

Between 2001 and 2004, when Skilling was indicted, the *Chronicle* ran nearly *100* victim stories, *six to 15 times* more than the major media in comparable venues. And no venue had in-depth profiles like "Faces of Enron." R:2995-97; SR3:2114. In 2004 alone—three years after the collapse—the *Chronicle* published *15* victim stories, while the other venues ran *none*. *Id*.

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[52] SR3:1404, 1497-522 (employees "scared," "nervous," "hurt," "angry," "worried," "betrayed," "humiliat[ed]," "helpless," living "paycheck to paycheck," facing "eviction," "will have to relocate," "no money to buy … Christmas gifts," "feels like he's failing his children").

[53] SR3:1489, 1531 ("nervous breakdown," "on anti-depressants," "unemployment benefits exhausted," "savings nearly gone"; employee laid off after cancer surgery passes away).

[54] SR3:847 ("Jobless Enron USMC Veteran Will Work For Food").

3. *The Demonization Of Jeff Skilling And Ken Lay*

Just as Houstonians were united in their support of Enron's victims, they were united in their hatred of Jeff Skilling and Ken Lay. At the peak of Enron's success, Skilling and Lay were "revered," with "rock-star status" in Houston. SR3:544. Skilling was approached in public "like a celebrity" and local "god"; Lay was a "legend," "mentioned for years as a potential mayoral candidate." SR3:522, 544, 944-52. After Enron's bankruptcy, they became Houston's most notorious villains.

Houstonians felt "angry," "disgusted," and "offended," and needed someone to blame for this "historic[] disaster." SR3:522, 594, 715, 732. One column ("Your Tar and Feathers Ready? Mine Are") called for a "witch hunt." SR3:746. As Enron's chief executives, Skilling and Lay were the focus of Houston's rage, and long before any facts emerged, Houstonians assumed they "stole money from investors," "ripped off their stockholders for billions," and "destroyed a great corporation." SR3:522, 690-703.

Skilling and Lay were compared to Al Qaeda, Hitler, Satan, "child molesters, rapists, embezzlers, [and] terrorists," who should "go to jail" and "go to hell."

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[55] SR3:522, 690, 715, 1495 ("nightmare scenario came true," "so many have lost everything," "some will never recover," "lost close to a million dollars," "ruined," "devastated," "received notice of foreclosure," considered suicide).

SR3:511-22, 703.[56] Skilling was physically threatened on multiple occasions, R:42142, Skilling's Sentencing Mem. Exs. 6, 8 (Oct. 10, 2006) (sealed),[57] his picture was "used as a dart board" and placed on "Wanted" posters next to Osama bin Laden, SR3:847, 860, and a local rapper called for Skilling's murder, SR3:867-99 ("For everybody out there/who lost a dime/drop a 'S' off of Skilling/it's killing time"). Lay feared for his safety, traveling with armed bodyguards. SR3:864.

When Skilling appeared before Congress, his testimony was called "b.s." and "unbelievable." SR3:563-66.[58] When indicted, the *Chronicle* headline read, "Most Agree: Indictment Overdue." SR3:728.[59] Prosecutors fueled the blaze, ignoring their ethical duties and giving press conferences and interviews labeling Skilling a "corporate crook" and comparing the "evil" at Enron to evils the Nazis perpetrated. SR3:1561; R:12592-94.[60] Skilling and Lay's claims of innocence were rejected as "ludicrous," "not credible," "distasteful," a "doofus defense,"

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[56] SR3:578-602, 690-715, 732 ("I hope [Skilling] winds up in jail…. when that happens the people who worked at Enron will feel that it didn't come soon enough"; "Am I angry at … Jeff Skilling? ABSOLUTELY!"; "It would be easier for you to convince the Jewish people that Adolf Hitler didn't have anything to do with [the Holocaust] … than to convince me that Ken Lay was innocent").

[57] SR3:518 (Skilling, Lay would be "wise to take security precautions"), 852 (Enron executives should face "the old time Code of the West").

[58] *Id*. ("inconceivable," "he's lying," "he's twisting things").

[59] *Id*. ("I'm glad they're indicting him.").

[60] SR3:1418-32 (local Congressperson "appalled and outraged" at executives).

"smoke screen," and "fantasy world." SR3:514, 518, 566, 602, 671; R:12066-67; JKS-12.

Both men were pronounced guilty long before trial. The *Chronicle*, the paper of record in Houston, wrote that Skilling "ginned up increasingly convoluted mechanisms for concealing [Enron's] financial reality." SR3:671. It said the Raptors were "created solely to hide losses," and called the Barges deal "a fake sale," "one more cooking of the books in a very busy corporate kitchen." SR3:667, 933, 1947. It mocked Skilling's stated reason for resigning, and portrayed him as a bully who "preferred epithets to answers." SR3:481, 1891; JKS-12-14. It rejected his explanation of the bankruptcy, instead asserting it was caused by Skilling's "profound shortcomings." SR3:675, 1003; JKS-12.[61] And this was not limited to news and business coverage—it permeated articles on sports, education, music, and more, revealing how deeply it was embedded in Houston's public consciousness.[62]

[61] SR3:481, 616, 655-67, 677 (Skilling named "Best Local Boy Gone Bad," "Ultimate Enron Defendant"; Lay named "Bum Steer of the Year").

[62] *E.g.*, SR3:805-42 ("If statistics do indeed lie … then Shaquille O'Neal's are like former Enron CEO Jeff Skilling in front of a congressional subcommittee"; "If you believe the story [about the Dallas Cowboys], then you probably believe in other far-fetched concepts. Like Jeff Skilling having nothing to do with Enron's collapse."); R:38327, 38388, 38927, 39209, 39212, 39653, 39748, 39831.

The *Chronicle* even ran articles in direct response to Skilling's pretrial motion to change venue. One columnist (self-named "the chief tainter of potential jurors") acknowledged having written "harsh" and "mocking" things, insisting:

> I make no apology for that. This column does not exist to defend Lay and Skilling…. This column is for the others. They are the people who lost everything and for whom "everything" is literal—homes, jobs, life savings, dreams….
>
> It's important that Lay and Skilling are judged fairly…. Nowhere, though, does the law say the rest of us must stifle our outrage…. You can find mine under "Exhibit A." R:40054.[63]

In polling, Houston respondents gave "by far the most vitriolic" and emotionally-charged responses. R:2685-86. They called Skilling "pig," "snake," "evil," "crook," "thief," "fraud," "asshole," "criminal," "bastard," "scoundrel," "liar," "weasel," and "economic terrorist." They described him as "dirty," "deceitful," "dishonest," "greedy," "amoral," "devious," "lecherous," "manipulative," "unscrupulous," "despicable," "equivalent [to] an axe murderer" who has "no conscience," "stole from employees," and "swindled a lot of people." They proclaimed him "guilty as sin," and argued "he needs to pay the price," go to "jail for 20 years," and "be hanged." R:2685-86, 2727-29, 2732-33, 2735, 2737-38, 2740, 2744-45, 2747, 2750, 2753-54; JKS-15 at Resp. 32.

[63] SR3:3149 (venue motion "desperate"; "Did [Skilling] really need pollsters to prove Houstonians want a change of venue for him [prison] worse than he does?").

Overall, *one in three* Houstonians used negative words to describe Skilling; they were roughly *three times* more likely to do so than respondents in Phoenix, Denver, and Atlanta, and *four times* more likely to use "anger words." R:2683, 2685-87, 2703-04. Moreover, when asked to name all Enron executives they believed were guilty of crimes, without prompting (a "recall" task measuring intensity of beliefs), Houston respondents were almost *five times* more likely to identify Skilling. R:2683-84, 2698-2700. A poll conducted by the Task Force only reinforced this data: it found that almost *60%* of Houstonians believed Skilling and Lay were guilty, and showed a statistically significant difference between Houston and the only other venue tested. R:4055, 4107-12.

This deep-seated animus was no better evidenced than by the questionnaires answered by potential jurors prior to voir dire. Of the 283 Houstonians in the jury pool from which the district court drew:

- *Over 86%* had heard of or read about Enron-related cases. R:12384-85, Dkt-618 Apps. L, M.
- *80%* had negative views of Skilling and Lay; indicated they had opinions about the role they played in Enron's collapse; or expressed anger about what happened to Enron's victims. Dkt-618 App. B.
- *60%* had an opinion about the cause of Enron's bankruptcy, and nearly all of those believed Enron was brought down by "greed," "accounting fraud," "lie[s]," and other "criminal" and "illegal activities" by upper management. R:12383, Dkt-618 App. J.
- *Over 40%* openly admitted to being "angry" about Enron. R:12386, Dkt-618 App. N.

- *Over 40%* either admitted outright that they could not be fair or expressed reservations about their ability to impartially consider the evidence at trial. R:12389, Dkt-618 App. S.
- *Over 40%* had an opinion about Lay, and *over one-third* had an opinion as to Skilling—virtually all of which were emotionally-charged and hostile. R:12387, Dkt-618 App. Q.
- Approximately *40%* also had an opinion about Skilling and Lay's guilt or innocence, and the open-ended responses overwhelmingly indicated that they believed Skilling and Lay to be guilty. R:12388, Dkt-618 App. R.

When asked to express themselves in their own words, prospective jurors did so with venom. They called Skilling "the devil," "cheater," "smug," "sleaze," "arrogant," "totally unethical and criminal," "the biggest liar on the face of the earth," and "a high class crook" "without a moral compass" who "took everything he could" and "would lie to his mother if it would further his own cause." Dkt-618 App. Q. Over and over, Skilling and Lay were demonized as "greedy executives," and compared unfavorably to the "honest, hard-working," "poor little people who lost everything." R:12056-57, Dkt-618 Apps. J, N, O, Q, S.[64]

The presumption of guilt was impassioned and unshakeable. Jurors wrote that Skilling "was at the center of the financial schemes," "responsible for [the] collapse," "knew about the accounting problems," "initiated, designed, and authorized … illegal actions," and "defraud[ed] Enron employees and investors."

[64] *Id*. ("All the little regular people got ruined and rich guys got richer"; "corrupt executives … squashed and hurt all the little guys"; "these men have profited at the expense of others"; "so many innocent people were ruined … because of the greed of a few").

Dkt-618 Apps. Q, R.[65] In short, he was "guilty as hell."[66] As such, they believed he and Lay should "be stripped of all their assets," "pay back every cent," and "spend the rest of their lives in jail." One argued they "should be reduced to having to beg on the corner and live under a bridge"; another said "they don't even deserve a trial. Let all the people they ruined have at them." Dkt-618 Apps. J, K, O, Q, R, S, T.[67]

According to Dr. Edward Bronson (a leading expert on jury behavior, who testifies equally for the government and defense), "only 18" of the 283 questionnaires did not raise doubts about the jurors' ability to be fair. Indeed, "*the extent and depth of bias shown in these questionnaires is the highest or at least one of the very highest [Bronson] ever encountered*." R:13816 (emphases in original); *id*. at 13823-29, 39905. These were not the hasty responses of random participants in a test survey. These were *actual* responses of *actual* prospective jurors, who took time to write out their answers in the comfort of their homes.

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[65] *Id*. (Skilling and Lay "very much involved," "instrumental … in the massive fraud," "robbed innocent people of their … future," "responsible for the downfall of the corporation").

[66] *Id*. ("they're guilty—criminally and morally"; "guilty without any doubt"; "guilty as sin—come on now"; "the rape of Enron … could not have happened without their knowledge").

[67] *Id*. (Skilling and Lay "should hang," "serve many years in prison," "be prosecuted to the maximum," "be held accountable"; "it [is] morally awful that these people are still running loose…. [T]his should be a nice short trial, all of them go to jail, and not a country club").

Even the Task Force conceded significant prejudice existed. Based solely on these questionnaires, it agreed to strike 119 of the 283 jurors—*42% of the entire pool*—by stipulation. R:11890-93, 13593-98. Yet, many plainly biased jurors remained. For instance, one juror the Task Force refused to strike came to voir dire and called out for vengeance in open court: "I would dearly love to sit on this jury. I would love to claim responsibility, at least 1/12 of the responsibility, for putting these sons of bitches away for the rest of their lives." R:14411-12. Others said: "they stole money," "they knew exactly what they were doing," and "if there was no fraud, then how did the company collapse?" R:14405-10, 14507-10, 14603-11, 14660-66.

4. <u>*Causey's Guilty Plea On The Eve Of Trial*</u>

All these biases were only reinforced when Skilling and Lay's co-defendant, Richard Causey, suddenly pled guilty weeks before trial. The last-minute plea only compounded the prejudice: when potential jurors completed and returned their questionnaires in November 2005, Causey was listed as a co-defendant with Skilling and Lay and was equally prominent throughout the questionnaire. When he pled guilty in December 2005, it was a major news event in Houston, with the local media calling Causey a "star witness" who could provide "damaging" and "valuable ammunition," "undermine" the defense, and provide a "roadmap to conviction." R:12047-52, 12267-374, 12391-92, 12514-95. One editorial speculated that Causey would be the "linchpin" of the Task Force's case, and suggested his plea was proof of Skilling and Lay's guilt. R:12391-92. *Cf. U.S. v. Engleman*, 489 F.Supp. 48, 51-52 (E.D. Mo. 1980) ("The danger [of bias] is especially acute when reporting extends to such matters as … speculation as to testimony or other matters to be introduced at the trial.") In other venues, coverage of Causey's plea was minimal, less sensational, and more balanced. R:12372-73, 12520-25, 12527-29, 12581-82, 12584-86 (*New York Times*: Causey's value is an "uncertainty," since "the limited nature" of his admissions "do not lock him into the prosecution's portrait of [Skilling and others] … in a nearly continuous conspiracy to defraud investors").

Given the prejudicial nature of the stories, many undoubtedly drew the inference—forbidden by law, but common for laypersons—that because Causey pled guilty, Skilling was guilty too. *U.S. v. Leach*, 918 F.2d 464, 467 (5th Cir. 1990). Despite Causey's plea, the district court refused to send out a new round of questionnaires to an untainted pool or continue the trial beyond January 2006—to let the publicity subside. R:12052-62, 14115-16.[68]

[68] After Causey's plea, Skilling requested a continuance of at least 30 days to allow for a "cooling off" period following the intense negative publicity surrounding the plea. The Task Force opposed. The district only granted a two-week continuance, from January 17 to January 30, and refused Skilling's further request for additional time. R:12036-37, 13624-27, 14115-16, 14366-70.

5. *Houston's View Of The Trial: Overcoming The Tragedy*

For Houston, there was only one way to overcome the Enron tragedy. After the Task Force's Arthur Andersen conviction was unanimously reversed and the first Enron Broadband trial resulted in *no* convictions, the *Chronicle* wrote:

> What matters is what comes next. From the beginning, the Enron prosecution has had one true measure of success: *Lay and Skilling in a cold steel cage ….*
>
> The real trial, *the true measure of justice in the Enron saga*, begins in January. Let the small fry swim free if need be. *We've got bigger fish in need of frying*. R:12263-65.

Skilling's trial was described as the "Big One," the "showdown," the "main event"; the *Chronicle* confessed, Houston "can't wait for the trial." RS3:616, 1711, 1936; R:39912, 40002. With the empty Enron towers literally hovering over the courthouse and "hecklers" greeting Skilling and Lay as they entered ("I hope you rot in prison, Ken!"), the trial began. R:39893, 39901. Houstonians saw it as the "climax" of the "Enron disaster"; "[a]fter more than four years of waiting, of allowing the hurt and anger and resentment to churn inside," the trial was the final step in Houston's healing process. R:39904, 39946.

In Houston, the trial was an obsession. To satisfy its "minutiae-hungry audience," the *Chronicle* covered "courtroom developments minute by minute, hour by hour," with unprecedented depth and intensity. R:38897.[69] Its print

[69] RS3:570, 1051, 1058, 1691, 1701-03, 1741, 1754, 1763, 1799; SR3:2114, 2500, 2919, 3552; R:38897, 38914, 38946, 39004, 39082-92, 39137, 39261, 39429,

edition had multiple articles each day (almost always on the front page), plus daily features, courtroom sketches, columns, editorials, and letters to the editor.[70] No detail was spared—including inadmissible ones. R:39440 ("The Dirt That Jurors Won't Hear").[71] The *Chronicle*'s online coverage, which the Court can review at www.chron.com/enron, went even further. Its Enron website featured a complete catalog of stories, links to exhibits, videos, photos, podcasts, interactive timelines and graphics, a "Trial Notebook," and a chat room.[72] The centerpiece was three separate web blogs, which provided live play-by-play coverage (and color commentary) of the testimony, and curiosities like what outfits jurors wore.[73]

The coverage mirrored the community's bias. The government's case was described as "solid" and "damning," while the defense was ridiculed as "sweeping revisionism," "delusional," "laughable," and "absurd." R:39459, 39570, 39691,

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39436, 39841, 39850, 39857, 39899, 39904-33, 39936-40030, 40087, 40096, 40151, 40178-85, 40313-14, 40321, 40804-09, 40813, 40833.

[70] R:38914-15 ("to describe [our coverage] as 'comprehensive' would be anunderstatement"); R:40066-896 (trial coverage).

[71] R:12078, 13610-19, 14081-83, 39137-39, 39175, 39179, 39217-20, 39226, 39240, 39250, 39658, 40107-08, 40154, 40168-69, 40187-91, 40192, 40208-09, 40211, 40280-88; RS3:616, 1701, 1703, 1754, 1906-1918; JKS-13 (discussing inadmissible evidence, including: inflammatory trader tapes relating to California energy crisis; false rumor that Skilling "tr[ied] to intimidate witnesses"; speculation on testimony of witnesses not called at trial; victim witness losses; false report of Skilling's "arrest" in New York; document shredding allegations).

[72] *E.g.*, R:38897-98, 38946-47; SR3:570, 1051, 1691, 1701, 1703-09, 1799-801.

[73] R:40065-299 (business commentary blog); R:40301-839 ("Trial Watch" blog); R:40842-85 (legal commentary blog).

38981, 39849, 40089.[74] Government witnesses were "unflappable," while Skilling's testimony was "evasive," "implausible drivel." R:40073-74, 40199, 40271.[75] There was even a column *directed to the jury*, warning "[d]o not be drawn in by the circular arguments and seductive logic" of the defense, and arguing that "common sense" compels guilty verdicts. R:39886-87 (Skilling and Lay believe "rules are malleable," "investors are easy marks to be fleeced," "employees are pawns to be manipulated").

When Skilling and Lay were convicted, the local reaction was "almost universally positive." JKS-16. Houstonians did not just agree with the verdict, they *rejoiced* in it.[76] They called the convictions "justice," "closure," "the end of the road," and said "[n]ow we had permission to move on." R:38948-49, 42049-51; JKS-17-18. In post-trial interviews, jurors said they "worked tirelessly to give victims … the accountability they deserved," and that "Houston should be proud."

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[74] R:39004-07, 39102-03, 39137, 39144, 39295, 39381, 39446, 39537, 39570, 39593, 39617, 39626, 39691, 39703, 39738, 39775, 40090, 40199, 40228, 40235-45, 40265-73 (defense "weak," "courtroom artistry," "sleight of hand," "thin," "alchem[y]," "utter lack of substance," trying to "fool the jury" with "hype").

[75] R:39186, 39263, 39292, 39295, 39341, 40199-203, 40214-40232, 40271 ("selective memory," told "whoppers"). Lay's testimony was equally mocked. R:39175, 39179, 39217, 39226, 39240, 40187-89, 40280-88.

[76] *Id*.; R:38881, 38933, 38944, 38956, 38965 ("How sweet it is!"; "It's a great day in Houston, Texas"; "it's awesome"; "I'm elated"; "I am glad they got screwed"; majority of Houstonians "gloating," "taking delight" in Skilling and Lay's misfortune).

R:38967-68.[77] In an editorial after the verdict, the *Chronicle* put it best: "Houston needed closure after the civic trauma of the Enron debacle, and what the guilty verdicts have provided is an exorcism." R:38948-49.[78]

At sentencing, the focus was almost exclusively on punishing Skilling for the harm caused by Enron's collapse—even though it was undisputed that this case was "not about what caused the bankruptcy." R:36449, 42116, 42125-53, 42176-77; Govt. Sentencing Mem. at 40-47 (Oct. 10, 2006) (sealed). While many were satisfied with Skilling's 24-year sentence, a substantial number of Houstonians felt it was *too lenient*.[79] They wanted Skilling to serve "life without parole," "one year for every person that lost their job, benefits, or retirement," or "the equivalent of a death sentence." R:42049, 42103.[80] For Lay, even death was not enough. When Lay died before sentencing, Houstonians were actually *angry*, saying "justice ha[d]

[77] *Compare* R:38948 (jurors said "they kept their focus throughout the trial on the personal harm done to thousands of people when Enron spiraled into bankruptcy"), *with* R:14415-16 (Court: "we are not looking for people who want to … provide remedies for those who suffered from the collapse of Enron").

[78] *Id.*; R:38965; R:42049-51, 42062; JKS-16; JKS-18 ("Skilling's Sentencing Brings Closure to the Enron Scandal"; "Most Houstonians Say Convictions Serve Justice"; convictions "closed [the] book on the Enron saga"; victims can "get on with their lives"; "satisfying coda to their search for justice and retribution").

[79] *E.g.*, R:42098-105 (three local polls: (1) 46% "not tough enough"; (2) 38% "too lenient"; (3) 40% "he deserves more time").

[80] *Id.* ("life without parole, nothing less"; "he doesn't deserve another free day"; "a lot of people will work a lot longer than 24 years just to recover…. He should have gotten LIFE!").

been cheated." R:42060.[81] Perhaps most telling of the victimization the entire community felt was the sentiment expressed by one of the sitting jurors in this case about the passing of Ken Lay: "I feel bad for the people who really wanted to see him go to jail, that they needed the closure and they're not going to get it. You would hope [it] would be enough that … we came back guilty." JKS-19.

For Houston, this case was never really about justice. It was about punishing Enron's chief executives for the city's suffering, whether they were guilty or not. With Skilling's conviction and incarceration, Houston's long recovery from the Enron tragedy was finally complete.

B. The District Court's Refusal To Transfer Venue Denied Skilling A Fair Trial.

No fair trial could occur under these circumstances: "With his life at stake, it is not requiring too much that [Skilling] be tried in an atmosphere undisturbed by so huge a wave of public passion…." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

Yet, despite extensive briefing and declarations from prominent experts, the district court denied Skilling's motions to transfer venue *without even permitting a hearing*. R:4433-56, 14115-16; *Pamplin v. Mason*, 364 F.2d 1, 6 (5th Cir. 1966) (the "denial of a pre-trial [venue] hearing *was in itself a denial of due process*"). The court agreed that none of the critical facts was in dispute, but held that—*as a*

[81] R:37654, 38707, 38724, 38734-38 ("my sorrow is not for his family, but for the countless people … affected by his actions"; "by dying, he has cheated …

matter of law—Skilling's facts were insufficient to require a venue transfer. R:4454-55 ("the court is not persuaded that defendants have alleged facts capable of raising a presumption of jury prejudice"). As explained below, the court's ruling was grievously wrong.

1. *A Venue Transfer Was Constitutionally Required.*

Presumed prejudice is only "rarely" found, and is limited to "unusual" and "extraordinary" cases. *Busby v. Dretke*, 359 F.3d 708, 725 (5th Cir. 2004); *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980); *U.S. v. McVeigh*, 918 F.Supp. 1467, 1469 (W.D. Okla. 1996). This *was* an extraordinary case, and "[i]f there were no constitutional right to a change of venue" on these facts, "one can conceive of virtually no case in which a change of venue would be a constitutional necessity." *Coleman v. Kemp*, 778 F.2d 1487, 1538 (11th Cir. 1985).

Courts have repeatedly reversed convictions or granted habeas corpus relief where the defendant or his alleged crime evoked strong emotional responses in the community, including many cases with far less egregious facts than this one:

- In *Johnson v. Beto*, 337 F.Supp. 1371 (S.D. Tex. 1972), the defendant was widely viewed as a "black militant" in Houston, and was publicly associated with racial unrest. A jury convicted him for "the gift of one marijuana cigarette," and he was sentenced to 30 years in prison. On habeas review, the court held that community prejudice deprived him of a fair trial.

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society of its debt, both financial and penal"); R:41112.

- In *U.S. v. Maad*, 75 Fed.Appx. 599 (9th Cir. 2003) (unpublished), the community "came together in an outpouring of support" for an Arab man whose shop was vandalized after September 11, but "turned against" him when he was accused of faking the incident to gain insurance proceeds. The court reversed, finding presumed prejudice and that the failure to change venue precluded a fair trial.

- In *Nevers v. Killinger*, 990 F.Supp. 844 (E.D. Mich. 1997), the city of Detroit compared the defendants' police brutality to the Rodney King beating, and feared acquittals would lead to riots like those in Los Angeles, creating a strong pressure to convict. The trial court's failure to transfer venue was held to be manifest error.

- In *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), a rural Georgia community was shocked by a multiple murder, leading to a widespread presumption of guilt and calls for the death penalty. The court reversed, finding presumed prejudice and "an atmosphere of hostility."

- In *Wansley v. Miller*, 353 F.Supp. 42 (E.D. Va. 1973), the media convinced a Virginia town that the defendant was a rapist and a threat to the community. The court vacated his conviction, because it was "an impossible task [for local jurors] to maintain the appropriate detachment."[82]

Many similar cases never reach appellate or habeas review, since the district court transfers venue specifically to *avoid* a due process violation. For instance:

- In *U.S. v. Moody*, 762 F.Supp. 1485 (N.D. Ga. 1991), the defendant was charged with murdering a federal judge. In light of prejudicial pretrial publicity and the recusal of all judges in the Eleventh Circuit and the Northern District of Georgia, the court transferred the case from Atlanta to Minnesota.

- In *U.S. v. Abrahams*, 466 F.Supp. 552 (D. Mass. 1978); *U.S. v. Abrahams*, 453 F. Supp. 749, 751 (D. Mass. 1978), the head of a

[82] *Irvin*, 366 U.S. at 727-28 (Indiana town; murder); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (Cleveland; murder); *U.S. v. Williams*, 523 F.2d 1203 (5th Cir. 1975) (Atlanta; kidnapping); *United States ex. rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963) (en banc) (Suffolk County, NY; murder).

"defunct" commodities firm was charged with mail and wire fraud. The local media branded him a "con man" and "swindler" who ran financial "scams." The court transferred the case from Boston (where the firm was headquartered) to Phoenix.

- In *U.S. v. Mazzei*, 400 F.Supp. 17 (W.D. Pa. 1975), a state senator was charged with perjury. Because of a statewide perception that he violated the public's trust, the court transferred the case from Pittsburgh to Delaware.
- In *U.S. v. Marcello*, 280 F.Supp. 510 (E.D. La. 1968), an assault case, the defendant was publicly regarded as the "evil," "sinister," and "ruthless" head of the Louisiana Mafia. The court doubted that local jurors "could expunge this long-standing and prevalent notion from their minds," and transferred the case from New Orleans to Texas.[83]

While "each case must turn on its special facts," *Calley v. Callaway*, 519 F.2d 184, 204 (5th Cir. 1975), all these cases have one common trait: a "pattern of deep and bitter prejudice" in the community that made a fair trial impossible, *Irvin*, 366 U.S. at 727. Here, the prejudice in Houston was widespread, intense, and overwhelming—indeed, it was far *worse* than almost every case in which a venue transfer was held to be constitutionally mandated.

[83] *U.S. v. Ebens*, 654 F.Supp. 144 (E.D. Mich. 1987) (Detroit; murder); *U.S. v. Engleman*, 489 F.Supp. 48 (E.D. Mo. 1980) (St. Louis; murder); *U.S. v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952) (New York City; racketeering); *U.S. v. Hoffa*, 205 F.Supp. 710 (S.D. Fla. 1962) (Orlando; mail/wire fraud); *U.S. v. Holder*, 399 F.Supp. 220 (D.S.D. 1975) (South Dakota Indian reservation; assault); *U.S. v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955) (Corpus Christi; tax evasion); *U.S. v. Rossiter*, 25 F.R.D. 258 (D.P.R. 1960) (Puerto Rico; unclear); *U.S. v. Saya*, 980 F.Supp. 1157 (D. Haw. 1997) (Honolulu; unclear); *U.S. v. Tokars*, 839 F.Supp. 1578 (N.D. Ga. 1993) (Atlanta; racketeering, murder); *U.S. v. Faulkner*, 17 F.3d 745, 754-55 (5th Cir. 1994) (Dallas; bank fraud) (noting district court transferred venue); *U.S. v. Angiulo*, 497 F.2d 440, 442 (1st Cir. 1974) (Boston; assaulting federal officer)

In the government's own words, Skilling was blamed for "devastating" the entire community—"both from an economic and psychological standpoint"—and for harming *tens of thousands* of Houstonians. Govt. Sentencing Mem. at 47 (Oct. 10, 2006) (sealed); R:42154-61. Unlike other corporate scandals and criminal cases, Enron's collapse was not something Houstonians merely read about in the newspaper or saw on television; it was a community trauma that rocked the city on a grand scale.

The closest analogy is *U.S. v. McVeigh*, 918 F.Supp. 1467 (W.D. Okla. 1996), the Oklahoma City bombing case. There, the court presumed prejudice because "[t]he effects of the explosion on th[e] community [were] so profound and pervasive." *Id*. at 1470. The need for a change of venue was so obvious, "no detailed discussion of the evidence [was] necessary," and the court presumed prejudice in the entire state, because the crime "shook the entire state" and had "immeasurable effects on the hearts and minds of [its] people." *Id*. at 1469-71.

Enron's collapse was the single most important event in Houston's recent history. As in *McVeigh*, it had a "powerful emotional impact," and in response, the community "united as a family," showed strong "public sympathy for victims," and "pulled together" to overcome the tragedy. *Id.* at 1470-72. Meanwhile, Skilling and Lay were "demonized" and provoked passionate feelings of "anger

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(noting district court transferred venue).

and vengeance." *Id*. at 1472. Their trial was viewed as the "last step on the road to recovery," and there was a "common belief" that "only a guilty verdict" and stern punishment would bring closure for the community's pain. *Id*. Houston jurors felt "a personal stake in the outcome," and could not be trusted to set aside their opinions, emotions, and experiences. *Id*. at 1473.

Three experts—none of whom was disputed—confirmed the parallels to *McVeigh*. First, Dr. Stephen Klineberg, the leading sociologist on Houston community attitudes, testified that Houston is "a city with a deep and pervasive emotional stake in seeing these defendants convicted." R:2866-67. Even if they did not presume guilt, Houston jurors "would be under strong community pressure to convict," knowing an acquittal would be unacceptable to their fellow citizens. *Id*.; *McVeigh*, 918 F.Supp. at 1473 (trust in jurors' ability to be fair diminishes when they "feel a sense of obligation to reach a result which will find general acceptance" in the community); *Nevers*, 990 F.Supp. at 863 ("the message [was] clear; jurors could avoid intense public scrutiny … by convicting").

Even the *court* acknowledged this social pressure to convict. During the court's voir dire, it said the collapse was "a major event in this area," and given prevailing community attitudes, "it would take courage" for a Houston juror to acquit:

JUROR: My reluctance would be that I think the public—*I think a lot of people feel that they're guilty. And maybe they're expecting something to come out of this trial*.
COURT: And that's why I'm asking you these questions…. And if you were to vote not guilty and go back into the community and people said, "How could you do that," *there's a sense of moral outrage among some people.*
JUROR: Yeah.
COURT: And *it would take courage* to find—
JUROR: It would.
COURT: Do you have that courage?
JUROR: *It would be tough*.

R:14597-99. The mere *asking* of these questions spoke volumes. No defendant should be forced to stand trial in a city where jurors will be required to have "courage" in the face of widespread "moral outrage" to vote for acquittal or presume innocence. *Nevers*, 990 F.Supp. at 863 ("the Constitution of the United States does not bend to placate an enraged citizenry").

Second, renowned media expert Russell Scott Armstrong—who testified in *McVeigh*—opined that the Houston media's coverage of Enron "mirror[ed] the Oklahoma media's response to the Oklahoma City bombing," resulting in "a dramatic difference" between Houston and other venues. R:2970-71, 2980-3004; JKS-20:41; R:4067-68, 4092-102. While other venues were interested in the "who, what, where, why, and when … in a general sense," Houstonians "wanted to know every detail." *McVeigh*, 918 F.Supp. at 1471; R:2985-87, 2992-93, 4093-101.[84]

[84] R:2657 (editorial cartoon: public focus eclipsed by "Enron Fixation"); RS3: 496 (*Chronicle* readers follow Enron proceedings "with an extraordinarily high

Thus, the local media covered Enron with exhaustive depth and intensity—on most issues, several times more than other venues *combined*:

	Houston	Phoenix	Denver[85]		Atlanta
Enron Articles (12/2/01 – 10/15/04)	**4,361**	527	720	637	1,277
Skilling Articles (12/2/01 – 10/15/04)	**435**	46	25	19	14
Enron TV News Segments (5/2/02 – 10/22/04)	**19,303**	1,265	693		448
Skilling TV News Segments (5/2/02 – 10/22/04)	**1,687**	57	31		15
Trial Articles (1/1/06 – 6/1/06)	**413**	7	13	18	41
Front Page Trial Articles (1/1/06 – 6/1/06)	**102**	1	1	0	2

RS3:2114; JKS-21; R:2970-71, 2976-87. "Using a quantitative approach," much "of the pretrial publicity in this case [was] factual, *i.e.*, not inflammatory in nature. However, combining the extraordinary volume of coverage (virtually all of which is highly negative to the Defendants) with the emotional nature of some of the coverage, one may infer that a widespread bias exists which could interfere with a fair trial." *Tokars*, 839 F.Supp. at 1582.

Indeed, as Armstrong explained, Houston's coverage mirrored local coverage of the Oklahoma City bombing. As in *McVeigh*, the Houston media

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level of interest," since Houstonians "impacted more … than most Americans").

[85] Denver has two major newspapers.

engaged in “civic journalism”—meaning it highlighted the bankruptcy’s local impact; juxtaposed “the tragedy and triumph of victims” with demonization of perceived culprits Skilling and Lay; and “reassur[ed]” the public that prosecutors were “steadily closing in” on Skilling and Lay, whose convictions would heal the aggrieved community. R:2994-3004, 4067-68, 4092-102; RS3:1675; JKS-20:41; *McVeigh*, 918 F.Supp. at 1472 (“repetition of emotionally intense stories of loss,” “in sharp contrast with the prevalent portrayals of the defendants,” trial and conviction “the necessary last step on the road to recovery”); *Ebens*, 654 F.Supp. at 144-46 (emotional victim impact story cited as grounds for venue transfer).

Third, jury behavior expert Dr. Edward Bronson—who also testified in *McVeigh*—agreed that this case “falls into the Oklahoma City bombing category,” as it is “now part of the Houston venue’s collective memory and cultural consciousness, and will be embedded there for many years.” R:2819-20, 2823-25, 2835-36. He concluded that “it will be nearly impossible” for Houston jurors to put aside their deep-rooted biases, “even if they say they can.” R:2837-44.

As with the bombing tragedy, he said, many Houstonians’ biases operated at *subconscious* levels. R:2818-19; *McVeigh*, 918 F.Supp. at 1472 (“[prejudice] may go unrecognized in those who are affected by it”); *Wansley*, 353 F.Supp. at 50 (“[w]hat the ears hear and the eyes see, the mind retains”); *Delaney v. U.S.*, 199 F.2d 107, 113 (1st Cir. 1952) (no juror can set aside “unconscious influence of his preconceptions”). This was not surprising. As the Supreme Court has recognized, when jurors “are part of a community deeply hostile to the accused, [it is] more likely that they may have unwittingly been influenced by it.” *Murphy v. Florida*, 421 U.S. 794, 803 (1975); *Irvin*, 366 U.S. at 727 (“The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes.”).

Dr. Bronson explained that Houston jurors viewed the case through a unique psychological “prism,” which affected their decision-making—especially how they weighed evidence and credibility. Facts consistent with their subconscious biases (those supporting conviction) were “readily absorbed,” while inconsistent facts (those supporting acquittal) “tend to be rejected.” R:2818-19; JKS-20:40-41; *Delaney*, 199 F.2d at 112-13 (unconscious bias especially important for credibility issues). This bias simply did not exist in other venues, and put Skilling at an incredible disadvantage.

If this case is not sufficiently “extraordinary” to warrant reversal, no case is:

- It was extraordinary for a city to compare corporate executives to rapists, child molesters, murderers, and terrorists, and blame them for an entire city’s suffering.
- It was extraordinary that nearly *half* the jury pool was connected to Enron or its bankruptcy.
- It was extraordinary that the entire local U.S. Attorney’s Office recused itself from the case; if federal prosecutors cannot be expected to set aside their prejudice, surely lay jurors cannot. *Moody*, 762 F.Supp. at 1486-88

(venue transferred where district and circuit judges recused from case where judge was murdered).

- It was extraordinary that over *40%* of the jury pool openly admitted anger and reservations about their own fairness, that only *18* of 283 potential jurors expressed no bias, and that *42%* were so obviously biased they were excused *by stipulation*.
- It was extraordinary that, even according to the government's poll, nearly *60%* of Houstonians prejudged Skilling and Lay's guilt, R:4054-55—and that was *before* Causey pled guilty on the eve of trial. *Tokars*, 839 F.Supp. at 1583 (venue transferred; 55.6% believed defendant guilty).
- It was extraordinary that this case became a local obsession, fueled by a relentless and hostile media, and that the community found catharsis in Skilling's conviction and punishment.

Perhaps the most sobering proof of this extraordinary sentiment—and Houstonian's attention to it—came during voir dire, when one potential juror expressed her disbelief that Skilling and Lay would be tried in Houston:

> JUROR: The last articles I read really were like in the "Court Register" when they were talking about [how] … the Judge has denied the move of the trial.
> COURT: That's true…. What did you think about that?
> JUROR: *I was surprised.*
> COURT: They were too.

R:14657-58.[86] Because of the district court's refusal to transfer the case, Skilling's right to a fair trial was violated. *Marcello*, 280 F.Supp. at 515 ("any defendant who seeks a change of venue is presented with a formidable task…. Yet it is equally clear that it is not to be denied when the facts of the case warrant it").

2. *The District Court Misapplied The Law And Ignored Critical Facts.*

[86] RS3:1799 (poll: 46% say Enron defendants cannot get fair trial in Houston).

The district court's orders denying a venue transfer *ignored the impact of Enron's bankruptcy completely*. There was no discussion of the harm caused to the community or the community's emotional response. There was no discussion of Dr. Klineberg, Dr. Bronson, or Mr. Armstrong. R:4433-56, 14115-16. Instead, the court applied a flawed interpretation of the law. Rather than analyzing the unique facts of Skilling's case, the court rigidly compared this case to *Rideau v. Louisiana*, 373 U.S. 723 (1963), a case of robbery, kidnapping, and murder involving a televised confession in a town of 150,000. Because this case was not on all fours with *Rideau*, the court concluded that a venue transfer was precluded. R:4437-49.

Unlike *Rideau*, the court held, "the facts of this case are neither heinous nor sensational." R:4442. Moreover, despite conceding "dramatic differences, both qualitatively and quantitatively" between Houston and elsewhere, the court ruled the publicity here was not as "egregious" or "inflammatory" as *Rideau*, since it did not involve "prior convictions, escapes, arrests, prior and/or subsequent indictments, and/or [as in *Rideau*] confessions." R:4442-47. Nor was it "pervasive," because it did not meet the exact penetration level in *Rideau*. R:4447-49. Essentially, the court held that transfers are only warranted in cases with violent crimes, small towns, and publicized confessions or prior convictions.

There were two major errors in the court's analysis. First, it focused exclusively on "pre-trial publicity," as if that were the only possible source of community prejudice. That is simply not true. Prejudice can be presumed when *any* "outside influences affecting the community's climate of opinion as to a defendant are inherently suspect." *Pamplin*, 364 F.2d at 5. Publicity is "not the focus" of the inquiry; it is just "one form of evidence proffered to show the prejudice within the community." *U.S. v. Campa*, 459 F.3d 1121, 1175 (11th Cir. 2006) (Birch, J., dissenting); *Coleman*, 778 F.2d at 1489 ("The trial court may be unable to seat an impartial jury because of prejudicial publicity *or an inflamed community atmosphere*."). Here, as Mr. Armstrong explained, "the tragedy itself *causes* community sentiment; the media coverage *reflects, reinforces, and amplifies* the sentiment." R:4092. Thus, by ignoring the impact of Enron's bankruptcy, the court ignored the true source of Houston's community prejudice.

Second, the court overlooked 40 years of law since *Rideau*. Courts have found venue transfers necessary in a wide variety of cases—those involving both big cities and small towns, and both violent and non-violent crimes. The size of the community, while relevant, has never been dispositive. Cases have been transferred from large metropolitan areas including Houston, New York, Atlanta, Dallas, Boston, Detroit, Pittsburgh, St. Louis, Cleveland, New Orleans, Oklahoma City, Orlando, and Honolulu. *Supra* at 145-47. Moreover, courts have transferred venue for such non-violent crimes as fraud, perjury, tax evasion, and the "gift of one marijuana cigarette." *Id*.; *Pamplin*, 364 F.2d at 7 ("the same constitutional safeguard of an impartial jury is available … for a misdemeanor as for a felony").

In addition, while publicized confessions and stories of defendants' prior convictions are indeed prejudicial, they are not prerequisites to prove constitutional unfairness. *E.g.*, *Maad*, 75 Fed.Appx. at 600-01; *Holder*, 399 F.Supp. at 227-28. Even if they were, though, the test was met here. The government forced Skilling and his alleged co-conspirators to do staged, public "perp walks" and held press conferences proclaiming their guilt, and many of these alleged co-conspirators either pled guilty or were tried and convicted—all to great fanfare in Houston leading up to Skilling's trial. The resulting prejudice was the same as if Skilling had publicly confessed. *Coleman*, 778 F.2d at 1488-1538 (conviction reversed where defendant's trial followed highly publicized guilty plea and separate trials of three co-conspirators). Causey's plea was especially damaging, given his status as Skilling's co-defendant, the virtually identical charges, his prominence in the jury questionnaires, and the proximity of his plea to trial. If jurors ever forgot about these pleas, the *Chronicle* posted a "Prosecution Scorecard" on its website tallying the government's victories in Enron cases. SR3:570.

Again, the critical issue is not the nature of the crime or the size of the city, but "the community's climate of opinion." *Pamplin*, 364 F.2d at 5; *Bronstein v.*

Wainwright, 646 F.2d 1048, 1051 (5th Cir. 1981). This is a highly individualized inquiry; neither *Rideau* nor any other case provides a hard-and-fast checklist of mandatory factors. Thus, courts warn "generalizations are not helpful" because "each case must turn on its special facts" and "the totality of circumstances." *Calley*, 519 F.2d at 204; *Murphy*, 421 U.S. at 799; *Irvin*, 366 U.S. at 724-25.

Ultimately, the legal test was simple: based on all the facts, could Skilling receive a fair trial in Houston? *Sheppard*, 384 U.S. at 362-63. The court's rigid approach circumvented this basic question. By focusing exclusively on the indicia of prejudice from *Rideau* that did *not* exist, the court ignored all the indicia that *did*. Although courts have ruled that "no artificial formula… [can] serve as a 'litmus test'" on venue, the court applied such a test. *Marcello*, 280 F.Supp. at 515. To do so, especially on these facts, was reversible error.

C. Voir Dire Was An Insufficient Safeguard Against Community Prejudice.

Voir dire was Skilling's last line of defense. As conducted by the district court, it was no defense at all.

1. *The District Court's Voir Dire Failed To Provide A Reasonable Assurance That Prejudice Would Be Discovered.*

The court made two early decisions that doomed any chance for a meaningful voir dire. First, despite acknowledging that "it's going to be a challenging task to pick a fair jury," SR1:233, the court decided—in advance—to limit voir dire to just one day. R:11808. In most high-profile cases with fairness concerns, voir dire typically lasts days or even weeks.[87] Here, potential jurors were questioned for slightly over *five hours*. R:14441-699.

Next, the court decided to prohibit individual attorney voir dire and conduct limited voir dire itself. Counsel only were allowed to ask a few questions of jurors at the bench. R:11050-54; 11803-806. Under the court's own rules, it will "normally allow" attorney voir dire of the panel.[88] Here, however, counsel were permitted a handful of follow-up questions to individual jurors, and nothing more. And the court made sure that counsel went no further. More than once, it chastised defense counsel for asking too many questions, making clear: "*I don't intend individual voir dire*." R:14489, 14609-10.

Given these pre-determined time and scope limits, the results were not surprising. Despite the government's claim that Houston had "4.7 million" citizens from which to select a fair jury, only 46 people were questioned—just eight more than the absolute minimum necessary—and for just a few minutes each. Of those

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[87] *E.g.*, JKS-22 (Bernard Ebbers (WorldCom), two days; John Rigas (Adelphia), four days; "Scooter" Libby, four days; Dennis Kozlowski and Mark Swartz (Tyco), one week; Martha Stewart, six days; Zacarias Moussaoui, two weeks; Timothy McVeigh, 18 days (after venue change); Terry Nichols, 24 days (same); O.J. Simpson (civil), one month.

[88] http://www.txs.uscourts.gov/district/judges/sl/sl.pdf (Court Procedures, Hon. Sim Lake, ¶13); R:12044.

46, only seven were struck for cause, and one was excused for hardship. R:14510, 14513, 14557, 14585, 14601, 14641, 14666, 14669, 14410-12.

Most of the court's questions were conclusory and high-level, and failed to adequately probe jurors' true feelings. Many were merely asked how they get their news and what they "remembered" from Enron-related publicity. If they did not specify anything inflammatory, that was the end of the inquiry. *E.g.*, R:14442-47, 14447-49, 14464-66, 14450-54, 14503-04, 14580-81, 14602-03, 14603-07, 14639-40. In some cases, the court failed to ask about clearly troubling questionnaire responses.[89] Other times, it asked the question, but never got an answer. *E.g.*, R:14644 (no answer to question about "corporate greed" causing collapse).

More troubling, the court almost always took jurors' statements at face value (even when they flatly contradicted their questionnaire responses), with no attempt to elicit their deeper opinions or bases for them. For example, despite several negative questionnaire responses, juror No. 75 assured the court that she could presume innocence and hold the Task Force to its burden.[90] That was enough to satisfy the court. When defense counsel followed up, and the juror admitted that

[89] *E.g.*, R:14446, Questionnaire for Juror No. 4 ("JQ-4"; all juror questionnaires can be found at Dkt. 1214) (Enron's collapse caused by "widespread greed," Enron "fool[ed] people"); R:14582-87 (Court fails to elicit that juror presumes there was fraud at Enron), 14558-66; JQ-61 (Enron's collapse "criminal"); R:14592-93; JQ-76 ("management … robbed [employees] of everything for their future").

[90] JQ-75 (*e.g.*, "crooked executives, cooked books, and the employees paid the price").

she had “already decided” there was fraud at Enron, that part of the burden was “already resolved,” and defendants would have a difficult time changing her mind. Only then was she excused for cause, but not before the court sought to *rehabilitate* the juror, arguing “it’s one thing to say that there has been a fraud at Enron. It’s another thing to say that Mr. Lay or Mr. Skilling are guilty of that fraud.” R:14593-601. (Of course, that disregarded Skilling’s primary defense—that there was no fraud at Enron.) The court’s voir dire revealed none of these latent biases; nor could it, given the few minutes devoted to each juror.

In cases involving unknown defendants and a generally dispassionate community, the court’s approach may have been adequate. Here, however, where there was a “significant possibility of prejudice,” the court’s hurried, superficial questioning “failed to provide a reasonable assurance that prejudice would be discovered.” *U.S. v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982). That alone is reversible error. While efficiency is important, the court was not permitted to “emphasize[] interests of efficiency at the expense of [Skilling’s] right to a fair trial.” *U.S. v. Stratton*, 649 F.2d 1066, 1083 (5th Cir. 1981).

2. *The District Court Failed To Independently Assess Jurors’ Impartiality.*

It is well-settled that “the juror is poorly placed to make a determination as to his own impartiality,” and that courts are obligated to “make an *independent determination* whether the panel member can and will be impartial.” *U.S. v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978); *Chagra*, 669 F.2d at 254 n.14. Thus, a juror's assurance of fairness "cannot be dispositive"; to the contrary, "continual protestations of impartiality from prospective jurors are best met with a healthy skepticism from the bench." *Murphy*, 421 U.S. at 800; *Williams*, 523 F.2d at 1209 n.10; *U.S. v. Hyde*, 448 F.2d 815, 848 n.38 (5th Cir. 1971) ("it is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed").

When there is strong community prejudice, "jurors' claims that they can be impartial should not be believed." *Nevers*, 990 F.Supp. at 864. The Supreme Court in *Irvin*, 366 U.S. at 722-23, announced the basic rule of voir dire: jurors need not be "ignorant," just capable of setting aside their preconceptions. But *Irvin* recognized the distinction between "*any* preconceived notion … *without more*," and "strong and deep impressions" rooted in "a wave of public passion." *Id*. at 722 n.3, 723, 728. The latter are nearly impossible to set aside. Thus, when there is "a dominant sentiment of prejudice in the community," "the court may disregard prospective jurors' assurances of impartiality," even if they are well-intentioned. *Marcello*, 280 F.Supp. at 514-15; *Murphy*, 421 U.S. at 803 ("In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question."); *Irvin*, 366 U.S. at 728 ("Where so many, so many times, admitted prejudice … a statement of impartiality [by others] can be given little weight."); *Holder*, 399 F.Supp. at 227 (when "deeply-rooted passions" have permeated the community, "the efficacy of voir dire in screening the prospective jurors is diminished").

Here, however, the court relied heavily on leading self-assessment questions ("can you nevertheless be fair and impartial?"), and used them as a bright-line test: if a juror said they could *not* be fair, they were excused; if a juror said they *could* be fair, they remained in the pool. Instead of independently assessing whether these assurances of impartiality were trustworthy, the court simply took jurors at their word. As long as they ultimately said they could be fair—even if they expressed hesitation—a cause challenge was denied, regardless of their bias.[91]

For example, No. 29 said she lost $50-60,000 in her 401(k) because Enron collapsed and her friend who worked for Enron, got laid off, and lost savings. On her questionnaire, she wrote Skilling was "guilty," and "not an honest man." JQ-29. At voir dire, she said he was "dishonest," "arrogant," and "intimidated people," and said there was "corruption" at Enron. Even the court noted, "[y]ou sound like you've already assumed that they're guilty of something." She responded "at one time" she did, but "I don't now," because "I think I can set that aside." The defendants' cause challenge was denied. R:14490-99, 14681-82.

[91] R:14498-99 ("[Government:] [*W*]*e have to take her at her word*…. [S]he said earlier what her opinions were, and that based upon the law, they've changed. That's what we ask of our jurors. [Court:] *I agree*. Motion is denied."); R:14566 ([Government:] Again, Your Honor, *we have to take them at the[ir] word, and that's the way we've been doing it*…. [Court:] The motion is denied.").

No. 61 was "angry" about Enron, because it was "based" on "greed" and sent "a huge shock wave" that "hurt a lot of innocent people." She said "we were delusional" for thinking Enron was a good company, and believed the cause of its collapse was "criminal." "Shame on" Lay and Skilling, she said, because they were "at the helm" and "should have known what was going on at the company." When asked if she could presume innocence, she said, "I hope so; but you know, I don't know…. *I do have some concerns*." After further pressing by the court and Task Force, she said she would acquit if there was reasonable doubt. Despite her reservations, defendants' cause challenge was denied. JQ-61; R:14558-66.

No. 74 blamed Enron for her "personal loss" on investments, and knew two people who worked there. She was "angry" about the collapse, felt sorry for those who lost jobs, and heard the media coverage of this case was "all negative." She believed Enron was rife with fraud (Enron "is a wake-up call for large companies to watch out because they may not be able to get away with *fraud* anymore"), and thought upper management was guilty of crimes ("[t]here is never enough money for the higher-ups so they have to *steal* it"). On her questionnaire, she was "unsure" of her ability to be fair. At voir dire, she repeated her hesitation: "I would say yes, I can; *but I can't say for sure 100 percent*." The court then said "we can't ask [for] perfection," just that you will honestly try; she promised to try. Later, when asked again if she could decide solely on the evidence, she replied: "*I* *can't say yes for sure, no*." Nevertheless, the defendants' cause challenged was denied. JQ-74; R:14585-93, 14602.

Many other jurors insisted they could be fair, giving the socially "correct" and deferential answer. Having been instructed that the judge is looking for "fair and impartial" jurors, Dr. Bronson warned that most jurors will give the "good-citizen response" and insist they can do their civic duty—even if all the evidence shows they cannot. R:2837-44, 4136-37, 13812-14; *Irvin*, 366 U.S. at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial … but the psychological impact requiring such a declaration before one's fellows is often its father."); *Wansley*, 353 F.Supp. at 51 ("It is not unusual to anticipate that certain veniremen would express, in sincere belief, an impartiality when faced with the duty of sitting on a jury, despite conscious or unconscious reservations.").

That clearly happened here. For instance, No. 101's questionnaire and voir dire responses raised numerous concerns:

- Both Skilling and Lay are "guilty."
- "Angry" about Enron, because she personally lost 401(k) savings as a result.
- "[The collapse] should not have happened. The top folks got too greedy…. they knew what was going on."
- What stands out in her mind about Enron: "The greed."
- "It's just hard to think that the top doesn't know what's going on."

On her questionnaire, she was "*unsure*" of her ability to be fair. At voir dire, the court asked if she could decide based on the evidence, and she said "*possibly*."

The court then told her "[w]hat we want are people who can base their decision on the facts that they hear in the courtroom," and asked again: "will you be able to base your decision on what you hear in court?" This time, she upgraded her response to "*probably*." After further questioning, the court asked a third time: "can you in your heart of hearts assure us that you will base your decision on what you hear in this courtroom?" Now, all of her doubts were gone completely: "It will be based on what I hear in the courtroom." By repeatedly asking leading questions and signaling the "correct" answer, the court *persuaded* the juror to say she could be fair. Thus, despite her hesitations, anger, personal loss, and belief that Skilling was guilty, defendants' cause challenge was denied. R:14650-59; JQ-101; *cf. Davis*, 583 F.2d at 197 n.7 (voir dire meant to explore juror's attitudes, "not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have"); *Chagra*, 669 F.2d at 254 n.14 (same).

This was not an isolated event. Sitting in a ceremonial courtroom, with the national media and spectators present, the jurors knew the world was watching. And the court made clear the answers it was looking for: "*we want* people who will listen to the evidence," "*we really want* people who can start with an open mind," "*we don't want* you to prejudge people," "*we want* 16 jurors … who will faithfully, conscientiously and impartially serve." R:14416, 14483, 14512, 14631, 14634-35, 14655. The jurors responded by retracting their inflammatory questionnaire responses and insisting they could be fair, just as Dr. Bronson warned. This was a disturbing pattern throughout voir dire:

- *Questionnaire*: "I think they are all guilty of knowing what was happening to the company, but did nothing to let the employees know."

  Voir Dire: "It's been a long time since I answered that questionnaire…. Honestly, I don't know that I should have put it that way."

- *Questionnaire*: Both Skilling and Lay "guilty," "unsure" of ability to be fair.

  Voir Dire: "Q. Do you think fraud happened at Enron?" "A. You know what? I'm not sure…. I don't know if it was something fraudulent."

- *Questionnaire*: "Angry" about Enron, because "Enron management … robbed [employees] of everything for their future."

  Voir Dire: "I guess at the time … [I thought] there was some things going on that were not legal." Now, "I don't know if it was legal or illegal…."

- *Questionnaire*: "Unsure" of ability to base decision on the evidence.

  Voir Dire: "I would base my opinion on [the evidence]. I'm sure of that."

Such stark turnarounds should have aroused the court's suspicions; instead, they eliminated them. Each of these jurors passed the court's "can you be fair?" litmus test with minimal scrutiny. JQ-76; JQ-91; JQ-101; R:14603-12 (cause challenge denied for Juror No. 76), 14634-35, 14650-59, 14677-78 (cause challenge denied for Juror No. 101).[92]

In all these examples, there was substantial evidence that the jurors' claims of impartiality were unreliable—yet the court accepted them at their word. *U.S. v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) ("frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence"). The court's failure to independently assess jurors' claims of impartiality was reversible error. *Davis*, 583 F.2d at 196-98 (reversing where court "did not reach its own independent determination whether the impartiality of any juror had been destroyed"). Given the strong community prejudice in Houston, this case required *heightened* skepticism of jurors' claims of fairness; that did not occur here. This compromised the integrity of the process and forced Skilling to use many of his peremptory strikes on jurors who should have been excused for cause. R:14490-99, 14558-66, 14585-93, 14603-12, 14650-59, 14687; JQ-29; JQ-61; JQ-74; JQ-76; JQ-110; *cf. U.S. v. Dozier*, 672 F.2d 531, 547 (5th Cir. 1982) (error "to force a party to exhaust his peremptory challenges on persons who should be excused for cause").

3. <u>*Voir Dire Could Not Identify And Eliminate All Biases.*</u>

Moreover, some biases are impossible to expose. No amount of voir dire could eliminate the subconscious prejudice described by Dr. Bronson. Nor could it protect against the social pressure to convict described by Dr. Klineberg. If anything, voir dire drove these biases home. *People v. Boss*, 701 N.Y.S.2d 342, 347 (N.Y. App. Div. 1999) ("The very asking of such questions [about resisting a

[92] JQ-118; R: 14678-79 (questionnaire: collapse caused by "upper management greed"; voir dire: "I think that that answer was wrong…. I don't know what caused the collapse of Enron. I really don't.").

"public cry for conviction"] carries the danger of implanting or reinforcing in the jurors' minds the fear of the consequences of reaching an unpopular verdict.").

Nor could voir dire detect "stealth" jurors who actively concealed their bias in hopes of being selected. *Cf. Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."). In Houston, the danger of "stealth" jurors was especially acute. For instance, the night before voir dire, one potential juror was overheard in a restaurant saying he "would do everything to make sure he got on the jury because he would then have it made." JKS-23. In 2005, misreading a *Chronicle* article entitled "Want to be an Enron juror?", several Houstonians called the court and *volunteered* to serve for the Enron Broadband trial, a minor event compared to Skilling's trial. R:12415-16 ("'People wanted to know how they could be on the Enron jury,' [Chief Deputy Clerk] Bradley said. '*I've never had that happen before.*'").

4. *<u>The Selected Jury Was Tainted By Actual Prejudice.</u>*

The end result was a jury that reflected the attitudes of the community at large. Collectively, the selected jurors had the same biases as most Houstonians—a presumption of greed and misconduct by Enron management, anger about

Enron's collapse, and strong sympathies for the employees and shareholders. The following are from several of the actual jurors' questionnaires:

- Skilling and Lay are "guilty": "I think they probably knew they were breaking the law."
- "Collapse was due to greed and mismanagement .... What a shame."
- "Greed on Enron's part .... A lot of people were hurt financially."
- "It makes me angry that so many people lost their jobs and their retirement savings."
- "I cannot say if they are guilty or innocent, I would say they are suspect."
- "It was sad. People lost jobs and money—lots of money."
- "If [Lay] did not know what was going on in his company, he was really a poor manager/leader."
- "Angry" about Enron: "I feel bad for those that worked hard and invested in the corp. – only to have it all taken away."
- "[There were] [n]ot enough corporate controls or effective audit procedures to prevent mismanagement of corporate assets."
- "I think that the involuntary loss of the 401(k) savings made the most impact on me, especially because I have been forced to forfeit my own 401(k) funds to survive layoffs."
- What stands out: "The sad state of the long-term loyal employees who are left with nothing…"
- Bankruptcy caused by "[p]oor management and bad judgment. Greed."

JQ-10; JQ-11; JQ-20; JQ-38; JQ-63; JQ-64; JQ-87.

Like most Houstonians, Enron touched the lives of several jurors. Four jurors knew former Enron employees who lost savings. JQ-10; JQ-11; JQ-50; JQ-64; R:14455-57, 14537-38, 14573-75. One said he may have owned Enron stock himself, through a mutual fund—if true, he was an alleged victim of Skilling. JQ-

10. Another got laid off shortly before Enron's bankruptcy, and was forced to cash out her 401(k) to get by, making her extremely sensitive to the plight of Enron employees. JQ-20; R:14480-85. Still another worked across the street from Enron at the time of the collapse. R:14459.

At voir dire, all of the jurors assured the court they could be fair. But once again, there were reasons to be skeptical. For example, when No. 63 was asked about her opinion that Skilling and Lay were guilty, she suddenly recanted:

> JUROR: I don't know…. I don't really have an opinion either way….
> COURT: This says that "Do you have an opinion?" And you said, "I think they were breaking the law…."
> JUROR: I mean, I really don't feel either way about them. I don't know what I was thinking at the time [I wrote that] …

JQ-63; R:14566-71.

Similarly, No. 87 (the forewoman) insisted that she would presume innocence, but at the same time maintained "something went wrong" at Enron, "somebody there [was greedy]," and the decision to be made was "are they guilty of something illegal…. [o]r are they just guilty of being poor managers?" R:14618-26. Clearly, she put the burden on Skilling and Lay to prove that Enron was a strong, financially sound company—the central issue of the case.

Likewise, No. 10 said "somebody wasn't running the ship" and greed and mismanagement of its "head people" brought Enron down. When asked if he would have any reluctance returning to his community after an acquittal, he said, "[m]aybe some hesitancy"—a clear sign of the social pressure to convict in Houston—but, not surprisingly, claimed he could be fair. R:14450-54.

According to an anonymous note sent to the Task Force, No. 64 "repeatedly made comments" to co-workers after receiving her jury summons "that she was very interested in serving on the Enron jury," raising at least the possibility that she was a "stealth" juror. Trial Tr. at 3-10 (Feb. 15, 2006) (sealed); JKS-24.

Finally, No. 11 believed all CEOs are motivated by "pure greed," "historically" they "stretch[] the legal limits," and "some get caught and some don't." Defense counsel asked No. 11 if he thought Lay was greedy: "*Yeah, I think so*." Counsel asked if defendants would have to change No. 11's mind: "*I don't hardly know how you could do that*. I mean, anybody that takes home the salaries and the bonuses and the stuff that they have, *they got to be greedy*." The court then asked, "do you think anybody who makes $10 million or whatever he makes is probably greedy?", and the juror immediately backpedaled: "*No. No, I can't really answer that. I don't know.*" He also said just because he believes Lay is greedy, does "not necessarily" mean he committed a crime. Defendants' cause challenge was denied. R:14455-61.

These were the jurors that held Skilling's life in their hands. Clearly, actual prejudice "found its way into the jury box," depriving Skilling of his right to an impartial jury. *Calley*, 519 F.2d at 204 n.32. Moreover, it confirms the pervasive nature of Houston's community bias, justifying a finding of presumed prejudice. Under either theory, Skilling's convictions must be reversed.[93]

D. The Task Force's Claim Of Fairness Is Without Merit.

The Task Force has asserted two other reasons why it believes Skilling received a fair trial in Houston. Neither has merit.

First, it argued that impartial juries were empanelled in other Enron cases in Houston, citing jury deadlocks and acquittals on some counts in the Barges and Broadband trials. The comparison proves nothing. There was a vast difference, between Skilling and Lay and the individuals on trial in the Barges and Broadband cases: *Houstonians blamed Skilling and Lay for Enron's collapse*. That is why

[93] We could have no doubt uncovered further evidence of improper influences on members of the actual jury, but the district court after the conclusion of trial erroneously issued a gag order preventing *only* counsel in the case from interviewing the jury, despite allowing the jury to give public interviews, write books about the case, and appear as speakers on the lecture circuit. R:41907-09. The court oddly reasoned that defense counsel, as skilled advocates, would be able to obtain evidence from jurors that might cast doubt on the validity of the judgment. *Id*. One rich vein of evidence we would have explored but for the court's order is to ask what media jurors followed during the trial, if any. As the court recognized, jurors were likely to follow the case in the press, despite instructions not to do so, as it is, in the court's words: "impossible to prevent jurors from reading about the case and listening and watching media reports." R:10951-52.

Given the one-sided treatment of the trial in the Houston media and the frequent comments the local media made about jurors' behavior, dress, and moods, it is likely both that jurors followed the press closely, and that they were unduly influenced by its bias. *E.g.*, R:39850-51 ("Style at the Trial"); R:40178-80 (jury humor); 40313-14 (juror dress); R:40813-14 ("Jury Habits"). The court's ruling denying Skilling access to this mine of evidence was further error.

Skilling was called "pig," "snake," "evil," and worse while the Barges and Broadband defendants remained relatively anonymous. R:4038-40.

Indeed, the Barges and Broadband trials only *confirmed* that Skilling could *not* receive a fair trial in Houston. For instance, after Enron accountant Sheila Kahanek was acquitted in the Barges case, one of the jurors wrote an email to her attorney about the filing of Skilling's motion to change venue: "I noticed the big boys want to change their trial location. DON'T MESS WITH TEXAS!" SR3:3454. When asked during voir dire who was to blame for Enron's bankruptcy, one potential Broadband juror said "the bigwigs" in "upper management," while another said Skilling and Lay must have known "there was something terribly wrong at Enron." R:41659-60, 41711-12, 41755-56, 41812-14. After the Broadband trial, two jurors submitted affidavits attesting to the anti-Enron hostility in their deliberations: one said "[t]here were preconceived ideas that an Enron executive must be convicted"; the other said "[t]here was an atmosphere of 'let's fry them' referring to Enron's upper management." JKS-25:5.

Second, the Task Force claimed that Skilling's nine insider trading acquittals proves the jury was fair. That the Task Force all but abandoned those nine counts does not mean the jury did not harbor bias. Not a single witness in the Task Force's case-in-chief testified about these trades, and besides a brief portion of Skilling's cross-examination, they were barely discussed at all. R:29662-732, 30556-70, 30879-91. While acquittals do sometimes suggest that a jury has carefully and impartially weighed the evidence, they do not preclude reversal. *Faulkner*, 17 F.3d at 764-65 ("We do not believe that this fact standing alone is an important one, but … it should inform our analysis.").

Here, the acquittals are explained by the Task Force's failure of proof: just because the jury recognized the *total absence* of evidence, that does not mean it was "ready, willing and able to give [Skilling] the benefit of a reasonable doubt" in considering the evidence that *was* truly disputed. *McVeigh*, 918 F.Supp. at 1473. The acquittals neither show the jury was fair, nor rebut the presumption of prejudice in Houston. If Skilling had been tried elsewhere on the same weak proof, he would have been acquitted on all counts.

IV. THE TASK FORCE'S MISCONDUCT REQUIRES REVERSAL.

It is the "duty of the prosecutor" in our system "to seek justice, not merely to convict." ABA STANDARDS FOR CRIM. JUSTICE §3-1.2(c) (3d ed. 1993). Thus, it is "as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). As Justice Scalia warned, the institution of the "special prosecutor" carries with it particular dangers of abuse:

> In [such cases], it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.

> It is in this realm—in which the prosecutor … selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Morrison v. Olson, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting).

The specially appointed Enron Task Force, by its own admission, was under intense public pressure to indict and convict Skilling, Lay, and other Enron executives.[94] In their zeal to secure these results—which the press, public, and politicians wrongly preordained—members of the Task Force pushed too hard, and crossed the line from vigorous prosecutorial advocacy to abuse of prosecutorial power.

The Task Force was comprised of literally scores of prosecutors, SEC and IRS investigators, and FBI agents. Presumably all of them were motivated by

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[94] *E.g.*, Hueston, *supra*, at 200; JKS-26 (Former Enron Task Force Director Leslie Caldwell: "[B]y the summer of 2002, there was a lot of new pressure from Congress and from the press…. [T]he general theme was, 'Well, what did you expect? I mean, this is the Bush Justice Department. They can't possibly be expected to actually really thoroughly investigate Bush's cronies, Ken Lay and Company….' We needed a special prosecutor, because Bush and Lay, it's obvious that Lay is being protected by Bush. Meanwhile, little did they know that in the halls of the Justice Department, people were saying, 'Can't you please indict somebody now? Anybody? Just indict Fastow.' People were saying, 'Indict somebody before Congress comes back from their holiday,' which was after Labor Day. And, frankly, I think that while the White House never said anything to us, or to anyone at the Department as far as I know, I'm sure they wouldn't, the happiest thing they could have heard was that Kenneth Lay was being indicted and that would be an issue they wouldn't be concerned about any more."); Edward Iwata, *Enron task force faces big pressure to deliver*, USA TODAY (Aug. 21, 2002).

genuine dedication to the duties of their public offices, and surely the majority executed those duties consistent with the law.

But for those at the very top of the Task Force—those under the most scrutiny, and those with the most to gain from a trial victory—the public and political pressure to deliver convictions clearly proved too much to resist. These prosecutors knew that their specially appointed function was to be sure that Jeff Skilling was punished severely for what happened at Enron.

Skilling never had a chance of being treated fairly. To the contrary, the leaders of the Task Force orchestrated an extraordinary scheme of prosecutorial intimidation, abuse, and concealment, all designed to secure convictions in a case that they knew to be factually and legally tenuous. The Director of the Task Force and his subordinates threatened witnesses and their counsel and instructed them not to assist Enron defendants or testify on their behalf. The Director of the Task Force secured unlawful plea deals that mandated that, if corporations like Merrill Lynch and CIBC did not want to suffer the corporate "death penalty" that befell Arthur Andersen, their employees and agents could not testify against the Task Force. The subsequent Director of the Task Force, in closing arguments in Skilling's trial, misrepresented the credibility of the Task Force's most important witness, Andrew Fastow, who sponsored the Global Galactic document and falsely connected it to Skilling. Hundreds of hours of interview statements by Fastow were also deleted from all Task Force computers and records and replaced by a carefully scripted narrative of Fastow's story, thereby hobbling Skilling's ability to impeach him.

Given the evidence of misconduct we managed to obtain, it is likely there was more, and we asked for discovery to get it. Despite documented evidence of witness threats, unconstitutional plea deals, and improper tactics to suppress evidence that would have impeached Fastow and others, the trial court consistently denied meaningful relief. Skilling is entitled to a reversal on every count as a result of the Task Force's misconduct, as well as outright dismissal of the case. If there is a remand for retrial, Skilling at a minimum should be afforded the opportunity to explore the full range of the Task Force's misconduct and seek all necessary and appropriate relief to remedy it. *Cf. U.S. v. Stein*, 435 F.Supp.2d 330, 382 (S.D.N.Y. 2006) (allowing such discovery; ultimately dismissing case: "If those whom the government suspects are culpable in fact are guilty, they should pay the price. But the determination of guilt or innocence must be made fairly—not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.").

A. The Task Force Obstructed Skilling's Access To Witnesses, Violating His Due Process Rights.

1. *The Task Force Interfered With Skilling's Access To Witnesses.*

Witnesses “are the property of neither the prosecution nor the defense”; both sides “have an equal right, and should have an equal opportunity” to interview witnesses and secure their testimony. *U.S. v. Soape*, 169 F.3d 257, 270 (5th Cir. 1999). If the government “interfere[s] substantially” with a witness’s “free and unhampered choice” to meet with or testify for the defense, it “violates defendant’s due process rights.” *U.S. v. Scroggins*, 379 F.3d 233, 239 (5th Cir. 2004); *U.S. v. Bieganowski*, 313 F.3d 264, 291 (5th Cir. 2002); *U.S. v. Thompson*, 130 F.3d 676, 686 (5th Cir. 1997); *U.S. v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980).

From its inception, the Task Force engaged in a sustained pattern of impermissible witness interference, severely impeding Skilling’s ability to prepare a defense. Among other actions, the Task Force:

- Directed an email from Task Force Director Andrew Weissmann to counsel for EBS CEO Ken Rice, a key cooperator against Skilling, instructing Rice to either prohibit his attorney from speaking with Skilling’s counsel or “get rid” of him. Mot. to Dismiss Based on Prosecutorial Misconduct at 9-11, Ex. 24 (Sept. 1, 2005) (sealed) (“MTD”); Reply in Support of Mot. to Dismiss at 13-16 (Oct. 26, 2005) (sealed) (“MTD-R”).[95]
- Ordered Wholesale trader Tim Belden, over threats of reprisal, not to talk to anyone besides the Task Force about Enron matters, and if deposed or called to testify, to invoke the Fifth Amendment. MTD at 12-13; MTD-R at 16-18; JKS-27:15-18.

[95] All citations are to the sealed, unredacted version of Skilling’s motion to dismiss. An unsealed, redacted version can be found at R:8126.

- Advised attorney Wendell Odom, counsel for witness Michael Andersen, "you don't want to talk to" Skilling, Lay, or their lawyers, because "they are bad news." MTD at 11-12; MTD-R at 25-26.

- Made it clear to attorney Robert Sussman that if his clients help or meet with defendants, the Task Force would "make them pay." MTD at 13; MTD-R at 18-21.

- Left a voicemail message from Director Weissmann to counsel for Arthur Andersen partner David Duncan, stating that since the Task Force was "not going to direct that he speak … pursuant to the cooperation agreement … I assume you're going to have [him] assert the [F]ifth." JKS-27:3-4.

- Told EBS witness Rex Shelby that it was not a "good idea" to speak with defense counsel in the EBS case. MTD at 12, Ex. 5; MTD-R at 2.

- Made "veiled threats" to counsel for witness Mark Palmer, four times in the month before his testimony in the EBS trial, that it was "dangerous" and "not in [Palmer's] best interest" to testify for the defense. MTD at 20; MTD-R at 2-7.

- Called counsel for witness Larry Ciscon three times in two weeks before his testimony in the EBS trial, to "remind" him that he was a "target" and could be indicted at any time. Ciscon's counsel described this as an effort to "pressure [Ciscon] not to testify," and Ciscon interpreted it as a "warning" and a "threat that [he] could be prosecuted" if he testified. MTD at 22-23; MTD-R at 2-7. The presiding judge in the EBS trial correctly observed that such warnings put the Task Force "in the position of sort of eliminating people as potential witnesses." MTD at 22-23.

- Changed Arthur Andersen witness Kate Agnew's status from "witness" to "subject" shortly before the Andersen trial, and threatened her with perjury charges if she testified, successfully dissuading Agnew from taking the stand and contradicting one of the key theories of the Task Force's case. MTD at 20-22, Ex. 1; MTD-R at 21-24.

- Secured cooperation agreements with Merrill Lynch and CIBC that expressly prohibited the banks and any of their officers, employees, and agents from "contradicting any" of the Task Force's allegations documented in the plea agreements, by testifying to the contrary "in litigation" or by making "any public statement." MTD at 27-31, Exs. 8, 14; MTD-R at 7-12.

- Procured additional plea conditions from Merrill and CIBC entitling the Task Force to intrude upon meetings between the banks' employees and defense counsel. MTD at 32-34; MTD-R at 7-12.
- Obtained cooperation agreements that bar witnesses and their counsel from disclosing to defendants any information gleaned from meetings with the Task Force, which some attorneys interpreted as forbidding information sharing on any *topics* discussed with the government—even though such conversations are plainly not privileged, and even though the Task Force secured agreements that witnesses and their counsel must report on conversations with the defense. MTD at 34-41; MTD-R at 7-12.
- Fostered a pervasive atmosphere of fear for all witnesses associated with Enron, by publicly touting a perpetually "ongoing" grand jury investigation, and maintaining a 100-plus-person co-conspirator list shrouded in secrecy. MTD at 41-42.

Most of these actions defied three separate court orders instructing the Task Force not to interfere with defendants' access; all contributed to depriving Skilling of witnesses and evidence in his defense. MTD at 43-49, Exs. 7, 13; R:6375.

The Weissmann email *alone* was stunning evidence of the Task Force's misconduct, and should have been enough to move the district court to provide Skilling significant relief, including grants of witness immunity, if not dismissal. In May 2005, Weissmann wrote to William Dolan, counsel for EBS CEO Ken Rice. Weissmann said he had heard "reports" that Dolan's co-counsel, Dan Cogdell, was "huddling" with "Petro," Skilling's lead attorney, Daniel Petrocelli. Without even knowing the subject of their conversation, Weissmann warned that "speaking with Skilling's lawyers" was a "conflict," and "not … in Rice's best interests." Insisting the Task Force would "have to get to the bottom of this," he gave Rice two options: either he "instructs his lawyers who they can speak to and who they cannot," or he "gets rid of [Cogdell]." MTD at 9-11, Ex. 24; MTD-R at 13-16. The message to witnesses was unmistakable: talk to Skilling or his lawyers, and you will pay the price. The message worked—in response, Cogdell said he would not speak to Skilling's counsel again. MTD Ex. 28; MTD-R at 16.

Weissmann's email was inexcusable. *U.S. v. Henao*, 652 F.2d 591, 592 & n.1 (5th Cir. 1981) ("the government's making a witness unavailable and thereby preventing a defendant from interviewing the witness" violates Constitution). The statements to Belden, Odom, Sussman, and Shelby, though arguably less explicit, were equally unlawful. *U.S. v. Peter Kiewit Sons' Co.*, 655 F.Supp. 73, 75-76, 78 (D. Colo. 1986) (government did not tell witnesses they "couldn't" meet with defense, but said they "probably shouldn't," and "strongly implied that the witnesses should decline … defense interviews").

As for Palmer, Ciscon, and Agnew, the law is clear: "Threats against witnesses are intolerable." *Goodwin*, 625 F.2d at 703. While perjury admonitions are not inappropriate *per se*, a "barrage of warnings" designed "to coerce a witness into silence" requires reversal. *U.S. v. Vavages*, 151 F.3d 1185, 1188-90 (9th Cir. 1998); *U.S. v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979) (reversing where FBI agent told witness he would have "nothing but trouble" if he testified for defendant); *Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997) ("[a] prosecutor may not intimidate a witness into invoking the Fifth Amendment”); *U.S. v. Blackwell*, 694 F.2d 1325, 1334 (D.C. Cir. 1982) (“warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify”). Given the timing, nature, and repetition of the Task Force’s warnings, one can only conclude—as Palmer, Ciscon, and Agnew did—they were “deliberate and badgering threats designed to quash significant testimony,” simply because it was unfavorable to the Task Force. *U.S. v. Davis*, 974 F.2d 182, 187 (D.C. Cir. 1982).

Finally, the Merrill Lynch, CIBC, and other cooperation agreements were especially pernicious. It is improper to contractually forbid witnesses from giving exculpatory testimony for defendants, *U.S. v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977); require the presence of government lawyers at meetings with defense counsel, *Gregory v. U.S.*, 369 F.2d 185, 188-89 (D.C. Cir. 1966); and prohibit witnesses from sharing information with defendants, *U.S. v. Leung*, 351 F.Supp.2d 992, 993-98 (C.D. Cal. 2005). Yet the Task Force’s cooperation agreements did *all three*, and the Task Force enforced these unlawful terms. MTD at 27-41.

These tactics plainly violated Skilling’s constitutional rights. *Scroggins*, 379 F.3d at 239 (“the Fifth Amendment protects the defendant from governmental interference with his defense”; “Sixth Amendment guarantees a defendant the right to present witnesses … without fear of retaliation against the witness by the government"). *And these are only the incidents Skilling found out about*. Given the extent of the Task Force's misconduct, Skilling's utter inability to meet with witnesses, and witnesses' and their counsels' understandable reluctance to come forward, it is a virtual certainty other evidence of misconduct exists.

2. *Skilling's Ability To Prepare A Defense Was Severely Prejudiced.*

Regrettably, the Task Force's campaign of intimidation was successful. Rice, Belden, Shelby, Agnew, Odom, Sussman, employees from Merrill Lynch and CIBC, and every single Task Force cooperator all refused Skilling's interview requests. Decl. of Matthew Kline ¶¶9-10, 17-18, 35-54, 81 (Sept. 1, 2005) (sealed) ("Kline"); Decl. of Michael Ramsey ¶¶7-11 (Sept. 1, 2005) (sealed); MTD at 12; R:16761, 17997, 19225, 20225, 20531, 24511. So did virtually everyone else. There were literally *hundreds* of potential witnesses, yet only a handful agreed to meet with Skilling's counsel, assist his defense, or testify on his behalf.[96]

[96] When the brave few did come forward their testimony was astonishing. The Task Force's first witness in the case—and by its own account one of its most important, Hueston, *supra*, at 203—was Mark Koenig. Koenig had defended Enron and its bankruptcy for several years only to plead guilty after his direct subordinate, Paula Rieker, pled and Jamie Olis, a low-ranking Dynegy executive, was sentenced by a Houston federal court to 24 years in prison for playing a minor role in a securities fraud. R:15987-16003. The first defense witness whom Skilling and Lay called was Joannie Williamson, and a woman Koenig had described as "trustworthy," a "great friend," and a "truth-teller." R:16763-65. She testified that "Mark had always told me that he had not done anything wrong," and the day he pled guilty he called her and she asked him, "'What are you doing? Why did you plead guilty? You're not guilty.' And he said, *'I know that. But in order for this to work, everyone needs to believe that I am.'*" R:26584-85.

In April 2005, Skilling sent letters to 144 witnesses, requesting meetings. Only *two* agreed. MTD at 5-6. In May 2005, Skilling sent additional letters to 138 witnesses, attaching an order by the district court—issued over the Task Force's objection—assuring them the Task Force would not hold their decision to meet with Skilling against them. Only *two* more agreed. MTD at 6-7. In September 2005, the district court itself sent letters to 38 witnesses, again stating that the Task Force would not penalize them for assisting the defense. These yielded only *one* positive response—from Mark Palmer, who was already brave enough to testify at the EBS trial. MTD-R at 1, 28.[97] Renowned criminal defense lawyer and professor Michael Tigar, who served as an expert witness for Skilling, opined that, in nearly 40 years, he had "never seen defendants in a major public trial … so completely ostracized by witnesses." MTD at 7; R:8190. This was no coincidence. Given its pattern of witness interference, it was clearly the *Task Force's actions*—not mere happenstance—that deprived Skilling of access to witnesses on such a grand scale.

Indeed, some witnesses confirmed this in their refusals of Skilling's request. For instance, Belden's counsel said the Task Force instructed him not to talk to

[97] The letter was never sent to the overwhelming majority of witnesses to whom Skilling requested it be sent. At the district court's insistence, the letters were limited to 38 recipients, a tiny fraction of potential witnesses in the case. Even then, the Task Force sought to cut the list by 23, and objected to Skilling's request to send the letter to 100 more—revealing the Task Force's true interest in

"anybody," and made it "very clear" he might suffer repercussions if he cooperated with Skilling. Moreover, under the terms of his plea agreement, Belden's counsel "could not discuss with [Skilling's counsel] any topic that Mr. Belden had discussed with the Enron Task Force." Kline ¶¶25-35. Emails between Task Force lawyers and Belden's counsel—copies of which we finally obtained *after* the trial—document these commands. JKS-27:17 ("[f]or months, Tim has strictly followed your *directions not to contact any of his former colleagues*…. I would like for Tim to be permitted to send Christmas cards … to [certain] colleagues with whom *he has been ordered not to contact*"); MTD at 37, Exs. 30, 50 (Dave Delainey declining to meet partly because he "is restricted by his agreement with the United States from disclosing certain information to third parties"). Such limits on information-sharing were widespread in this case; yet they are precisely what the law proscribes. *Leung*, 351 F.Supp.2d at 993-98 (permitting discovery regarding government interference with witness access; dismissing indictment on less egregious facts).[98]

"reassuring" witnesses. MTD-R at 6-7.

[98] The Belden email was produced in response to a subpoena calling for "[a]ll … communications [with] the ENRON TASK FORCE … about whether YOU or YOUR client should communicate with any DEFENDANT or DEFENSE COUNSEL." R:7527; JKS-27. Other revealing documents were also produced in response to the subpoena, including the transcribed voicemails from Task Force Director Weissmann to the attorney for Arthur Andersen witness David Duncan. JKS-27:3-4. Duncan's lawyer, Sam Seymour—who thought Weissmann's voicemail important enough to save, transcribe, and produce—is a highly

One particularly stark example of the prejudice caused by the Task Force's unlawful cooperation agreements was silencing CIBC witness Ian Schottlander. According to the Task Force, Fastow had a "secret oral side deal" with Schottlander that CIBC would not lose money on several Enron-related deals. Before CIBC entered its plea agreement with the Task Force, Schottlander gave a deposition and emphatically denied the allegation that Fastow had ever made a guarantee that would have blown the accounting. MTD Ex. 6. Testimony from Schottlander would have been highly important in Skilling's case to refute the Task Force's erroneous "side deal" theory. *Supra* at 27-33. However, after CIBC signed its agreement with the Task Force—and accepted the Task Force's side deal allegations, and agreed that no present or former CIBC employee would testify to the contrary, lest CIBC be prosecuted—Schottlander immediately went silent. After the deal to avoid CIBC's prosecution (and certain demise), Schottlander asserted his Fifth Amendment rights and refused to testify further or even meet with Skilling. MTD at 27-31, Ex. 6 at 199-207, Ex. 14 at 3, 7; MTD-R at 10, Ex. 2.

At trial, the severe imbalance in witness access was obvious. The Task Force's case consisted mostly of cooperators from Enron's senior management—

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experienced criminal defense lawyer and former Assistant United States Attorney. The district court not only deprived Skilling of access to many more of these documents, it would not follow up with any of these witnesses to explore whether they interpreted these communications and plea provisions to be threats and instructions not to testify. R:7736-77.

people who worked with Skilling at Enron and who were his friends, including some of his closest friends. With plea or non-prosecution agreements with the Task Force, these witnesses were under the Task Force's complete domination and control. They were obligated to testify, contractually bound to admit guilt and support the allegations against Skilling, and their ultimate fate rested in the "sole and exclusive discretion" of the Task Force. GX3210; GX3212-14; GX3216; GX3219; GX4129; GX4645; GX7803; GX10000. *None* of them would meet with Skilling or his counsel. *E.g.*, Kline ¶¶9-10, 17-18. At least two (Rice and Belden)—and probably all of them—were clearly ordered not to. MTD at 9-13, Ex. 24; MTD-R at 13-18; JKS-27:17-18.

In contrast, most of Skilling's key defense witnesses never took the stand. Specifically, Skilling sought to call David Duncan of Arthur Andersen and seven Enron executives: Greg Whalley, Rick Buy, Lou Pai, Jeff McMahon, Georgeanne Hodges, Janet Dietrich, and Joe Hirko. Each possessed critical exculpatory evidence, and would have directly refuted testimony given by Task Force cooperators. R:34231, 34598-602, 34610-53. Yet all eight invoked the Fifth Amendment, fearing Task Force reprisals. R:34595, 34655-704. Hoping to overcome this, Skilling asked the Task Force to immunize them, as it did for Ben Glisan (its own witness). The Task Force declined, thereby ensuring that vital exculpatory testimony never saw the light of day. R:34594, 34607-08.

Without these (and many other) key witnesses, the defendants were forced to rely primarily on their own testimony. R:28175-29425, 29607-906, 29988-30626, 30718-851, 31126-688, 31838-32097, 32258-565, 32747-33052, 73285-357. Roughly two-thirds of the defense case consisted of Skilling and Lay's testimony; the remainder was a patchwork of character witnesses, experts, and others—anyone courageous enough to testify. Most could offer relatively narrow testimony on limited issues. *Id*.; R:26567-962, 27032-88, 30855-30919, 31118-26, 33881-34137, 34299-356, 34781-814. Besides Skilling and Lay, only two senior executives testified for the defense, and neither was deeply involved in many transactions at issue. R:27471-528, 27692-916, 28095-175.

Compounding the prejudice, the Task Force argued in closing that Skilling's defense was not credible because it did not square with the testimony of many witnesses. R:29893-95, 29994, 30067, 30365, 30540. By intimidating witnesses into silence and then refusing to immunize them—knowing they would give testimony favorable to the defense—it was the *Task Force* that prevented witnesses from corroborating Skilling. *U.S. v. Golding*, 168 F.3d 700, 702-05 (4th Cir. 1999) ("The government did not stop with the threat. Instead, the prosecutor further abused her power by using the very situation she had created against the defendant in closing argument."). Skilling, meanwhile, could not explain to the jury why his best witnesses were missing, because the district court explicitly prohibited him from introducing any evidence of the Task Force's threats and other misconduct. R:10874-89, 14087-88.

The prejudice was irreparable. It obstructed Skilling's preparations before trial, distorted the presentation of evidence at trial, and affected the outcome. *Gregory*, 369 F.2d at 188-89 ("A criminal trial … is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined.").

3. *The District Court's Refusal To Grant Relief Was Reversible Error.*

In cases of witness interference, courts have the authority to grant a wide range of relief, including depositions, *Peter Kiewit*, 655 F.Supp. at 78, *aff'd U.S. v. Carrigan*, 804 F.2d 599, 604 (10th Cir. 1986); evidentiary sanctions, FED. R. CRIM. P. 16(d); discovery, *Leung*, 351 F.Supp. at 997; and court-ordered witness immunity, *U.S. v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992); *U.S. v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 1995). When prosecutorial misconduct is especially severe and no lesser remedy will suffice, dismissal is required. *U.S. v. Welbron*, 849 F.2d 980, 985 (5th Cir. 1988); *U.S. v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983); *U.S. v. Doe*, 125 F.3d 1249, 1253 (9th Cir. 1997); *Leung*, 351 F.Supp.2d at 997; *U.S. v. Stein*, 2007 WL 2050921 (S.D.N.Y.).[99]

[99] While witness interference once led to *per se* reversal, *Goodwin*, 625 F.2d at 703, such claims are currently subject to harmless error analysis, *U.S. v. Weddell*, 800 F.2d 1404, 1410-11 (5th Cir. 1986). Because that analysis "would be a

The Task Force's conduct here was far worse—and far more extensive—than all these cases. The district court, however, granted no meaningful relief. R:13082-87, 37293-314. Instead, it held "there [was] no credible evidence … that the government has substantially interfered with witnesses' decisions not to meet with defense counsel," and that "the court has remedied any harm" by reassuring witnesses that they were free to do so. R:13085-87.

This was clearly erroneous, *Bieganowski*, 313 F.3d at 291 (standard of review is "clear error"), for at least four reasons. *First*, the court failed to consider the large majority of Skilling's evidence. Because many witnesses' counsel would only acknowledge the Task Force's threats "off-the-record," Skilling was forced to submit attorney declarations recounting their statements. Dkt. Nos. 440-54 (Sept. 1, 2005) (sealed). The court deemed these declarations inadmissible hearsay, and dismissed them entirely. R:10948, 13084.

That ruling was wrong. Federal Rule of Evidence 804(b)(6) directly applies; it provides a hearsay exception for statements "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Rule 804(b)(6) "recognizes the need for a prophylactic rule to deal with abhorrent behavior which strikes at the heart of

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speculative inquiry into what might have occurred in an alternate universe," the Supreme Court's recent decision in *U.S. v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2565 (2006), casts doubt on the applicability of harmless error doctrine. The Court need the system of justice itself …. The rule applies to all parties, *including the government*." Adv. Comm. N. to 1997 Amendments. Indeed, courts have recognized that "successful witness intimidation would often not be provable at all if hearsay were not permitted, since the most direct source of evidence of intimidation is the very witness whose intimidation prevents him or her from testifying in the first place." *Smith v. Artus*, 2005 WL 1661104, *6 (S.D.N.Y.); *Geraci v. Senkowski*, 23 F.Supp.2d 246, 258 (E.D.N.Y. 1998).[100]

Second, if the court *had* considered all the evidence, it almost certainly would have arrived at a different conclusion. Significant evidence of witness interference was not even disputed. For instance, the Task Force did not deny telling Shelby it was not a "good idea" to meet with defense counsel, giving repeated target reminders to Ciscon on the eve of his testimony, or telling Palmer that testifying was "dangerous." MTD-R at 2-7. Nor could the Task Force explain or escape the plainly unconstitutional language of its agreements with Merrill and CIBC, arguing instead that it should be trusted not to enforce the unlawful plea provisions as written. MTD-R at 7-12. Less prejudicial plea agreements and prosecutorial tactics have led to the dismissal of entire cases and caused a

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not resolve that issue here, however, since the prejudice is clear.

[100] The abundance of corroborating evidence, witnesses' reluctance to come forward, and defense counsel's role as officers of the court also provided "circumstantial guarantees of trustworthiness" to qualify for the residual hearsay exception. FED. R. EVID. 807.

significant public outcry, including from former members of the Task Force, condemning such abuses.[101] The trial court *completely ignored these illegal plea deals* in denying Skilling's requests for relief.

Of the claims the Task Force did dispute, the preponderance of the evidence always fell in Skilling's favor. Virtually without exception, Skilling's attorney declarations were corroborated by written documents, contemporaneous notes, and independent witnesses, while the Task Force merely relied on self-serving denials by some of its own members (others were conspicuously silent) and disavowals by counsel who had strong incentives to curry favor with the Task Force. MTD-R at 13-26; JKS-27:3-4, 15-18; *Peter Kiewit*, 655 F.Supp. at 76 (weighing "motives not to offend the government" and "contemporaneously taken notes").

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[101] *Stein*, 2007 WL 2050921, *26 (prosecution "foreclosed these defendants from presenting the defenses they wished to present and, in some cases, even deprived them of counsel of their choice. This is intolerable in a society that holds itself out to the world as a paragon of justice. The responsibility for the dismissal of this indictment as to thirteen defendants lies with the government."); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Sen. Judiciary Comm.*, 109th Cong. 2, 16-17, 23-24 (2006) (statement of Andrew Weissmann); Gregory Burns, *Backlash Against Hardball Tactics*, CHI. TRIB., Jan. 14, 2007, at C1; Lynnley Browning, *Justice Department Is Reviewing Corporate Prosecution Guidelines*, N.Y. TIMES, Sept. 13, 2006, at C1; Purva Patel, *Prosecutors Easing Back on Methods*, HOUSTON CHRON., Dec. 13, 2006, at B1; *Roundtable: White Collar Defense*, CAL. LAWYER, Dec. 2005, at 47-50 (interview with former Task Force prosecutors); Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411, 415 n.5 (2007) ("Examples of corporate acquiescence to terms that go well beyond what would appear to be justified by the alleged criminal conduct are starting to abound in the post-Enron era.").

At the very *least*, as in cases like *Leung* and *Stein*, the court should have held a full evidentiary hearing to resolve these credibility disputes. Instead it discounted the large majority of proof and held a limited hearing, featuring only Odom and Sussman. Although both men *verified* that fear of reprisal by the Task Force was a factor that led them to advise their clients not to assist defendants, the court, after examining counsel, concluded that the threats made to Odom's client and the fear both lawyers felt were not enough, under the court's (erroneous) view of the law, to prove misconduct. R:10995-11043. By isolating on these two pieces of evidence and working to explain them away—and by ignoring altogether the Weissmann email, illegal plea agreements, and all the other evidence that Skilling's attorneys had marshaled that proved pervasive misconduct—the court's ruling was contrary to the clear weight of the evidence.

Third, the court's analysis was tainted by a serious error of law. Explaining its denial of Skilling's motion for defense witness immunity, the court made an extraordinary pronouncement: "The primary reason a person asserts a Fifth Amendment privilege is because the person is guilty of criminal conduct." R:37312. The court continued:

> Given the number of people who have pleaded guilty and have been found guilty for perpetrating Enron-related crimes and the large number of alleged co-conspirators, *there is a reasonable likelihood that the proposed witnesses have asserted their Fifth Amendment privilege for this reason*, and not because of fear of government reprisals.

R:37312-13. In other words, because these witnesses asserted their constitutional rights and were associated with Enron, the court assumed they were *guilty*—and that was likely the reason they refused to testify, not because of threats or intimidation by the Task Force.

This chain of logic turned the presumption of innocence on its head and contradicted fundamental Fifth Amendment jurisprudence. *Grunewald v. U.S.*, 353 U.S. 391, 421 (1957) ("one of the Fifth Amendment's basic functions … is to protect *innocent* men"); *Ullman v. U.S.*, 350 U.S. 422, 426 (1956) ("Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are [] guilty of crime…."); *Slochower v. Bd. of Higher Ed. of the City of New York*, 350 U.S. 551, 557 (1956) ("[t]he privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent [] to a confession of guilt").

Finally, contrary to the district court's conclusion, its assurances to witnesses were no remedy at all. Neither its May 2005 order nor its September 2005 letters helped Skilling break through the wall of silence. MTD at 5-7; MTD-R at 1, 28. This was hardly surprising: the court obviously had no actual authority to protect witnesses from zealous prosecutors looking to indict. Only *prosecutors* can provide protection from prosecution—namely, the immunity that the Task

Force uniformly refused to provide Skilling's potential witnesses. And absent true immunity, the damage was done once the threats were made, whatever unenforceable assurances witnesses later received. *Leung*, 351 F.Supp.2d at 997 (witnesses "[knew] what [was] expected of [them], and the possibility that [they] would now feel free to be interviewed … [was] ephemeral at best."); *U.S. v. Carrigan*, 804 F.2d 599, 604 (10th Cir. 1986) ("[a]n order merely to cease such interference, after the fact, might be insufficient because the witnesses' free choice might have been already perverted").

The court's letters and order gave witnesses no reason to set aside their fears. Witness access orders were entered in other Enron cases as early as 2003, yet the Task Force consistently ignored them. MTD at 43-47. Publicly, the Task Force repeatedly assured the court that "witnesses … are free to talk to whomever they want." R:6313; MTD at 45-47. Privately, however—within weeks of these assurances—it insisted that talking to Skilling was hazardous to Rice's "best interests," demanded that Cogdell be silenced or fired for doing so, and pressured Ciscon not to testify at the EBS trial. MTD at 9-11, 22-23, 45-47, Ex. 24; *Leung*, 351 F.Supp.2d at 998 ("When confronted with what they had done, they engaged in a pattern of stone-walling entirely unbecoming to a prosecuting agency.").

Ultimately, there was only one remedy that would have been effective: dismissal of the case. No lesser remedy could have deterred the Task Force's conduct or restored witnesses' freedom of choice. *Leung*, 351 F.Supp.2d at 997 (dismissing because "no other sanction could remedy the harm done"). At the very least, Skilling's convictions must be reversed and significant measures (including discovery and an evidentiary hearing) imposed on remand to protect Skilling's constitutional right to a fair trial.

B. The Task Force Misled The Jury And Concealed Crucial Evidence Regarding Andrew Fastow.

By whatever means, the Task Force had to protect the credibility of its least credible, but most important, witness, Andrew Fastow.[102] The Task Force described Fastow's testimony as "critical" to obtaining Skilling's conviction, because he provided the "key link" between Skilling and the so-called "Global Galactic" document—"[t]he prosecution's most incriminating document"—and single-handedly established "fraud tied to Mr. Skilling." R:4134-35; GX1298; Hueston, *supra*, at 197. The Task Force crossed the line in shielding Fastow from impeachment.

1. *The Task Force Misrepresented Fastow's Sentence To Bolster His Credibility.*

[102] According to one prosecutor, Fastow "provided the Task Force with a seat on the 50th floor," "provided a global perspective of Skilling and Lay's knowledge of earnings manipulation schemes," and testified to "the knowing involvement of Skilling and Lay in key transactions and meetings." Hueston, *supra*, at 199-200, 218.

In his plea agreement, Fastow agreed to serve 10 years in prison—no more, no less. GX3216:2-3. Over and over again, the Task Force touted the agreed-upon sentence as a *minimum*, not just a maximum. In a press conference, it said, "Fastow *is* going to serve *10 years* in jail without parole." R:41361. In press releases, it claimed "Fastow *will* serve a *10-year* prison sentence." R:41370, 41374-75. It even used Fastow's "minimum" sentence to argue for stiff sentences in the Nigerian Barges case it brought against the Merrill Lynch defendants. Skilling's Sentencing Mem. at Ex. 119, p.71 (Oct. 10, 2006) (sealed) ("*[Y]our Honor, those are minimums*…. [Fastow] will serve under the terms of his agreement *no less than 10 years*.").

During Fastow's examination at trial, Fastow and the Task Force repeatedly—and emphatically—asserted that 10 years was a "minimum," and that it would not seek a downward departure based on Fastow's cooperation. *E.g.*, R:21329, 22429-30 ("[m]y plea agreement states that I agree to a sentence of 10 years"; "[m]y understanding is that I will be sentenced to 10 years"; "Q. And what is the minimum….? A. It calls for a 10-year sentence").

This became particularly relevant to Global Galactic. The indictment never charged Skilling with knowledge of Global Galactic; the allegation was limited to Fastow and *Causey*. R:858-59. The Task Force confirmed this before trial: "The indictment *does not even charge Skilling with being a part of the Global Galactic* *agreement*." R:1888. After Causey pled guilty, however, the Task Force shifted course and elicited Fastow's testimony linking Skilling to Global Galactic. R:21312-16. In response, Skilling attacked Fastow's credibility and challenged Global Galactic's authenticity. R:21812-13, 21815-18, 21902-12, 21928-42.

In its redirect examination of Fastow and in closing argument, the Task Force argued to jurors that Fastow had no reason to fabricate the document, because his sentence was "*locked*" at 10 years:

> What possible motive would Andy Fastow have to produce that document? …. You go back and review your notes. *That document was produced after Mr. Fastow had his 10-year deal*. It was produced after his wife had entered into her final plea agreement. The only thing that document could do, ladies and gentlemen, was sink him if it were a fraud. The deals were already in place. *Ten years locked for Mr. Fastow*. His wife's deal is done. No possible reason that he would come forward with a document that wasn't accurate.

R:37020-21; 22429-31.

This, it turned out, was false. Fastow's sentence was *not* "locked" at 10 years. At his sentencing, which occurred shortly after Skilling was convicted, Fastow requested a reduction in sentence to five years. R:41429-30. With Skilling's conviction secured—and despite its representations about Fastow's minimum 10-year sentence, and the plain language of the plea agreement in which the Task Force said it "will not at any time in the future file any motion for a reduction in [Fastow's] sentence," GX3216:6—the Task Force *supported* Fastow's request for a sentence of less than 10 years. The Task Force spared no praise for

Fastow: calling his cooperation "critical," a "key breakthrough," and vital to securing the convictions of Skilling and Lay; and describing him as a "contrite," "rehabilitat[ed]," and "truly repentant" man who had "regain[ed] his moral compass." R:41433-36, 41438. Although it never formally joined Fastow's motion, the Task Force plainly advocated for leniency. It worked, and Fastow was sentenced to six years. R:41447.

The Task Force's treatment of Fastow's sentence violated Skilling's rights in two ways, each requiring reversal. *First*, the Task Force improperly bolstered Fastow's credibility at trial—and the authenticity of Global Galactic—by "arguing to the jury that [Fastow] had no possible reason to be untruthful," and "nothing [to] gain from cooperating," when in reality the Task Force knew he could well have much to gain—as indeed he later did when his sentence was reduced down to six years. *Ruetter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989). As in *Ruetter*, the Task Force "was not merely glossing over the widely understood fact that cooperation … eventually may be helpful to a prisoner"; instead, it "was representing to the jury that [Fastow] had no reason to expect any specific benefit from his testimony." *Id*. But that simply was not true. Fastow could well benefit at sentencing by incriminating Skilling—and the Task Force had to know it was not true even as it made the representation. Unsurprisingly, after hearing of Fastow's reduced sentence, one juror said she felt "very misled" by prosecutors "when they told us repeatedly that he had a minimum and a maximum of 10 years in prison." R:40917. By insisting to jurors that Fastow was "locked" into a 10-year "minimum," the Task Force plainly misled the jury and prejudiced Skilling.

Second, the Sixth Circuit has held that, under these circumstances, the court and defense are entitled to presume the existence of an undisclosed "side deal"—whether explicit or implicit—between the prosecution and a witness for favorable treatment, and that the agreement must be treated as *Brady* evidence. *Bell v. Bell*, 460 F.3d 739, 753 (6th Cir. 2006), *vacated and reh'g granted*, 2006 U.S. App. LEXIS 32575 (6th Cir. 2006). Although rehearing en banc has been ordered in *Bell*, the panel's reasoning fully applies here and compels reversal—especially considering how heavily the Task Force relied on Fastow's testimony, how definitively prosecutors bolstered his credibility, and how they went to prevent defendants from gaining access to evidence that would have impeached Fastow. At a minimum, the circumstances create a strong enough inference of a side deal assuring Fastow of favorable treatment that discovery should have been ordered into the existence of any such agreement, even if tacit or unspoken.

2. *The Task Force Improperly Refused To Produce Interview Notes And Destroyed Draft FBI 302s Reflecting Fastow's Interviews.*

The Task Force protected Fastow's testimony from scrutiny in another, equally unlawful way: although it interviewed Fastow scores of times over a two-year period, it refused to produce any interview notes and it deleted all draft 302s documenting the substance of those meetings.[103]

To ensure the defense could not scrutinize Fastow's many statements carefully, the Task Force literally rewrote them. According to the Task Force, "[n]o cooperator in the history of federal white-collar crime investigations was debriefed more thoroughly and extensively than Mr. Fastow," as "well in excess of 1,000 hours" were spent interviewing him. R:41435. Yet—unlike virtually *every other witness* in this case—the Task Force did not prepare individual 302s reflecting what Fastow said at each interview. Instead, the Task Force generated and produced just two "composite" 302 summaries—violating internal FBI policies in the process—combining different interviews and making it impossible to learn how Fastow's story changed and evolved over time. R:11660-71; Def. Mot. Re: Fastow Jencks Production Exs. C, D (Dec. 16, 2005) (sealed) ("302s").

The main Fastow 302 is especially extraordinary. *Id*. It runs 160 pages and purports to record statements Fastow made over the span of a year, during an unspecified number of interviews. It comes complete with a three-page table of contents and is broken into nine thematic "Sections." The structured narrative carefully attempts to smooth out inconsistencies among Fastow's statements and even labors to neutralize seemingly exculpatory statements with arguments why

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[103] A "302" is the official FBI form for memorializing witness interviews and

the statements are not exculpatory. R:11663-64; 302s. The 302 bears no reality to how any witness normally talks, acts, or thinks during FBI interviews.

Skilling moved for an order requiring production of the raw interview notes and preservation of all notes and drafts of the 302s, to compare the real-time evolution of Fastow's statements with the polished composite version. R:11660-71. Nobody could dispute the importance of even seemingly minor inconsistencies in Fastow's story, given the centrality of Fastow's testimony and the profound significance of just a word or two here or there—as in, for example, precisely what Skilling said to Fastow—if anything—about alleged guarantees, when he said it, and exactly how he said it. *United States v. Brown*, 303 F.3d 582, 590-91 (5th Cir. 2002) (discrepancy between raw notes and 302s subject to *Brady* disclosure); *United States v. Pelullo*, 105 F.3d 117, 119-20 (3d Cir. 1997) (same).

In response, the Task Force steadfastly refused to produce the notes, and announced that it had *destroyed all the draft 302s*, including apparently even deleting of electronic versions from computer hard drives. R:11922, 11927, 14079-80. There was simply no legitimate explanation for this. It did not happen by accident. It reflected a concerted plan to identify and destroy all notes, hard copies of drafts, and all electronic documents that went into the creation of the composite 302—to prevent Skilling from getting valuable, important evidence to

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statements. FBI, Legal Handbook for Special Agents §7-13 (1998).

challenge Fastow's testimony. R:12604-06. And the Task Force broke from its usual 302 protocols to do so.[104]

The Task Force's extraordinary conduct concerning Fastow's witness statements violated Skilling's Sixth Amendment right to cross-examine Fastow vigorously, and severely prejudiced his defense, depriving him of the fair trial to which he was entitled.[105]

3. *The Task Force Impermissibly Refused To Turn Over Known Exculpatory Evidence In Its Possession.*

The Task Force's approach to the disclosure of documentary evidence likewise violated Skilling's due process rights, because it resulted in the effective concealment of a huge quantity of exculpatory evidence from Skilling.

The Task Force compiled an enormous "open file" of evidence, consisting of *several hundred million* pages of documentary evidence. *E.g.*, SR1:191-195;

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[104] The district court ultimately ordered the Task Force to produce the original notes *in camera*, and refused to allow Skilling access to them unless Fastow's testimony conflicted with the notes. R:14070-80. Skilling objected to this procedure, since it would not—and did not—enable Skilling to examine Fastow about the evolution of his story over time. R:14077-80, 21061-63. Furthermore, given the complex nature of the subject matter and Skilling's heavy pre-trial preparation, Skilling and his counsel were far better suited to discern the relevance and use of the notes, exculpatory statements within them, and statements that could be used to impeach Fastow.

[105] If there were any doubt that Fastow's testimony was carefully staged—and that Skilling was denied the *Brady* and *Giglio* materials he needed to impeach Fastow—one only needs to read "Behind the Scenes of the Enron Trial: Creating the Decisive Moments," an account of Fastow's testimony by the Task Force prosecutor responsible for writing the script. Hueston, *supra*, at 211-21.

R:1528-56, 1713-44. The sheer volume of evidence made it impossible for Skilling's defense team to review the open file in its entirety—it would have taken scores of attorneys, working *around-the-clock* for several *years* to complete the job. R:1543. In light of this difficulty, the Task Force promised to "cull out" all exculpatory evidence. SR1:209-11; R:1536, 1875, 5741-42, 6713, 9461. But in over two years, the Task Force never produced a single *Brady* document. R:9461.

This is not to say the Task Force had no exculpatory documents in its possession. It had many. *E.g.*, R:987-88, 1545-46, 4561-62, 5738-40; In Camera Submission (May 17, 2005) (sealed). Rather, the Task Force repeatedly argued that its *Brady* obligations were satisfied simply by giving Skilling access to the open file. R:1858-61, 4509-10, 9646-49. The district court agreed, holding "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, *with any reasonable diligence*, he can obtain himself." R:4529, 4534, 9787.

The court's ruling erred by failing to acknowledge, apply, or give any meaning to the phrase "reasonable diligence." Finding *Brady* materials in a case involving hundreds of millions of pieces of paper—the overwhelming majority of which Skilling had never seen—was not a matter of diligence, it was a matter of blind luck. *U.S. v. McVeigh*, 954 F.Supp.1441, 1443-50 (D. Colo. 1997); *Banks v. Dretke*, 540 U.S. 668, 695-96 (2004). Open file discovery has its place, in cases involving tens or even hundreds of thousands of pages of discovery or when the defendant is familiar with the germane evidence. *U.S. v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997) (500,000 pages; defendants had personal knowledge of exculpatory evidence); *U.S. v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002) (single computer; defendant's expert made him aware of exculpatory evidence months before trial).

By contrast, the use of an "open file" discovery in a case challenging virtually all of Enron's business practices over a several year period, and in a case involving close to *one billion* pages of discovery, was tantamount to no disclosure at all. A needle hidden inside a mountainous haystack may as well be sealed in a vault, after all. The Task Force's unjustifiable refusal to provide Skilling exculpatory documents unfairly prejudiced Skilling's defense, tainted the convictions, and requires a new trial, with fair and adequate disclosures.

V. SKILLING'S SENTENCE IS UNREASONABLE AND MUST BE VACATED.

"In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." *Rita v. U.S.*, 2007 U.S. LEXIS 8269, *28-29. This is such a case.

On October 23, 2006, when Skilling stood before the district court to be sentenced, he was the only executive from Enron's "50th Floor" whose fate remained uncertain and, to many people, he was the sole remaining person who could answer for all that went wrong at Enron. Causey, Enron's Chief Accounting Officer, pled guilty on the eve of trial and agreed to serve between five and seven years in prison. Fastow, the CFO, had been sentenced to six years. Lay died before sentencing. Houstonians had decried Fastow's sentence as a "complete travesty" and some felt that, "by dying, [Lay] ha[d] cheated … society of its debt, both financial and penal." R:38402, 38724. "Cheated" of its pound of flesh, Houston demanded it from Skilling. R:42049, 42060, 42103. The district court sentenced the 53-year old defendant to close to a life sentence—or 292 months (24.3 years).

To put its severity in perspective, Skilling's sentence is 18 years longer than the longest sentence given to any other Enron executive; 12 years longer than the average sentence for leaders of massive drug conspiracies; 10 years longer than the average federal sentence for armed robbers with extensive felony records; and six years longer than the average federal sentence for first-degree murder. R:41447; U.S. Sentencing Comm'n, 2005 Sourcebook of Federal Sentencing Statistics at 252, Table 14 (2006). Even a former Task Force Director criticized Skilling's sentence as "too severe" and "hardly seems necessary to satisfy the traditional sentencing goals of specific and general deterrence—or even retribution."[106]

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[106] Weissmann & Block, *supra*, at 286; Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1626

Federal appellate courts have a duty to review criminal sentences and set aside those they find to be "unreasonable." *Rita*, 2007 U.S. LEXIS 8269, *7. Appellate courts may presume a sentence within the recommended Sentencing Guidelines range is reasonable *only* if two requirements are met:

First, the sentence must "reflect[] a proper application of the Sentencing Guidelines." *Id*. at *16. Put another way, when a sentence is premised on a misapplication of the Guidelines, the Guidelines cannot justify the sentence.

Second, the district court must exercise independent judgment about the appropriate sentence for the individual case before it, in accord with the statutory sentencing objectives set forth in 18 U.S.C. §3553(a). *Rita*, 2007 U.S. LEXIS 8269, *17-19; *id*. at *50 (Stevens, J., concurring) ("*Booker*'s standard of review allows—indeed, requires—district judges to consider all of the factors listed in §3553(a) and to apply them to the individual defendants before them."). The Guidelines reflect a "wholesale" judgment about the application of the §3553(a) sentencing factors in "the mine run of cases," but the district court has a duty to apply those factors at "retail," *i.e.*, to the specific factors of the case before it. *Id*. at *19-23. Where the district court failed to make an individuated judgment, or where it has attempted to do so but its judgment about appropriate punishment fails to adhere substantively to §3553(a)'s objectives, the appellate presumption of

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(2007) (former Task Force member: "law governing sentencing of corporate reasonableness is rebutted and the sentence is unlawful. *Id*. at *19-23, 51 (Stevens, J., concurring) ("Our decision today makes clear … that the rebuttability of the presumption is real.").

As shown below, Skilling's 24-year sentence is contrary to both of the foregoing principles. In numerous respects, it both fails to reflect a reasonable, individuated judgment about how the general sentencing factors should be applied, and fails to apply the specific Guideline factors correctly. Even if one or all of Skilling's convictions are not reversed, his sentence must be reversed, and a new sentencing ordered.

A. Skilling's Sentence Reflects An Unlawful Disparity.

One of the most important statutory factors the district court was required to apply in sentencing Skilling was to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). Eliminating unjustified disparities "reach[es] towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. U.S.*, 518 U.S. 81, 113 (1996). Acknowledging these principles, this Court has specifically emphasized the importance of avoiding unwarranted disparity in sentencing. *U.S. v. Guidry*, 462 F.3d 373, 378 (5th Cir. 2006) ("[T]he district court failed to consider that the

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offenders has gone astray").

sentence it imposed … would create significant disparity between Guidry and other defendants with similar criminal histories convicted of similar criminal offenses. Such failure is [a] reason why this sentence is unreasonable.”). Indeed, eliminating sentencing disparities and establishing general uniformity in criminal sentences was in large measure the *very point* of the Guidelines. Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 FED. SENT. R. 116 (1993) (“Of all the problems that inspired Congress to establish [G]uidelines, none was as urgent as inconsistency in sentencing.”).

In this case, the sentence imposed by the district court’s application of the Guideline factors resulted in an extraordinary, indefensible disparity between Skilling’s sentence and that of similarly situated defendants—including a defendant with whom he was *identically* situated, Richard Causey. Skilling and Causey were both among Enron’s five highest-ranking officers and were charged with the same crimes for the same conduct in the same case before the same judge. The indictment describes both Skilling and Causey, along with Lay, as the “principal operators” of the conspiracy. R:848; RE-3. Skilling was charged with 25 substantive counts and 10 counts of insider trading. In 24 of Skilling’s 25 substantive counts, Causey was a named a co-defendant. Causey was named as a defendant in 10 additional counts where Skilling was not named, including offenses that occurred after Skilling resigned from Enron. R:877-902; RE-3. In the words of the Task Force during closing argument, "Mr. Causey was up to his eyeballs in fraud." R:36537.

Despite their virtually equivalent status in the case—and despite being sentenced by the very same judge—Skilling and Causey received startlingly different sentences. Skilling received 24.3 years; Causey 5.5. Given the statutory command to "avoid unwarranted sentence disparities," the district court was required to articulate a valid justification for the tremendous disparity. *Guidry*, 462 F.3d at 378. The court did not and could not do so.

The Guidelines, statutes, and cases recognize that a certain level of disparity between cooperating and non-cooperating defendants is acceptable. *U.S. v. Duhon*, 440 F.3d 711, 721 (5th Cir. 2006). However, unlike virtually every other case where a defendant raises an unwarranted disparity claim, cooperation is *not* an issue here. When Causey pleaded guilty, he and the Task Force agreed that the maximum sentence to which he would be subject was seven years—*without any cooperation whatsoever*. JKS-7:20-22. When the court accepted Causey's Rule 11(c)(1)(C) plea, it agreed to the seven-year limitation and thus, by definition, determined that for Causey seven years was "sufficient, but not greater than necessary" to further the goals of sentencing. FED. R. CRIM. P. 11(c)(1)(C); 18 U.S.C. §3553(a).

Nor does the Guidelines' "acceptance of responsibility" factor explain the difference. For one, Causey fought his charges for years, pled guilty literally on the eve of trial, did not testify against Skilling or Lay, and formally accepted responsibility for only one of the 34 counts against him. Even if Causey were entitled to the full three-point downward adjustment, instead of two, U.S.S.G. §3E1.1, the difference in sentence would be at most three or four years, not 19.

Unable to find a legitimate basis to justify sentencing Skilling to nearly 20 years more than Causey, the court seized on an impermissible ground: the fact that Skilling had chosen to go to trial, and Causey had not.

> SKILLING'S ATTORNEY: [W]e did a count and I think [Causey's] name came up over … a couple thousand times in the course of the trial. And I think we did the math and it was once every 15 minutes. I mean, he was a major person that the government was accusing of wrongdoing throughout the entire case and the way that they connected up Andy Fastow to Jeff Skilling. And I'm suggesting that it's fundamentally unfair to have a man who's implicated in the same conduct gets 7 years and someone who decides to go to trial and mount an appropriate defense gets 25, 30, or even longer.
>
> *THE COURT: But if he wins, [Skilling] might get nothing. Whereas Mr. Causey has seven years, [he has] no chance to—*
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> SKILLING'S ATTORNEY: Well, but [Causey] got three levels for [acceptance of] responsibility, so you can add that into -- you'd come up with a sentence, in my view, Judge, of about seven to ten years. I think that's what's appropriate for Mr. Skilling ….

R:42174-75.

The district court's justification for the stark disparity between Skilling's 24-year sentence and Causey's sentence—that Skilling asserted his right to trial, and Causey had not—has no basis in the federal sentencing statutes or Guidelines and is constitutionally impermissible, because it punishes Skilling for exercising a *constitutional right*. This Court and many others have long held that a defendant "cannot be punished by a more severe sentence because he unsuccessfully exercised his constitutional right to stand trial rather than plead guilty." *Baker v. U.S.*, 412 F.2d 1069, 1073 (5th Cir. 1969).[107] But that is exactly what happened here, as evidenced by the court's own words.

To be fair, historically courts have awarded a "discount" to defendants who save the government the time and expense of going to trial by pleading guilty. However, there is a statutory and constitutional line between an acceptable "plea discount" and an unacceptable "trial penalty." In the pre-Guidelines regime, individual courts possessed virtually unlimited discretion in toeing the line between "plea discount" and "trial penalty." Not surprisingly, approaches and

[107] *U.S. v. Hutchings*, 757 F.2d 11, 14 (2d Cir. 1985) ("The 'augmentation of sentence' based on a defendant's decision to 'stand on [his] right to put the government to its proof rather than plead guilty' is clearly improper."); *U.S. v. Derrick*, 519 F.2d 1, 4 (6th Cir. 1975) ("[I]t is improper for a trial judge to impose a heavier penalty because a defendant in a given case has availed himself of his constitutional right to a fair trial by jury."); *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982) ("[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."); R:38216.

discounts varied widely, but courts generally found discounts of "thirty to forty percent" permissible. Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 961 n.4 (2005); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28 (1998). The disparity here between Skilling's sentence and Causey's ultimate 5.5 year sentence is over 440%.

The Sentencing Commission criticized the variability that existed before the Guidelines and, through §3553(a)(6) and Guidelines provisions, sought to "regularize the guilty plea benefit" in order reduce disparity. U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 29-30 (2004), http://www.ussc.gov/15_year/15year.htm. The Sentencing Commission "considered, but rejected, a proposal to give the sentencing judge considerable latitude to give a sizeable sentence reduction because of the entry of a guilty plea." *Id.* "Doing so," the Commission concluded, "would have risked the introduction of considerable unwarranted disparity and unpredictability into the system." *Id.*

A close to two-decade, 440% disparity cannot be justified in this case. It could not be justified even if the evidence of Skilling's guilt was "overwhelming," which it was certainly not, and it was foolhardy for him to have gone to trial. *U.S. v. Frost*, 914 F.2d 756, 774 (6th Cir. 1990). Indeed, what makes the trial penalty so unjust in this case is that, notwithstanding the errors described *supra*, Skilling's choice to go to trial resulted in acquittals on nine of the charged counts. *U.S. v. Derrick*, 519 F.2d 1, 4 (6th Cir. 1975) ("it is improper for a trial judge to impose a heavier penalty because a defendant in a given case has availed himself of his constitutional right to a fair trial by jury," especially where by going to trial, defendant obtained a directed verdict on one count and an acquittal on another).

To be clear, we do *not* contend that courts are categorically forbidden from treating differently defendants who go to trial and those who do not. But courts plainly cannot impose a greater sentence on a defendant *because* he chose to go to trial, which is exactly what happened here. Nor may courts, in drawing the line between acceptable plea discount and unconstitutional trial penalty, sentence the defendant who went to trial to a sentence almost *five times* greater than the sentence imposed on his similarly-situated co-defendant. Wherever the constitutionally permissible line is drawn, the court exceeded it.

The Eighth Circuit's admonition in *U.S. v. Lazenby*, 439 F.3d 928, 933-34 (8th Cir. 2006), could well have been written for the sentence in this case:

> Prior to *Booker*, the district court lacked discretion to remedy … Guidelines-created disparity. *Booker* gave courts discretion to cure such an injustice …. Perfect parity among the sentences imposed on the various members of a criminal conspiracy is no doubt impossible

> to achieve, given the complexity of the task. But the extreme disparity in these two sentences not only fails to serve the legislative intent reflected in §3553(a)(6), it also suggests an arbitrary level of decision-making that fails to "promote respect for the law," §3553(a)(2)(A).

Lastly, and to be clear, the need for redress in this case goes well beyond Jeffrey Skilling. The extraordinary sentence he received wrongly discourages other defendants who have plausible grounds for acquittal from pressing their cases to a jury, because they have been forewarned: exercise your constitutional rights, and you will suffer for it. Indeed, the same district court's harsh sentence in *U.S. v. Olis*, 429 F.3d 540, 543-49 (5th Cir. 2005), which this Court reversed, served as a stark warning to executives everywhere and may have even motivated guilty pleas in this case. R:38438-39, 40305.

Skilling's sentence is unreasonable. It cannot stand.

B. The Sentence Unlawfully Punishes Skilling For Causing Enron's Bankruptcy.

Skilling's sentence is also unreasonable because it is based on the district court's assumption—unproved at trial and untrue in fact—that Skilling's conduct caused Enron's bankruptcy and the consequent losses to Enron employees and shareholders. The bankruptcy was the court's sole reason for adhering rigidly to the sentence dictated by Guideline §2F1.1 rather than depart from or modify the Guideline based on the specific facts of this case. Because the court's sole reason for applying the Guideline range was a demonstrably improper one, the court effectively had *no* individuated reason for imposing the Guideline sentence on Skilling, rendering the sentence unreasonable under *Booker* and *Rita*.

1. *<u>There Was No Evidence That Skilling Caused Enron's Bankruptcy.</u>*

The Task Force's case was never about whether Skilling's conduct caused Enron's collapse, and because the government disclaimed any need or desire to carry the burden of proving that connection, no trial record was established to support the connection.

The indictment did not allege that Skilling's conduct caused Enron's bankruptcy. R:842-907. When it came time for trial, the Task Force could not have been clearer that the bankruptcy was irrelevant to its charges against Skilling. Prosecutors insisted to the court that "the Defendants are not charged with intending to cause the bankruptcy of the company, and they're also not charged with causing the stock price to decline." R:16839-40. They were also explicit in argument to the jury:

> This case is not about what caused the bankruptcy of Enron. You don't have to worry about that. You don't have to think about that during your deliberations. It's not about what caused the bankruptcy.

R:18607-08, 36449.

Likewise during trial, when Skilling and Lay sought to show that their actions had *not* caused the bankruptcy—to correct any latent misimpression among jurors (a prescient concern, as the court's sentencing later proved)—relevance objections by the Task Force frustrated their efforts. Early on, the court warned Skilling's counsel that there is "nothing in the indictment about the cause of Enron going into bankruptcy," and "I'm not going to have anybody question about the cause in Enron's bankruptcy, unless you can show me some relevance." R:18607. When defense expert Chris Barry later attempted to explain that Enron's demise was the result not of criminal conduct, but a "classic run-on-the-bank" caused by Enron's low credit rating, negative publicity, poor response to the publicity, and escalating cash calls from counterparties—much like that affecting mortgage brokers in recent weeks—the Task Force "object[ed] to this as irrelevant, what caused the downfall of Enron." R:34402. The court sustained the objection, but also expressed its own "skepticism" about the testimony in the presence of the jury. R:34402-442. Even still, several government witnesses did refer to the bankruptcy—and all conceded that it *was not foreseeable when Skilling resigned from the company in August 2001*. R:15935, 19102, 24456; SR3:3632.

There was, in short, no trial evidence supporting an inference that Skilling's conduct caused Enron's bankruptcy, nor was Skilling given a meaningful opportunity to demonstrate the falsity of that common assumption.

2. *The Trial Court Erred By Relying On The Bankruptcy In Refusing To Depart From Or Modify The Guidelines-Dictated Sentence.*

In sentencing Skilling, the trial court departed from its rulings at trial and relied on Enron's bankruptcy and consequent losses to Enron employees and shareholders. The district court sentenced Skilling according to Guideline §2F1.1, which calculates a sentence based on the "loss" suffered by the victims of the defendant's conduct. The district court tied its reliance on §2F1.1, and its loss calculation thereunder, directly to the bankruptcy, but in so doing all but explicitly conceded its own error:

> The illegal conduct of Mr. Skilling misled the investing public and kept the market price of Enron stock artificially high. When the marketplace discovered the falseness of the defendant's statements, a loss of confidence occurred as to Enron's true earnings and cash flow and as to the credibility of senior management, as evidenced by the decline in share price during the second half of 2001. This loss of confidence curtailed Enron's ability to obtain credit, which prevented Enron from engaging in wholesale gas and power transactions. *Although not an issue in this criminal prosecution*, this ultimately led to Enron's bankruptcy, and the stock held by the two employee plans became worthless.

R:42116, 42177 ("[A]s the many victims of his crime have so poignantly explained, [Skilling's] crimes have imposed on hundreds, if not thousands, of people a life sentence of poverty, when they anticipated instead a secure retirement."). The chain of causation described by the court plainly mirrors public impressions of what happened at Enron, but it does not reflect the facts and—more importantly—it is not supported by the record, as the court's own statement concedes.

The court's erroneous decision to connect Skilling's sentence to Enron's bankruptcy arose in direct response to Skilling's submission that the full sentencing range dictated by Guideline factor §2F1.1 should not be applied rigidly to his individual case. The punishment provided under that factor—which broadly encompasses "Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States"—may make sense for "traditional" financial crimes, where the offender intends to cause loss and harm to the victim—*e.g.*, the bunko artist who swindles a senior citizen out of his retirement checks; the trustee who skims cash from the accounts of the estate; or the corporate CFO, like Andy Fastow, who steals $50 million from the company that employs him. As courts and commentators have recognized, however, the range dictated by §2F1.1 cannot reasonably be applied in an individual case without considering whether the defendant intended to cause the loss in question, because §2F1.1 itself focuses only on the total quantum of harm, with no punishment gradations to account for mens rea. Consequently, a rigid application of §2F1.1 to cases lacking an intent to do harm results in punishments that are far too harsh, and divergent from the objective of criminal law. *E.g.*, *U.S. v. Ranum*, 353 F.Supp.2d 984, 990 (E.D. Wis. 2005); *U.S. v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006); Weissmann & Block, *supra*, at 286.[108]

[108] Frank O. Bowman III, *Settling for a Scapegoat*, LEGAL TIMES, Jan. 8, 2007 ("The rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense…. [S]entences have become too harsh…. [U]nder current law, a corporate officer, stockbroker, or commodities trader engaged in a stock fraud causing a loss as low as $2.5 million could be subject to a [G]uidelines sentence of life imprisonment.").

In the post-*Booker* advisory regime, courts have begun to correct for this failing. In the last two years alone, eight high-ranking executives from major corporations were convicted and sentenced by federal courts on charges similar to those here. *Every one of them received a below-Guidelines sentence*.

Name	**Company**	**Looting (Y/N)**	**Loss Calculation**	**Guidelines Level and Sentencing Range**	**Sentence**
J. Rigas	Adelphia	Y	$2+ billion (PSR)	46 (Life)	15 years
T. Rigas	Adelphia	Y	$2+ billion (PSR)	46 (Life)	20 years
Wittig	Westar	Y	$1.65 billion (court)	43 (Life)	18 years
Lake	Westar	Y	$1.65 billion (court)	43 (Life)	15 years
Shelton	Cendant	N	$3+ billion (govt)	32 (121-51 mos.)	10 years
Crumpler	Health South	N	$7+ billion (PSR)	15 year statutory max	8 years
Adelson	ImPath	N	$260 million (court)	43 (Life)	3.5 years
Ebbers	WorldCom	N	$2.5 billion (PSR)	42 (30 years-Life)	25 years[109]

Skilling's Sentencing Mem. at 131-39 (Oct. 10, 2006) (sealed).

The common thread running through these cases is judicial recognition that the Guidelines—due to an emphasis on "loss" that may make sense in the typical fraud, deceit, or theft case but not necessarily in a public company "false

[109] Dennis Kozlowski and Mark Swartz, the CEO and CFO of Tyco, were tried in New York State Court for, *inter alia*, stealing more than $100 million from Tyco. Kozlowski and Swartz were convicted and received sentences of 8.5 to 25 years. Each is parole eligible in seven years. http://washingtonpost.com/wp-dyn/content/article/2005/09/19/AR2005091900246_pf.

statement" case—inadequately gauge the moral and legal culpability of the defendant. As one court explained:

> [O]ne of the primary limitations of the [G]uidelines, particularly in white-collar cases, is their mechanical correlation between loss and offense level … In the present case defendant did not act for personal gain…. [He] was reckless with this employer's money. But that is not the same as stealing it.

Ranum, 353 F.Supp.2d at 90.

Adelson made the same point. There, as here, a corporate executive was convicted of making false statements about his company to project a vision of "ever forward" and "to keep the stock high." Skilling's Sentencing Mem. Ex. 144 at 30 (Oct. 10, 2005) (sealed). Despite hundreds of millions in asserted loss under §2F1.1, the life sentence recommended by the [G]uidelines was, in the court's words, an "utter travesty of justice … result[ing] from the [G]uidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." *Id*. at 512. "[W]here, as here, the calculations under the [G]uidelines have so run amok that they are patently absurd on their face, a court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences." *Id.* at 515. Stepping outside the wooden box of the Guidelines, the court sentenced Adelson to a term of 3.5 years.

Such flexibility was required here. The point is not that a district court *must* impose a below-Guidelines sentence whenever a corporate executive is convicted of making a false disclosure. But under *Booker* and *Rita*, the court must, at a minimum, apply the statutory sentencing factors individually to the case before it with no presumption in favor of the Guidelines' range, and where that range results in a seemingly unreasonable sentence, the court must justify its refusal to apply a below-Guidelines sentence. *Supra* at 209-10.

The problem here was that the district court's *only* justification for refusing to depart from or modify the abstract §2F1.1 sentence to account for Skilling's lack of intent was the supposed "fact" that Skilling caused Enron's bankruptcy. Responding to Skilling's argument that because of his lack of intent to harm Enron's shareholders, application of §2F1.1 would be improper in this case, the court specifically cited the connection between Skilling's acts and the bankruptcy:

> THE COURT: But your argument is like a defendant is charged with arson of a commercial property to collect on insurance and it turns out unbeknownst to the defendant that there were people in the property who were killed in the fire. You could argue, "Well, he only intended to burn the building. He didn't intend that those people who were there unbeknown to him would be killed." Certainly in that situation you would not deny I should consider the death of those three victims?

R:42171. There are several errors in that reasoning. Most important, the "fact" that Skilling caused the bankruptcy—the "fire" in the court's analogy—was not a fact judge or jury could have found on this record, as already discussed. It is thus as if the court had *no individuated reason at all* for applying the full §2F1.1 range to this case, but simply did so because that is the range generically mandated by the Guideline for fraud cases of this kind. That is error under *Booker* and *Rita*.

If anything, the arsonist example shows why §2F1.1 did *not* apply to Skilling's case: while the arsonist obviously intended at least to cause the fire that killed the people inside the building, *nobody contended Skilling intended to cause the bankruptcy that harmed the shareholders here*. Thus, there was no justification for refusing to depart from §2F1.1. R:42171.

In short, no record evidence supported the court's finding that Skilling caused the metaphorical fire in this case, nor did anybody even *contend* that Skilling intended to cause harm to Enron of any kind. The court therefore lacked the individuated basis, required by *Booker* and *Rita*, for rigidly applying to Skilling a Guideline sentence range that makes sense only for the grifters, con men, and swindlers—like Andy Fastow—who steal from others and intend to cause their victims harm.

C. The Sentence Rests On A Factually And Legally Erroneous Application Of The Guidelines' Four-Point "Financial Institution" Enhancement.

Skilling's sentence also rests on a demonstrably incorrect application of the Guidelines' enhancement for "substantially jeopardizing the safety and soundness of a financial institution." U.S.S.G. §2F1.1(b)(8)(A). Adopting a novel definition of “financial institution” proposed by the Probation Department for the first time *just days* before sentencing, R:42116-17, Govt. Sentencing Mem. at 15-18 (Oct. 10, 2006) (sealed), the district court construed the enhancement as applying to losses accruing to 401(k) plans and employee stock option plan (ESOP) as a result in stock-price declines caused by the defendant. That four-point enhancement, *by itself*, increased Skilling’s recommended Guidelines range by roughly nine years. U.S.S.G. Sent. Table (offense level of 36 yields range of 188-235 months; level 40: 292-365 months).

The court’s application of the “financial institution” enhancement was wrong for two reasons. First, the enhancement applies only when the “institution” was placed in “substantial jeopardy” of becoming insolvent. Guidelines §2F1.1(b)(8)(A), App. Note 20. The trial court’s theory that Skilling’s conduct placed Enron’s 401(k) and ESOP in substantial jeopardy of insolvency rested entirely on its unsupported and incorrect assumption that the conduct caused Enron’s bankruptcy. R:42116; *supra* at 218-21. Because the court relied on an erroneous factual assumption in applying this factor, the sentence must be reversed. *U.S. v. Castillo*, 430 F.3d 230, 238-39 (5th Cir. 2005).

Second, the district court’s legal holding that Enron’s ESOP and 401(k) constituted “financial institutions” within the meaning of the enhancement is unprecedented and wrong. In the 20 years §2F1.1(b)(8)(A) has been on the books, no court anywhere has held that 401(k) plans and ESOPs are "financial institutions" under the enhancement. Recent cases confirm the opposite.[110] And indeed, even in other Enron cases involving the very same conspiracy and losses alleged here, the Task Force affirmatively agreed that 401(k) losses did *not* implicate the financial institutions enhancement.[111]

The reason no court has ever held that ESOPs and 401(k) are not "financial institutions" under the enhancement is obvious: that reading has no support in the text, history, or logic of the provision. Application Note 19 to the provision specifies a detailed list of entities qualifying as "financial institutions" for purposes of the enhancement. Neither 401(k)s nor ESOPs are on the list:

> [A]ny institution described in 18 U.S.C. §§20, 656, 657, 1005–1007, and 1014; any state or foreign bank, trust company, credit union,

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[110] In *Adelson*, the court refused to impose the financial institution enhancement even though Adelson, like Skilling, had been convicted of lying to the public. Skilling's Sentencing Mem. Ex. 141, at 30). In *Ebbers*, the government did not even seek the four-level enhancement for jeopardizing a financial institution even though WorldCom, like Enron, was a public company whose employees' 401(k) plans were devastated by the company's bankruptcy. Instead, the government pursued a different two-point adjustment that "applies if the defendant has received gross receipts of more than a million dollars from a financial institution as a result of the offense." Govt. Sentencing Mem. Ex. 13, at 34. The trial court refused to apply any financial institution adjustment, and the Second Circuit affirmed. *U.S. v. Ebbers*, 458 F.3d 110, 117 (2d Cir. 2006).

[111] Tim Belden pled guilty to devising fraudulent energy schemes that inflated Enron's profits, and Mark Koenig pled guilty to aiding and abetting the very same securities fraud for which Skilling was charged. The Task Force stipulated that neither Belden nor Koenig "substantially jeopardize[d] the safety and soundness of a financial institution." GX3210:2; GX3212:2.

> insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government.

§2F1.1(b)(8)(A), App. Note 19 (2000).[112]

The district court presumably believed that 401(k) and stock ownership are implicitly included within that definition as "any similar entit[ies]." R:42116-17. Specifically, because "employee pension funds" are "financial institutions," the argument goes, 401(k) and stock ownership plans also must be, because they are just another form of retirement benefit afforded to employees.

But 401(k)s and ESOPs are *materially different* from employee pension funds and every other entity identified in Application Note 19. Pensions are defined *benefit* plans and, along with the other entities listed in the application note, they possess two critical characteristics: (1) they "consist of a general pool of assets rather than individual dedicated accounts"; and (2) the institution's fiduciary has direct access to the communal assets. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999); LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 45 (3d ed. 2000).

By contrast, 401(k)s and ESOPs are defined *contribution* plans. Instead of pooling assets, they provide "for an individual account for each covered employee and for benefits based solely upon the amount contributed to the covered employee's account." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 607 (1993); LANGBEIN & WOLK, *supra*, at 49-51. More critically, while the employer may contribute to the employees' accounts by matching investments or offering company stock, the employer does not have access to the employees' accounts or make individual investment decisions on the employee's behalf. *Hughes Aircraft*, 525 U.S. at 439.

These distinctions make all the difference. A crooked fiduciary of a pension fund, bank, trust company, or mutual fund can divert money from the common fund to his own pockets. This is precisely the conduct the Commission sought to target through the financial institution enhancement. *E.g.*, *U.S. v. Lauer*, 148 F.3d 766, 767 (7th Cir. 1988). Redirection of beneficiaries' assets is impossible with 401(k) and ESOP plans, however, because the employer or fiduciary has no access to the individual accounts. Unsurprisingly, the Task Force never charged Skilling with diverting money from Enron employees' 401(k) or stock ownership accounts.

[112] This Court gives Guideline commentary like Application Note 19 "controlling weight if not plainly erroneous or inconsistent with the [G]uidelines." *U.S. v. Martinez-Mata*, 393 F.3d 625, 627 (5th Cir. 2004).

Instead, Skilling was charged with making false statements about Enron's true financial health. The trial court assumed that the revelation of the truth depressed the value of Enron's stock which, in turn, depreciated the value of the assets in individual employees' accounts, which, in turn, reduced the value of the employee's individual 401(k) and stock ownership plans. That is not the jeopardy to a "financial institution" the Commission had in mind, and not what the Guidelines say. If it were, every company, law firm, or business in the country that offered employees a 401(k) or ESOP retirement option—General Electric, IBM, PepsiCo.—would be a "financial institution" like foreign banks, credit unions, or insurance companies.

Nothing in the Guidelines, its commentary, or any case suggests the Commission intended the "financial institution" enhancement to have such a broad scope. To the contrary, in 2003, the Commission added a provision to the Guidelines to address offenses affecting or jeopardizing large public companies. U.S.S.G. §2B1.1(b)(12)(B)(ii), (iii) (enhancement for offenses that "substantially endangered the solvency or financial security of an organization that, at any time during the offense … was a publicly traded company [or] had 1,000 or more employees"). That provision confirms that the Commission did not intend courts to treat large publicly traded companies with 401(k)s or ESOPs—which is to say virtually all publicly traded companies stock ownership plans—as financial institutions under that distinct enhancement.

The district court also suggested that 401(k)s and ESOPs should be deemed "financial institutions" under the enhancement because ERISA classifies them as "pension plans." Second Addendum to PSR at 1-4; R:42115-17. But the Commission plainly *avoided* ERISA's definition. While Application Note 19 explicitly incorporates legal concepts and definitions from many statutes, it does not mention ERISA anywhere. And yet the Commission knew how to incorporate an ERISA definition when it wished. In Application Note 3 to U.S.S.G. §2E5.1 (2000) (concerning, *inter alia*, "Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan"), the Commission explicitly adopted ERISA's definition of "fiduciary of the benefit plan." It makes sense that ERISA, a civil statute aimed at broadly regulating *all* forms of employee retirement plans, employs an expansive definition of pension plan. 29 U.S.C. §1002(2)(A). As discussed above, the Commission's "financial institution" enhancement has a different, narrower objective—preventing fiduciaries of common asset pools from looting the pools and lining their own pockets—and thus ERISA's broad design has no application here.

Finally, if there is any doubt about whether the financial institution enhancement includes losses to 401(k) plans and ESOPs, that doubt must be resolved in Skilling's favor under the rule of lenity. *U.S. v. Inclema*, 363 F.3d 1177, 1179, 1182-83 (11th Cir. 2004) (rule of lenity requires resolution of ambiguity in Guideline provisions in favor of defendant).

Because Skilling's sentence rests on a legally erroneous construction of this enhancement, it must be reversed. *U.S. v. Duhon*, 440 F.3d 711, 716 (5th Cir. 2006).

D. The District Court Erred By Imposing A Two-Point "Obstruction of Justice" Enhancement.

Finally, Skilling's sentence improperly rests on a two-level upward adjustment for "obstruction of justice." That adjustment was based on testimony Skilling gave to the SEC, which the Task Force contended was false in material respects and obstructed its investigation into alleged fraud at Enron.[113] Although Skilling maintains his SEC testimony was completely truthful, its veracity is irrelevant here, for even taking as true the Task Force's view of the testimony, the district court was legally prohibited from relying on it in sentencing, because of assurances the SEC gave Skilling when he testified. U.S.S.G. §3C1.1; R:41887.[114]

On six occasions between December 2001 and January 2003—always pursuant to subpoena—the SEC deposed Skilling. R:11083 Exs. C-H (sealed).

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[113] The district court rejected the Task Force's claim that Skilling gave false testimony before the House of Representatives and at trial. R:41878, 42118-19.

[114] The propriety of the court's reliance on the SEC testimony is a legal question reviewed *de novo*. *U.S. v. Goldfaden*, 987 F.2d 225, 226 (5th Cir. 1993).

The SEC provided Skilling a form notice, known as a "Form 1622," informing him of his right to counsel, of his right not to testify, and that it was "routine" for the SEC to share information with other agencies, including the Department of Justice. R:11999-12003. Mindful of public demands for a criminal prosecution, Skilling asked and was assured his SEC testimony was part of a "fact-finding" inquiry and he was not, at the time, a "target" or "subject" of criminal investigation:

> SKILLING'S COUNSEL: Can I ask you then whether it remains true today what you in essence said in the cover letter when [Skilling] was first subpoenaed or asked to testify a long time ago, that this is a factfinding inquiry with no targets or subjects?
> SEC ATTORNEY: Yes, this is a factfinding inquiry. And, from the point of view of the Securities and Exchange Commission, we don't have any target subjects. And we have not yet made a decision one way or the other about what, in [sic] anything, we might do with Mr. Skilling. R:11083 Ex. H at 13 (sealed).

That statement was false. The SEC and the Task Force were working closely together to build a criminal case against Skilling. In January 2004, after indicting Skilling, the SEC touted its collaboration: "In the last two and a half years, *the [SEC]— working in close coordination with the Enron Task Force*—has systematically tracked down those responsible for the Enron debacle." R:11122-23.[115] The coordination was so extensive the district court ruled the Task Force

[115] FBI Agent and Task Force member Raju Bhatia testified that for years the Task Force "worked very closely with" the SEC and that he personally reviewed witness statements taken by the SEC. R:11126-29.

and SEC had merged into one prosecutorial team and the SEC had "acted on the [Task Force's] behalf" in connection with Skilling's criminal case. R:4525-26.

The government could not deny the collaboration between the DOJ and the SEC. It instead argued Skilling's SEC testimony was properly admitted at his criminal trial because the SEC's investigation was not "solely" to obtain evidence for a criminal prosecution and it had notified Skilling that his SEC testimony might be shared with other agencies. R:11941-44. The district court agreed. R:13049-50. Both were wrong.

It is true that government agencies may conduct parallel investigations and share information without fear that subsequent use of the information will be excluded. But what they may *not* do is "develop a criminal investigation under the auspices of a civil investigation," *U.S. v. Stringer*, 408 F.Supp.2d 1083, 1089 (D. Or. 2006), through concealment and misdirection. *U.S. v. Kordel*, 397 U.S. 1, 11 (1970), and its progeny make clear that the government must not mislead or lull an individual into thinking an investigation is only civil when, in fact, it is both civil and criminal. *Stringer*, 408 F.Supp.2d at 1089 ("It would be a flagrant disregard of individuals' rights to deliberately deceive, or even lull someone into incriminating themselves in the civil context when activities of an obvious criminal nature are under investigation"). Courts have held that evidence obtained under such pretenses may not be used against a defendant to prove guilt at his criminal trial.

Stringer, 408 F.Supp.2d at 1090; *U.S. v. Scrushy*, 366 F.Supp.2d 1134, 1137-40 (N.D. Ala. 2005); *U.S. v. Parrott*, 248 F.Supp. 196, 199-02 (D.D.C. 1965). It follows *a fortiori* that the same evidence cannot be used—as here—to enhance the defendant's punishment.

These precedents make clear that the use of Skilling's civil SEC testimony, obtained only after the SEC's false representation that Skilling was neither a target nor a subject of criminal inquiry, violated his Fourth and Fifth Amendment rights. So that Skilling could make an informed and knowing decision about whether to comply with the subpoena or refuse to testify, the SEC was required to inform him honestly whether it was working in concert or sharing information with the Task Force. One court recently described the constitutional dimensions of such notice:

> [T]he danger of prejudice flowing from testimony out of a defendant's mouth at a civil [SEC] proceeding is even more acute when he is unaware of the pending criminal charge…. When a defendant *knows* that he has been charged with a crime, or that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could later be used against him in the criminal case. When a defendant does not know about the criminal investigation, the danger of prejudice increases…. In that special situation the risk to individuals' constitutional rights is arguably magnified.

Scrushy, 366 F.Supp.2d at 1139-40.

Another case recently applied this principle to not only exclude testimony—but *dismiss the prosecution's case*—in circumstances indistinguishable from those here. In *Stringer*, the SEC and USAO worked together for many months, "communicated regularly," and "exchang[ed] information and discuss[ed] strategy." 408 F.Supp.2d at 1086. As here, the SEC subpoenaed Stringer to testify. Like Skilling, Stringer asked whether he was a target or subject of a criminal investigation. Like here, the SEC implied "no":

> STRINGER'S ATTORNEY: My first question is whether Mr. Stringer is the target of any aspect of the investigation being conducted by the SEC.
> SEC ATTORNEY: The SEC does not have targets in this investigation.
> STRINGER'S ATTORNEY: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.
> SEC ATTORNEY: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned. *Id.* at 1086-87.

The SEC's answers to Stringer's were more forthcoming than the SEC's answers to Skilling, and yet the court held that they "misled Stringer and his attorney into believing he was not a target and evaded the question about the USAO's involvement." *Id.* at 1089. The government's "strategy to conceal the criminal investigation from [Stringer] was an abuse of the investigative process" and its "tactic to move forward under the guise of a civil investigation[] violated [Stringer's] due process rights." *Id.* at 1088-89. Form 1622's boilerplate notification that the SEC "routine[ly]" shares information with Justice was utterly deficient in light of the "active role of the USAO in the SEC investigation" and the SEC's "evasive and misleading" answers to Stringer's direct inquiry. *Id.*; *U.S. v.*

Thayer, 214 F.Supp. 929, 933 (D. Colo. 1969) ("[T]he giving of the warning cannot have much significance where the defendant was, so to speak, then within the sights of the government and did not receive an explanation of the true import of the inquiry."). Based on the government's "grossly shocking and … outrageous" conduct, the court not only excluded Stringer's testimony from trial, it dismissed his indictment. *Stringer*, 408 F.Supp.2d at 1088-90.

If the government's conduct in *Stringer* warranted dismissal, its conduct here should have, at a minimum, prohibited the court from relying on Skilling's SEC testimony to increase his sentence. The court's reliance on that testimony impermissibly increased Skilling's Guideline range. The improper sentence that resulted must be reversed.

CONCLUSION

Under any fair analysis, Skilling's convictions should be reversed, and his case remanded with instructions either to dismiss or to retry the case in a different venue under lawful procedures with an properly instructed jury. In the alternative, Skilling's sentence should be vacated and the case remanded for resentencing in accordance with the law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to verify that true and correct copies of the following document (Brief Of Defendant-Appellant Jeffrey K. Skilling) has been filed via Federal Express and served by both Federal Express and electronic mail on this 14th day of September, 2007 on counsel listed below.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 58,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and this Court has granted Defendant-Appellant Jeffrey Skilling permission to file a principal brief not exceeding ___________ words.

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2003.

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