06-20885

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY K. SKILLING,
Defendant-Appellant.

REPLY 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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Our opening brief detailed how grave errors infected every critical part of the case against Jeffrey Skilling, from the theory of prosecution, to the selection of the venue and jury, to the instructions on the law, and to the evidence presented—and the evidence suppressed. Those errors were born of necessity, for they were the *only* way the Enron Task Force could secure convictions for what, at worst, were business judgments that, in hindsight, can be seen as mistakes, overly optimistic, or too fraught with risk. No matter how strenuously the Task Force urges, and no matter how defiantly it misstates the record and the law, those errors cannot be masked, justified, or explained away. There is only one just course. Those errors—all of them—must be acknowledged, and the 19 convictions they produced must be reversed.

STATEMENT OF THE FACTS—RESPONSE

Space limitations preclude a full recitation of the Task Force's distortion of the trial record. So that this Court may examine the sufficiency of the evidence, review for harmless error, and assess the overall cumulative error essential to deciding Skilling's appellate claims, we highlight key areas where the Task Force has presented a misleading account of the record.

Viewed in the most favorable light, the Task Force's case cannot withstand fair scrutiny. Despite the breadth of its attack, the Task Force can muster no coherent evidence that Jeff Skilling led or engaged in criminal conduct. Criminal

intent was wholly manufactured, largely from random snippets of vague testimony extracted from Skilling's former colleagues—Skilling had a "preference" to beat the Street; Skilling didn't like calling Enron a "trading" company; and Skilling asked, "What do you want to do?" Many of the charges rested on the notion that Skilling was too optimistic or opinionated in talking to stock market analysts. Other charges reduced to Skilling's supposed "bad thoughts" in supporting transactions that the Task Force *conceded* met financial, accounting, and disclosure rules. The glaring absence of criminal conduct forced the Task Force ultimately to condemn Skilling for failing to render "honest services" to Enron:

> *[M]ake no mistake*, they [Skilling and Lay] 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 do it appropriately.

R:37065 (Task Force closing argument; emphases added, *passim*, unless noted).

With an angry jury—misguided about the laws of criminality, deprived of access to exculpatory facts, and misled by overreaching tactics—convictions against Skilling were assured. A brief look at the Task Force's evidence, which centered on five areas of Enron's business, shows how weak its case was.

1. EES According to the Task Force, Skilling became aware of potential problems in Enron's retail segment, Enron Energy Services. Skilling appointed David Delainey to turn around the unit. Br. of U.S. as Appellee 12 ("U.S.Br."). In March 2001, Skilling met with Delainey and others—Wholesale accountant Wes

Colwell, Enron's CAO Rick Causey, and Wholesale executive Greg Whalley—to hear a presentation about transferring EES's risk management functions to Wholesale. When Delainey said the proposal lacked "integrity," Causey and Whalley "reacted with anger." *Id.* at 15. *Skilling did not.* Instead, he asked Delainey—the new head of EES—"What do you want to do?" As Delainey testified, Delainey expressed his approval to the resegmentation of functions, but only because he privately interpreted Skilling's simple question to mean, "Get in line." *Id.* Delainey testified to no other statements or actions by Skilling that supposedly influenced his decision, just the one question.

This evidence does not remotely show criminal conduct by Skilling. Nor did the Task Force begin to tell the whole story. Prominently omitted from its brief, for example, is any mention that the accounting for the resegmentation—even according to Delainey—was "rock solid" and complied with the disclosure rules. Br. of Def.-Appellant Jeffrey K. Skilling 47 ("Br.").

Faced with this evidence, the Task Force retreats to its mantra—there was "no business purpose" for the resegmentation. U.S.Br.15. This is a recurring default in the Task Force's attack on Enron's business decisions and actions. When it could find no fault with the accounting treatment and disclosures, the Task Force simply asserted there was no "business purpose." This is an unprincipled position, repeatedly taken by the Task Force to mislead the jury into finding

criminal conduct where none existed. Yet, in the case of the resegmentation, not even that baseless theory was supported by the Task Force's witnesses, who agreed that the transfer of risk functions from EES to Wholesale resulted in management improvements and efficiencies. Br.48.

Equally misleading is the Task Force's claim that the CPUC surcharge on energy sold to Enron customers caused an "immediate and dead loss" of $200 million. U.S.Br.14. The record showed there was only a *potential* loss, and the amount was thus booked—accurately—as reserves. Br.49. An analysis of the surcharge showed several possible outcomes for Enron, one of which was a net *gain*. DX33125. In fact, the final surcharge did not apply to most Enron customers, and much of the reserve was later released into earnings. Br.49. Treating the loss as "immediate and dead," in other words, would have improperly understated earnings.

2. EBS The Task Force's discussion of the evidence related to Enron Broadband Services badly misstates the record. Focusing on EBS losses during 2000 and early 2001, the Task Force argues that Skilling wrongly promoted a failed venture through false statements. But as everyone knew, EBS was a *start-up business*, founded at the beginning of 2000, and Skilling and others repeatedly disclosed it would lose money. Br.53-54. Expressing confident, hopeful, and even bullish views about a new venture is not criminal.

Skilling did not publicly equate EBS's success with earnings or revenues, as the Task Force suggests, but with EBS's output in trading volumes and total contract value. Br.53-54. Meeting those targets, Skilling told stock analysts, was the key to assessing EBS's prospects for long-term success. *Id.* Judged by those metrics, which the market was free to reject, EBS was meeting and exceeding expectations. *Id.* Even the Task Force's witnesses were "optimistic about EBS's chances for long-term success." *Id.* Kevin Hannon, the second-highest ranking executive at EBS and a key Task Force witness, agreed that market turmoil in could be good news for EBS, as Skilling had opined to analysts. R:20821-22. Hannon admitted he never told Skilling his public statements in March 2001—for which Skilling was charged in Count 24—were overly optimistic. R:20835-36.

The Task Force says Enron did not disclose its meager revenues from EBS's "core" businesses—bandwith intermediation and content services. U.S.Br.18. That is false—Enron's 10-Ks and 10-Qs plainly did so. Br.54-55. Also false is the Task Force's claim that EBS's 2Q 2000 earnings came mostly from the sale of its dark fiber network to LJM at a "price that no third party would have paid." U.S.Br.19. The Task Force fails to point out that LJM sold the same fiber to a third party for a *profit*. Task Force witnesses admitted the sale from EBS to LJM was a "negotiated arm's length transaction," with "heated" negotiations, and the price EBS received "could be considered a market price." R:17921-23, 21000-01.

The Task Force hints that EBS acted improperly by "monetizing" certain future revenue streams, U.S.Br.20-21 & n.2, but its own witnesses agreed that such monetizations—no matter how pejoratively described (*e.g.*, "crack," "nose candy")—are an appropriate and customary way for start-ups to raise cash and defray costs, and EBS's monetizations were fully disclosed. Br.54-55. It asserts Skilling set ambitious targets that EBS executives complained could not be met. U.S.Br.20. These sorts of complaints about the demands of leaders are as old as civilization; modern U.S. capitalism could never prosper without high—and even seemingly unreachable—goals. Ken Rice, the Task Force's chief EBS witness, admitted there was nothing wrong with Skilling's desire to reach higher targets; he had low-balled Skilling on budget estimates in the past; and the initial estimates Skilling allegedly adjusted upward were, in fact, too low. R:17617-24.

3. Wholesale The Task Force's discussion of Enron's Wholesale business perhaps best sums up its position on appeal—indeed, its entire case. The Task Force proclaims, with no record support, that describing Wholesale as a "logistics" company was securities fraud, because the description concealed that Wholesale engaged in "very risky" energy trading. U.S.Br.23. Using descriptive words like "logistics company" cannot possibly be securities fraud, and it reveals the depth of the Task Force's zeal to convict Skilling that it would prosecute him for such statements. Beyond that, the Task Force then intentionally refused to discuss the

crucial fact that Enron carefully calculated and tracked its "Value at Risk" or "VaR," which it always disclosed in its public filings. Br.43-45. Nor does it discuss Enron's massive infrastructure for transporting and delivering natural gas and electricity, *id*. at 42, 44-45, which is essential to understanding why Enron was not a speculative "trader," and why Skilling would not want it described as such.

Finally, though asserting Enron was in a "dire financial state," U.S.Br.101, the Task Force overlooks entirely that the Wholesale business generated $100 billion in annual revenues by 2001, was twice the size of its closest competitors, and was so successful that, according to the Task Force, it was forced to *hide* $1 billion of extra profits—enough to eclipse *all* the earnings generated from all the alleged frauds in this case. Br.17, 24-25; DX16704:3541, 3548; GX996:1153.

4. Reserves

4Q 1999 Penny. The Task Force claimed that Enron's earnings were changed from 30 to 31 cents shortly after the analysts' consensus estimate increased to 31 cents. The Task Force insinuates Skilling made the decision to add the extra penny in a conversation with Mark Koenig, Enron's head of investor relations, U.S.Br.34, but Koenig testified to nothing of the sort. R:15157-58. Of critical importance, the Task Force conceded below that it had *no evidence* of where the extra penny came from. R:36517. Yet even that concession was inaccurate: records from the Task Force's own exhibit list showed that Arthur

Anderson projected Enron's earnings at 31 cents days *before* the analysts' estimate shifted, and Paula Rieker, who worked with Koenig, testified that Andersen likely approved the adjustment. Br.37. In the end, the Task Force simply relied on Koenig's conclusory assertion: "Enron wrongly increased its earnings…based on its desire to meet the increase in the consensus estimate." U.S.Br.35.[1]

2Q 2000 Penny. Although the Task Force's discussion of 2Q 2000 bears little resemblance to the record, close inspection reveals one dispositive admission: Skilling's only involvement was to state a "preference" to beat analysts' expectations by two to three cents, rather than the one cent initially projected. U.S.Br.35. Unsurprisingly, the Task Force remained silent about much of the trial testimony of its key witness on this issue—Wes Colwell, Wholesale's CAO, who actually made the reserve adjustment that released $14 million into earnings. As Colwell admitted, Skilling *never* told him to release the reserve or do anything wrong, and Colwell *never* told Skilling or anyone his actions were improper. Br.40. Moreover, the Task Force overlooks Colwell's admission that the timing of the adjustment was not a problem because—as other witnesses elaborated—it took weeks to close the books and the figures routinely changed between the end of the quarter and final earnings release. Br.39.

[1] The Task Force has never explained how it could assert, in this case, its theory for the 31st penny, when it pursued a *totally different* theory in *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006). Br.37-38.

The Task Force's claim reduced to Colwell's opinion that reserves cannot be adjusted—*even accurately*—if influenced by a desire to meet earnings goals. To be clear, Colwell admitted that Enron's final reserve estimate accurately reflected its litigation exposure, *id.* at 40; the $14 million adjustment he made was immaterial, *id*.; and Enron was *over*-reserved in credit reserves by $40 million in 2Q 2000. R:19607-09. So, if anything, Enron *understated* its earnings.

4Q 2000 Reserve. The issue here is the flip side of 2Q 2000: Enron reserved too much, even though all agreed the amount reserved in 4Q 2000 *accurately* reflected significant risks and fluctuations in energy markets. Br.41. Once again, determined to find fault, the Task Force insists crimes were committed simply on the theory that Enron was motivated to understate its earnings, and Colwell hid this motivation from Andersen, even though the resulting earnings were accurately stated. U.S.Br.39. Motivations do not make financial statements inaccurate. The undisputed fact remains that the reserves were accurate *and never* released from a "cookie jar" to make up for weaknesses in later quarters. They were in line with market realities, and steadily reduced in 2001 as energy markets quieted. No Task Force witness disputed this. Br.41.

5. LJM The Task Force's discussion of the LJM entities and their transactions with Enron rests on a profound distortion of the applicable accounting rules and regulations, underlying economics and business rationale for each

transaction, and the record below. Perhaps the best example of this is the Raptors.

> Raptors worked as follows:
>
> (1) *The Put*: Enron purchased a "put" on Enron stock from the Raptor entity for $41 million (or other consideration in the case of Raptor III); in return, if Enron's stock dropped below a certain price, the Raptor would pay Enron the difference.
>
> (2) *The Hedges*: Once the put settled, the Raptor vehicle distributed the $41 million premium to LJM; in turn, Raptor would allow Enron to hedge certain volatile assets in the structure without "pay[ing] anything to anyone." U.S.Br.51-56; Br.30.

The Task Force's attack on the Raptors is laced with rhetoric: the "put" was a secret "contrivance" with no "independent business purpose" that was "disguised" from Arthur Andersen. The "hedges" were fraudulent because, once LJM received the $41 million, it "had nothing at risk in the Raptors." *Id.*

But rhetoric is no substitute for the record, which demonstrates two business purposes for the put. First, as the Task Force acknowledges, Fastow "initially declined" investing in Raptor I because, by his analysis, the hedging part of the transaction was too risky for LJM. U.S.Br.51. "To allay that concern," Enron agreed to purchase the put, which Fastow felt made the overall transaction less risky. *Id.* Enron's business purpose, clearly, was to induce LJM to enter into risky hedging deals for Enron's benefit, imparting what Glisan described was an "opportunity"—not a guarantee—for LJM to make a profit on the put. R:24591-95. Parties negotiate all the time by trading better gains on one part of a deal for

less secure ones on another part, and vice versa—it's called consideration.

The other purpose of the put was to provide a hedge—a form of insurance—to protect Enron from a decline in its stock price. Guarding against such risk is common, especially in a market driven, at the time, by volatile dot-com companies. Despite the Task Force's insinuation that Enron was merely "betting that its own stock price would drop," U.S.Br.51, just the opposite was true. If the stock remained at the same price or increased, the Raptors would be funded, which was the goal. If Enron's stock price dropped, LJM would have to pay Enron $30 million of LJM's *own* money, as Glisan conceded. R:28821-26, 244591-95.

Far from a secret, Glisan—who devised, presented, and recommended the Raptors to Skilling and the Board—testified that the put, its purposes, and the absence of hedging during the put period were "absolutely" known and not "disguised" from Andersen:

> Q [Skilling's counsel]: [T]his structure, this "mechanic," I think is the word you've used, this was widely known to everybody?
>
> A [Glisan]: Yes, absolutely.
>
> Q: And it was also widely known that there would be no hedging during this period of time in which the put is in effect --
>
> A: Yes.…
>
> Q: Isn't it true that the accountants understood that the commercial intent [of the put] was for LJM to have an opportunity to get its money back plus an opportunity to have a subsequent 30 million-dollar distribution?
>
> A: I think Arthur Andersen understood that, yes.

R:25009. Moreover, the existence, amounts, and effects of the Raptor put

transactions were fully disclosed in Enron's public filings. For example, Enron's 10-K for 2000 reports: "Enron paid $123 million [$41 million multiplied by 3] to purchase share-settled options from the [Raptors] Entities on 21.7 million shares of Enron common stock." GX1032:383.

The Task Force's criticisms of "the hedges" are unfounded and unsupported in the record. Its conclusory claim that once LJM received its money from the put, it "had nothing at risk," U.S.Br.54, is contrary to the written contracts, which provide that even after the put settled, LJM maintained $30 million in equity in each Raptor. DX8662, 8666, 8668-69. Fastow tried to explain away these contracts by suggesting he had "discussions" with Causey that LJM "should not expect" to "get back" any of the $30 million "back-ends." R:21381. However, on cross-examination, Fastow admitted he "did expect…that there might be some back ends" and even "put [his] foot down" and told Enron, "You know what? I got $41 [million from the put]. There's 30 [million] still in there for these vehicles. I want the 30 [million] too." R:21792. In fact, when the vehicles were ultimately unwound, LJM negotiated a return of roughly $25 million in equity. R:24660-61.

The Task Force's other criticism of the Raptors hedges—that "Enron did not have to pay anything to anyone to hedge"—is also wrong. U.S.Br.56. The hedges were not premium-based. They were *swaps*, meaning (a) Enron received downside protection from the Raptors should the asset's value decline, and (b) the Raptor

entity obtained the upside benefit should the asset's value appreciate. Under this structure, no money changed hands. DX8662, 8666, 8668-69.

To paint the Raptors as fraudulent, the Task Force had to misrepresent the record on key points, as illustrated below:

Task Force's Description	Actual Evidence
"When Glisan presented Raptor I to the Finance Committee of the Board of Directors for approval in May 2000, Skilling said he would not ordinarily approve such a deal except that it allowed him to circumvent the accounting rules." U.S.Br.53.	This description disregards Glisan's testimony that when he said the word "circumvent," he was" not intending to convey…that Mr. Skilling was seeking to violate accounting rules." To the contrary, Skilling approved Raptors based on the advice of Glisan, Causey, and Andersen that the structure complied with accounting rules and "provided accounting *protection*." R:25005-08. Glisan added he had some reservations about Raptors, but never shared them with Skilling and, in fact, expressly recommended their approval to Skilling and the Board. R:24571-72, 24578-79.
"In the same period, Delainey questioned Skilling over whether it was proper for Enron to use Enron stock to protect its own income statement, and Skilling said he supported the use of Enron stock in Raptor." U.S.Br.53.	Delainey testified he had "no involvement" in structuring the Raptors. Based on snippets of information he heard, Delainey thought the use of Enron stock was "odd" and wanted to make sure Skilling was "aware of" and "okay" with it. Skilling told him the use of Enron's stock "was approved and he supported it." Delainey admitted that Enron's use of its stock in Raptor was never "hidden or secret" and, indeed, was made "very clear." R:20475-77.
"Enron hedged its investment in Avici into the first Raptor. Enron wanted to hedge its Avici investment at its highest value, but by late August 2000 when Enron accomplished the hedge,	The backdating story is false, as two of the government's own witnesses explained. Kevin Hannon testified that he *personally* called Causey on August 3 and said "I want a hedge [on Avici] as of this date. Put it in place." As far as Hannon knew, Avici was a "legal, legitimate hedge."

Avici's stock price had already started to decline. Accordingly, Causey and Fastow backdated the hedge to August 3, 2000, the date on which Avici closed at $163, its highest closing value." U.S.Br.55.	R:21003-04. Glisan's contemporaneous handwritten notes and testimony at trial corroborated Hannon that the Avici hedge occurred on "August 3 or 4"—not some future date. GX10008; R:24609, 25009-10. Fastow testified he never told Skilling the Avici hedge had been improperly backdated. R:21417-18.
"Because the losses suffered by the hedged assets showed up on the Raptor's balance sheet, and not Enron's, LJM and the Raptors helped Enron avoid showing $495 million in losses in 2000." U.S.Br.57.	This statement—the culmination of the Task Force's case on Raptors—could not be more wrong. The effect of the Raptors and every other LJM transaction *did* show up on Enron's balance sheet and financial statements, in black and white: "In 2000, Enron entered into derivative transactions with the Entities [Raptors]…to hedge certain merchant investments and other assets… *Enron recognized revenues of approximately $500 million related to the subsequent change in the market value of these derivatives, which offset market value changes of certain merchant investments and price risk management activities*." GX1032:384.

ARGUMENT

I. ALL COUNTS OF CONVICTION MUST BE REVERSED BECAUSE THEY ARE TAINTED BY THE LEGALLY INVALID "HONEST SERVICES" FRAUD THEORY.

Our opening brief demonstrated that Skilling's convictions must be reversed because they all rest on a theory of honest-services wire fraud that this Court rejected in *Brown*. The Task Force conceded as much in other Enron-related cases, recognizing that, under *Brown*, a corporate employee cannot be convicted of conspiracy to commit honest-services wire fraud when he "engages in fraud with the intent to benefit his employer." U.S. *Howard* Reply Br. 11 (cited Br.67);

U.S.Br.75 (honest-services theory does not apply where employees "breached a fiduciary duty in pursuit of what they understood to be a corporate goal").

Appreciating that *Brown* compels reversal of each of Skilling's convictions, the Task Force tries in vain to avoid the rule of *Brown*, even though the conduct charged in *Brown* was part of the *same conduct* here—and in both cases, Enron executives were charged with using unlawful *means* to accomplish the *same corporate goal* of improving Enron's share value. *Brown* squarely holds that acts committed in pursuit of that goal do not establish the statutory crime of honest services fraud, even if they involve some other improper, unlawful, or even criminal wrongdoing. 459 F.3d at 523. Because that core trial theory infected every one of Skilling's convictions, every count must be reversed.

The Task Force makes three attempts to avoid *Brown*. First, it says there is an unwritten principle in the wire fraud statute that exempts from its proof requirements all corporate employees senior enough to help set basic corporate objectives such as increasing or maintaining share value. This, to be sure, is nothing more than a call for a "Jeff Skilling" exception to be grafted onto the wire fraud statute. As shown below, the undefined and illogical premise of this argument has no basis in the statute, *Brown*, or any other case applying the statute, and neither the trial record nor the jury's instructions would permit such a principle to be applied *post hoc* to the facts of this case.

Second, the Task Force contends that even if Skilling's conduct is not actionable as honest-services fraud in light of *Brown*, his conspiracy conviction must still be sustained because the jury *could* have convicted him of the securities fraud predicate rather than honest-services fraud. This, too, would require a change in law, since a general verdict that rests on both a legally invalid theory and a legally valid theory, as exists in this case, *must* be reversed. *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*"). The Task Force posits an exception to this rule—one that, at best, would apply only when a conviction on the legally invalid theory *necessarily required* the jury to convict on the legally valid theory at the same time. That would require the Task Force to show that its prosecution of honest-services wire fraud against Skilling was superfluous, unnecessary, and pointless. That is *impossible*, since honest-services fraud was a dominant theme of the Task Force's case throughout the trial. Given the facts and arguments the Task Force advanced, the jury could have convicted Skilling—and likely did—for conspiring to commit honest-services wire fraud without also finding him guilty of securities fraud.

Third, the Task Force contends that even if Skilling's conspiracy conviction must be reversed, his other convictions remain untainted by the flawed honest-services theory. That is demonstrably wrong. In arguing that each conviction can

be supported by other, independent evidence of Skilling's guilt, the Task Force simply—and improperly—assumes the jury convicted him on those independent bases. The Task Force's burden on appeal is not merely to show that Skilling *possibly* was convicted on a legally *permissible* ground—it is to show that he was *not possibly* convicted on the legally *impermissible* ground. The Task Force does not even attempt to carry that burden, and it could not, given the case it tried.

A. The Conduct For Which Skilling Was Convicted Does Not Satisfy The Requirements Of Honest-Services Fraud.

The *Brown* Court's summary of its grounds for reversal applies here word-for-word: "This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest." 459 F.3d at 522.[2] Because "all were driven by the concern that Enron would suffer absent the scheme," the fact that the scheme constituted a wrongful or

[2] The Task Force incorrectly states that *Brown*'s reference to self-dealing was merely a quote from the Second Circuit's opinion in *U.S. v. Rybicki*, 354 F.3d 124, 141-42 (2d Cir. 2003). U.S.Br.80. The quote in text is not from *Rybicki*, and, in fact, this Court repeatedly referred to self dealing as a result of its own analysis of prior caselaw. 459 F.3d at 521-22. The Court certainly did quote from *Rybicki*, expressly *agreeing* with its conclusion that honest-services fraud precedents "can be generally categorized in terms of either bribery and kickbacks or self-dealing." *Id.* at 521.

unlawful act was not enough to establish that the employees had deprived Enron of their honest services. *Id.*

The same is true here. Nobody contends Skilling was involved in bribery or self-dealing—either as to the same Nigerian Barges transaction at issue in *Brown* or as to any other deal. Nobody disagreed that Skilling's conduct was designed (as the indictment itself asserted) to advance the corporate goal of maintaining or improving Enron shareholders' stock value—the *same* corporate goal pursued by the Enron executives in *Brown*. 459 F.3d at 522.[3]

The Task Force nevertheless argues that Skilling's conviction for conspiracy to commit honest-services wire fraud can survive *Brown* because his conduct both fits within prior honest-services fraud cases and falls outside what the government misdescribes as *Brown*'s "exception" to the statute. U.S.Br.77-78. The Task Force is mistaken—as even the district court below recognized. R:41895-98.

1. The Task Force's analysis of *Brown* begins with a lengthy recitation of pre-*Brown* cases, none of which addresses the issue *Brown* resolved or Skilling raises—*i.e.*, whether an employee who is not self-dealing and instead is seeking to advance his employer's interests can be convicted of honest-services fraud.

[3] The Task Force refers obliquely to increases in the value of Skilling's stock holdings resulting from his conduct, but if the Task Force means to suggest by this that Skilling was actually engaged in self-dealing by improving *all* shareholders' stock value, that argument was squarely rejected in *Brown*, 459 F.3d at 522 (no self-dealing where personal compensation incentive is provided by employer); *accord U.S. v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).

The Task Force first cites *U.S. v. Ballard*, 663 F.2d 534 (5th Cir.1981), *modified*, 680 F.3d 352 (5th Cir. 1982), but that case does not support Skilling's conviction in any respect. The oil company executives in *Ballard* were engaged in an unauthorized and undisclosed scheme of "kickbacks" in oil sales, which allowed them to profit personally from the sales, to the direct detriment of their employer. 663 F.2d at 540. The unauthorized kickbacks were quintessential self-dealing and thus well within the heartland of honest-services fraud as defined in *Brown*. *Brown*, 459 F.3d at 521 n.11 (citing *Ballard* as lead example of self-dealing). The Task Force here tries to characterize *Ballard* as broadly criminalizing all material withholding of information from the employer, U.S.Br.77, but the key in *Ballard* was that the employees withheld disclosure of the kickbacks because they knew they were contrary to their employer's interests.

The Task Force next cites *U.S. v. Gray*, 96 F.3d 769 (5th Cir. 1996), but its argument about *Gray* was already rejected in *Brown*, 459 F.3d at 522 n.13. In *Gray*, Baylor basketball coaches were convicted of depriving Baylor of their honest services by fraudulently establishing the academic eligibility of transfer basketball recruits. The Task Force contends *Gray* "cannot be squared with" *Brown*, because the defendants in *Gray* claimed they, too, were only trying to help their employer by building a successful basketball team. U.S.Br.77 n.8, 72. But as this Court explained in *Gray*, the defendants' conduct was plainly *not* consistent

with the university's stated interests because it denied Baylor "the quality student it expected," and prevented Baylor from recruiting other students *both* athletically qualified *and* academically fit for the school. *Gray*, 96 F.3d at 775. Universities are, after all, primarily centers of learning, not professional basketball operations. By contrast, the *Brown* defendants' conduct was entirely consistent with Enron's stated corporate interests in increasing shareholder value. *Brown*, 459 F.3d at 522 n.13. Corporations exist primarily for the economic benefit of their owners—the shareholders.[4] *Brown* held *Gray* was "distinguishable both factually and legally" for this reason, *id.*, a distinction the Task Force ignores completely.

The Task Force also cites *U.S. v. Brumley*, 116 F.3d 728 (5th Cir. 1997), but the rule enunciated in that case is the very rule applied in *Brown* to reverse the convictions for the same conduct alleged here: "'honest services fraud' contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer—or that he consciously contemplated or intended such actions. For example, something close to bribery." *Brown*, 459 F.3d at 521 (quoting *Brumley*, 116 F.3d at 734). There was, of course, nothing "close to bribery" in *Brown*, just as there is nothing close to bribery here—as the Task Force

[4] WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS 270-75 (3d ed. 1997) (discussing textbook case of *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed to that end.")).

itself recognized in successfully opposing an honest-services jury instruction using the "close to bribery" formulation. Br.71; R:41327-28, 36022. And as *Brown* further elaborated, a mere fiduciary breach alone does not qualify as "something less than the best interests of the employer": not every fiduciary breach is "something close to bribery," and criminalizing every fiduciary breach would make honest-services fraud an ill-defined common-law crime. 459 F.3d at 522. Hence, *Brown* concludes, the statute does not criminalize a fiduciary breach that is "disassociated from bribery or self-dealing" and is instead "associated with and concomitant to the employer's own immediate self-interest." *Id.*

The same point is made in the final case cited by the Task Force, *U.S. v. Caldwell*, 302 F.3d 399 (5th Cir. 2002). Carefully avoiding any actual discussion of the case, the Task Force simply asserts that *Caldwell* holds that a fiduciary breach and material nondisclosure will support an honest-services fraud conviction. U.S.Br.73. But the Task Force avoids mentioning what the fiduciary breach and nondisclosure in the case involved: a secret self-dealing scheme by the defendant to shift his employer's profits to himself. 302 F.3d at 403-04. Again, nothing like that was present in this case.

In short, Skilling's conduct does not fall within any of the honest-services cases decided before *Brown*. Every case involved what this case does *not*—actions by defendants either entirely in their own interest or plainly contrary to their

employer's. Far from "carv[ing] out" an "exception" to the basic requirements of honest-services fraud, U.S.Br.78, *Brown* summarizes the *most elemental* of those requirements: a corporate employee deprives the employer of his honest services only by consciously engaging in acts clearly *not* in service of the employer's objectives. Where the employee's conduct *is* designed to further the employer's stated interests, even a fiduciary breach or other wrongful act committed in furtherance of that design does not constitute the crime of honest-services fraud.

2. The Task Force fully concedes that its trial proof of honest-services fraud did not satisfy the standard enunciated in *Brown*. U.S.Br.85. Instead, it contends that *Brown* does not apply at all to Skilling, because of an implicit exception in the statute for employees senior enough to set the basic corporate goals being pursued by those who act dishonestly. U.S.Br.78. No such exception exists or can be created to avoid reversal.

a. The Task Force's "Jeff Skilling" exception has no basis in the wire-fraud statute, which proscribes the deprivation of honest services without defining the concept. The statute's vagueness is precisely why *Brown* held that only a narrow category of clearly defined fiduciary breaches can fall within the statute. To say that the statute again becomes unbounded for certain (undefined) employees who help set certain (undefined) corporate goals in certain (undefined) ways is contrary to *Brown*'s essential premise that the wire-fraud statute must be *limited clearly*, not

expanded vaguely to cover all manner of fiduciary breaches, as the government's theory would do. *Brown*, 459 F.3d at 522 n.13; *accord 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").

Indeed, despite a direct invitation in Skilling's opening brief, Br.79, the Task Force did nothing to *clearly define* the type or level of corporate employee who fits within the proposed Skilling exception, the types of corporate goal-setting that count for purposes of the exception, the circumstances under which establishing a standard corporate goal such as improved shareholder value becomes a criminal fiduciary breach under the exception, and how much influence the employee must have over the relevant goal to qualify for prosecution under the exception. The Rule of Lenity compels rejection of the government's theory in the face of such unanswered ambiguities. *U.S. v. Granderson*, 511 U.S. 39, 54 (1994) (where statute's "text, structure, and history fail to establish that the Government's position is unambiguously correct," court must "apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"); *James v. U.S.*, 127 S.Ct. 1586, 1603 (2007) (Scalia, J., dissenting) (criminal statute capable of two readings must be given "the more narrow reading of which it is susceptible").

b. Neither does the Task Force's theory square with the logic of *Brown*. Nothing in *Brown*'s holding or analysis turns on the employee's title, seniority, or corporate responsibilities. To the contrary, *Brown* relies heavily on the Second Circuit's decision in *Rybicki*, which holds that the statute requires proof of self-interested behavior by "an *officer* or employee of a private entity." 354 F.3d at 146-47. *Brown* and *Rybicki*'s holdings pivot not on the employee's title or duties, but on his *conduct* and, specifically, on whether that conduct was "disassociated from bribery or self-dealing" and was instead "associated with and concomitant to the employer's own immediate self-interest." *Brown*, 459 F.3d at 522.

The Task Force's contrary view misreads a single footnote in *Brown*. In that footnote, the Court distinguished *Gray*, noting that "*Gray* is dissimilar to this case in part because the opinion recognizes nothing akin to Enron's corporate incentive policy coupled with senior executive support for the [Nigerian Barges] deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron had a corporate interest in, and was a willing beneficiary of, the scheme." 459 F.3d at 522 n.13. The Task Force mistakenly reads that sentence as limiting *Brown*'s entire analysis to executives following instructions from "senior executive[s]." The footnote, however, merely observes that in *Gray*, the conflict with the employer's interest in academic qualifications was self-evident, whereas in *Brown* the defendants' actions were consistent with

the corporate goal of increasing shareholder wealth openly stated by Enron management, through the compensation policy incentivizing employees to meet earnings targets. Under those circumstances, the Enron executives' interest in achieving increased bonuses was "not so clearly distinguishable from the corporate goals communicated to the Defendants (via their compensation incentives)" that they should have recognized the conflict and understood their conduct to be criminal honest-services fraud. *Id.* at 522.

Under any reading of *Brown*, there is no tacit exception for executives who set such standard corporate goals as increasing shareholder wealth and meeting earnings targets. *Brown* holds instead that where those corporate objectives are clear and understood, a fiduciary breach committed in service of those objectives is not honest-services fraud unless it involves conduct approaching bribery or self-dealing. Absent that limitation, *Brown* warns, the Task Force's theory that a common-law fiduciary breach alone can be a criminal act creates "the danger…of defining an ever-expanding and ever-evolving federal common-law crime." *Id.* at 522 n.13.[5] Nothing about *Brown* suggests that this danger evaporates merely because the employee was senior enough to help set corporate goals.

[5] Indeed, absent the limitation, the statute would provide no clear notice of the prohibited conduct and thus would be unconstitutionally vague. *Rybicki*, 354 F.3d at 158-65 (Jacobs, J., dissenting).

c. The Task Force's application of its proposed Skilling exception to Skilling himself illustrates its fatal flaws. The government starts by subtly shifting the goalposts. In *Brown*, the relevant corporate goals followed by the Enron executives were "corporate earnings targets," which, if met, would maintain or increase Enron's stock value. *Id.* at 522, 514, 520 n.8. This Court held that the *means* employed to pursue those goals—*e.g.*, misstating earnings—might themselves be unlawful on some other basis, but their employment in the service of the employer's stated goals did not constitute the crime of honest-services fraud. *Id.* at 522. To escape the force of that ruling, the Task Force tries to redefine the relevant corporate goal to *include* the illegitimate means, asserting that *Brown* does not apply here because Skilling set a corporate goal of "*artificially* supporting Enron's stock price." U.S.Br.78. But that is not what the Task Force argued below—to the contrary, the indictment expressly states that the point of the alleged conspiracy was to "support[] Enron's stock price and its credit rating." Indictment ¶18; *id.* ¶20 (improper means were "designed to prop up [Enron's] stock price"). The testimony and arguments of the Task Force at trial were to the same effect: the central objective of Skilling's conduct was to increase Enron's share values. R:15173, 15236-37, 17226-30, 23974-75, 36467-69.

Nor can the Task Force show that Skilling himself fixed that corporate goal. Skilling—no less than the Enron executives in *Brown*—had an "employer," *i.e.*,

"Enron and its shareholders," U.S.Br.79, and it was Enron's shareholders who, like any other corporate shareholders, expected Enron's managers and Board of Directors (to whom Skilling reported) to pursue increases in Enron's share value. *E.g.*, KLEIN, *supra*, at 270-75; *Dodge*, 170 N.W. 668. By the Task Force's own account, then, Skilling was in *exactly the same position* as the defendants in *Brown*: he sought to use assertedly improper *means* to achieve his employer's goal of improving shareholder value. Those means might be unlawful in some other way, but they do not constitute honest-services fraud.[6]

d. Finally, even if the wire-fraud statute were now construed to expose higher-level corporate employees to unique criminal liability for non-self-dealing breaches of fiduciary duty, that special exception could not be applied to sustain Skilling's convictions. The Task Force never sought any instruction requiring the jury to find the conditions required for the special liability rule to apply. As noted above, to find that Skilling affirmatively set unlawful goals—as opposed to pursuing unlawful means to satisfy legitimate goals—the jury would have to evaluate numerous considerations about the goals at issue, Skilling's corporate

[6] It is not true that Skilling directed less senior employees to *artificially* increase shareholder value. The Task Force's discussion on this issue does not include a single citation to any evidence. And it is the Task Force's own view of the record (albeit one Skilling contests, *infra* 47-63) that the jury may have concluded from the trial evidence *not* that Skilling directed anybody to do anything unlawful, but that Skilling simply blinded himself to the wrongful acts of others. U.S.Br.107-08. The Task Force thus has not shown that the jury necessarily found that Skilling "direct[ed]" others wrongfully to increase shareholder value. U.S.Br.80.

responsibilities, and his influence with respect to the corporate goals. Even assuming an instruction could be devised that would accurately and clearly identify all the conditions, the Task Force offered none. Thus, the jury had no basis for determining—and did not determine—that Skilling had the requisite level of responsibility and set the kind of goals that will subject him to honest-services fraud liability on the government's still-undefined theory.[7]

The jury was never instructed to make those necessary factual findings because the Task Force never advanced its special senior-employee liability theory at trial. Instead, it sought to hold Skilling liable on *precisely* the theory rejected in *Brown*. Br.71. Completely new and woven from whole cloth *after* trial is the claim that employees with senior corporate responsibilities face unique exposure to honest-services fraud liability. That claim cannot sustain Skilling's convictions.

[7] Skilling's liability on this vague theory certainly cannot be *assumed* from the record. Even if the jury did find Skilling guilty of directing a conspiracy to use unlawful means to increase shareholder values, that is not the same as finding both that Skilling had the authority to establish the relevant corporate goals and that the goals he established were breaches of fiduciary duty. A public corporation's Board of Directors establishes basic corporate goals and policy, not any one senior employee. Skilling cannot be held liable for honest-services fraud because, as just one vote on the Board, he supported the central corporate goal shared by all publicly traded corporations of improving shareholder value. Even to the extent any of these issues were contestable at all, they would have been questions for the jury to decide in determining whether Skilling's conduct violated the honest-services provision of the wire-fraud statute.

B. Because It Is Possible The Jury Relied On The Flawed Honest-Services Fraud Theory To Convict Skilling Of Conspiracy To Commit Wire Fraud, The Conspiracy Count Must Be Reversed.

As in *Brown*, the conspiracy count against Skilling alleged multiple possible objects: a conspiracy to commit (a) wire fraud by depriving Enron of honest services; (b) wire fraud by depriving Enron of money and property; and (c) securities fraud. The Task Force concedes, "If *Brown* applies to Skilling's conspiracy conviction, then the honest services fraud object is legally flawed." U.S.Br.85. The consequences of that concession are unambiguous: "When disjunctive theories are submitted to the jury and the jury renders a general verdict of guilty…and any of the theories was legally insufficient, then the verdict must be reversed." *Tomblin*, 46 F.3d at 1385; *see U.S. v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996); *U.S. v. Smithers*, 27 F.3d 142, 146-47 (5th Cir. 1994). This Court applied that rule to reverse the convictions in *Brown* and order a retrial uninfected by the legally invalid theory. 459 F.3d at 523. The same result must occur here.

The rule applied in *Brown* was set forth in *Yates v. U.S.*, 354 U.S. 298 (1957), as modified and reaffirmed in *Griffin v. U.S.*, 502 U.S. 46 (1991). *Yates* holds that when a jury returns a general verdict of guilty on a conspiracy count with multiple objects, the entire count must be reversed when "the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." 354 U.S. at 312. *Griffin* clarifies the *Yates* rule,

explaining that a general verdict can stand where one of the possible grounds of conviction was *factually insufficient*, so long as other grounds were factually supported, because jurors are presumed capable of analyzing evidence and making factual sufficiency judgments. 502 U.S. at 59. But because jurors "are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question…fails to come within the statutory definition of the crime," the basic *Yates* rule still requires reversal whenever "jurors have been left the option of relying upon a *legally* inadequate theory." *Id.* In other words, "even if the evidence and instructions properly allowed the jury to convict" on a legally valid theory, the court "cannot presume that the jury based its verdict on the legally sufficient ground," and thus the conviction "must be reversed." *Tomblin*, 46 F.3d at 1385; *accord U.S. v. Bailey*, 405 F.3d 102, 109 (1st Cir. 2005) ("because [defendant's] claim is one of legal error rather than sufficiency of the evidence, the availability of an alternate theory of conviction would not save the jury's verdict").

Seeking to avoid the force of *Yates*, the Task Force asserts it does not apply where the legally inadequate theory is *also* factually unsupported. U.S.Br.85-86. The point of this assertion is unclear, for *nowhere* does the Task Force argue that the honest-services fraud theory it prosecuted below was factually unsupported.

Instead, the Task Force focuses on a different, much narrower, and *inapplicable* basis for avoiding *Yates*. Relying on a principle invoked in cases involving *instructional* errors, the Task Force contends that a multi-ground general verdict based on a legally invalid ground can be affirmed if the jury, to convict on the legally improper basis, *necessarily must* have found every element of a legally valid theory was satisfied simultaneously. *U.S. v. Holley*, 23 F.3d 902, 910 (5th Cir. 1994). In other words, where the jury could not possibly have convicted on the legally invalid theory without finding facts that also would have required conviction on a legally valid theory, it can be presumed the jury relied on the valid theory. *Id*.; *U.S. v. Huebner*, 48 F.3d 376, 383 (9th Cir. 1994) ("Under the facts in this case, it would not have been possible for the jury to have found a conspiracy to aid and abet attempted [tax] evasion without also finding a conspiracy to defraud the United States by obstructing [tax] collection."). But where it *is* possible the jury convicted on the legally invalid basis and *not* on the legally valid basis, *Yates* governs and requires reversal. *Pettigrew*, 77 F.3d at 1511-12 ("Because we are unable to determine on review which…offense the jury selected, we reverse."); *Smithers*, 27 F.3d at 146-47; *Keating v. Hood*, 191 F.3d 1053, 1062-63 (9th Cir. 1999); *U.S. v. Holmes*, 93 F.3d 289, 295-96 (7th Cir. 1996); *U.S. v. Vasquez*, 85 F.3d 59, 61 (2d Cir. 1996).

Thus, even assuming this exception to *Yates* applies outside the context of instructional errors,[8] it would be available here only if the Task Force could prove that it was *impossible* for the jury to have concluded that Skilling committed honest-services fraud without simultaneously concluding he committed securities fraud as well. The Task Force cannot carry that burden. Nor does it even try. Because it cannot demonstrate how the jury *necessarily* convicted Skilling on securities fraud grounds, the Task Force contends only that the jury *likely* convicted him on that basis. That cannot satisfy the *Yates* standard.

To start, the Task Force's brief barely addresses *the trial* at all, but instead focuses almost entirely on the *indictment*, which the Task Force says "primarily" describes a scheme of securities fraud. U.S.Br.88-89. The Task Force even emphasizes that its original indictment did not include honest-services allegations against Skilling, and that prior to trial it dismissed counts asserting honest-services charges against Skilling. U.S.Br.89-90. None of this, of course, is relevant to the actual evidence and arguments the Task Force decided to submit to the jury. That the Task Force pursued an honest-services fraud theory against Skilling at trial is all that matters under *Yates*. U.S.Br.91. Whether or not the Task Force's trial evidence *also* "showed that Skilling participated in…conduct that falls within the

[8] *But see U.S. v. Holly*, 488 F.3d 1298, 1306 & nn.2&3 (10th Cir. 2007) (holding that exception applies only to instructional errors, not where jury was properly instructed but conduct possibly found by jury was not a criminal act, in which case reversal is automatic).

definition of securities fraud that the district court gave in the jury instructions," U.S.Br.89, the fact that another factually and legally valid basis for conviction was available does not permit affirmance under *Yates*. The Task Force's burden is to show that the jury *necessarily* found Skilling guilty of securities fraud in order to find him guilty of honest-services fraud.

The Task Force makes no effort to carry that burden. Beyond referring to its irrelevant pretrial pleadings, it merely insists it did not "prominently feature" the flawed honest-services fraud theory at trial. U.S.Br.90. That is beside the point. Even *assuming* the Task Force "featured" its securities fraud allegations *more* "prominently," the Task Force *also* asserted a theory of honest-services fraud on which the jury could have relied without finding securities fraud. That alone requires reversal under *Yates*. *Pettigrew*, 77 F.3d at 1511.

In any event, the Task Force *did* feature its legally flawed honest-services fraud theory at trial, because it perceived it was the easiest path to convictions. From its opening statement, to its witness examinations, through its closing argument, the Task Force repeatedly urged that Skilling violated his duty of "loyalty to employees and to investors," the "trust placed in" him, his "duty of honest services," and his "fiduciary responsibility." Br.70-71 & n.23. The Task Force's closing argument drove the point home that Skilling and Lay: "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.

The message was unmistakable: because Lay and Skilling did not "do their job and do it appropriately," they must be convicted of depriving Enron and its employees of their honest services. Nothing about finding the securities fraud elements of material misrepresentations, scienter, or even stock purchases or shareholders was made a prerequisite to that judgment.

Indeed, much of the LJM case—a central feature of the Task Force's trial theory—had *nothing* to do with securities fraud. As its own appellate brief confirms, the Task Force contended that Skilling breached his fiduciary duty to Enron simply by supporting Board approval of LJM's creation despite Fastow's conflict of interest. U.S.Br.40. Government witnesses specifically testified that the LJM transactions were bad for Enron because of Fastow's conflict, and that Skilling should not have approved them for that reason alone. U.S.Br.41. Witnesses testified that Skilling was warned about the "Wall Street Journal risk" associated with LJM—not a risk of direct economic loss or from its accounting treatment or disclosure, but the risk that the transactions would "look terrible" to the media and thereby reflect badly on Enron. *Id.* Still other witnesses testified that LJM would not serve as an adequate hedge for Enron, and that LJM was receiving greater benefits from the relationship than Enron. *Id*. at 41-42.

All of those concerns may well have been legitimate reasons to question Skilling's approval of LJM—and, to the point here, sufficient reasons for the jurors to find Skilling's approval of LJM itself a breach of his fiduciary duty to Enron, as the Task Force urged. But those concerns by themselves did not show the conduct to be *securities fraud*. Indeed, the financial impact on Enron from all the LJM transactions was fully disclosed to accountants, investors, and the SEC, Br.26-27, further suggesting the jury did not find Skilling directly liable for securities fraud in connection with LJM, but instead convicted him for fiduciary breaches with respect to his business judgments about the use of LJM.

To be sure, the Task Force *also* urged a securities-fraud version of its LJM allegations—the version it now emphasizes on appeal, U.S.Br.39—under which Skilling and others used LJM to conceal Enron losses. But that was not the *only* theory of LJM-related fraud it advanced, and, as just shown, the jury was not required to accept the securities-fraud version of the theory to find Skilling guilty of honest-services fraud in connection with LJM.[9]

Another major trial issue that included distinct versions of honest-services fraud and securities fraud was Enron's Wholesale business. In the honest-services fraud version, the Task Force contended Skilling took too much risk in the

[9] Indeed, the jury could have concluded that *others*—especially Fastow and Causey—committed securities fraud in using LJM without finding that Skilling himself was a direct participant in their securities fraud. *Infra* 42-44, 135-36.

Wholesale business by steadily increasing VaR over the years and allowing traders to make large chunks of their profits by "betting" on energy prices. R:19710-11, 19847, 22389, 36508-12. The Task Force argued that Skilling allowed Enron to be kept afloat by speculative and risky practices—a breach of fiduciary duty to Enron's shareholders, who were entitled to sounder investments on their behalf. R:36508-12. The securities-fraud version added several elements, claiming that Skilling misrepresented to investors the nature of the Wholesale business, describing it as a stable logistics company, when it was "actually" a risky trading company whose profits were exposed to fluctuations in price. The glaring problem with this securities fraud theory was that no matter how Skilling characterized Wholesale, the level of risk it incurred was fully disclosed, and thus there were no misrepresentations on which a reasonable Enron investor would rely. Br.42-45. Therefore, it was not only possible, but indeed likely, that if the jury found that Skilling conspired to commit any fraud in connection with the Wholesale business, it was fraud of the invalid honest-services variety, not securities fraud requiring proof of scienter and material misrepresentations to investors.

Yet another government theory with two versions involved the use of Enron's reserves. The Task Force contended that Skilling directed the "manipulation" of various reserves to increase earnings in several quarters. The Task Force contended that these adjustments *both* improperly used the reserves

(honest-services fraud) *and* resulted in false or, at least, misleading earning statements (securities fraud). But Skilling adduced ample evidence demonstrating that the final reserve amounts were accurate and immaterial if they were misstated, and, if anything, Enron understated its earnings that quarter because "credit reserves" were over-reserved. Br.40-41; R:19594-98; DX8548. On that record, the jury easily could have rejected the securities-fraud proposition, but agreed with the Task Force's honest-services fraud theory that it was improper to "back into" even accurate earnings statements by "manipulating" reserves.

Under *Yates*, all that matters is the "possibility," *Pettigrew*, 77 F.3d at 1511, that the jury found Skilling guilty under the legally invalid honest-services fraud version of the government's LJM, Wholesale, or reserves allegations, rather than the distinct securities-fraud version of those allegations. Because the Task Force cannot exclude that possibility, Skilling's conspiracy conviction must be reversed. Indeed, the district court—who heard the case, saw the evidence, and knew the Task Force's theories well—drew this very same conclusion in recognizing that this count was likely infirm. R:41895-98.

C. The Remaining Substantive Fraud-Related Counts Are All Equally Infected By The Honest-Services Fraud Theory.

Believing it had proved a factually and legally valid case of conspiracy to commit honest-services wire fraud, the Task Force used—through instruction, evidence, and argument—its alleged conspiracy to obtain convictions on each of

the other counts. The Task Force invites this Court to disregard its heavy reliance on the wire-fraud conspiracy at trial because there was separate evidence of Skilling's guilt on the substantive counts to sustain those convictions. Again, that is not the test: If the other convictions *could have* rested on the legally invalid honest-services fraud theory, then they can be sustained under *Yates* only if the Task Force shows that it is *impossible* that the jury relied on the legally invalid theory. *U.S. v. Edwards*, 303 F.3d 606, 641 (5th Cir. 2002) (conviction based on multiple potential grounds, one of which is legally inadequate, must be reversed when "it is impossible to tell which ground the jury selected"); *Tomblin*, 46 F.3d at 1385. Because the Task Force does not acknowledge that burden, much less meet it, Skilling's other convictions must fall with the conspiracy count.

1. *Insider Trading*

In Count 51, the Task Force contended that Skilling committed insider trading because he knew there was a broad conspiracy to defraud Enron afoot, and sold stock when he understood that exposure of the conspiracy would cause Enron's unraveling. Br.72-73. The prosecutors even told jurors that "evidence of the conspiracy" alone was a sufficient basis for them to "conclude" that Skilling possessed inside information "that he used to sell his stock." R:37010.

On appeal, the Task Force now asserts that "it is not true that Skilling's knowledge of the conspiracy was the material inside information on which he was

convicted of trading." U.S.Br.102. The Task Force does not explain, however, how it could possibly *know* the jury did not convict Skilling on that basis. Instead, it merely recites, without a single record citation, other inside information on which Skilling supposedly traded, which it says the jury *may* have considered in convicting him for insider trading. U.S.Br.101. But even indulging this, the striking point is that the Task Force's own recitation of the "other" inside information is actually its *invalid* honest-services fraud conspiracy. According to the Task Force, Skilling traded on information that his "fraudulent actions" had "reduced" Enron to a "dire financial state," that under his leadership EES had become "beset by chaos and staggering losses" and "EBS had failed," and that Enron was being kept afloat by "speculative and potentially unsustainable trading." U.S.Br.101. Those were pure honest-services allegations, which is obviously why the Task Force told the jury in closing that the conspiracy to commit wire fraud was sufficient to establish that Skilling sold his stock on the basis of inside knowledge about the fraud and its consequences. The Task Force's *ipse dixit* that the jury could not have convicted on the very basis the Task Force urged is a complete contrivance.

2. *Securities Fraud*

To obtain Skilling's convictions for securities fraud, the Task Force—over Skilling's objection, R:25880-82—insisted on and obtained a *Pinkerton*

instruction, by which it urged jurors to connect Skilling vicariously to securities fraud committed by co-conspirators without having to actually prove that he personally committed securities fraud. R:36408-10. That instruction advised jurors that "if you have first found Jeffrey K. Skilling…guilty of the conspiracy charged in Count 1, and if you find…other conspirators committed the offenses charged in Counts 2 and 14, 16 through 20, and 22 through 29 [all securities fraud counts] in furtherance of or as a foreseeable consequence of that conspiracy, then you may find the defendant guilty of [the securities fraud offenses], *even though the defendant may not have participated in any of the acts which constitute the offenses described in those counts*." R:36410.

The Task Force's successful fight for this instruction over Skilling's objections was not wasted. In its closing, the Task Force explicitly cited the instruction as providing a sufficient basis for convicting Skilling for securities fraud, and its graphic presentation to the jury during closing tied *every securities-fraud count directly to the conspiracy count*. Br.73.

The Task Force does not dispute it used the instruction to urge the jury to convict Skilling for securities fraud on the basis of the flawed conspiracy count. U.S.Br.92-94. It argues, however, that the securities-fraud convictions can stand because there was *also* evidence of Skilling's direct participation in the offenses on which the jury might have relied. It says the burden is on *Skilling* to prove that the

jury did *not* rely on the theory that he personally participated in the securities-fraud acts, rather than on the legally flawed wire-fraud theory—a burden, it claims, Skilling can carry only through a "factual analysis of the trial record" to determine the basis on which the jury likely acted. U.S.Br.96.

The Task Force has the standard of proof wrong and the burden of proof backward. This is another *legal* error governed by *Yates*. Because of the *Pinkerton* instruction, the jury was invited to convict Skilling for securities fraud vicariously on the basis of the *legally* inadequate theory that the acts were part of a conspiracy to commit honest-services wire fraud. The government suggests *Yates* does not apply because the jury was faced only with "two *factual* options," *i.e.*, the direct liability theory and the conspiracy-based vicarious liability theory. *Id*. That suggestion is frivolous: while the jury was required to find certain facts to select either theory, the inadequacy in the conspiracy-based vicarious liability theory was not the insufficiency of the facts supporting the theory, it was the *legal* flaw in the underlying conspiracy conviction. *U.S. v. Kaiser*, 660 F.2d 724, 732 (9th Cir. 1981) (vicarious liability finding legally prohibited where conspiracy conviction reversed). Hence, the situation is governed by *Yates*, not *Griffin*. *Edwards*, 303 F.3d at 641. And under *Yates*, Skilling bears no burden of proving through a "factual analysis" of the trial record that the jury relied on the legally inadequate vicarious-liability theory in convicting him for securities fraud. Rather, the Task

Force must prove that it was impossible for the jury to have convicted Skilling vicariously for securities fraud committed by others. *Id.*[10]

Unsurprisingly, the Task Force simply ignores that burden. Its review of the securities-fraud counts does nothing more than show a possibility that the jury might have convicted Skilling directly. It does not, as it must, *exclude* the possibility that Skilling was convicted vicariously for securities fraud committed by others. Nor could it:

- Count 2 (Raptors): The Task Force contends that the jury could have found that Skilling and others used Raptors to misrepresent Enron's true earnings through side deals between Fastow and Causey that eliminated LJM's risk. But the jury equally could have found that Skilling was not aware of any such side deals, and thus convicted him vicariously for Fastow's and Causey's acts. R:24248. Indeed, in graphics shown to the jury in closing argument, the Task Force pressed this very alternative for holding Skilling guilty on a vicarious theory. Br.73.

[10] The cases cited by the government for the proposition that Skilling was required to conduct a "factual analysis" of the trial record are all cases involving the *Griffin* situation, *i.e.*, where the theory is problematic only because *factually* unsupported. U.S.Br.96. In that situation, the conviction can be sustained so long as there is another legally valid theory with factual support, which is why the courts review the facts closely to determine whether there is evidentiary support for another theory. *Edwards*, 303 F.3d at 641.

- Counts 14, 16-20 (Forms 10-Q and 10-K): The Task Force argues the jury could have found that when Enron submitted the individual SEC filing charged in each count, Skilling "knew that Enron had fraudulently manipulated earnings or engaged in other behavior that rendered the forms false." U.S.Br.97. But the earnings manipulation alleged for each filing again included ostensibly risk-eliminating side deals between Fastow and Causey in LJM transactions involving Raptors (Counts 17-20), Cuiaba (Count 14), and Nigerian Barges (Counts 14 and 16). While it is possible the jury concluded Skilling made or was aware of those side deals, it is also possible the jury did not find he made or knew of them, but convicted him vicariously for Fastow and Causey's conduct. This would not be a surprising result—indeed it would be the expected result—since, according to the Task Force, Fastow and Causey were the negotiators and signatories to the Global Galactic deal. Task Force cooperators, like Glisan, admitted they had not shared their concerns about the Raptors deal with Skilling. And as CAO, it was Causey who was primarily responsible for filing the 10-Qs and 10-Ks. R:24571-72, 24579, 21822-23, 36537; GX1026-29, 1032-34.[11]

[11] The same is true for other earnings manipulations charged in these counts. For instance, Count 14 was premised on the notion that an un-named co-conspirator fraudulently generated an "extra penny" for the 4Q 1999. The Task Force never identified where the penny came from and adduced no evidence that Skilling himself was aware of its origin. Br.36-37. Counts 16 and 18 alleged that

- Counts 22-26 (Analyst Calls/Conference): The Task Force contends that the jury could have found that Skilling knowingly "made false and misleading statements to the investing public about Enron's financial condition." U.S.Br.98. But again, the Task Force's own brief acknowledges that "other conspirators"—including Ken Rice, Mark Koenig, and others—also made statements about earnings and performance during these same calls and at the conference, U.S.Br.25, 30-32, and the jury may have found *their* statements to be knowingly false, *not Skilling's*.[12]

In short, for *every* count of securities fraud the jury was invited—through *Pinkerton*—to convict Skilling vicariously for the acts of others on the basis of the legally flawed premise that every act was part of a broader conspiracy to deprive Enron and its shareholders of the conspirators' honest services. The jury did not *necessarily* have to find that Skilling himself made knowingly false statements to convict him on these counts. The Task Force does not even attempt to show

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Enron's reserves were manipulated to increase earnings reports, but the Task Force's own witness—the co-conspirator who adjusted the reserves—testified that Skilling never told him to do it, and Skilling was never told that any reserves had been misused. *Id*. at 40. Given the paucity of evidence connecting Skilling directly to these alleged acts of substantive securities fraud, it is highly probable the jury used *Pinkerton* to convict him vicariously for the acts of others.

[12] Count 22 (1/22/01 Analyst Call): DX20600; R:868-69, 15289-91 (Koenig); Count 23 (1/25/01 Analyst Conference): GX984, R:17559-60 (Rice); Count 24 (3/23/01 Analyst Call): GX985 (Koenig); Count 25 (4/17/01 Analyst Call): DX20603, R:15534-36 (Koenig), 17364-67 (Rice); Count 26 (7/12/01 Analyst Call): GX987 (Koenig, "unidentified male").

otherwise. Therefore, the securities-fraud convictions also must fall with the conspiracy conviction.

3. *False Statements To Auditors*

The remaining five counts charged Skilling with making false statements in representation letters to auditors. Assuming the conviction for conspiracy to commit fraud cannot stand, the *Yates* problem with the false statement counts is simple, obvious, and direct: one statement the Task Force claimed was false in every letter was that there had been "no fraud" among Enron's senior managers. Consequently, the jury easily could have relied—and likely did rely—on the legally impermissible conclusion that Skilling participated in a wire-fraud conspiracy to find those statements to be false. It is possible the jury relied on other statements in the letters, but again, so long as it is *possible* the jury relied on a legally inadequate theory, the fact that other theories were factually supported is irrelevant. The situation is indistinguishable from that in *U.S. v. Barona*, 56 F.3d 1087, 1096-98 (9th Cir. 1995), which the Task Force ignores outright.

Rather than address the *Yates* problem, the Task Force invents and responds to a wholly fictional account of Skilling's argument. It says Skilling's *Yates* argument depends on an elaborate "chain of premises" that includes both *Pinkerton* and the securities fraud convictions to show that the false statement counts were infected with error. U.S.Br.98-99. But *Pinkerton* and securities fraud have

nothing whatsoever to do with the legal flaw in the false-statement counts. The "no fraud" statements in the letters were not denying *securities* fraud, they were denying fraud *simpliciter*, and thus the jury obviously could have found the statements to be false solely on the basis of a belief that Enron managers were, in fact, conspiring to commit honest-services fraud.

The Task Force ignores this problem and instead responds to a nonexistent argument. First, the Task Force asserts that the "chain" of premises is "simply too attenuated," U.S.Br.99, but it is referring to the false chain including *Pinkerton* and securities fraud, not the simple *Yates* problem here. Second, the Task Force notes that the *Pinkerton* instruction did not refer to the false-statements counts, *id.*, but *Pinkerton* is irrelevant. Third, the Task Force notes that the false statements instruction required the jury to find an independent false statement in the letters, "not to find that Skilling was guilty on the securities fraud counts," U.S.Br.100, but, again, the securities-fraud counts are irrelevant. Fourth, the Task Force says there was factual support for alternative findings that other statement were false, *id*., but under *Yates*, the factual sufficiency of other theories is irrelevant, so long as it is possible the jury convicted on a legally inadequate theory. *Supra* 29-37.

* * *

Because the Task Force does not and cannot refute the possibility that the jury relied on the legally inadequate honest-services fraud theory in convicting Skilling, every count of conviction must be reversed.

II. MULTIPLE JURY INSTRUCTION ERRORS COMPEL REVERSAL OF SKILLING'S CONVICTIONS.

The Task Force engineered a perfect storm in charging the jury: securing a deliberate ignorance instruction that reduced its burden to prove *mens rea*; excluding materiality and structural reliance instructions that would expose its case as deficient; and withholding all legal or technical guidance on its claims that Enron's accounting for three Enron-LJM transactions was vitiated by improper "side deals." The jury was not properly instructed, to Skilling's extreme detriment.

A. The Deliberate Ignorance Charge Was Factually Unjustified, Allowed The Jury To Convict Skilling If It Disapproved Of His Business Decisions, And Defeated Skilling's Reliance Defense.

It was inexcusable to give an ostrich instruction in a case such as this one—where the Task Force struggled to show the conduct in question was criminal, and Skilling agreed he knew about the business acts in question, but firmly believed they were proper, in part because of his reliance on teams of advisors. Given this conscious involvement, the conscious avoidance instruction had no place in the trial and only enabled the jury to convict Skilling for failing to make better business decisions—a civil standard of liability. The Task Force says this Court has a practice of rubberstamping ostrich instructions, and it recites six tiny fragments from volumes of testimony and documents that it says justify the charge. Even if it was error to give the charge, the Task Force argues any error was harmless, because its "principal theory" was that Skilling had actual knowledge of

the underlying acts, the instruction was appropriate as to Ken Lay, and Skilling was a "sophisticated businessman" whom it never accused of negligence. These responses do not address the issues.

1. The Instruction Lacked A Factual Predicate And Was Erroneously Given.

Task Force prosecutors have publicly acknowledged this was a close case and its main challenge was proving that Skilling's conduct was criminal—and not just the exercise of business judgment.[13] That explains, no doubt, why the Task Force insisted on an ostrich instruction for Skilling.

Cognizant that the record below does not support this request, the Task Force urges the Court to *assume* a basis for the deliberate ignorance instruction because the Court frequently upholds them. U.S.Br.105 & n.12. This flips Fifth Circuit law on its head, which holds that such instructions should only rarely be given. Br.82. A review of the string of cases the Task Force cites reveals:

- 62 involved the archetypal and distinguishable drug-offense scenario, where the defendants purported not to know, for example, they were carrying drugs across the border. *Infra* Appendix 1.1 (collecting cases).

[13] Br.17-21 (Task Force and its witnesses admitting Skilling's behavior was "seemingly inconsistent with alleged criminal intent"; prosecution would have to "navigate around serious advice of counsel issues and some serious reliance on auditors issues"; Skilling "loved" Enron and "had the best interests of Enron in mind"; Skilling did not steal from Enron; this was "not a case about greed").

- 2 involved defendants who denied knowing property in their possession was stolen, but clearly ignored indicia of that fact. Appendix 1.2.
- 7 involved get-rich-quick, Ponzi, and other scams and ignoring clear signs that the schemes were not above-board. Appendix 1.3.
- 7 involved defendants who helped file false claims or sell services never delivered despite strong indicia of illegality. Appendix 1.4.
- 6 involved defendants who made no inquiry or response when told their activity was actually or likely illegal. Appendix 1.5.
- 5 involved a felon's knowing possession of a firearm. Appendix 1.6.
- 6 involved defendants who went well out of their way to avoid acquiring guilty knowledge in the face of circumstances ranging from highly suspicious to manifestly illicit. Appendix 1.7.
- 5 involved substantial evidence the defendants actually knew about illegality, leading this Court to find the instruction harmless. Appendix 1.8.
- *None* involved business decisions made after considerable review and discussion with advisors.

The Task Force has no principled basis to distinguish the Tenth Circuit's decision in *U.S. v. Hilliard*, 31 F.3d 1509 (10th Cir. 1994). *Hilliard* was a business decision case, has been expressly recognized by this Court, and destroys the Task

Force's position. In *U.S. v. Fuchs*, 467 F.3d 889, 902 n.8 (5th Cir. 2006), this Court, citing *Hilliard*, recognized the impropriety of an ostrich instruction when the defendant, in response to concerns about certain decisions, sought the advice of counsel. *Fuchs* distinguished *Hilliard*, but only because the defendants in *Fuchs* made no such inquiry. *Id*. If the holding of *Hilliard* was contrary to Fifth Circuit law, as the Task Force suggests, surely the Court would have just said that.[14]

Instructing on deliberate ignorance may make sense for a drug runner who, having been paid thousands of dollars to drive across the border, chooses not to look in the car's trunk. But it makes no sense for a CEO who reviews and approves hundreds of complex business decisions, and does so after considerable evaluation and discussion, weighing alternatives, and deciding on courses of conduct along with the corporation's inside and outside advisors.

That pattern of behavior—which Skilling personified—is the very opposite of purposeful avoidance. *U.S. v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). Skilling was, in the Task Force's own words, a "controls freak" who

[14] The Task Force's attempt to distinguish *Hilliard* on the facts fails. As discussed *infra*, the Task Force could not and did not show that Skilling "failed to follow up on information suggesting that multiple transactions with LJM were fraudulent." *Compare* U.S.Br.111, *with infra* 53-56. Moreover, that *Hilliard* involved a "single series" of transactions, U.S.Br.111, was never once cited by the court as a salient fact. The key facts were that Hilliard sought and relied on advice in making business decisions, and this reliance showed he did not deliberately blind himself. The ostrich instruction destroyed his reliance defense and punished him for relying on the wrong advisor—just as happened here. 31 F.3d at 1516-17.

"wanted to know everything that was going on at the company." R:36531, 36534; Br.87-88. To the jury it may have looked, in hindsight, as though Skilling had made the wrong business decisions—Enron collapsed, after all. Consequently, the deliberate ignorance instruction should not have been given because it posed the danger the jury would convict Skilling "on the basis of the lesser *mens rea* of negligence—punishing the defendant for what he should have known." *U.S. v. Gray*, 105 F.3d 956, 967 (5th Cir. 1997); *Lara-Velasquez*, 919 F.2d at 951 (same).

Throughout the trial, the Task Force realized Skilling's case was ill-suited for the willful blindness instruction. The Task Force did not seek the instruction for Skilling until the end to enhance its chance of success,[15] in spite of its insistence throughout the trial that Skilling had his "hands firmly on the wheel."

With 18 months to mine the trial record to find facts justifying the ostrich instruction, the Task Force—understandably—has come up empty. The fact that Skilling denied entering into a "conspiracy," making "secret side deals," and participating in "fraudulent activity"—*the crimes charged*—plainly did not justify it, U.S.Br.106; otherwise, the instruction would be given in every case. *Cf. Lara-*

[15] The Task Force says its change of position does not appear in the record. U.S.Br.113-14 n.13. That is incorrect. Skilling's district court briefs and briefs before this Court are in the record, and they repeatedly refer to this change of position. R:38020-21; Appellant's Mot. for Bail Pending Appeal at 9 (Nov. 16, 2006). The Task Force has never once denied changing course—even now.

Velasquez, 919 F.2d at 951 ("The circumstances which will support the deliberate ignorance instruction *are rare*.").

The threshold question must be more penetrating, in order to separate cases where criminal conduct is conceded but knowledge of it is not, from cases where the lawfulness of the charged conduct is the central dispute. *Lara-Velasquez*, 919 F.2d at 952 (the instruction may be given "only when the Government presents facts that support an inference that the particular defendant subjectively *knew his act to be illegal*"). There were very few instances where Skilling denied that the alleged conduct happened—he agreed statements were made, conversations occurred, transactions were approved. Indeed, most were a matter of written record. Skilling's position was that the conduct was not criminal or wrongful. Thus, classic deliberate ignorance cases like *Nguyen*—where the defendants acknowledge their conduct contributed to a crime but deny having known about it—are inapposite. *U.S. v. Nguyen*, 493 F.3d 613, 619-22 (5th Cir. 2007); *U.S. v. Ebbers*, 458 F.3d 110, 124-25 (2d Cir. 2006) (CEO admitted company engaged in fraud; avoided discovering it by, *e.g.*, tossing reports in trash).

For these same reasons, the Task Force cannot establish that Skilling was "subjectively aware of a high probability of the existence of the illegal conduct" but "purposely contrived to avoid learning of" it. *Lara-Velasquez*, 919 F.2d at 951.

Lacking any theory or basis for the instruction, the Task Force dissected the record in search of evidence and came up with six meager snippets of testimony.

a. *Fastow's Asserted Conflict* The Task Force argues Skilling was deliberately ignorant because Enron executives Ken Rice and Cliff Baxter said Fastow's role at LJM posed a conflict of interest, and Jeff McMahon questioned having to negotiate against Fastow. U.S.Br.107-08. Fastow's conflict, however, was known, vetted, and approved by Enron's accountants, lawyers, management, and the full Board. R:21710-12, 22089-92; GX511, 2280. Skilling and the Board held numerous meetings on the conflict, instituted controls to mitigate it, and monitored it over time. R:27518-26, 28645-50, 28677-81 GX209:2; GX311; DX7364. That Enron would be negotiating with Fastow and LJM was fully understood. R:21781-82, 21965, 28646. What's more, the conflict and its waiver were publicly disclosed in Enron's SEC filings. R:31158, 22095-99; GX209, 210:01123, 1023:757-58, 1025:863, 1031:269, 996:200-01. Although the decision to approve LJM and waive the conflicts can be second-guessed, it cannot make Skilling deliberately blind. *Hilliard*, 31 F.3d at 1515.

b. *Glisan And Delainey On Raptors* Of no more help to the Task Force are two of many conversations Skilling had about Raptors, in which Glisan discussed their use of "puts" and another in which Delainey commented on the use of Enron stock to collateralize them. U.S.Br.108. Using puts and Enron stock to fund the

Raptors were not signs of wrongdoing—they were pivotal features of the structures, painstakingly examined, discussed, and disclosed. R:25008-09, GX996:200-01; *supra* 9-14. As with Fastow's conflict, the Task Force did not—and could not—claim their use was improper, much less illegal. R:24550. Delainey himself testified that the use of Enron stock was "not hidden or secret," and that the Board approved Raptors after "full consideration." R:20475-77, 19890-91. Glisan (and Skilling) testified that Skilling took time to review and understand Raptors. R:24254-57, 30069-113. To suggest these conversations demonstrated Skilling's purposeful efforts to remain blind is simply wrong; the evidence was that Skilling was informed and engaged.

c. *Fastow's Compensation* In September 2000 (before the overwhelming majority of LJM deals were done), Fastow told Skilling he expected to make a 20 to 25 percent return on Enron-LJM deals. U.S.Br.109. Contrary to the Task Force's suggestion (and for obvious reasons), this was a *projected* return. Skilling challenged Fastow, saying 20 percent was too high, which Fastow conceded. R:28664-67, 29865-66. Skilling promptly discussed the exchange with the Board's Finance Committee. GX209:2. Tellingly, the Task Force asked Fastow *no* questions about this conversation. Indeed, Fastow conceded he concealed his illicit profits from Skilling; and, in an email, is quoted as saying if Skilling found out how much money he had really made, Skilling would "shut down LJM."

R:21767-68, 21685, 21690, 21724-25, 21771, 21788, 21794; DX8793. Being deceived by Fastow did not make Skilling deliberately blind; it made him yet another of Fastow's many victims.

d. *The Mintz Memo* The Task Force suggests blindness is evidenced by Skilling's failure to respond to a memo by Enron attorney Jordan Mintz asking for Skilling's signature on LJM deal approval sheets. U.S.Br.109-10. But the Mintz memo contained no red flags. Nor was there any evidence Skilling ever saw it. No witness so testified, Skilling said he did not receive it, and the Task Force elected not to call Mintz. R:28685-88. The evidence, moreover, was undisputed that Skilling signed every LJM approval sheet he *was* given. R:28682-84; DX30887, 21680. Skilling had no reason *not* to sign the sheets; there was nothing incriminating about them; there was nothing to avoid. Nor was there an "Enron policy" that "required" Skilling's "authorization" of the LJM deals. U.S.Br.109. The Mintz memo itself says as much. Though Mintz observed that each sheet "provide[d]" for Skilling's signature, he noted even *without* Skilling's signature, "[a]ll required sign-offs...*have been recently completed*." GX3586.[16]

[16] The *only* evidence Skilling was required to approve Enron-LJM transactions came from Fastow. R:21273-74. However, in a civil deposition given days after Skilling was sentenced, Fastow admitted that although he once "thought" Skilling had responsibility for approving such transactions, his "understanding is that Mr. Skilling was not, in fact, approving all the LJM transactions *and that there may not have been a requirement for him to do so*." Def.-Appellant Jeffrey K. Skilling's Unopposed Mot. To Supp. The Record On Appeal To Include Civil Dep.

e. *Kaminski's Transfer* Skilling transferred Kaminski and his group out of RAC (Enron's risk analysis group), shortly after Kaminski's work on the RhythmsNet transaction. Kaminski was needed elsewhere, and Skilling commented there were enough "cops" in the risk group. U.S.Br.108-09; R:28631-33. Even viewed through the government's lens, this transfer left RAC with a "couple hundred" risk analysts and associates, and actually *returned* Kaminski's group to his preferred assignment, Wholesale. R:28633, 27712, 28325-26, 28333-34, 22989 (Kaminski: "I was quite happy because I didn't like being moved to RAC in the first place"). Kaminski was not removed from analyzing controversial transactions; he and his group were asked to do additional work on both the RhythmsNet deal and Raptors. R:22994-95, 22989, 22988-89, 22994 (Kaminski: "functions remained the same" and move "didn't change the responsibilities"). Kaminski testified he did not believe Skilling *ever* did anything "illegal." R:23005. Nothing about Kaminski's transfer suggests willful blindness.[17]

Testimony Of Andrew Fastow (filed herewith) ("Mot. to Supp. re Fastow Dep.") Ex. A at 585-86.

[17] Kaminski was also wrong about RhythmsNet. Despite openly discussing his reservations with the deal, R:22837-44, it performed well, R:28621-22, 24550-51. Overlooking this, the Task Force asserts Kaminski "echoed the assessment of other witnesses that Skilling would 'typically send the message that he doesn't agree with you and to stop the discussion.'" U.S.Br.109. But Kaminski made this comment to convey that Skilling was "a very forceful person," R:23009, not to say that Skilling never wanted to discuss hard issues. Indeed, Kaminski added that Skilling "valued" his "intellect," "opinion," "candor," and "honesty," and that Kaminski was not "afraid" of Skilling and *was never hesitant to express his views*

f. *2Q 2000 "Preference"* The Task Force says that the 2Q 2000 penny adjustment shows Skilling knew his subordinates broke the law to accomplish his goals, but did not concern himself with the details. U.S.Br.110. This claim, made for the first time on appeal, is baseless. Both Task Force and defense witnesses *agreed* that the final reserves number ($56M) accurately reflected Enron's litigation risks. R:19588-89; Br.40. Wes Colwell, the Task Force witness who made the adjustment, testified he never told Skilling it was improper, Br.40, and that the $14 million adjustment was immaterial, *id.* at 40 n.14. Indeed, Colwell admitted that Enron ended up *over-reserved* that quarter, by $40 million, which was consistent with Skilling's belief at the end of the quarter that Enron was "coming in hot" and that the draft earnings estimates were too low. R:19593-428559-62; DX8548.

These isolated snippets are all the Task Force can muster to justify the deliberate ignorance instruction. It can point to nothing like the defendants in:

- *Ebbers*, 458 F.3d at 125, who admitted he trashed critical accounting reports that would have revealed the fraud;
- *U.S. v. Gray*, 105 F.3d at 967, who prevented others from inquiring into her company's activities and told a cover-up story; or

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"politely but firmly." R:22985, 22977, 23003-04. The Task Force's similar citations to Rice and Rieker, U.S.Br.109, show only that Skilling was decisive, hardly an unusual characteristic in a CEO. R:17273; Br.20.

- *U.S. v. Investment Enterprises*, 10 F.3d 263, 269 (5th Cir. 1994), who never attended board meetings of the company whose obscene materials he transported, refused to meet the CEO at the company's headquarters, and sent others to collect payment.

Here, Skilling attended meeting after meeting where the subject transactions were discussed, debated, and acted on, where all the features the Task Force now says were controversial were known. There was no evidence Skilling tried to avoid suspected wrongdoing, blinded himself to transactions or business problems, or communicated, "in effect, 'Don't tell me, I don't want to know.'" *Lara-Velasquez*, 919 F.2d at 951. The ostrich instruction was patently unwarranted.

2. Error Giving The Ostrich Instruction Is Not Harmless And Requires Reversal Of All Counts.

The Task Force concedes this Court has twice reversed convictions because of impermissible deliberate ignorance instructions, and without any showing of harm. U.S.Br.105-06 n.12 (citing *U.S. v. Ojebode*, 957 F.2d 1218 (5th Cir. 1992); *U.S. v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994)). Although this Court's law has varied,[18] Skilling submits that *Ojebode* and *Cavin* state the appropriate rule, particularly in cases like *Hilliard*—and here—where the defendant does not deny knowledge of the underlying acts but instead advances *actus reus* and reliance

[18] The Eleventh Circuit has cited *Ojebode* as establishing a *per se* rule of reversal in the Fifth Circuit, *U.S. v. Stone*, 9 F.3d 934, 940 (11th Cir. 1993), but as the list *infra* Appendix 1 shows, this Court has at times found the error harmless.

defenses. Using actual knowledge to prove harmlessness when a defendant says the acts were not fraudulent and were pursued in good faith conflates knowledge of the acts in question, which is undisputed, with knowledge of *illegality*, which the government must establish to invoke the instruction in the first instance. *Hilliard*, 31 F.3d at 1515 (government must show defendant avoided learning facts "which would have made him realize his conduct was criminal," not simply that he had "actual knowledge of the facts supporting criminal liability"); *Stone*, 9 F.3d at 939-40 (noting reasons for *per se* rule, including that: instruction "reliev[es] the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt").

If the Court decides to consider harm, it is clear that the Task Force has failed to carry its burden of proving the deliberate ignorance charge harmless. The Task Force advances four arguments on this point. None has merit.

a. <u>*Ken Lay*</u> The Task Force says the instruction was harmless because it was rightly given as to Lay without any objection by Skilling. The Task Force egregiously misstates the record: Skilling objected three separate times to the instruction being given—to him or to Lay.[19] As for Lay, his premature death foreclosed the ability to test the appropriateness of the instruction.[20]

[19] R:25867-69 ("The Task Force has submitted no evidence against *defendants* that would justify a 'deliberate ignorance' instruction.... *[D]efendants* have *not* asserted an ostrich defense, and no corresponding deliberate ignorance instruction

Even assuming the instruction could be given for Lay, Skilling was entitled to a balancing instruction making clear the willful blindness instruction could be applied to either or neither of the defendants. Br.92-94. The district court's refusal to give such clarification compels reversal of Skilling's convictions. The Task Force cannot credibly disagree, because *it* first recommended the balancing charge to the court. R:38063. Its current suggestion—that the deliberate ignorance instruction itself made the point clear, U.S.Br.113—is specious. The charge said no such thing. Moreover, both the charge given and the balancing instruction refused are drawn from the Fifth Circuit Pattern Instructions, and there would be no need for the latter if the former sufficed. Br.93-94.[21]

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may be given."); R:33198 ("[T]here are no facts in the record that would support giving a deliberate ignorance instruction *at all* in this case."); R:34768 ("A deliberate ignorance charge should not be given against *either defendant*.").

[20] If he had that chance, though, he could refute the Task Force's assertion—supported by no record cites—that the instruction properly applied to him. To take just one example, the Task Force says Lay turned a blind eye to concerns raised by employees, U.S.Br.112, which would presumably include the memorandum Sherron Watkins wrote about perceived problems with Raptors. Rather than turn a blind eye to her memo, Lay had Vinson & Elkins conduct an investigation. R:14933-34, 27296, 27302-33, 27808-12, 31300. The Task Force may quarrel with the investigation, but as this Court noted in *Fuchs*, launching such an inquiry runs contrary to being willfully blind. 467 F.3d at 902 n.8.

[21] Nor can one presume the jury did not apply the factually unsupported instruction to Skilling, as the Task Force submits. U.S.Br.113. The whole *point* of giving the balancing instruction when facts are lacking as to one defendant is that, without it, the "the jury might convict for negligence or stupidity." *U.S. v. Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993);*U.S. v. Mendoza-Medina*, 346 F.3d 121, 134 (5th Cir. 2003) ("We cannot assume that in every instance in which the evidence does not support the deliberate ignorance instruction the jury will

b. *Actual Knowledge* The Task Force next asserts Skilling had "actual knowledge," so any error was harmless. Without a single supporting citation, the Task Force cannot possibly have carried its demanding burden of proving harmlessness. *U.S. v. Boutte*, 13 F.3d 855, 859 (5th Cir. 1994) (appellate courts require an extensive and compelling examination of the record evidence to conclude the government has met its burden). Again, in showing harmlessness, the knowledge to be proved is that Skilling was aware of *illegal* conduct, not mere knowledge of the business acts in dispute. *Lara-Velasquez*, 919 F.2d at 952 (government must show defendant "subjectively knew his act to be illegal").

c. *Skilling Was Smart* The government says there was no danger "that the jury…convict[ed] for negligence or stupidity," because it admitted he is intelligent and never said he was "negligent." U.S.Br.115. That proves nothing. No prosecutor would explicitly argue negligence to the jury in an intent case.[22] Instead, the Task Force argued negligence under the guise of tort-like rhetoric, saying Skilling "breached [his] duties," R:29611; Br.91, and inviting the civil "should have known" standard. The part of the deliberate ignorance charge excluding "negligence" and the charge the district court gave on "good faith" do

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disregard it. We have repeatedly stated that the instruction should rarely be given because it possesses a danger of confusing the jury.").

[22] The argument that no jury could have convicted Skilling of deliberate ignorance because the prosecutors did not say the word "negligence" is belied by the fact that prosecutors also ran from any mention of the word "conspiracy" at trial, yet the jury convicted Skilling on Count 1. R:36678, 36993.

not cure the problem. U.S.Br.115. Apart from the fact that the latter instruction was inadequate, *infra* 81-85, the point of *Hilliard* and cases like it is that the willful blindness charge invites the jury to convict on the civil standard *despite* a defendant's good faith. 31 F.3d at 1516-17.

d. *Specific Intent* The Task Force suggests six counts of conviction requiring a showing of specific intent are salvageable, regardless of any error. U.S.Br.115-16. The government has it backwards: the potential for juror confusion is greatest when the underlying charges require both knowledge and specific intent. "One cannot be deliberately ignorant...and still have the *purpose* of engaging in illegal...activities." *U.S. v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990); *U.S. v. Soto-Silva*, 129 F.3d 340, 344 (5th Cir. 1997); *U.S. v. Scotti*, 47 F.3d 1237, 1442-43 (2d Cir. 1995) (it is "logically impossible for a defendant to intend and agree to join a conspiracy if he does not know that it exists"). That is a legal error, and the jury cannot have been expected to reconcile the two.

Indeed, the Task Force admits it was error to give the charge as to these six counts, but claims the jury could not have been misled because the "evidence on those counts...did not include evidence of deliberate ignorance." U.S.Br.116. No matter, the deliberate ignorance instruction, by its own terms, applied to the word "knowledge" *whenever* it was used to define a count. R:36410. *Every count* for

which Skilling was convicted contained a knowledge element. R:36408, 36416, 36428, 36433. All of Skilling's counts were infected and must be reversed.

B. A Complete Instruction On Materiality Was Necessary For The Jury To Parse The Statements Relied On By The Task Force.

For each charge in this case, the jury had to determine whether the alleged false statements were material. Jurors needed a thorough instruction on materiality, especially because statements for which Skilling was convicted were *immaterial as a matter of law*. The rigid instruction the district court gave failed to provide the necessary guidance to distinguish statements the securities laws forbid from those it permits. This is a technical—yet critical—distinction, informed by decades of developed law. What the securities laws deem immaterial often do not cohere with lay notions of fairness. *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 393 (5th Cir. 2007). Here, the district court let lay perceptions reign, as best evidenced by the convictions the jury returned on statements that cannot possibly be material in the eyes of the law.

1. The Task Force Cannot Show The Incomplete Materiality Instruction Was Adequate.

The Task Force makes four arguments in defense of the district court's materiality instruction. All are unavailing.

a. Citing the fact that the district court's materiality instruction tracked this Court's pattern instruction, the Task Force argues the instruction is all but

unassailable. U.S.Br.116-21. Even if an "instruction is correct," however, a district court commits reversible error if the charge it gives is not "a *comprehensive, all-inclusive* statement" of the law. *Corey v. Jones*, 650 F.2d 803, 806-07 (5th Cir. 1981); *U.S. v. Bello-Bahena*, 411 F.3d 1083 (9th Cir. 2005) (reversing when instruction stated elements of offense but was incomplete).

Although the district court's charge told jurors to look at the "importance" of each statement in "the total mix of information," it did not specifically explain that puffery, forward-looking statements, opinions, and the like have been deemed immaterial as a matter of law. Br.94-103. When a defendant asserts a "puffery" defense, he is "entitled to an instruction putting this defense before the jury." *U.S. v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996); *Beardshall v. Minuteman Press Int'l, Inc.*, 664 F.2d 23, 28 (3d Cir. 1981) (error to obscure "the distinction between factual misrepresentation, which may be actionable, and statements of opinion or mere 'puffery'"). Where, as here, "terms are not readily understood by the jury or where the possibility of confusion concerning a term exists, the court should define or explain" them. *U.S. v. Whitehead*, 176 F.3d 1030, 1040 (9th Cir. 1999). The district court failed to provide such definitions and explanations, complaining that doing so would amount to teaching a class on securities law. Br.98-99. Providing such guidance is required, and it was error to refuse it.

b. As a fall-back, the Task Force contends the district court "captured the essence" of Skilling's proposed instruction. U.S.Br.118-19. Again, this is wrong. The Task Force does not deny that Skilling's proposed instruction properly described the applicable law: it informed the jury what puffing was and explained that general forward-looking statements are immaterial; described that even specific forward-looking statements are immaterial if accompanied by cautionary statements; and explained that broad statements are legally inconsequential when the figures underlying those statements are fully disclosed. Br.98 n.33.[23]

In *U.S. v. Lake*, the Tenth Circuit reiterated that "[w]hen a defendant's defense is so dependent on an understanding of an applicable law, the 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." 472 F.3d 1247, 1263 (10th Cir. 2007). The Task Force relies on the supposed adequacy of the given materiality instruction to distinguish *Lake*, U.S.Br.120-21, but that argument is circular—*Lake* in fact *demonstrates* the instruction's inadequacy.

The Task Force says *Lake* is distinguishable because even though it was a securities case, "materiality" was not the element at issue. U.S.Br.120. *Lake*'s

[23] The Task Force contends the district court's instruction requiring the jury *also* to find falsity "makes up" for the failings of the materiality instruction. U.S.Br.118-19. However, falsity and materiality involve different principles of law and present different questions of fact.

holding was not limited to a single, limited aspect of securities law. The overarching principle in *Lake*, which is directly applicable here, is that the government cannot pursue a theory of criminal securities fraud that is not even proscribed under a *civil* standard. Br.99-101.

c. The Task Force argues that a reasonable juror would be able to distinguish puffery from fact and would "*assume*" that a reasonable investor would not consider "mere puffery" important in the "total mix" of information. U.S.Br.119. The argument assumes its conclusion: a juror cannot know to disregard "mere puffery" without knowing what puffery *is*. The district court's instructions gave no content to that term. Moreover, the law never regards a jury competent to "assume" what the law is, *Griffin*, 502 U.S. at 59, and the Task Force is wrong to insist that a reasonable juror can simply step into the shoes of a reasonable investor. The investor is presumed to know information in the marketplace; the juror must be told by the court how to evaluate market information. *Compare Whirlpool Financial Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) (reasonable investor "is presumed to have information available in the public domain"), *with Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (jurors have access only to "evidence developed at the trial").

d. *Finally*, the Task Force asserts that any error in refusing Skilling's proposed instruction was harmless because Skilling did not present a materiality

defense. U.S.Br.121. This contention—unsupported by a single cite to the record—is demonstrably wrong. Skilling:

- Introduced analyst report after analyst report showing that *no* reasonable investor thought Skilling's comments regarding EBS were material because all value attributed to the business unit had already been discounted. R:16676-87, 17945-48, 29306-11.
- Fended off improper motions by the Task Force to exclude these analyst reports, which Skilling argued went to *materiality*. R:17771, 17895, 29306-09, 16460-64.
- Testified on direct about information that did not have to be disclosed to the public because it was not material. *E.g.*, R:29171-77; *see also* R:14961, 14902, 14930, 14955, 36899 (Lay asserting puffing defense as well).
- Cross-examined Task Force witnesses Rieker and Koenig regarding their testimony that certain facts were important because investors "would want to know." R:15906-08, 16146-47, 16201-12, 16273-74, 19152-54.
- Contested the materiality of statements like "Wholesale is not a trading company" as pure opinion. R:16432-36, 17390-94.
- Objected to the Task Force's cherry-picking of isolated statements failing to convey the total mix of information. R:15272-75, 15294-96, 15305-06.
- Argued for the admission of evidence for the purpose of showing the total mix of information in the marketplace. R:15633-35, 15409-10.
- Cross-examined Task Force witness Wes Colwell on the immateriality of adjusting a litigation reserve by $14 million. R:21742-45.

2. The Failure to Instruct the Jury on Materiality Prejudiced Skilling, As the Task Force's Own Statement of Facts Clearly Shows.

The Task Force says the jury needed no guidance on materiality and did not likely convict Skilling for puffing. The Task Force's own rendition of the facts—and the scores of civil cases it fails to address on "puffing"—belie this claim.

The Task Force does not deny that "the same standards apply to civil and criminal liability under the securities law." *U.S. v. Gleason*, 616 F.2d 2, 16 (2d Cir. 1979). Nor does the Task Force dispute that statements exactly like those it prosecuted at trial have repeatedly been found *immaterial* as a matter of law—as puffery, corporate cheerleading, or forward-looking—including a civil suit about Enron and Skilling before the same district judge who presided over Skilling's criminal trial. *In re Azurix Corp. Sec. Litig*., 198 F.Supp.2d 862 (S.D. Tex. 2002) (Lake, J.). The statements are indistinguishable:

Statements Deemed Immaterial in Civil Cases	**Statements Said To Be "Material" in Skilling's Criminal Case**
• "[Azurix has] assembled the core assets and capabilities for *strong growth* in our key markets." *Azurix*, 198 F.Supp.2d at 873. • Statement about company's "*strong performance*." *Next Century Comms. Corp. v. Ellis*, 318 F.3d 1023, 1027-28 (11th Cir. 2003). • "Strong," "healthy," "robust," "well-positioned," "solid," "positive." *In re Splash Tech. Holdings Inc. Sec. Litig.*, 160 F.Supp.2d 1059, 1077 (N.D. Cal.	• "[E]ssentially *strong growth* on the intermediation side, *strong growth* on the content services side." U.S.Br.29. • Enron's major businesses were "*uniquely strong* franchises with sustainable high earnings power." U.S.Br.26. • "[F]irst quarter *results were great*" in EES. *Id.* at 30. "[O]verall, on the intermediation side, *very strong development* of the marketplace.... And we're *feeling very good* about the

2001); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001). • Company is in "*strong financial condition* and [its] *business prospects remain excellent*." *In re Eng'g Animation Sec. Litig.*, 110 F.Supp.2d 1183, 1195 & n.6 (S.D. Ia. 2000).	development of this business." U.S.Br.31. • "We're having a *great quarter* on the intermediation side of the bandwidth business." U.S.Br.28.
• Touting "Azurix's ability to become a *successful player* in…the industry," growth opportunities "that will distinguish the company as a *leading player*." *Azurix*, 198 F.Supp.2d at 881, 886.	• "[W]e have *an enormous lead over several other players* in this industry." U.S.Br.28.
• Earnings "would approximate $500 million for the year 2000 and $800 million for the year 2001." *Azurix*, 198 F.Supp.2d at 885. • "[E]xpected annual growth rate of 10% to 30% over the next several years." *Raab v. Gen. Phys. Corp*, 4 F.3d 286, 288-91 (4th Cir. 1993). • "Company 'remains comfortable' with...estimates of...revenue growth." *In re MCI WorldCom*, 191 F.Supp.2d 778, 784-86 (S.D. Miss. 2002).	• Enron was "highly confident" that EES would make its earnings target for the year. U.S.Br.27. • "So, we are *comfortable with the projections* on volumes and the targets and the benchmarks we set for EBS....So, EBS is *coming along just fine*." U.S.Br.29. • EES "firmly on track to achieve [its] 2001 target of $225 million." U.S.Br.33.
• "1999 was *an outstanding year*"; "WorldCom posted a *strong quarter* with record revenue and record profits." *MCI WorldCom*, 191 F.Supp.2d at 785-86.	• EES "*had an outstanding second* quarter." U.S.Br.33.
• Statements accompanied by cautionary language. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003) (statement immaterial because it was "qualified with the word 'anticipate,'" and "accompanied by extensive cautionary language").	• R:14053-60 (Stmt. in Compl.) (full statements from which the government draws its excerpts on U.S.Br.25-33, which contain the cautionary language not quoted by the government in its brief).

Inexplicably, the Task Force argues this comparison proves the materiality instruction "worked." Sure, it worked—to secure erroneous convictions. That the jury convicted Skilling of making legally immaterial statements is definitive proof that error occurred, prejudicing Skilling and requiring reversal of every count. *Burks v. U.S.*, 437 U.S. 1 (1978) (*per se* acquittal when proof legally insufficient).

3. Counts 23 And 24 Must Be Reversed And Cannot Be Retried.

Counts 23 and 24 alleged that Skilling made false statements at an analysts' conference on January 25, 2001 and on a March 23, 2001 analyst call. U.S.Br.122-23. Skilling moved to dismiss these counts because the indictment failed to include any material misstatements amounting to securities fraud. The district court denied the motion. On appeal, Skilling challenges both the legal and factual sufficiency of these charges. R:7340-69, 37275-79; Br.104.

The Task Force clings to Counts 23 and 24, suggesting they are "immune from challenge" because any inadequacies in the indictment were cured by other documents filed with the district court or proof adduced at trial. U.S.Br.121, 125. The Task Force is wrong. The only further document it filed with the district court—the so-called "Statement in Compliance"—fails to allege any material false statements to support these counts, as set forth in Skilling's opening brief. Br.104-05. In any event, the Statement in Compliance never went to the jury; the jury evaluated the Task Force's case based on the evidence at trial.

The Task Force cites *nothing* from the trial evidence identifying a statement that could support these two charges. All it ever mentions are the alleged false statements set forth in its statement of facts. That rendition only confirms that Skilling was convicted for non-material statements. Skilling's statement at the January analysts' conference that Enron "was not a trading business" was pure opinion. U.S.Br.26-27; *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 378, 380 (5th Cir. 2004). The rest were puffery as a matter of law: "stable, high-growth"; "great quarter"; "enormous lead"; "we are comfortable with the projections"; "strong growth." U.S.Br.26-29.[24]

The Task Force defends these counts by pointing to one victim witness who testified these statements were "important" to him. U.S.Br.126. But this witness was a former employee who lost money on Enron holdings, was not aware of any information in the marketplace other than what was said at employee meetings, and did not conclude that the information was important until the Task Force raised the issue with him years later, in recruiting him to testify. R:20642-45. As Task Force prosecutors admitted after the fact, they did not have good evidence of materiality, so instead they relied on such "victim" statements to evoke an "emotional"

[24] The "implied statement[s] of fact" noted by the Task Force, U.S.Br.123, 126, are equally immaterial. Just as one cannot be held criminally liable for saying a business is in "great shape," one cannot be convicted for "implying" it, particularly when the data underlying the statements are disclosed. *City of Monroe Empls. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 675-76 & n.21 (6th Cir. 2005).

response. Br.100-01 n.34. The applicable legal standard asks what a reasonable investor would find important; it is not subjective, and is not based on what someone who lost money thinks, looking back with the help of prosecutors, might have been useful to know.[25]

Finally, that the jury found Skilling guilty on Counts 23 and 24 in no way cures the indictment's defects. It simply shows the jury was permitted to find Skilling guilty for immaterial statements because it was never instructed on the governing rules. Counts 23 and 24 must not only be reversed; they cannot be tried again because the government's proof at trial was legally deficient. *Burks v. U.S.*, 437 U.S. 1, 18 (1978); *U.S. v. Chambers*, 408 F.3d 237, 247 n.6 (5th Cir. 2005).

C. All Of Skilling's Convictions Must Be Reversed Because The District Court Refused To Instruct On "Secret Side Deals."

"Secret oral side deals" were central to the Task Force's prosecution. According to the Task Force, Skilling made such deals with Andrew Fastow on two transactions (Cuiaba and Nigerian Barges) and failed to report them to Enron's auditors and the public. This, the theory goes, rendered false a number of Enron's financial statements and representation letters to its auditors. "Secret side deals,"

[25] *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 684 (5th Cir. 1986) (the rule regarding the nonactionability of "opinion and puffery" is "hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed." (quoting *Deming v. Darling*, 20 N.E. 107, 108-09 (1889) (Holmes, J.)).

the Task Force urged, were reason *alone* to convict Skilling on *every* count in the indictment. Br.106-08.

What is a secret side deal? What makes it "secret"? What does "side" mean? What makes it criminal? Not one of these questions was answered or explained by the judge to the jury. Because of its paramount importance, Skilling proposed a jury instruction to help the jury understand and evaluate the side-deal theory. The instruction explained both that there is a line between an appropriate verbal assurance and an improper guarantee, and that how and where to draw that line is complex, fact-dependent, and governed by a SEC regulations. SEC Financial Reporting Release 23, 17 C.F.R. Part 211, 50 F.R. 51671 (1985) ("SEC Release 23") (requiring disclosure only when seller makes "material commitment which is in substance a guarantee").

Skilling's instruction tracked SEC Release 23, which was directly on point, and would have informed jurors that not every assurance, compromise, or bargain is of legal consequence. Br.110-12; R:35949-50. The Task Force did not object at trial, and *concedes* on appeal, that Skilling's instruction correctly stated the law, was not unduly argumentative, and was not covered by other instructions or the charge as a whole. U.S.Br.127-33; R:11351-52 (Task Force motion *in limine* citing SEC Release 23; stating: "oral agreements, which are in substance guarantees, must be reported to auditors"); R:11300-01, 27995 (Task Force:

"[T]here is no dispute that side agreements may exist and that their effects depend on the facts and circumstances in which they are entered.").

The district court not only refused Skilling's instruction, but provided no other guidance. Hence, the jury had no basis to determine whether or how the alleged conversations between Skilling and Fastow crossed the line from appropriate assurance to guarantee affecting the accounting and disclosures. "Amid a sea of facts and inferences, instructions are the jury's only compass. Here, they were cast adrift." *U.S. v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990).

The Task Force now says the district court rightly refused the instruction because "no evidence" supported it; the refusal was harmless because Skilling's closing argument "emphasized" the same point; and Skilling requested the instruction too late. U.S.Br.127-33. The Task Force could not be more mistaken.

1. More Than Ample Evidence Supported Skilling's Side-Deal Instruction.

The Task Force impermissibly blurred the line between assurances and guarantees and implored the jury to disregard voluminous written contracts because "[t]he real deal [was that] Mr. Skilling promised verbally to Mr. Fastow—the bear hug—that he wouldn't lose money on the deal, he would make a guaranteed return." R:36459-60. Skilling's proposed instruction would have filled the gap and properly advised the jury that SEC Release 23 requires companies to report "guarantees in substance" but *not* "verbal assurances not amounting to

guarantees." Br.110-11. The factual predicate for this distinction was established through substantial evidence:

a. *Fastow's Testimony* Fastow was the Task Force's chief witness on "side deals" and the only person to testify that Skilling made any sort of promise to anyone. On direct examination, Fastow described alleged conversations with Skilling concerning two transactions, Cuiaba and Nigerian Barges, in which Fastow said he got "bear hugs" from Skilling. Fastow conceded Skilling never used the word "guarantee," never promised that Enron would repurchase Cuiaba at a profit, and never expressly guaranteed that Fastow or LJM would not lose money. As best Fastow could recall, Skilling's actual words were "Don't worry. I'll make sure you're all right on the project" or "You won't lose any money." R:21298-303, 21962-63. That was it. Fastow was then deftly led to add that he "*interpreted*" Skilling's words as "guarantees," although he never told Skilling that he took it that way. R:21269. Despite his "*interpretation*," Fastow was forced to admit on cross-examination that some risk remained with LJM. R:21280, 22271.[26]

[26] In addition, in his recent civil deposition, Fastow backtracked from his trial testimony that the only reason LJM did the Cuiaba deal was Skilling's "bear hug." Fastow testified that LJM purchased Cuiaba for "two reasons": the alleged bear hug and because, after reviewing the "transaction documents," he determined "there was incentive for Enron to perform." Mot. to Supp. re Fastow Dep. Ex. A at 595. This material change in Fastow's testimony—admitting that he did due diligence, and that there was an independent business reason to do the Cuiaba deal—further undermines the Task Force's side-deal claims.

b. *Skilling's Testimony* Skilling testified that Fastow came to him shortly before LJM purchased an interest in Cuiaba with "concerns" that Enron negotiators had lied to LJM about Cuiaba's business prospects. When Fastow asked for "protect[ion]," Skilling responded: "You've got your own investment fund here. To the extent that something is being misrepresented to you, we'll treat you like any other equity partner." R:28711. As to whether he guaranteed Fastow against loss, Skilling testified: "I had no agreement with Andy Fastow that would guarantee him a rate of return on a project, period." R:28703.

c. *Glisan And Bauer's Testimony* Glisan 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. Andersen accountant Tom Bauer testified that oral guarantees "can" (not "necessarily do") impact how one discloses a transaction. R:23540. *Neither* Glisan nor Bauer heard of a "side deal" involving Skilling. Most tellingly, neither was asked by the Task Force whether the conversations described by Fastow (if true) would be considered guarantees affecting the accounting and requiring disclosure. R:23540-42, 24622, 24653-54.

d. *Documentary Evidence* The deal documents for these transactions included integration clauses prohibiting precisely the sort of "oral guarantees" Fastow said Skilling had made. DX8756:435, 8662:221, 8666:249, 8669:316, 8668:809. Moreover, some included "remarketing agreements" pursuant to which

Enron promised to assist the buyer in re-selling its interests to a third-party. R:22692-93; DX8756:436-37. Without Skilling's proposed jury instruction, the jury had no way to determine whether a "remarketing promise" was an improper guarantee—and may well have wrongly concluded it was—even though the Task Force has openly acknowledged it is not. Br. for U.S. at 229-230 n.87, *U.S. v. Brown*, No. 05-20319 (5th Cir. Oct. 11, 2005).

In short, there was more than sufficient evidence to justify Skilling's proposed side-deal instruction. *U.S. v. Cardova-Larios*, 907 F.2d 40, 42 (5th Cir. 1990) ("A defendant is entitled to have the jury instructed on a theory of defense for which there is *any* foundation in the evidence."); *U.S. v. Rubio*, 834 F.2d 442, 446 (5th Cir. 1987) ("If there is *any* evidentiary support whatsoever for a legal defense, and the trial court's attention is specifically directed to that defense, the trial judge commits reversible error by refusing to charge the jury.").

2. **No Expert Issue Was Presented.**

The Task Force's suggestion that Skilling needed to call an expert witness to "establish a predicate" for his proposed side-deal instruction is wrong. U.S.Br.131. "Federal judges," not expert witnesses, "instruct the jury on the law applicable to the issues raised at trial." *U.S. v. Johnson*, 718 F.2d 1317, 1322 (5th Cir. 1983); *Fontenot v. U.S.*, 89 F.3d 205, 209 (5th Cir. 1996) ("The judge doesn't need an expert to tell him the law."). No basis in law exists to impose such a burden on a

defendant. If anything, as the party bearing the burden of proof, it was the *government's* obligation to introduce expert testimony to demonstrate the existence of an accounting violation or irregularity. *Garnac Grain Co., Inc. v. Blackley*, 932 F.2d 1563, 1566 (8th Cir. 1991) ("demonstrating violations of GAAS requires expert testimony"); *SEC v. Guenthner*, 395 F.Supp.2d 835, 846 (D. Neb. 2005) (same). Furthermore, when Skilling sought to introduce expert testimony about how "understandings or assurances that are not embodied in contractual documentation" affect a transaction, R:25384-94, 41312-15, the Task Force vigorously *objected*, claiming the proffered testimony invaded the province of the court, and touted that "precisely this type of testimony…was stricken from the record in the recent trial of Enron Broadband executives." R:27995-96, 11300-01.

3. **The District Court's Error Severely Prejudiced Skilling.**

Also devoid of merit is the Task Force's contention that the district court's failure to properly instruct the jury on side deals was "harmless"—because defense counsel argued the point in closing. U.S.Br.131-33. The Supreme Court has held that "arguments of counsel cannot substitute for instructions by the court," because it is "the duty of the court to safeguard [the defendant's] rights"—"a duty only [the court]…[can] perform[] reliably." *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978); *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568 (5th Cir. 2004); *Walters*, 913 F.2d at 392.

U.S. v. Lake, 472 F.3d at 1249, is directly on point. Here and there: (a) every count of conviction depended, at least in part, on a failure to report a certain fact; (b) the critical issue was whether SEC and accounting rules required disclosure; (c) defendants sought a jury instruction tracking the governing SEC regulation; (d) the district court denied the instruction; (e) the jury convicted; (f) and the government argued, on appeal, that defense counsel's arguments about what the applicable rules were was enough. As here, it was reversible error "for the district court to abdicate its responsibility in this regard and let opposing counsel argue their competing theories." *Id.* at 1263.

4. Skilling Did Not Delay In Proposing A Side-Deal Instruction.

The Task Force does not contend that Skilling "waived" his ability to raise the side-deal issue on appeal. Nor can it. Nonetheless, it suggests this Court should dismiss the claim because Skilling treated the instruction as an "afterthought" and first proposed it after the close of evidence. U.S.Br.128-29.

This is baseless. "Secret side deals" were no afterthought. Before trial, Skilling filed a motion *in limine* seeking to preclude the Task Force from eliciting conclusory testimony that an alleged discussion resulted in "an oral guarantee that blew the accounting." R:11555-58. The Task Force filed its own motion to prohibit defendants from arguing that only "legally enforceable" promises must be reported. R:11349-52.

Skilling proposed his side-deal instruction on May 10, *before* the first of two jury instruction conferences and well before closing arguments. R:35948, 36017, 36286.[27] The Task Force did not object to Skilling's proposed side-deal instruction or argue it was untimely, and the district court never said the instruction came too late. To the contrary, there was an ongoing dialogue concerning jury instructions through close of evidence. R:25740, 35948, 36017, 36020-23, 36308, 41327, 41337. Indeed, on May 11 and 12—the two days after Skilling submitted his side-deal instruction—the *Task Force* submitted two letters concerning jury instructions. In its May 11 letter, it argued against including a reference to "bribery" in the honest-services instruction, arguing this was an "honest services fraud" case based on defendants "breaching their fiduciary duties" (which, of course, belies their current arguments about *Brown*). R:41327-29. On May 12, the Task Force submitted another letter, this time asking for a balancing instruction clarifying that the deliberate ignorance charge need not necessarily apply to Skilling. R:38062-63. Suffice to say, these are hardly minor issues in the case, and May 10 was hardly too late a date for Skilling to ask for a side-deal instruction.

[27] Contrary to the Task Force's claim, U.S.Br.128, Skilling's objections to the revised jury charge plainly preserved his objection to the absence of a side-deal instruction: "The Court's charge does not include many of the defendants' jury instruction proposals….Defendants object to the Court's jury charge to the extent it deviates from defendants' proposal." R:36286, 35887.

To the contrary, Skilling clearly and "substantially complied" with Rule 30. *U.S. v. Mendoza*, 473 F.2d 697, 701 (5th Cir. 1973); *U.S. v. Tourine*, 428 F.2d 865, 869 (9th Cir. 1970). As this Court observed in similar circumstances, "The procedure for requesting charges, and for objections, "should not be applied woodenly, but should be applied where its application will serve the ends for which it is designed." *U.S. v. Davis*, 583 F.2d 190, 195 (5th Cir. 1978). The Task Force advances this half-hearted waiver argument only because it lacks a substantive response. Since the Task Force's side-deal theory, by its own admission, underpinned each count, every count must be reversed.[28]

D. The Incomplete Good Faith Instruction Crippled Skilling's Reliance Defense.

Skilling was entitled to a structural reliance defense, but received only a personal reliance instruction. The district court's instruction did not fit the facts of this case, and did not explain to jurors that Skilling could rely on his staff to consult with legal and accounting advisors to establish a good faith defense. This

[28] In addition, because the Task Force failed to present sufficient evidence to support a side-deal theory of securities or wire fraud, Skilling submits that the Court should reverse with instructions that he may not be retried on the Task Force's side-deal theory. *Burks*, 437 U.S. at 17-18 (when evidence insufficient for conviction, state should not get a "second bite at the apple"); *U.S. v. Larkin*, 605 F.2d 1360, 1369 (5th Cir. 1979), *as modified* at 611 F.2d 585, 586-87 (5th Cir. 1980); *U.S. v. Bailin*, 977 F.2d 270, 277-278 (7th Cir. 1992) (even where Double Jeopardy does not apply, direct estoppel mandates that the government should not "have the opportunity to hone its presentation on those issues which have already been decided against it").

was not a trivial mistake: A major challenge for the government in prosecuting Skilling was, by its own admission, to "navigate around some serious advice of counsel issues and some serious reliance on auditors issues." Br.19. In response, the Task Force makes four arguments to excuse the district court's failure to give a structural reliance instruction. None has merit.

1. The Instruction Given Was Not "Good Enough." The Task Force argues that a bare-bones good faith instruction is always adequate to convey a reliance defense. The cases do not support this point. U.S.Br.133-34.

- The Task Force says *U.S. v. Peterson*, 101 F.3d 375, 377-82 (5th Cir. 1996), is the definitive authority on reliance instructions, but in *Peterson*, the defendant sought *and obtained* an instruction on personal reliance on counsel. The central point in that case was not the type of reliance charge, but the defendant's right to a charge on good faith generally. *Peterson* says nothing about what instruction is suited to this case.
- In *U.S. v. Tannehill*, 49 F.3d 1049, 1057-58 (5th Cir. 1995), the defendant was *acquitted* of the count for which he asserted reliance on counsel. If anything, *Tannehill* shows the harm of the personal reliance charge here, since Skilling was *not*, in fact, acquitted of the counts most closely related to reliance—*e.g.*, the Count 2 Raptors charge and the five false statement to auditor counts.

- *U.S. v. Johnson*, 577 F.2d 1304, 1311-12 (5th Cir. 1978), is even farther off the mark. The defendant tax protester did not seek at trial the reliance instruction he pressed on appeal.

2. The Jury Was Not Equipped To "Figure It Out On Its Own." The Task Force does not dispute that Skilling was legally entitled to a structural reliance defense under Oregon and Fifth Circuit law, yet insists the jury understood the defense based on the personal reliance instruction it received. U.S.Br.134-35. This is not a reasonable conclusion. A jury told that *personal* reliance amounts to good faith has no reason to believe that reliance on *corporate processes* suffices. The incomplete instruction not only left the jury without the necessary guidance, but was affirmatively *misleading*. *U.S. v. Pierre*, 254 F.3d 872, 876 (9th Cir. 2001) (instruction that stated who bore burden of proof on one element but said nothing about burden of proof on another element "might have led the jury to conclude, by negative implication, that Defendant bore the burden of proof on that first element"); *Bowley v. Stotler*, 751 F.2d 641, 648 (3d Cir. 1985) (instruction that failed "fairly and adequately" to define "control," which was an element of the offense, "left the jury without guidance about the significance of much of the evidence on which [the defendant] relied"). The "erroneous instruction went to the heart of [Skilling]'s defense," *Pierre*, 254 F.3d at 877, yet the jury, finding Skilling's theory of reliance not to fall within the four corners of the trial court's

instruction, could have rejected his defense out of hand. *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 135 (2d Cir. 1998) ("A jury charge is erroneous if it misleads the jury as to the correct legal standard, or if it does not adequately inform the jury of the law"). The "jury should not have been left to guess or interpolate as to what the applicable law...might have been." *Id.* at 136.

3. *Defense Counsel's Argument Is No Substitute.* The Task Force's argument that Skilling's counsel adequately explained the law of reliance, U.S.Br.135-36, again, is wrong. *Lake*, 472 F.3d at 1263.

4. *Skilling Was Harmed.* The Task Force's argument reduces to a claim that the evidence in Skilling's support was so substantial the jury could not have failed to account for it:

- Skilling "relied on accountants and lawyers to advise him." U.S.Br.135.
- He relied on their representations and decisions. *Id.* at 12-15.
- He relied on them to provide talking points for analyst calls. *Id.* at 24-33.
- He relied on their advice in approving deals, including assurance that the deals had been approved by the external auditors. *Id.* at 54.
- He relied on internal accounting and legal advisors in signing the management representation letters. *Id.* at 60-61.

These examples come from the *Task Force's* statement of facts *to this Court*, and the trial record is replete with them. But the jury did not know what to do with

such facts. Refusing to tell the jury that it could accept Skilling's *mens rea* defense on the basis of these facts was error, and it was harmful error.

III. OVERWHELMING JUROR AND COMMUNITY PREJUDICE DENIED SKILLING A FAIR TRIAL.

Common sense must mean something. Just ask anyone: "Could Jeff Skilling get a fair trial in Houston?" The reason why *no one* answers "yes" is *everyone* understands the unique feelings people in Houston have about Enron and the unique pain and loss they suffered. The Task Force's insistence—and the district court's decision—to try Skilling in Houston, in spite of its unique disability, had the predictable result. Every aspect of the proceedings was infected with bias: from publicity that preceded the trial, to outside prejudices influencing the actual jury, to scathing media reports calling for guilty verdicts, to a short-circuited voir dire that only worsened the problem.

Skilling's opening brief challenged each of these infirmities—and others still—and made clear his entire trial was unconstitutionally unfair.

A. The Standard Of Review

Skilling asserts two separate claims of error related to jury bias. First, negative publicity and community pressure to convict were so strong the Court can *presume* prejudice and reverse on that ground. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Mayola v. Alabama*, 623 F.2d 992, 998 (5th Cir. 1980); *Pamplin v. Mason*, 364 F.2d 1, 4-5 (5th Cir. 1966). Where, as here, the challenge relates to

the *overall* fairness of the trial—including choice of venue, pretrial *and* contemporaneous trial publicity, other sources of animus, and deficiencies in voir dire—the standard of review is *de novo*, and this Court must review the entire record anew. Br.123. The Task Force asserts that Skilling challenges only the district court's venue rulings, which are reviewed under a more deferential standard. U.S.Br.136, 149. Skilling's claims have never been so limited—not when he repeatedly raised the broader constitutional issues in the district court,[29] and not now. Br.9-11, 14, 121-73. Once Skilling establishes a *prima facie* case of presumed prejudice, the Task Force can seek to rebut it. But unseating the presumption is "very difficult," and the government must prove a fair jury was actually empanelled. *Mayola*, 623 F.2d at 1001.

Second, Skilling makes an actual prejudice claim—*i.e.*, that one or more seated juror was biased, *Calley v. Callaway*, 519 F.2d 184, 204 n.32 (5th Cir. 1975). This claim is reviewed for abuse of discretion. *McVeigh*, 153 F.3d at 1179.

[29] R:2600-78, 4027-62, 12036-83, 14000-34, 14174-244 (venue motions); R:8369-91, 9513-20, 9748-51 (objections to jury questionnaire); R:11050-53, 11804-05, 12037, 12067, 12990-13007; Trial Tr. at 3 (Jan. 30, 2006; 4:48 p.m) (sealed) (seeking individual, extended, attorney-conducted voir dire); R:14461-62, 14499, 14513-14, 14566, 14612, 14677-78, 14682 (seeking additional peremptory challenges); R:12074-76, 14174-244 (moving for continuance and other relief in light of Causey plea); R:14179-244 (seeking writ relief from this Court); Trial Tr. at 3 (Jan. 30, 2006; 4:48 p.m) (sealed) (objecting to jury as seated); R:38320-21, 41926-28, 38039-47 (addressing constitutional claim in motions for bail post-trial).

B. Skilling Met His Burden Of Showing Presumed Prejudice.

The Constitution and Rule 21 mandate a venue change where outside influences deny the defendant a fair trial.[30] Prejudice is *presumed* where a "reasonable likelihood" exists that "inflammatory pretrial publicity [has] literally saturated the community in which [defendant's] trial was held," or "outside influences affecting the community's climate of opinion as to a defendant are inherently suspect." *Pamplin*, 364 F.2d at 5; *Mayola*, 623 F.2d at 997.

There are many reasons to presume prejudice, but the finding often arises when community sentiment—and the obsessive publicity that both feeds and mirrors it—convinces people that for justice to be done, and the community to be vindicated, the defendant must be punished.[31] For example, the court in the Oklahoma City bombing case found presumed prejudice because a "repetition of emotionally intense stories of loss and grief and the valiant efforts to overcome the consequences" had engendered a "common belief" that "only a guilty verdict" and the punishment of death would heal the community. *U.S. v. McVeigh*, 918 F.Supp.

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[30] *Sheppard*, 384 U.S. at 363 (Sixth Amendment jury-trial right violated when there is "*a reasonable likelihood*" that publicity and other outside influences prevented a fair trial); FED. R. CRIM. P. 21(a) (court "*must* transfer the proceeding" if it "is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant *cannot obtain a fair and impartial trial there.*"). Whatever the Task Force's contention, U.S.Br.149 n.16, Skilling invokes both the constitutional standard and Rule 21, R:2612.

[31] *Pamplin*, 364 F.2d at 5; *Sheppard*, 384 U.S. at 363; *U.S. v. Abrahams*, 466 F.Supp. 552 (D. Mass. 1978); *Nevers v. Killinger*, 990 F.Supp. 844 (E.D. Mich. 1997); *Wansley v. Miller*, 353 F.Supp. 42 (E.D. Va. 1973).

1467, 1472 (W.D. Okla. 1996). Here, of course, these same indicia of presumed prejudice exist: (1) Houston was "saturated" with media labeling Skilling a criminal and blaming him for the plight of Enron's employees, Br.127-36, 149-50; (2) the "climate of opinion *was* suspect," as evidenced by public opinion polls, jury questionnaires, and the *en masse* recusal of the U.S. Attorney's office from all Enron cases, Br.124-36, 154;[32] and (3) for the city of Houston, convicting Skilling, sentencing him for life, and stripping him of his money were oft-repeated and fully realized goals, *id*. at 138-42.

Showing "presumed prejudice" may not be easy, *Busby v. Dretke*, 359 F.3d 708, 725 (5th Cir. 2004), but it has been done in more than 20 reported federal cases in the last 40 years. Whatever the Task Force may say, these cases neither are archaic nor involve only violent crimes in small or racist towns. To the contrary, they encompass venues small *and* large (including Houston), and crimes that were violent, non-violent, race-related, *and* purely economic.[33]

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[32] Oddly, the Task Force notes the office recused itself before the first Enron criminal charges were brought, as if that matters. U.S.Br.158 n.18. That the Enron tragedy struck so close to home that officers of the court could not objectively investigate, much less judge, the facts of *any* Enron criminal case exemplifies the prejudice in Houston. *U.S. v. Moody*, 762 F.Supp. 1485, 1486-88 (N.D. Ga. 1991).

[33] *Sheppard*, 384 U.S. 333, 335-36 (Cleveland; murder); *Rideau v. Louisiana*, 373 U.S. 723, 725-27 (1963); (Lake Charles, LA; murder); *Irwin v. Dowd*, 366 U.S. 717 (1961) (small Indiana town; murder); *Abrahams*, 466 F.Supp. 552 (Boston; financial fraud); *U.S. v. Abrahams*, 453 F.Supp. 749 (D. Mass. 1978) (Boston and New York; financial fraud); *U.S. v. Beckner*, 69 F.3d 1290 (5th Cir. 1995) (New Orleans; financial fraud by public official); *Johnson*, 337 F.Supp.

Instead of addressing these cases head on, the Task Force deflects the issue in two ways. First, citing *CBS, Inc. v. U.S.D.C.*, 729 F.2d 1174 (9th Cir. 1984), the Task Force says in "'a populous metropolitan area,'" one can "'*usually*…find an adequate number of untainted jurors.'" U.S.Br.152-53. But Skilling's case is hardly "usual." Unlike the defendant in *CBS*, Skilling was accused of bringing great shame and causing severe economic harm to the entire city of Houston.

> Mr. DeLorean [was] charged with conspiracy to import cocaine, a non-violent crime that is similar in nature to hundreds of others currently before [courts] in California.... While Mr. DeLorean's prominence has certainly distinguished his case from the others..., *there is no evidence that his prominence will inflame public sentiment*.

1371 (Houston; "gift" of marijuana cigarette); *U.S. v. Engleman*, 489 F.Supp. 48 (E.D. Mo. 1980) (St. Louis; murder); *Nevers*, 990 F.Supp. 844 (Detroit; murder); *U.S. v. Ebens*, 654 F.Supp. 144 (E.D. Mich. 1987) (Detroit; murder); *U.S. v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952) (New York City; mafia); *U.S. v. Hawkins*, 658 F.2d 279, 282-85 (5th Cir. 1981) (Beaumont, Texas; drugs); *U.S. v. Hoffa*, 205 F.Supp. 710 (1962) (Orlando; mail and wire fraud); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985) (rural Georgia town; murder); *U.S. v. Holder*, 399 F.Supp. 220 (D.S.D. 1975) (South Dakota; assaulting federal officer); *Maad*, 75 Fed. Appx. 599 (Anchorage; insurance fraud); *U.S. v. Marcello*, 280 F.Supp. 510 (E.D. La. 1968) (New Orleans; assaulting FBI agent); *U.S. v. Mazzei*, 400 F.Supp. 17 (W.D. Pa. 1975) (Pittsburgh; senator perjury); *McVeigh*, 918 F.Supp. 1467 (Oklahoma City; terrorism); *Moody*, 762 F.Supp. 1485 (Atlanta; murder); *U.S. v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955) (Corpus Christi; tax fraud); *U.S. v. Rossitter*, 25 F.R.D. 258 (D.P.R. 1960) (Puerto Rico; unclear); *U.S. v. Saya*, 980 F.Supp. 1157 (D. Hi. 1997) (Honolulu; drug sales); *U.S. v. Tokars*, 839 F.Supp. 1578 (N.D. Ga. 1993) (Atlanta; murder); *U.S. v. Williams*, 523 F.2d 1203 (5th Cir. 1975) (Atlanta; kidnapping); *Wansley* 353 F.Supp. 42 (Lynchburg, Virginia; rape); *U.S. ex. rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963) (en banc) (Suffolk County, New York; murder); *U.S. v. Faulkner*, 17 F.3d 745 (5th Cir. 1994) (Dallas; bank fraud); *U.S. v. Anguilo*, 497 F.2d 440 (1st Cir. 1974) (Boston; impeding federal officer).

CBS, 729 F.2d at 1181. Indeed, *CBS* only raises the question why the district court did not examine a broad cross-section of the Houston venire before picking a jury, but rather examined in the most cursory manner only eight jurors more than the absolute minimum. Br.10, 158.[34] The Task Force has no answer.

Second, the Task Force says it is "quixotic, at best" for Skilling to rely on "death penalty" cases like *McVeigh* to argue presumed prejudice. U.S.Br.158. Not only has this Court rejected that very argument,[35] the comparison between this case and *McVeigh* was drawn by the same experts in *McVeigh*, who saw no appreciable difference in the level of community antipathy for the Oklahoma City bombers and Skilling. R:2816, 2819-20, 4063-102; JKS-11 at 40. These expert opinions were uncontradicted, and far from suggesting it found the testimony incredible, the district court simply ignored it. Indeed, the district court:

- Never once mentioned *McVeigh* or most of the cases cited above;
- Refused to hold a hearing to examine Skilling's experts or even address his broader community prejudice arguments. *Cf. Pamplin*, 364 F.2d at 6 (denials of venue hearing "itself a denial of due process"); and

[34] *Tokars*, 839 F.Supp. at 1584 (transferring venue because of intense negative publicity; even in a "populous city," like Atlanta, "the difficult task would be ascertaining which prospective jurors in fact are unbiased")

[35] *Pamplin*, 364 F.2d at 7 ("The *Irvin v. Dowd* line of cases involves capital crimes. We are of the view, however, that the same constitutional safeguard of an impartial jury is available to a man denied his liberty—here two years—for a misdemeanor as for a felony.").

- Disregarded Skilling's argument, well-grounded in the law, that finding presumed prejudiced is not simply a matter of tallying news stories.[36]

Worse yet, and as explained in Skilling's opening brief, the district court did no more than compare this case to the facts of *Rideau*—as if no case with different facts could ever involve impermissible prejudice. R:4444-53. Not only was the district court's reading of *Rideau*—which the Task Force urged below and presses on appeal—erroneously narrow, it ignored almost all the factors courts have considered in analyzing community prejudice in the 40 years since.

To put to rest the *Rideau* argument—and the claim that Skilling did not show a reasonable likelihood of prejudice—below, in italics, are every one of the factors that courts since *Rideau* have said show presumed prejudice. Each is present in this case:

[36] Indeed, in its tallying, the district made another error. In reasoning that much of the press coverage was factual or came from one media source that every potential juror might not read, U.S.Br.138, 155, the district court overlooked that courts routinely presume prejudice even though much of the reporting is factual, because a handful of inflammatory articles, or even a steady drumbeat of factual articles, can do considerable damage, especially when, as here, they appear in major media outlets. *Denno*, 313 F.2d at 371 (single editorial attacking defendant's insanity defense); *Tokars*, 839 F.Supp. at 1582 (bulk of pre-trial publicity factual, but volume of coverage combined with its emotional nature raised inference of widespread bias); *Hawkins*, 658 F.2d at 282-85 (same); *Marcello*, 280 F.Supp. at 516-517 ("damaging publicity" in two magazine articles "obviously intended to inflame the public and arouse the ire"); *Nevers*, 990 F.Supp. at 862 ("many" articles "were factual," but "a significant portion of the pre-trial publicity contained prejudicial information."); *Ebens*, 654 F.Supp. at 146 ("continually repeated factual recitations" and "effect of [a single Sunday magazine feature], in the newspaper of largest circulation" sufficient to cause bias).

1. *There has been recent, widespread, vilifying media coverage regarding defendant, his alleged crimes, or other alleged misdeeds.*[37] Appendix 2, *infra*, provides a glimpse of the coverage in Houston. In these stories, Skilling was compared to Satan, Al Qaeda, Hitler, and worse. Br.130-31. Skilling's "other alleged misdeeds"—a supposed incident in New York and assistance he gave his girlfriend's new business—were fodder for many new stories, including predictions these character attacks were enough to convict him. SR3:623, 1906-12; R:40271, 40180, 40196-98.

2. *"Close attention" has been paid to pre-trial "procedural moves," there has been pressure from the media to indict and convict defendant, and the local populace has a unique appetite for detailed coverage of the case.*[38] One need only go to the *Chronicle* website, which devotes thousands of web pages to the "minutiae hungry" coverage of this case and incendiary calls for Skilling's indictment and conviction. Br.138-42.

3. *The crimes alleged are serious, have a unique effect on the local venue, and either were very violent, affected many, or involved a violation of public*

[37] *Abrahams*, 466 F.Supp. at 557; *Tokars*, 839 F.Supp. at 1581; *Coleman*, 778 F.2d at 1538.

[38] *Sheppard*, 384 U.S. at 341 ("Why Isn't Sam Sheppard in Jail?"); *Williams*, 523 F.2d at 1205-06; *Ebens*, 654 F.Supp. at 146; *McVeigh*, 918 F.Supp. at 1471.

trust.[39] Pages 124-127 of Skilling's opening brief describe this sentiment, as did the Task Force, which openly argued: "Houston as a community was particularly hard hit by what happened at Enron." R:42161.

4. *The public perceives defendant as a "linchpin" of the alleged crime or conspiracy.*[40] The local media and sitting jurors in Enron cases, including this one, shared this false predisposition. Br.172-73; SR3:481-84, 518-20, 628. The *Chronicle* summed up Houston's views, publishing a column arguing: "From the beginning, the Enron prosecution has had one true measure of success: Lay and Skilling in a cold steel cage." R:12264.

5. *Media coverage focuses heavily on alleged victims.*[41] Pages 127-129 of Skilling's opening brief lay out this evidence in detail, including the *Chronicle*'s "Faces of Enron" series.

6. *Defendant's name or alleged crimes evoke strong emotional responses.*[42] Polling data done by both defense and government experts, as well as jury questionnaires and voir dire, all proved this point. R:2679-704, 3209-11; Br.162-66. Indeed, the uncontradicted testimony of Skilling's expert—who has testified for the prosecution in scores of cases—was that this was the

[39] *McVeigh*, 918 F.Supp. at 1471; *Nevers*, 990 F.Supp. at 862-64 (fear of racial unrest); *Mazzei*, 400 F.Supp. at 20 (Pittsburgh's trust betrayed by politician).

[40] *Abrahams*, 466 F.Supp. at 555; *Johnson*, 337 F.Supp. at 1375-78.

[41] *McVeigh*, 918 F.Supp. at 1472; *Ebens*, 654 F.Supp. at 145.

[42] *Tokars*, 839 F.Supp. at 1583; *McVeigh*, 918 F.Supp. at 1472.

worst evidence of bias he had ever seen, and only 18 of 283 potential jurors evinced no clear sign bias. R:13811-12.

7. *In other venues, publicity has been less prominent or prejudicial and defendant is less well known or reviled.*[43] The evidence showed that venues like Phoenix, Atlanta, Denver were better places for a fair trial. R:2679-704, 2813-45, 4063-4102.

8. *Jurors have a personal stake (either emotional or economic) in the outcome of the case, feel obligated to reach a particular result, or fear reprisals if they acquit.*[44] Uncontradicted testimony from sociological, psychological, and economic experts—like juror questionnaires, voir dire, and post-trial comments—all bore out these prejudices. R:2813-45, 2859-67, 2891-96, 38967-68; Br.163-66; JKS-24.

9. *Government officials promote these biases.*[45] The flames were stoked by indictment-day press conferences; staged "perp" walks; speeches by local politicians; Task Force press conferences announcing it would seize Skilling's assets for Enron's victims; and interviews in which Task Force

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[43] *Marcello*, 280 F.Supp. at 517-18; *Saya*, 980 F.Supp. at 1159.

[44] *McVeigh*, 918 F.Supp. at 1471, 1473-74 (Oklahomans "feel a personal stake in the outcome"); *U.S. v. Polchemi*, 219 F.3d 698, 704 (7th Cir. 2000) ("a court must excuse a juror for cause...if the juror has even a tiny financial interest in the case"); *Nevers*, 990 F.Supp. at 862-64 (fear of racial unrest).

[45] *Moody*, 762 F.Supp. at 1488-90; *Wansley*, 353 F.Supp. at 47-48; *Kemp*, 778 F.2d at 1538-39; *Abrahams*, 453 F.Supp. at 752; *Ebens*, 654 F.Supp. at 146.

prosecutors (despite their ethical obligations, ABA MODEL R. 3.6 (2004)), compared Enron executives to Nazis and baseball drug cheats, and called Skilling a "corporate crook" who must be "brought to justice." SR3:1551-77; R:1452-53, 2645-46.

10. *There have been previous trials or highly publicized pleas involving defendant or his alleged conspirators, and the local media covered those events with particular intensity and speculated how such events would negatively affect defendant's case.*[46] The Task Force tried three criminal trials in Houston before Skilling's, and every event in its more than 20 prosecutions was immediately documented in the *Chronicle*'s "Prosecution Scorecard" and stories about how each plea or conviction further cemented Skilling's guilt. SR3:570-71; Br.137. Indeed, the most prejudicial plea involved Skilling's co-defendant, Rick Causey, which was entered on the eve of Skilling's trial to great fanfare. R:12267-364.

11. *Highly publicized parallel legislative investigations or civil actions are being pursued against defendant.*[47] Skilling's testimony in front of Congress was not only featured in the Houston media, but was openly dismissed as "b.s.," and a "smoke-screen." SR:3:567; JKS-8. Droves of civil cases

[46] *Engleman*, 489 F. Supp at 51; *Kemp*, 778 F.2d at 1532, 1538.

[47] *Mazzei*, 400 F.Supp. at 20; *Marcello*, 280 F.Supp. at 515-16; *Parr*, 17 F.R.D. at 518; *Florio*, 13 F.R.D. at 298; *Hoffa*, 205 F.Supp. at 722-23.

against Skilling, most in the same courthouse, received similar coverage. R:12078, 12459-62, 14236; SR3:3224-25. Indeed, after Ben Glisan pled guilty, Task Force Director Andrew Weissmann linked the Enron criminal and civil cases, telling the public that success in the criminal cases would make winning the civil cases "a virtual slam dunk." R:14236.

12. *Reporting on the case focuses on inadmissible evidence.*[48] The media wrote stories about excluded evidence, including a feature on all the "dirt" the defense "didn't want [the jury] to hear." R:39440; Br.139.

13. *The facts of the case are complicated and nuanced, requiring an especially "clearheaded" jury.*[49] The district court observed that this case was "far more complex than the usual white collar fraud case," SR1:217, and acknowledged that jurors would follow the news coverage, despite instructions not to. R:14439-40.

As shown here and before, *every one* of the salient facts proving presumed prejudice is present in this case. R:2671-78. Whether this case maps onto the precise facts of *Rideau* does not matter. With overwhelming proof—virtually all of it unchallenged and undisputed—Skilling demonstrated there was a "reasonable

[48] *Engelman*, 489 F.Supp. at 51.
[49] *Williams*, 523 F.2d at 1209.

likelihood" that bias infected his trial. *Sheppard*, 384 U.S. at 363; SR3:1140-41 (Task Force endorsing "reasonable likelihood" test).[50]

C. The Task Force's Arguments That Skilling Failed To Show Presumed Prejudice Are Specious.

The Task Force offers three arguments why, despite all this, presumed prejudice should not be found. Each argument lacks merit.

1. The "Wall Of Authority"

Citing five cases, the Task Force says a "solid wall of authority" establishes that Skilling was not prejudiced by being tried in Houston. U.S.Br.156-57. None

[50] Skilling's case also bears none of the indicia courts cite when declining to find presumed prejudice—*i.e.*:

1. little publicity regarding defendant, *U.S. v. Walker*, 890 F.Supp. 954, 959 (D. Kan. 1995);
2. initially heavy coverage diminishes and lapses before trial, *Beck v. Washington*, 369 U.S. 541, 556 (1962);
3. media coverage not extensive, emotional, or condemning, but rather "brief, straightforward, unemotional news," *U.S. v. Chagra*, 669 F.2d 241, 251-52 & n.12 (5th Cir. 1982); *U.S. v. O'Keefe*, 722 F.2d 1175, 1180 (5th Cir. 1983);
4. defendant could not show publicity reached the jury pool, *U.S. v. Smith-Bowman*, 76 F.3d 634, 637 (5th Cir. 1996);
5. community attitudes and media coverage same, if not worse, elsewhere, *U.S. v. Lindh*, 212 F.Supp.2d 541, 549-51 (E.D. Va. 2002);
6. little awareness of defendant individually compared to broader scandal, *U.S. v. Malmay*, 671 F.2d 869, 875 (5th Cir. 1982);
7. strong favorable attitudes toward defendant to counterbalance negative coverage, *U.S. v. Parker*, 877 F.2d 327, 331 (5th Cir. 1989).
8. case proceeding in large city and is not of local concern, *e.g.*, *U.S. v. North*, 713 F.Supp. 1444, 1444 (D.D.C. 1989); and
9. court and counsel spent *several days* conducting voir dire and little bias was found, *e.g.*, *U.S. v. Harrellson*, 754 F.2d 1153, 1160 (5th Cir. 1985).

of these cases involves facts remotely like this one—*i.e.*, where the defendant was accused of victimizing the very community in which he was tried. To the contrary:

- In *Calley*, 519 F.2d 184, defendant was tried in a military court in Georgia for war crimes that occurred half the world away in Vietnam. Although the crimes were notorious, several members of the military jury pool expressed admiration for defendant, and 55% of readers in a local magazine poll thought defendant was a scapegoat. *Id*. at 206, 210. Moreover, in sharp contrast to this case, "defense counsel and the prosecution were allowed almost unlimited freedom [during individual voir dire] to inquire into [jurors'] attitudes, perceptions, backgrounds and the nature and extent of their exposure to pretrial publicity." *Id*. at 209.
- In *U.S. v. Capo*, 595 F.2d 184 (5th Cir. 1975), defendants were tried for a violent drug-murder in Florida in the late 1970s—sadly, not a unique event. Although the crime occurred in Panama City, the case was tried 100 miles away in Tallahassee. Only *21* stories were published about the crime, and yet the court conducted a *10*-day voir dire. *Id*. at 1091-92. Here, thousands of TV, radio, print, and Internet stories ran, yet voir dire was a mere *5 hours*.
- *Mayola*, 623 F.2d 992, was a kidnap-murder case. While this Court suggested the publicity there may have justified a presumption of prejudice, defendant failed to show its extent, and the Court dismissed the claim on

laches grounds. *Id*. at 999. Here, Skilling raised his community animus claims early and often, *supra* n.29, and produced circulation statistics, box-loads of articles, DVDs full of media, and 10 expert declarations. R:2600-3004, 4027-82, 12036-594, 13805-87; SR3:453-3560.[51]

- *Busby*, 359 F.3d 708, another murder case, involved a defendant who had defaulted on his habeas claim. Commenting on the merits, this Court noted that the pretrial publicity in the case—almost all of which occurred a year before trial—was not sensational and had not been proved in detail. *Id*. at 726 & n.18. Notably, even in *Busby*, and unlike here, the district court heard extensive testimony and permitted cross-examination of witnesses in determining whether the venue was tainted. *Id*.
- Finally, *U.S. v. Dozier*, 672 F.2d 531 (5th Cir. 1982), involved press conferences given by a prosecutor concerning a politician's indictment. To

[51] The Task Force asserts that Skilling's "hired experts" cannot be trusted. U.S.Br.166-167, 139. That experts are routinely paid is meaningless. Expert testimony and polling data are well-accepted ways of measuring prejudice; the government hired such experts here and in other cases. *Chandler v. McDonough*, 471 F.3d 1360, 1362 (11th Cir. 2006); *U.S. v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990); *McVeigh*, 918 F.Supp. 1467. That psychological and sociological experts must make inferences about likely behavior based on data does not make their conclusions "speculation." U.S.Br.167. Presumed prejudice requires making those assessments. *Irvin*, 366 U.S. at 727-28; *Smith v. Phillips*, 455 U.S. 209, 221-222 (1982) (O'Connor, concurring). Skilling's experts, who are leading authorities, examined the record carefully, found numerous indicia of bias, and explained how their findings were consistent with the literature in their respective fields. R:2859-67, 2813-45, 2679-704, 2890-96, 2965-3005; JKS-11. The Task Force and district court simply ignored the results.

guard against prejudice, the district court questioned 90 jurors (44 more than were questioned here) and granted every defense challenge for cause save one (unlike here, where proper cause challenges were summarily denied), *compare id.* at 546, *with infra* 111-14; R:14462, 14497-99, 14566, 14602, 14611-12, 14677-78. Moreover, there was no evidence in *Dozier* of hostile publicity or public sentiment remotely approaching that directed at Skilling.

The most analogous cases—which the Task Force declines to address except to say they involved racism or violence—are:

- *Johnson*, 337 F.Supp. 1371, where a district court in Houston granted habeas relief to a defendant convicted of gifting a marijuana cigarette. The court concluded that the public and jurors, as here, were holding defendant liable for a broader social problem afflicting Houston (there, racial unrest; here, community-wide economic collapse), and the jury's verdict may well have been influenced by these emotions.
- *Maad*, 75 Fed. Appx. at 600, involved an Anchorage shopkeeper convicted of insurance fraud. Like Skilling, he had risen to local prominence. When it was perceived he had defrauded Anchorage and violated its "outpouring of support," he was convicted, predictably. *Id.* In an unpublished opinion, the Ninth Circuit recognized this violation of public trust gave rise to presumed prejudice, mandating reversal.

- *Abrahams*, 466 F.Supp. 552, involved a high-profile fraud in Boston, which befell a well-known local company and its charismatic CEO. The district court changed venue because the company was headquartered in the city and so closely associated with it. To be sure, no city and company have been more closely identified than Houston and Enron.
- Finally, the Task Force distinguishes *McVeigh*, saying it involved mass murder, scores of deaths, and the destruction of a federal building, and that the government there consented to a venue change. U.S.Br.158. Though Skilling is sickened by the comparisons, Houstonians likened Enron's fall to the Oklahoma City bombing, 9/11, and a "nuclear explosion"; they referred to Enron's former building as "ground zero" and the "epicenter of the Enron blast"; and compared Skilling to the worst terrorists, genocidal maniacs, and murderers the world has ever seen. Br.130-31; R:39969; SR3:933, 1486. Moreover, as in *McVeigh*, Houstonians perceived Enron as a Houston tragedy, and they felt "a personal stake in the outcome." 918 F.Supp. at 1473. Finally, the government *did* oppose a venue change from Oklahoma to Denver, as evidenced by its motion papers and cross examination of McVeigh's experts (who were denied the opportunity to testify here). 1995 WL 759141 (W.D.Okla.Trans.); 1996 WL 37683 (W.D.Okla.Trans.).

2. **Acquittals**

The Task Force argues that acquittals returned in this case and other Enron-related cases show the venire was not biased. U.S.Br.148-49, 161-62. To state the obvious, *this* case concerned Enron's former CEOs—two of the most famous men in modern-day Houston—both of whom were accused of betraying the city. The other Enron cases only confirm that prejudice should have been presumed here.

- In the EBS trial, in which some acquittals were returned, jurors said, "let's fry them," when talking about Enron's senior management. JKS-20 at 5.
- In the Nigerian Barges case, the jury acquitted a junior Enron accountant, but after doing so, a juror emailed her lawyer: "I noticed the big boys [Skilling and Lay] want to change their trial location. DON'T MESS WITH TEXAS!" SR3:3454.
- In the prosecution of Andrew Fastow's wife, *U.S. v. Lea Fastow*, 292 F.Supp.2d 914 (S.D. Tex. 2003), the district court *transferred* venue from Houston to Brownsville after her guilty plea was revoked. R:3266.

The Task Force mentions none of this.

The Task Force also wrongly relies on Skilling's acquittals on nine counts of insider trading. Courts consider acquittals as one factor among many, but as neither a strong nor dispositive one. *Faulkner*, 17 F.3d at 764-65 ("[w]e do not believe that this fact standing alone is an important one"); *U.S. v. Bermea*, 30 F.3d

1539, 1558 (5th Cir. 1994) (one of the "[l]esser factors"). Bias operates on obvious and subtle levels and may even shift the burden of proof, thereby requiring defendant to prove his innocence. *U.S. v. Gianakos*, 415 F.3d 912, 930 (8th Cir. 2005) (juror "biased [if] she effectively holds the defendant to an impermissible burden of proof"). Thus, as one commentator noted when *Rideau* was decided:

> [T]he failure to convict a defendant on all counts or to convict all his codefendants is not necessarily any indication of the jurors' impartiality. *The convictions which were returned may have been tainted by the jurors' prejudice, and the failure to return all other convictions requested may have resulted despite their prejudice, rather than because of their lack of prejudice.*

Annot., 10 L. Ed. 2d 1243, 1249 n.5 (1964); *see also U.S. v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) ("The jury acquitted Santos of about half the counts in the indictment and might have acquitted her of some or even all of the rest had the trial judge not committed the litany of errors that we have enumerated.").

The Task Force's gross overcharging—as well as Skilling's highly publicized desire to change venue—invited this result. By charging Skilling on 28 overlapping counts, the Task Force gave the biased jury the opportunity to acquit Skilling on charges it all but abandoned, while still convicting him on numerous counts.

3. **Voir Dire**

The Task Force's last argument against presumed prejudice is to point to the district court's voir dire. But the voir dire was inadequate—it was perfunctory and,

if anything, only confirmed the actual bias of the seated jury. Even an adequate voir dire would not have been a safe harbor, however, in light of all the prejudicial publicity that overwhelmed the roughly 60 days of trial that followed.

a. *Voir Dire In This Case Was Too Anemic To Rebut The Presumption Of Prejudice.*

1. The Law The Task Force cites *Chagra*, *Mayola*, and *Harrelson* to rebut the presumption of prejudice. But rebutting the presumption is "very difficult," *Mayola*, 623 F.2d at 1001, voir dire in this case was not "searching," *Harrelson*, 754 F.2d at 1160, and the process did not show that jurors were untainted by bias, *Chagra*, 669 F.2d at 252.

- In *Chagra*, the government rebutted the presumption of prejudice because "eleven jurors knew nothing about this case at all from any source" and the twelfth juror had only "minimal contact" with the publicity, having read an article that did not draw "any connection between [the crime and] appellant's case." *Chagra*, 669 F.2d at 252. Here, of course, over 86% of prospective jurors had read or heard about the case, over 80% had negative views about Skilling and Lay, over 60% had an opinion about the cause of the bankruptcy, and 40% were openly angry about Enron and doubted their ability to be fair. Br.134. Of the 12 *seated* jurors, nine had read or heard

about the case,[52] nine expressed sympathy for Enron's employees or had some personal connection with the company, [53] three had negative views about a defendant or their ability to be fair,[54] four had an opinion about the cause of Enron's bankruptcy,[55] and three said they were angry.[56]

- In *Mayola*, this Court said "a showing that *none* of the twelve jurors impanelled had ever been exposed, first or second hand, to the inflammatory publicity, would *probably* suffice to negate the presumption…." 623 F.2d at 1001. Although some jurors, according to the Task Force, did not read the *Houston Chronicle*, many others did.[57] Moreover, as *Mayola* makes plain, the fact that jurors did not read one newspaper or watch much TV ignores

[52] JQ-10, 11, 13, 20, 38, 50, 63, 67, 87.

[53] JQ-10 ("co-workers…owned Enron stock"); 11 (coworker "worked at Enron," "A lot of people were hurt financially"); 20 (Enron caused "Sarbanes-Oxley regulations that are now impacting my job," "loss of the 401k savings made most impact on me"); 38 ("feel bad for" victims); 50 ("feel sorry for the employees"); 64 (friends worked at Enron; knew people who lost money); 78 ("Many people lost their jobs"); 84 ("know people were hurt + their future dollars/life effected"); 87 (employees "left with nothing in their retirement accounts").

[54] JQ-10 ("if [Lay] did not know what was going on in his company, he was a poor manager/leader"); R:14460 (Juror 11) ("anybody that takes home the salaries and the bonuses and stuff that they have, they got to be greedy"); 63 ("I think they probably knew they were breaking the law").

[55] JQ-10 ("Collapse was due to greed and mismanagement; What a shame"); 11("Greed on Enron's part, retaliation on California's part"); 20 ("not enough corporate controls," "audit procedures," "mismanagement"); 87("Poor management + bad judgment - greed").

[56] JQ-20, 38, 50.

[57] JQ-10, 11, 20, 38, 50, 64, 67, 84, 87.

the problem that jurors may be exposed to adverse publicity "first or second hand." Indeed, of the 12 seated jurors, nine admitted having read or heard about Enron and Skilling from some source.[58]

- Finally, in *Harrelson*, the Court noted any prejudicial publicity was ameliorated because "we have carefully examined the voir dire conducted.... [It] was searching and sensitive, covering seven court days and more than two thousand pages of transcript" and included "separate, individual inquiries" of each juror. 754 F.2d at 1160. Again, the voir dire below lasted only five hours, and although there was some individual questioning, it was abbreviated and restricted. The Task Force asserts Skilling and Lay elected not to question several potential jurors. U.S.Br.147. They were unable to do so because the district court warned more than once: "I don't intend individual voir dire." R:14489, 14609-10.

Based on all this, the Task Force asserts this "Court has never reversed a conviction on the ground that pretrial publicity so infected a community that it could not be addressed by voir dire." U.S.Br.156. This is true, but only because no appellate court could ever reverse a standing conviction based *solely* on *pre*trial prejudice; as part of its *de novo* review of the entire record, it must examine the voir dire and publicity at trial. *Mayola*, 623 F.2d at 1001. The Task Force's

[58] JQ-10, 11, 20, 38, 50, 64, 67, 87, 90.

assertion thus merely begs the questions: did the voir dire here work; and was the publicity at trial prejudicial? We address the latter question *infra*, 115-18.

As for the former, several Fifth Circuit authorities not discussed by the Task Force establish that the voir dire was so deficient here it could not possibly rebut the presumption of prejudice. The "Free Press-Fair Trial Guidelines," endorsed by this Court, caution that jurors in high profile cases should be questioned "outside of the presence of other jurors…by conducting the questioning of each juror in turn at the bench or sidebar, in a separate courtroom, or in the judge's chambers." *Free Press-Fair Trial Guidelines*, 87 F.R.D. 519, 532-33 (1980); *U.S. v. Davis*, 583 F.2d 190, 197 n.7 (5th Cir. 1978) (endorsing ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.4(a) (1968)).[59] We asked the district court to follow these procedures; it declined, instead conducting much of the voir dire in open court in front of throngs of reporters and the public. R:12067-74, 14398-680.

The Task Force also ignores *U.S. v. Hawkins*, 658 F.2d 279, 282-85 (5th Cir. 1981). In that marijuana conspiracy case, defendants submitted over 40 pre-trial media reports, and it was shown through *attorney*-conducted voir dire that 86% of panel (oddly, the same number here) had been exposed to that publicity. R:13812.

[59] *Accord U.S. v. Schrimsher*, 493 F.2d 848, 854 (5th Cir. 1974); *U.S. v. Runner*, 502 F.2d 908, 912 (8th Cir. 1974); *Silverthorne v. U.S.*, 400 F.2d 627, 639 (9th Cir. 1968).

When the attorneys asked to conduct more voir dire, the district court refused. This Court reversed, because the district court merely inquired of the entire panel:

> if any of you have heard about this case, or have read about it in the newspaper, or heard it on TV or the radio, or have talked with anyone, which has caused you to form an opinion as to the guilt or innocence of the Defendants, and if that is such an opinion as would affect you if selected as a Juror, if so, may I see your hand?

Hawkins, 658 F.2d at 282. When no panel members responded, the judge concluded:

> I presume then, that none of you know enough about the case or heard enough about it that you feel that it would keep you from being a fair and impartial Juror or would affect or influence your verdict.

Id. This Court held: "the district court's abbreviated treatment of this issue simply does not afford a 'reasonable assurance that prejudice would [have been] discovered if present.'" *Id*. at 285. Far more was required, given the "continuous flow of local newspaper articles reporting the guilty pleas and sentencing of various other defendants," the "charges of conspiracy, criminal enterprise and racketeering," and the "fact that forty-eight of the fifty-six potential jurors acknowledged some exposure to the publicity." *Id*. at 282, 284-85.

U.S. v. Beckner, 69 F.3d 1290 (5th Cir. 1995), is also not addressed by the Task Force. Beckner was a former U.S. Attorney in New Orleans prosecuted for wire fraud, obstruction of justice, and perjury. Pretrial publicity—48 articles, eight TV broadcasts, and reports that in an initial mistrial 11 of 12 jurors were ready to

convict—created a substantial risk of prejudice. Even though "many [of the media reports were] merely objective reports of the status of [the] case," this Court reversed. *Id*. at 1293. As this Court explained, although the district court:

> devoted great attention to pretrial publicity in its voir dire of prospective jurors [it] did not ask jurors what information they had read, heard, or otherwise received as a result of such publicity. Nor did the district court ask jurors how any such information had affected their attitudes or perceptions of the case. The district court did ask the panel whether anyone had been so affected by pretrial publicity that he or she could not be completely fair and impartial. None of the prospective jurors responded. *By allowing jurors to decide their own impartiality, the district court failed to fulfill its obligation under Davis [cited supra] to make an independent determination of the impartiality of each juror*. *Id*. at 1293-94.

Where publicity and prejudice are issues, as they plainly were here, voir dire requires time. Expediency cannot trump fairness.[60] The following cases—two from the Task Force's "solid wall"—show this to be the norm, Br.157:

Case	*Length of Jury Selection*
Bernard Ebbers (WorldCom)	Two days
John & Timothy Rigas (Adelphia)	Four days
Lewis "Scooter" Libby	Four days
Calley (cited by Task Force)	Four Days
Dennis Kozlowski/Mark Swartz (Tyco)	One week
Martha Stewart	Six days
Capo (cited by Task Force)	Ten days

[60] *U.S. v. Colabella*, 448 F.2d 1299, 1304 (2d Cir. 1971) ("[W]hen there is any foundation for concern about juror partiality...the demands of the 'most priceless' safeguard of individual liberty—the right to trial by an impartial jury—justify the small expense of time required by the guidelines suggested above.").

Tyrone Williams (human smuggling; extensive publicity in Houston)	Over two weeks
Zacarias Moussaoui	Two weeks
Timothy McVeigh	18 days (*after* venue change)

Indeed, in a recent case where an Eleventh Circuit panel initially reversed defendants' convictions because of prejudicial publicity, the *en banc* court affirmed the convictions only because of the "model," seven-day voir dire the court conducted. *U.S. v. Campa*, 459 F.3d 1121, 1147 (11th Cir. 2006) (en banc).

2. The Facts The Task Force devotes eight pages of its brief to juror comments to show there was no bias. U.S.Br.141-148, 160. Characteristic of so much of its prosecution, the Task Force's list was constructed to create a highly misleading impression. As shown in Appendix 3, *infra*, for almost every juror statement included by the Task Force to demonstrate *no* bias, there are many more statements from *the same juror* showing that each *did* hold preformed views about Skilling and faced outside pressures to convict. Yet those statements were deliberately omitted by the Task Force. To illustrate:

Juror No.	Juror Responses the Task Force Claims Show Lack of Bias	Juror Responses the Task Force Omitted From Its Brief
Juror 11 Def. cause challenge denied, R:14461-62;	Did not "get into details," Enron is "old news." U.S.Br.143. Did not recall particular articles or television reports on Enron.	On Enron: "Greed on Enron's part; Retaliation on California's part"; "A lot of people were hurt financially." JQ-11. On government's investigation: "needed to be done." JQ-11. Coworker "absolutely" lost money due

Def. request for additional peremptory challenges denied, R:14462; Selected for Jury, R:14687.	U.S.Br.144. Answered "I do not" to question, "Do you believe everything you read in the" *Chronicle*? U.S.Br.146	to Enron. R:14456. On executives: "anyone from Billy Sol Estes to T. Boone Pickens, it's all greed. All the way up. That's pure greed."; "they're stretching the legal limits on it. I'm not sure -- I'm not going to say that they're all crooks, but, you know --" R:14457. "Worked at KBR right across the street when all of this was going on. And, you know, it was of interest because I was close by." R:14459. On being able to change his mind that Lay was greedy: "I don't hardly know how you could do that." R:14460.
Juror 29 Def. cause challenge denied, R:14497-99. Def. request for additional peremptory denied, R:14499.	"I just quit reading about it." U.S.Br.143. "The media can be very biased, half truths." U.S.Br.146.	On Skilling: "not an honest man." JQ-29. On Enron: "Very sad - the many, many people who worked for Enron and lost their savings etc." JQ-29. On connections: Friend worked for Enron for 6 years and got laid off when Enron went bankrupt. Friends lost money and were negatively affected and hurt as a result of Enron's bankruptcy. JQ-29. Remembered employees "leaving the building; when they were told about the situation at Enron." JQ-29. On personal loss: attributed $50,000 to $60,000 loss to Enron's collapse. R:14491. On pretrial publicity: remembered "mostly about how loose [defendants] were with people's -- how dishonest they were"; "how arrogant [Skilling] was

		supposedly. They made -- intimidated people, supposedly." R:14493.
Juror 74 Def. cause challenge denied, R:14602. Def request for additional peremptory denied, R:14682.	Did not watch or rarely watched television news. U.S.Br.142.	On Enron: "the rich get richer. There is never enough money for the higher ups so they have to steal it." JQ-74. On investigation: it is a "wake up call for large companies to watch out because they may not be able to get away with fraud anymore." JQ-74. On feelings: she "work for a large corporation and count on all invested money for retirement and feel for those involved with the loss of jobs/investments." JQ-74. On publicity: "all negative, of course." R:14586. On how it affected her: "it has hurt us" "in a personal way" because as a result of Enron, her family could not invest the way they wanted. R:14591.
Juror 76 Def. cause challenge denied, R:14611-12. Def. request for additional peremptory denied, R:14612.	Did not subscribe to the Houston Chronicle or read it infrequently. U.S.Br.142. "I have not read anything since it initially happened." U.S.Br.144.	On defendants: they are "guilty of knowing what was happening to the company, but did nothing to let the employees know." JQ-76. On victims: felt "terribly about the people that put their trust and money and years of service in the hands of the Enron management only to be robbed of everything for their future." JQ-76. Knew somebody who worked at Enron whose employment terminated when Enron went bankrupt. JQ-76. She or her friends did business with Enron, and had friend who lost money due to Enron. JQ-76.

Juror 101 Def. cause challenge denied, R:14677-78. Def. request for additional peremptory denied, R:14678.	Answered "not all the time" when asked if she thinks what she read in the paper is true. U.S.Br.146-147.	On Enron: "the greed"; collapse "should not have happened. The top folks got too greedy." JQ-101. On personal loss: lost money in mutual fund/401k from Enron Collapse. Angry. JQ-101. On defendants: "guilty" and not sure if she could be fair; "they knew what was going on, sold their shares, but not the employed. JQ-101. "I have mixed feelings about [this case]. To me, it's like the amount of money involved and the amount of people that were affected and for nobody to know what was going on, it just doesn't seem possible that somebody didn't know something." R:14653. Thought Skilling was guilty because "everything I'd seen on TV and a lot of stuff that was in the '*Wall Street Journal*.'" R:14657. On defense counsel: heard that Lay and Skilling "had $43 million to contribute for their case and that there was an insurance policy they could collect on, too." Their "hav[ing] an insurance policy ahead of time" made her suspicious. R:14654. Was "surprised" venue was not changed in this case. R:14657.

Its misleading editing aside, this comparison exposes two false premises in the Task Force's arguments. First, Houston jurors plainly were biased even if they did not regularly read the *Chronicle*, did not watch the television news, did not pay much attention to the news, avoided exposure to news about Enron, did not know

specifics regarding the case, or expressed skepticism about the media—all the criteria that the Task Force says are so important. U.S.Br.141-47. Using these criteria, the Task Force argues "37 of the 43 individuals questioned said they had no significant exposure to pretrial publicity," and thus, this was "not a panel fatally 'saturated' with pretrial publicity." U.S.Br.160-61.

Looking at the juror answers the Task Force omits—like those in the above chart—*only seven jurors*—not the 12 required for a panel—had not expressed prejudicial views about Skilling and Enron. *Infra* Appendix 3 (Jurors 13, 16, 36, 66, 67, 93, 99). Of those *potentially* fair seven, inadequate voir dire could not expose whether they held subconscious biases, or worse yet, were stealth jurors. *Cf. Phillips*, 455 U.S. at 221-22 (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."). Of those 36 panel members honest enough to admit bias, they said Skilling was guilty and a liar; they believed Enron's bankruptcy was caused by greed; they expressed sympathy for Enron's victims or anger; or they or people they knew were hurt by Enron's collapse. *Infra* Appendix 3.

The Task Force tries to rehabilitate these jurors, arguing that several said they could be fair in spite of their biases. U.S.Br.165. But as this Court and others have repeatedly emphasized, one may *not* rely on such assurances when jurors

have been exposed to inflammatory publicity and openly admitted biases.[61]

Nevertheless, the Task Force and district court did exactly what the rules forbid—they let the jurors be the judge:

> TASK FORCE: Your Honor, we have to take her at her word. When she had previously said earlier what her opinions were, and she 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. [The defense motion for cause] is denied.
>
> * * *
>
> TASK FORCE: Again, Your Honor, we have to take them at the word, and that's the way we've been doing it. And she said she could.
>
> COURT: The [defense motion for cause] is denied.

R:14498-99, 14566.

b. *Contemporaneous Trial Publicity, Continuing Well After Voir Dire Concluded, Further Prejudiced Skilling.*

Remarkably, the Task Force concedes that "pretrial publicity…creates a smaller danger of prejudice than does sensationalism *occurring throughout the*

[61] *Irvin*, 366 U.S. at 727-28 ("The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man....No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. *Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.*"); *Mayola*, 623 F.2d at 1001 (presumption of prejudice not rebutted "merely by the jurors' assurances on voir dire of their own impartiality"); *Colabella*, 448 F.2d at 1304 ("It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial."); *Davis*, 583 F.2d at 197 & n.7 (same); *Nevers*, 990 F.Supp. at 854 (same); *Coleman*, 778 F.2d at 1542-43 (same); *McVeigh*, 918 F.Supp. at 1473 (same).

trial." U.S.Br.150. The district court admitted it was "impossible to prevent jurors from reading about the case and listening and watching media reports," R:10951, and cases like *Hawkins*, 658 F.2d at 284 cite such contemporaneous reports in presuming prejudice *despite* any voir dire. *Marshall v. U.S.*, 360 U.S. 310, 312 (1959) (reversing conviction because jurors saw three articles published during trial). The Task Force does nothing to address contemporaneous trial publicity, other than to erroneously say it is not a part of the record. U.S.Br.148-49.[62]

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[62] The Task Force asserts the district court "issued a minute order denying Skilling's request to supplement the record with [this] material." U.S.Br.149. To the contrary, all the evidence Skilling submitted is a part of the record.

As for the order, after Skilling was convicted, he filed a pleading in which he: *first*, supplemented the record with contemporaneous trial publicity in aid of motion for bail pending appeal, R:38320-21, 41926-28, 38039-47; and *second*, requested access to sealed transcripts, the so-called "Fastow binders," and other materials from the district court. R:38321-22, 41928-30. In denying Skilling's bail motion, the district court said it "looked at" and "carefully considered" the materials Skilling submitted, which included the community animus evidence, R:41927; if there were any doubt, Skilling urged the court to consider the materials again, R:41927 n.4. The district court then, weeks later, filed a separate order granting in part and denying in part Skilling's "requests" to gain access to the sealed materials. R:42191. This is the order the Task Force misleadingly cites.

The Task Force also omits that Skilling filed a similar motion to supplement the record with venue material with this Court. Def.-Appellant's Mot. to Supp. Record on App. (Sep. 14, 2007). In its opposition, the Task Force argued that articles that appeared during or after the trial were irrelevant. U.S.Resp. at 4-6 (Sept. 28, 2007). This Court disagreed and granted Skilling's motion. Order (Nov. 1, 2007).

Finally, the Task Force offers no reason or authority why these materials may not be considered. The government has supplemented the record on appeal in venue cases, *U.S. v. Lipscomb*, 299 F.3d 303, 338, 343 (5th Cir. 2002), and Skilling presented his fair trial arguments to the district court—before, during, and after trial, *supra* n.29. The Task Force cites no authority holding that Skilling had

The contemporaneous trial reports in this case were heavily biased against Skilling, and are dispositive proof—voir dire or not—that prejudice must be presumed. To highlight some examples:

- On the day of jury selection, the jury pool and Skilling and Lay were greeted by "hecklers" screaming out for Skilling's guilt, and a *Chronicle* column, written days after the jury was selected, warned them: "do not be drawn in by [defendants'] circular arguments and seductive logic"; they believe "rules are malleable, that ends justify the means no matter how ridiculous, that investors are easy marks to be fleeced and employees are pawns to be manipulated." R:39893, 39886-87.
- In the days before jury selection, the *Chronicle* published an exhaustive "guide" to the trial, consisting of a "scorecard" of the charges, graphics explaining why various transactions (including Nigerian Barges and Raptors) were fraudulent, and a list of "key witnesses" and summaries of their likely testimony. All these articles remained on the *Chronicle*'s website for jurors to reference throughout trial. R:39904, 39912, 39916, 39920, 39924, 39928, 39930, 39932, 39938, 39940, 39956, 39961, 39981, 39999, 40002, 40009, 40013, 40027.
- Sitting jurors were reminded their trial was "the hottest seat in town," the

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to file a new trial motion on venue issues, nor does it or can it even say that Skilling waived a single claim by not doing so. FED. R. CRIM. P. 51(b).

"climax" of the "Enron disaster," and "a city full of people whose lives were damaged by the scandal" will be seeking a final explanation for the bankruptcy that "rocked the city." R:39904.

- The *Chronicle* ran front page headlines about the case almost every day throughout trial, and it reported heavily on evidence prejudicial to Skilling and ruled inadmissible. Its website had a constant running commentary, much of it devoted to the habits of the jury (no doubt attracting its attention), while at the same time praising the prosecution ("solid," "damning" case), its witnesses ("never buckled"), and mocking the defense ("weak and implausible," "thin," "absurd," "laughable," "sweeping revisionism," "courtroom artistry," "sleight of hand," "alchemy," "combative," "evasive," "implausible drivel"). R:39004-07, 39102-03, 39292, 39446, 39570, 39626, 39691, 39703, 39144, 39446, 39617, 39848, 40089, 40199, 40265-71.
- "In short," the *Chronicle*—and other media sources told the jury—"Enron was a colossal lie, perhaps the biggest ever told in the history of American business." R:39494.

D. Actual Prejudice Found Its Way Into The Jury Box.

In addition to proving presumed prejudice, Skilling has shown the seated jurors in his case were actually prejudiced. Br.164-65. The Task Force suggests

Skilling did not preserve this claim,[63] and says there are no facts to support it. It is wrong on both.

Actual bias is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007). That inference can be drawn when "the circumstances point so sharply to bias in a particular juror that even his own denials must be discounted in ruling on a challenge for cause." *U.S. v. Nell*, 526 F.2d 1223, 1229 n.8 (5th Cir. 1976). Bias was palpably present here:

- Juror 20: "It makes me angry that so many people lost their jobs and their retirement savings." JQ-20.
- Jurors 38 and 50: "angry" about Enron. JQ-38, 50.
- Juror 87: Bankruptcy caused by "[p]oor management and bad judgment. Greed." JQ-87.

[63] The Task Force says "Skilling did not object to the jury as empanelled." U.S.Br.148. That is false:

> THE COURT: Is there any objection to the jury as constituted?
> [LAY'S COUNSEL]: Yes, Your Honor…And if we had six additional peremptory challenges, we would strike Juror Number 20, 38, 63, 67, 78 and 84. So we respectfully object to those venirepersons being seated as jurors.
> THE COURT: Objection is overruled.
> [SKILLING'S COUNSEL]: And we join in that objection, your Honor. And, for the record, we also add the objection that we were not permitted to fully voir dire each of the jurors.

Trial Tr. at 3 (Jan. 30, 2006; 4:48 p.m) (sealed).

- Juror 90: "The small average worker saves money for retirement all his life. It's not right for someone or anyone to take or try to take this part of his life away from him." JQ-90.

The Task Force argues the district court told these jurors they had to be fair and put aside their prejudices, U.S.Br.140, 165, but as this Court has held, voir dire is not "a means of educating [jurors] about [their] responsibilities." *Chagra*, 669 F.2d at 254 n.14. Rather, it is an essential tool for "discovering the depth and breath of [a juror's] knowledge or attitude." *Id.*[64]

The district court's truncated voir dire was not aimed at discovering bias; at its best, it was designed to get jurors to admit they could be fair. For example, Juror 11 said Enron's collapse was caused by greed. JQ-11. When questioned, he likened this case to that of Billy Sol Estes—one of Texas' most notorious swindlers—and said, "it's all greed. All the way up." R:14457.[65] In Juror 11's mind, greed and crime were intertwined, *id*. ("I'm not going to say they're all crooks, but you know"), and when asked whether defendants would have to prove they were not greedy, he responded: "I don't hardly know how you could do that,"

[64] *Davis*, 583 F.2d at 197 n.7 (this Court endorsing ABA fair trial standard, requiring: "The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, *not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have*.").

[65] Ironically, the Supreme Court reversed Estes' conviction because of the circus atmosphere of his trial. *Estes v. Texas*, 381 U.S. 532 (1965).

R.14460. Juror 11 also had knowledge of Enron's bitter disputes with the State of California over allegations Enron manipulated energy prices. JQ-11. The district court excluded the California allegations from the trial, R.13610-19, yet did not explore this area of bias. R:14455-62; *cf. Marshall*, 360 U.S. at 312 ("exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence" basis to reverse). Instead, it asked Juror 11 if he could decide the case on a "clean slate." R:14458. When Juror 11 said he could, the court denied defendants' challenge for cause and refused to grant defendants an extra peremptory challenge. R:11461-62. Juror 11 exhibited such obvious bias that the national media ran a story: "If Juror No. 11 is any indication: Look out, defense." Greg Farrell, USA TODAY, Feb. 6, 2006, at Money 2B.

Juror 10 was equally biased. He lost money as a result of Enron's collapse and worked with former Enron employees. JQ-10. When asked if he would be reluctant to tell others he voted to acquit, he said: "I don't think I would tell anyone what the vote was." R:14452-53. Like almost everyone in Houston, he thought the collapse was due to "greed and mismanagement" and defendants were "suspect" because of "what I see on television and everything." JQ-10; R:14452-53. When Juror 10 made these statements, the district court abruptly cut him off: "Can you conscientiously follow my instruction that they're presumed to be innocent?" R:14452-53. Juror 10's response, which the district court treated as

good enough, was: "I think so." *Id.* Such "pallid," *Nell*, 526 F.2d at 1229-30, responses are never "good enough," *Nelson*, 277 F.3d at 202 ("a juror who could probably be fair and impartial should not be considered impartial, because probably is not good enough").

Skilling's jury, biased when chosen, was then assaulted with daily reminders that the people of Houston expected convictions. As their post-trial comments indicate, jurors were acutely aware of these community expectations and pressures.

- Juror 20, who lost her job shortly before Enron's bankruptcy, said before trial that she was "angry that so many people lost their jobs." JQ-20. After trial, she expressed her pride in the jury's verdict: "[We were] responsible. We were always accountable. We had to find a way to circle back and tie up loose ends. And I think those (Enron) employees were entitled to the same thing." R:40982.
- Before trial, Juror 87 said what stood out in her mind were Enron employees "who left with nothing in their retirement accounts." JQ-63. After trial, she hoped her "decision will make [all companies] more conscientious." R:40978.
- Before trial, Juror 63 said Skilling and Lay "probably knew they were breaking the law." JQ-63. After trial, she worried Lay's death might cheapen their verdict: "I feel bad for the people who really wanted to see

[Lay] go to jail, that they needed the closure and they're not going to get it. You hope it would be enough...that we came back guilty." JKS-24.

If Skilling's convictions are affirmed on these facts, the right to a fair trial, free from prejudice, is a dead letter.

IV. THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT ITS MISCONDUCT SHOULD NOT LEAD TO REVERSAL.

A prosecutor's duty "is not that [he] shall win a case, but that justice shall be done....[W]hile he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). The Task Force violated that principle. Under intense pressure to indict and convict Skilling on an admittedly tenuous case, the Task Force intimidated witness, suppressed vital impeachment materials, and buried exculpatory facts. It cannot excuse those acts.

A. The Task Force Engaged In Witness Intimidation.

"Witnesses...are the property of neither the prosecution nor the defense." *Gregory v. U.S.*, 369 F.2d 185, 188 (D.C.Cir. 1966). Yet time and again the Task Force barred access to the *hundreds* of witnesses in this case—who almost to a person refused to speak to Skilling. A brave few admitted the reason why was Task Force intimidation. Br.177-82. The Task Force responds that the district court found no intimidation occurred, witnesses had "valid reasons for their reticence," and the district court's efforts "inoculated the trial against any possible prejudice." U.S.Br.175-77. None of these excuses withstands scrutiny.

1. The District Court Clearly Erred in Finding No Interference.

The district court erred, in three ways, in finding that Skilling introduced "no credible evidence" of Task Force intimidation. First, the court overlooked, as does the Task Force, much of the misconduct evidence Skilling presented. The court's failure to consider this evidence—including the "Weissmann email," unconstitutionally restrictive plea agreements, and impermissible written threats—means its factual determination is entitled to no deference. *Jimenez v. Mary Washington Coll.*, 57 F.3d 369, 379 (4th Cir. 1995).

Second, the district court's belief that Skilling failed to present credible evidence of intimidation simply cannot be squared with the record or common sense. The Weissmann email *alone*—sent by the Director of the Enron Task Force, days after allegations of witness intimidation surfaced in the EBS trial—is powerful and shocking evidence of misconduct. The email, on its face, was intended to stop Skilling's counsel from talking to counsel for a key witness—Ken Rice, the CEO of EBS. Weissmann's assertion that it was "not...in Rice's best interests" for his attorneys to talk to Skilling's attorney sent an unmistakable chill. In a letter the district court ignored, Rice's attorney assured Weissmann he would "not speak to Mr. Petrocelli further during the pendency of the EBS trial(s) or sentencings," MTD Ex.28—exactly the stranglehold on access to proof that cases like *Gregory* condemn.

This was only the tip of the iceberg:

- *Unlawful Plea Agreements* The Task Force secured plea agreements with Merrill Lynch and CIBC prohibiting the banks, their employees, and agents from testifying in Skilling's trial to contradict the Task Force's "side deal" allegations. Restrictions like these plainly violate the law, *U.S. v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977); Br.191 n.100, yet the district court ignored them in making its findings, and the Task Force says nothing about them in its appellate brief. Also not addressed was the letter to Skilling's counsel from Dave Delainey's counsel, in which he plainly admits his client's plea agreement—like all the Task Force's cooperation agreements —"restricted" him from "disclosing certain information to third parties." MTD 37. This restriction—which Delainey's counsel *documented in writing*—on speaking to Skilling about non-privileged meetings with the Task Force violates the law. AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE § 3-3.1(d) (3d ed. 1996).

- *Shelby Statements* Former EBS executive Rex Shelby met with the Task Force in late 2002 and took notes. Shelby asked the agents whether to return a phone call from counsel for an EBS defendant. The Task Force informed Shelby it was his decision whether to talk to defense attorneys, but added "they did not think it was a good idea." MTD Ex.5. This was not an isolated instance, and this Court clearly forbids such warnings. *U.S. v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979) (agent improperly advised witness that in light of legal "situation," he would have "nothing but trouble" if he testified). Again, silence from the district court and Task Force.

- *Belden Statements* Counsel for the head of Enron's West Trading Desk, Tim Belden, sent a remarkable email to the Task Force. Belden wanted to send

> *Christmas cards* to his former Enron colleagues but feared the Task Force would view it as failing to "fully cooperate." "For months," counsel wrote, "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*." JKS-15:17. These "orders" not to communicate are unlawful, *U.S. v. Soape*, 169 F.3d 257, 270 (5th Cir. 1999), but the district court did nothing. Instead, it allowed Belden, Rice and Delainey to freely testify for the Task Force.

Even this limited record presented clear proof of impermissible government interference. And the proof was in the pudding—no one would talk to Skilling or his counsel—no one would testify. The trial was not a competition for the truth. It was a display of raw prosecutorial power and zeal. As we told the jury below, although Skilling was the defendant, *fear* was on trial.

Third, with respect to *disputed* instances of misconduct, the proof decidedly favored Skilling, and the district court clearly erred in concluding otherwise. Br.192. We do not repeat all the evidence here, except to address the Kate Agnew facts, U.S.Br.185, which exemplify the district court's error.

Skilling claimed the Task Force intimidated former Andersen accountant Agnew into not testifying at Andersen's criminal trial. Skilling submitted a letter from Andersen's criminal counsel, Rusty Hardin, to DOJ leadership. Hardin documented that the Task Force had changed Agnew's status from "witness" to

"target" after she indicated she would testify for Andersen and refute the Task Force's knowing distortion of a key document in the case. MTD 20-21. Skilling submitted a declaration (and corroborating notes) regarding conversations his counsel had with Agnew's criminal attorney, Tim Evans. Evans confirmed the substance of Hardin's letter; added that 10 days before the Andersen trial, Weissmann called him and made a "patently meritless" threat that Agnew would be charged with perjury if she testified; and said he had contemporaneous "notes" of the "blatant, horrible, and awful" event that he would produce if ordered to do so by the court. MTD 20-21.

The Task Force's counter-evidence, in total, consisted of a declaration from Catherine Palmer, a friend and former colleague of Weissmann (and current colleague of two of the lead prosecutors below), who purported to be the *civil* lawyer for all former Andersen employees. Despite having no personal knowledge of any of the events, Palmer "swore that Agnew denied that her former attorney ever told her that the government had changed her status to target or threatened to prosecute her for perjury." U.S.Br.184. The Task Force submitted no declaration from Weissmann, Agnew, or Evans. Without mentioning, much less resolving the competing evidence, the district court refused to order testimony from Weissmann, Evans, or Agnew, and declined to order that Evans' notes be produced.

The Task Force says the district court rightly rejected Skilling's evidence as hearsay and was "entitled" to "rely" on Palmer's hearsay declaration. It was not. Skilling's proffers were admissible out-of-court statements offered against a party who "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6).[66] "'[W]itness 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, at *6 (S.D.N.Y. Jul. 14, 2005).

In contrast, Palmer's counter-declaration is pure hearsay not subject to any exception, lacks personal knowledge, and bears none of the indicia of reliability of Skilling's attorney declaration, such as the existence of corroborating notes. Most importantly, Palmer's carefully worded statements are highly dubious in light of Hardin's letter, Evans' corroborating notes, Agnew's decision not to testify in the *Andersen* trial, and the absence of *any* direct evidence from the actual Task Force

[66] The Task Force wrongly claims Skilling failed to argue admissibility before the district court. U.S.Br.181. Skilling fairly presented the issue. *U.S. v. Mendiola*, 42 F.3d 259, 260 n.2 (5th Cir. 1994) (no plain error review when "essential substance" of argument "is obvious and was made known"). The attorney declarations on their face implicate Rule 804(b)(6). Moreover, when the government criticized Skilling's showing as "unreliable hearsay" without "supporting detail," R:9790-92, Skilling submitted contemporaneous documents to corroborate the declarations and underscore this point. Reply in Support of MTD at 13-26 (Oct. 26, 2005) (sealed) ("MTD-R").

members implicated in the misconduct. MTD-R 21-24. On far less compelling records, courts have rightly discounted attorneys' retractions of an earlier description of witness intimidation. *U.S. v. Peter Kiewit Sons' Co.*, 655 F.Supp. 73, 76-78 (D.Colo. 1986) (retraction incredible because attorney's client walking a "tightrope of prosecutorial discretion from the threat of imprisonment to the hope of freedom"). At a minimum, the district court should have ordered Weissmann, Evans, and Agnew to testify and reviewed Evans' notes. Under the circumstances, it clearly erred in finding "no credible evidence" of interference.

2. The Task Force "Substantially Interfered" With Skilling's Access to Witnesses.

The Task Force next argues that even if it *tried* to intimidate witnesses, the district court properly rejected Skilling's claim because, as in "most white-collar cases," the witnesses were represented by "experienced attorneys" and had "valid reasons" for refusing to cooperate with the defendants. U.S.Br.176-78.

No case holds that witness intimidation can only occur with unrepresented persons. No case requires Skilling to show that "but for" government interference, a witness would have met with or testified for him. This Court previously recognized the real-world practicality that many factors influence witnesses' decisions, and has held that interference is shown where "a preponderance of the evidence" demonstrates the government's actions "interfered substantially" with witnesses' "free and unhampered" choice to meet with him or testify. *U.S. v.*

Scroggins, 379 F.3d 233, 239 (5th Cir. 2004); *U.S. v. Bieganowski*, 313 F.3d 264, 291 (5th Cir. 2002); *Hammond*, 598 F.2d at 1012.

Skilling amply met his burden by introducing the written materials described above, among other evidence. Moreover, although Robert Sussmann and Wendell Odom, the two "experienced attorneys" who testified below, stated that a number of "factors" led them to advise their clients not to meet with Skilling, *both* admitted that in "the totality of circumstances," the Task Force's conduct was one important "factor." R:11016, 11040. Moreover, the only expert testimony on this issue came from renowned criminal defense attorney Michael Tigar. He stated unequivocally that in 40 years of practice, including litigating numerous misconduct cases, he had "never seen all these unfair pressures brought to bear on the adversary system in a single case," and that Skilling's "drastic inability to interview witnesses and secure their testimony at trial" was unique and harmful. R:8190-97.

Skilling requested immunity for some individuals who could have provided testimony contradicting key government witnesses, but who said they would assert their Fifth Amendment rights. In denying Skilling's request, the district court concluded that "[t]he primary reason a person asserts a Fifth Amendment privilege is because the person is guilty of criminal conduct." R:37312-13; RE-22.

This astounding statement turns the presumption of innocence on its head, is not the law, and not even the Task Force tries to justify it. *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."). In the face of indisputable evidence of misconduct, the district court wrongly concluded—no doubt reflecting the same negative attitude toward Enron and Skilling that pervaded Houston—that defense witnesses remained silent "not because of fear of government reprisals," but because they collectively perpetrated a sweeping fraud.

3. **The District Court Did Not "Cure" the Prejudice.**

The Task Force suggests the district court "eliminated *any* possible prejudice" by notifying witnesses it would not view adversely their decision to meet with defendants. U.S.Br.175-76. This is incorrect. The notification itself reinforced the risk that the Task Force viewed cooperation with defendants as non-cooperation. That message was heard by individuals subject to plea agreements where the Task Force—*not the court*—maintained "sole and exclusive" discretion to determine whether the witness had "fully cooperated." MTD Ex.54.

The Task Force's argument also overlooks that similar orders by courts in other Enron-related cases did *nothing* to deter the Task Force from (a) threatening Dr. Larry Ciscon; (b) advising Odom that his client should not meet with Lay and Skilling because "they are bad news"; (c) writing and delivering the Weissmann email; or (d) making "veiled threats" to Mark Palmer four times shortly before he

was scheduled to testify. Br.177-78. Court orders plainly had no impact on the Task Force or the witnesses it sought to silence. Virtually no witnesses—and no critical witnesses—agreed to meet with Skilling before trial. Eight key witnesses subpoenaed for trial testimony invoked their Fifth Amendment rights.

In cases involving far less grave misconduct, prophylactic measures did not "cure" the problem. In *U.S. v. Carrigan*, 804 F.2d 599, 601, 604 (10th Cir. 1986), court orders instructing the government "to cease" interference were insufficient to remedy obstruction of the defendant's access to witnesses. The Task Force distinguishes *Carrigan*, arguing the order there "*merely*" compelled the government to cease interfering, whereas the order here "went far beyond directing the government to cease interfering with witnesses." U.S.Br.179. The Task Force has it backwards. The order here—which "merely" notified witnesses the government would not view their decision to meet with defendants adversely—was *less* meaningful than *Carrigan*'s order, especially considering that the *Carrigan* court subsequently ordered the witnesses be deposed. 804 F.2d at 604.

In *U.S. v. Leung*, 351 F.Supp.2d 992, 996-97 (C.D. Cal. 2005), the court noted that, when the only misconduct is a passing "admonition" not to speak to a defendant, a "judge's explanation" will usually undo the harm. More appropriate here, though, is *Leung*'s holding that when the government has "engaged in willful

and deliberate misconduct, depriving defendant of...access to...critical witness[es]," an explanation or letter from the court cannot "undo the damage." *Id.*

B. The Task Force Wrongly Bolstered the Credibility of, and Withheld Critical Exculpatory Information About, Fastow.

It is no exaggeration to say—and the Task Force does not dispute—that the outcome of Skilling's trial depended largely on whether the jury believed Andrew Fastow's testimony. From the day Fastow pled guilty in January 2004 through closing arguments here, the Task Force was acutely aware of the significance of his credibility and employed any means necessary to preserve and salvage it. In so doing, the government violated Skilling's Sixth Amendment rights.

1. The Task Force Destroyed Exculpatory Material.

For every witness but Fastow, the Task Force adhered to FBI policy and created, retained, and produced Form 302 memos summarizing specific interviews. Br.202. For Fastow, agents took handwritten notes of interviews but did not to prepare individual 302s. Instead, the Task Force generated two "composite" 302 summaries combining literally dozens, maybe hundreds of different interviews.

There is no legitimate reason for this special treatment, and the Task Force offers none. The Task Force knew Fastow would be the chief witness in Skilling's trial. It knew that Fastow's credibility was severely compromised because he stole tens of millions of dollars from Enron, *lied* to Skilling about it, and rather than confess his crimes, let his wife go to jail for participating in a tax fraud he

engineered. R:21341-42, 21622-23. The Task Force's apparent decision not to prepare—and certain decision not to disclose—individual interview memos for Fastow was not casually made: it was calculated to frustrate Skilling's ability to expose inconsistencies that would further destroy Fastow's credibility.

Just before trial, the Task Force made a second startling revelation about the 302s: it *destroyed all copies*, including electronic drafts on computer hard drives. R:11920-30. The Task Force's claim that "there is no reason to believe that the government discarded the drafts of Fastow's 302 in anything other than the normal course of preparing the final version" is, in a word, *incredible*. U.S.Br.193.

To this day, the Task Force is desperately fighting to keep Skilling from its raw notes of interviews with Fastow. Def.-Appellant Jeffrey K. Skilling's Opp. To The U.S.'s Mot. For Reconsideration By A Three-Judge Panel Of Order Requiring It To Produce FBI Raw Notes (Nov. 30, 2007). The day before this brief was due, the Court ordered the Task Force to produce these notes to Skilling. Once it does so, Skilling will seek leave to file a supplemental brief addressing their contents and how they impact the issues on this appeal, including Skilling's *Brady* and misconduct claims.

2. The Task Force Misled the Jury and Improperly Bolstered Fastow's Credibility.

The Task Force's pattern of withholding exculpatory material continued through trial. Global Galactic is one—but certainly not the only—example of a

highly contentious issue that turned solely on Fastow's credibility. Whatever the term "Global Galactic" meant—and there was significant contradiction among the Task Force's own witnesses, Br.34-35—*nothing* about the document itself links Skilling to anything. None of Skilling's name, initials, or fingerprints appears anywhere on the document. GX1298. Although Fastow claimed he and Skilling "talked about" some of its terms, he conceded he never showed the document to Skilling or mentioned "Global Galactic." R:21314-15, 21812-13, 22490. Indeed, until the eve of trial, the Task Force told the Court: "[t]he Indictment does not even charge Skilling with being a part of the Global Galactic Agreement." R:1888.

Fastow said once he and Causey made their "agreement," he created an original document, obtained Causey's initials on it, made a copy and offered it to Causey. R:21317. Even though the document supposedly inculpated the two men in unchecked fraud, Causey casually declined, saying "[d]on't worry about it, I don't need a copy, [y]ou just hold on to it." *Id*. Fastow put the original and copy in his briefcase until "[s]ometime in mid-2001," when he decided he better destroy all evidence of his crimes. *Id.* Fastow destroyed the original and "looked around" for but could not find the copy. R:21317-18.[67]

[67] Fastow's testimony about "looking for" the copy directly contradicts his 302, which states: "Fastow forgot about the copy until seeing it" in 2004. Fastow Composite 302 at 65. This is precisely the sort of inconsistency the agents' notes will expose.

Years later, in 2004, Fastow's wife found the copy in the family's safety deposit box. (Curiously, she had gone to the safety deposit box a few months earlier—with her criminal attorney—but did not see the document.) Fastow had no idea how or when the copy made its way from his briefcase to the deposit box. R:21929-31. Ms. Fastow supposedly discovered the document *just days* before the Task Force dropped a six-felony-count indictment against her and recharged her with a single misdemeanor count. R:21824, 21931-32, 21937-43, 21660-62; GX1297. Calling the timing pure coincidence, Fastow denied that he and the Task Force had a "quid pro quo" related to the document's production. Fastow said, although he obtained the document from his wife *before* the government changed her status, it just "sat on his desk" for "six weeks." R:21937-43, 22430.

Skilling attacked Fastow's implausible tale and questioned the document's authenticity. Plainly aware Fastow's credibility was the central issue, the Task Force assured the jury in closing argument:

> What possible motive would Andy Fastow have to produce that document?….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 that document could do, ladies and gentlemen, was sink him if it were a fraud. The deals were already in place. *Ten years locked in for Mr. Fastow*. His wife's deal done. No possible reason that he would come forward with a document that wasn't accurate. R:37020-21; 22429-31.[68]

[68] The Task Force is wrong that Skilling did not ask Fastow about his sentence during cross-examination. U.S.Br.186. Skilling's counsel asked: "And you said

As it turns out, Fastow's deal was not "locked" at 10 years. Soon after Skilling was convicted, Fastow asked to be sentenced to *half* that amount. R:41427-29. The Task Force did not object, did not insist he adhere to the terms of his plea agreement, and did not alert the sentencing judge that, just months earlier, it had told Skilling's jury that Fastow should be trusted because he had nothing to gain. Instead, the Task Force spoke of Fastow's remarkable "rehabilitation," "candor," the "critical part" he played in "convicting Mr. Skilling." R:41434. The court sentenced Fastow to six years in prison; he may be out in three.

This *is* prejudicial misconduct, and the Task Force's suggestion that we do not "believe" in the claim is an affront.[69] The *only* reasonable conclusion on these facts is that Fastow and the Task Force had an express or tacit understanding that "if his testimony [is] helpful to the prosecution, the state [will] give him a break on some pending criminal charge." *Wisehart v. Davis*, 408 F.3d 321, 323 (7th Cir. 2005). That is *Brady* and *Giglio* material the Task Force was required to disclose.

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you have to go to jail for 10 years, right?" Fastow answered: "Well, my sentence is for 10 years. I could potentially have time off for good behavior." R:21635-36. Fastow said nothing to even hint he could receive a reduced sentence.

[69] The Task Force cites no authority for its assertion that Skilling is "foreclosed" from raising Fastow's sentence in this Court because he has not filed a new trial motion. U.S.Br.189. Rule 33 prescribes a time limit within which one must bring a new trial motion; it does not preclude an appellant from amplifying arguments on appeal with facts that become known after trial. FED. R. CRIM. P. 33. Moreover, as the Task Force well knows, Skilling *did* alert the district court to this very issue in his motion for bail pending appeal. R:38049.

Skilling's convictions must be reversed, even assuming no such side deal. In *Ruetter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989), which the Task Force ignores, the prosecutor told the jury that a cooperating witness had "no possible reason to be untruthful in his testimony" because his sentence had been decided and he had "nothing to gain." *Id.* After Ruetter was convicted, the witness went before the parole board and the prosecutor recommended parole. *Id.* at 580. The court reversed, expressly holding that "[o]ur conclusion does *not* depend on a finding of either an express or an implied agreement between [the witness] and the prosecution regarding the prosecution's favorable recommendation to the parole board." The prosecutor's statements were "hardly the full truth and," like here, "it is difficult for us to conclude there is not a reasonable probability that the prosecutor's remarks had an effect on the judgment of the jury." *Id.* at 582.

C. *Brady* Is Not Satisfied by a "Document Dump" Masquerading as "Open File" Discovery.

The Task Force does not deny it was required to identify potentially exculpatory materials that Skilling could not himself locate with "reasonable diligence." Br.203. Instead, it argues Skilling cannot identify any exculpatory evidence that was not in fact produced, U.S.Br.193, 196, that its various indices, letters, and "hot document" productions satisfied *Brady*. U.S.Br.194-96.

The Task Force's first argument simply side-steps the constitutional issue. The question is not whether Skilling found *some* exculpatory material in the

massive open file (which he did at great effort and expense, Br.203), but whether merely producing a "file" containing a *billion pages*—without more specific *Brady* disclosures, and by definition—suppresses exculpatory evidence.

We submit it did. The exculpatory documents Skilling used at trial *he found himself* through excruciating work. *None* was identified by the Task Force, which for two years denied the existence of *any Brady* material in the entire case. R:9461. It is a statistical certainty that more such evidence exists in the "open file," but remains undiscovered because we were physically unable to review hundreds of millions of pages before trial, as the Task Force does not dispute. No amount of diligence here—let alone reasonable diligence—would have revealed all exculpatory materials in the document dump. *Cf. U.S. v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003) (disclosure must be early enough to permit defendant to make "effective use" of favorable evidence at trial).

None of the Task Force's letters, indices, or "hot documents" solved this fundamental problem. The production was woefully under- and over-inclusive, ceased a year before trial began, comprised documents from only a small portion of the government's file, and did not include many exculpatory documents that we found and showed the district court, but to no avail. R:9464, 5707-35, 6715-25, 8107-09, 987-88, 1545, 4562, 5738-40; *In Camera* Supp. to Def.'s Mot. To

Compel Production of Exculpatory and Rule 16 Materials (May 17, 2005) (sealed). Equally useless, *cf.* U.S.Br.195-96, were:

- The 1A and 1B indices the Task Force provided. These 1,000-page page indices were inconsistent and contained only vague descriptions for whole boxes of materials or caches of computers that Skilling had to request access to; they did not identify exculpatory materials. R:5707-35, 6715-25.
- The Task Force's exhibit and witness lists were of no help. They identified evidence that would be used *against* Skilling.
- As for the Task Force's *Brady* witness letters, they were intentionally incomplete and uninformative and when we reached out to witnesses, they refused to meet with us or testify. R:9895-902, 10383-88, 11415-19.
- Finally, SEC databases and "electronic databases" created for the *Newby v. Enron* litigation only further buried Skilling in hundreds of millions of pages of documents. No authority holds that the government's *Brady* obligations are satisfied by pointing to massive civil productions, particularly where, as here, the civil litigants largely sought to *assign liability* to Skilling, not exculpate him. R:9755-56.

* * *

Taken together, the prejudice from the Task Force's unlawful misconduct was irreparable. It deprived Skilling of the right to mount a full defense and

severely skewed the evidence. This was systematic and deliberate. The Task Force was taking no chances. This marquis trial was the crowning culmination of the President's crackdown on corporate fraud. The Task Force would do—did do—whatever it took to win this case. It got what it wanted—convictions of Skilling and Lay—but *only* by breaking the rules. It is now up to this Court to call out and condemn that behavior so that it does not happen again—not in this case, not in any case. Skilling is entitled to reversal on all counts and dismissal of the indictment; at a minimum, he is entitled to reversal and a new trial with instructions to hold an evidentiary hearing to ensure his due process rights are protected.

V. CUMULATIVE ERROR OVERWHELMED SKILLING'S TRIAL.

The Task Force seeks to minimize the numerous errors that plagued Skilling's trial—flawed honest-services charges; one-sided jury instruction; jury bias; and prosecutorial misconduct—by treating all these errors in an atomized way, and arguing each is harmless. But that is not the law. "[H]armlessness is not the test of reversible error when a cascade of errors turns a trial into a travesty." *U.S. v. Warner*, 506 F.3d 517, 520 (7th Cir. 2007) (Posner, J., dissenting). When a series of improprieties have so "fatally infect[ed] the trial that they violated the trial's fundamental fairness," nothing short of reversal is required. *U.S. v. Fields*, 483 F.3d 313, 362 (5th Cir. 2007).

Put another way, "a court is required to assess the harm done by the errors considered in the aggregate," including those it may have individually determined to be harmless. *U.S. v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000); *U.S. v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990); *U.S. v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998). Indeed, "several incidents of improper argument or misconduct may require reversal, even though no single one of the incidents, considered alone, would warrant such a result." *U.S. v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984). The errors in this case are far more extensive and far worse than in any of the many cases where courts have reversed convictions invoking the cumulative-error doctrine.[70] Especially given the admitted weaknesses and close nature of the Task Force's case, *e.g.*, Br.16-21, the cumulative effect of the errors shown here destroyed any prospect of a fair ascertainment of the truth in this case.

[70] *Santos*, 201 F.3d at 965 (evidentiary errors and erroneous denial of continuance); *U.S. v. Woods*, 207 F.3d 1222, 1237 (10th Cir. 2000) (denial of motion for judgment of acquittal on two of three murder charges and erroneous admission of testimonial and documentary evidence required reversal); *U.S. v. Candelaria-Gonzalez*, 547 F.2d 291, 297-98 (5th Cir. 1977) (prejudicial cross-examination of character witnesses combined with court's mistreatment of defense counsel resulted in "a failure to accord [defendant] a fair trial"); *U.S. v. McLister*, 608 F.2d 785, 791 (9th Cir. 1979) (improper jury instruction and several evidentiary errors warranted reversal); *U.S. v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978) (improper prosecutorial comments and trial court's permitting erroneous cross-examination denied appellant "fair trial that he is entitled to under the law"); *see U.S. v. Montague*, 2000 U.S. App. LEXIS 15, at *11 (4th Cir. 2000) ("[t]aken individually," three evidentiary errors may have been harmless, but "[t]aking them together," jury's judgment may have been "substantially swayed").

VI. SKILLING'S SENTENCE MUST BE VACATED.

The 24.3 year sentence—effectively life—imposed on Skilling is contrary to law and must be vacated. The sentence rests on four distinct legal errors, none of which the Task Force can overcome.

A. The Court Erred In Applying The Financial Institution Enhancement.

The district court imposed a four-point enhancement under § 2F1.1—increasing Skilling's sentence by nine years—after concluding that Skilling's conduct "jeopardized" the safety of a "financial institution," which the court deemed to include 401(k) plans and employee stock ownership plans (ESOPs). The application of the financial institution enhancement was wrong for two reasons: 401(k) plans and ESOPs are not "financial institutions"; and the record evidence did not show that Skilling's conduct jeopardized them. Br.223-29.

First, as to the definition of financial institution, the Task Force advances a single argument: Application Note 19 to § 2F1.1 indicates that a "financial institution" includes an "employee pension plan," and that phrase tacitly incorporates ERISA's definition of "employee pension benefit plan," which includes ESOPs and 401(k) plans. U.S.Br.200. As noted in Skilling's opening brief, other than the district court below, no court had ever adopted this view of the enhancement. The Task Force fails to identify any precedent for its position. Citing to Black's Law Dictionary, the Task Force says it "defines 'pension fund'

using the definition in [ERISA]." U.S.Br.200. Black's does no such thing. Instead, Black's cites ERISA's definition as *one example* of *one* definition of "pension fund." Black's Law Dictionary 1170 (8th ed. 2004). The Task Force simply omits the *other* example of a *different* definition of "pension fund" provided in Black's, which comes from the Internal Revenue Code and defines the phrase more narrowly to encompass only *defined benefit plans—i.e., not* 401(k) plans and ESOPs. *Id.*

Black's thus firmly supports Skilling's argument that the phrase "pension fund" has different meanings depending on its context, and the context here clearly establishes that the Commission intended to refer to defined *benefit* plans when it used the phrase "pension plan" in Application Note 19. Br.225-29. That context includes other Guideline provisions demonstrating that when the Commission meant to incorporate particular ERISA definitions and concepts, it cited ERISA explicitly. *Id*. at 228. The relevant context also includes the list of entities immediately surrounding "pension fund" in Application Note 19, which all share a common characteristic—a general pool of assets—that is also shared by defined benefit plans, but *not* by defined contribution plans such as 401(k)s and ESOPs. *Id*. at 226.

The Task Force ignores these important contextual factors. Equally significant, it fails to point to anything in the Guidelines' text, structure, history, or

purpose affirmatively indicating that "pension fund" in Application Note 19 refers to the broad definition used by ERISA rather than the narrower meaning employed in the Internal Revenue Code. The Task Force cites only Black's, as if the Court were construing the dictionary rather than the Guidelines. But as shown, there is no conflict here: Black's confirms that a "pension fund" can refer solely to a defined benefit plan, as it does in the Code, and the Guidelines make clear that is the usage the Commission intended under § 2F1.1.

In *U.S. v. Soileau*, 309 F.3d 877 (5th Cir. 2002), this Court rejected an approach to construing the financial institution enhancement nearly identical to what the Task Force urges here. The government there argued that Medicare was a "financial institution" because it is "similar" to other entities identified in Application Note 19. *Id.* at 878. This Court made clear that the enhancement cannot be applied beyond its strict terms: "Congress has never defined the term 'financial institution' to include the Medicare Program nor directed the Sentencing Commission to do so and it appears the Commission has never exercised its authority in order to include Medicare in the definition of 'financial institution.' Soileau's sentence cannot be enhanced.. because Medicare is not a "'financial institution.'" *Id.* at 881. So, too, here. Skilling's sentence cannot be enhanced because neither Congress nor the Commission has ever defined "financial institution" to include ESOPs and 401(k) plans.

Second, even if § 2F1.1 and Application Note 19 could be sensibly construed as including 401(k)s and ESOPs within the meaning of "financial institution," the court still erred in applying the enhancement because there was no record evidence establishing that Skilling jeopardized the plans. The Task Force cites *no* evidence linking Skilling's conduct to the plans' decline. U.S.Br.203-04. Instead, the Task Force merely recites, as if it were fact, the myth that Skilling's conduct led to Enron's demise, and quotes the trial court's own repetition of the same mythology. *Id.* But as our opening brief explained, Skilling tried to demonstrate the myth was false, and why Enron went bankrupt. Br.215-17. The Task Force and district court prevented Skilling from making that case, because both agreed that the cause of Enron's bankruptcy was *not an issue at trial*. *Id.* Moreover, no additional evidence was introduced at sentencing.

In short, there is no record basis for concluding the ESOP and 401(k) losses from Enron's bankruptcy were a consequence of Skilling's acts. Consequently, there was no legal basis for applying the financial institutions enhancement.

B. The Court Erred In Applying The Obstruction Of Justice Enhancement.

The district court imposed a two-level upward adjustment for "obstruction of justice" on the basis of allegedly perjurious testimony Skilling gave to the SEC on December 6, 2001. As explained in Skilling's opening brief, because the SEC was coordinating with the DOJ while falsely assuring Skilling that his deposition was

part of a "fact-finding inquiry" with no criminal targets or subjects, the district court was prohibited from relying on Skilling's allegedly false SEC testimony to enhance his sentence. Br.229-34. The Task Force's three responses lack merit.

1. *Skilling Preserved This Argument For Appeal.*

The Task Force first asserts that Skilling failed to preserve this argument. U.S.Br.206. Skilling squarely raised the argument in multiple motions before and during trial and again in both his Objections to the Pre-Sentencing Investigation Report and Sentencing Memorandum:

> When Skilling testified before the SEC, he was not aware of an investigation against him. Of course, Skilling knew an investigation into the collapse of Enron had commenced, but he was not aware that he was a target. To the contrary, in a letter asking Skilling to testify, the SEC explicitly stated that the SEC's mission was a fact-finding one and that Skilling was neither a "target" nor "subject"....*Because Skilling was not aware of an investigation "against him" at the time he testified before the SEC, his testimony before that body cannot, as a matter of law, trigger the obstruction adjustment.*

Skilling's Objections to Pre-Sentence Investigation Report 37-38; Skilling Sentencing Mem. 29-30; R:11083-97, 12596, 13722-29, 14114, 14860-61 (trial motions and objections). This was more than enough to fairly apprise the district court of his arguments and preserve the issue for appeal.[71]

[71] FED. R. CRIM. P. 51(b); *U.S. v. Rodarte-Vasquez*, 488 F.3d 316, 320 (5th Cir. 2007) ("If a defendant voices [an] objection[ ] sufficient to apprise the sentencing court that he is raising a *constitutional claim* with respect to judicial fact-finding in the sentencing process, the error is preserved."); *U.S. v. Smith*, 481 F.3d 259, 262

2. *The SEC and DOJ Coordinated Investigations.*

The Task Force does not dispute that, while agencies may conduct parallel investigations, they may not "develop a criminal investigation under the auspices of a civil investigation" or mislead or lull an individual into thinking an investigation is only civil when, in fact, it is both civil and criminal. *U.S. v. Stringer*, 408 F.Supp.2d 1083, 1089 (D. Or. 2006); *see U.S. v. Scrushy*, 366 F.Supp.2d 1134, 1139-40 (N.D. Ala. 2005) (same); *U.S. v. Kordel*, 397 U.S. 1, 11 (1970). Nor does the Task Force dispute that the SEC unambiguously advised Skilling before and during his December 6 deposition that the deposition was for "factfinding" and thereby delivered the clear message that it was *not* for criminal investigation purposes. Br.230.

The Task Force's only response is that this statement was true—*i.e.*, the SEC and DOJ did *not* coordinate investigations. U.S.Br.207. It says the Enron Task Force was not formed until after December 6, 2001, and a SEC lawyer submitted a declaration stating that the SEC was not coordinating its investigation with the Department of Justice on December 6. *Id.* But the Enron Task Force was formally established only a few weeks later, in January 2002. R:1943. Before a dedicated "task force" was formed, individual DOJ prosecutors were already investigating Enron's collapse and coordinating with the SEC, as the SEC lawyer's declaration

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(5th Cir. 2007) ("[R]equesting such an instruction would have been futile because … counsel had already discussed the issue several times with the trial court.").

concedes. R:11996 ("the SEC informally notified those U.S. Attorneys' Offices that *had begun investigations*, that the SEC had scheduled Mr. Skilling's testimony.").

While the SEC lawyer denied soliciting or receiving specific advice about Skilling's deposition from DOJ lawyers actively investigating him, there would have been no reason to notify DOJ of the pending deposition other than to facilitate the DOJ investigation. And that is exactly what the SEC later confirmed: on February 19, 2004, the day Skilling was indicted, the SEC emphasized that for "the last two and a half years"—*i.e.*, before Skilling was deposed—the SEC had "work[ed] in close coordination with the Enron Task Force" to "systematically track[] down those responsible for the Enron debacle." R:2017.

Numerous other SEC statements emphasized the close and much heralded coordination among the agencies throughout the investigation:

- A 2003 report by the President's Corporate Fraud Task Force listed "inter-agency cooperation" as perhaps the "most important" "hallmark[] of recent corporate fraud prosecutions." The report cites the work of the "Enron Task Force" as a prime example of "member agencies," including the SEC, DOJ, FBI, and others "cooperating … to marshal and pool the resources necessary to complete their investigations and prosecutions." R:1943-44.
- SEC press releases announcing indictments or plea deals of former Enron executives Michael Kopper, Ben Glisan, and Andrew Fastow touted "the close cooperation between the SEC and the Justice Department's Enron Task Force" and characterized it as "a true and really terrific partnership." R:1925, 1927, 2031.

- Another SEC press release announcing its complaint against Skilling reported that the "Commission brought this action in coordination with the Department of Justice Enron Task Force, which filed related criminal charges against Skilling." R:1923. Officials from the DOJ, FBI, and SEC once again described the "close cooperation" between their offices as a "true partnership," and the Deputy Attorney General singled out the SEC for its "spectacular contribution to this partnership." R:2015-16.

In *U.S. v. Tweel*, 550 F.2d 297 (5th Cir. 1977), this Court denounced a similar "half truth" assurance about the nature of a seemingly civil inquiry. There, government investigator Miller contacted Tweel to schedule a tax audit. To discover whether the audit was "a criminal inquiry," Tweel asked Miller whether an IRS "special agent" had been assigned to the case. *Id.* at 298. Miller said "no," because the audit was requested not by the IRS but by the DOJ. *Id.* at 299-300. This Court agreed with Tweel that Miller's negative response, even if technically true, was disingenuous and violated his constitutional rights:

> [Miller's] failure to apprise [Tweel] of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent … and a flagrant disregard for [Tweel's] rights….
>
> Miller obviously knew [Tweel] inquired whether a special agent was involved to determine whether he was conducting a criminal audit. Miller's response, although on the face of it true, misled appellant to such a degree that his consent to the 'search' must be vitiated by the agent's silence concerning the origin of this investigation…. We cannot condone this shocking conduct by the IRS….
>
> During oral argument counsel for the government stated that these procedures were 'routine'. If that is the case, we hope our message is clear. This sort of deception will not be tolerated and if this is the 'routine' it should be corrected immediately.

Id. at 299-300 n.9.

Similarly here, the Task Force seeks to rely on the same kind of clever half truth the SEC lawyer deployed to respond to Skilling's inquiry: the inquiry was civil because only SEC lawyers were formally involved in the deposition itself. The truth of the latter half obscures the falsity of the first half. The SEC well knew that criminal investigations were already underway, and it well knew the deposition would be used in those inquiries. The SEC's failure to disclose those known facts renders Skilling's testimony inadmissible in a subsequent proceeding.

3. The Court Was Prohibited from Relying on Skilling's SEC Testimony.

The Task Force's final argument is that "[e]ven if Skilling's challenge to the legality of the [SEC] deposition had merit, the exclusionary rule *ordinarily* does not apply at sentencing." U.S.Br.207-08. The key word is "ordinarily" and the case on which the government relies—*U.S. v. Robins*, 978 F.2d 881, 891 (5th Cir. 1992)—recognizes a "fundamental fairness exception to this general rule."

Evidence obtained as a result of an accidental, unintentional, or technical violation of a defendant's constitutional rights must be excluded from trial but may be used in sentencing. *Id.* In contrast, where the government misleads a defendant or "the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures, that evidence should be disregarded by the sentencing judge." *Verdugo v. U.S.*, 402 F.2d 599, 613 (9th Cir.

1968) (cited approvingly by this Court in *Robins*, 978 F.2d at 891); *accord U.S. v. Campbell*, 684 F.2d 141, 153 (D.C. Cir. 1982). In this case, the Task Force's deceptive conduct easily falls within the "fundamental fairness" exception. *E.g.*, *Stringer*, 408 F.Supp.2d at 1089 (dismissing indictment based on government's "grossly shocking and outrageous conduct"; misleading defendant into believing his SEC deposition was part of fact-finding inquiry).[72]

C. Skilling's Sentence Reflects Two Unlawful Disparities.

Skilling's 24.3-year sentence reflects a profound and unwarranted disparity compared to the (1) uniformly below-Guidelines sentences imposed on eight even more culpable high-ranking executives from major corporations; and (2) the 5.5 year sentence imposed on co-defendant Richard Causey. Br.207-14, 219. The

[72] The district court's reliance on Skilling's deposition is especially problematic because his testimony was accurate. The district court apparently believed Skilling lied to the SEC when he said he had no "plan" to sell his Enron stock before 9/11 because, on September 6, he called his broker and inquired about selling 200,000 shares of Enron stock. But Skilling's call was not part of a "plan" to liquidate his Enron holdings; as Skilling told his broker, he considered modifying an existing "bull hedge" (a common way to spread risk throughout one's portfolio) in which Skilling was "long" on Enron and "short" on another company, AES. R:29392-95.

After discussing options, Skilling elected *not* to sell shares on September 6. *Id*. Then came September 11. When the NYSE reopened on September 17, it was down 1,000 points. R:29383-85. Skilling decided to sell a portion of his Enron holdings. The most powerful evidence corroborating Skilling's testimony is the fact that he instructed the broker *not* to execute the sale if Enron's price dropped from $31.50 to $30.00—a mere 5%. R:29386-87.

Task Force completely ignores the first disparity and asserts unsupportable arguments to defend the second.

1. *Non-Enron Executives*

The Task Force concedes that courts must consider sentences imposed on similarly situated defendants across the country, but inexplicably does not address the fact that, in the post-*Booker* sentencing regime, except for Skilling, *every* high-ranking executive to have gone to trial and been convicted of similar charges received a *below-Guidelines* sentence, even when the executive, *unlike* Skilling, was also convicted of looting his company. Br.219.

Nor does the Task Force confront Skilling's argument that the reason these courts invariably imposed a sentence below the advisory Guidelines range is that, like here, the massive loss enhancement grossly overstates the defendant's intent to do harm. Br.220-22. The Task Force likewise ignores that only a decade ago, similar conduct generally resulted in civil regulatory penalties, not criminal prosecution. DAVID U. GOUREVITCH, *Between a Rock and a Hard Place: Parallel Proceedings in the Post-Enron Era*, 1383 PLI/Corp. 503, 507 (2003).

Instead, the Task Force appears to rest solely on the proposition that a "sentence [like Skilling's] imposed within a properly calculated guidelines range is presumptively reasonable and is accorded great deference on review." U.S.Br.209. But the presumption favoring a within-Guidelines sentence is an appellate

presumption only. "[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita v. U.S.*, 127 S.Ct. 2456, 2465 (2007). The sentencing court must make an independent determination and articulate why, in light of the section 3553(a) factors and the defendant's arguments, a sentence within the advisory Guidelines range is reasonable. *Id*.

It did not do so. Other than to state generally "the sentencing guidelines adequately address all of the other factors that the Court is required to consider by Congress under 3553(a)," the district court ignored Skilling's nationwide disparity arguments and did not so much as mention, much less distinguish, *any* of the eight other defendants Skilling identified. R:42176. *Rita*, which was decided after Skilling was sentenced, rejects this approach, strips "within Guidelines" sentences of the presumption of reasonableness, and requires a remand here. *Rita*, 127 S.Ct. at 2465; *accord Gall*, slip op. at 7-8 (district court must make "individualized assessment based on the facts presented," in part, because it has "greater familiarity" with the defendant than the Sentencing Commission).

2. *Richard Causey*

The Task Force says the district court was prohibited from considering the sentence imposed on former Enron CAO Richard Causey because the Guidelines and sentencing statutes concern "nationwide" disparities rather than those among co-defendants. U.S.Br.210. This is not the law. This Circuit has long recognized

the district court's ability to consider co-defendants' sentences. *E.g.*, *U.S. v. Wright*, 211 F.3d 233, 239 (5th Cir. 2000) (remanding for resentencing because court wrongly believed "the discrepancy in sentencing between [co-defendants] Franklin and Barger" was an impermissible ground to depart). Similarly, in the post-*Booker*, advisory-Guidelines regime, courts regularly consider the sentences imposed on co-defendants. *U.S. v. Lazenby*, 439 F.3d 928, 934 (9th Cir. 2006); *U.S. v. McGhee*, 408 F.3d 966, 988 (7th Cir. 2005); *U.S. v. Gray*, 362 F.Supp.2d 714, 719 (S.D. W.Va. 2005). Indeed, just this month, the Supreme Court expressly approved of a sentencing court's giving "specific attention to the issue of disparity when [it] inquired about the sentences already imposed by a different judge on two…co-defendants." *Gall*, slip op. at 9.

The Task Force's authorities do not hold otherwise. U.S.Br.210-11. Rather, the courts evaluated sentences imposed on co-defendants—precisely what the Task Force says courts may *not* do—but found the disparity "warranted" due to the co-defendant's cooperation with the government.[73] The discrepancy between Skilling

[73] *U.S. v. Duhon*, 440 F.3d 711, 720 (5th Cir. 2006) ("The court acknowledged that Life had obtained the benefit of a downward departure for 'substantial assistance' to the Government under U.S.S.G. § 5K1.1. Because disparity between Duhon's and Life's sentences were not 'unwarranted' within the meaning of section 3553(a)(6), the court erred in considering it."); *U.S. v. Candia*, 454 F.3d 468, 476 (5th Cir. 2006) ("Only *unwarranted* disparities are among the § 3553(a) sentencing factors…. There appears to be no dispute that the reductions in sentence occurred as a result of substantial assistance given by the co-defendants."); *U.S. v. Sparks*, 2 F.3d 574, 587 (5th Cir. 1993) (same); *U.S. v.*

and Causey's sentences was not—and cannot be—justified by Causey's cooperation or substantial assistance. Causey pled guilty under Rule 11(c)(1)(C), pursuant to which he could receive no more than seven years in prison *regardless* of cooperation, FED. R. CRIM. P. 11(c)(1)(C). As the Task Force put it: "With respect to Mr. Causey, there is no cooperation agreement." R:36013. This distinguishes Skilling's case from every case cited by the government.

Moreover, when Skilling highlighted the almost two-decade, 400% disparity between his sentence and Causey's, the district court pointed *not* to Causey's assistance or cooperation, but to the fact that Causey pled guilty and accepted a term of seven years, whereas Skilling exercised his right to trial and "if he wins, might get nothing." R:42174-75. Penalizing Skilling for choosing trial was patently unconstitutional. Br.210-14; *Baker v. U.S.*, 412 F.2d 1069, 1073 (5th Cir. 1969).

Nor is there any substance to the Task Force's contention that Skilling may be sentenced to a term four times as long as Causey because Skilling played a much greater role in the alleged conspiracy. U.S.Br.212-13. The district court did not accept this argument when the Task Force raised it below. R:42174-75; U.S. Resp. to Skilling Sentencing Mem. 18-19 (sealed). And correctly so:

Parker, 462 F.3d 273, 277 (3d Cir. 2006) (same); *U.S. v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) (same).

- Causey and Skilling were charged together in 34 of 35 counts. R:842-906.

- The indictment accused Causey of being one of three "principal conspirators" at Enron. As Chief Accounting Officer, he "managed Enron's accounting practices…finances, and…disclosures and representations to the investing public." *Id.*

- Causey signed every quarterly and yearly representation letter to Enron's auditor and financial statement. R:846, 2185.

- The Task Force charged Causey with overseeing the Enron-LJM relationship and says his initials, not Skilling's, appear on the "Global Galactic" document. R:27508-09, 27704; GX1298.

- After Skilling resigned from Enron, Causey allegedly misled the public about Enron's "Wessex" investment and announced to a group of employees that challenging Enron's accounting was tantamount to challenging his reputation. R:31509, 31331-32.

- Causey was also supposedly responsible for the allegedly improper resegmentation of EES, and "reacted with anger" when Delainey questioned the deal. All the Task Force says Skilling did in response is ask Delainey what he wanted to do. R:19976-82; U.S.Br.15.

Put most simply, the man the Task Force now says played a minor role in the alleged Enron conspiracy, is the same man it told the jury below was Skilling's closest ally and "up to his eyeballs in fraud." R:36537.

There is no rational and lawful basis for the 19-year disparity between Causey and Skilling's sentences. The only ground offered by the district court was contrary to the Constitution. And the only ground offered by the Task Force was not endorsed by the district court.

D. The District Court Wrongfully Relied On The Bankruptcy To Justify Skilling's Sentence.

Finally, Skilling's sentence is unreasonable because it is based on the district court's assumption that Skilling caused Enron's bankruptcy. Br.214-22. Rather than address the thrust of this claim, the Task Force argues that because the district court sentenced Skilling to the bottom of the advisory Guidelines range, it had no obligation to justify its thought process. U.S.Br.213. The Task Force is wrong.

As explained above, the "presumption of reasonableness" is an appellate one only. Where, as here, "a party contests the Guidelines sentence generally under § 3553(a)—that is [he] argues that the Guidelines reflect an unsound judgment or, for example, that they do not generally treat certain defendant characteristics in the proper way," the district court must explain why the range the Guidelines advise makes sense for this defendant. *Rita*, 127 S.Ct. at 2468-69.

Moreover, the discretionary presumption of reasonableness is "rebutted" if the district court "gives significant weight to an irrelevant or improper factor" or commits a "clear error of judgment in balancing the sentencing factors." *U.S. v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006); *U.S. v. Taylor*, 487 U.S. 326, 337 (1988) (same). Both errors occurred here.

The indictment did not allege that Skilling caused Enron's bankruptcy, and when it came time for trial, the Task Force insisted "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. Indeed, when Skilling and Lay sought to *disprove* they caused the bankruptcy, the district court sustained various objections, expressing "skepticism" about the testimony in the presence of the jury. R:34402-442. And those witnesses who did refer to the bankruptcy all conceded it was *not* foreseeable when Skilling resigned from the company in August 2001, something the Task Force does not dispute. R:15935, 19102, 24456; SR3:3632.

Having precluded Skilling from introducing evidence to refute the claim that his conduct caused Enron's bankruptcy, the district court unconstitutionally and improperly relied on a non-existent "fact" in enhancing his sentence. *Gall*, slip op. at 13 (Scalia, J., concurring) (in some cases, it would be unconstitutional to impose sentence based on "the existence of a fact found by the sentencing judge and not by the jury."); *Smith*, 440 F.3d at 708.

The district court's factual conclusion was also clearly erroneous. As this Court has instructed, "there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines." *U.S. v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005). *None* of the conduct for which Skilling was charged and convicted was disclosed before Enron's bankruptcy; these allegations surfaced only when the company's corpus was

overrun with investigators intent on finding alleged crimes. Skilling Sentencing Mem. (Fischel Report ¶17-19); Br.215-16; R:13292, 13286-87.

CONCLUSION

If Jeffrey Skilling is to be held accountable for what happened at Enron, if he is to become the poster child for corporate fraud in this country, then give him a fair trial. A trial based on recognized theories of criminal law. A trial in a disinterested community, in front of a dispassionate judge and impartial jury. A trial where witnesses are not afraid to appear and give testimony. A trial where the jury is given all the right law. A trial where justice can be done. He asks for no more.

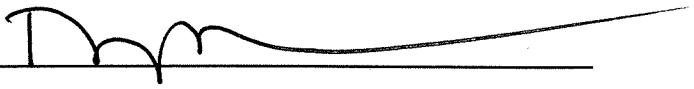
Every one of Mr. Skilling's convictions must be overturned. Counts 23, 24, and 51 must be dismissed with prejudice, and the Task Force must be precluded from pursuing any "side deal" theory on retrial. If the Court does not bar this prosecution for reasons of prosecutorial misconduct, Skilling should be afforded ample relief to account for the Task Force's misconduct. Any retrial should occur in a venue other than Houston; voir dire should be meaningful.

At oral argument, we will renew Mr. Skilling's request for bail pending appeal. We would make that request now, but we are compelled to be mindful of the enormous burden on this Court to review the voluminous record and assess the many issues raised in this appeal. Because of the fatal infirmities in the

convictions, we respectfully submit that a determination be made at the earliest possible time that Mr. Skilling be allowed to remain free on bond while this Court considers and decides this appeal. As the district court repeatedly said, Mr. Skilling is not a flight risk or danger to the community. He is inalterably committed to vindicating himself.

Dated: December 21, 2007

Respectfully submitted,

By: 

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