

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

JAMIE OLIS
Defendant-Petitioner.
(Civil No. H-07-3295)

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CR. NO. H-03-217

**UNITED STATES' ANSWER TO MOTION TO VACATE
PURSUANT TO 28 U.S.C. § 2255, MOTION
FOR SUMMARY DENIAL, AND
SUPPORTING MEMORANDUM OF LAW**

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JAMIE OLIS	§	
Defendant-Petitioner.	§	
(Civil No. H-07-3295)	§	

**UNITED STATES' ANSWER TO MOTION TO VACATE
PURSUANT TO 28 U.S.C. § 2255, MOTION FOR
SUMMARY DENIAL AND SUPPORTING
MEMORANDUM OF LAW**

The United States of America, by the United States Attorney for the Southern District of Texas, files this Answer, Motion for Summary Denial and Supporting Memorandum of Law in response to the Motion to Vacate pursuant to 28 U.S.C. §2255 filed by Jamie Olis (“Olis”).

A. Statement of the Case

Olis was charged along with Gene Shannon Foster and Helen Christine Sharkey, on June 10, 2003, by indictment in the United States District Court for the Southern District of Texas, Houston Division, Criminal Number H-03-217, with conspiracy to commit mail fraud, wire fraud and securities fraud (count 1) and with aiding and abetting the substantive offenses of securities fraud (count 2), mail fraud (count 3) and wire fraud (counts 4-6) in violation of 15 U.S.C. §§ 78j(b) and 78ff; 17

C.F.R. § 240.10b-5 and 18 U.S.C. §§ 2, 371, 1341, 1343 (Doc.¹ 1). A jury convicted him on all counts (Doc. 92). This court sentenced Olis on March 25, 2004, to 292 months confinement, to be followed by a three-year term of supervised release, and imposed a \$25,000 fine (Doc. 133, 137). Olis's convictions were affirmed in a published opinion, but his sentence was vacated and the case remanded for re-sentencing (Docs. 185, 186). *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005). After a re-sentencing hearing, Olis was sentenced to 72 months confinement to be followed by a three-year term of supervised release (Docs. 293, 294). Olis took no appeal from the re-sentencing.

On October 5, 2007, Olis filed his Motion to Vacate pursuant to 28 U.S.C. § 2255 (Doc. 305), Memorandum of Points and Authorities in Support (Doc. 315) and supporting declarations (Docs. 311, 312, 313, 314, 316, 317, 318). At the same time he filed a Motion for Release on Bail pending disposition of his Motion pursuant to 28 U.S.C. § 2255 (Doc. 307). The United States filed a Response in Opposition to the Motion for Release on November 16, 2007 (Doc. 323). On November 28, 2007, Olis filed his Reply in Support of his Motion for Release (Doc. 326) and a Motion for Discovery (Doc. 327). On December 12, 2007, Robert Weisberg, Professor of Law

¹ "Doc." refers to the document filed in the underlying criminal case, H-03-217-01, and is followed by the document number.

at Stanford Law School, moved this court for Leave to File on behalf of a group of interested law professors an *Amicus Curiae* brief in support of Olis's Motion to Vacate (Doc. 332). The United States filed a Response in Opposition to the Motion for Discovery on December 18, 2007 (Doc. 336).

This court entered an order on March 3, 2008, denying Olis's Motion for Release on Bond, denying his Motion for Discovery, and denying the Motion for Leave to File an *Amicus Curiae* brief (Doc. 344). This court also directed the United States to file its Answer and Motion for Summary Judgment in response to Olis's Motion pursuant to 28 U.S.C. § 2255, along with a supporting memorandum with authorities, affidavits, transcripts and other pertinent materials, on or before April 4, 2008 (Doc. 344). Olis was ordered to file his response to the United States' Answer and Motion for Summary Judgment on or before May 5, 2008 (Doc. 344).

B. Allegations

Olis makes the following claims in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255:

- 1) His Fifth and Sixth Amendment rights were violated by alleged interference with his right to fund his defense by members of the United States Attorneys Office (USAO);
- 2) The prosecutors, in closing argument, allegedly constructively amended the indictment;

3) He was denied his right to effective assistance of counsel at trial due to his attorneys' failure to:

- a) object to the prosecutors' arguments on the ground that they constructively amended the indictment;
- b) object to a seated juror on the ground of bias and to this court's *ex parte* communications with that juror;
- c) object to the wire fraud instructions on the ground that they improperly stated the government's burden in regard to the use of wire communications and to the mail and wire fraud instructions on the ground that they did not accurately track the statutory language;
- d) object to Hecker testifying as an expert witness; and
- e) hire experts.

(Doc. 305).

C. Denial

The United States denies every allegation of fact made by Olis, unless the United States indicates herein that such fact is supported by the record.

D. Statement of Facts

On direct appeal, the Court of Appeals for the Fifth Circuit summarized the facts underlying Olis's convictions as follows:

The conviction arises from Olis's position as Senior Director of Tax Planning and International (and later, Vice President of Finance) at Dynegy on a transaction called "Project Alpha," a complex five-year deal involving natural gas transactions. Project Alpha was a plan to

borrow \$300 million and make it appear to the outside world (and in particular to Dynegy's auditor Arthur Andersen) as if the money was generated by Dynegy's business operations. Project Alpha was designed to generate positive cash flow to Dynegy "from operations" during 2001 and negative cash-flow in 2002-05. Specifically, a special purpose entity ("SPE") called ABG Gas Supply was created and owned by Deutsche Bank and Credit Suisse. During 2001, ABG Gas bought natural gas at market prices and sold it to Dynegy at a discount. Dynegy then sold the gas at market prices, netting \$300 million. During 2002-05, Project Alpha arranged that ABG Gas would buy gas at market prices and resell it to Dynegy at above-market prices. That money would flow to the banks, which would recoup the \$300 million, plus interest.

To support the accounting characterization of the deal as cash from operations, ABG Gas and the lenders could not be guaranteed full repayment on their investment. Further, ABG Gas had to be sufficiently "independent" from Dynegy, and the owners of ABG Gas had to bear risk. But contrary to these requirements, Olis, his boss Gene Foster and his colleague Helen Sharkey, secretly put into place the "parent level" hedge and the "tear-up" agreements among Dynegy, ABG's owner banks, and Citibank to ensure that the banks would not lose any money. The Government's proof indicated that Olis, Foster, and Sharkey intentionally concealed the parent level hedge and tear-ups from Jim Hecker, the Arthur Andersen partner responsible for signing off on Dynegy's SEC statements, in order to obtain the desired accounting treatment of the transaction.

Olis, 429 F.3d at 541-42 (footnote omitted). A more detailed recitation of the facts proved at trial, along with record references, is filed in this case as Appendix A to the United States' Response to Olis's Motion for Discovery (Doc. 336).²

² In that appendix, "7 R." refers to Doc. 97; "8 R." refers to Doc. 98; "9 R." refers to Doc. 99; "10 R." refers to Doc. 102; "11 R." refers to Doc. 103; and, "12 R." refers to Doc. 104.

E. Summary of Answer and of Motion for Summary Denial

The records and files of the case, including Olis's submissions, conclusively demonstrate that Olis is not entitled to relief on the grounds urged. The United States did not violate Olis's Sixth or Fifth Amendment rights. Dynegy's decision a few months before trial to begin putting money for Olis's fees into an escrow account was not government action because Dynegy independently made that decision. Even if such conduct somehow constitutes government action, that action did not violate Olis's right to counsel of his choice given that, unlike many of the defendants in *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006) and *United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007), his counsel of choice continued to represent him.

Nor did Dynegy's escrow decision violate any right Olis had to fund his defense. The pre-trial strategy of trial counsel as set forth in a pretrial filing, the lack of any pretrial claims to this court of insufficient funds to pay for experts such as those made by the defendants in *Stein*, the nature of the escrow decision as opposed to a final fee cut-off decision, and Olis's expertise, his personal resources and his subsequent hiring of an expert for sentencing all belie Olis's *post hoc* claims that Dynegy's escrow decision prevented him from hiring a crew of experts, jury consultants, and discovery aides. In addition, Olis did not raise this issue in the trial

court or on direct appeal and he cannot establish cause and prejudice sufficient to overcome the procedural default of this claim. Olis's counsel was aware of the escrow decision pretrial but did not challenge it then, and Olis has not identified how the escrow policy applied pretrial would have changed the jury's finding that he engaged in the charged scheme to defraud.

With regard to Olis's remaining claims, they were procedurally defaulted because they were not raised at trial or on appeal and because Olis's submissions, when viewed in light of the entire record, are insufficient to support a finding of actual prejudice. In any case, there was no constructive amendment of the indictment, no impropriety in the nature of the communications with, and continued seating of, one of the jurors, no incorrect jury instructions and no impropriety in Hecker's testimony. Olis therefore cannot demonstrate either that his attorneys' performance was deficient or the prejudice necessary to establish his ineffective assistance of counsel claims.

F. No Constitutional Violation
Based on Alleged Governmental Interference

Olis contends he has a Sixth Amendment right to fund his defense that was violated, along with his Fifth Amendment right to Due Process, by members of the United States Attorneys Office ("USAO") when they communicated to

representatives of Dynegey, his former employer, the contents of the Thompson memorandum, an internal Department of Justice memorandum issued on January 20, 2003. That memorandum provided prosecutors with a revised set of principles to guide them in their decision whether to seek charges against a business organization.

[Http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

1. No Cause or Prejudice Excusing Procedural Default of Claim

“Usually, after a conviction and exhaustion or waiver of any right to appeal, this Court is entitled to presume that the defendant stands fairly and finally convicted.” *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001) (citing *United States v. Frady*, 456 U.S. 152, 164 (1982)). “As a result, review of convictions under section 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of cause and prejudice.” *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998).

The Supreme Court has given the cause and prejudice test in the context of procedural default the same meaning that it has given it in the context of the abuse of writ doctrine. *Bloomer v. United States*, 162 F.3d 187, 191 n.1 (2d Cir. 1998) (citing *McCleskey v. Zant*, 499 U.S. 467, 490, 493 (1991)). “Cause must be some objective factor external to the defense and not attributable to the defendant, such as

interference by government officials making compliance with the relevant procedural rules impracticable or a showing that the factual or legal basis of the claim was not reasonably available to counsel.” *United States v. Salazar*, 323 F.3d 852, 855 (10th Cir. 2003) (citing *McCleskey*, 499 U.S. at 493-494, emphasis added).

The Supreme Court emphasized in *McCleskey* that the abuse of writ doctrine examines the petitioner’s conduct and stated that “the question is whether petitioner possessed, *or by reasonable means could have obtained*, a sufficient basis to allege a claim in the first petition and pursue the matter though the habeas process” *McCleskey*, 499 U.S. at 497, 111 S.Ct. at 1472. The fact that petitioner did not possess, or could not reasonably have obtained, certain evidence, however, fails to establish cause “*if other known or discoverable evidence could have supported the claim in any event.*” *Id.* at 498, 111 S.Ct. at 1472. The Court further elaborated that the requirement of cause in the abuse of writ context “is based on the principle that petitioner *must conduct a reasonable and diligent investigation* aimed at including all relevant claims and grounds for relief in the first federal habeas petition.” *Id.*; *see also Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995)

High v. Head, 209 F.3d 1257, 1263 (11th Cir. 2000) (emphasis added). “Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.” *Jones v. Whitley*, 938 F.2d 536, 541 (5th Cir. 1991) (quoting *McCleskey*, 111 S.Ct. at 1472). The mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.” *Murray v. Carrier*, 477 U.S. 478, 486 (1986). Also, in order for a claim of ineffective assistance of

counsel to be used to establish cause for a procedural default, the general rule is that it must be presented as an independent claim. *Id.* at 489.

Olis's submissions in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255 demonstrate that Olis possessed prior to trial, or by reasonable means could have obtained, a sufficient basis for the claim of alleged government misconduct that he is now raising in relation to payment of his attorneys' fees by Dynegy. According to evidence submitted by Olis in Support of his Motion to Vacate pursuant to 28 U.S.C. § 2255 (Doc. 318³, Ex. D), in the form of sworn testimony by Terry Yates, one of Olis's two trial attorneys, Yates was aware prior to the start of trial on November 3, 2003, of the following facts:

- 1) Around the time of Sharkey's guilty plea on August 5, 2003, Dynegy had stopped paying her attorney's fees (Doc. 318, Ex. D, p. 47-52).
- 2). Cristin Cracraft was employed as an attorney for Dynegy and was the person with whom Yates spoke about any agreement by Dynegy to pay for Olis's representation in relation to Project Alpha (Doc. 318, Ex. D, pp. 16-18, 32 -34).
- 3) Yates understood that Larry Finder was Dynegy's lawyer (pp. 36-39). Between June 25, 2003 and July 10, 2003, Yates had communications with Finder that related to Dynegy providing Yates with documents in relation to the criminal proceeding, particularly models of Project Alpha and Finder supplied him with some of the documents he requested (Doc.

³ Doc. 318 contains several transcripts as Exhibits. When pages from those transcripts are cited by the United States in this pleading, the page numbering on the right side of the transcript pages, rather than on the top or bottom, is used.

318, Ex. D, pp. 37-44).

Yates spoke with Finder around June 25, 2002, concerning Dynegey's agreement to pay Olis's attorneys fees and during that conversation Yates believed that Finder's inquiry about whether his agreement with Dynegey was in writing was a reference to the Thompson memorandum:

A. ... And he asked me about the fees, if arrangements had been made with Dynegey.

Q. And you testified – and you told him that that was already taken care of?

A. I told him that I had talked to Cristin Cracraft, and we had an agreement that they would pay the fee to me direct.

Q. And then he asked you if the fee arrangement was in writing?

A. He asked if this was [sic] arrangement was an oral agreement, oral contract, or is it in writing.

Q. And you told him that it was not in writing, right?

A. I said it was an oral agreement. And then there was kind of a pause, and I said, "Is there any problem with that do you think?" And he said, "No, as long as you talked to Cristin Cracraft." Like he testified here: "As long as you talk to Cristin Cracraft, that's the person to go to."

Q. Were you concerned about the question about whether it was in writing or not?

A. No. I understood probably why he was inquiring. I wasn't concerned. I mean, I guess I was – around that time everybody had concerns about putting things in writing with corporations because of the Thompson memorandum,

so – but I wasn't concerned. We do – I do – almost every corporation I've represented, the corporation or employees, I do it on a handshake basis. I don't put it in writing. We just do it. Just Larry Finder said, he's represented – well [sic], he get paid by Dynegy today on an oral agreement, so I wasn't concerned that it wasn't in writing, especially after he said, you know, she's the person to talk to.

Q. He didn't mention anything about the Thompson memo in that call. Correct?

A. He did not, but that's –

Q. You at least, in the back of your mind, you knew that the Thompson memo was an issue that the corporations had to deal with. Correct?

A. Yes, sir.

(Doc. 318, Ex. D, p. 167-68) (emphasis added). After that conversation, Yates never spoke with Finder about fees again (Doc. 318, Ex. D, p. 169).

4) On August 7, 2003, Yates sent his first bill to Cristin Cracraft at Dynegy for payment of his representation of Olis in relation to Project Alpha (Doc. 318, Ex. D, pp. 57-58).

5) On August 13, 2003, after reaching an agreement with the USAO to see all the evidence in the case, Yates saw his bill to Dynegy, along with his letter of representation of Olis, at the USAO (Doc. 318, Ex. D, pp. 55-61).

6) On the same day, August 13, 2003, Yates received a hand-delivered letter to Olis from Dynegy which stated that Dynegy was going to escrow money to pay any claims for attorney's fees accrued on behalf of Olis by Yates after August 17, 2003 (Doc. 318, Ex.D, pp.63-68; Doc. 318, Ex.BB; Doc. 318, Ex. F, pp. 42-46). The letter referred to Dynegy

having advanced fees and said that effective August 18, it would advance those into an escrow account (Doc. 318, Ex.D, p. 67).

7) Yates stated in sworn testimony that he believed the reason the attorneys' fees were going to be held by Dynegy in escrow was because Dynegy was attempting to comply with the Thompson memo (Doc. 318, Ex. D, pp. 65-71). Specifically, Yates testified as follows:

Q. You must be thinking if they are going to advance these fees, they are going to put them somewhere where it's safe.

A. What occurred and has occurred I was aware of at the time. Sometimes companies will set up an escrow. Especially the Thompson memorandum. They put your fee into the escrow and that's [sic] way the government can't call and say, Hey, you're paying their fee, they could honestly say no, we are not paying them. They didn't tell them they put it in an escrow account, but once the fees are in escrow, then it's secure, then you submit your bills to the escrow account, then it's paid to you. So it's a way for companies to be compliant with Thompson, not lie to the government, but comply with the contractual obligations to directors and employees, and contracts they have with lawyers. So that's what I thought they were telling me, but I wasn't sure.

Q. Okay. So if they put it in escrow, it's beyond the company's control?

A. Right.

Q. They can't get it back and they could tell the government, hey, it's out of our hands. We have already put half million dollars out there.

A. They usually don't tell them that, they just tell them we are not paying so and so's fees – we are not paying Jamie

Olis' fees anymore. They are not. They are in escrow. Now the person who's in charge of the escrow account can pay the fee, not the company, so they can legally say that to the company, honestly say that, but not –

(Doc. 318, Ex. D, p. 66) (emphasis added).

8) On August 13, 2003, Yates asked Cristin Cracraft whether Dynegy had sent his bill for Olis's attorneys' fees to the USAO and she told him to ask Larry Finder about it (Doc. 318, Ex. D, pp. 69-70). At that time Cracraft also told Yates that she did not know whether Dynegy was going to pay his bill (Doc. 318, Ex. D, pp. 68, 72).

9) Yates's response to Cracraft's suggestion that he talk to Larry Finder was that he did not want to burn any bridges with Dynegy because he needed Dynegy to provide him with access to documents and consulting experts:

Q. At the end of this conversation were y'all – was everything pleasant or still hot?

A. You know, it's a situation where you can't afford – I couldn't afford to confront her because, you know, she's in a position of power over me and my client, so I didn't, you know –

Q. Still needed document from her?

A. We needed documents.

Q. Did you hope to get witnesses from Dynegy?

A. Witnesses, help. We are about to – once we figure out what kind of experts we need, we still – we had just gotten the documents that day, August 13th, and what we were doing is we were trying to figure out [sic] we need, who we need, what kind of consulting experts we need. I didn't

want to burn any bridges, so to speak.

Q. Okay. And after that day, did you have an occasion to talk to her anymore?

A. I did not. I was done with her. Really had it with Cristin. I did tell Mark that, Look, we need to follow this up because – and he [sic] said, Look, since you know her better than I do, maybe you'll get a response. She will talk to you. Why don't you call her? He testified about it. It was sometime of after I did, maybe a few days. Y'all heard what he said. Same thing, basically.

(Doc. 318, Ex. D, pp. 70-71). Yates purposefully never spoke with Cracraft again after August 2003 (Doc. 318, Ex. D, p. 96).

10) Yates purposefully delayed submitting another bill to Dynegy until October 2003, and said when he “found out they had my billing records, then I just told them basically hold up everything.” (Doc. 318, Ex. D, p. 75). He said that after that event he “need[ed] to figure out what's going on over there before I ship them another bill.” (Doc. 318, Ex. D, p. 75).

11) Yates understood a procedure was available to him to litigate, pretrial, the issue of whether there was any impropriety in relation to Dynegy withholding of payment of Olis's attorney's fees:

Q. If you would have known August the 13th, or in August, that Dynegy had been pressured by the government to stop paying these bills, what we have heard here in court, what would you have done?

A. I had no – I had absolutely no idea what was going on – what was going on over there between the government and Mr. Williamson. If I had any idea what they were planning, I would [sic] filed a motion, gone in front of Judge Lake, and asked him to intervene to get some people up on the stand, swear them in and let's find out what's

going on.

Q. Is that what Mr. Finder was talking about, prosecutorial misconduct would have gone on?

A. Exactly what they did in the Stein⁴ case, same thing.

(Doc. 318, Ex. D, pp. 84-85).

As demonstrated by Olis's submission of Finder's sworn testimony in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255 (Doc. 318, Ex. G, pp. 134-175), Finder was aware of the nature of the communications by the USAO with Dynegy about the payment of Olis's legal fees. Based on the information available to Olis pretrial, including Cracraft's suggestion that Yates contact Larry Finder about the decision to escrow the money to pay Olis's attorneys' fees, Yates's knowledge of the availability of a pretrial motion to develop the facts, and Yates's strategic decision not to pursue the matter to avoid the risk of "burning bridges" with Dynegy, Olis's submissions demonstrate he possessed prior to trial, or by reasonable means could have obtained, a sufficient basis for the claim he is now raising in relation to payment of his attorneys' fees by Dynegy. *Cf. Jones*, 938 F.2d at 542 (no showing of cause for failure to pursue evidence of mental condition based on medication of defendant while incarcerated - "Had counsel examined Jones in depth about his medication and

⁴ This is an apparent reference to *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006) and *United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007).

consulted with jail authorities or with outside expert, the nature of his medication would have come to light.”) This court should find on this record no cause as a matter of law and that Olis has procedurally defaulted this claim.

In addition, Olis cannot demonstrate sufficient prejudice to excuse his procedural default in failing to raise this claim at trial or on direct appeal. The cause and prejudice standard presents a significantly higher hurdle than the plain error standard that is applied on direct appeal. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). This rigorous standard is applied “in order to ensure that final judgments command respect and that their binding effect does not last only until ‘the next in a series of endless postconviction collateral attacks.’” *Id.* (quoting *Frady*, 456 U.S. at 165-66). A defendant must meet this standard even when he alleges a fundamental constitutional error. *Id.*

A mere showing of possible prejudice will not satisfy the actual prejudice prong of the cause and prejudice test. *Shaid*, 937 F.2d at 236 (citing *Frady*, 456 U.S. at 170). A defendant “must shoulder the burden of showing, not merely that the errors at his trial created the *possibility* of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170. Accordingly, the prejudice component of the cause and prejudice test is not satisfied if there is strong evidence of a petitioner’s

guilt and a lack of evidence to support his claim. *See Frady*, 456 U.S. at 172 (“We conclude that the strong uncontradicted evidence of malice in the record, coupled with Frady’s utter failure to come forward with a colorable claim that he acted without malice, disposes of his claim that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified.”); *United States v. Bondurant*, 689 F.2d 1246, 1250 (5th Cir. 1982) (strong evidence at trial that confession was voluntary and defendant’s failure to come forward with evidence at trial that confession was involuntary disposed of claim of actual prejudice due to an instruction on voluntariness).

Here, the evidence of Olis’s guilt was overwhelming (Doc. 336:Appendix A and n.2, *supra* (excerpt from United States’ brief on appeal setting forth trial evidence with record references); *Olis*, 429 F.3d at 542 (“A reasonable jury, basing its conclusion on the testimony of Foster and Hecker, together with the incriminating emails among Olis and his co-indictees and a wealth of other evidence, could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes.”) (footnote omitted).

In addition the record, including Olis’s submissions in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255, supports a finding of no *actual* interference by the United States with Olis’s ability to fund his defense, and thus no *actual*

prejudice. Based on Olis's own submissions, the record demonstrates that Olis had funds available that were deliberately not used for his defense. Yates testified that he never asked the Olises for any money for his representation: "I had an oral agreement I made with the Olises on June the 20th of 2003 that I would not charge them; Dynegy was paying. And I wasn't going to break my word to the Olises just because Dynegy broke their word for me. I was never going to charge the Olises, never have, never will charge the Olises." (Doc. 318, Ex. D, p. 91). Yates testified that when he determined Olis needed an expert for sentencing, he requested the money from Jamie and Monica Olis and they provided him with \$50,000 for that purpose (Doc. 318, Ex. D, pp. 91-94). It was proved at trial that between 1999 and 2002, Olis earned \$1,217,507.00 at Dynegy (Doc. 104, pp. 191-93; Doc. 336:Appendix A at brief excerpt p. 80). Not surprisingly, the presentence report prepared in advance of Olis's March 25, 2004 sentencing, demonstrated that Olis's net worth as of December 1, 2003, was significant (Rev. PSR Feb. 10, 2004 ¶ 76).

In addition, Yates testified that, despite the delay in receiving \$150,000 from Dynegy for the only bill that he submitted to Dynegy prior to trial that went unpaid, they got the work done: "And we are trying to do this without – limited resources. We didn't have the money coming in. We were doing the work, but the money wasn't coming in." (Doc. 318, Ex. D, p. 122, emphasis added). Later, he again

testified he got the work done:

A. We were there every weekend, almost every reweekend [sic]. I mean the amount of work that we had to do and that compressed period of time, the amount of witnesses, SEC testimony, depositions, amount of documents to go through. It was just – like I said, other cases. I had other people we had to help. And we were there almost every weekend seemed like. I remember one thing my family and I do go to Austin at the UT games. I remember Jamie and I sitting there watching Nebraska play Texas that year in Austin. I missed the Nebraska game and the Kansas State game. Jamie and I got to be good friends. It was tedious hard work, but we did it.

(Doc. 318, Ex. D, p. 123) (emphasis added). Yates testified that in addition to the attorneys' fees that Dynegy paid him for representing Olis, he provided Olis with an additional \$448,556.05 in services (Doc. 318, Ex. D, p. 120).

Co-counsel Clark testified that Yates made sure that Clark was paid an agreed-upon minimum fee while Clark worked on the case and that he received that amount (Doc. 318, Ex. F, p. 79). Clark later agreed to receive an additional \$23,000, in the event Yates was successful in civil litigation to recover the attorneys' fees from Dynegy (Doc. 318, Ex. F, p. 82). Clark submitted an invoice to Yates in December 2003, after the trial, reflecting the money due him for that quarter (Doc. 318, Ex. F, pp. 82-83). Clark testified that the fee issue was left for another day, once September came around:

Q. So you understood that there was going to be a dispute about whether they were going to make payments directly to you after August 1^{7th} when

you talked to Ms. Cracraft around the time that escrow letter was sent; right?

A. Soon thereafter. I don't know if it was in that conversation, but soon thereafter it became apparent that they intended to hold that money.

Q. You called her and asked her about it, and you say that she was pretty good about not divulging any particular position?

A. Correct.

Q. And so you took, from that, that there was going to be a disagreement or a dispute; right?

A. I wasn't getting a position back that we were going to pay your fees. I wasn't being told that we are going to absolutely refuse your [sic] pay your fees, either. But since I wasn't being told we are going to pay your fee, I take that as a no.

Q. That was something that you were very concerned about at that time; right?

A. It was a concern going forward. It was a concern on the experts' issue, I think, in that, okay, we don't have a consultant. As far as our personal fees, yes, it's a concern because, you know, we need to get paid in order to keep on going as an ongoing business. However, beginning in September it became apparent that we were going to trial and my concern was focusing on going to trial and winning the trial. And the fee issue would certainly take care of itself another day. And here we are another day.

(Doc. 318, Ex. F, p. 166) (emphasis added). He stated: "I knew there would be another day to fight that fight." (Doc. 318, Ex. D, p. 167).

Also, Olis's post-conviction submissions about what he now claims additional

funds would have been used for do not demonstrate *actual* prejudice. *See Grossman v. McDonough*, 466 F.3d 1325, 1347 (11th Cir. 2006) (“The widespread use of the tactic of attacking trial counsel by showing ‘what might have been’ proves that nothing is clearer than hindsight - except perhaps the rule that we will not judge trial counsel’s performance through hindsight.”) Olis contends that if he had access “to full funding, he would have retained experts to counter the prosecutions’ theories, investigators to investigate the facts and potential witnesses, and a jury consultant; he would have purchased a searchable database to better enable review of the enormous volume of discovery; and his attorneys would have been better prepared to meet the charges against him.” (Doc. 312, pp. 1-2; 315, pp. 53-54).

According to Olis’s submissions, however, Yates testified under oath that prior to jury selection on November 3, 2003, he never made any request of Dynegy to have funds for an expert (Doc. 318, Ex. D, p. 215). Yates also said he made no calls or searches for experts (Doc. 318, Ex. D, p. 215-16). According to Olis’s submissions, co-counsel Mark Clark testified in a proceeding to recover his and Yates’s attorneys fees that it would have been nice to have *consulting* experts and that no other experts were needed for trial:

A. ... David Gerger ... was to be involved in the sentencing phase.

Q. In order to prepare for this [sentencing] phase of the presentation to

the Court, did you need experts?

A. Yes. This is where the experts, in fact, were needed.

Q. All right. Had you needed experts for the trial in the matter?

A. Experts for the trial were needed on a consulting basis; could have been on a testifying basis. Let me understand what I'm saying by that. Oftentimes in litigation, attorneys will go out and get a consulting expert, someone that can sit down and look at Project Alpha. This was a huge, huge project that had many, many boxes on the page, with natural gas swaps, hedges, and all sorts of highly technical things that people who specialize in this know about it, and it would be nice if you could have a consultant who could sit down with you and talk to you about those things, and educate you as the attorney on what the law is regarding those things, how those things work, what the standards are in the industry. All of that. At the trial phase, it would have been nice to have a consulting expert to educate us in that regard. That consulting expert could have become a testifying expert if we had so chosen.

But at the sentencing phase, the number one issue at the sentencing phase was what is the loss ...

(Doc. 318, Ex. F, pp. 73-74) (emphasis added). Clark testified that after he was hired he only placed one call to one potential expert and he did not remember who that was (Doc. 318, Ex. F, pp. 187-88). He also admitted the call might have been placed during the sentencing phase, rather than prior to trial (Doc. 318, Ex. F, pp. 188-89).

Also, on July 28, 2003, in response to the United States' motion to declare the case complex, Yates acknowledged that Olis was effectively a consulting expert in the matter: "Defendant Olis, who is a licensed CPA and attorney has cooperated in

the Government's investigation for more than one year, is very familiar with the relevant documents and has been able to assist his attorneys." (Doc. 42). Foster testified at trial that Olis had the best understanding of all the various components of the Project Alpha transaction, both early on and through its completion (Doc. 103, pp. 169-70). Any claim that Olis was prejudiced because he was allegedly unable to retain expert accounting consultants to assist in evaluating the Project Alpha transaction and to cross-examine the prosecution witnesses concerning key aspects of the transaction is refuted by this record and no *actual* prejudice is demonstrated.

With regard to Olis's claim that he lacked the capacity to hire experts to discredit and counter Jeffrey Heil's testimony, Olis claims he would have hired Bala Dharan to impeach Heil's testimony. He asserts that he could have shown through the expert the timing of the sale of Dynegy stock by the University of California Retirement System ("UCRS") and its purchase of 900,000 shares of stock after April 25, 2002, when Dynegy announced in an 8-K that the \$300 million generated from Project Alpha was not cash flow, but financing. Yates previously testified under oath, however that it was time, not the need for an expert or a lack of funds, that caused him to fail to pursue this avenue of impeachment:

Q. But as you are sitting in trial, did you have a chance to investigate what this guy was going to tell you?

A. We didn't know. No, we didn't prepare because we didn't think it was going to be admitted at trial. And we hadn't had a chance to do the background as to his testimony.

Q. Did you have a deposition of what he was going to say?

A. No.

Q. Did you have – did he have a written out affidavit that laid out his testimony for you so you could track it in advance?

A. No. It came as a complete surprise. And if we had known ahead of time, we could maybe – I don't know if Dynegy would have given it to us, but try to get that information from Dynegy because they know who the shareholders are, especially someone as big as – an institution that has that many shares of stock.

(Doc. 318, Ex.D, pp. 130-131).

The United States produced its witness list on October 30, 2003, and Heil was on that list (See Doc. 116, p.7; Doc. 117, p.3; Doc. 122, pp. 10-11; Doc. 336:Appendix B). Yet there is nothing in the record to indicate that Olis's attorney sought a continuance in order to review the stock records from either Dynegy or UCRS. *See United States v. Mulderig*, 120 F.3d 534, 545-46 (5th Cir. 1997) (court finds a lack of due diligence in relation to newly discovered evidence claim where, among other things, defense counsel failed to seek a continuance to explore the matter further or to obtain relevant documents). After trial, Olis's appellate counsel apparently had no difficulty in obtaining the stock records - he attempted to

supplement the record on appeal with a list of the dates, amounts, and prices of Dynegy stock bought and sold by the UCRS in 2001 and 2002. (Doc. 336:Appendix C (“Motion Filed by Appellant Jamie Olis to supplement the record on appeal with University of California’s True Stock Sales - Exhibit 1”)).

With regard to the limited probative value of the evidence, at trial Heil only estimated the timing and amount of Dynegy stock purchased by UCRS in 2001 pursuant to his office’s recommendation:

Q. Did your office recommend to the Regents that they buy Dynegy stock in 2001?

A. Yes, it was January 2001.

Q. All right. That was one time. Did you-all recommend that they buy Dynegy stock again in 2001?

A. About nine months later, September of 2001, we bought a second smaller amount, yes.

Q. Do you know what the breakdown was – and I know you probably don’t know the number of stock, but how much stock you bought with respect to the time periods?

A. The first purchase was approximately \$75 million worth of stock, and we paid about \$42 a share. So, it seems like it would have been maybe 1.7 million shares.

Q. What about the second purchase?

A. Another 25 million, to bring the total up to 100 million. The price was a little bit lower, like the high 30s, just under \$40 a share.

Q. And that was the purchase in the fall of 2001?

A. Yes.

(Doc. 104, 215-16). When asked about Dynegy's reclassification in April 2002 of the funds from Project Alpha as cash flow from financing, rather than as cash flow from operations as it had previously reported, Heil said they "ended up selling the stock in May of 2002" and that the reclassification was 80 percent of the reason it was sold (Doc. 104, pp. 220-21). He said that overall the UCRS lost \$105 million when they sold the stock (Doc. 104, p. 222).

The evidence Olis now claims he would have produced via an expert shows that after December 20, 2001, the only purchase of Dynegy stock by UCRS took place between May 6, 2002 and May 7, 2002, when 900,000 shares were purchased for between \$13.264 and \$14.958 per share (Doc. 336:Appendix C). Before that time, that is, between March 19, 2001 and December 20, 2001, UCRS had purchased 3,257,700 shares of Dynegy stock at a total cost of \$135,613,000, at prices of between \$20.750 and \$48.370 per share, with only 378,000 of those shares being purchased for less than \$33.791 per share, and most of it being purchased for around \$45.00 per share (Doc. 336:Appendix C).

Between May 21, 2002 and May 29, 2002, the UCRS sold 1,154,900 shares of Dynegy stock at between \$9.225 and \$10.392 per share (Doc. 336:Appendix C).

Between June 16, 2002, and June 28, 2002, the UCRS sold the rest of its Dynegy stock, or 2,866,300 shares, at between \$6.082 and \$8.938 per share (Doc. 336: Appendix C). In total, the UCRS lost \$114,217,707 from its purchase and sale of Dynegy stock (Doc. 336: Appendix C). If the 900,000 shares of stock purchased on May 6-7, 2002 had all been purchased for \$15 (the highest price it sold for during the period) and sold for \$6 (the least amount that UCRS received when it finished selling all of its Dynegy stock in June 2002), the additional loss would only be \$8.1 million (Doc. 336: Appendix C). Subtracted from the overall loss of \$114 million, UCRS was still left with a loss of just over \$105 million based on the pre-April 25, 2002 purchases of Dynegy stock.

This record demonstrates not only that the evidence Olis claims he would have produced if he had more money, in fact, could have been obtained without an expert by using due diligence, but also that its limited probative value is insufficient to establish actual prejudice, especially in light of the overwhelming evidence of guilt. The fact that the UCRS purchased 900,000 additional shares at a significantly lower price after Project Alpha was disclosed as a loan to the public and then sold it, along with the rest of Dynegy's stock, within seven weeks, for a total loss of \$114 million, is consistent with Heil's testimony.

With regard to Olis's claim that he lacked the capacity to hire experts to opine

on the issue of loss, the sworn testimony of Olis's trial attorneys demonstrates they did not consider obtaining such experts for trial. *See* pp. 22-23, *supra*. Their position was reasonable since evidence of actual loss is not necessary to establish the charged offenses. *United States v. Haddy*, 134 F.3d 542, 449-551 (3rd Cir. 1998) (no requirement in securities fraud to prove a specific victim who acted upon the deception); *United States v. Loney*, 959 F.2d 1332, 1337-38 (5th Cir. 1992) (same in mail fraud). Prior to trial Olis asked this court to exclude expert testimony on the issue of loss and it agreed that it was not necessary for the United States to prove loss (Doc. 71, Doc. 103, pp. 234-239). This court also agreed it was admissible on the issue of intent and motive (Doc. 103, pp. 236-239; Doc. 104, pp. 128-134). The prosecutors then informed the court that the United States was not going to present an expert in its case in chief, and instead was going to rely on the fact witness, Jeffrey Heil, to show motive and intent (Doc. 104, p. 133). As Olis's appellate attorney noted in his Motion to Supplement, "Mr. Heil did not testify about what 'caused' Dynegy's price to fall" (Doc. 336:Appendix C, p. 2). Instead, he described the role that reported cash flow played in his valuation of the stock (Doc. 104, pp. 204-215). This record, including Olis's submissions in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255, refutes Olis's recent claim that a lack of funds prevented him from presenting expert evidence on the issue of loss at trial.

If the United States had introduced, after a *Daubert*⁵ hearing, expert testimony on the effect of Project Alpha on the value of Dynegy's stock price, then Olis's claim that rebuttal expert testimony would have been admissible would be stronger. *See United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (for newly discovered evidence to be material, it must be admissible). However, given the failure by the United States to offer such evidence, the outcome of the battle of the experts at sentencing (Docs. 296, 297, 298), as reflected in this court's finding that it was "not possible to estimate with any degree of reasonable certainty the actual loss to shareholders attributable to the corrective disclosures about Project Alpha" *United States v. Olis*, 2006 WL 2716048 * 8-9 (S.D. Tex. Sept. 22, 2006) (unpublished), the limited probative value of the evidence Olis claims he was prevented from presenting is insufficient to demonstrate actual prejudice, particularly in light of the overwhelming evidence of Olis's guilt.

Olis also cannot demonstrate prejudice based on the omission of expert testimony on the issue of whether Project Alpha complied with Generally Accepted Accounting Principles ("GAAP") or on Arthur Andersen's relationship with ICA. The scheme to defraud that was alleged and proved did not require a battle of the experts on the issue of whether the representation of Project Alpha in Dynegy's

⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

financial statements complied with GAAP (See pp. 53-57, *infra*, citing *United States v. Ebberts*, 458 F.3d 110, 125-26 (2d Cir. 2006)). With regard to ICA, the jury was aware of the relationship between ICA and Arthur Andersen. The fact that Arthur Andersen was going to receive a significant contingency fee from ICA if Project Alpha were successful was developed at trial through the cross-examination of Sean Muller (Doc. 98, pp. 27-167). Olis also introduced a tax opinion that was written on the CBES transaction (the predecessor tax transaction involving ICA that was incorporated into Project Alpha) which showed that Arthur Andersen was to receive 50 percent of the profit from the transaction, or \$7.8 million (Doc. 98, 27-49; G.E. 679A; D.E. 3). Muller agreed that Arthur Andersen was receiving a contingency fee from ICA, that ICA was expected to earn a \$15.7 million profit for its participation in Project Alpha and that Arthur Andersen was to receive half of that amount (Doc. 98, pp. 29, 72, 74-75, 165-67). He also agreed that Dynegy was not paying Arthur Andersen for its work on the transaction other than billing Dynegy \$250,000 that was credited against future work (Doc. 98, pp. 167-68).

In addition, as previously demonstrated, trial counsel made no effort to locate experts on these issues prior to trial. *See* pp. 22-23, *supra*. There can therefore be no causal relationship between the delay in receiving payment from Dynegy and the absence of any such evidence at trial. Since this record refutes a finding of actual

prejudice, Olis has procedurally defaulted his claim of an alleged interference with any right he had to fund his defense.

2. No Sixth Amendment Violation

Even if the absence of cause or prejudice were not conclusively demonstrated by the records and the files of the case, the record conclusively demonstrates there was no constitutional violation based on Dynegy's escrowing of Yates' attorneys fees. To establish a constitutional violation, Olis must prove a causal connection between the alleged misconduct and the alleged violation. *United States v. Hoffman*, 832 F.2d 1299, 1303-04 (1st Cir. 1987) (citing *United States v. Weddell*, 800 F.2d 1404 (5th Cir. 1986); *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984) and *United States v. Simmons*, 699 F.2d 1250 (D.C. Cir. 1982)). As discussed at pp. 18-20, *supra*, not only did Yates deliberately choose not to request funding from Olis prior to or during the trial, but when he did ask for money to hire an expert for sentencing, Olis provided him with only a fraction of his significant financial resources. Olis therefore cannot demonstrate that any conduct by Dynegy in relation to its employment contract with Olis caused a lack of ability on Olis's part to fund his defense.

In addition, Olis cannot establish government action in relation to Dynegy's treatment of any financial obligation it had to Olis to pay for his defense. "Generally,

the Fifth and Sixth Amendments restrain action by the government, not action by a private party.” *United States v. Graham*, 2003 WL 23198793 (D. Colo. Dec. 2, 2003) (unpublished). The existence of the Thompson memo is not sufficient *per se* to establish the existence of an agency relationship between Dynegy and the USAO when Dynegy made the decision to escrow legal fees accrued by Yates on behalf of Olis because “[t]hese memos are generalized statements of a policy directed specifically to United States Attorneys, not private parties.” *Id.*

Where a defendant claims that the government has infringed on his Sixth Amendment rights, he must prove the conduct in question is attributable to the government, i.e., that it constitutes “state action.” *See Thompson v. Mississippi*, 914 F.2d 736, 738 (5th Cir. 1990) (victim’s pretrial viewing of defendant at jail not attributable to state, so no violation of Sixth Amendment right to counsel). Olis’s own submissions (Doc. 318, Ex. B - Testimony of Bruce Williamson) demonstrate that Dynegy acted independently after being presented with the Thompson memo and being questioned by members of the USAO regarding Dynegy’s payment of Olis’s legal fees. *Cf. United States v. Blanche*, 149 F.3d 763, 769 (8th Cir. 1998) (witness reached decision not to testify after consulting with court-appointed counsel and not

as a result of government or judicial coercion).⁶ According to those submissions, Bruce Williamson has been the Chairman and CEO of Dynegy since October 23, 2002 (Doc. 318, Ex. B, Apr. 26⁷, p. 4). Williamson's decision to place Olis's fees in escrow was made after consultation with his own legal experts, one of whom was outside counsel Larry Finder, a former interim United States Attorney and Assistant United States Attorney (Doc. 318, Ex. G, pp. 3, 176-178).

In his email on July 19, 2003, to the United States Attorney for the Southern District of Texas, Michael T. Shelby, Williamson made it clear that Dynegy's decision in relation to paying attorneys' fees was an independent decision made in consultation with Finder: "Larry and I talked and I wanted to let you know directly that I am totally supportive of trying to modify our legal support posture. I have wanted to do so for some time. Larry can get you more details but I think we have a workable game plan to further support your efforts." (Doc. 318, Ex. V). Williamson

⁶ Dynegy's incentive to cooperate with the investigation did not result in it not acting independently. *See United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (government may encourage a guilty plea by offering substantial benefits in return for the plea without rendering it involuntary); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."); *United States v. Santiago*, 410 F.3d 193, 202-203 (5th Cir. 2005) ("a confession is not involuntary merely because the suspect was promised leniency if he cooperated with law enforcement officials.") (citation omitted).

⁷ Exhibit B of Document 318 contains two transcripts reflecting Williamson's testimony, one dated April 26, 2007 and the other dated April 30, 2007, therefore these transcripts are also identified by dates.

later testified that when he told Shelby he was in favor of modifying Dynegy's legal support posture, he was referring to "not pay[ing] directly to the individual but to pay into an escrow account." (Doc. 318, Ex. B, Apr. 30, p. 73). As Williamson explained: "[t]he Thompson memo wanted us to not pay at all. We didn't feel we could stop payment, but could to pay into an escrow account." (Id).

Williamson said the idea of not giving the money to the lawyers and putting it into an escrow account "[c]ame from the legal department because the Thompson memo wanted no payments made and the rules - from our ruling, in effect, from our legal department was we could not stop payment but we could pay into an escrow account or take other means, as we covered last week, which was Paragraph 2 of Advancement of Fees (Doc. 318, Ex. B, Apr. 30, p. 74; see also Doc. 318, Ex. K, p. 12). He said that under that paragraph the company could take measures to protect its ability to recoup the funds and put the money into escrow (Doc. 318, Ex. B Apr. 30, pp. 212-13).

Williamson described his perceptions of the message he received from his communications with the USAO and from the Thompson memo:

The message and the interpretation of the Thompson memo, which is the guidance from the Department of Justice, was the company should not advance fees, should not provide financial support for individuals under investigation. We were continuing to do so. We stopped payment for those that we could and we continued to pay. And in July we made a

determination that we could pay into an escrow account for the two directors and officers.

(Doc. 318, Ex. B, Apr. 30, p. 78). He said that there were no discussions with Shelby other than the email about paying Olis's lawyers:

Q. And so at some point in time, according to these emails, you began to have a discussion with Mr. Shelby then what can you do to stop giving the money to Mr. Olis' lawyers, right?

A. The e-mail that you have here I think speaks to and covers everything with regard to your attempt to cooperate under the Thompson memo. The discussion with what we can and can't do, what was permitted and what could be escrowed and all of that, I can assure you, I didn't work out the details of that.

(Doc. 318, Ex. B, Apr. 30, pp. 78-79). Williamson did not want to pay attorney's fees for people no longer with the company because he was "cheap," the company was going to go into bankruptcy and he did not want any money leaving the company (Doc. 318, Ex. B, Apr. 30, pp. 80-82). According to Williamson, Shelby "pushed the Thompson memo, which said the companies, in order to be viewed as cooperating, would not advance fees. And that gave me additional impetus for the team internally to look for a solution to that." (Doc. 318, Ex. B, Apr. 30, pp. 80-81) (emphasis added). Dynegy's general counsel discussed the Thompson memo with board members when it passed the resolution to escrow the attorney's fees (Doc. 318, Ex. B Apr. 30, p. 95). Regarding the evidence that supported Dynegy's decision to

escrow Olis's fees, Williamson said Dynegy saw the information and evidence as it was delivered to the Department of Justice that "clearly indicated that Mr. Olis knew he was breaking the law." (Doc. 318, Ex. B, Apr. 30, pp. 112-113).⁸ Williamson forwarded the board resolution to escrow the attorney's fees to Shelby "[a]s a show of good faith that we [Dynegy] were trying to get as close to the standard of cooperation under the Thompson memo as we could." (Doc. 318, Ex. B Apr. 30, p. 107). Williamson's statement to Shelby saying he hoped it helped, was meant to convey that he hoped it helped Shelby to understand that Dynegy was cooperating, that the board resolution was the most they could do and that they could not, per the Thompson memo, cut off fees (Doc. 318, Ex. B, Apr. 26, p. 186). Williamson's characterization of his communication with Shelby as the best Dynegy could do demonstrates that it was Dynegy that decided, after consulting with their own legal experts, if, and to what extent, to limit advancement of Olis's attorney's fees according to its own legal interpretation of its contractual obligations to Olis.

In addition, Olis must establish prejudice from the alleged Sixth Amendment violation, since there is no claim that he was denied his right to counsel of choice altogether. *United States v. Rosen*, 487 F.Supp.2d 721, 734 (E.D. Va. 2007) ("[T]his

⁸ The 2007 board resolution addressing whether Olis met the standard for indemnification essentially required that Olis "did not know that he was breaking the law" (Doc. 318, Ex. B, Apr. 30, p. 215).

is not a case like [*United States v.*] *Gonzalez-Lopez* [, 548 U.S. 140 (2006)] in which defendant was denied counsel of choice altogether; rather it is a case like *Strickland v. Washington*, 466 U.S. 668 (1984)], where the claim is that counsel’s effectiveness was impaired.” *Id.* and n. 19); *see also United States v. Weddell*, 800 F.2d 1404, 1410-12 (5th Cir. 1986) (Court of Appeals for the Fifth Circuit recognizes, based on Supreme Court precedent, that there is no *per se* rule of reversal in cases involving governmental interference with a defendant’s right to present witnesses to establish a defense). Here, as in *Rosen*, “[t]he difficulty of assessing prejudice is no greater than the difficulty of doing so in the typical ineffective assistance of counsel case, which is now routine in federal courts.” 487 F.Supp. 2d at 735 (citing *Strickland*, 466 U.S. at 697).

To assert a successful ineffective assistance of counsel claim, a defendant is required to establish both (1) constitutionally deficient performance by his counsel and (2) actual prejudice as a result of counsel’s ineffectiveness. *Amador v. Quarterman*, 458 F.3d 397, 407 (5th Cir. 2006). Judicial scrutiny of counsel’s performance must be highly deferential and every effort must be made to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. With regard to prejudice, the *Strickland* test focuses on whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v.*

Fretwell, 506 U.S. 364, 372 (1993). As discussed in relation to the conclusiveness of the record on the issue of procedural default, pp. 17-31, *supra*, Olis's submissions in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255, when viewed along with his allegations and the entire record demonstrate, as a matter of law, that the escrowing of Olis's attorneys fees by Dynegy did not impact his attorneys' performance in a manner that rendered the outcome of Olis's trial unreliable.

3. No Fifth Amendment Violation

Olis contends that the conduct of members of the USAO in relation to the Thompson memo violated his right to due process by "unjustifiably imped[ing] Olis' fundamental right to use resources lawfully available to him to conduct his defense to criminal charges." (Doc. 315, p. 45). He asks this court to find that the Thompson memo is legislation that interferes with this "fundamental right" and that it is not justified by a compelling government interest. In the alternative, he argues that the government conduct violates substantive due process because it allegedly involved acts so outrageous as to "shock the conscience." (Doc. 315, pp. 46-51).

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). However, the Supreme Court has warned that it must "exercise the utmost care whenever ... asked to break new ground in this

field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* at 720 (citation omitted). Further, "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (citation omitted). And, "substantive due process analysis requires 'a careful description of the asserted fundamental liberty interest.'" *Rosen*, 487 F.Supp.2d at 736-37 (quoting *Glucksberg*, 521 U.S. at 720-22).

In *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 (1989), the Court rejected a Due Process Clause challenge to the forfeiture statute, first noting *Strickland's* observation that any such claim might well be co-extensive with the Sixth Amendment. Nonetheless, assuming that the Fifth Amendment "provide[d] some added protection not encompassed by the Sixth Amendment's more specific provisions," 491 U.S. at 633, the Court rejected the claim in the absence of prosecutorial misconduct. *Id.* at 634. This decision confirms that a right to funds to pay for one's counsel of choice is not a fundamental right. Had such a right been deemed "fundamental," it would have been immune from infringement absent a compelling state interest.

Applying these principles, the district court in *Rosen* concluded that the precise issue raised in this case must be measured exclusively under Sixth Amendment standards. *Rosen*, 487 F.Supp.2d at 737. Since the right asserted by Olis, to whatever extent it is protected by the Constitution, is protected by the Sixth Amendment, his Fifth Amendment Due Process claim fails.

In addition, “the ‘touchstone of the due process clause is protection of the individual against arbitrary action of government, and ... with respect to abusive executive action, only ‘conscience shocking’ or ‘the most egregious official conduct’ is so arbitrary as to violate due process. *O’Neal v. Cazes*, 2007 WL 2875998 * 3 (5th Cir. Oct. 1, 2007) (unpublished, quoting *Lewis*, 523 U.S. at 845-847 and n.8). Here, the alleged misconduct is that members of the USAO followed a policy promulgated by the Department of Justice that was designed to gauge whether corporations were cooperating with the investigation of criminal activities by the corporation and its employees. This conduct cannot be fairly characterized as arbitrary or shocking to the conscience. *Cf. United States v. Nava-Salazar*, 30 F.3d 788, 800-801 (7th Cir. 1994) (nothing in case came even close to showing outrageous government conduct where actions complained of “were authorized by and done in full compliance with Rule 16(d)(1)”); *United States v. Thomson*, 752 F.Supp. 75 (W.D.N.Y. Oct. 24, 1990) (outrageous government conduct claims based on government surveillance of

defendant entirely unfounded where surveillance was lawfully authorized and conducted under Foreign Intelligence Surveillance Act).

G. No Constructive Amendment of the Indictment

Olis contends the United States constructively amended the indictment by arguing to the jury that it did not matter whether Hecker's accounting opinion was wrong and that what mattered was whether Olis and his codefendants concealed the existence of the outside hedges and tear-ups (Doc. 315, pp. 70-73). He submits that such argument, in combination with an alleged absence of evidence that Olis and his codefendants intended to make false representations to the SEC or investors, was inconsistent with the "gravamen of the indictment," which he describes as "a scheme to achieve an incorrect and false accounting result, and thereby to defraud not just Hecker, but 'Dynergy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts and the investing public.'" (Doc. 318, p. 73, quoting, in part, ¶ 21 of Doc. 1). He also contends that this alleged constructive amendment of the indictment "eliminated the concept of victim from the alleged fraud" and that there was no proof he or his co-conspirators sought to obtain money from or to deprive any victim of money or property (Doc. 318, p. 73). The latter allegation is also made by Olis in relation to his challenges to the mail and wire fraud instructions and is addressed by the United States in response to those claims. *See pp. 73-79, infra.*

1. No Cause or Prejudice

Olis did not raise this issue at trial or on direct appeal. He must, therefore, show cause for his procedural default and the requisite degree of prejudice. *Frady*, 456 U.S. at 164-170. Acknowledging his default, Olis argues that he received ineffective assistance of counsel at trial based on this omission. To succeed on this claim, Olis must establish both constitutionally deficient performance by his counsel and actual prejudice as a result of counsel's ineffectiveness. *Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir. 1998). With regard to counsel's performance, the defendant must show that his counsel's actions fell below an objective standard of reasonableness. *Pratt v. Cain*, 142 F.3d 226, 230 (5th Cir. 1998) (citing *Strickland*, 466 U.S. at 688). With regard to counsel's performance on appeal, counsel is not obligated to urge every nonfrivolous issue that might be raised. *West v. Johnson*, 92 F.3d 1385, 1396 (5th Cir. 1996). Here, counsel's performance was not deficient because a person exercising reasonable professional judgment would conclude the prosecutors' argument did not amend the indictment. *See pp. 43-58, infra*. Also, because there was no amendment or prejudicial variance, Olis cannot satisfy the Sixth Amendment's prejudice requirement.

2. The Prosecutors' Argument Did Not Amend the Indictment

Since the Fifth Amendment guarantees that a criminal defendant will only be tried on charges alleged in a grand jury indictment, the indictment cannot be broadened or altered except by a grand jury. *United States v. Threadgill*, 172 F.3d 357, 370 (5th Cir. 1999). There is no constructive amendment where “the offense proved was fully contained within the indictment.” *United States v. Miller*, 471 U.S. 130, 137 (1985). “[A] ‘constructive amendment cannot occur where the indictment completely and accurately describes the conduct [of the defendant]’” *United States v. Hanson*, 161 F.3d 896, 903 (5th Cir. 1998) (citation omitted). Further, any claim of variance between the facts alleged and the evidence at trial is not fatal unless the defendant can demonstrate it was material and prejudiced his substantial rights. *United States v. Guidry*, 406 F.3d 314, 321-22 (5th Cir. 2005). “‘As long as the defendant receives notice and is not subject to the risk of double jeopardy, his substantial rights are not affected.’” *Id.* (citation omitted).

To prove a violation under 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, the government must show the defendant knowingly and willfully used instrumentalities of interstate commerce in connection with the purchase or sale of a security and used manipulative and deceptive devices, including “making any untrue statement of

material fact or omitting to state a material fact ... or ... engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit.” *United States v. Peterson*, 101 F.3d 375, 379 (5th Cir. 1996). “[C]riminal liability under section 10(b) of the Securities Exchange Act does not require deception of and reliance by an identifiable buyer or seller of securities.” *Haddy*, 134 F.3d at 544, 549-551 (explaining *United States v. Naftalin*, 441 U.S. 768 (1979), *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) and *United States v. O’Hagan*, 521 U.S. 642 (1997)).

The term scheme to defraud “includes any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money.” *United States v. Caldwell*, 302 F.3d 399, 414 (5th Cir. 2002). “[A] scheme may be fraudulent even though no affirmative misrepresentation of fact be made.” *Id.* at 673-74 (citations omitted). Express misrepresentations are unnecessary, “under the mail fraud statute, it is just as unlawful to speak ‘half truths’ or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading.” *United States v. Townley*, 665 F.2d 579, 585 (5th Cir. 1982).

“The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some

financial loss to another or bringing about some financial gain to himself.” *United States v. Doke*, 171 F.3d 240, 243 (5th Cir. 1999) (citation omitted). “It need not be shown that the intended victim of the fraud was actually harmed; it is enough to show defendants contemplated doing actual harm, that is something more than merely deceiving the victim.” *Loney*, 959 F.2d at 1337-38 (citations omitted). “[T]he government can convict a person for mail ... fraud even if his targeted victim never encountered the deception – or, if he encountered it, was not deceived.” *United States v. Gray*, 367 F.3d 1263, 1269 (11th Cir. 2004) (citation omitted). All the government needs to show is that the defendant anticipated the intended victim’s reliance. *Id.*

In addition to charging that the financial statements that Dynegy reported to the SEC and to the public falsely stated that \$300 million of cash flow from financing was from risk-management activities, the indictment alleged that the financial statements were misleading (Doc. 1, ¶¶ 21, 24). Each of the substantive fraud counts re-alleged and incorporated the factual details set forth in paragraphs 1-12 and 14-25 of the conspiracy count (Doc. 1, pp. 16, 18, 19). Those paragraphs described details of the scheme to defraud that included the following allegations:

6. As an issuer of publicly-traded stock ... Dynegy was required to comply with the rules and regulations of the United States Securities and Exchange Commission (“SEC”). These rules and regulations were created to protect the members of the investing public by, among other things, ensuring that the results of Dynegy’s operations were accurately

reflected in financial statements filed periodically with the SEC and made available to the investing public.

7. Under SEC rules and regulations, Dynegy and its officers had a duty to file with the SEC quarterly reports on Form 10-Q and annual reports on Form 10-K that included financial statements accurately presenting Dynegy's financial condition and results of business operations. The financial statements were required to disclose, among other things, Dynegy's income, its cash flows from operating activities (operations) and its cash flow from financing (debt). ... The investing public was entitled to, and did, rely upon the information in Dynegy's financial statements in making investment decisions, including the decision to buy or sell Dynegy stock.

(Doc. 1, pp. 2-3).

9. At least one Rating Agency placed Dynegy's credit rating under review for possible downgrade in the late summer of the year 2000, raising the specter of higher borrowing costs for Dynegy.

(Doc. 1, p. 4).

12. On September 20, 2000, the Wall Street Journal questioned the quality of the earnings reported by Dynegy's principal business segment - energy trading activities. ... Noting that Dynegy's energy trading contracts did not seem to be generating "operating cash flows" at the level to be expected if Dynegy's earnings estimates were valid, the Wall Street Journal, in essence, was questioning whether Dynegy's earnings profile justified Dynegy's stock price.

(Doc. 1, p. 5).

14. The Defendants ... would and did interpret the above-mentioned Wall Street Journal article as identifying a serious and increasing "gap" or "disconnect" between Dynegy's earnings and its cash flows from energy trading, or "risk-management, activities. The Defendants ... decided to respond and to fend off the Wall Street Journal's criticism by

improving the “risk-management activities” line of the “cash flows from operating activities” section of the cash flow statement in Dynegy’s quarterly (Forms 10Q) and annual (Form 10-K) reports filed with the SEC. ...

(Doc. 1, p. 7).

15. To better “match” Dynegy’s earnings and operating cash flows, the Defendants ... would and did conceive, design and execute a plan to borrow money: that is, to engage in a “financing activity” but make it appear that the borrowed funds were cash flow from Dynegy’s “risk-management activities” to create the false impression and illusion that Dynegy’s cash flow from risk-management activities were much improved and that its earnings were of sufficient quality to justify, maintain and increase Dynegy’s stock price, and to avoid the potentially adverse effect of a downgrade of Dynegy’s credit rating.

16. The Defendants ... called the plan “Project Alpha”.

17. The Defendants ... knew and intended that, during the first nine months ending on December 31, 2001, Project Alpha would create the appearance of improved cash flows from risk-management activities through the execution of an essentially circular break-even five-year natural gas contract between Dynegy and a specially-created corporation, sometimes referred to as either a Special Purpose Entity (“SPE”) or a Special Purpose Vehicle (“SPV”). Project Alpha was to be funded with loans from financial institutions that included Citibank/Salomon Smith Barney ..., Deutsche Bank and Credit Suisse First Boston (the “Project Alpha Lenders”). The Project Alpha Lenders expected and required full repayment, with interest, or a similarly assured return.

(Doc. 1, pp. 8-9) (emphasis added).

18. The Defendants ... knew and intended that the SPE ... would purchase natural gas on the open market at market prices and then resell it to Dynegy at a discount The resale would generate positive cash

flow for Dynegy in the approximate amount of Three Hundred Million Dollars The Defendants ... knew and intended that over the remaining 51 months of the 5-year term of Project Alpha's circular break-even natural gas contract, the SPE would purchase natural gas from the open market at market prices and then resell it to Dynegy at a premium so that the Project Alpha Lenders would be fully repaid, with interest.

19. To ensure the Project Alpha Lenders demand of full repayment, with interest or other assured return, the Defendants ... did secretly adopt a 100 % hedging strategy and did secretly add special "tear up" language to the Project Alpha transaction documents. Thus, as the Defendants ... knew, intended, and believed, Project Alpha was, in fact, a loan structured to appear as a 5-year natural gas contract that should have been disclosed as cash flows from financing activities: that is, as a loan (debt) rather than as cash flows from risk-management (operating) activities in Dynegy's financial statements (Forms 10-Q and 10-K) for the 2nd, 3rd, and 4th quarters of, and for the year, 2001.

20. The Defendants ... knew and understood that Generally Accepted Accounting Principles ("GAAP") required that an SPE be an independent entity and that the SPE, and the financial institutions that funded the SPE, could not be assured or guaranteed full repayment of, or a return on, their investment, but had to bear some risk of losing money. The Defendants ... knew this because Dynegy's auditors had warned that either a 100 % hedging strategy or "tear up" language would prevent Dynegy from reporting the cash flow from the Project Alpha natural gas contract as cash flows from risk-management activities in its publicly-filed financial statements. Notwithstanding the warning of Dynegy's auditors, the Defendants ... intended to, decided to, and did implement a 100% hedging strategy and did include "tear up" language in the Project Alpha documents to protect and to ensure that the Project Alpha Lenders would not lose money.

21. The Defendants ... did intentionally conceal from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, the implementation and effect of the 100% hedging

strategy and the “tear up” language. In doing so, the Defendants ... knew and intended that Dynegy would and did falsely report to the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, by means of electronic filing of Quarterly Reports (“Forms 10-Q) and an Annual Report (“Form 10-K”), that approximately \$300,000,000 of “cash flows from financing activities” were “cash flows from Risk-management activities,” throughout the last 9 months of the year 2001.

22. ... As the Defendants ... intended, the accounting opinion provided by Dynegy’s auditors and the representation letter upon which it was based, did not reflect the hedging and “tear-up” features of Project Alpha that made the transaction, in fact, a financing activity: that is, a loan (debt).

(Doc. 1, pp. 9-11) (emphasis added). The indictment further alleged:

24. In this manner ... the Defendants ... caused Dynegy’s cash flow from operations, and more specifically, from Risk-management activities, to be materially overstated in the second, third, and fourth quarters of 2001, and willfully omitted material facts necessary to make the statements made in Dynegy’s financial statements, in the light of the circumstances in which they were made, not misleading, in documents filed with the SEC and intended for consideration by the Rating Agencies, lenders, market and securities analysts, and the investing public in connection with the purchase and sale of stock and securities of Dynegy, Inc.

(Doc. 1, p. 12) (emphasis added).

Count two charged securities fraud and, like paragraph 13 c. of the conspiracy count, specifically charged that Olis and others did aid and abet each other to employ manipulative and deceptive devices and contrivances in connection with the purchase and sale of a security, “and to (a) employ a device, scheme and artifice to defraud, (b)

make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in light of the circumstance under which they were made, not misleading, and (c) engage in acts, practices and a course of business which would operate as a fraud and deceit upon a person in connection with the purchase and sale of the securities of Dynegey, Inc.” (Doc. 1, pp. 6-7, 17). Counts three, like paragraph 13 a. of the conspiracy count, charged that Olis and others committed mail fraud in that they did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of material false and fraudulent pretenses, representations and promises (Doc. 1, pp. 6,18). Counts four through six charged, like paragraph 13 b. of the conspiracy count, that Olis and others committed wire fraud in that they did execute and attempt to execute a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, including but not limited to representations and pretenses about the effect of Project Alpha on Dynegey’s financial statements (Doc. 1, pp. 6, 19-20).

In its instructions to the jury, this court instructed them that “[t]he defendant is not on trial for any act, conduct or offense not alleged in the indictment.” (Doc. 105, p. 21). With regard to the securities fraud, this court carefully directed the jury to consider whether Olis was guilty of the fraud charged in the indictment:

In order to sustain its burden of proof for the crime of securities fraud as charged in Count Two of the indictment, the government must prove ... beyond a reasonable doubt: ... Defendant Jamie Olis knowingly either employed any device, scheme or artifice to defraud, as detailed in the indictment; or made any untrue statement of material fact, or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading as detailed in the indictment; or engaged in a transaction, practice, or course of business which operated or would operate as a fraud and deceit on any person as detailed in the indictment.

(Doc. 105, p. 26) (emphasis added). This court further explained:

Count Two of the indictment alleges certain types of fraudulent conduct in connection with the purchase or sale of any security. The government must prove beyond a reasonable doubt, therefore, that there were purchases or sales of securities and that the fraud or deceit described in the indictment had some relationship to or was connected with these sales or purchases.

The government need not show, however, that Defendant Jamie Olis, or any one associated with him, bought or sold securities in question.

If you decide that a particular statement or particular omission was false or misleading at the time that it was made, then you must determine if the facts state or omitted was a material fact or a material omission under the evidence received in this case.

In order for you to find a material fact or a material omission, the government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to cause or to induce a person to invest or to cause or induce a person not to invest.

The securities frauds statutes under which Count Two of the indictment is brought is concerned only with such material misstatements or such material omissions and does not cover or meaningless or unimportant

ones.

(Doc. 105, p. 28) (emphasis added). This court further instructed that “[a] ‘device, scheme, or artifice to defraud’ as used in these instructions ... means the forming of some invention, contrivance, plan or design to trick or to deceive in order to obtain money or something of value.” (Doc. 105, p. 29). Importantly, and consistent with the Fifth Circuit’s Pattern Instructions Nos. 2.59, 2.60, this court gave the following instruction with regard to false representations:

A representation is false if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be false when it constitutes a half truth or effectively omits or conceals a material fact, provided it is made with intent to defraud.

(Doc. 105, pp. 30, 32) (emphasis added). This court also charged the jury the United States had to prove beyond a reasonable doubt, with regard to both the mail and wire fraud counts, that Olis knowingly devised or intended to devise a scheme to defraud “that was substantially the same as the one alleged in the indictment” (Doc. 105, pp. 31, 33).

Olis has failed to demonstrate any constructive amendment of the indictment by virtue of the United States’ argument that it did not matter whether Hecker’s advice was correct regarding whether the use of tear-ups and hedging would ruin the accounting treatment. The United States argued and proved, as alleged, that the

statement in Dynegy's financial statements that the \$300 million from Project Alpha was cash from operations was false because it was a half truth and effectively omitted material facts, that is, the details surrounding the transaction that were hidden from Hecker. Further, the United States argued and proved that the statement was made to the public via Dynegy's financial statements with the intent to deceive by evidence of the steps Olis and his coconspirators took to conceal the omitted information from Hecker. Because of these material omissions, the statement that the \$300 million from Alpha was cash flow from operations was false regardless of whether Hecker was wrong about the accounting rules. *United States v. Ebbers*, 458 F.3d 110, 125-26 (2d Cir. 2006) (although GAAP may be relevant to whether the defendant acted in good faith, if the government proves that a defendant was responsible for financial reports that intentionally and materially misled investors, the statute is satisfied. The government is not required to prevail in a battle of expert witnesses over the application of individual GAAP rules."). In *Ebbers*, 458 F.3d at 112-17, the court explained that the issue in relation to the financial reports was not whether an argument could be made that the accounting was permissible under particularized rules, but whether the use of the accounting rules led to a financial statement that was materially misleading, which would itself be a violation of GAAP. *Id.* As illustrated by that court:

For example, an addition to revenue used in the “Close the Gap” program may or may not have been improper under particularized GAAP rules. However, where an addition intentionally involved funds that had not previously been used to calculate revenue and were a one-time addition to revenue, investors would not have been alerted to the fact that revenue as previously calculated was actually down. Such an intentionally misleading financial statement violates the statute.

Ebbers, 458 F.3d at 126 (emphasis added). In *Ebbers*, the court gave other examples of why the transactions in the financial statements, even if arguably permissible under GAAP, were misleading and thus rendered the entire statement to be violative of GAAP. *Id.* Here, as in *Ebbers*, the scheme to defraud that was alleged and proved did not turn on whether the treatment of Project Alpha in Dynegy’s financial statements could have been shown to be technically in compliance with GAAP. As Olis admitted at sentencing, Project Alpha amounted to “financial engineering” that was designed to “enhance cash flows” (Doc. 297, pp. 199-200).

The materiality standard to be used when assessing fraudulent statements filed with the SEC is whether there is a substantial likelihood that a reasonable shareholder would consider misstated or omitted facts important. *United States v. Berger*, 473 F.3d 1080, 1098 (9th Cir. 2007) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) and *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)). As the Court of Appeals for the Second Circuit explained in *United States v. Rigas*, 490 F.3d 208, 221 (2d Cir. 2007):

... The jury heard testimony that the debt reclassifications were specifically designed to mislead investors about the amount of money the Rigas family and their companies owed to Adelpia, and it could have reasonably found that Defendants committed fraud. Even if Defendants complied with GAAP, a jury could have found, as the jury did here, that Defendants intentionally misled investors. ...

Just as the court reasoned in *Rigas*, 490 F.3d at 221, a jury in this case could have found that Olis and his coconspirators intentionally and materially misled investors, even if Olis were able to obtain an expert to testify that booking the transaction as cash flow from risk management activities could comply with GAAP if the hedges were with a holding company and the tear-ups only indirectly linking the entities.

According to Heil, a company's cash flow is a key factor in projecting its future performance and he relied on Dynegey's reported cash flow in making the decision to invest UCRS money in that company (Doc. 104, pp. 201-02, 204, 208-20). He explained that analysts project a company's future growth rate based on what they have done in terms of cash flow (Doc. 104, pp. 210-12). Heil testified that the reclassification from operations to financing of Dynegey's cash flows was the primary reason he sold the stock because, as a trading company, it was going to hurt Dynegey in three ways:

... That it would cause their counter-party risk – their perceived risk as a counter-party would rise and therefore their trading partners would want more collateral when they traded with them, which would really increase the cost of them trading, doing business.

Second, I figured it was a foregone conclusion after this, that the credit rating would be downgraded; therefore, their cost of borrowing would rise, which would make it more expensive for them to finance their trading operation.

And, third, I figured that some of their actual trading partners will just stop doing business with them because of fear of problems in the company, so that they would actually lose a volume of business in their trading operation.

(Doc. 104, pp. 220-22; see also Doc. 222, 235).

A critical aspect of the scheme to defraud alleged and proved, and then argued by the prosecutors to the jury to be evidence of Olis's intent to deceive, was the deception of Hecker, the independent auditor.⁹ In *United States v. Turner*, 2007 WL 1367597 *1 (W.D.Wash. May 8, 2007), the defendant was charged with "multiple violations of 15 U.S.C. § 78m(a), (b)(2); *id.* § 78ff; 17 C.F.R. § 240.13b2-2 and 18 U.S.C. § 2." Those violations also involved deception of the company's independent auditor in relation to the company's financial statements and the district court rejected the defendant's argument that the government could not prove its securities fraud case without expert testimony regarding the application of GAAP. *Id.* at *1-2.

Olis's attorney demonstrated prior to trial a clear understanding from the

⁹ Olis's claim that the indictment alleged that all of the members of Arthur Andersen constituted the auditors is not a reasonable interpretation of the indictment and the evidence was clear that Hecker and his group, and not members of the tax division at Arthur Andersen, were responsible for certifying the financial statements. See Doc. 97, pp. 22-46; Doc. 102, pp. 7-31.

indictment of the nature of the scheme to defraud that was charged as a scheme to hide information from Dynegy's auditors and thereby from the SEC and the investing public (Doc. 42). This is precisely the theory of fraud that the United States proved and argued to the jury. It is also the scheme to defraud that this court described the evidence at trial as showing. *United States v. Olis*, 2006 WL 2716048 * 12 (S.D.Tex. Sept. 22, 2006).

To the extent that Olis is challenging the sufficiency of the evidence to support his convictions, the Court of Appeals for the Fifth Circuit concluded that a reasonable jury could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes. *Olis*, 429 F.3d at 542-544. A § 2255 motion may not be used to relitigate an issue that was raised and considered on direct appeal without some highly extraordinary circumstances, such as an intervening change in the law. *Davis v. United States*, 417 U.S. 333, 345-46 (1974). In any case, the evidence demonstrated that Olis, Sharkey and Foster expected Project Alpha to increase Dynegy's stock price (Doc. 97, pp. 75-85; G.E. 255). As set forth in more detail at pp. 76-79, *infra*, the scheme alleged was a scheme for Dynegy, through Olis and his coconspirators, to obtain money or property by avoiding an increase in its cost of borrowing in relation to its energy trading activities. Olis's intent to harm can also be inferred from the evidence of his financial gain. *See* Doc. 104, pp. 27-28, 41-43, 180-193. With regard

to the propriety of the accounting treatment, Olis was able to put his good faith defense before the jury through this court's jury instructions (Doc. 105, p. 24) and in closing argument (Doc. 105, pp. 55-76). On appeal, Olis reiterated his good faith argument and it was rejected by the Court of Appeals. *Olis*, 429 F.3d at 542-544. There was no constructive amendment of the indictment and no prejudice to Olis based on the prosecutors' closing argument.

H. No Ineffective Assistance of Counsel

Olis contends he was denied his right to effective assistance of counsel because his attorneys (1) failed to object to the prosecutor's argument on the ground that it constructively amended the indictment; (2) failed to object and agreed to permit the court to conduct *ex parte* communications with an allegedly biased juror; (3) failed to object to the jury instructions defining wire and mail fraud; (4) failed to object to Hecker's testimony on the ground that it was improper expert testimony; and (5) unreasonably failed to hire necessary experts. The standards for evaluating a claim of ineffective assistance of counsel are set forth at pp. 37-39, 43, *supra*. Whether Olis was denied effective assistance of counsel due to his attorneys' failure to argue that the prosecutors' statements to the jury constructively amended the indictment has been briefed at pp. 43-58, *supra*; and, whether counsel unreasonably failed to hire necessary experts has been briefed at pp. 17-31, *supra*. The United States reurges

those arguments here.

1. Failure to Object to a Seated Juror on the Ground of Bias and to this Court's *Ex Parte* Communications with the Juror

With regard to Olis's claim that he was denied his Sixth Amendment right to effective assistance of counsel because his attorneys did not object during trial to an allegedly biased juror and because they agreed to permit this court to communicate *ex parte* with the juror, the record refutes his claim. On the first day of trial, after the United States presented its opening statement, this court informed the parties of a note from one of the jurors stating she could not be a juror because she had to pick up her daughter after school; and, this court received permission to conduct an *ex parte* inquiry (Doc. 122, pp. 106-107). After interviewing the juror, this court informed counsel of the conversation:

THE COURT: She has to pick her daughter up at 5:00 on Tuesday, 5:50 on Thursday. I explained to her that Thursday shouldn't be a problem because we're always out of here by 5:00, and she lives in – well, anyway, she can get there by 5:30. I told her tomorrow we're going to stop at 4:30 so jurors can get home and vote, so that wouldn't be a problem tomorrow.

So it's basically Tuesday of next week and the following week. And her daughter is 15. I told her she can just do homework for 30 minutes and stay at the school, that shouldn't be a problem. So, I think I calmed her down and got it worked out. So, I explained to her that she needs to stay and everybody has to do homework. She can just do it at the school waiting.

Okay. Is there anything else? ... Is there anything else?

MR. LEWIS: Thank you.

THE COURT: Okay.

MR. YATES: Thank you, Judge.

(Doc. 122, p. 111). On the second day of trial, the following transpired:

THE COURT: I have received another note from the same juror. It says as follows: I am sorry to inform you that I will not be able to judge this case fairly, knowing that my boss will not pay me for missed days and how my child will be getting home from school, because my income is the main source for my household. So, it is not fair for all that I remain on the jury. So, I'm asking you to please dismiss me from the case.

Now, I think I've already addressed yesterday the problem with her daughter. Normally jurors are paid for their service at the end of the jury [sic]. But I've checked, and I can have her paid once a week. Jurors are paid \$40 a day, which is not a large amount, but it's probably somewhere in the range of what she's being paid. So, my proposal would be to tell her that we will pay her once a week, but that we will not excuse her.

And I would like your comments.

MR. YATES: That's acceptable with the defense, Judge.

(Doc. 97, pp. 121-22). When the prosecutor indicated some concern with the court communicating *ex parte* with the juror, this court explained its reasons:

THE COURT: Certainly you're supposed to be careful. The problem is sometimes if you bring the juror in the courtroom, we can't close the courtroom, so all the spectators would be here and all the attorneys would be here. It has a high level of embarrassment about a personal,

financial and family matter. So, my normal procedure is to talk to the juror, find out what the facts are, communicate with counsel, get counsel's concurrence, and then communicate back.

In certain situations if I think the juror has potentially been tainted from an outside source, I will bring the juror in and have a question and answer in the courtroom. But I prefer to start on this basis. So, you-all do your research, I'll look at mine.

I'm comfortable that this procedure is appropriate, but I understand you've got a lot invested in this case and want to be careful, so that's fine.

(Doc. 97, p. 123). Later, this court addressed the issue again and defense counsel informed the court: "I think your solution was fine, Judge." (Doc. 97, p. 224). After the prosecutor also agreed, this court gave further explanation of what it proposed to do and then reported the results of its next contact with the juror:

THE COURT: All right. So I'm going to tell her that we'll pay here on a weekly basis to help her out financially. I'm going to tell her that I think I've already solved – I thought I had already solved the problem with her children. And then if there's some further question or anything, I'm going to come right back in here and discuss it with you.

* * *

(Short recess)

* * *

THE COURT: She makes about \$80 a day, and her boss told her she won't be paid during jury service. I explained to her that we pay \$40 a day, which is much better than the States does, but she still has a gap. So I suggested to her that she ask the boss if he could make up the difference between \$40 and what we pay. And she was not happy with

that outcome, but I told her basically we could not excuse her. I pointed out that the questionnaires they all filled out have, “Do you have any other inability that would keep you from serving as a juror,” and she didn’t say that, nor did she ask the people in jury selection to be excused. We get a lot of requests to be excused. So, I told her it was just too late. So that’s where we are.

(Doc. 97, pp. 224-25).

Olis argues that counsel’s performance was deficient in failing to object to the juror and that he was prejudiced by the omission because the juror made “an ‘open declaration of her inability to be fair[]’” (Doc. 315, pp. 89-93). Given the nature of the juror’s complaint, the context in which the juror expressed concern that she could not be fair to either side, that is, due to a matter unrelated to the facts of the case against Olis, this court’s determination that the issue of being able to pick her daughter up from school had been resolved, its explanation that it normally brings the juror into the courtroom if it believes the juror has been tainted, and this court’s solution to the juror’s complaint about being paid, it was not outside the bounds of reasonable professional judgment for defense counsel to fail to object to either the *ex parte* communications or the continued seating of the juror. In addition, Olis has failed to demonstrate that he was prejudiced by counsel’s omissions.

With regard to evaluating whether defense counsel’s performance was deficient, courts examine “whether the challenged representation fell below an

objective standard of reasonableness.” *United States v. Hall*, 455 F.3d 508 (5th Cir. 2006). “Judicial scrutiny of counsel’s performance must be ‘highly deferential.’” *Harrison v. Quarterman*, 496 F.3d 419, 424 (5th Cir. 2007) (quoting *Strickland*, 466 U.S. at 689). “Further, ‘strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments supports limitations on investigation.’” *Id.* (quoting *Strickland*, 466 U.S. at 690-91).

“[T]he Constitution ‘does not require a new trial every time a juror has been placed in a potentially compromising situation ... [because] it is virtually impossible to shield jurors from every contact or influence that may theoretically affect their vote.’” *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The Supreme Court has cautioned that “[w]hen an *ex parte* communication relates to some aspect of the trial, the trial judge should generally disclose the communication to counsel for all parties.” *Id.* at 119. The failure to do so, however, can be harmless and “[p]ost-trial hearings are adequately tailored to this task.” *Id.* at 119-120. In this case, the communication was disclosed to counsel for all parties and it did not relate to any aspect of the trial. Defense counsel’s performance was, therefore, not deficient in failing to object to the *ex parte*

communications.

In addition, Olis cannot demonstrate prejudice due to this omission. “[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.” *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citation omitted). “If a defendant is entitled under Rule 43 to attend certain ‘stages of the trial’ which do not take place in open court, the defendant or his counsel must assert that right at the time; they may not claim it for the first time on appeal from a sentence entered on a jury’s verdict of ‘guilty.’” *Id.* at 529. The facts of this case are of even less concern than those presented in *United States v. McDonald*, 933 F.2d 1519, 1523-1525 (10th Cir. 1991), where the court found no plain error based on the district court’s *ex parte* communication with a juror about her concern that someone in the case was a gang member.

With regard to Olis’s claim that the juror was biased, the Supreme Court has recognized that “[t]he safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge are not infallible” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Thus, “[d]ue process means a jury capable and willing to decide the case

solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Id.* at 217.

District courts have wide latitude in choosing appropriate means of investigating claims of juror bias, and “[a]mong the factors [the district court] should consider are the strength and seriousness of the allegations,” *United States v. White*, 116 F.3d 903, 929 (D.C.Cir. 1997) (per curiam). Interrupting a trial to question jurors about their fairness carries with it risks of placing undue emphasis on the challenged conduct, *see United States v. McVeigh*, 153 F.3d 1166, 1187 (10th Cir. 1998), and district courts, having first-hand observation of jurors and their demeanor, *see, e.g., United States v. Gartmon*, 146 F.3d 1015, 1029 (D.C.Cir. 1998), are in the best position to decide whether inappropriate conduct meriting an investigation has occurred, *see White*, 116 F.3d at 929. ...

United States v. Gibson, 353 F.3d 21, 26 (D.C. Cir. 2003).

Here, the juror’s statements that she would not be able to judge the case fairly because of her concern about childcare and lost income did not warrant more of an investigation than was conducted in this case. The juror had already indicated during voir dire that she could be fair and impartial when this court addressed the panel on that issue (Doc. 122, pp. 6-31). Even “a juror’s express doubt as to her own impartiality on *voir dire* does not necessarily entail a finding of actual bias.” *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001).

Olis cites *United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976), for the

proposition that the juror's statement that she would not be able to judge the case fairly is dispositive on the issue of her actual bias. The juror's comments in this case are distinguishable for several reasons. They were made after trial began and the juror had been selected, they did not involve a statement of bias in relation to the facts of the case and, importantly, this court addressed the juror's concerns that prompted the statement. *Cf. Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006) (state court's holding of no deficient performance by defense counsel in failing to challenge three jurors was reasonable where jurors said they could not fairly consider the testimony of a person with a prior conviction and their statements viewed in context of other statements made by the jurors).

Based on the information available to defense counsel by virtue of this court's communication of the juror's concerns to the parties, defense counsel's performance was not deficient for failing to object to the juror's continued presence on the jury on the ground of bias. The record reasonably supports this court's implied finding that the juror's familial concerns were not an impediment to her continuing to serve impartially on the jury. *See Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977) (in some cases judge's recollection of events at issue may enable him to summarily dismiss §2255 motion); and *cf. Suarez v. Bennett*, 171 Fed.Appx. 361 (2d Cir. 2006) (state court's decision to retain juror who had a family obligation on the evening of the

deliberations fell within the boundaries established by *Smith v. Phillips*, 455 U.S. ... [at] 217, ... with respect to impartiality, and *Early v. Packer*, 537 U.S. 3, 10-11 ... (2002) (per curiam), with respect to coercion.”).

For these same reasons, Olis also cannot establish the requisite degree of prejudice. *Hall*, 455 F.3d at 516 (to establish prejudice a defendant must show “that there is a reasonable probability that the result of the proceedings would have been different[,] thereby rendering the trial fundamentally unfair or unreliable.”) (citations and internal quotations omitted). This record refutes Olis’s claim that a Sixth Amendment violation occurred in relation to the continued seating and communications with the juror.

2. Failure to Object to Jury Instructions

Olis also contends that his attorneys’ performances were deficient, and that he was prejudiced, because they did not object to the jury instructions as they pertained to the wire fraud and mail fraud charges. He makes no challenge to counsels’ performances in relation to the securities fraud count.

Trial courts are afforded substantial latitude in describing the law to the jury; and, instructions are read as a whole to determine if they accurately reflect the law and cover the issues presented in the case. *United States v. Young*, 282 F.3d 349, 353 (5th Cir. 2002) (citations omitted). “Technical errors will be overlooked, and the

court's instructions will be affirmed, if the charge in its entirety presents the jury with a reasonably accurate picture of the law." *United States v. Webster*, 162 F.3d 308, 322 (5th Cir. 1998) (citation omitted).

a. Innocent Mailings

Olis contends in relation to the wire fraud counts that the filing of 10-Q and 10-K forms is required by law¹⁰ and therefore, under the holdings of *Parr v. United States*, 363 U.S. 370 (1960) and *United States v. Curry*, 681 F.2d 406, 412 (5th Cir. 1982), this court should have instructed the jury that, to convict, they had to find that those reports were false or fraudulent. The portion of the charge which Olis claims was erroneous, in context, reads as follows:

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the material transmitted by wire was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of the interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the interstate wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme.

¹⁰ Hecker testified that when they are filed, the SEC requires them to be filed electronically (Doc. 102, p. 49).

(Doc. 105, pp. 32-33) (emphasis added). This instruction was a correct statement of the law.

After *Parr*, the Supreme Court in *Schmuck v. United States*, 489 U.S. 705, 714-715 (1989), clarified that there is no “general rule that routine mailings that are innocent in themselves cannot supply the mailing element of the mail fraud offense [].” As the Court explained:

In *Parr* the Court specifically acknowledged that “innocent” mailings - ones that contain no false information - may supply the mailing element. 363 U.S. , at 390^[1] In other cases, the Court has found the elements of mail fraud to be satisfied where the mails have been routine. See, e.g., *Carpenter v. United States*, 484 U.S. 19 ... (1987) (mailing newspapers).

... The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time

Schmuck, 489 U.S. at 714-715 (emphasis added).

The Court of Appeals for the Fifth Circuit has long recognized that “the ‘innocent mailings’ exception does not apply where the legal requirement to make the mailings is triggered by the fraudulent scheme.” *United States v. Krenning*, 93 F.3d 1257, 1263-1264 (5th Cir. 1996) (citing *United States v. Bright*, 588 F.2d 504, 509-510 (5th Cir. 1979)); see also *United States v. Green*, 786 F.2d 247, 250 (7th Cir. 1986)

¹¹ In *Parr*, 363 U.S. at 390, the Court pointed out that the government had “soundly argue[d] that immunization from the ban of the statute is not effected by the ... fact that the things they caused to be mailed were ‘innocent in themselves,’ if their mailing was ‘a step in a plot.’ *Badders v. United States*[, 240 U.S. 391 (1916)]....”

(*Parr* “was based on the way the government presented the case, not solely on the legal requirement that the district mail tax notices.”)

In *Green*, 786 F.2d at 248-251, the defendant mailed truthful notices under legal command, but the court found the evidence sufficient where it supported the conclusion that the defendant “not only hatched a plan to defraud but also that ‘for the purpose of carrying out the scheme ... [Green] used the United States mails ... knowingly and with intent to extort money from those who responded to the notices.’” Here, the jury was charged that they had to find “the use of the interstate wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme”, thus removing the possibility of conviction based on an innocent mailing (Doc. 105, pp. 32-33).

Although the Court of Appeals in *Curry*, 681 F.2d at 412, 416, stated that, if the affidavits in the case before it were true and correct, they could not “under the holding of *Parr*, be regarded as mailed for the purpose of executing” the scheme, the actual holding in *Curry* was that the “evidence support[ed] a finding that Curry falsified the affidavits in order to conceal ... the true amounts collected ...” and the evidence was sufficient to support Curry’s convictions. Thus, to the extent Olis relies on *Curry* as authority for the proposition that the jury instruction in this case was

incorrect, that reliance is based on *obiter dictum*. Further, after *Curry*, the Court of Appeals for the Fifth Circuit has acknowledged that the Supreme Court in *Schmuck* placed a limitation on the *Parr* rule. *United States v. Caldwell*, 302 F.3d 399, 416 (5th Cir. 2002). “The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time.” *United States v. Busch*, 1992 WL 176488 (N.D.Ill. July 6, 1992) (unpublished) (citing *Schmuck*, 109 S.Ct. at 1449). “Legally required mailings can cause liability under § 1341 if the mailings were part of the means of carrying out the scheme to defraud.” *Id.* (citing *Green*, 786 F.2d at 249).

Although the financial statements had to be transmitted to the SEC via wire transfers, Hecker testified that, absent the fraud, there would have been no clean opinion blessing Dynegy’s financial statements and no acceptance of the financial statements by the SEC (Doc. 102, pp. 28-29, 40-49). *Cf. United States v. Ferguson*, 478 F.Supp.2d 220, 229 (D.Conn. Jan. 24, 2007) (mailings of AIG’s Form 10-K to the SEC and AIG’s Annual Reports to investors was similar to scheme in *Schmuck* because without these mailings perpetuating the false loss reserves figures from 2000 and 2001, the value of the company would decline - the fear of which allegedly motivated the fraudulent transaction)). The deception of Hecker which resulted in him filing a clean opinion in relation to Dynegy’s financial statements and their

acceptance by the SEC was therefore part of the means of carrying out the scheme to defraud. In addition, as discussed at pp. 44-57, *supra*, the characterization of Project Alpha in Dynegy's financial statements as cash flow from risk management activities was false within the meaning of the fraud statutes because it contained material omissions in relation to the hedges and tear-ups.

Because the wire fraud instructions were a correct statement of the law, counsels' performance was not deficient in failing to object to them. For the same reason, and because there were material omissions in the financial statements, Olis was not prejudiced because the omission of his attorneys did not render the outcome of the trial unreliable.

b. A Scheme to Defraud Includes a Scheme to Deprive

Olis also contends that his attorneys should have objected to the jury instructions as they pertained to the wire fraud and mail fraud counts on the ground that they allegedly expanded the scope of the statutes (Doc. 315, p. 98). He argues that, contrary to Supreme Court precedent construing 18 U.S.C. § 1341, the instructions incorrectly permitted the jury to convict based on a finding that the scheme was simply to deprive another of property and that the jury should have been required to find that the scheme was to obtain money or property from a victim (Doc. 315, pp. 99-100).

When § 1341 was first enacted in 1872, it only proscribed use of the mails to further any scheme or artifice to defraud. *Cleveland v. United States*, 531 U.S. 12, 19 (2000). “In 1896, th[e] [Supreme] Court held in *Durland v. United States*, 161 U.S. 306, 313 ..., that the statute covered fraud not only by ‘representations as to the past or present,’ but also by ‘suggestions and promises to the future.’” *Id.* “In 1909, Congress amended § 1341 to add after ‘any scheme or artifice to defraud’ the phrase ‘or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.’” *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 357 (1987)). “[T]he 1909 amendment ‘codified the holding of *Durland* ..., and ‘simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property’.” *Id.* “[T]he 1909 amendment signaled no intent by Congress to ‘depart[t] from [the] common understanding’ that ‘the words to defraud commonly refer to wronging one in his property rights’” *Id.* (citation and some internal quotations omitted).

With regard to Olis’s claim that the jury instructions erroneously failed to track the statutory language and thereby broadened it, the jury instructions on the wire fraud and the mail fraud instructions were similarly worded (Doc. 105, pp. 29-33). Both required the jury to find that Olis knowingly created a scheme to defraud

“substantially as described in the indictment”, that he acted with specific intent to defraud and that the scheme to defraud employed false material representations (Doc. 105, pp. 29-32). Both included the following additional definitions with regard to the elements of the respective offenses:

A “scheme to defraud” includes any scheme to deprive another of money or property by means of a false or fraudulent pretense, representation or promise.

An “intent to defraud” means an intent to deceive or cheat someone.

A representation is false if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be false when it constitutes a half truth or effectively omits or conceals a material fact, provided it is made with intent to defraud.

(Doc. 105, pp. 30, 32) (emphasis added).

Olis argues that the instruction was erroneous because it permitted the jury to conclude that a scheme to defraud could include a scheme to deprive another of money or property which, he contends, is a lesser requirement than the statutory language defining the offenses as including a scheme for obtaining money or property by means of false or fraudulent pretenses, representations or promises. He asserts that whether the scheme was to obtain money or property was critical to the case because there was allegedly no evidence that he or his coconspirators intended to obtain money or property.

The portion of the instruction that Olis now complains of was a correct statement of the law. In fact, it is almost a direct quotation from the Supreme Court's decision in *Carpenter v. United States*, 484 U.S. 19, 27 (1987):

Sections 1341 and 1343 reach any scheme *to deprive* another of money or property by means of false or fraudulent pretenses, representations or promises. As we observed last Term in *McNally*, the words “to defraud” in the mail fraud statute have the “common understanding” of “‘wrongdoing one in his property rights by dishonest methods or schemes,’ and ‘usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.’” The concept of “fraud” includes the act of embezzlement, which is “‘the fraudulent appropriation to one’s own use of the money or goods entrusted to one’s care by another.’”

Id. at 27 (emphasis added).

In addition, when viewed as a whole, the instruction required the jury to find a scheme to defraud “substantially as described in the indictment” which alleged a scheme to defraud and to obtain money and property. The substantive wire and mail fraud counts charged, in pertinent part, that Olis and his codefendants “knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of material false and fraudulent pretenses, representations and promises” (Doc. 1, pp. 18, 19). Those counts also incorporated by reference the allegations in the conspiracy count which, in its introduction, alleged that Olis “was employed by Dynegy, Inc. as Senior Director of Texas Planning and International

during 1999, 2000, and 2001 and as Vice-President of Finance during 2002.” (Doc. 1, p. 1). It alleged that “Dynergy, Inc. was a publicly-traded corporation incorporated under the laws of the State of Illinois ... whose stock was: (1) registered and issued under Section 12 of the Securities Exchange Act of 1934 and (2) publicly traded on the New York Stock Exchange, a national securities exchange.” (Doc. 1, p. 2). It alleged that “Dynergy Inc. had shareholders located throughout the United States” (Doc. 1, p. 2). The indictment alleged that “Dynergy ... was engaged in a variety of ... business activities, including ‘energy trading’. ‘Energy trading’ refers to the purchase and sale of contracts for the delivery of energy-related commodities. ...” (Doc. 1, p. 2). Other descriptions of the scheme included the following:

... The investing public was entitled to, and did, rely upon the information in Dynergy’s financial statements in making investment decisions, including the decision whether to buy or sell Dynergy stock.

(Doc. 1, p. 3). The indictment also described events that occurred prior to Project Alpha that indicated Dynergy’s cost of borrowing money was at risk of increasing due to its publicly filed financial statements regarding its earnings:

... Dynergy’s activities and financial statements were the subject of scrutiny by various credit analysts ... (collectively ... referred to as the ‘Rating Agencies’), which assign credit ratings to energy companies and then disclose these rating to lenders, market and securities analysts, and the public. Credit ratings affect a company’s cost of borrowing money. Credit ratings assigned by Ratings Agencies are based primarily on two ratios: (1) the ratio between the company’s Funds From Operations and

its Debt and (2) the ratio between the company's Funds from Operations to its Interest (together, 'the Ratings Ratios'). The amounts assigned to Funds From Operations (which includes 'operating cash flow(s)'), Interest and Debt are obtained by the Rating Agencies from the information on the financial statements the company provides to the SEC and to the public. Therefore, as a company's 'operating cash flow(s)' change(s), so do the Ratings Ratios.

(Doc. 1, pp. 3-4). The indictment further alleged:

... On September 20, 2000, ... the Wall Street Journal, in essence, was questioning whether Dynegy's earnings profile justified Dynegy's stock price.

(Doc. 1, p. 5).

... The Defendants ... decided to respond to and fend off the Wall Street Journal's criticism by improving the "risk-management activities" line of the "cash flows from operating activities" section of the cash flow statement in Dynegy's quarterly (Forms 10Q) and annual (Form 10-K) reports filed with the SEC. ...

(Doc. 1, p. 7, emphasis in original). The scheme to defraud alleged in the indictment was:

... a plan to borrow money: that is, to engage in a "financing activity" but make it appear that the borrowed funds were cash flow from Dynegy's "risk-management activities" to create the false impression and illusion that Dynegy's cash flows from risk-management activities were much improved and that its earnings were of sufficient quality to justify, maintain and increase Dynegy's stock price, and to avoid the potentially adverse effect of a downgrade of Dynegy's credit rating.

(Doc. 1, p. 8) (emphasis added). It alleged:

... the Defendants ... caused Dynegy's cash flow from operations, and

more specifically, from Risk-management activities, to be materially overstated in the second, third, and fourth quarters of 2001, and willfully omitted material facts necessary to make the statements in Dynegey's financial statements, in the light of the circumstances in which they were made, not misleading, in documents filed with the SEC and intended for consideration by the Rating Agencies, lenders, market and securities analysts, and the investing public in connection with the purchase and sale of stock and securities of Dynegey, Inc.

(Doc. 1, p. 12). The scheme alleged was therefore a scheme for Dynegey, through Olis and his coconspirators, to obtain money or property by avoiding an increase in its cost of borrowing in relation to its energy trading activities. *See United States v. Hanson*, 161 F.3d 896, 900-901 (5th Cir. 1998) (jury could conclude defendant profited or hoped to profit from fraudulent scheme from evidence he was able to save interest and reduce the cost on his house construction loan and was able to obtain permanent financing without making a down payment). The scheme also was intended to deprive others of money or property by inflating the value of Dynegey's stock, which placed investors at risk of spending too much money for the stock. Olis has failed to establish any error in relation to this court's jury instructions relating to the wire and mail fraud charges. Counsel's performance was therefore not deficient and the complained of omission did not render the result of the trial unreliable.

In addition, Olis's challenge to the conspiracy count on the ground that the jury was allegedly not properly instructed on the mail and wire fraud objects fails to

recognize that this court described the charged offense as an agreement “[t]o knowingly devise and intend to devise a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, representations, and promises ... in violation of Title 18, United States Code, Section 1341 ...[and] 1343 ...” Doc. 105, pp. 22-23). Olis also makes no direct challenge to this court’s instructions on count two, which charged the substantive offense of securities fraud (Doc. 1, pp. 16-17). In those instructions, this court instructed the jury that “[a] ‘device, scheme or artifice to defraud’ as used in these instructions, however, means the forming of some invention, contrivance, plan, or design to trick or to deceive in order to obtain money or something of value.” (Doc. 105, p. 29).

Olis directs this court to *United States v. Castaneda*, 16 F.3d 1504, 1511 (9th Cir. 1994), as standing for the proposition that if a conspiracy conviction is reversed, the convictions on the substantive offenses must be reversed unless there is sufficient evidence to support the defendants’ convictions as an aider and abettor or as a principal (Doc. 315, p. 101). He then argues that his conviction on the securities count could only rest on his participation in the conspiracy because this court’s “instructions permitted the jury to convict Olis of the various substantive offenses based solely upon *Pinkerton* liability.” (Doc. 315, p. 101). This statement is factually incorrect and refuted by the record, which reflects that, before instructing the jury on

*Pinkerton*¹², this court gave the jury the Fifth Circuit’s pattern instruction on aiding and abetting (Doc. 105, pp. 33-34). SEE FIFTH CIRCUIT PATTERN INSTRUCTIONS, CRIMINAL NO. 2.06 (2001).

3. Failure to Object to Hecker as an Expert

Olis contends that, if the United States attempts to argue that Hecker provided expert testimony that the accounting treatment of Project Alpha was improper, that he was denied his right to effective assistance of counsel due to counsel’s failure to object to Hecker on the ground that he had not been qualified as an expert and that he had not received pretrial notice of his expert testimony. The United States did not, however, rely on Hecker as an expert on the applicability of GAAP to Project Alpha. Rather, Hecker testified as a fact witness regarding his role as independent auditor in relation to Dynegy’s financial statements and particularly in relation to the accounting treatment of Project Alpha. Although some discussion of GAAP by Hecker was admitted into evidence in order to explain his testimony in relation to the historical events of this case, that discussion did not result in him testifying as an expert. As Olis observed in his supporting Memorandum, “Hecker – a witness to relevant facts in this case – could properly testify as a lay witness to his ‘personal interactions’ with Olis or his purported coconspirators[.]” (Doc. 315, p. 103). *See also Teen-Ed, Inc. v.*

¹² *Pinkerton v. United States*, 328 U.S. 640 (1946).

Kimball Intern., Inc., 620 F.2d 399, 403 (3d Cir. 1980) (“The fact that Zeitz might have been able to qualify as an expert on the use of accepted accounting principles in the calculation of business profits should not have prevented his testifying on the basis of his knowledge of appellant’s records about how lost profits could be calculated from the data contained therein.”) Counsel’s performance in failing to object was not deficient and Olis cannot demonstrate he was prejudiced by the complained of omission.

I. Motion for Summary Denial

“A motion to vacate judgment and sentence filed pursuant to 28 U.S.C. § 2255 does not automatically mandate a hearing.” *United States v. Hughes*, 635 F.2d 449, 451 (5th Cir. 1981). A district court’s decision to deny relief under § 2255 without a hearing is reviewed for an abuse of discretion. *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998).

“Section 2255 permits the district court to dispense with a hearing if ‘the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ...’” *United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990) (emphasis omitted). That section “requires only conclusive evidence - and not necessarily direct evidence - that a defendant is entitled to no relief under § 2255

before the district court can deny the motion without a hearing.” *Id.*¹³

Rule 4 of the Rules Governing Section 2255 Proceedings provides, in pertinent part: “If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.” Rule 4(b), Rules Governing Section 2255 Proceedings (emphasis added). The commentary following Rule 4(b) directs the reader to the commentary following Rule 4 of the Rules Governing Section 2254 Cases, which provides:

28 U.S.C. § 2243 requires that the writ shall be awarded, or an order to show cause issued, “unless it appears from the application that the applicant or person detained is not entitled thereto.” Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state opinions. The judge may order any of these items for his consideration if they are not included with the petition. ...

Rule 4, Rule Governing Section 2254 Cases - Advisory Committee Notes.

“[T]he district court is entitled to consider all the circumstances in the record in determining whether a hearing should be afforded.” *Gallo-Vasquez v. United States*, 402 F.3d 793, 797 (7th Cir. 2005) (citation omitted). The district judge may “employ a variety of measures in an effort to avoid the need for an evidentiary

¹³ In *Drummond*, 910 F.2d at 285, the appellate court concluded that where there was a clear inference from the record that the defendant was competent it would be a waste of judicial resources to require a hearing on the issue of competency.

hearing.” *Allison*, 431 U.S. at 81 (explaining similarly worded Rules Governing Habeas Cases). If a response to the Motion to Vacate is ordered, that response, along with the records of the case, may provide sufficient information for the district judge to dispose of the allegations without a hearing. *Franklin v. United States*, 589 F.2d 192, 193 (5th Cir. 1979); *see also Broadwater v. United States*, 292 F.3d 1302, 1304 (11th Cir. 2002) (“The district court, by its own action or by requiring a response from the government, may be able to gain sufficient information to dispose of appellant’s allegations without a hearing.”) (quoting *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978)).

Olis has filed various exhibits in support of his Motion to Vacate pursuant to 28 U.S.C. § 2255, including testimony from the jury trial in *Yates v. Dynegy*, 2005-37892, 127th Judicial District, Harris County, Texas. The United States, in its Answer, has incorporated by reference the attachments it previously filed in response to Olis’s Motion for Discovery (Doc. 336), that is, the portion of the United States’s brief on direct appeal that sets forth the facts proved at trial in the underlying criminal case, with record references (Doc. 336: Appendix A), the United States’ Exhibit List in the underlying criminal case (Doc. 336: Appendix B) and the Motion to Supplement, with attachment, filed by Olis on direct appeal in this case (Doc. 336: Appendix C).

As the Court explained in *Machibroda v. United States*, 368 U.S. 487, 495-496 (1962), the language in § 2255 which addresses when a hearing is required “...does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner.” Rule 7 of the Rules Governing 2255 provides:

(a) In General. If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.

(b) Types of Materials. The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

Rule 7, Rules Governing Section 2255 Proceedings. The Advisory Committee Notes following Rule 7 direct the reader to the Notes following Rule 7 of the Rules Governing Section 2254 Cases. Rule 7, Rules Governing Section 2255 Proceedings. That commentary explains that the purpose behind allowing the judge to expand the record “is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing.” Rule 7, Rules Governing Section 2254 Cases.¹⁴ As the Supreme Court has observed

¹⁴ “An expanded record may also be helpful when an evidentiary hearing is ordered.” *Id.*

in relation to a claim of an involuntary plea, there may be cases in which expansion of the record pursuant to Rule 7 “will provide ‘evidence against a petitioner’s extra-record contentions ... so overwhelming as to justify a conclusion that an (allegation of a dishonored plea agreement) does not raise a substantial issue of fact.’” *Allison*, 431 U.S. at 81 n.25 (citation omitted).

In addition to the Rules Governing Section 2255 Proceedings, the Supreme Court has recognized that, “[a]s in civil cases generally, there exists a procedure whose purpose is to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence. That procedure is, of course, the motion for summary judgment.” *Allison*, 431 U.S. at 81-82 (citing Fed.RulesCiv.Proc.56(e),(f)). “Summary judgment is proper when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *United States v. Corpus*, 491 F.3d 205, 209 (5th Cir. 2007) (citing Fed.R.Civ.P. 56(c)). “A genuine issue of material fact exists ‘if the evidence is such that a reasonable jury could return a verdict for the non-moving party.’” *United States v. Smith*, 513 F.3d 228, 230 (5th Cir. 2008) (citation omitted).

The record in this case is ripe for Summary Denial. *See* Rule 8, Rules Governing Section 2255 (“If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted

under Rule 7 to determine whether an evidentiary hearing is warranted.”) There is no requirement of an evidentiary hearing if the district court determines as a matter of law that the petitioner cannot meet the standard of showing cause and prejudice. *Jones v. Whitley*, 938 F.2d 536 (5th Cir. 1991) (citing *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)); *High v. Head*, 209 F.3d 1257, 1263 (11th Cir. 2000) (same). Also, “[i]f, on the record, it can be concluded as a matter of law that a defendant cannot prove an element necessary to establish an ineffective assistance of counsel claim, then an evidentiary hearing is not necessary.” *United States v. Urrego*, 127 F.3d 35 * 2 (5th Cir. 1997) (unpublished) (citation omitted); *see also United States v. Weaver*, 234 F.3d 42, 46 (D.C. Cir. 2000) (“When a § 2255 motion involves ineffective assistance of counsel, a hearing is not required if the district court determines that the ‘alleged deficiencies of counsel did not prejudice the defendant.’”) (citation omitted).

As discussed in relation to Olis’s first and second claims, the record and files of this case, including Olis’s submissions and his previous submission to the Court of Appeals, conclusively show that Olis procedurally defaulted these claims by failing to raise them at trial or on appeal. Even if his claims were not procedurally defaulted, as previously detailed in response to each of these claims, as well as in response to his ineffective assistance of counsel claims, the record and files of the case conclusively show that Olis is not entitled to relief on any of the grounds urged.

J. Conclusion

Based on the foregoing, the United States moves this court for an order summarily denying Olis's Motion to Vacate pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

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K. Certificate of Service

I, Kathlyn G. Snyder, Assistant United States Attorney, certify that a copy of the United States' Answer to Motion to Vacate, Motion for Summary Denial and Supporting Memorandum of Law has been served by mailing it on March 31, 2008, to:

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