No. 08-1394

IN THE
Supreme Court of the United States

JEFFREY K. SKILLING,
Petitioner,

v.

UNITED STATES.
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF OF TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION AND THE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas, non-profit corporation with a membership of more than 2900 attorneys practicing in the State of Texas. TCDLA was organized more than 37 years ago with the following purposes: (1) to protect and ensure by rule of law those individual rights guaranteed by the Texas and United States Constitutions in criminal cases, (2) to resist efforts to curtail such rights, (3) to encourage cooperation between lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and (4) through such cooperation, education, and assistance to promote justice and the common good.

The Harris County Criminal Lawyers Association (HCCLA) was organized in 1970 and has over 500 members from the local bar. Its mission is to assist, support, and protect the criminal defense practitioner in the zealous defense of individuals and their constitutional rights; and further to educate and inform the general public regarding the administration of criminal justice and the need for an independent, ethical, and professional criminal defense bar.

Amici will address solely the question of pretrial publicity and the social science research supporting

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

Petitioner's position on this critical question. Such research uniformly demonstrates that voir dire and judicial instruction simply cannot cure the very type of negative publicity that attended Petitioner's trial. That these measures are curative where prejudice is obvious proves to be a legal fiction – all the more so in Texas, where opinions, once formed, tend to be firmly held. *Amici* respectfully submit that they are uniquely positioned to address this issue as daily practitioners in the criminal courts of the State and County where Petitioner was tried. *Amici* join Petitioner in urging this Court to reverse Petitioner's conviction and to align the law in this area with accepted social science and good, common sense.

SUMMARY OF THE ARGUMENT

Social science research validates the principle that the prejudicial effects of inflammatory pretrial publicity cannot be purged through ordinary trial procedures such as voir dire and judicial instruction. The empirical evidence shows that under conditions of presumed prejudice, jurors' statements of impartiality cannot be believed, judicial questioning and admonitions are ineffective if not counter-productive, and community pressure to convict is nearly impossible to overcome.

In this case, the effects of adverse pretrial publicity were clearly reflected in the overwhelming evidence of bias in the venire. Under such circumstances, even a careful and thorough voir dire could not have negated the hostility towards Petitioner that infected the venire and ultimately the jury. Further, the voir dire that was actually conducted by the District Court was wholly inadequate to the task of ferreting out bias among the prospective jurors, and resulted in the empanelling of

a jury tainted with prejudice. The record, coupled with empirical research, shows that the presumption of prejudice that arose in this case could not have been and was not rebutted.

ARGUMENT

This Court has recognized that a presumption of prejudice arises when pretrial publicity is pervasive within a community. In this circumstance, a "juror's claims that they can be impartial should not be believed," and voir dire is an inadequate curative. *Mu'Min* v. *Virginia*, 500 U.S. 415, 429-30 (1991). Research from social psychology confirms fundamental weaknesses in the process of voir dire that have caused several prominent scholars to call into question its effectiveness as a general remedy for pretrial publicity, much less a remedy in cases (like this one) where the prejudice from that publicity is extreme.

I. WHERE PREJUDICE FROM PRETRIAL PUBLICITY IS PRESUMED, VOIR DIRE CANNOT ENSURE A DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL JURY.

Empirical research into jury decision-making confirms the insight that the traditional "indicia of impartiality" are of little use where the "general atmosphere in the community or courtroom is sufficiently inflammatory." *Murphy* v. *Florida*, 421 U.S. 794, 802 (1975).

A. Empirical research in social psychology demonstrates that juror assertions of impartiality are untrustworthy.

Studies show that jurors are unable to discount pretrial publicity despite their statements to the

contrary. According to one experimental study, jurors who were exposed to highly prejudicial pretrial publicity and claimed that they could disregard it were much *more* likely to convict than jurors who were not exposed.[2] Jurors who are able to recall details of pretrial publicity are also more likely to be favorably disposed to the prosecution, but no less likely to feel that they can hear the evidence with an open mind.[3] In another study, jurors who stated that they could disregard damaging pretrial publicity were as likely to convict as jurors who admitted to doubting their ability to be impartial—illustrating that self-reports of bias are both inaccurate and unreliable.[4] Jurors' assertions of impartiality must therefore be viewed with skepticism—as this Court maintained, for example, in *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961) ("No doubt each juror was sincere

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[2] Stanley Sue, Ronald E. Smith & George Pedroza, *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 Psychol. Reps. 1299, 1301 (1975) (53% of jurors exposed to damaging pretrial publicity voted to convict, despite claims that they had not been biased by publicity, versus 23% of jurors not exposed to pretrial publicity.)

[3] *See* Amy L. Otto, Steven D. Penrod, & Hedy R. Dexter, *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 L. & Hum. Behav. 453, 455 (1994)(describing study that showed that "pretrial knowledge of the case was related to perceived guilt of the defendant," but "subjects' knowledge of the case was not correlated with their reported ability to be impartial."); *see also* Rita Simon & Thomas Eimermann, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury*, 48 Journalism Quarterly 343, 344 (1991).

[4] Norbert Kerr, Geoffrey Kramer, John Carroll & James Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 Am. U. L. Rev. 665, 690 (1991)(jurors who claimed that could be impartial after being exposed to pretrial publicity were just as likely to convict as jurors who doubted their ability to be impartial).

when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father.") See also *Delaney* v. *United States*, 199 F.2d 107, 113 (1st Cir. 1952) ("One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity.") (cited favorably in *Irvin*, 366 U.S. at 727 and *Sheppard* v. *Maxwell*, 384 U.S. 333, 354 (1966)); *Groppi* v. *Wisconsin*, 400 U.S. 505, 510 (1971) ("Mr. Justice Holmes stated no more than a commonplace when, two generations ago, he noted that 'any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.'") (quoting *Frank* v. *Mangum*, 237 U.S. 309, 349 (dissenting opinion)).

Jurors' inability to disregard prejudicial pretrial publicity is consistent with the phenomenon of the *self-serving bias*, or the tendency for people to perceive their own information-processing capabilities as better than average.[5] This bias explains why people who have been exposed to pretrial publicity still believe that they could serve as fair and impartial jurors, while assuming that similarly situated community members could not.[6]

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[5] Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 Psych. Pub. Pol'y & L. 428, 449 (1997).

[6] Studebaker & Penrod, *supra* note 5 at 449 (citing Simon & Eimmerman, *supra* note 3).

Jurors also often withhold information or dissemble during voir dire. Justice O'Connor's observation in *Smith* v. *Phillips*, that a "juror may have an interest in concealing his own bias" or "may be unaware of it," is borne out by empirical research. 455 U.S. 209, 221-22 (1982). Several studies have shown that jurors are likely to exhibit either conscious or unconscious dishonesty during open court questioning.[7] This is unsurprising, as "practically speaking[] it is rare to find a juror willing to openly and honestly discuss his or her beliefs and biases."[8] Juror responses during voir dire are influenced by numerous social factors—for example, the need to conform to a group dynamic[9] or the desire to present themselves as "good citizens" and, as a result, minimize personal bias.[10] In particular, jurors are much less candid when they are questioned by

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[7] Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 Am. U. L. Rev. 631, 650 (1991); Richard Seltzer, Mark A. Venuti & Grace M. Lopes, *Juror Honesty During Voir Dire*, 19 J. Crim. Justice 451, 452, 460 (1991)(citing studies, and concluding from independent study of jurors in District of Columbia that "to a significant degree, [] jurors withhold information or lie during voir dire."); Dale Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503, 506 (1965)("The data contain numerous instances of conscious concealment and lack of candor.").

[8] Minow & Cate, *supra* note 7, at 650 n.123.

[9] Minow & Cate, *supra* note 7, at 650 n.123 (citing David Suggs & Bruce D. Sales, *Juror Self-Disclosure in Voir Dire: A Social Science Analysis*, 56 Ind. L. J. 245, 259 (1981)).

[10] Edward J. Bronson, Discussion Paper Series No. 89-1, The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect 28-30 (June, 1989) (presented at the 25th Anniversary of Law and Society Association) (published in the California State University, Chico Discussion Paper Series (1989)).

judges rather than attorneys—often out of a response to authority and a desire to provide answers they believe the judge wants to hear.[11] The effect of juror dishonesty is enhanced when the voir dire is conducted in open court, before other jurors, rather than privately and individually.[12] The inclination of jurors to distort their answers to questions posed during voir dire "cut[s] across all age, income, and occupational groups."[13] These risks are particularly acute in high-profile cases where jurors may believe they can achieve notoriety based on their jury service, or they wish to punish a particular defendant; such "stealth" jurors purposefully dissemble to get seated on a jury.[14]

B. Judicial instructions to ignore pretrial publicity and to judge the case fairly and impartially are ineffective.

Judicial admonitions to ignore pretrial publicity—like those issued by the District Court in this case—are commonly regarded as sufficient to counter the damaging effects of that publicity. In reality, instructions from a judge to ignore pretrial publicity in high-profile cases do not affect verdicts or the propensity of jurors to contest references to

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[11] Susan E. Jones, *Judge versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & Hum. Behav. 131, 143-45 (1987); Minow & Cate, *supra* note 7 at 651 (citing Neal Bush, *The Case for Expansive Voir Dire*, 2 L. & Psychol. Rev. 9, 17 (1976)).

[12] Bronson, *supra* note 10, at 28-30.

[13] Jones, *supra* note 11, at 145.

[14] Jerry Markon, *Jurors with Hidden Agendas*, Wall St. J., July 31, 2001.

pretrial publicity during jury deliberation.[15] In a study of whether voir dire could work effectively when nearly everyone in the community had been exposed to pretrial publicity, the authors concluded that "reliance on standard cautionary instructions as a remedy for prejudicial pretrial publicity appears to be unwarranted."[16]

Indeed, judicial admonitions to ignore pretrial publicity may actually accomplish the reverse—*heightening* the effect of pretrial publicity by reinforcing the very bias they counsel against.[17] Researchers have suggested that admonitions designed to remove bias in fact spur reactance or draw jurors' attention to the material they should be disregarding.[18] The study described above found that, "with respect to jurors' evaluation of the defendant, such instructions were counter-productive, actually strengthening the impact of factual publicity."[19] This effect is particularly pronounced with respect to emotionally arousing publicity, where

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[15] *See* Geoffrey P. Kramer, Norbert L. Kerr, & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 L. & Hum. Behav. 409, 430 (1990).

[16] Kramer et al., *supra* note 15, at 430. *See also* Minow & Cate, *supra* note 7, at 648 ("there has not been a single study which indicates that judicial instructions limit the effects of jury bias."); Kerr et al., *supra* note 4, at 675 ("Judicial admonitions had no effect on individual jurors or jury verdicts.")

[17] Kramer et al.. *supra* note 15, at 430; *see also* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psych., Pub. Pol. & L. 677, 691 (2000)(discussing studies).

[18] Kramer et al., *supra* note 15, at 412 (citing studies).

[19] Kramer et al., *supra* note 15, at 430.

the impact is "primarily affective and cannot be deliberately disregarded."[20]

Justice Jackson recognized half a century ago that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury. . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (internal citations omitted). Nowhere is this more true than under circumstances of presumed prejudice, where a barrage of constant and hostile media coverage is likely to make judicial instructions ineffective at best, and counter-productive at worst.

C. Studies of the effects of voir dire have shown it to be generally incapable of rooting out juror prejudice.

There is also substantial evidence that voir dire generally cannot distinguish between jurors who are prejudiced by pretrial publicity and those who are not. Studies confirm that voir dire is "grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'"[21]

The propensity of jurors to convict does not vary between jurors who survive voir dire and those who are excused for prejudice. One prominent experiment found that "[c]hallenged jurors exposed to the publicity were just as likely to convict as those not challenged, but both were more likely to convict than those never exposed to pretrial publicity," and that, as a result, "the net effect of judges', defense

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[20] Kramer et al., *supra* note 15, at 412 (citing studies).

[21] Broeder, *supra* note 7, at 505.

attorneys', and prosecutors' combined challenges was effectively *nil*."[22] Notably, this proposition has been shown to be true even where voir dire is extensive.[23]

Indeed, querying jurors about their exposure to pretrial publicity actually increases the prejudicial effects of that publicity.[24] In other words, the empirical evidence suggests that the very mechanism of voir dire may actually undermine its fundamental purpose.

In short, scholars of pretrial publicity broadly agree that voir dire is a woefully inadequate remedy for pretrial prejudice, and fails in its core function of filtering biased jurors from unbiased ones. A meta-analysis conducted of several pretrial publicity studies concluded that expanded voir dire—along with other remedies to pretrial publicity such as continuances, judicial instructions, trial evidence and jury deliberation—"do[es] not provide an effective balance against the weight of [pretrial publicity]." It noted further that "even the smallest effect contradicts our legal presumption of innocence."[25] This problem is exacerbated under circumstances of extremely widespread and entrenched adverse publicity—circumstances plainly present in this case.

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[22] Kerr et al., *supra* note 4, at 687-88 (emphasis added).

[23] Hedy R. Dexter, Brian L. Cutler & Gary Moran, *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. App. Soc. Psych. 819, 830 (1992). To be sure, the voir dire in the instant case was far from extensive. *See infra* Part II(B)(2).

[24] Lieberman & Arndt, *supra* note 17, at 682 (citing study).

[25] Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero, & Belia Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 L. & Hum. Behav. 219, 229 (1992).

As the author of one study demonstrating the ineffectiveness of voir dire has commented, "[I]t is not disturbing that voir dire accomplishes so little. What is disturbing is that we expect voir dire to accomplish so much."[26]

D. When there is strong community reaction in favor of a particular outcome, jurors feel compelled to reach that result.

Empirical evidence on the subject of jury bias confirms the effect of community pressure on jury verdicts.[27] Defined as 'conformity prejudice,' these studies show that "when the juror perceives that there is such strong community reaction in favor of a particular outcome of a trial [ ] he or she is likely to be influenced in reaching a verdict consistent with the perceived community feelings rather than an impartial evaluation of the trial evidence."[28] In high-profile cases, the media often not only reports details of the incident, but also responses from the community, "creat[ing] perceptions that there is a community consensus about what the verdict should be."[29] If jurors believe that there is consensus as to

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[26] Kerr et al., *supra* note 4, at 699.

[27] *See* Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 L. & Hum. Behav. 73 (2002).

[28] Vidmar, *supra* note 27, at 81-82; *see also*, Neil Vidmar, *Trial by Jury Involving Persons Accused of Terrorism, in Law and Psychology* (Freeman ed. 2006), *available at* http://ssrn.com/abstract=934792 (examining juror responses on a jury questionnaire and discovering that "jurors were cognizant that a not guilty verdict might be met with outrage by some of their friends, family and co-workers").

[29] Vidmar, *supra* note 27, at 86.

the correct verdict, and that there are expectations that the correct verdict will be reached, jurors will feel pressure to reach that verdict before reentering the community once the trial ends.

This principle was illustrated by the trial of the individuals accused of the Oklahoma City bombing. The District Court in that case recognized that community pressure can adversely affect the ability of individual jurors to act impartially when "there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience." *United States* v. *McVeigh*, 918 F.Supp. 1467, 1473 (W.D. Okla. 1996). It then granted the defendant's motion for change of venue, reasoning that "the entire state had become a unified community, sharing the emotional trauma of those who had been directly victimized." *U.S.* v. *McVeigh,* 955 F.Supp. 1281, 1282 (D. Colo. 1997). When there is a strong community reaction in favor of a particular outcome—as there was in the Oklahoma case, and as there also was in this case—jurors feel compelled to reach that result, notwithstanding their promises to the contrary.

II. THE VOIR DIRE IN THIS CASE WAS INADEQUATE TO CURE THE PREJUDICE FROM PRETRIAL PUBLICITY.

While the empirical evidence exposes concerns that might arise in theory in many cases, the point is not that publicity is always an insurmountable problem or that voir dire can never operate effectively when executed properly. In the vast majority of cases, a well-executed voir dire can and will identify impartial jurors, and other standard trial protections

will ensure jurors' fairness during trial.[30] What the evidence does suggest is that in very close cases, courts should err on the side of transferring venue under Rule 21. And what the evidence shows beyond any question is that when community passion and publicity is so pervasive and intense, voir dire simply will not provide adequate protection no matter how well it is executed, and that venue transfer is the only choice due process permits. In this case, the community fervor and publicity rose to such a fever pitch, rendering any voir dire insufficient to ensure a fair trial. Moreover, the voir dire conducted in this case was so inadequate to combat the adverse pretrial publicity as to be an abuse of discretion.

A. The pretrial publicity in this case was pervasive and vituperative.

The collapse of Enron had a devastating effect on the community—thousands of Houstonians lost their jobs and retirement savings and the bankruptcy of the company resulted in catastrophic losses for businesses across the city. *United States* v. *Skilling*, 554 F.3d 529, 560 (5th Cir. 2009). Enron's bankruptcy engendered so many victims that media outlets in Houston ran nearly 100 stories from 2001-2004 focusing solely on the victims' stories. Pet. Br. 5. In the media, outraged Houstonians demanded a witch hunt, compared Petitioner to Hitler, Stalin, a child molester or terrorist, and labeled him a 'pig,' 'snake,' 'crook,' the 'equivalent [to] an axe murder.' Pet. Br. 6. The media portrayed Petitioner as obviously guilty and declared that any claim of

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[30] *See, e.g., United States* v. *Campa*, 459 F.3d 1121, 1147 (2006)(concluding that voir dire in high-profile case was "model" one where district court conducted "meticulous two-phase voir dire stretching over seven days.")

innocence on his part was 'ludicrous' and part of a 'fantasy world.' Pet. Br. 6. This "reportage" was especially pernicious because social science research shows that information from "neutral" sources such as newspapers have a greater prejudicial effect than other sources.[31]

The responses to questionnaires sent by the District Court to prospective jurors mirrored the sentiments of the media. In the questionnaires, Houston citizens chastised Petitioner as "the devil," "a high class crook," and "guilty as hell." Pet. Cert. Pet. 9. Potential jurors also stated that Petitioner "should be stripped of all [his] assets" and should "spend the rest of [his life] in jail" and "be reduced to having to beg on the corner and live under a bridge." Pet. Cert. Pet. 9.

The number of people in Houston affected by Enron's collapse and the resulting media blitzkrieg (the only appropriate World War II-era metaphor here) thus reinforced the jury's desire to convict.[32] One of the veniremembers selected to sit on the jury

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[31] Christina A. Studebaker, Jennifer K. Robbenolt, Maithilee K. Pathak-Sharma & Steven D. Penrod, *Assessing Pretrial Publicity: Integrating Conent-Analytic Effects*, 24 L. & Hum. Behav. 317, 326 (2000).

[32] The size of the community in this case is irrelevant in considering the impact of the prejudicial pretrial publicity. One scholar of the effects of pretrial publicity on jurors has noted, "*in a particular[ly] high-profile case*, a large community may react very much like a small community." Edward J. Bronson, California State University, Chico Discussion Paper Series, *Size of the Community As a Factor in Change of Venue: When a Large Community Becomes Small for Purposes of Venue* (1999). One of the factors that causes a large community to behave in the same manner as a small one is the presence of a "dominant employer or shared economic base," which "enhance[s]homogeneity, informal communication, and shared values." *Id*. at 11.

responded that he would have "some hesitancy" if he had to tell people that the government did not prove its case. JA852a. Other prospective jurors informed the judge that they were aware of what the Houston community wanted. One stated that he felt that "a lot of people are upset and that—I think there is a sense that people want to get to the bottom of this and find out who was responsible for this happening." JA955a. When pressed on whether there would be moral outrage if the juror went back into the community if he voted not guilty, the juror admitted, "I think a lot of people feel that they're guilty. And maybe they're expecting something to come out of this trial . . . it would be tough." JA956a; see also JA910a (when asked if he thought the defendants were guilty of something, stated: "I think the majority of people out there think so, you know, from what the media puts out."), JA1003a("I would be very upset with the government if they could not prove their case.") During voir dire, the district judge himself acknowledged the social pressure to convict in Houston, noting that there was "a sense of moral outrage" in the community and that "it would take courage" to acquit the defendants. JA956a-957a

With the entire city of Houston seeking a simple and anthropomorphic solution to a devastating financial disaster, the jurors in the venire and those ultimately empanelled could not help but feel compelled to bring about a conviction. See *Flamer* v. *Delaware*, 68 F.3d 736, 754 (3d Cir. 1995)(presumption of prejudice cannot be rebutted where "community and media reaction" is so "hostile and so pervasive as to make it apparent that even the most careful voir dire process would be unable to assure an impartial jury.") No possible voir dire could have cleansed the jury of the impressions and

biases it formed during the barrage of media coverage that preceded the trial. As this Court has noted, "influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin*, 366 U.S. at 727.

B. The voir dire conducted by the District Court was inadequate to overcome the prejudicial publicity.

Examination of the voir dire conducted by the District Court here reveals numerous fatal flaws. The cursory, superficial—and highly public—questioning by the District Court in conjunction with voluminous evidence of bias in the venire merits a reversal of the conviction.

1. The veniremembers' assertions of impartiality could not be believed.

At the voir dire, the District Court explained the importance of an impartial jury and then asked whether any of the venire had "doubts about [their] ability" to follow the rules. Tellingly, only two venire members indicated at that stage that they could not be fair. This number is particularly shocking considering that only 119 out of 283 potential jurors had previously been struck based on the results of a prescreening questionnaire in which 80% of the 283 expressed negative feelings about Petitioner and his co-defendant, 60% had an unfavorable opinion about the cause of Enron's bankruptcy, 40% openly admitted that they could be not be fair or impartial, and 40% had an opinion about the defendants' guilt. Pet. Br. at 8. As Petitioner's brief details, the venire members who remained after the prescreening had obvious biases. See id. at 9 (discussing potential jurors who remained in the venire despite

questionnaires that stated: "they [the defendants] knew exactly what they were doing," "they stole money," and Petitioner was "guilty of knowing what was happening to the company, but did nothing to let the employees know.")

The way in which the District Court conducted the voir dire was also essentially guaranteed to elicit less-than-candid responses from the jurors. Rather than conducting the "extensive, non-public, individualized" voir dire sought by Petitioner,[33] the court held voir dire in a courtroom crowded with reporters and refused to let the defense counsel ask too many questions about prejudice as the court had prohibited "individualized voir dire." Pet. Br. 10. Under such circumstances, and considering the numerous external indicators of bias, the jurors' statements that they could be fair simply should not have been taken at their word.

Notwithstanding the research that establishes that jurors' representations and even beliefs about their own impartiality are inherently suspect, especially in situations of presumed prejudice, the jurors' self-reports of impartiality could not be trusted to rebut the presumption in this case, particularly where those same jurors had previously and repeatedly admitted to prejudice. "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Irvin*, 366 U.S. at 728.

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[33] Again, as noted in the empirical discussion *supra* part I(A), open voir dire has been established to be less effective than private, individualized voir dire, while judge-initiated questioning is concomitantly less effective at eliciting juror candor than attorney-directed questioning.

2. The District Court's questioning was incapable of winnowing out prejudice

The District Court's voir dire was far from extended or probing. The court spent a total of only five hours questioning all prospective jurors, with each prospective juror being questioned for only a few minutes. Pet. Br. 10. This truncated process is especially troubling in light of the comparatively lengthy voir dires conducted by trial courts in other high-profile cases. In the Zacarias Moussaoui trial, the voir dire alone took two weeks,[34] while the voir dire in the Timothy McVeigh trial took eighteen days *after* a change of venue had been granted.[35] The voir dire in the trials of Dennis Kozlowski the former CEO of Tyco, lasted one week.[36]

In questioning the jurors, the District Court also ignored many inflammatory responses given in the prescreening questionnaire—for example, statements that Enron's collapse was "criminal" and caused by "widespread greed," and that Enron had "fool[ed] people." *Id*. In the end, despite the clear indicia of bias on the part of numerous venire members, the court struck only seven for cause. *Id*.

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[34] *Untied States* v. *Moussaoui*, No. 1:01-cr-00455-LMB-1, (E.D. Va.) (Criminal Docket).

[35] *See* Nolan Clay & Penny Owen, *Jury Selection Begins Slowly In Bomb Trial: Ex-Tulsan Cried at Blast Site*, Daily Oklahoman, April 1, 1997; Nolan Clay & Penny Owen, *Seven Men, Five Women On Bomb Jury*, Daily Oklahoman, April 23, 1997.

[36] *See* Tatsha Robertson & Jeffrey Krasner, *Jury Selection Begins for Former Tyco Chief Kozlowski's Corporate-Theft Trial*, Boston Globe, Sept. 30, 2003; Samuel Maull, *Lawyers Complete Jury Selection for Tyco Trial*, The Associated Press State & Local Wire, October 3, 2003.

The jurors also exhibited signs of providing the answers they thought would please the judge. For example, Juror 101 (who had in her questionnaire admitted that she was "unsure" if she could be fair), upon being asked by the court if she could decide the case based on the evidence, responded, "possibly." The court then told her that "[w]hat we want are people who can base their decision on the facts that they hear in the courtroom," and asked her again if she could base her decision on what she heard in court. Juror 101 responded, "probably," and the court asked her *again* if she could "in your heart of hearts assure us that that you will base your decision on what you hear in this courtroom?" Finally, she responded, "It will be based on what I hear in the courtroom." Pet. Br. 12. This incidence of leading questioning by the principal authority figure in the proceeding is a paradigmatic example of the phenomenon described above, see *supra* Part I(A), wherein jurors deliver dishonest responses to judge-initiated questioning out of a desire to arrive at the "right" answer. See *United States* v. *Davis*, 583 F.2d 190, 197 (5th Cir. 1978) (endorsing the ABA Fair Trial standard, recommending that jurors be examined individually and out of the presence of other jurors, and requiring that "[t]he questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have"); *United States* v. *Chagra*, 669 F.2d 241, 254 (5th Cir. 1982) (voir dire is not "a means of educating [jurors] about [their] responsibilities," but rather a tool for "discovering the depth and breath of [a juror's] knowledge or attitude").

The five-hour voir dire, after a prescreening process that showed that the vast majority of potential jurors had been exposed to negative publicity about Enron and Petitioner, was incapable of eliminating biased jurors from the panel. And in fact, as Petitioner documents, the seated jurors demonstrated the same level of hostility and prejudice as those jurors excused for cause. Pet. Br. 13-15.

3. The District Court failed to provide any justification for keeping the trial in Houston.

It is telling that the District Court denied Petitioner's motion to transfer venue *without holding a hearing* and *before* conducting voir dire, even though "a district court should usually hold a transfer motion in abeyance while conducting voir dire instead of dismissing it at the outset." *Skilling*, 554 F.3d at 559 n.40. See also *Pamplin* v. *Mason*, 364 F.2d 1 (5th Cir. 1966) (trial court's denial of a hearing on defendant's change of venue motion was itself a denial of due process where there was evidence of a hostile community atmosphere). The District Court thus treated as a foregone conclusion the likelihood that the venire would reveal no signs of prejudice, despite copious evidence to the contrary.

The District Court's refusal to transfer the trial is particularly baffling given the ease and routine operation of federal Rule of Criminal Procedure 21, and the utter paucity of reasons for keeping the trial in Houston. In a case such as this, where the government has failed to prove beyond a reasonable doubt that the jury was impartial—and where so much reason for doubt existed—the District Court's action was a clear abuse of discretion. For that reason, this Court should reverse the conviction.

CONCLUSION

The decision below should be reversed, and the case remanded for a new trial.

Respectfully submitted,

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