

No. 08-1394

In the Supreme Court of the United States

JEFFREY K. SKILLING, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES

ELENA KAGAN
*Solicitor General
Counsel of Record*

MYTHILI RAMAN
*Acting Assistant Attorney
General*

MICHAEL R. DREEBEN
Deputy Solicitor General

DAVID A. O'NEIL
*Assistant to the Solicitor
General*

JOEL GERSHOWITZ

KEVIN GINGRAS

Attorneys

*Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTIONS PRESENTED

1. Whether, to convict petitioner of conspiring to commit wire fraud by depriving his employer and its shareholders of the right to petitioner's honest services (18 U.S.C. 1343, 1346), the government was required to prove that petitioner intended to obtain some private gain.
2. Whether 18 U.S.C. 1346 is unconstitutionally vague.
3. Whether the district court erred in denying petitioner's motions for a change of venue.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-135a) is reported at 554 F.3d 529.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2009. A petition for rehearing was denied on February 10, 2009 (Pet. App. 136a-138a). The petition for a writ of certiorari was filed on May 11, 2009. The petition for a writ of certiorari was granted on October 13, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of one count of conspiracy to commit securities

fraud and wire fraud, in violation of 18 U.S.C. 371 (Count 1); 12 counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2 (Counts 2, 14, 16-20, 22-26); five counts of making false representations to auditors, in violation of 15 U.S.C. 78j(b) and 78ff, and 18 U.S.C. 2 (Counts 31-32, 34-36); and one count of insider trading, in violation of 15 U.S.C. 78j(b) and 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2 (Count 51). J.A. 1107a-1113a. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1a-135a.

1. Petitioner was the president, chief operating officer, and, for several months in 2001, the chief executive officer of Enron Corporation. Between 1999 and the end of 2001, petitioner orchestrated a massive scheme to deceive Enron's shareholders, federal regulators, and the investing public about the company's financial condition and performance. Pet. App. 1a-18a.

a. Enron was formed by the merger of two natural gas pipeline companies in 1985. R. 15066. It enjoyed steady growth through the 1990s due largely to earnings from energy trading in the company's wholesale division. R. 15228. By early 1999, Enron's stock was trading at about 25 times its per-share earnings. R. 17227. Petitioner, whose compensation was tied directly to the value of the company's stock, wished to increase the share price even further. But petitioner also knew that revenue from Enron's existing trading business could not support a higher price-to-earnings multiple (or P/E ratio); as he told his managers, "[t]here ain't no more 'E' in the earnings." R. 17228. Petitioner therefore sought to increase the P/E ratio by convincing the market that Enron was poised for steady and significant growth.

As part of that strategy, petitioner portrayed as bright and promising the prospects of two newer businesses: Enron Energy Services (EES), which sold energy at retail, and Enron Broadband Services (EBS), which represented Enron's effort to enter the telecommunications industry. R. 15226-15229, 17229-17232, 19920-19921. Instead of showing promising results, however, EES and EBS suffered substantial losses. By early 2001, Enron internally predicted that EES would eventually lose more than \$1 billion as a result of deteriorating conditions in the California utilities markets. R. 19398. Similarly, EBS lost money in every quarter that it existed. R. 17215, 17232-17233, 17239-17241.

Petitioner responded by systematically concealing the financial condition of EES and EBS from investors. In March 2001, instead of truthfully disclosing EES's poor first quarter numbers, petitioner hastily arranged a "reorganization" of that business two days before the quarter ended. R. 19979-19982. The sole purpose of the reorganization was to hide the losses in EES by shifting all of its money-losing components into the larger balance sheet of Enron's wholesale division. R. 15556, 19446-19448, 19775-19781. The head of EES later testified that petitioner's approval of the reorganization was the worst corporate conduct he had ever experienced, R. 20257, and said of the meeting at which it took place, "I wish on my kids' lives I would have stepped up from that table and walked away." R. 20338.

As a result of the reorganization scheme, Enron reported first quarter earnings for EES of \$40 million, when in fact the business should have recognized a \$350 million loss. R. 19988-19989. In the second quarter, Enron announced that EES's earnings had increased 30% to \$60 million, although in reality EES had lost

\$495 million by that time. R. 15567-15568, 15572-15573; Gov't C.A. Br. 17. On analyst calls, petitioner assured investors that “first quarter results were great,” that EES “had an outstanding second quarter,” and that the reason for the shift of certain aspects of EES’s business to the wholesale division was “to get more efficiency out of management.” *Id.* 33; R. 15579.

Petitioner engaged in a similar deception to conceal the failure of EBS. He set earnings targets at numbers that its executives told him they could not meet and refused to change those targets when senior management warned of shortfalls. R. 17281-17283. To meet the inflated targets, EBS “monetized,” or sold as securities, the projected future revenue from its contracts—an accounting trick that one senior manager described as “[o]ne more hit of crack cocaine” because it provided an artificial short-term jolt to the company’s earnings. R. 17359, 20667-20668. As with EES, petitioner misrepresented the true condition of EBS. At an analyst conference in January 2001, petitioner told investors that EBS was a “uniquely strong franchise[] with sustainable high earnings power,” even though he had learned from EBS’s CEO three weeks earlier that the company had an unsupportable cost structure and no customers. R. 17280-17282; Gov’t C.A. Br. 26; GX 984, at 13. And on a special analyst conference call in March 2001 intended to address rumors about EBS’s poor condition, petitioner described EBS as in the midst of a “great quarter” marked by “strong growth” in all aspects of its business. Gov’t C.A. Br. 28-29. According to the trial testimony of EBS’s chief operating officer, that description was “the opposite” of the truth. R. 20698.

Petitioner’s scheme to inflate Enron’s share price took a wide variety of other forms. To maintain the fic-

tion that Enron was steadily growing at a rate that met or exceeded analyst's expectations, for example, petitioner repeatedly directed that earnings figures be altered after the quarter ended so that the reported numbers would "beat the street." Gov't C.A. Br. 35. On two such occasions, funds were simply moved out of unrelated reserve accounts and recorded as earnings. R. 19311, 19324-19327. The CEO of Wholesale later explained that this tactic was "backwards" and flatly improper. R. 19859. As one of Enron's outside auditors put it at trial: "That is not a gray area. It's black and white." R. 23512.

b. On August 14, 2001, petitioner abruptly resigned from his position as Enron's CEO. By that time, petitioner knew that Enron faced mounting problems and was suffering substantial undisclosed losses. R. 21451-21452, 23962. On September 6, 2001, shortly after meeting with Kenneth Lay, who had succeeded petitioner as CEO, petitioner called his broker and tried to sell 200,000 shares of Enron stock. R. 25018-25019, 25021. The broker explained he would have to report the transaction to the SEC and the public unless petitioner obtained a letter from Enron indicating that he was no longer a manager. R. 25021-25023. Petitioner told the broker to hold the order, R. 25021, obtained such a letter on September 10, 2001, Gov't C.A. Br. 64; GX 1892, and on September 17, the first day that the markets opened after the September 11 terrorist attacks, conveyed to his broker an order to sell 500,000 shares of Enron stock along with instructions that he did not want people at Enron to know about the sale. R. 25024, 25032. Petitioner netted more than \$15 million from the transaction; he later testified under oath before the SEC that the reason he sold those shares was that he was

“scared” by September 11, and that “[t]here was no other reason other than September 11th that [he] sold the stock.” R. 25061, 25064. Less than three months after petitioner’s trade, Enron collapsed in bankruptcy.

2. On February 18, 2004, a federal grand jury in the Southern District of Texas returned an indictment against petitioner and Richard Causey, Enron’s chief accounting officer. First Superseding Indictment. The indictment alleged that petitioner conspired to commit securities fraud and to defraud Enron of money and property through the use of the interstate wires. *Id.* at 34-41. It also charged petitioner with 35 substantive counts, including 20 counts of securities fraud for making false statements to investors, the SEC, and outside auditors. *Id.* at 41, 44-50.

On July 7, 2004, the grand jury returned a superseding indictment adding Lay as a defendant. J.A. 274a. That superseding indictment also supplemented Count 1 to allege that the conspiracy in which petitioner, Lay, and Causey participated included as an object “depriving Enron and its shareholders of the intangible right of honest services.” J.A. 318a. The superseding indictment, like the prior indictment, recounted petitioner’s massive scheme to deceive Enron and the investing public by manipulating earnings, making false statements to the SEC and the public, concealing losses through sham transactions, and enriching himself in the process. J.A. 274a-370a.

3. a. On November 8, 2004, petitioner and his co-defendants moved for a change of venue, contending that inflammatory pretrial publicity and pervasive community prejudice against former Enron executives would prevent a fair trial in Houston. Gov’t C.A. Br.

136-137; Def. Jeffrey Skilling's Memo. in Supp. of Joint Mot. to Transfer Venue 1-5.

The government submitted a lengthy opposition refuting each basis for the motion. Govt's Memo. of Law in Resp. to Defs.' Joint Mot. to Transfer Venue (Venue Response). The government noted that polling data the defendants offered to show pervasive bias among Houston residents in fact demonstrated the opposite. Venue Response 35-38. When asked to name Enron executives they believed were guilty of a crime, nearly nine out of ten Houston respondents failed to identify petitioner. *Id.* at 36. Almost half of those polled had never heard of petitioner or had no substantive response when asked to provide any words they associated with his name. *Id.* at 37-38; J.A. 371a-551a. Results of a government-conducted survey, moreover, showed that Houston residents were actually more likely to believe that petitioner was not guilty than residents in other cities to which petitioner sought a transfer. Venue Response 40.

The government further argued that the press coverage concerning petitioner was largely factual and objective. Venue Response 29-35. Most of the coverage that petitioner characterized as "inflammatory" consisted of entries on the Internet, inside-page stories, letters to the editor, and opinion-based columns of uncertain or low readership. 4:04-cr-00025 Docket entry No. 230 paras. 17-18 (S.D. Tex. Dec. 3, 2004) (Zagorski Decl.). The government emphasized that press coverage of Enron had peaked in 2002, shortly after its bankruptcy, and had generally subsided in the two years since. Venue Response 31-32; Zagorski Decl. paras. 15, 19.

In addition, the government observed that other district courts had considered and rejected the argument that Houston could not produce impartial juries in

Enron-related criminal cases. Venue Response 20-28. In November 2003, Judge Hittner concluded that Lea Fastow, the wife of the former Enron chief financial officer, had failed to establish that community prejudice would preclude a fair trial or that jury selection would be ineffective to isolate any such prejudice. *United States v. Fastow*, 292 F. Supp. 2d 914 (S.D. Tex. 2003).¹ Similarly, in 2004, Judge Gilmore denied a venue transfer motion brought by executives of EBS, concluding that the Enron media coverage consisted primarily of “straight news stories” and that the use of questionnaires on prospective jurors drawn from the large and diverse Houston metropolitan area would yield an impartial panel. Order at 5-6, *United States v. Hirko*, No. 4:03-cr-00093 (Nov. 24, 2004) (*Hirko* Venue Order).

b. The district court agreed with the other courts to consider the issue and, after conducting a “[m]eticulous review of all of the evidence and arguments presented by the defendants,” denied their motion. App., *infra*, at 7a. The court found that the defendants had highlighted “isolated incidents of intemperate commentary” but that, “for the most part, the reporting appears to have been objective and unemotional” with a “fact-based tone.” *Id.* at 11a. The court also rejected the claim that community sentiment warranted a presumption of jury prejudice. The court concluded that the defendants’ polling data did not show “a reasonable likelihood that the court will be unable to [e]mpanel an impartial jury despite widespread knowledge of the case.” *Id.* at 19a. The court added that public opinion polls are generally “unpersuasive” and that “effective voir dire [i]s a prefer-

¹ Judge Hittner later ordered a venue transfer to Brownsville, Texas, after Fastow confessed in a failed guilty plea allocution that was widely reported in Houston. Venue Response 18 n.8.

able way to ferret out any bias.” *Id.* at 18a. The court also concluded that because it had “carefully reviewed defendants’ evidence,” *id.* at 12a, and because the defendants’ factual allegations would not justify relief even if established, no evidentiary hearing on the motion was necessary, *id.* at 21a-22a.²

c. By the time petitioner’s case reached trial, three other Enron-related criminal cases had proceeded to verdict in Houston: *United States v. Arthur Andersen LLP*, involving charges against Enron’s outside accountants; *United States v. Bayly*, concerning charges against Merrill Lynch and Enron executives for sham sales of Nigerian barges; and *United States v. Hirko*, involving allegations of fraud and insider trading by five EBS executives. A different district court judge presided over each of those trials, but in all three the court conducted jury selection in the same manner. Each court distributed a jury questionnaire to a pool of several hundred potential jurors; dismissed individuals whose responses to the questionnaire demonstrated bias or other disqualifying characteristics; and, after further questioning by the court and counsel, selected a jury from the remaining venire in one day. Venue Response 20-28.

That process proved effective in empaneling juries capable of basing verdicts on the evidence presented in court. In *Hirko*, the jury deliberated for several days and did not convict any Enron defendant; in *Bayly*, which was routinely described as “the first Enron criminal trial,” the jury convicted five defendants, including

² Petitioner and Lay renewed the venue transfer motion on January 4, 2006, after Causey pled guilty. The district court again denied the motion, essentially for the reasons set forth in its earlier order. Order (Jan. 23, 2006).

four Merrill Lynch executives, but acquitted a former Enron executive. Venue Response 24-28. At the sentencing phase of *Bayly*, the jury found a loss amount of slightly over \$13 million, even though the government had argued that the true loss to Enron and its shareholders from the defendants' fraud was \$40 million. *Id.* at 28. In an article reporting the *Bayly* verdicts, the *Houston Chronicle* quoted a commentator saying that the performance of the jury undermined claims that Houston could not render impartial justice in Enron-related cases. Mary Flood & Tom Fowler, *5 Guilty in Enron Barge Scheme*, *Houston Chronicle*, Nov. 4, 2004 <<http://www.chron.com/disp/story.mpl/special/enron/barge/2883572.html>>.

d. The district court selected petitioner's jury using the same basic procedure employed in *Bayly*, *Hirko*, and *Arthur Andersen*. Before trial, the court distributed a 14-page jury questionnaire to 400 prospective jurors and received 283 responses. R. 11773; S.J.A. 5sa-244sa. The questionnaires sought information about the prospective jurors' jobs, education, political views and party affiliation, their relationship to Enron or to anyone affected in any way by the company's collapse, their opinions about Enron and the government's investigation, their sources of information about the case, the periodicals they read, and the Internet sites they visited. The questionnaires also asked whether recipients were angry at Enron or had an opinion about the defendants or the defendants' guilt. Gov't C.A. Br. 140. After reviewing the completed questionnaires, the parties agreed to excuse 119 jurors for "cause, hardship, and/or physical disability." R. 11890-11891, 13593-13594. The court remarked that its evaluation of the questionnaires left it "very im-

pressed by the apparent lack of bias or influence from media exposure.” R. 14375.

The court then conducted voir dire of the remaining venire members. The court began by explaining the importance of an impartial jury and inquiring whether “any of you have doubts about your ability to conscientiously and fairly follow these very important rules.” Pet. App. 62a. After excusing two prospective jurors who indicated that they could not be fair, the court again cautioned that the case was not about Enron’s bankruptcy and emphasized that the jurors’ role was not “to right a wrong or to provide remedies for those who suffered from the collapse of Enron.” *Ibid.* The court admonished the potential jurors that they could not “seek vengeance against Enron’s former officers because of some wrongdoing they believe Enron or its officers may have committed,” and that anyone who had such an attitude could not “be a fair and impartial juror.” *Id.* at 62a-63a.

The court next questioned the potential jurors individually, out of earshot of other venire members, about their responses to the jury questionnaire and exposure to pretrial publicity. J.A. 852a; Pet. App. 63a; Gov’t C.A. Br. 141. The court allowed the defense attorneys to ask further questions they thought necessary to determine a juror’s impartiality, and although the court twice curtailed inquiry by Lay’s counsel, it never prevented petitioner’s counsel from asking such questions. *Ibid.* Even so, defense counsel asked only eight potential jurors about their exposure to publicity and declined to question 19 of the 46 potential jurors called to the bench, including four who were selected and three of the four alternates. R. 14445-14446, 14468-14470, 14477-14478,

14495-14497, 14505, 14534-14535, 14646-14649, 14657-14659.

Thirty-seven (or approximately 85%) of the 43 potential jurors questioned individually about pretrial publicity stated that they had limited exposure to media coverage of Enron or the defendants or did not recall anything significant. Gov't C.A. Br. 160; see *id.* at 141-147. Of those venire members who recalled hearing news about Enron, most said that they did not remember very much or did not hear anything that either would make them think petitioner was guilty or would interfere with their ability to decide the case on the evidence. *Id.* at 144-146.

The court continued the individual voir dire until it had qualified 38 potential jurors—enough so that 12 jurors and four alternates would remain after the parties exercised their peremptory challenges, including two additional challenges the court allotted the defendants. Gov't C.A. Br. 141; R. 12596. In the process, the court granted three challenges for cause by the defendants and denied five; it granted one challenge for cause by the government and denied four. Gov't C.A. Br. 147.

Of the individuals who remained after this process and served as jurors or alternates, ten told the court that they did not follow the news about Enron, nine either did not subscribe to the *Houston Chronicle* or read it infrequently, and four never or rarely watched television. Gov't C.A. Br. 141-142. Most indicated a general lack of interest in or knowledge about the Enron subject matter, offering the common refrain that “I just don't care much about it at all” because “it's just not something that directly concerns me.” R. 14577 (Juror 66); see, *e.g.*, R. 14670 (Juror 113: “[I]t didn't directly affect me, so I didn't really retain much of what was in the

news at the time.”); R. 14547 (Juror 55: “just not interested in the case”); R. 14459 (Juror 28: “not interested”); R. 14634 (Juror 91: “I don’t know a whole lot about this case, honestly”). One juror whom petitioner unsuccessfully challenged for cause sat on the jury after petitioner declined to use a peremptory strike to remove him. Pet. App. 54a.

e. On May 25, 2006, after a four-month trial and nearly five days of deliberation, the jury found petitioner guilty of conspiracy, 12 counts of securities fraud, five counts of making false representations to auditors, and one count of insider trading. Pet. App. 19a; Gov’t C.A. Br. 5, 161. The jury also found petitioner not guilty of nine counts of insider trading. Pet. App. 19a.

4. The court of appeals affirmed petitioner’s convictions and remanded for resentencing. Pet. App. 1a-135a. Petitioner argued that his conduct did not constitute honest services wire fraud because it was intended to benefit Enron, “not to promote [petitioner’s] interests at Enron’s expense.” Pet. C.A. Br. 68; see *id.* at 60-71. The court rejected that contention, concluding that “the jury was entitled to convict [petitioner] of conspiracy to commit honest-services wire fraud” based on the elements contained in the jury instructions. Pet. App. 29a.

Petitioner also argued that pretrial publicity and community prejudice required a presumption that any jury empaneled in Houston would not be fair and impartial, and contended that the jury that actually sat in his case was biased. Pet. C.A. Br. 121-173. The court of appeals agreed with petitioner that the nature of the media coverage and the effects of Enron’s collapse on Houston were sufficient to raise a presumption of jury prejudice. Pet. App. 54a-60a. The court concluded, however, that the district court’s “proper and thorough” voir

dire “more than mitigated any effects of this prejudice.” *Id.* at 63a, 68a. The court noted that, after “prescreening veniremembers based upon their responses” to an “extensive questionnaire,” the district court had conducted “searching” questioning of the prospective jurors, “requiring more than just the veniremembers’ statements that he or she could be fair.” *Id.* at 62a-63a & n.51. In addition, the court found that the government “met its burden of demonstrating the impartiality of the empaneled jury.” *Id.* at 67a; see 63a-68a. Observing that petitioner “failed to challenge for cause all but one of the jurors who actually sat,” *id.* at 64a, the court affirmed the district court’s finding that the one seated juror whom petitioner had challenged for cause was unbiased. *Id.* at 65a-67a.

SUMMARY OF ARGUMENT

I. The district court’s denial of petitioner’s motion for a change of venue did not violate his constitutional rights. Petitioner’s central contention is that the degree and nature of pretrial publicity, and the impact of Enron’s collapse on Houston, gave rise to an irrebuttable presumption of prejudice among the entire venire. But this Court’s cases—and the Constitution—are satisfied if the jurors who actually sat are impartial. Publicity surrounding a crime may create a need for special care in jury selection, but a defendant is not deprived of a constitutional right unless he can show that a selected juror was biased. The meticulous and careful jury-selection process conducted by the district court in this case produced an unbiased jury, and petitioner cannot carry his burden to show otherwise.

Petitioner argues for an exception to the usual rule requiring a showing of actual bias based on language in

this Court's cases discussing a presumption of prejudice in extreme circumstances. But only one of those cases applied such a presumption, and that case turned on the unique fact of a televised jailhouse confession of the defendant that saturated the community and effectively substituted for the trial. In the nearly 50 years since, the Court has not seen a similar case. It has invalidated convictions when pretrial publicity produced *actually* biased jurors, and when the presence of the media *in* the courtroom produced a circus atmosphere. But those cases fundamentally differ from the situation here. This Court's decision in *Mu'min v. Virginia*, 500 U.S. 415 (1991), establishes that a trial judge's vigilance in voir dire is fully capable of ferreting out bias and that the judge's decisions to seat a juror are entitled to deference on appeal. In contrast, petitioner's conclusive presumption of prejudice conflicts with this Court's general avoidance of rules of automatic reversal and is at odds with the basic premise of the jury system that trial judges are equal to the task of empaneling impartial jurors.

Even if publicity could sometimes create a presumption of prejudice, none should apply here. Petitioner was tried in a large and diverse metropolitan area with a population of 4.5 million. Screening devices are fully capable of identifying 12 jurors untainted by publicity in that setting. Three different district judges hearing Enron-related criminal trials in Houston so concluded. And the mixed outcomes in those cases—including petitioner's acquittals on nine counts—demonstrates that the publicity did not corrupt the trial juries.

Finally, if a presumption of prejudice did arise here, the government should be able to rebut it by establishing by a preponderance of the evidence that no biased

juror sat. On the record here, the government carried that burden.

II. The honest services statute, 18 U.S.C. 1346, is not unconstitutionally vague, and petitioner's conspiracy conviction should be upheld.

A criminal statute is not unconstitutionally vague if it provides fair notice of the conduct it reaches and does not encourage arbitrary enforcement. This Court has recognized that the meaning of a statute can be illuminated by judicial decisions and that statutes can incorporate terms of art and judicial interpretations of protected rights. Section 1346 employs a term of art—"the intangible right of honest services"—which takes its meaning from the body of case law before this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). Those cases reveal that honest services violations required three elements—a breach of the duty of loyalty, intent to deceive, and materiality. Courts also have universally recognized that the pre-*McNally* cases took two forms: (1) accepting a bribe or kickback in payment for official action, and (2) taking official action that furthers an undisclosed, conflicting personal financial interest. Petitioner would find a lack of clarity in peripheral areas of pre-*McNally* law, in which he exaggerates supposed disagreements, and in past prosecutorial litigating positions, which courts rejected. But none of his arguments refute that the core elements and theories of honest services fraud sufficiently define the statute to satisfy constitutional requirements. And vagueness concerns are especially unwarranted here because no defendant can be convicted absent intent to engage in deceptive conduct in breach of a known duty.

Petitioner does not question the clarity of the bribery/kickback line of cases, and in light of the abundant

pre-*McNally* case law he could not reasonably do so. The statute therefore cannot be held facially vague in *all* of its applications. He does argue that the nondisclosure cases form a less-well-defined category and that nondisclosure cases can be prosecuted as money-or-property frauds. Those claims are incorrect. Many pre-*McNally* cases involved undisclosed self-dealing—including *McNally* itself. And not all non-disclosure cases defraud the principal of money or property. For example, a council member who votes to rezone an area in which he secretly holds property interests does not commit a money-or-property fraud—but does commit honest services fraud.

While petitioner's crime did not take the classic form of an undisclosed outside interest that the employee furthered through his official action, it does come within the nondisclosure theory. Petitioner pursued his own financial interests—his compensation scheme—by taking action as an Enron executive to inflate Enron's stock price through deception about the company's true financial condition. The only question here is whether the public nature of petitioner's compensation scheme prevents his conduct from constituting honest services fraud. It does not. Although petitioner's basic compensation scheme was public, his scheme to artificially inflate the company's stock price by misrepresenting its financial condition, in order to derive additional personal benefits at the expense of shareholders, was not. Petitioner suggests that Section 1346 requires as an element that he acted for private gain, but the pre-*McNally* cases do not support that purported element and, in any event, it was amply satisfied here.

ARGUMENT**I. THE DENIAL OF PETITIONER'S VENUE TRANSFER MOTIONS DID NOT VIOLATE HIS FAIR TRIAL RIGHTS**

Petitioner contends (Br. 23-38) that the district court violated his due process right to a fair trial and his Sixth Amendment right to an impartial jury by denying his motions for a change of venue. He argues that pretrial publicity surrounding Enron's collapse created an irrebuttable "presumption of prejudice," requiring automatic reversal of his convictions without regard to whether the jury that decided his case was actually biased. Alternatively, petitioner contends that the "presumption of prejudice" obligated the government to prove the impartiality of each juror beyond a reasonable doubt, that the courts below erroneously failed to hold the government to that burden, and that the government could not make such a showing in any event.

The Court should reject those claims. Petitioner received what the Constitution guaranteed him: a trial before a panel of unbiased jurors capable of deciding the case based on the evidence presented in court. Although language in some of this Court's cases speaks of a presumption of juror prejudice from pretrial publicity, no holding of this Court requires the general irrebuttable presumption of jury prejudice that petitioner seeks. And many of this Court's cases attest to the efficacy of the usual trial tools employed to ferret out bias. To the extent a presumption of prejudice exists, it would not apply in this case, and even if it did apply, it would not require "automatic reversal" of petitioner's convictions. Instead, any such presumption would shift to the government the burden to show by a preponderance the actual impartiality of the seated jury. For the reasons

the court of appeals identified, the government amply satisfied that showing.³

A. Because The Jury That Decided His Case Was Impartial, Petitioner Has Failed To Establish A Constitutional Violation

Petitioner emphasizes the publicity generated by Enron’s collapse, contending that such media coverage, combined with the financial impact of the company’s bankruptcy, rendered Houston a constitutionally impermissible venue for his trial. That contention is incorrect. The Constitution guarantees a trial before a jury that is actually impartial, not a trial in a venue whose populace has no exposure to the effects of the defendant’s crime or adverse pretrial publicity about it. Because no biased juror sat on petitioner’s jury, no violation of rights occurred.

1. *The Constitution requires trial before an impartial jury*

“The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors.” *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (internal quotation marks and citation omitted); see *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process

³ Petitioner also contends (Br. 34) that, independent of the Constitution, this Court should exercise its “inherent supervisory power” to reverse his convictions. Because petitioner did not assert that argument below, the court of appeals did not address it, and it is not properly before this Court. In any event, there is no warrant for this Court to use its supervisory authority to establish a new and different impartiality rule. See *United States v. Payner*, 447 U.S. 727, 737 (1980) (holding that supervisory authority does not “confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing”).

means a jury capable and willing to decide the case solely on the evidence before it”). That principle is satisfied when no biased juror is actually seated at trial. See *Rivera v. Illinois*, 129 S. Ct. 1446, 1454 (2009) (“[H]aving been tried by a jury on which no biased juror sat, [the defendant] could not tenably assert any violation of his right to due process.”) (internal quotation marks, citations, and ellipsis omitted); see *id.* at 1450 (“[i]f all seated jurors are qualified and unbiased,” erroneous denial of defendant’s peremptory challenge does not warrant reversal); see also *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) (“The relevant question” is whether the jurors who decided the case “had such fixed opinions that they could not judge impartially the guilt of the defendant.”).

A defendant who argues that he was deprived of an impartial jury must establish that claim “not as a matter of speculation but as a demonstrable reality.” *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) (citation omitted). Thus, “[t]his Court has long held that the remedy for allegations of juror partiality” is the defendant’s “opportunity to prove actual bias” on the part of a seated juror. *Smith*, 455 U.S. at 215; see *Dennis v. United States*, 339 U.S. 162, 171-172 (1950) (“Preservation of the opportunity to prove actual bias is a guarantee of a defendant’s right to an impartial jury.”). When the defendant’s claim of bias arises from allegedly prejudicial publicity, “the appropriate safeguard against such prejudice is the defendant’s right to demonstrate that the media’s coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.” *Smith*,

455 U.S. at 217 (quoting *Chandler v. Florida*, 449 U.S. 560, 575 (1981)).

2. *Petitioner's jury was impartial*

a. Petitioner has failed to establish that any juror who decided his case was actually biased. Voir dire demonstrated that, whatever the beliefs of Houston residents generally, the particular individuals selected for petitioner's jury neither knew nor cared much about Enron's collapse or the resulting media coverage. See p. 12, *supra* (noting that nine jurors did not read the *Houston Chronicle*, four rarely or never watched television, and ten said that they did not follow the news about Enron). The overwhelming sentiment among the seated jurors was indifference to events that did not concern them and that were by then "old news." J.A. 856a. The juror's statements thus indicated that they were eminently "capable and willing to decide the case solely on the evidence before [them]." *Smith*, 455 U.S. at 217.

Petitioner's own actions during voir dire underscore the absence of actual bias among the seated jurors. Although petitioner moved to strike eight potential jurors for cause, he did not assert such a challenge specifically to 11 of the 12 individuals who sat on the jury. Indeed, counsel for both petitioner and his co-defendant declined to ask a single question of four of the seated jurors, apparently satisfied, after reading those jurors' questionnaires and hearing their responses to the court's initial inquiry, that they did not harbor any bias or partiality.

The jury's verdict confirmed its impartiality. Although the jurors found petitioner guilty on some counts, they also found him not guilty on nine counts. The counts of acquittal, moreover, concerned allegations that petitioner had enriched himself at the expense of

Enron shareholders by selling company stock based on inside information. If petitioner were correct that the jury was infected with a venomous anti-Enron sentiment, conviction on those charges, regardless of the sufficiency of the evidence, would have served as an apt means to express the jury's purported desire for "revenge" on behalf of Houston's residents. That the jurors instead unanimously voted to find petitioner not guilty of nine insider trading charges speaks volumes about their ability, irrespective of any pretrial publicity about the case, "conscientiously [to] apply the law and find the facts" based on the evidence at trial. *Lockhart v. McCree*, 476 U.S. 162, 178 (1986).

b. In an effort to establish actual bias, petitioner emphasizes certain comments made by jurors whom he declined to challenge for cause. That effort, however, relies on a selective and incomplete characterization of the record. Petitioner notes, for example, that one juror expressed sympathy on his questionnaire for the "small average worker [who] saves money for retirement all his life." Pet. Br. 14. But petitioner chose not to challenge that juror (or even to ask him any questions) after the juror made clear that he "underst[oo]d that it's the government's job to prove guilt beyond a reasonable doubt" and did not have "any problem" with that requirement; that he "[v]ery seldom" read the *Houston Chronicle* and never watched the news; and that he had "no opinion" about the defendant's guilt. J.A. 981a-983a. Similarly, petitioner attacks another juror as biased because she stated on her questionnaire that "someone had to be doing something illegal" in connection with Enron's collapse. Br. 14. Petitioner omits to mention, however, that at voir dire the same juror explained that "[b]ecause it never really affected [her]," she "never

really paid that much attention” to news about Enron; that she “ha[d] really honestly not formed an opinion” about petitioner’s guilt; and that she “[a]bsolutely” could “base [her] decision only on the evidence in the case.” J.A. 1010a-1011a. Petitioner did not seek to ask that juror any questions, much less to remove her on grounds that she was biased.

Petitioner also relies heavily on certain statements of Juror 11, the one seated juror whom petitioner individually challenged for cause. But at trial, even though the district court granted petitioner and his co-defendant 12 peremptory challenges—six more than necessary to strike every potential juror, including Juror 11, whom counsel had unsuccessfully challenged for cause—neither defendant chose to strike Juror 11. In the view of trial counsel and petitioner’s professional jury consultants, Juror 11 evidently did not appear so “obvious[ly] bias[ed]” or his comments so “cartoonishly prejudicial” as petitioner now asserts. Br. 35.

In any event, the district court was correct in rejecting the claim of actual bias on the part of Juror 11. Petitioner cites the juror’s statements during voir dire that corporate CEOs are “greedy” and “walk a line that stretches sometimes the legality of something,” and that he worked with a former Enron employee who lost money in his retirement plan. Pet. App. 65a-66a. As the court of appeals observed, however, Juror 11 also stated that he had “no idea” about the defendants’ guilt; that he would have “no problem” telling his co-worker that the government failed to prove its case; that he did not “get into the details” of the Enron coverage; that he did not believe everything he read in the newspapers; that the defendants “earned their salaries”; that “greedy” did “not necessarily” mean “illegal”; and that he could “start

this case with a clean slate that would require the government to prove its case.” *Id.* 65a-67a; J.A. 853a-858a.

This Court has held that “ambiguous and at times contradictory” responses to voir dire examination of this kind do not alone establish actual bias. *Patton*, 467 U.S. at 1039. “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The district court, which is “best suited to determine competency to serve impartially,” *Patton*, 467 U.S. at 1039, concluded that Juror 11 was capable of discharging that function. Because the district court’s determination “is essentially one of credibility, and therefore largely one of demeanor,” it is “entitled * * * to special deference.” *Id.* at 1038 & n.14 (internal quotation marks omitted); see *Mu’Min v. Virginia*, 500 U.S. 415, 428 (1991) (“A trial court’s findings of juror impartiality may be overturned only for manifest error.”) (citation omitted). After careful review of the entire voir dire, and with an eye on the publicity surrounding this case, the district court found Juror 11 unbiased and the court of appeals properly accepted that determination.

B. Petitioner Cannot Establish A Constitutional Violation Based On Presumed Jury Prejudice

Petitioner contends that the circumstances surrounding his trial warrant a departure from the ordinary rule requiring that he establish actual bias. He argues that the publicity and impact resulting from Enron’s collapse gave rise to a conclusive “presumption of juror prejudice,” which compels automatic reversal. That argument lacks merit. Despite language in some opinions, this Court’s holdings do not support such an irrebuttable

presumption, which would conflict with well-established principles of constitutional adjudication and basic precepts of the jury system. In any event, even if petitioner were correct that an irrebuttable presumption of juror prejudice could be triggered in some cases, it would not be justified here.

1. This Court's decisions do not support an irrebuttable presumption of juror prejudice

Petitioner cites a number of this Court's decisions for the proposition that, when a community is exposed to a certain level of pretrial publicity, all potential jurors in that community must be presumed biased. Pet. Br. 23-34 (citing, *inter alia*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Irvin v. Dowd*, *supra*). In petitioner's view, that presumption is irrebuttable because jurors in such a community can neither be trusted to identify their own prejudices nor believed when they profess to be impartial.

a. The only decision in which this Court has "presumed" juror prejudice based solely on pretrial publicity is *Rideau*, and that case turned on the unique circumstance that the defendant's jailhouse confession was repeatedly televised in a small community. There, the morning after a bank employee in a small community was kidnapped and murdered, police subjected the defendant to jail-cell questioning that resulted in his detailed confession to the crimes. The confession was recorded and, for the next several days, a 20-minute film of the defendant in the act of confessing was aired on local television before audiences constituting as much as two-thirds of the community. 373 U.S. at 723-727. The defendant was convicted by a jury that included three

members who saw and heard his confession, as well as two deputy sheriffs. *Id.* at 725. In light of the televised confession, this Court characterized the ensuing trial as a “kangaroo court proceeding[.]” *Id.* at 726.

Given its unique facts, *Rideau* does not establish a general rule that courts may presume bias among all potential jurors whenever a particular community is exposed to heavy and adverse media coverage of events related to a crime. Indeed, the Court has yet to find a parallel to *Rideau* in the nearly 50 years since it was decided. As this Court has since explained, “pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976). *Rideau* involved what this Court viewed as essentially an out-of-court “trial,” presided over by a sheriff and conducted while the defendant was in jail and without counsel. 373 U.S. at 727. The Court’s holding that it did not need to review the voir dire transcript to say that a capital trial following the defendant’s televised jailhouse confession violated due process, *ibid.*, provides no precedent for an irrebuttable presumption of prejudice for inflammatory newspaper articles about a crime or the impact of that crime on a community.

b. The remaining cases petitioner cites provide no support for a “presumed prejudice rule.” In *Irvin*, “the Court readily found actual prejudice” after carefully reviewing the voir dire and determining that “eight of the 12 [seated] jurors had formed an opinion that the defendant was guilty before the trial began.” *Murphy*, 421 U.S. at 798; see *Irvin*, 366 U.S. at 727 (conducting an “examination of the 2,783-page voir dire record” and focusing in particular on the “voir dire examination * * * of the jurors finally placed in the jury box”); Pet.

Br. 26 (“*Irvin* may be understood as a case addressing the actual prejudices of a particular jury.”). Similarly, while *Patton* characterized *Irvin* as applying a rule of presumptive prejudice, 467 U.S. at 1031, the Court’s holding in *Patton* was that no such presumption applied and that “[t]he relevant question is not whether the community remembered the case, but whether the jurors at * * * trial had such fixed opinions that they could not judge impartially the guilt of the defendant.” *Id.* at 1035.

Petitioner describes *Estes v. Texas, supra*, and *Sheppard v. Maxwell, supra*, as holding that the defendant need not demonstrate actual juror bias when the community is “saturated” with adverse publicity. But that is precisely the interpretation of those cases that this Court has rejected. The constitutional flaw in *Estes* was the “circus atmosphere” of the trial, and in *Sheppard*, the Court found a due process violation principally because the “courthouse [was] given over to accommodate the public appetite for carnival.” *Murphy*, 421 U.S. at 799; see *Sheppard*, 384 U.S. at 355 (noting that “bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom”). This Court explained in *Murphy* that *Estes* and *Sheppard* “cannot be made to stand for the proposition that juror exposure to information about a state defendant’s prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.” 421 U.S. at 799. Those cases concern the due process implications of media presence in the courtroom, not primarily the effect of pretrial publicity on potential jurors.

Petitioner also notes several instances in which this Court has suggested that, when a community is exposed

to particularly prejudicial publicity, “the jurors’ claims that they can be impartial should not be believed.” Pet. Br. 29 (quoting *Mu’Min*, 500 U.S. at 429). In the same cases, however, this Court has emphasized the heavy deference due the trial court’s determination of a juror’s actual impartiality. See *Mu’Min*, 500 U.S. at 428-429 (noting that “[a] trial court’s findings of juror impartiality may be overturned only for ‘manifest error’”) (citation omitted); see *id.* at 427 (emphasizing that, “[p]articularly with respect to pretrial publicity,” “primary reliance on the judgment of the trial court” to determine juror bias “makes good sense”); see *Patton*, 467 U.S. at 1031 (stating that although *Irvin* “held that adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors’ claims that they can be impartial should not be believed,” *Irvin* also emphasized “that the trial court’s findings of impartiality might be overturned only for ‘manifest error’”) (citation omitted). The statements petitioner emphasizes mean only that the district court should conduct a more searching inquiry than usual and closely scrutinize juror claims of impartiality when pretrial publicity is particularly intense. They do not compel the conclusion that juror claims of impartiality must never be believed—and that appellate courts are bound to reverse a trial judge’s contrary credibility determination—once pretrial publicity exceeds a certain threshold.

Petitioner’s position runs counter to this Court’s most recent pronouncement on the issue in *Mu’Min*. There, the Court noted that the record before it did not reflect the same kind of community sentiment described in *Irvin*. But the Court reasoned that, if such animosity did exist, the appropriate remedy would have been more searching voir dire, not automatic transfer or reversal.

The Court explained: “Had the trial court in this case been confronted with the ‘wave of public passion’ engendered by pretrial publicity that occurred in connection with Irvin’s trial, the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here.” *Mu’Min*, 500 U.S. at 429.

2. *The presumption petitioner proposes would conflict with well established principles and preclude trial of the most prominent cases*

a. Petitioner’s proposed rule of automatic reversal in cases of exposure to high levels of pretrial publicity would conflict with this Court’s “structural error” doctrine as well as with bedrock principles underlying the jury system.

This Court has explained that a rule of “automatic reversal,” without an inquiry into actual prejudice, is appropriate “only in a very limited class of cases.” *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotation marks and citations omitted). That category is characterized by cases in which the effect of a serious error cannot be ascertained or isolated. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-150 & n.4 (2006). This Court has identified only a handful of defects that qualify as such “structural error,” such as a total deprivation of the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)); a biased trial judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)); the race-based exclusion of grand jurors (*Vasquez v. Hillery*, 474 U.S. 254 (1986)); an incorrect reasonable doubt instruction (*Sullivan v. Louisiana*, 508 U.S. 275 (1993)); and denial of the right to be represented by retained counsel of choice (*Gonzalez-Lopez*, 548 U.S. at 149).

Exposure of potential jurors to intense pretrial publicity does not qualify as a “structural error” under this framework. Indeed, as explained above, see pp. 19-21, *supra*, no “error” occurs at all in this context unless the *voir dire* reveals that such exposure actually impaired a juror’s impartiality. But even if a high risk of bias among prospective jurors were itself considered a constitutional “error,” the effects of that error can be ascertained. That is the purpose of *voir dire*—“to *ascertain* whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.” *Connors v. United States*, 158 U.S. 408, 413 (1895) (emphasis added). Using the many tools at its disposal, the district court can insulate the trial from the improper influence of media coverage by ensuring—as the district court did in this case through questionnaires and searching *voir dire*—that individuals actually selected for the jury lack knowledge of or interest in the problematic publicity. Thus, although this Court has recognized that the effects of *actual* bias resulting from exposure of the “petit jury” to prejudicial publicity “cannot be ascertained,” see, *e.g.*, *Gonzalez-Lopez*, 548 U.S. 149 n.4 (citation omitted), that rationale does not extend to *potential* bias arising from media coverage in the community from which the jury is drawn.

Petitioner’s position rests on the premise that, when the potential jury pool has been saturated with pretrial publicity, *voir dire* is ineffective because “jurors in such circumstances can become infused with biases they cannot recognize” or will refuse to disclose. Pet. Br. 30. But the “almost invariable assumption of the law [is] that jurors follow their instructions,” *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), even when they are

exposed to prejudicial information with a far greater “psychological impact” than press reports. Pet. Br. 30; see, e.g., *Watkins v. Sowders*, 449 U.S. 341, 347-349 (1981) (holding effective an instruction not to consider erroneously admitted eyewitness identification evidence). Contrary to petitioner’s contention, this Court has recognized that “one who is trying as an honest [person] to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.” *Dennis*, 339 U.S. at 171.

Similarly, petitioner’s speculation that judges will be incapable of detecting perjury designed to conceal a juror’s bias cannot be squared with the longstanding respect for the expertise of trial courts in matters of jury selection. As this Court has explained, “[t]he trial judge’s function * * * [during jury selection] is not unlike that of the jurors later on in the trial”; “[b]oth must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.” *Mu’min*, 500 U.S. at 424 (citation omitted). Indeed, this Court has said that, “[p]articularly with respect to pretrial publicity,” “reliance on the judgment of the trial court” in determining juror impartiality “makes good sense.” *Id.* at 427 (emphasis added).

b. The conclusive presumption of juror prejudice petitioner proposes would create serious obstacles to trial in prominent cases. To a far greater degree than in the early 1960s, when this Court decided the cases on which petitioner relies, publicity of noteworthy events and prosecutions is nationwide in scope. By its nature, media coverage carried on national networks, cable stations, and the Internet is not confined to the venue in which the crime is committed. If exposure to a certain

level of pretrial publicity about the defendant or the events underlying trial renders a community per se unable to convene an impartial jury, as petitioner argues, then no venue will be acceptable, and no trial will be possible, in the most nationally significant cases. That cannot be the law.

3. Even if juror prejudice may be presumed in some cases, that presumption would not apply here

For three reasons, a conclusive presumption of bias among the entire jury pool would be particularly inconsistent with the realities surrounding petitioner's trial. For the same reasons, the court of appeals erred in finding even a rebuttable presumption applicable on these facts. Pet. App. 56a-60a.

a. First, petitioner's jury was drawn from the Houston Division of the Southern District of Texas, which consists of 13 counties and in 2004 had a population of at least 4.5 million people. Gov't C.A. Br. 152-153. The population of major metropolitan areas is sufficiently large, diverse, and transient that appropriate screening techniques such as questionnaires and voir dire examination can produce an impartial jury. See *Mu'Min*, 500 U.S. at 429 (evaluation of effect of pretrial publicity requires consideration of "the kind of community in which the coverage took place"); *CBS, Inc. v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 729 F.2d 1174, 1181 (9th Cir. 1984).

Because of the size and composition of the jury pool, the court of appeals erred in concluding that "the sheer number of victims" from Enron's collapse supported a presumption of jury prejudice. J.A. 58a. Contrary to the court of appeals' reasoning, the district court did not "fail[] to account for th[at] non-media prejudice" in as-

sessing whether Houston could yield a fair jury. *Ibid.* The district court was plainly aware of that potential source of bias; that is why it employed a detailed questionnaire that specifically asked potential jurors more than 20 questions about any contact they or anyone they knew had with Enron or the effects of its collapse. S.J.A. 9sa-13sa; *id.* at 12sa (“Do you know anyone * * * who has been negatively affected or hurt in any way by what happened at Enron?”). In a large urban area like Houston, screening devices like a questionnaire and voir dire are fully capable of identifying and eliminating from the jury pool any individual who has been influenced by media coverage or personally affected by the events at issue—and are fully capable of identifying 12 untainted jurors.

b. Second, the district court judge in this case was the third in the Southern District of Texas to consider claims of prejudicial pretrial publicity in an Enron-related prosecution and to conclude that Houston was capable of producing a fair and impartial jury. See *United States v. Fastow*, 292 F. Supp. 2d 914 (S.D. Tex. 2003); *United States v. Arthur Andersen LLP*, 4:02-cr-00121 Docket Entry No. 28 (S.D. Tex. Apr. 26, 2004); *Hirko* Venue Order. Those judges found that, contrary to petitioner’s portrayal, “for the most part, the reporting appears to have been objective and unemotional” with a “fact-based tone.” App., *infra*, at 11a; *Hirko* Venue Order at 6 (Enron coverage was primarily “straight news stories”). The court of appeals disagreed with that assessment of the media coverage, citing stories that it thought were “hard to characterize as non-inflammatory, even if they were just reporting the facts.” J.A. 57a. But that finding was premised on the court of appeals’ incorrect application of *de novo* review to the question

whether the circumstances surrounding trial presumptively prejudiced the community. This Court has counseled deference to the trial court about the effect of publicity on the jury pool. “The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation * * * his own perception of the depth and extent of news stories that might influence a juror.” *Mu’Min*, 500 U.S. at 427. Consistent with *Mu’Min*, this Court should respect the judgment of the three different district court judges sitting in Houston about the sentiment of that community and the overall nature of the press coverage there.

c. Third, the outcome of this case and others demonstrated the ability of Houston jurors “conscientiously [to] apply the law and find the facts” in Enron-related criminal trials. *Lockhart*, 476 U.S. at 178 (citation omitted). In *Bayly*, the “first Enron criminal trial,” the jury acquitted one of the two Enron defendants. In *Hirko*, the jury hung on certain counts but did not vote to convict any defendant. The case was retried before a second jury, which found one of the defendants not guilty in a verdict announced within days of the verdict in petitioner’s case. And in this case, the jury deliberated for nearly five days and then found petitioner not guilty on nine counts. These results refute the suggestion that Houston jurors could not fairly consider the evidence in Enron cases or that the trial atmosphere in such proceedings was “utterly corrupted by press coverage.” *Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (citation omitted).

**C. The Court Of Appeals Correctly Concluded That, Even If
A Presumption Of Juror Prejudice Applied, The Govern-
ment Rebutted It On This Record**

Even if petitioner were correct that some presumption of bias in the jury pool were warranted in this case, that presumption would not compel reversal of petitioner's convictions. Applying "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry:" whether pretrial publicity or community animosity resulted in actual bias on the jury that decided petitioner's case. *United States v. Olano*, 507 U.S. 725, 739 (1993). Such a presumption would simply reverse the ordinary allocation of burdens in this context, relieving the defendant of the obligation to establish actual bias and requiring the government to show its absence.

Petitioner asserts that "[i]f the presumption of prejudice is rebuttable," then "the Government should be required to prove beyond a reasonable doubt that no seated juror was actually affected by media and community bias." Pet. Br. 34. Although the government could satisfy a burden of proof beyond a reasonable doubt here, that burden is not the appropriate one. The government bears such a burden only when it seeks to show that a constitutional violation is harmless. See *Chapman v. California*, 386 U.S. 18, 24 (1967). But for the reasons set forth above, see pp. 19-21, *supra*, even presumptively prejudicial exposure of potential jurors to pretrial publicity does not itself establish a constitutional violation. To the extent the government must rebut a presumption of prejudice among potential jurors, that requirement "is not a matter of showing that the violation was harmless, but of showing that a violation of the right * * * [to an impartial jury did not] occur[]." *Gonzalez-Lopez*, 548 U.S. at 150. Because the existence of a constitutional violation

turns on whether it is more likely than not that any particular juror was actually biased, a preponderance of the evidence standard should apply.

Applying the proper standard, the court of appeals correctly concluded that the government rebutted any presumption of bias. The district court's "exemplary" (Pet. App. 62a) jury-selection process resulted in a venire on which more than 85% of the individuals questioned said that they had no significant exposure to pretrial publicity. And for the same reasons that petitioner fails to establish actual bias among the jurors who were selected from that venire, see pp. 21-24, *supra*, the government can show that those jurors were impartial. The seated jurors professed either disinterest or unawareness of the press coverage concerning Enron; they stated that they had formed no opinions about petitioner's guilt; they testified that they would hold the government to its burden of proof; and their unanimous not guilty verdicts on nine counts confirmed that the district court correctly credited their assertions.

II. THE HONEST SERVICES STATUTE IS CONSTITUTIONAL, AND PETITIONER'S CONVICTION IS VALID

Petitioner contends (Br. 38-58) that his conspiracy conviction is invalid because one object of the conspiracy was to violate the honest services wire fraud statute, 18 U.S.C. 1343, 1346, which petitioner argues is unconstitutionally vague. That contention lacks merit. Section 1346 provides fair notice and ascertainable limits on the conduct it covers. The elements of the offense—a material breach of the duty of loyalty, undertaken with a specific intent to deceive—limit the statute to two established categories of conduct: bribes and kickbacks, and undisclosed personal financial conflicts of interest. Peti-

tioner’s conduct satisfies those elements, but in any event, any error in the honest services aspect of petitioner’s conspiracy conviction was harmless beyond a reasonable doubt.

A. Section 1346 Is Not Unconstitutionally Vague

A penal statute is void for vagueness only if it fails to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). That principle “does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.” *Rose v. Locke*, 423 U.S. 48, 49 (1975). Nor is a statute void for vagueness simply because “trained lawyers” must “consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty” what the statute forbids. *Id.* at 50; see *United States v. Kozminski*, 487 U.S. 931, 941 (1988) (holding that in 18 U.S.C. 241, “Congress intended the statute to incorporate by reference a large body of potentially evolving federal law”). Constitutional vagueness concerns “rest on * * * lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.” *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Under these standards, Section 1346 is constitutional.

1. Section 1346 reinstated the pre-McNally definition of honest services fraud

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected the unanimous view of the courts of appeals that the mail fraud statute, 18 U.S.C. 1341, protected against not only schemes for obtaining money or

property, but also schemes to deprive others of intangible rights, such as the intangible right of honest services. 483 U.S. at 358; *id.* at 364 (Stevens, J., dissenting). The Court observed that, if Congress wished to expand federal fraud statutes beyond the deprivation of property rights, “it must speak more clearly than it has.” *Id.* at 360. The following year, Congress responded by restoring one such right (the very right at issue in *McNally*) through Section 1346, which states that, for purposes of the mail and wire fraud statutes, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. 1346; see *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000) (“Congress amended the law specifically to cover one of the ‘intangible rights’ that lower courts had protected under § 1341 prior to *McNally*.”).

“[T]he intangible right of honest services” to which Congress referred is a term of art: it invokes the doctrine that this Court had rejected in *McNally* and reinstates it in both public and private contexts. As the Second Circuit has explained, “[t]he definite article ‘the’ suggests that ‘intangible right of honest services’ had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing [mail fraud] * * * schemes to deprive others of *that* ‘intangible right of honest services[]’ which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.” *United States v. Rybicki*, 354 F.3d 124, 137-138 (2003) (en banc), cert. denied, 543 U.S. 809 (2004).

2. *The elements of honest services wire fraud under pre-McNally law are clearly defined*

Before *McNally*, the deprivation of the right of honest services was recognized as a species of fraud in both the public and the private spheres. *McNally*, 483 U.S. at 363-364 (Stevens, J., dissenting). The crime was exemplified by the conduct prosecuted in *McNally* itself. That case involved a “self-dealing” scheme in which state officials (both actual and de facto) deprived the government and citizens of the right to have government affairs “conducted honestly,” by directing certain payments on state-purchased insurance to entities in which they had a financial interest, without any disclosure of that interest to relevant state officials. *Id.* at 352-353. *McNally* thus sets forth the paradigm case of honest services fraud that Congress intended to prohibit in Section 1346. That paradigmatic offense consists of three elements: (1) a breach of the duty of loyalty, undertaken with (2) an intent to deceive, that also is (3) material.

a. *Breach of the Duty of Loyalty.* Schemes to deprive others of “the intangible right of honest services” require that a public official, agent, or other person who owes a comparable duty of loyalty breaches that duty by secretly acting in his own financial interests while purporting to act in the interests of his principal. See *Rybicki*, 354 F.3d at 141-142. Such feigned loyalty to one’s principal is a classic form of fraud.

McNally exemplifies the equation of “honest services” with the duty of loyalty, see 483 U.S. at 355; it involved a breach based on nondisclosure of a personal financial interest that might reasonably be thought to influence official decisionmaking. Other pre-*McNally* cases similarly illustrate the two general categories involving breaches of this duty: cases involving bribes or

kickbacks and cases involving official action that furthers an undisclosed conflict of interest. Section 1346 therefore does not target all manner of dishonesty but rather criminalizes only schemes in which an employee or public officer takes official action to further his own interests while pretending to act in the interests of those to whom he owes a duty of loyalty.

b. *Specific Intent to Deceive*. Section 1346 also has a high mens rea requirement—specific intent to deceive—which eliminates any risk of unintentional violation. A “mind intent upon willful evasion is inconsistent with surprised innocence.” *United States v. Ragen*, 314 U.S. 513, 524 (1942).

The mail and wire fraud statutes punish only schemes or artifices to “defraud,” thus limiting their scope to intentional, fraudulent conduct. See *Durland v. United States*, 161 U.S. 306, 313 (1986). Innocent intent is not a mere affirmative defense; the government bears the burden of proving beyond a reasonable doubt the required intent to deceive. See, e.g., *United States v. Warner*, 498 F.3d 666, 691, 698 (7th Cir. 2007), cert. denied, 128 S. Ct. 2500 (2008); *United States v. Alkins*, 925 F.2d 541, 549-550 (2d Cir. 1991). Simple misrepresentations or omissions unaccompanied by the requisite subjective intent never amount to fraud. See *United States v. Kincaid-Chauncy*, 556 F.3d 923, 946 (9th Cir.), cert. denied, No. 09-5076 (Dec. 7, 2009). Before and after *McNally*, courts have agreed on this point. See *United States v. Sawyer*, 85 F.3d 713, 732 n.16 (1st Cir. 1996) (“prior to *McNally*, courts endorsing the honest-services mail fraud theory *invariably* required some showing of deceit which is inherent in the term ‘fraud’”) (emphasis added).

The specific intent requirement eliminates fair notice concerns; a defendant can hardly complain of a lack of fair warning when he intends to deceive. See *Colautti v. Franklin*, 439 U.S. 379, 395 & n.13 (1979); *Screws v. United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion). Because “statutes must deal with untold and unforeseen variations in factual situations,” this Court demands “no more than a reasonable degree of certainty” and so has long held that the “presence of culpable intent as a necessary element of the offense” significantly undermines vagueness concerns. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 342 (1952).

The intent element of Section 1346 shields a public or private defendant whose nondisclosure of a conflict occurs because he believes that he has no conflict or disclosure duty. A defendant cannot breach a duty that he does not know he has (even though he need not know the legal source of the duty). Nor does Section 1346 cover a fiduciary whose conflict is already known to the person or persons to whom he owes a duty of loyalty, or whose actions are otherwise taken without deceptive intent.

c. *Materiality*. Materiality is an element of the mail fraud offense and therefore of honest services fraud. *Neder*, 527 U.S. at 25. The materiality element requires that the defendant’s deceptive conduct be of a kind that may influence the victim to change his behavior. *Id.* at 22-23. That requirement limits the offense to deceptive breaches of duty that have a sufficient level of importance to the victim’s affairs; insignificant breaches are not actionable. See *Rybicki*, 354 F.3d at 146. In the private sector, a misrepresentation or omission will ordinarily be material if it can cause the victim harm (economic or otherwise) by inducing him to act or to refrain from acting in a particular way. In many public sector

cases, such as those involving legislators, a deception will be material if it makes a difference in the way the public or other officials assess whether the office-holder has placed his self-interest above that of the public.

3. Pre-McNally honest services fraud clearly encompassed bribes and kickbacks, as well as undisclosed financial conflicts of interest furthered by official action

Based on the three elements of honest services fraud, pre-*McNally* cases exhibit a solid consensus on two categories of conduct.

a. First, the acceptance of bribes or kickbacks by a public official or private employee constitutes honest-services fraud. The pre-*McNally* cases so holding are legion.⁴ No pre-*McNally* decision ever questioned this

⁴ See, e.g., *United States v. Lovett*, 811 F.2d 979 (7th Cir. 1987); *United States v. Bruno*, 809 F.2d 1097 (5th Cir.), cert. denied, 481 U.S. 1057 (1987); *United States v. Price*, 788 F.2d 234 (4th Cir. 1986), vacated *sub nom. McMahan v. United States*, 483 U.S. 1015 (1987); *United States v. Schwartz*, 785 F.2d 673 (9th Cir.), cert. denied, 479 U.S. 890 (1986); *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States v. Bonansinga*, 773 F.2d 166 (7th Cir. 1985), cert. denied, 476 U.S. 1160 (1986); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *United States v. Conner*, 752 F.2d 566 (11th Cir.), cert. denied, 474 U.S. 821 (1985); *United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984); *United States v. Venneri*, 736 F.2d 995 (4th Cir.), cert. denied, 469 U.S. 1035 (1984); *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984); *United States v. Gann*, 718 F.2d 1502 (10th Cir. 1983), cert. denied, 469 U.S. 863 (1984); *United States v. Whitt*, 718 F.2d 1494 (10th Cir. 1983); *United States v. Primrose*, 718 F.2d 1484 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984); *United States v. Pecora*, 693 F.2d 421 (5th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); *United States v. Washington*, 688 F.2d 953 (5th Cir. 1982); *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), cert. denied, 465 U.S. 1066 (1983); *United States*

proposition, and post-*McNally* honest-services cases uniformly recognize that taking bribes and kickbacks is one of the “two principal theories” of honest-services fraud. *Kincaid-Chauncey*, 556 F.3d at 942; *United States v. Urciuoli*, 513 F.3d 290, 295 n.3 (1st Cir. 2008); *United States v. Kemp*, 500 F.3d 257, 279 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008); *United States v. Brown*, 459 F.3d 509, 521 (5th Cir. 2006), cert. denied, 550 U.S. 933 (2007); *Rybicki*, 354 F.3d at 139-141; *United States v. Woodward*, 149 F.3d 46, 57 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999). Indeed, petitioner concedes that “bribes and kickbacks were * * * paradigm cases.” Pet. Br. 49. Petitioner does not assert that the courts have had any difficulty applying Section 1346 in cases involving bribery or kickback schemes, or that a reasonable person could have any doubt that such schemes are covered by the statute.

Second, deprivation of honest services encompasses undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the em-

v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States v. Bottom*, 638 F.2d 781 (5th Cir. 1981); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), vacated, 602 F.2d 653 (4th Cir. 1979) (per curiam), cert. denied, 445 U.S. 961 (1980); *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975); *United States v. Staszczuk*, 502 F.2d 875 (7th Cir. 1974), cert. denied, 423 U.S. 837 (1975); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States v. George*, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973); *Shushan v. United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941).

ployee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty. Although not as numerous as the bribery and kickback cases, the pre-*McNally* cases involving undisclosed self-dealing were abundant.⁵ Indeed, the theory of liability in *McNally* itself was nondisclosure of a conflicting financial interest. 483 U.S. at 355 (jury instructions required a finding that actual or de facto officials used authority to direct commissions on state-purchased insurance to entities in which they had an ownership interest “without disclosing that interest to persons in state government whose actions or deliberations could have been affected by the disclosure”); *id.* at 361 n.9 (“The violation asserted is the failure to disclose their financial interest.”). Congress clearly intended to revive the nondisclosure theory invalidated in *McNally* itself.

b. Petitioner argues that, if his facial vagueness challenge is rejected, Section 1346 should be strictly limited to cases involving bribes and kickbacks to “avoid[] redundancy with traditional money or property fraud.” Br. 49.

⁵ See *United States v. Kwiat*, 817 F.2d 440 (7th Cir.), cert. denied, 484 U.S. 924 (1987); *United States v. Holzer*, 816 F.2d 304 (7th Cir.), vacated, 484 U.S. 807 (1987); *United States v. Dick*, 744 F.2d 546 (7th Cir. 1984); *United States v. Siegel*, 717 F.2d 9 (2d Cir. 1983); *United States v. Feldman*, 711 F.2d 758 (7th Cir.), cert. denied, 464 U.S. 939 (1983); *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), modified on reh’g, 680 F.2d 352 (5th Cir. 1982); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States v. McCracken*, 581 F.2d 719 (8th Cir. 1978); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *Post v. United States*, 407 F.2d 319 (D.C. Cir. 1968), cert. denied, 393 U.S. 1092 (1969); *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949).

Petitioner's argument assumes that an employee's acceptance of a bribe or kickback does not ordinarily deprive his employer of money or property, whereas self-dealing schemes are "effectively money or property fraud cases anyway." Br. 51.

Pre-*McNally* non-disclosure cases refute petitioner's argument. *McNally*, the decision Section 1346 was written to reverse, described the scheme at issue as involving "self-dealing," while making clear that it involved no showing that the state "was defrauded of any money or property." 483 U.S. at 352, 360. See also, *e.g.*, *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975) (city alderman bought properties through nominees and voted on matters that favorably affected the properties without disclosing his interest), cert. denied, 424 U.S. 976 (1976); *United States v. O'Malley*, 707 F.2d 1240 (11th Cir. 1983) (insurance commissioner steered insurance companies to use law firm in which he had an interest). In these cases and others involving self-dealing, the scheme will not necessarily deprive the persons to whom a duty is owed of money or property.

Even petitioner's more modest proposal to limit self-dealing schemes to the direction of money or property to third parties in which the official has an undisclosed interest, Br. 52 n.14, is flawed. For example, a vote to rezone property, when the public official secretly owns property interests in that location, involves no government expenditures to a third party. Nor does a legislator's voting down a tax increase to benefit the interests of a party from whom the legislator is soliciting employment involve expenditures. Yet both forms of undisclosed self-dealing are core honest services frauds.

4. Neither pre-McNally decisional conflicts nor the government's litigation positions render Section 1346 unconstitutionally vague

Petitioner incorrectly claims (Br. 39-44) that conflicts in pre-*McNally* case law and the history of government prosecutions create uncertainty about the reach of the honest services statute.

a. Petitioner significantly overstates the extent to which the courts of appeals differed about the scope of an honest services offense before *McNally*. Most importantly, petitioner identifies no disagreement about the core elements that constitute the statutory violation, as discussed above. And even as to the peripheral issues petitioner raises, the disagreement was not so severe as to render the statute void on its face.

Whether a Violation of State Law Is Required. Before *McNally*, the courts of appeals agreed that an honest-services conviction need not be based on a violation of state law. See, e.g., *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), vacated, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); see *McNally*, 483 U.S. at 355 (citing *Mandel* as illustrative of courts of appeals' honest-services jurisprudence); *id.* at 377 n.10 (Stevens, J., dissenting) (citing *Mandel* and other decisions holding that the mail fraud statute forbids schemes that do not violate state law). In *McNally* itself, the Court recognized that the theory of liability at issue posited a nondisclosure violation "even if state law did not require [disclosure]." *Id.* at 361 n.9. Although *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), mentioned in passing the absence of an affirmative disclosure duty under state law as a factor in reversing a conviction, the Eighth Circuit had previously recognized that "[t]he fact that a

scheme may or may not violate State law does not determine whether it is within the proscriptions of [Section 1341].” *United States v. McNeive*, 536 F.2d 1245, 1247 n. 2 (1976) (citation omitted).

Whether Contemplated Economic Harm Was Required. As the government’s brief explained in *Black v. United States*, No. 08-8768, at 28-34, only one pre-*McNally* outlier held that the honest services offense had a distinct element of contemplated economic harm. *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984). Most cases treated contemplated harm as a natural facet of materiality and did not state that the harm had to be “economic.” See *United States v. Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983); *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981), modified on reh’g, 680 F.2d 352 (5th Cir. 1982); *United States v. Von Barta*, 635 F.2d 999, 1005 n.14 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *Epstein*, 174 F.2d 754, 768 (6th Cir. 1949). And even *Lemire* believed that its formulation “only makes more explicit what [other courts] meant by a ‘material non-disclosure or misrepresentation.’” 720 F.2d at 1337.

Whether Private- and Public-Sector Honest Services Fraud Had the Same Elements. The cases petitioner cites establish nothing more than the uncontroversial proposition that the duties of loyalty for private and public officials may be distinct and that what is material may correspondingly differ. See *Lemire*, 720 F.2d at 1337 n. 13 (“[p]ublic officials may be held to a higher standard of public trust”). *United States v. Price*, 788 F.2d 234 (4th Cir. 1986), vacated *sub nom. McMahan v. United States*, 483 U.S. 1015 (1987), did not disagree; it held only that in

a private-sector case involving elected labor union officials, the public-sector standard was the better fit.

Whether Honest Services Violations Require Official Action. Contrary to petitioner’s contention, courts did not disagree on whether honest-services violations require “official action.” Misuse of official position was clearly required for a breach of the duty of loyalty. Consistent with that principle, the court in *Rabbitt* reasoned that a state legislator did not commit honest-services fraud by recommending an architectural firm for state business when his official duties did not include awarding state contracts to architects, and when he had not in any way used the powers of his office to advance the contracts. 583 F.3d at 1026. In *United States v. Bush*, 522 F.2d 641(7th Cir. 1975), cert. denied, 424 U.S. 977 (1976), the court upheld the honest-services conviction of the press secretary of the Chicago mayor, reasoning that the press secretary had violated his duty of loyalty by “us[ing] his official position” within the mayor’s “inner circle” to influence a contract decision. *Id.* at 647. The holdings of the two cases were not different in principle; in *Bush* the court merely found that the defendant had used his official position in a way the defendant in *Rabbitt* had not. That sort of fact-specific variation is hardly peculiar to the honest services fraud statute.

Whether a Misuse of Fiduciary Position Is Required. Before *McNally*, honest services cases consistently required breaches of fiduciary duties. Petitioner cites *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir.), cert. denied, 456 U.S. 915 (1981), for its statement that the defendant’s “use[.]” of his “fiduciary relationship” was not a prerequisite to conviction. *Id.* at 926. But the court found that the defendant had “breach[ed] his fiduciary duty” to his law firm’s client by concealing his represen-

tation of a client with conflicting interests, and it held only that no further showing was necessary that the lawyer misused information from the law firm's client. *Id.* at 929. In any event, the court found that the evidence supported "an inference that such activity occurred." *Ibid.*

b. Petitioner asserts that in the lower courts here, as well as in other cases, the government has advanced positions concerning the nature of honest services fraud that differ from its position in this Court. Br. 42-44. That assertion does not establish any constitutional infirmity in the honest services statute. As lower courts address and resolve issues of statutory construction, and until the Solicitor General has had occasion to adopt a formal position, the government may over time make different arguments concerning the scope or meaning of a statute. That type of development occurring in the course of handling cases involving distinctive fact patterns or raising legal issues of first impression is an ordinary incident of the litigation process, and it does not suggest that the statute is unconstitutionally vague. As the Second Circuit reasoned in rejecting a vagueness challenge, "[p]rosecutors sometimes make mistakes as to the reach of criminal statutes; courts correct them." *Rybicki*, 354 F.3d at 143.

B. Petitioner Conspired To Commit Honest Services Wire Fraud

Although petitioner's prosecution did not involve the prototypical secret, outside conflicting financial interests that are characteristic of nondisclosure honest services cases, the conduct petitioner conspired to commit constitutes honest services wire fraud under the principles outlined above.

1. Petitioner had, and acted upon, his personal financial interests, which conflicted with those of the shareholders to whom he owed a fiduciary duty. The company and its shareholders attempted to align their long-term interests with petitioner's by linking his compensation to stock price. But the obvious premise of that arrangement was that petitioner would act to maximize shareholder wealth. Petitioner subverted that premise, and placed his interests in conflict with that of the shareholders, when, for his own financial benefit, he engaged in an undisclosed scheme to artificially inflate the stock's price by deceiving the shareholders and others about the company's true financial condition. That conduct constituted fraud. The only question here is whether the public nature of petitioner's compensation scheme prevents his conduct from constituting honest services fraud. It does not. Although petitioner's basic compensation scheme was public, his scheme to artificially inflate the company's stock price by misrepresenting its financial condition, in order to derive additional personal benefits at the expense of shareholders, was not. Petitioner's deception deprived shareholders of the information they needed to make informed decisions and thereby defrauded them of his honest services.

2. Petitioner argues that the government was required but failed to prove as an element of the wire fraud statute that he acted for private gain. That argument is incorrect both legally and factually.

As a legal matter, the critical element is the defendant's undisclosed *personal conflicting financial interests* furthered by official action, not the defendant's subjective motive. No pre-*McNally* court of appeals decision, whether in a public- or a private-sector case, held that intended private gain was an *element* of honest-ser-

vices fraud. To be sure, the vast majority (if not all) pre-*McNally* honest-services cases did involve self-enrichment schemes. But, as the Seventh Circuit observed before *McNally*, “[w]hile most cases have involved some financial gain to the one breaching his fiduciary duty, they have not *required* financial gain.” *United States v. Dick*, 744 F.2d 546, 551 (7th Cir. 1984) (emphasis in original). “[T]he notion of misuse of office for personal gain adds little clarity to the scope of § 1346,” but instead “adds [only] an extra layer of unnecessary complexity to the inquiry.” *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir.), cert. denied, 537 U.S. 819 (2002).⁶

As a factual matter, the indictment alleged, and the evidence at trial showed, that petitioner’s scheme resulted in immense private gain. In a section entitled “Defendants’ Profit as a Result of the Scheme,” the conspiracy count expressly enumerated the ways in which petitioner profited from the fraudulent scheme: through the receipt of salary and bonuses, which were tied to Enron’s stock price, and through the sale of approximately \$200 million in Enron stock, which netted him \$89 million. J.A. 280a-281a. Far from conceding that petitioner sought to further Enron’s “best interests,” as petitioner erroneously asserts (Br. 57), the government explained in its opening statement that the honest-services fraud

⁶ Petitioner relies (Br. 53-55) on cases describing the honest services offense as involving private gain—as did *McNally* itself, 483 U.S. at 355. But that descriptive language does not create an element. Even in *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), what was missing was a conflict of interest of any kind. And Judge Friendly’s observation that use of “a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute,” *id.* at 1399, does not establish that it is required by the mail fraud statute.

scheme entailed private gain to the conspirators from the sale of Enron stock:

[T]hese two men [petitioner and Lay] chose to violate their duties of loyalty and trust by lying over and over again about the true financial condition of Enron, concealing from [the] employees and investors information which was critical for them to make good decisions about what to do with their own stock; and at the same time, they repeatedly put their own interests in front of those investors by self-dealing, by selling their own stock.

R. 14758. At trial, petitioner stipulated that he repeatedly sold multi-million dollar quantities of his Enron holding during the course of the fraudulent scheme, see R. 25211-25214—sales that enabled him to benefit from the artificially inflated stock price. The conduct proved in this case thus satisfies any statutory requirement of private gain.

C. Any Error In The Honest Services Fraud Object Was Harmless Beyond A Reasonable Doubt

Even if this Court were to find error in the honest services object of the conspiracy, any juror who voted for conviction based on that object also would have found petitioner guilty of conspiring to commit securities fraud. Therefore, any error was harmless.

1. In *Yates v. United States*, 354 U.S. 298 (1957), this Court held that when one of the objects of a multi-object conspiracy count is legally invalid, the conspiracy conviction is constitutionally flawed. Like other instructional defects, however, a *Yates* violation is subject to harmless error analysis. See, e.g., *Neder, supra*; *California v. Roy*, 519 U.S. 2 (1996) (per curiam); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986). This

Court has so held in the collateral review context, *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam), and the same principle applies on direct review.

2. The jury instructions on the honest services object required the jurors to find that the scheme to defraud “employed false material representations.” R. 36423. The misrepresentations alleged in the indictment and relied on by the government at trial consisted of petitioner’s statements about the financial condition of Enron and its various components. Any juror who found that petitioner committed honest services fraud must therefore have found that he made those statements and that they were false. Those same misstatements provided the basis for the securities fraud object of the conspiracy. Thus, any juror finding that the government proved the honest services object of the conspiracy also would have found that the government proved the securities fraud object. Similarly, the jury necessarily found that petitioner had committed the conduct underlying the securities fraud object because it found him guilty on the 12 substantive securities fraud counts, which were based on many of the same misrepresentations that formed the basis for the conspiracy charge. Accordingly, the jury’s verdict on the conspiracy count would have been the same without the honest-services theory. *Neder*, 527 U.S. at 17.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

MYTHILI RAMAN
*Acting Assistant Attorney
General*

MICHAEL R. DREEBEN
Deputy Solicitor General

DAVID A. O'NEIL
*Assistant to the Solicitor
General*

JOEL GERSHOWITZ
KEVIN GINGRAS
Attorneys

JANUARY 2010

APPENDIX

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

CRIMINAL NUMBER H-04-025

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICHARD A. CAUSEY, JEFFERY K. SKILLING, AND
KENNETH L. LAY, DEFENDANTS

[Filed: Jan. 19, 2005]

MEMORANDUM AND ORDER

Pending before the court are the Joint Motion of Defendants Jeffery K. Skilling and Richard A. Causey to Transfer Venue (Docket Entry No. 196) and Defendant Kenneth L. Lay's Declaration of Adoption of Jeffrey Skilling's Motion to Transfer Venue (Docket Entry No. 195). Defendants argue that this case should be transferred to another venue (e.g., Atlanta, Denver, or Phoenix) because they will be unable to receive a fair and impartial trial in Houston. For the reasons explained below, the motion will be denied.

I. Introduction

The defendants in this action are charged in a 53-count Second Superseding Indictment (SSI) (Docket Entry No. 97)—either jointly or individually—with conspiracy, securities fraud, wire fraud, bank fraud, insider trading, money laundering, and making false statements to banks. The SSI alleges that the defendants served in various executive positions at Enron, i.e., that: Lay served as Chief Executive Officer (CEO) and Chairman of the Board of Directors from Enron’s formation in 1986 until February of 2001 when he stepped down as CEO and continued as Chairman; Skilling served as President and Chief Operating Officer (COO) from January of 1997 until February of 2001, and served as President and CEO from February of 2001 until August of 2001 when he resigned; and Causey served in various positions from 1992 until 1998 when he became Enron’s Chief Accounting Officer (CAO). (SS1 ¶¶ 6-8) The offenses charged in the SSI arise from an alleged scheme to deceive the investing public, including Enron’s shareholders, the Securities Exchange Commission (SEC), and others

about the true performance of Enron’s businesses by: (a) manipulating Enron’s publicly reported financial results; and (b) making public statements and representations about Enron’s financial performance and results that were false and misleading in that they did not fairly and accurately reflect Enron’s actual financial condition and performance, and they omitted to disclose facts necessary to make those statements and representations fair and accurate.

(SS1 ¶ 5)

II. Transfer to Another District

Defendants argue that this case should be transferred to Atlanta, Denver, Phoenix, or another comparable venue because “[a]bsent a change in venue, Skilling and his co-defendants cannot receive a fair trial.”¹ The government disagrees.²

A. **Applicable Law**

1. *United States Constitution*

Article III § 2 cl. 3 of the United States Constitution provides that “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.” The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Constitution, Amend. VI. Nevertheless, since the Due Process Clause of the Fifth Amendment requires that the prosecution of federal crimes be fundamentally fair, the place of trial provisions in Article III and the Sixth Amendment must yield to the right to an impartial jury. *See United States v. Valenzuela-Bernal*, 102 S. Ct. 3440, 3449 (1982) (“Due process guarantees that a criminal defendant will be treated with ‘that fundamental fairness essential to the very concept of justice.’”) (quoting *Lisenba v. People of State of California*, 62 S. Ct. 280, 290 (1941)).

¹ Memorandum in Support of Joint Motion to Transfer Venue, Docket Entry No. 197, p. 1.

² See Government’s Memorandum of Law in Response to Defendants’ Joint Motion to Transfer Venue, Docket Entry No. 231.

2. *Federal Rule of Criminal Procedure 21(a)*

In situations where community prejudice threatens to deprive a criminal defendant of a fair trial, Federal Rule of Civil Procedure 21(a) provides for a change of venue. The rule states that

[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Fed. R. Civ. P. 21(a). Since the constitutional requirement for trial in the state and district where the offense is alleged to have been committed is a right provided to the defendant by Article III and the Sixth Amendment, a change of venue may be granted on a defendant's motion. *See* Notes to Subdivisions (a) and (b) following Rule 21, ¶ 3 (recognizing that filing of motion waives right to trial in the state and district where the offense was committed). The decision to transfer venue is "committed to the sound discretion of the trial court." *United States v. Harrelson*, 754 F.2d 1153, 1159 (5th Cir.), *cert. denied*, 106 S. Ct. 277 and 599 (1985). Every claim of potential jury prejudice due to publicity must turn upon its own facts. *See Irvin v. Dowd*, 81 S. Ct. 1639, 1642 (1961) ("necessity for transfer will depend upon the totality of the surrounding facts"). Defendants bear the burden of showing that their motion for change of venue to another district should be granted. *See United States v. Smith-Bowman*, 76 F.3d 634, 637 (5th Cir.), *cert. denied*, 116 S. Ct. 2537 (1996).

3. *Supreme Court Precedent*

Jury selection has not started and no trial date has been set in this case. The only case that the court has found in which the Supreme Court has reversed a conviction solely on the basis of community prejudice arising from pretrial publicity without examining the voir dire record for actual jury prejudice is *Rideau v. State of Louisiana*, 83 S. Ct. 1417 (1963).

In *Rideau* the Supreme Court, “without pausing to examine a particularized transcript of the voir dire examination of members of the jury,” 83 S. Ct. at 1419-1420, overturned the conviction of a habeas petitioner whose uncounselled confession had been filmed, recorded, and then broadcast three times by the local television station to large audiences in the Louisiana parish from which the jury was drawn and in which he was tried two months later. The principle distilled from this holding by courts subsequently discussing the case is that where a defendant adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, “[jury] prejudice is presumed and there is no further duty to establish bias.”

Mayola v. State of Alabama, 623 F.2d 992, 996-997 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1986 (1981) (quoting *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied sub nom Lukefar v. United States*, 100 S. Ct. 660 (1980)). Relying on principles distilled from *Rideau* the Fifth Circuit has explained that

[g]iven that virtually every case of any consequence will be the subject of some press attention . . . the

Rideau principle of presumptive prejudice is only rarely applicable, and is confined to those instances where the petitioner can demonstrate an extreme situation of inflammatory pretrial publicity that literally saturated the community . . .

United States v. Lipscomb, 299 F.3d 303, 344-345 (5th Cir. 2002) (citing *Mayola*, 623 F.2d at 997). *See also Capo*, 595 F.2d at 1090- 1091 & n.4 (“The cases in which such presumptive prejudice has been found are those where prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury.”). Moreover, in all but the most extreme cases, the *Rideau* presumption is rebuttable, and the government may demonstrate at voir dire that an impartial jury can be impaneled. *See Mayola*, 623 F.2d at 1000-1001. *See also United States v. Blom*, 242 F.3d 799, 803 (8th Cir.), *cert. denied*, 122 S. Ct. 184 (2001) (“When pretrial publicity is the issue, [courts] engage in a two-tiered analysis. At the first tier, the question is whether pretrial publicity was so extensive and corrupting that a reviewing court is required to presume unfairness of constitutional magnitude. . . . Because our democracy tolerates, even encourages, extensive media coverage of crimes . . . the presumption of inherent prejudice is reserved for rare and extreme cases. In all other cases, the change-of-venue question turns on the second tier of . . . analysis, whether the voir dire testimony of those who bec[o]me trial jurors demonstrate[] such actual prejudice that it [i]s an abuse of discretion to deny a timely change-of-venue motion.”) (citations omitted). *Sheppard v. Maxwell*, 86 S. Ct. 1507, 1522 (1966).

B. Analysis

Defendants argue that this case should be transferred because “unlike any other venue, voir dire and other lesser remedies will be wholly inadequate to eliminate the pervasive latent biases that exist in Houston against Skilling and his co-defendants.”³ The government argues that defendants’ evidence is not sufficient to raise a presumption of prejudice because Houston, as the United States’ fourth largest city, provides a sizable jury pool from which twelve fair and impartial people can be found to serve on the jury.⁴ Meticulous review of all of the evidence and arguments presented by the defendants persuades the court that they have failed to raise a presumption of prejudice consistent with the principles established by *Rideau* and its progeny.

1. *Presumption of Prejudice*

“Prejudice will be presumed when the defendant produces evidence of pervasive community prejudice in the form of highly inflammatory publicity or intensive media coverage.” *United States v. O’Keefe*, 722 F.2d 1175, 1180 (5th Cir. 1983) (citing *Capo*, 595 F.2d at 1090). *See also Spivey v. Head*, 207 F.3d 1263, 1270 (11th Cir.), *cert. denied*, 121 S. Ct. 660 (2000) (“To establish that pretrial publicity prejudiced [defendant] without an actual showing of prejudice in the jury box, he must show first that the pretrial publicity was sufficiently prejudicial and inflammatory and second that the prejudicial pretrial

³ Memorandum in Support of Joint Motion to Transfer Venue, Docket Entry No. 197, p. 1.

⁴ See Government’s Memorandum of Law in Response to Defendants’ Joint Motion to Transfer Venue, Docket Entry No. 231, pp. 19-20.

publicity saturated the community where the trial was being held.”).

When pretrial publicity is the basis for a defendant’s motion to transfer to another district under Rule 21, a trial court errs as a matter of law in denying such a motion only if the defendant can show that pretrial publicity inflamed the jury pool, pervasively prejudiced the community against the defendant, probatively incriminated the defendant, or exceeded “the sensationalism inherent in the crime.”

Lipscomb, 299 F.3d at 343 (quoting *United States v. Parker*, 877 F.2d 327, 331 (5th Cir.), *cert. denied*, 110 S. Ct. 199 (1989)).

Asserting that they have been demonized in Houston, that Enron’s rise and fall has special symbolic and cultural importance for the Houston area, and that Enron’s collapse has had serious negative effects on the local economy, defendants argue that the Houston jury pool has an emotional and potentially economic interest in supporting the victims of Enron and making them whole by convicting the defendants. Defendants’ assertions are supported by affidavits from expert witnesses⁵ and

⁵ See Declaration of Dr. Stephen Klineberg, Docket Entry No. 200 (a sociologist who has analyzed Enron’s bankruptcy and social pressures alleged to influence local jurors); Amended Declaration and Supplemental Declaration of Dr. Phillip K. Anthony, Docket Entry Nos. 217 and 252 (a polling and jury research expert who has conducted a comparative study of relevant community attitudes in Houston, Phoenix, Denver, and Atlanta); Declaration and Supplemental Declaration of Mr. Russell Scott Armstrong, Docket Entry Nos. 203 and 251 (a media expert who has compared Houston news coverage to coverage in other venues); Declaration and Supplemental Declaration of Dr. Edward Bronson, Docket Entry Nos. 199 and 254 (a social science expert who has analyzed jury attitudes towards defendants in Houston, Atlanta, Denver, and Phoenix); and Declaration of Mr. Roy Weinstein,

hundreds of exhibits drawn primarily from local news reports.⁶ Defendants argue that the effect of Enron’s collapse on members of the local jury pool was immediate and devastating: Thousands lost their jobs, many more lost their savings, local businesses suffered, creditors went unpaid, employees in related or dependent businesses lost their jobs, local charities lost funding, and everyone felt betrayed.⁷ Defendants argue that because a high percentage of victims and witnesses of Enron’s collapse reside in Houston, the collapse of Enron and the lawsuits that it has generated, including *inter alia* this case, have received extensive publicity from local news outlets.

(a) Inflammatory Publicity

Publicity is “inflammatory” if it “[t]end[s] to cause strong feelings of anger, indignation, or other type of upset; [or] tend[s] to stir the passions.” *Black’s Law Dictionary*, 782 (7th ed. 1999). Courts have characterized “inflammatory publicity” as publicity that “prejudiced the community against the defendant, probatively incriminated the defendant, or exceeded ‘the sensationalism inherent in the crime.’” *Lipscomb*, 299 F.3d at 343

Docket Entry No. 201 (an economist who discusses the vested economic interest members of the local jury pool may have—or perceive they have—in convicting the defendants). See also Declaration of Phillip K. Anthony in Support of Ken Lay’s Motion to Transfer Venue, Docket Entry No. 253.

⁶ See Declaration and Supplemental Declaration of David J. Marroso, Docket Entry Nos. 202 and 256, consecutively numbered exhibits consisting of copies of newspaper articles cited in defendants’ memorandum in support of motion to transfer venue.

⁷ Memorandum in Support of Joint Motion to Transfer Venue, Docket Entry No. 197, pp. 1-2.

(quoting *Parker*, 877 F.2d at 331). See also *Murphy v. Florida*, 95 S. Ct. 2031, 2035 (1975) (“In *Irvin v. Dowd* the rural community in which the trial was held had been subjected to a barrage of inflammatory publicity . . . including information on the defendant’s prior convictions, his confession to 24 burglaries and six murders including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence.”); *Patton v. Yount*, 104 S. Ct. 2885, 2889 (1984) (characterizing inflammatory publicity as publicity capable of creating a “wave of public passion”).

Unlike many of the cases cited by defendants, the facts of this case are neither heinous nor sensational. Defendants have, however, documented incidents in which less-than-objective language was used in news reports either about them or about this case. Examples relating to Skilling include the *Houston Chronicle*’s characterization of Skilling as the “Ultimate Enron Defendant,”⁸ and the *Houston Press*’s characterization of him as “Best Local Boy Gone Bad.”⁹ Examples relating to Lay include the *Texas Monthly*’s award of the “Bum Steer of the Year” to him in 2002,¹⁰ and former Enron employees’ comparison of him to Satan, Osama Bin Laden, and Adolf Hitler.¹¹ Additional examples include a story by the *Houston Chronicle*’s business columnist

⁸ *Id.* at 14 (citing a September 12, 2004, special section of the *Houston Chronicle* titled “Ultimate Houston,” Marroso Exhibit No. 28).

⁹ *Id.* at 14-15 (citing the September 23, 2004, edition of the *Houston Press*, Marroso Exhibit No. 29).

¹⁰ *Id.* (citing January 2003 edition of *Texas Monthly*, Marroso Exhibit No. 34).

¹¹ *Id.* at 13 (citing July 8, 2004, article in the *San Antonio Express-News*, Marroso Exhibit No. 6).

that ridiculed Lay's "doofus defense" and speculated that when his lawyers' "smoke screen clears, they may have succeeded in arguing Lay was not guilty by reason of ignorance. We all know better."¹² Defendants argue that the *Houston Chronicle* has ridiculed Skilling's explanations for the cause of Enron's collapse and published statements from former Enron employees who have accused Skilling of lying to Congress.¹³

But isolated incidents of intemperate commentary about the alleged crimes and their perpetrators do not rise to the level of "inflammatory" where, as here, for the most part, the reporting appears to have been objective and unemotional. See *United States v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002) (finding no inherent prejudice in press coverage despite "understandable emotionalism"). For example, the text accompanying the *Houston Chronicle's* characterization of Skilling as the "Ultimate Enron Defendant" illustrates the largely fact-based tone of most of the articles cited by the defendants:

Rather than lying low, former Enron CEO Jeff Skilling keeps making news. In April he was arrested after a drunken scuffle in New York. A federal judge ordered him to stop drinking alcohol, find a job or volunteer work, and obey a curfew. Skilling has pleaded not guilty to 35 felony counts accusing him of manipulating earnings reports at Enron to inflate

¹² *Id.* at 15-16 (citing a July 9, 2004, *Houston Chronicle* column written by Loren Steffy titled "What of Lay's claims? Answers lie in Valhalla," Marroso Exhibit No. 35).

¹³ *Id.* (citing February 8, 2002, *Houston Chronicle* article titled "The Fall of Enron; It's Kind of Hard to Believe; Ex-Enron Workers Rip Skilling's Story," Marroso Exhibit No. 17).

the company's value. As the only top Enron official to testify before lawmakers in Washington, D.C., Skilling has proclaimed his innocence, "I have nothing to hide," he said. We can't wait for the trial.¹⁴

Having carefully reviewed defendants' evidence, the court concludes that the pretrial publicity in this case does not approach the egregiousness present either in *Rideau* or other cases on which defendants rely. In *Rideau* a local television station aired three broadcasts of the defendant's taped confession to robbing a bank, kidnapping three of the bank's employees, and killing one of them, and the broadcasts were viewed by at least one-third and possibly as many as two-thirds of the local populace. 83 S. Ct. at 1417. In *United States v. Abrahams*, 453 F. Supp. 749, 751-753 (D. Mass. 1978), which defendants cite as an example of a case in which defendants' motion to transfer venue was granted,¹⁵ the news reports painted

a black and bleak picture of Mr. Abrahams. Repeatedly, in great detail, and often with lurid language, these stories describe, usually as if they were indisputable facts, all of the following alleged activity (and more) of the defendant: (1) his use of half a dozen aliases; (2) the startling discovery of his true identity; (3) his characterization by the FBI as an "armed and dangerous" fugitive; (4) his convictions for income tax fraud, defrauding another commodities dealer, and writing a \$3,000 bad check; (5) the

¹⁴ See September 12, 2004, special section of the *Houston Chronicle* titled "Ultimate Houston," Marroso Exhibit No. 28.

¹⁵ See Reply Memorandum of Defendants Jeffrey Skilling and Richard Causey in Support of Joint Motion to Transfer Venue, Docket Entry No. 249, pp. 5-6 & n.18, p. 8 & n.33, and p. 20 & n.104.

charges against him, pending in two other federal courts, three state courts, and Canada, for contempt, prison escape, passport fraud, obtaining money under false pretenses, issuing worthless checks, probation violation for bond default, contributing to the delinquency of a minor, and writing numerous bad checks for large amounts; (6) his failure to appear for various court proceedings; (7) the consequent denial of bail . . .

Id. at 752. The news accounts in this case simply do not constitute the type of inflammatory reporting of inherently prejudicial facts (e.g., prior convictions, escapes, arrests, prior and/or subsequent indictments, and/or confessions) needed to support a claim of presumptive prejudice.

(b) Pervasive Publicity

Courts have characterized “pervasive publicity” capable of raising a presumption of jury prejudice as publicity that has “saturated the community with sensationalized accounts of the crime and court proceedings.” *See Capo*, 595 F.2d at 1090.

Defendants argue that a presumption of prejudice arises in this case because of extensive Enron-related coverage by the *Houston Chronicle*, the *Houston Press*, local television networks, and other news outlets including, e.g., the *Texas Observer*, the *Houston Business Journal*, *Texas Monthly*, and internet sites. Defendants argue that a telephone survey of the Houston jury pool shows that six in ten potential jurors who have heard of this case think that the defendants are guilty.¹⁶ Defendants present evidence showing dramatic differences,

¹⁶ *Id.* at 2.

both qualitatively and quantitatively, between news coverage of Enron's collapse and at least two of the defendants in this case (Lay and Skilling) by news outlets in Houston and comparable news outlets in Atlanta, Denver, and Phoenix.¹⁷

Notoriety alone does not indicate that a change of venue is warranted. See *United States v. Dozier*, 672 F.2d 531, 545-546 (5th Cir.), *cert. denied*, 103 S. Ct. 256 (1982) (mere awareness of the allegations does not constitute prejudice); *Parker*, 877 F.2d at 330 (“[e]xposure to pretrial publicity . . . does not necessarily destroy a juror’s impartiality . . . [c]onsequently . . . a change of venue should not be granted on the mere showing of widespread publicity”). The Fifth Circuit has explained that

[i]f, in this age of instant, mass communication, we were to automatically disqualify persons who have heard about an alleged crime from serving as a juror, the inevitable result would be that truly heinous or notorious acts will go unpunished. The law does not prohibit the informed citizen from participating in the affairs of justice. In prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system of justice.

Calley v. Callaway, 519 F.2d 184, 210 (5th Cir. 1975), *cert. denied sub nom Calley v. Hoffmann*, 96 S. Ct. 1505 (1976). See also *Irvin*, 81 S. Ct. at 1642 (“It is not required, however, that the jurors be totally ignorant of the facts and issues involved.”). To satisfy their burden of showing that there is a reasonable likelihood that

¹⁷ See Declaration of Russell Scott Armstrong, Docket Entry No. 203, p. 5 ¶ 10.

prejudicial news coverage prior to trial will prevent a fair trial, defendants must demonstrate that the populace from which their jury will be drawn is widely infected by *prejudice* apart from mere *familiarity* with the case. *Mayola*, 623 F.2d at 999.

Unlike the petitioner in *Rideau*, who adduced evidence that his televised confession had been seen by up to two-thirds of the citizens in the Louisiana parish of 150,000 from which the jury had been drawn, defendants' evidence of adverse publicity is much less extensive. The *Houston Chronicle*, which defendants describe as the "major local paper" and whose lead on Enron-related news has largely been followed by Houston-area television stations, reaches less than "one-third of occupied households in Houston."¹⁸ Although defendants assert that this circulation rate reaches 40%-50% of the adult population in Houston,¹⁹ the court is not persuaded that the material published in the *Houston Chronicle* about Enron is either pervasive or largely prejudicial as opposed to factual. Although defendants cite news reports from other outlets such as the *Houston Press*, which they describe as an alternative weekly paper that reaches 300,000 readers per week, they provide no circulation figures for the other print media that they cite as having infected the local jury pool with prejudicial reports, e.g., *Texas Monthly* and the *Texas Observer*. See *Mayola*, 623 F.2d at 998 (failure to produce circulation figures or other evidence of the scope of that county's exposure to the prejudicial publicity instrumen-

¹⁸ Memorandum in Support of Joint Motion to Transfer Venue, Docket Entry No. 197, p. 14 n.45.

¹⁹ See Reply Memorandum of Defendants Jeffrey Skilling and Richard Causey in Support of Joint Motion to Transfer Venue, Docket Entry No. 249, p. 19.

tal in the court's rejection of petitioner's pretrial publicity claim); *United States v. Ricardo*, 619 F.2d 1124, 1131, 1132 (5th Cir. 1980) (failure to adduce newspaper circulation statistics instrumental in court's rejection of appellant's pretrial publicity claims).

Moreover, while defendants' evidence shows that each of the local television news programs reach between 8 and 15% of the local population,²⁰ these figures do not come close to those in *Rideau* where one of the three televised broadcasts of the defendant's confession reached over one-third of the local population and the three broadcasts together could have reached almost two-thirds of the local population. Nor have defendants shown that the reports aired by the local television stations are any more prejudicial than the reports that appear in the local print media. The court concludes that defendants' evidence is insufficient to show that prejudicial publicity about this case has so saturated the local populace that defendants are unlikely to receive a fair trial from an impartial jury.

In addition to reports published by local news outlets, defendants rely on data from telephone surveys of the local jury pool to demonstrate the scope of the prejudice against them in the Houston community.²¹ Evidence adduced from the telephone survey conducted on defendants' behalf suggests that some people in each venue surveyed have formed preliminary opinions regarding their guilt or innocence. Defendants assert that

²⁰ See Exhibit 15 attached to Declaration of Russell Scott Armstrong, Docket Entry No. 203.

²¹ See Declaration of Philip K. Anthony, Ph.D., in Support of Defendant Jeffrey Skilling's Motion to Transfer Venue, Docket Entry No. 217.

Questions 4-7, set forth below, comprised the “substance” of the survey:

- Question #4: Please name all of the former executives of Enron who you believe are guilty of crimes.
- Question #5: What words come to mind when you hear the name, Jeff Skilling?
- Question #6: Do you personally know anyone who has been harmed by what happened at Enron?
- Question #7: In your opinion, was the economy of the [interviewee’s venue] area more affected by the collapse of Enron than other cities in the United States?²²

Not surprisingly, responses to these four questions show that “[r]espondents in Houston were twice as likely as respondents in Atlanta and almost three times as likely as respondents in Denver and Phoenix to personally know someone who has been harmed by what happened to Enron,”²³ and “almost 70% of Houston-area residents feel their region has been harmed more [by the collapse of Enron] than any other region of the country.” Although “[t]he proportion of residents mentioning Mr. Skilling [as a former Enron executive known to be guilty of crimes] in the Houston venue (12.3%) was almost five times higher than in Denver (2.7%), and Atlanta (2.6%), and nine times higher than in Phoenix (1.4%),”²⁴ 87.7% of the survey’s Houston-area respon-

²² *Id.* at 14-15.

²³ *Id.* at 22.

²⁴ *Id.* at 19.

dents did not identify Skilling when they were asked to “name all the former Enron executives you know of who are guilty of crimes.”²⁵ Moreover, none of the data adduced by the survey presents any estimate of bias towards Causey or Lay.

While public opinion polls are sometimes introduced to show that community prejudice raises a presumption of prejudice that requires a change of venue, courts have commonly rejected such polls as unpersuasive in favor of effective voir dire as a preferable way to ferret out any bias. See *United States v. Collins*, 972 F.2d 1385, 1398 & n.19, and 1400 & n.24 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (concluding that voir dire was adequate to ferret out jury bias even in face of poll indicating that 57% of those surveyed had heard of the case and that 90% of those who had heard of the case thought the defendant was probably or definitely guilty). See also *United States v. Malmay*, 671 F.2d 869, 876 (5th Cir. 1982) (affirming district court’s denial of motion to transfer where approximately 50% of those polled believed that the charges against the defendants were true).

The Supreme Court has explained that

[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

²⁵ *Id.*

Irvin, 81 S. Ct. at 1642-1643. Although in a few rare cases pretrial publicity has been held to be so inherently prejudicial that judicial instructions to the jury were insufficient to satisfy the mandate of due process, the court *is* not persuaded that the publicity in this case is sufficiently pervasive to raise such a presumption of jury prejudice. Broad and intensive public awareness was held not to have triggered the *Rideau* presumption, or to have deprived defendants of fair trials, in some of the most notorious and widely publicized cases of the last century, e.g., the My Lai murders, *Calley*, 519 F.2d at 203-213, and the high-level conspiracy to cover up the Watergate break-in, *United States v. Haldeman*, 559 F.2d 31, 60-69 (D.C. Cir. 1976), *sub nom Ehrlichman v. United States*, and *Mitchell v. United States*, *cert. denied*, 97 S. Ct. 2641 (1977).

Whether a jury is biased is a question of fact for the court to decide. *See Wainwright v. Witt*, 105 S. Ct. 844, 854-855 (1985) (juror bias determination is a question of fact, even though “[t]he trial judge is of course applying some kind of legal standard to what he sees and hears”); *Patton*, 104 S. Ct. at 2891 & n.12 (juror bias is a question of fact although “[t]here are, of course, factual and legal questions to be considered in deciding whether a juror is qualified”). Defendants have failed to persuade the court that prospective jurors who have formed preliminary opinions about the defendants’ guilt or who are connected to the case in a way that would render them biased cannot be identified and excused during voir dire. The court is not persuaded that there exists a reasonable likelihood that the court will be unable to impanel an impartial jury despite widespread knowledge of the case.

III. Defendants' Request for a Hearing

“In addition to their written submissions, defendants [Skilling and Causey] request a hearing on . . . [their motion to transfer venue] to present argument and live witness testimony.”²⁶ Skilling and Causey reassert their request for a hearing in their reply memorandum.²⁷ Lay, too, requests a hearing on the joint motion to transfer venue.²⁸

Evidentiary hearings are not granted as a matter of course, but are held only when the defendant alleges sufficient facts which, if proven, would justify relief. *United States v. Smith*, 546 F.2d 1275, 1279-1280 (5th Cir. 1977); *United States v. Poe*, 462 F.2d 195 (5th Cir. 1972), *cert. denied*, 94 S. Ct. 107 (1973). Whether a hearing must be granted is a matter within the sound discretion of the district court. *Poe*, 462 F.2d at 197. “An evidentiary hearing is not required where none of the critical facts are in dispute and the facts as alleged by the defendant if true would not justify the relief requested.” *Smith*, 546 F.2d at 1279-1280.

To show that their motion to transfer venue should be granted at this stage of the proceedings (i.e., before voir dire), defendants must show that “prejudicial, inflammatory publicity so saturated the community jury

²⁶ Joint Motion of Defendants Jeffrey Skilling and Richard Causey to Transfer Venue, Docket Entry No. 196, first page.

²⁷ Reply Memorandum of Defendants Jeffrey Skilling and Richard Causey in Support of Joint Motion to Transfer Venue, Docket Entry No. 249, p. 3 n.8.

²⁸ See Kenneth Lay's Declaration of Adoption of Jeffrey Skilling's Motion to Transfer Venue, Docket Entry No. 195, p. 2, and Ken Lay's Reply and Request for a Hearing on the Issue of Venue, Docket Entry No. 257.

pool as to render it virtually impossible to obtain an impartial jury.” *Smith-Bowman*, 76 F.3d at 637 (citing *Parker*, 877 F.2d at 330). *See also Sheppard*, 86 S. Ct. at 1522 (“[W]here [defendants show that] there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should . . . transfer it to another . . . [venue] not so permeated with publicity.”).

Skilling and Causey have alleged with specificity the facts from which they argue that prejudicial, inflammatory publicity has so saturated the community that it will be impossible to impanel an impartial jury in Houston, and have supported their allegations with affidavits and other documentary evidence. Although Lay has neither alleged specific facts nor submitted documentary evidence in support of his motion to transfer, he has joined and adopted the motion and supporting evidence submitted by Skilling and Causey. For the reasons explained above, the court is not persuaded either that the facts alleged by the defendants are sufficiently prejudicial to raise a presumption that it will be impossible to impanel an impartial jury in Houston, or that there exists a reasonable likelihood that community prejudice will prevent a fair trial here. Because the court is not persuaded that defendants have alleged facts capable of raising a presumption of jury prejudice, the court concludes that a hearing is not warranted on defendants’ motion to transfer venue. *See Smith*, 546 F.2d at 1279-1280 (“An evidentiary hearing is not required where none of the critical facts are in dispute and the facts as alleged by the defendant[s] if true would not justify the relief requested.”).

IV. Conclusions and Order

For the reasons explained above, the court concludes that defendants have failed to allege facts capable of establishing either that the defendants' assertions of pretrial publicity and/or community prejudice raise a presumption of inherent jury prejudice. Although news coverage about Enron's collapse, this case, and these defendants has been extensive, the court is not persuaded that it has been so inflammatory or pervasive as to create a presumption that there exists a reasonable likelihood that pretrial publicity will prevent a fair trial. Accordingly, defendants' request for a hearing on their joint motion to transfer venue is **DENIED**, and the Joint Motion of Defendants Jeffery K. Skilling and Richard A. Causey to Transfer Venue (Docket Entry No. 196), which has been adopted by defendant Kenneth L. Lay via his Declaration of Adoption of Jeffrey Skilling's Motion to Transfer Venue (Docket Entry No. 195), is **DENIED**.

SIGNED at Houston, Texas, on this 19th day of January, 2005.

FOR THE COURT,

/s/ SIM LAKE

SIM LAKE

UNITED STATES DISTRICT JUDGE