SKILLING V. UNITED STATES 561 U.S. 358, (2010)

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UNITED STATES V. KENNETH L. LAY AND JEFFREY K. SKILLING, (H-04-25)

Brief factual overview:

The defendant, Jeffrey Skilling, was a longtime CEO of Enron which, in 2001, was the 7th highest-revenue-grossing company in America, before crashing into bankruptcy.

A government investigation uncovered an elaborate conspiracy to prop up Enron's stock prices by overstating the financial well-being of the company, resulting in dozens of prosecutions of employees, including Skilling and two other top executives.

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud. Specifically, it alleged that Skilling had sought to "deprive Enron and its shareholders of the intangible right of [his] honest services."

Skilling was also charged with 20 counts of securities fraud, four counts of wire fraud and ten counts of insider trading.

Skilling was convicted after a trial in Houston, Texas, and appealed to the 5th Cir., which upheld the convictions. Skilling then filed a writ of certiorari to the United States Supreme Court.

EXCERPT FROM THE DEPARTMENT OF JUSTICE PRESS RELEASE, MAY 25, 2006

- FEDERAL JURY CONVICTS FORMER ENRON CHIEF EXECUTIVES KEN LAY, JEFF SKILLING ON FRAUD, CONSPIRACY AND RELATED CHARGES
  - WASHINGTON, D.C. – A federal jury in Houston has convicted former Enron Chief Executive Officers Kenneth L. Lay and Jeffrey K. Skilling on charges including conspiracy, securities fraud, wire fraud, and making false statements, the Department of Justice announced today. The eight-woman, four-man jury returned its verdict today on its sixth day of deliberations, following 56 days of trial proceedings before U.S. District Judge Sim Lake. . . .
  - Skilling, 52, was convicted on 19 of the 28 counts pending against him: conspiracy, 12 counts of securities fraud, one count of insider trading, and five counts of making false statements to auditors. Skilling was acquitted of nine insider trading counts.

APPEAL TO THE U.S. SUPREME COURT: CONVICTION AFFIRMED IN PART AND VACATED IN PART

- Appeal to the Fifth Circuit Court of Appeals:
  - Conviction was affirmed
  - Appeal to the U.S. Supreme Court – writ of certiorari
- Two issues reviewed by the Supreme Court:
  - (1) Did Skilling receive a fair trial because of the pretrial publicity; and
  - (2) Did the jury improperly convict Skilling of conspiracy to commit "honest-services" wire fraud, under 18 USC §§371 and 1346.
  - Justice Ginsburg delivered the opinion of the Court.
    - Affirming the 5th Cir. on the first issue– Skilling did receive a fair trial because he failed to establish a presumption of juror prejudice or that actual bias infected the jury that tried him.
    - Vacating the 5th Cir. on the second issue – Because §1346 only covers bribery and kickback schemes and, because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within §1346's proscription.

TAKING A STEP BACK: JUSTICE GINSBURG AND CRIMINAL LAW

- Justice Ginsburg is well known for her leadership, decisions and dissenting opinions regarding issues of social justice, most notably in the area of gender discrimination.
- While Justice Ginsburg's opinions on constitutional criminal procedural issues are relatively faint in comparison, when viewed through the lens of her broader leadership on issues of equality, her commitment to equal rights can be seen.
- Justice Ginsburg has provided an important criminal procedure legacy which I will explore before returning to her opinion in *Skilling*.

FOCUSED ON PROTECTING THE DIGNITY OF DEFENDANTS FACING OFFICIAL POWER

- Important areas highlighted by Justice Ginsburg's decisions regarding criminal procedure:
  - Due process obligations of prosecutors
  - Adequate representation of defendants
  - Expanded right to confront witnesses
  - Increasing the jury's control over sentencing determinations

FOCUS ON INEQUALITY OF THE CRIMINAL JUSTICE PROCESS

- In true RBG style, her opinions on criminal procedure appear most animated when they concern the aspects of the criminal justice process that reinforces inequality.
- Justice Ginsburg focused on the power of individual defendants within the trial process.
- She was looking for a fair playing field for those caught in the web of government cases.
- Justice Ginsburg approach to this body of cases was to focus on "trial process" rather than exploring and/or expanding constitutional rights.

FOCUS ON INEQUALITY OF THE CRIMINAL JUSTICE PROCESS (CON'T)

- Justice Ginsburg's vigilance about procedural safeguards led her to support a less frequent ally, Justice Scalia, in his decisions redefining the Confrontation Clause and expanding the domain of the jury.
- It also placed her at odds with a more frequent ally, Justice Sotomayer, because Justice Sotomayer was focused on expanding constitutional rights.

FOCUS ON INEQUALITY OF THE CRIMINAL JUSTICE PROCESS (CON'T)

- Justice Ginsburg provided a commitment to ensuring fairness within the existing system of criminal adjudication rather than changing its parameters.
- She meticulously reviewed the details of a case and the procedural complexities comported with her deliberate approach.
- She fully understood how litigation related to policy and, over time, her criminal procedural decisions have helped to balance the government's power in the trial process and identified "practical obstacles" to protecting those rights. She also advocated for the removal of those barriers.
- For example, Justice Ginsburg guarded the right to be heard, to mount a defense, the opportunity to cross examine witnesses and present facts to a jury.

A FEW NOTABLE RBG CRIMINAL PROCEDURE CASES

- *Alabama v. Shelton* – extended the right to counsel to proceedings where the defendant receives a suspended sentence.
- *Halbert v. Michigan* – argued that defendants who decide to appeal from a guilty plea also require counsel, stating that the state should never "bolt the door to equal justice" when indigent defendants seek appellate review of criminal convictions.
- *Maples v. Thomas* – wrote a searing description of the minimal resources and training supporting defense attorneys in Alabama capital cases.
- *Vermont v. Brillon* – wrote that "delay resulting from a systematic breakdown in the public defender system" should be charged to the state.
- *Apprendi v. New Jersey* – voted with the majority requiring juries to find aggravating factors to increase criminal sentences beyond statutory maximums.

UNITED STATES V. BOOKER, 543 U.S. 220 (2005)

- In one of the most notable cases that completely changed the landscape of sentencing in federal criminal cases, Justice Ginsburg's concern with mandatory sentencing guidelines pushed up against her natural resistance to abrupt systemic change.
- In *Booker*, RBG was the only justice to join the majority opinion on both substance and remedy:
  - Agreeing that the mandatory federal Sentencing Guidelines violated the jury trial guarantees of the Sixth Amendment
  - Concluding that the appropriate remedy was to give judges the discretion to apply the guidelines.

CONNICK V. THOMPSON, 563 U.S. 51 (2011)

- One of the most telling criminal procedure opinions authored by Justice Ginsburg came in a civil case, *Connick v. Thompson*.
- In *Connick*, the defendant was wrongfully convicted because of prosecutors withholding several pieces of exculpatory evidence, including blood samples from the scene which were a different blood type than Thompson. After spending 18 years in prison, 14 of them on death row, Thompson was granted a new trial. He was acquitted and released from prison.
- Thompson sued for violation of his federal civil rights pursuant to *Brady v Maryland* and a jury awarded Thompson $14 million in damages.
- In a 5-4 decision, the U.S. Supreme Court reversed, holding that the District Attorney's Office could not be held liable for a single incident of wrongdoing, and that to prevail Thompson needed to demonstrate that the District Attorney was deliberately indifferent to the need to train prosecutors in his office about *Brady* and that such lack of training led to the *Brady* violation.

CONNICK V. THOMPSON, (CON'T)

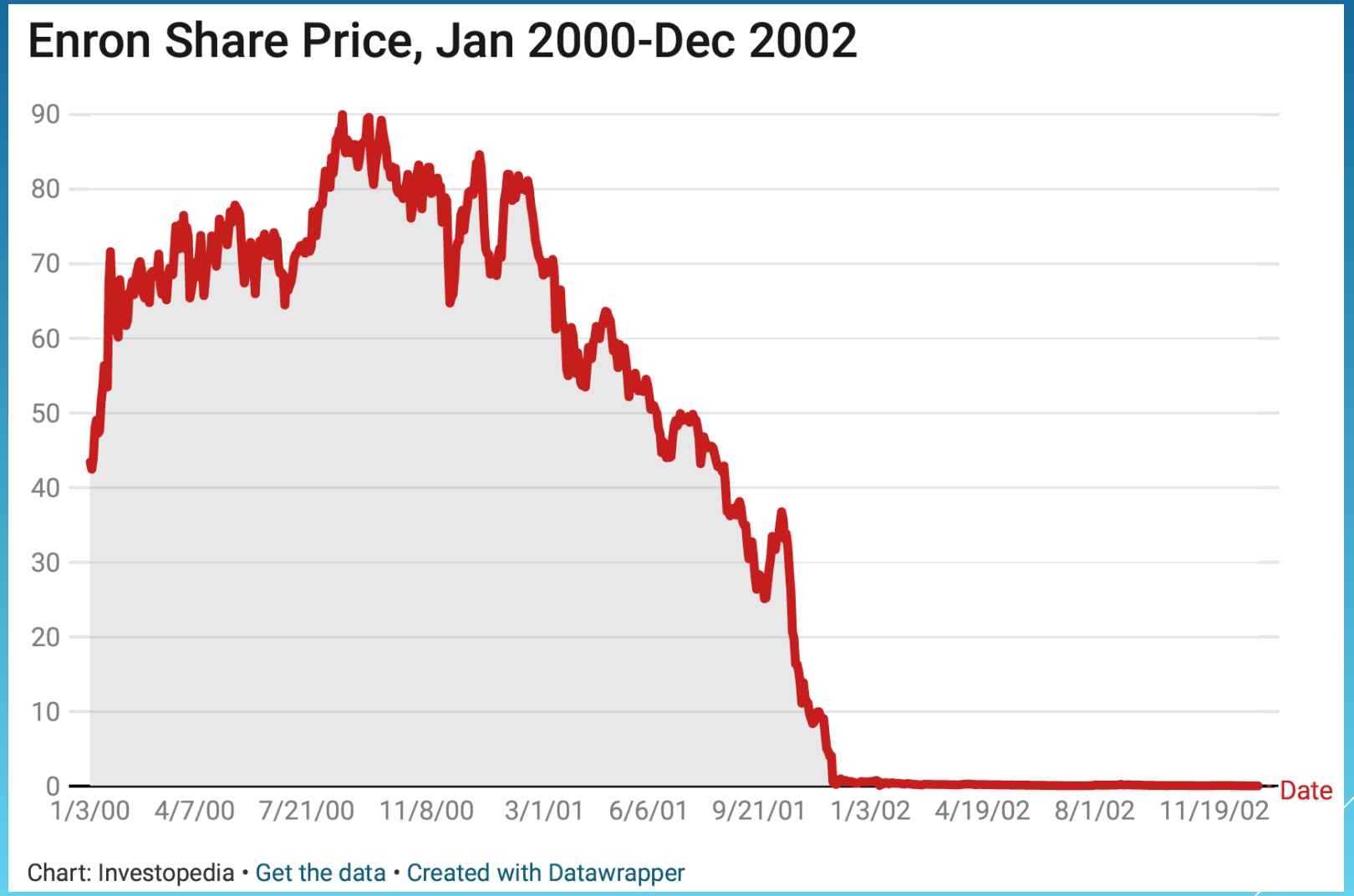
- Justice Ginsburg would have upheld the damages award in light the "gross, deliberately indifferent, and long-continuing violation of [Thompson's] fair trial right."
- Accordingly, Justice Ginsburg let the facts speak for themselves and dedicated her dissent—joined by Justices Breyer, Sotomayor, and Kagan—to a "lengthy excavation of the trial record."
- Justice Ginsburg exposed the root causes and net effects of pervasive noncompliance with *Brady* violations and she used the record to refute the majority's conclusion that only a single violation had occurred.
- Justice Ginsburg pointed out that:
  - the District Attorney's cavalier attitude toward training was not just "deliberate" but "flagrant." When the supervisor had long ago" stopped reading law books," and the office had never disciplined a single prosecutor despite "one of the worst records" in the country concerning *Brady* violations, then breaches were not just predictable but inevitable;
  - "the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office." To conclude that a "culture of inattention" does not constitute disregard for "a known or obvious consequence" simply ignores the facts.

CONNICK V. THOMPSON, (CON'T)

- For Justice Ginsburg *Brady* "is among the most basic safeguards brigading a criminal defendant's fair trial right," and a *Brady* violation "by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out." Because the absence of the withheld evidence may result in the conviction of an innocent defendant, "it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light."
- The intensity with which Justice Ginsburg wrote her dissent in *Connick* emphasizes the faith she had in the rigor of the adversarial system, and her view that it can only function if defendants have full and fair access to court and to fair criminal trials.
  - Now, with this background, back to Skilling . . . .

BRIEF TIMELINE

1985	Enron is formed following a merger between Houston Natural Gas Co. and InterNorth Inc.
1995	Enron is named "America's Most Innovative Company" by Fortune. The firm goes on to win this award for six consecutive years.
1998	**Andrew Fastow is promoted to CFO, he ultimately spearheads the creation of a network of companies that hide Enron's losses**.
2000	**Enron's shares skyrocket to an all-time high of $90.56.**
Feb. 12, 2001	**Jeffrey Skilling replaces Kenneth Lay as CEO**. However, Lay remains a member of the board of directors.
Aug. 14, 2001	**Skilling resigns suddenly, and Lay takes over once again.** Enron's broadband division also reports a massive $137 million loss. Analysts became weary of the company and subsequently drop their ratings for Enron's stock. In turn, the company's share price dives to $39.95, a 52-week low.
Oct. 12, 2001	**Arthur Andersen legal counsel tells auditors to destroy all Enron files**, except Enron's most basic documents.
Oct. 16, 2001	Enron reports a $618 million loss and $1.2 billion value write off. **Enron's stock drops further to $38.84.**
Oct. 22, 2001	Enron announces it's facing a SEC probe. **Shares fall to around $20.75** that day, following the announcement.
Nov. 8, 2001	**Enron admits it has been inflating its income by around $586 million since 1997.**
Nov. 29, 2001	Arthur Andersen becomes another casualty of the Enron scandal as the SEC expands its investigation.
Dec. 2, 2001	**Enron files for Chapter 11 bankruptcy. Its stock closes at $0.26**
Jan. 9, 2002	The Justice Department launches a criminal investigation.
Jan. 15, 2002	Enron is suspended from the NYSE.
June 15, 2002	Enron's accounting firm, Arthur Andersen is convicted of obstructing justice.


Enron Share Price, Jan 2000-Dec 2002
90
80
70
60
50
40
30
20
10
0
1/3/00
4/7/00
7/21/00
11/8/00
3/1/01
6/6/01
9/21/01
1/3/02
4/19/02
8/1/02
11/19/02
Date
Chart: Investopedia • Get the data • Created with Datawrapper

THE HARM DONE BY THE COLLAPSE OF ENRON

- Three major harms from the Enron fraud:
  - The stock, which had achieved a high of $90.75 per share in mid-2000, plummeted to less than $1 by the end of November 2001.
    - The market value was as high as $68 billion before it collapsed in December 2001
  - The collapse wiped out thousand of jobs
  - The collapse wiped out more than $2 billion in pension plans.

18, U.S.C., §1346 - HONEST SERVICE STATUTE

- Skilling's argument was that his conspiracy conviction was "premised on an improper theory of honest-services wire fraud" because
  - the statute is unconstitutionally vague or,
  - alternatively, his conduct did not fall within the statute's compass.
- RBG takes us through the legislative history of the original mail fraud provision, dating back to 1872, and case law dating between 1941 through 2000.
- RBG stated that the statute should be construed rather than invalidated.
  - the honest-services doctrine had its genesis in prosecutions involving bribery allegations;
  - "In view of this history, there is no doubt that Congress intended §1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that §1346 criminalizes *only* the bribe-and-kickback core of the pre- *McNally* case law"

TYING IT ALL TOGETHER – SIMPLE AND CLEAR

- True to her work against discrimination and inequalities, Justice Ginsburg's work in the area of criminal procedure was designed to provide a fair playing field for those caught in the web of government cases, to ensure that the government not foster inequality, and to work to remedy the effects of past injustices.
- In *Skilling*, RBG stated the following:
  - The familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."
  - The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme … through the receipt of salary and bonuses, … and through the sale of approximately $200 million in Enron stock, which netted him $89 million."
  - The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations.
- Justice Ginsburg's analysis of the facts and law led to the holding that
  - Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed because he never engaged in any bribe or kickback scheme.

IMPORTANT NOTES

- Justice Ginsburg noted that the Court, with its holding in *Skilling* regarding the honest-services law,
  - "perceive[d] no significant risk that the honest-services statutes, as [interpreted in this opinion] will be stretched out of shape" because it's prohibition on bribes and kickbacks draws from pre-McNally case law and from federal statutes;
  - "Interpreted to encompass only bribery and kickback schemes, §1346 is not unconstitutionally vague";
  - "In sum, our construction of §1346 'establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of 'overruling' *McNally* .'"

FINAL THOUGHTS ON *SKILLING*

- This case was very impactful for federal prosecutors who charged a violation of the honest-services law.
- RBG's opinion was easy to follow with a clear conclusion, namely, that to have a violation of the honest-services statute the defendant must have engaged in actual bribery and/or kickbacks, not just be part of a scheme to defraud.
- Such clarity makes a fair playing field for all in the criminal justice system because all will have the same understanding of how to apply the law.

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1. *Skilling v. United States, 561 U.S. 358*
   Client/Matter: -None-
   Search Terms: 561 us 358
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Skilling v. United States

Supreme Court of the United States

March 1, 2010, Argued; June 24, 2010, Decided

No. 08-1394

Reporter
561 U.S. 358 *; 130 S. Ct. 2896 **; 177 L. Ed. 2d 619 ***; 2010 U.S. LEXIS 5259 ****; 78 U.S.L.W. 4735; Fed. Sec. L. Rep. (CCH) P95,808; 22 Fla. L. Weekly Fed. S 550

JEFFREY K. SKILLING, Petitioner v. UNITED STATES

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

United States v. Skilling, 554 F.3d 529, 2009 U.S. App. LEXIS 204 (5th Cir. Tex., 2009)

Disposition: Affirmed in part, vacated in part, and remanded.

Core Terms

jurors, voir dire, impartiality, honest-services, district court, prospective juror, cases, questions, questionnaire, kickbacks, honest, seated, bias, bribery, pretrial publicity, collapse, courts, media, bribes, impartial jury, media coverage, murder, guilt, convictions, marks, vague, quotation, guilty plea, deprivation, answers

Case Summary

Procedural Posture

Defendant was convicted in federal district court of charges that included conspiracy to commit "honest services" wire fraud under *18 U.S.C.S. §§ 371*, *1343*, and *1346*. The United States Court of Appeals for the Fifth Circuit affirmed. The Supreme Court granted certiorari.

Overview

Defendant, a former executive of a corporation, was alleged to have sought to deprive the corporation and its shareholders of the intangible right of his honest services by engaging in a scheme to deceive the investing public about the corporation's finances. Defendant claimed that his trial should have been moved to a different venue because of pretrial publicity. The Supreme Court found that defendant's *Sixth Amendment* right to trial by an impartial jury was not violated. No presumption of juror prejudice arose, nor was there a showing of actual prejudice; a comprehensive questionnaire was used in addition to voir dire to ensure against jury bias. In order to avoid vagueness concerns, the Court held that *§ 1346* criminalized only schemes to defraud involving bribery or kickbacks, which were the core applications of the honest-services doctrine that predated the statute. Because defendant was not alleged to have solicited or accepted side payments from a third party in exchange for making the alleged misrepresentations, he did not commit honest services fraud. Whether the error was harmless or whether it affected any of defendant's other convictions was a matter for remand.

Outcome

The court of appeals' judgment was vacated insofar as it upheld defendant's conspiracy conviction, and the matter was remanded for further proceedings. The court of appeals' ruling that defendant received a fair trial was affirmed. 6-3 decision on the fair-trial issue; 9-0 decision on honest services fraud. 2 concurrences; 1 dissent in part.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Governments > Legislation > Vagueness

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN1 **Wire Fraud, Elements**

In proscribing fraudulent deprivations of the intangible right of honest services, 18 U.S.C.S. § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning would encounter a vagueness shoal. Therefore, § 1346 covers only bribery and kickback schemes.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN2 **Wire Fraud, Elements**

The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. 18 U.S.C.S. § 1341 (mail fraud), 18 U.S.C.S. § 1343 (wire fraud). The honest-services statute, 18 U.S.C.S. § 1346, defines the term "scheme or artifice to defraud" in these provisions to include a scheme or artifice to deprive another of the intangible right of honest services.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Transfer

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Right to Unbiased Jury

HN3 **Criminal Process, Right to Jury Trial**

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. By constitutional design, that trial occurs in the state where the crimes have been committed. U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment provides the right to trial by jury of the state and district wherein the crime shall have been committed. The Constitution's place-of-trial prescriptions, however, do not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial--a basic requirement of due process.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Right to Unbiased Jury

HN4 **Jurisdiction & Venue, Pretrial Publicity**

The theory of the United States' trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN5 **Pretrial Publicity, Prejudice**

The United States Supreme Court's decisions cannot be made to stand for the proposition that juror exposure to news accounts of a crime alone presumptively deprives a defendant of due process. Prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance. Jurors are not required to be totally ignorant of the facts and issues involved; scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. A presumption of prejudice attends only the extreme case.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN6 **Pretrial Publicity, Prejudice**

In determining whether a presumption of prejudice from pretrial publicity applies, the United States Supreme Court has emphasized the size and characteristics of the community in which the crime occurred.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN7 **Pretrial Publicity, Prejudice**

For purposes of determining whether a presumption of prejudice from pretrial publicity applies, a jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN8 **Pretrial Publicity, Prejudice**

It would be odd for an appellate court to presume prejudice due to pretrial publicity in a case in which jurors' actions run counter to that presumption. The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN9 **Jurisdiction & Venue, Pretrial Publicity**

Pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN10 **Pretrial Publicity, Prejudice**

When publicity is about an event, rather than directed at individual defendants, this may lessen any prejudicial impact.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN11 **Pretrial Publicity, Prejudice**

Although publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily warrant an automatic presumption of prejudice.

Criminal Law & Procedure > ... > Challenges to Jury

Criminal Law & Procedure > Juries & Jurors > Voir

Dire > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Judicial Discretion

HN12 **Juries & Jurors, Voir Dire**

No hard-and-fast formula dictates the necessary depth or breadth of voir dire. Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. Jury selection is particularly within the province of the trial judge.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Appellate Review

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Judicial Discretion

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN13 **Pretrial Publicity, Appellate Review**

When pretrial publicity is at issue, primary reliance on the judgment of the trial court makes especially good sense because the judge sits in the locale where the publicity is said to have had its effect and may base her evaluation on her own perception of the depth and extent of news stories that might influence a juror. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Appellate Review

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Appellate Review

HN14 **Voir Dire, Appellate Review**

Reviewing courts are properly resistant to second-guessing a trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record--among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service. A reviewing court considers the adequacy of jury selection, therefore, attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

HN15 **Voir Dire, Questions to Venire Panel**

To be constitutionally compelled, it is not enough that voir dire questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Legislative Intent

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Legislative Intent

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN16 **Jury Instructions, Particular Instructions**

In addition to focusing on the adequacy of voir dire, the United States Supreme Court has also taken into account other measures that are used to mitigate the adverse effects of publicity. For example, the prophylactic effect has been noted of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open

court. Peremptory challenges, too, provide protection against prejudice.

Criminal Law & Procedure > Juries & Jurors > General Overview

HN17 **Criminal Law & Procedure, Juries & Jurors**

Statements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of venire members is indeed one indicator that the process fulfilled its function.

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Cure for Trial Court Error

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Right to Unbiased Jury

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Legislative Intent

HN18 **Peremptory Challenges, Cure for Trial Court Error**

If a defendant elects to cure a trial judge's erroneous for-cause ruling by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any constitutional right. Indeed, the use of a peremptory challenge to effect an instantaneous cure of the error exemplifies a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > General Overview

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN19 **Challenges for Cause, Bias & Impartiality**

The seating of any juror who should have been dismissed for cause requires reversal. In reviewing claims of this type, the deference due to district courts is at its pinnacle: A trial court's findings of juror impartiality may be overturned only for manifest error.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Appellate Review

HN20 **Voir Dire, Appellate Review**

Jurors cannot be expected invariably to express themselves carefully or even consistently. It is there that a federal appellate court's deference must operate.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

HN21 **Bias & Prejudice, Tests for Juror Bias & Prejudice**

Jurors need not enter the box with empty heads in order to determine the facts impartially. It is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

HN22 **Jury Instructions, Particular Instructions**

A high bar has been rightly set for allegations of juror prejudice due to pretrial publicity. News coverage of civil and criminal trials of public interest conveys to society at large how the United States' justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented. Trial judges generally take care so to instruct jurors.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the

Government > Mail Fraud > Elements

HN23[] **Wire Fraud, Elements**

See 18 U.S.C.S. § 1346.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Vagueness

HN24[] **Procedural Due Process, Scope of Protection**

To satisfy due process, a penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement. The void-for-vagueness doctrine embraces these requirements.

Governments > Legislation > Interpretation

HN25[] **Legislation, Interpretation**

A court is required, if it can, to construe, not condemn, Congress's enactments. A strong presumptive validity that attaches to an Act of Congress.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN26[] **Wire Fraud, Elements**

The definite article "the" suggests that "intangible right of honest services" had a specific meaning to Congress when it enacted 18 U.S.C.S. § 1346--Congress was recriminalizing mail- and wire-fraud schemes to deprive others of that intangible right of honest services which had been protected before McNally v. United States, not all intangible rights of honest services whatever they might be thought to be.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN27[] **Wire Fraud, Elements**

Congress, by enacting 18 U.S.C.S. § 1346, meant to reinstate the body of pre-McNally v. United States honest-services law.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Vagueness

HN28[] **Case or Controversy, Constitutionality of Legislation**

It has long been the United States Supreme Court's practice, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. The federal courts have been accordingly instructed to avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible. If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, a court is under a duty to give the statute that construction.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN29[] **Wire Fraud, Elements**

The vast majority of the honest-services fraud cases have involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.

Congress's reversal of McNally v. United States and reinstatement of the honest-services doctrine under 18 U.S.C.S. § 1346 can and should be salvaged by confining its scope to the core pre-McNally applications.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Governments > Legislation > Vagueness

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN30 **Procedural Due Process, Scope of Protection**

Congress intended 18 U.S.C.S. § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, § 1346 criminalizes only the bribe-and-kickback core of the pre-McNally v. United States case law.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Interpretation

HN31 **Case or Controversy, Constitutionality of Legislation**

Courts may attempt to implement what the legislature would have willed had it been apprised of a constitutional infirmity. A court seeks to determine what Congress would have intended in light of the court's constitutional holding.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Interpretation

HN32 **Case or Controversy, Constitutionality of Legislation**

Cases "paring down" federal statutes to avoid constitutional shoals are legion. These cases recognize that a court does not legislate, but instead respects the legislature, by preserving a statute through a limiting interpretation.

Banking Law > ... > Racketeering > Money Laundering > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Governments > Legislation > Interpretation > Rule of Lenity

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN33 **Money Laundering, Elements**

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. This interpretive guide is especially appropriate in construing 18 U.S.C.S. § 1346 because mail and wire fraud are predicate offenses under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961(1), and the money laundering statute, 18 U.S.C.S. § 1956(c)(7)(A).

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Governments > Legislation > Vagueness

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN34 **Wire Fraud, Elements**

Interpreted to encompass only bribery and kickback schemes, 18 U.S.C.S. § 1346 is not unconstitutionally vague.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN35 **Wire Fraud, Elements**

Whatever the school of thought concerning the scope and meaning of 18 U.S.C.S. § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud, and the statute's mens rea requirement further blunts any notice concern.

Governments > Legislation > Interpretation

HN36 **Legislation, Interpretation**

Even if the outermost boundaries of a statute are imprecise, any such uncertainty has little relevance where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN37 **Wire Fraud, Elements**

No misconduct other than bribes and kickbacks falls within 18 U.S.C.S. § 1346's province.

Governments > Legislation > Vagueness

HN38 **Legislation, Vagueness**

Clarity at the requisite level to avoid vagueness may be supplied by judicial gloss on an otherwise uncertain statute.

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN39 **Crimes Against Persons, Bribery**

Under 41 U.S.C.S. § 52(2), the term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to enumerated persons for the purpose of improperly obtaining or rewarding favorable treatment in connection with enumerated circumstances.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Criminal Law & Procedure > Trials > Verdicts > General Overview

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

HN40 **Harmless & Invited Error, Constitutional Rights**

Constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory. This determination, however, does not necessarily require reversal of a conviction; errors of this variety are subject to harmless-error analysis.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

HN41 **Standards of Review, Harmless & Invited Error**

Harmless-error analysis applies equally to cases on direct appeal as well as collateral review.

Lawyers' Edition Display

Decision

[*619]** Former corporate executive held to have failed to establish that pretrial publicity prevented him from

obtaining fair trial on federal fraud-related charges; "honest services" fraud proscription in 18 U.S.C.S. § 1346 held limited to bribery and kickbacks.

Summary

Procedural posture: Defendant was convicted in federal district court of charges that included conspiracy to commit "honest services" wire fraud under 18 U.S.C.S. §§371, 1343, and 1346. The United States Court of Appeals for the Fifth Circuit affirmed. The Supreme Court granted certiorari.

Overview: Defendant, a former executive of a corporation, was alleged to have sought to deprive the corporation and its shareholders of the intangible right of his honest services by engaging in a scheme to deceive the investing public about the corporation's finances. Defendant claimed that his trial should have been moved to a different venue because of pretrial publicity. The Supreme Court found that defendant's Sixth Amendment right to trial by an impartial jury was not violated. No presumption of juror prejudice arose, nor was there a showing of actual prejudice; a comprehensive questionnaire was used in addition to voir dire to ensure against jury bias. In order to avoid vagueness concerns, the Court held that § 1346 criminalized only schemes to defraud involving bribery or kickbacks, which were the core applications of the honest-services doctrine that predated the statute. Because defendant was not alleged to have solicited or accepted side payments from a third party in exchange for making the alleged misrepresentations, he did not commit honest services fraud. Whether the error was harmless or whether it affected any of defendant's other convictions was a matter for remand.

[*620] Outcome:** The court of appeals' judgment was vacated insofar as it upheld defendant's conspiracy conviction, and the matter was remanded for further proceedings. The court of appeals' ruling that defendant received a fair trial was affirmed. 6-3 decision on the fair-trial issue; 9-0 decision on honest services fraud. 2 concurrences; 1 dissent in part.

Headnotes

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- DEPRIVATION OF RIGHT OF HONEST SERVICES > Headnote:

LEdHN[1] [1]

In proscribing fraudulent deprivations of the intangible right of honest services, 18 U.S.C.S. § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning would encounter a vagueness shoal. Therefore, § 1346 covers only bribery and kickback schemes. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- RIGHT OF HONEST SERVICES > Headnote:

LEdHN[2] [2]

The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. 18 U.S.C.S. § 1341 (mail fraud), 18 U.S.C.S. § 1343 (wire fraud). The honest-services statute, 18 U.S.C.S. § 1346, defines the term "scheme or artifice to defraud" in these provisions to include a scheme or artifice to deprive another of the intangible right of honest services. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Scalia, Kennedy, Thomas, and Alito, JJ.)

CONSTITUTIONAL LAW §839.5 > PLACE OF CRIMINAL TRIAL -- TRANSFER -- DUE PROCESS > Headnote:

LEdHN[3] [3]

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. By constitutional design, that trial occurs in the state where the crimes have been committed. U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment provides the right to trial by jury of the state and district wherein the crime shall have been committed. The Constitution's place-of-trial prescriptions, however, do not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial--a basic requirement of due process. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

TRIAL §3 > OPEN COURT RATHER THAN OUTSIDE INFLUENCE > Headnote:
LEdHN[4] [4]

The theory of the United States' trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

[*621]**

CONSTITUTIONAL LAW §841 > DUE PROCESS -- JURORS -- NEWS ACCOUNTS OF CRIME > Headnote:
LEdHN[5] [5]

The United States Supreme Court's decisions cannot be made to stand for the proposition that juror exposure to news accounts of a crime alone presumptively deprives a defendant of due process. Prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance. Jurors are not required to be totally ignorant of the facts and issues involved; scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. A presumption of prejudice attends only the extreme case. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

TRIAL §3 > PRETRIAL PUBLICITY -- COMMUNITY > Headnote:
LEdHN[6] [6]

In determining whether a presumption of prejudice from pretrial publicity applies, the United States Supreme Court has emphasized the size and characteristics of the community in which the crime occurred. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

JURY §33 > PRETRIAL PUBLICITY -- OPINIONS OF OTHERS > Headnote:
LEdHN[7] [7]

For purposes of determining whether a presumption of prejudice from pretrial publicity applies, a jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

APPEAL §1285 > PRESUMPTION OF PREJUDICE -- ACTIONS OF JURORS > Headnote:
LEdHN[8] [8]

It would be odd for an appellate court to presume prejudice due to pretrial publicity in a case in which jurors' actions run counter to that presumption. The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

TRIAL §3 > PRETRIAL PUBLICITY -- EFFECT > Headnote:
LEdHN[9] [9]

Pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

TRIAL §3 > PUBLICITY ABOUT EVENT > Headnote:
LEdHN[10] [10]

When publicity is about an event, rather than directed at individual defendants, this may lessen any prejudicial impact. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

TRIAL §3 > PUBLICITY ABOUT CODEFENDANT'S GUILTY PLEA > Headnote:
LEdHN[11] [11]

Although publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily warrant an automatic presumption of prejudice. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

[*622]**

JURY §42 > VOIR DIRE -- DEPTH -- PROCEDURE > Headnote:
LEdHN[12] [12]

No hard-and-fast formula dictates the necessary depth or breadth of voir dire. Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. Jury selection is particularly within the province of the trial judge. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

JURY §33 > PRETRIAL PUBLICITY -- EFFECT -- JUDGMENT OF TRIAL COURT > Headnote:
LEdHN[13] [13]

When pretrial publicity is at issue, primary reliance on the judgment of the trial court makes especially good sense because the judge sits in the locale where the publicity is said to have had its effect and may base her evaluation on her own perception of the depth and extent of news stories that might influence a juror. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

APPEAL §1403 > JUROR'S IMPARTIALITY -- TRIAL JUDGE'S ESTIMATION -- REVIEW > Headnote:
LEdHN[14] [14]

Reviewing courts are properly resistant to second-guessing a trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record--among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service. A reviewing court considers the adequacy of jury selection, therefore, attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

JURY §42 > VOIR DIRE -- WHEN QUESTIONS COMPELLED > Headnote:
LEdHN[15] [15]

To be constitutionally compelled, it is not enough that voir dire questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

JURY §44TRIAL §274 > MITIGATING PUBLICITY -- JURY INSTRUCTIONS -- PEREMPTORY CHALLENGES > Headnote:
LEdHN[16] [16]

In addition to focusing on the adequacy of voir dire, the United States Supreme Court has also taken into account other measures that are used to mitigate the adverse effects of publicity. For example, the prophylactic effect has been noted of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Peremptory challenges, too, provide protection against prejudice. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

[*623]**

JURY §35 > SELECTION -- STATEMENTS BY NONJURORS > Headnote:
LEdHN[17] [17]

Statements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of venire members is indeed one indicator that the process fulfilled its function. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

JURY §44 > PEREMPTORY CHALLENGE -- CURE OF ERROR > Headnote:
LEdHN[18] [18]

If a defendant elects to cure a trial judge's erroneous for-cause ruling by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any constitutional right. Indeed, the use of a peremptory challenge to effect an instantaneous cure of the error exemplifies a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

APPEAL §1626 > JUROR -- ERROR IN SEATING -- REVERSAL > Headnote:
LEdHN[19] [19]

The seating of any juror who should have been dismissed for cause requires reversal. In reviewing claims of this type, the deference due to district courts is at its pinnacle: A trial court's findings of juror impartiality may be overturned only for manifest error. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

APPEAL §1403 > JURORS -- DEFERENCE > Headnote:
LEdHN[20] [20]

Jurors cannot be expected invariably to express themselves carefully or even consistently. It is there that a federal appellate court's deference must operate. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

JURY §39 > IMPRESSIONS OR OPINIONS -- LAYING ASIDE > Headnote:
LEdHN[21] [21]

Jurors need not enter the box with empty heads in order to determine the facts impartially. It is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

TRIAL §274 > PUBLICITY -- JURY INSTRUCTIONS > Headnote:
LEdHN[22] [22]

A high bar has been rightly set for allegations of juror prejudice due to pretrial publicity. News coverage of civil and criminal trials of public interest conveys to society at large how the United States' justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented. Trial judges generally take care so to instruct jurors. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- RIGHT OF HONEST SERVICES > Headnote:
LEdHN[23] [23]

See 18 U.S.C.S. § 1346, which provides: “For the purposes of th[e] chapter [of the United States Code that prohibits, among others, mail fraud, 18 U.S.C.S. § 1341, and wire fraud, 18 U.S.C.S. § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.” (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

[*624]**

STATUTES §18 > CRIMINAL OFFENSE -- AVOIDING VAGUENESS > Headnote:

LEdHN[24] [24]

To satisfy due process, a penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement. The void-for-vagueness doctrine embraces these requirements. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

EVIDENCE §99 > ACT OF CONGRESS -- PRESUMPTIVE VALIDITY > Headnote:
LEdHN[25] [25]

A court is required, if it can, to construe, not condemn, Congress's enactments. A strong presumptive validity that attaches to an Act of Congress. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- RIGHT OF HONEST SERVICES > Headnote:
LEdHN[26] [26]

The definite article "the" suggests that "intangible right of honest services" had a specific meaning to Congress when it enacted 18 U.S.C.S. § 1346--Congress was recriminalizing mail- and wire-fraud schemes to deprive others of that intangible right of honest services which had been protected before McNally v. United States, not all intangible rights of honest services whatever they might be thought to be. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- HONEST SERVICES > Headnote:
LEdHN[27] [27]

Congress, by enacting 18 U.S.C.S. § 1346, meant to reinstate the body of pre-McNally v. United States honest-services law. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §108 > LIMITING CONSTRUCTION -- SAVING FROM UNCONSTITUTIONALITY > Headnote:
LEdHN[28] [28]

It has long been the United States Supreme Court's practice, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. The federal courts have been accordingly instructed to avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible. If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, a court is under a duty to give the statute that construction. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

[*625]**

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- HONEST SERVICES > Headnote:
LEdHN[29] [29]

The vast majority of the honest-services fraud cases have involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. Congress's reversal of McNally v. United States and reinstatement of the honest-services doctrine under 18 U.S.C.S. § 1346 can and should be salvaged by confining its scope to the core pre-McNally applications. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- BRIBES AND KICKBACKS > Headnote:
LEdHN[30] [30]

Congress intended 18 U.S.C.S. § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct would raise the due process concerns underlying the vagueness doctrine.

To preserve the statute without transgressing constitutional limitations, § 1346 criminalizes only the bribe-and-kickback core of the pre-McNally v. United States case law. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §108 > IMPLEMENTATION IN LIGHT OF CONSTITUTIONAL HOLDING > Headnote:
LEdHN[31] [31]

Courts may attempt to implement what the legislature would have willed had it been apprised of a constitutional infirmity. A court seeks to determine what Congress would have intended in light of the court's constitutional holding. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §108 > LIMITING INTERPRETATION -- AVOIDANCE OF UNCONSTITUTIONALITY > Headnote:
LEdHN[32] [32]

Cases "paring down" federal statutes to avoid constitutional shoals are legion. These cases recognize that a court does not legislate, but instead respects the legislature, by preserving a statute through a limiting interpretation. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §186 > LENITY -- FRAUD > Headnote:
LEdHN[33] [33]

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. This interpretive guide is especially appropriate in construing 18 U.S.C.S. § 1346 because mail and wire fraud are predicate offenses under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961(1), and the money laundering statute, 18 U.S.C.S. § 1956(c)(7)(A). (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §18.5 > FRAUD LIMITATION -- LACK OF VAGUENESS > Headnote:
LEdHN[34] [34]

Interpreted to encompass only bribery and kickback schemes, 18 U.S.C.S. § 1346 is not unconstitutionally vague. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- BRIBES AND KICKBACKS > Headnote:
LEdHN[35] [35]

Whatever the school of thought concerning the scope and meaning of 18 U.S.C.S. § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud, and the statute's mens rea requirement further blunts any notice concern. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

[*626]**

STATUTES §17 > UNCERTAINTY -- CORE CONDUCT > Headnote:
LEdHN[36] [36]

Even if the outermost boundaries of a statute are imprecise, any such uncertainty has little relevance where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

COMMUNICATIONS §8POSTAL SERVICE §48 > FRAUD -- MAIL -- WIRE -- BRIBES AND KICKBACKS > Headnote:
LEdHN[37] [37]

No misconduct other than bribes and kickbacks falls within 18 U.S.C.S. § 1346's province. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §17 > AVOIDANCE OF VAGUENESS -- JUDICIAL GLOSS > Headnote:
LEdHN[38] [38]

Clarity at the requisite level to avoid vagueness may be supplied by judicial gloss on an otherwise uncertain statute. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

STATUTES §178 > KICKBACK -- MEANING > Headnote:
LEdHN[39] [39]

Under 41 U.S.C.S. § 52(2), the term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to enumerated persons for the purpose of improperly obtaining or rewarding favorable treatment in connection with enumerated circumstances. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

APPEAL §1650.5 > JURY VERDICT -- HARMLESS-ERROR ANALYSIS > Headnote:
LEdHN[40] [40]

Constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory. This determination, however, does not necessarily require reversal of a conviction; errors of this variety are subject to harmless-error analysis. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

APPEAL §1513 > HARMLESS-ERROR ANALYSIS > Headnote:
LEdHN[41] [41]

Harmless-error analysis applies equally to cases on direct appeal as well as collateral review. (Ginsburg, J., joined by Roberts, Ch. J., and Stevens, Breyer, Alito, and Sotomayor, JJ.)

Syllabus

[*358] [*627] [**2899]** Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into the seventh highest-revenue-grossing company in America. Petitioner Jeffrey Skilling, a longtime Enron officer, was Enron's chief executive officer from February until August 2001, when he resigned. Less than four months later, Enron crashed into bankruptcy, and its stock **[**2900]** plummeted in value. After an investigation uncovered an elaborate conspiracy to prop up Enron's stock prices by overstating the company's financial well-being, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the chain of command, indicting Skilling and two other top Enron executives. These three defendants, the indictment charged, engaged in a scheme to deceive investors about Enron's true financial performance by manipulating its publicly reported financial results and making false and misleading statements. Count 1 of the indictment charged Skilling with, *inter alia,* conspiracy to commit "honest-services" wire **[****2]** fraud, 18 U.S.C. §§ 371, 1343, 1346, by depriving Enron and its shareholders of the intangible right of his honest services. Skilling was also charged with over 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading.

In November 2004, Skilling moved for a change of venue, contending that hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors. He submitted hundreds of news reports detailing Enron's downfall, as well as affidavits from experts he engaged **[***628]** portraying community attitudes in Houston in comparison to other potential venues. The District Court denied the motion, concluding that pretrial publicity did not warrant a presumption that Skilling would be unable to obtain a fair trial in Houston. Despite incidents of intemperate commentary, the court observed, media coverage, on the whole, had been objective and unemotional, and the facts of the case were neither heinous nor sensational. Moreover, the court asserted, effective *voir dire* would detect juror bias.

In the months before the trial, the court asked the parties for questions it might use to screen prospective

[**3]** jurors. Rejecting the Government's sparer inquiries in favor of Skilling's more probing and specific **[*359]** questions, the court converted Skilling's submission, with slight modifications, into a 77-question, 14-page document. The questionnaire asked prospective jurors about their sources of news and exposure to Enron-related publicity, beliefs concerning Enron and what caused its collapse, opinions regarding the defendants and their possible guilt or innocence, and relationships to the company and to anyone affected by its demise. The court then mailed the questionnaire to 400 prospective jurors and received responses from nearly all of them. It granted hardship exemptions to about 90 individuals, and the parties, with the court's approval, further winnowed the pool by excusing another 119 for cause, hardship, or physical disability. The parties agreed to exclude, in particular, every prospective juror who said that a pre-existing opinion about Enron or the defendants would prevent her from being impartial.

In December 2005, three weeks before the trial date, one of Skilling's codefendants, Richard Causey, pleaded guilty. Skilling renewed his change-of-venue motion, arguing that the juror **[****4]** questionnaires revealed pervasive bias and that news accounts of Causey's guilty plea further tainted the jury pool. The court again declined to move the trial, ruling that the questionnaires and *voir dire* provided safeguards adequate to ensure an impartial jury. The court also denied Skilling's request for attorney-led *voir dire* on the ground that potential jurors were more forthcoming with judges than with lawyers. But the court promised to give counsel an opportunity to ask followup questions, agreed that venire members should be examined individually about pretrial **[**2901]** publicity, and allotted the defendants jointly two extra peremptory challenges.

Voir dire began in January 2006. After questioning the venire as a group, the court examined prospective jurors individually, asking each about her exposure to Enron-related news, the content of any stories that stood out in her mind, and any questionnaire answers that raised a red flag signaling possible bias. The court then permitted each side to pose followup questions and ruled on the parties' challenges for cause. Ultimately, the court qualified 38 prospective jurors, a number sufficient, allowing for peremptory challenges, to empanel **[****5]** 12 jurors and 4 alternates. After a four-month trial, the jury found Skilling guilty of 19 counts, including the honest-services-fraud conspiracy charge, and not guilty of 9 insider-trading counts.

On appeal, Skilling raised two arguments relevant here. First, he contended that pretrial publicity and community prejudice prevented him from obtaining a fair trial. Second, he **[***629]** alleged that the jury improperly convicted him of conspiracy to commit honest-services wire fraud. As to the former, the Fifth Circuit initially determined that the **[*360]** volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice. Stating, however, that the presumption is rebuttable, the court examined the *voir dire,* found it "proper and thorough," and held that the District Court had empaneled an impartial jury. The Court of Appeals also rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest-services fraud. It did not address Skilling's argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague.

Held:

1. Pretrial publicity and community prejudice did not prevent **[****6]** Skilling from obtaining a fair trial. He did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him. *Pp. ___ - ___, 177 L. Ed. 2d, at 640-654*.

(a) The District Court did not err in denying Skilling's requests for a venue transfer. *Pp. ___ - ___, 177 L. Ed. 2d, at 641-646*.

(1) Although the *Sixth Amendment* and Article III, § 2, cl. 3, provide for criminal trials in the State and district where the crime was committed, these place-of-trial prescriptions do not impede transfer of a proceeding to a different district if extraordinary local prejudice will prevent a fair trial. *Pp. ___ - ___, 177 L. Ed. 2d, at 641*.

(2) The foundation precedent for the presumption of prejudice from which the Fifth Circuit's analysis proceeded is *Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663*. Wilbert Rideau robbed a small-town bank, kidnaped three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession, which, without his knowledge, was filmed and televised three times to large local audiences shortly before trial. After the Louisiana trial court denied Rideau's change-of-venue motion, he was convicted, and the conviction was upheld on direct appeal. This Court reversed. "[T]o the tens of **[****7]** thousands of people who saw and heard it," the Court explained, the interrogation "in a very real sense *was* Rideau's trial--at which he pleaded

guilty." Id., at 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663. "[W]ithout pausing to examine . . . the *voir dire,*" the Court held that the "kangaroo court proceedings" trailing the televised confession violated due process. Id., at 726-727, 83 S. Ct. 1417, 10 L. Ed. 2d 663. The Court followed *Rideau* in two other cases in which media coverage manifestly tainted criminal prosecutions. However, it later explained that those decisions **[**2902]** "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." Murphy v. Florida, 421 U.S. 794, 798-799, 95 S. Ct. 2031, 44 L. Ed. 2d 589. Thus, prominence does not necessarily produce prejudice, and juror *impartiality* does not require *ignorance*. **[*361]** See, *e.g.,* Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751. A presumption of prejudice attends only the extreme case. Pp. ___ - ___, 177 L. Ed. 2d, at 641-643.

(3) Important differences separate Skilling's prosecution from those in which the Court has presumed juror **[***630]** prejudice. First, the Court has emphasized the size and characteristics of the community in which the crime occurred. In contrast to the small-town setting in **[****8]** *Rideau*, for example, the record shows that Houston is the Nation's fourth most populous city. Given the large, diverse pool of residents eligible for jury duty, any suggestion that 12 impartial individuals could not be empaneled in Houston is hard to sustain. Second, although news stories about Skilling were not kind, they contained no blatantly prejudicial information such as Rideau's dramatically staged admission of guilt. Third, unlike *Rideau* and other cases in which trial swiftly followed a widely reported crime, over four years elapsed between Enron's bankruptcy and Skilling's trial. Although reporters covered Enron-related news throughout this period, the decibel level of media attention diminished somewhat in the years following Enron's collapse. Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government. It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption. Pp. ___ - ___, 177 L. Ed. 2d, at 643-645.

(4) The Fifth Circuit presumed juror prejudice based primarily on the magnitude and negative **[****9]** tone of the media attention directed at Enron. But "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, 96 S. Ct. 2791, 49 L. Ed. 2d 683. Here, news stories about Enron did not present the kind of vivid, unforgettable information the Court has recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact. Nor did Enron's sheer number of victims trigger a presumption. Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron, the extensive screening questionnaire and followup *voir dire* yielded jurors whose links to Enron were either nonexistent or attenuated. Finally, while Causey's well-publicized decision to plead guilty shortly before trial created a danger of juror prejudice, the District Court took appropriate steps to mitigate that risk. Pp. ___ - ___, 177 L. Ed. 2d, at 645-646.

(b) No actual prejudice contaminated Skilling's jury. The Court rejects Skilling's assertions that *voir dire* did not adequately detect and defuse juror prejudice and that several seated jurors were biased. Pp. ___ - ___, 177 L. Ed. 2d, at 646-654.

[*362] (1) No hard-and-fast **[****10]** formula dictates the necessary depth or breadth of *voir dire.* Jury selection is "particularly within the province of the trial judge." Ristaino v. Ross, 424 U.S. 589, 594-595, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (internal quotation marks omitted). When pretrial publicity is at issue, moreover, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories **[**2903]** that might influence a juror." Mu'Min v. Virginia, 500 U.S. 415, 427, 111 S. Ct. 1899, 114 L. Ed. 2d 493. The Court considers the adequacy of jury selection in Skilling's case attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary **[***631]** to ensure that impartiality. Pp. ___ - ___, 177 L. Ed. 2d, at 646-647.

(2) Skilling failed to show that his *voir dire* fell short of constitutional requirements. The jury-selection process was insufficient, Skilling maintains, because *voir dire* lasted only five hours, most of the District Court's questions were conclusory and failed adequately to probe jurors' true feelings, and the court consistently took prospective jurors at their word once they claimed they could be fair, no matter **[****11]** any other indications of bias. This Court's review of the record, however, yields a different appraisal. The District Court initially screened venire members by eliciting their responses to a comprehensive questionnaire drafted in

large part by Skilling. That survey helped to identify prospective jurors excusable for cause and served as a springboard for further questions; *voir dire* thus was the culmination of a lengthy process. Moreover, inspection of the questionnaires and *voir dire* of the seated jurors reveals that, notwithstanding the flaws Skilling lists, the selection process secured jurors largely uninterested in publicity about Enron and untouched by the corporation's collapse. Whatever community prejudice existed in Houston generally, Skilling's jurors were not under its sway. Relying on *Irvin v. Dowd, 366 U.S., at 727-728, 81 S. Ct. 1639, 6 L. Ed. 2d 751*, Skilling asserts the District Court should not have accepted jurors' promises of fairness. But a number of factors show that the District Court had far less reason than the trial court in *Irvin* to discredit jurors' assurances of impartiality: News stories about Enron contained nothing resembling the horrifying information rife in reports about Leslie Irvin's **[****12]** rampage of robberies and murders; Houston shares little in common with the rural community in which Irvin's trial proceeded; circulation figures for Houston media sources were far lower than the 95% saturation level recorded in *Irvin*; and Skilling's seated jurors exhibited nothing like the display of bias shown in *Irvin*. In any event, the District Court did not simply take venire members at their word. It questioned each juror individually to uncover concealed bias. This face-to-face opportunity **[*363]** to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and news sources, gave the court a sturdy foundation to assess fitness for jury service. *Pp. ___ - ___, 177 L. Ed. 2d, at 647-652*.

(3) Skilling's allegation that several jurors were openly biased also fails. In reviewing such claims, the deference due to district courts is at its pinnacle: "A trial court's findings of juror impartiality may be overturned only for manifest error."*Mu'Min, 500 U.S., at 428, 111 S. Ct. 1899, 114 L. Ed. 2d 493* (internal quotation marks omitted). Skilling, moreover, unsuccessfully challenged only one of the seated jurors for cause, "strong evidence that he was convinced the [other] jurors were not biased and had not formed any opinions as **[****13]** to his guilt." *Beck v. Washington, 369 U.S. 541, 557-558, 82 S. Ct. 955, 8 L. Ed. 2d 98*. A review of the record reveals no manifest error regarding the empaneling of Jurors 11, 20, and 63, each of whom indicated, *inter alia,* that he or she would be fair to Skilling and would require the Government to prove its case. Four other jurors Skilling claims he would have excluded with extra peremptory strikes, Jurors 38, 67, 78, and 84, exhibited no signs **[***632]** of prejudice this Court can discern. *Pp. ___ - ___, 177 L. Ed. 2d, at 652-654*.

[2904]** 2. *Section 1346*, which proscribes fraudulent deprivations of "the intangible right of honest services," is properly confined to cover only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within the Court's confinement of *§ 1346*'s proscription. *Pp. ___ - ___, 177 L. Ed. 2d, at 654-664*.

(a) To place Skilling's claim that *§ 1346* is unconstitutionally vague in context, the Court reviews the origin and subsequent application of the honest-services doctrine. *Pp. ___ - ___, 177 L. Ed. 2d, at 654-656*.

(1) In a series of decisions beginning in the 1940's, the Courts of Appeals, one after another, interpreted the mail-fraud statute's prohibition of "any scheme or artifice to defraud" to include deprivations not only of money or property, **[****14]** but also of intangible rights. See, *e.g., Shushan v. United States, 117 F.2d 110*, which stimulated the development of the "honest-services" doctrine. Unlike traditional fraud, in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services doctrine targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. Even if the scheme occasioned a money or property gain for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services." Most often these cases involved bribery of public officials, but over time, the courts increasingly recognized that the doctrine applied to a private employee who breached his allegiance to his employer, often by accepting **[*364]** bribes or kickbacks. By 1982, all Courts of Appeals had embraced the honest-services theory of fraud. *Pp. ___ - ___, 177 L. Ed. 2d, at 654-655*.

(2) In 1987, this Court halted the development of the intangible-rights doctrine in *McNally v. United States, 483 U.S. 350, 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*, which **[****15]** held that the mail-fraud statute was "limited in scope to the protection of property rights." "If Congress desires to go further," the Court stated, "it must speak more clearly." *Ibid*. *P. ___, 177 L. Ed. 2d, at 656*.

(3) Congress responded the next year by enacting *§*

1346, which provides: "For the purposes of th[e] chapter [of the U.S. Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pp ___ - ___, 177 L. Ed. 2d, at 656.

(b) Section 1346, properly confined to core cases, is not unconstitutionally vague. Pp. ___ - ___, 177 L. Ed. 2d, at 656-663.

(1) To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903. The void-for-vagueness doctrine embraces these requirements. Skilling contends that § 1346 meets neither of the two due process essentials. But this Court must, if possible, construe **[***633]**, not condemn, Congress' enactments. See, *e.g.*, Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 571, 93 S. Ct. 2880, 37 L. Ed. 2d 796. **[****16]** Alert to § 1346's potential breadth, the Courts of Appeals have divided on how best to interpret the statute. Uniformly, however, they have declined to throw out the statute as irremediably vague. This Court agrees that § 1346 should be construed rather than invalidated. P. ___ - ___, 177 L. Ed. 2d, at 656-657.

[2905]** (2) The Court looks to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase "the intangible right of honest services." There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud. Congress, it bears emphasis, enacted § 1346 on the heels of *McNally* and drafted the statute using that decision's terminology. See 483 U.S., at 355, 362, 107 S. Ct. 2875, 97 L. Ed. 2d 292. Pp. ___ - ___, 177 L. Ed. 2d, at 657-658.

(3) To preserve what Congress certainly intended § 1346 to cover, the Court pares the pre-*McNally* body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. In parsing the various pre-*McNally* decisions, the Court acknowledges **[****17]** that Skilling's vagueness challenge has force, for honest-services decisions were not models of clarity or consistency. It has long been the Court's practice, however, **[*365]** before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. See, *e.g.*, Hooper v. California, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297. Arguing against any limiting construction, Skilling contends that it is impossible to identify a salvageable honest-services core because the pre-*McNally* cases are inconsistent and hopelessly unclear. This Court rejected an argument of the same tenor in Letter Carriers, 413 U.S., at 571-572, 93 S. Ct. 2880, 37 L. Ed. 2d 796. Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these decisions do not cloud the fact that the vast majority of cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. Indeed, *McNally* itself presented a paradigmatic kickback fact pattern. 483 U.S., at 352-353, 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292. In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Because reading the statute to proscribe a wider **[****18]** range of offensive conduct would raise vagueness concerns, the Court holds that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law. Pp. ___ - ___, 177 L. Ed. 2d, at 658-661.

(4) The Government urges the Court to go further by reading § 1346 to proscribe another category of conduct: undisclosed self-dealing by a public official or private employee. Neither of the Government's arguments in support of this position withstands close inspection. Contrary to the first, *McNally* itself did not center on nondisclosure of a conflicting financial interest, but rather involved a classic kickback scheme. See 483 U.S., at 352-353, 360, 107 S. Ct. 2875, ***[***634]*** 97 L. Ed. 2d 292. Reading § 1346 to proscribe bribes and kickbacks--and nothing more--satisfies Congress' undoubted aim to reverse *McNally* on its facts. Nor is the Court persuaded by the Government's argument that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for some conflict-of-interest schemes, they reached no consensus on which schemes qualified. Given the relative infrequency of those prosecutions and the intercircuit inconsistencies they produced, the **[****19]** Court concludes that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases. Further dispelling doubt on this point is the principle that "ambiguity concerning the ambit of criminal statutes should be

resolved in **[**2906]** favor of lenity." *Cleveland v. United States, 531 U.S. 12, 25, 121 S. Ct. 365, 148 L. Ed. 2d 221* (internal quotation marks omitted). The Court therefore resists the Government's less constrained construction of *§ 1346* absent Congress' clear instruction otherwise. "If Congress desires to go further," the Court reiterates, "it must speak more clearly than it has." *McNally, 483 U.S., at 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. *Pp. ___ - ___, 177 L. Ed. 2d, at 660-662*.

[*366] (5) Interpreted to encompass only bribery and kickback schemes, *§ 1346* is not unconstitutionally vague. A prohibition on fraudulently depriving another of one's honest services by accepting bribes or kickbacks presents neither a fair-notice nor an arbitrary-prosecution problem. See *Kolender, 461 U.S., at 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903*. As to fair notice, it has always been clear that bribes and kickbacks constitute honest-services fraud, *Williams v. United States, 341 U.S. 97, 101, 71 S. Ct. 576, 95 L. Ed. 774*, and the statute's *mens rea* requirement further blunts any notice concern, see, *e.g., Screws v. United States, 325 U.S. 91, 101-104, 65 S. Ct. 1031, 89 L. Ed. 1495*. As to arbitrary prosecutions, **[****20]** the Court perceives no significant risk that the honest-services statute, as here interpreted, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing and defining similar crimes. *Pp. ___ - ___, 177 L. Ed. 2d, at 662-663*.

(c) Skilling did not violate *§ 1346*, as the Court interprets the statute. The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health to his own profit, but the Government never alleged that he solicited or accepted side payments from a third party in exchange for making these misrepresentations. Because the indictment alleged three objects of the conspiracy--honest-services wire fraud, money-or-property wire fraud, and securities fraud--Skilling's conviction is flawed. See *Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356*. This determination, however, does not necessarily require reversal of the conspiracy conviction, for errors of the *Yates* variety are subject to harmless-error analysis. The Court leaves the parties' dispute about whether the error here was harmless for resolution on remand, along with the question whether reversal **[****21]** on the conspiracy count would touch any of Skilling's other convictions. *Pp. ___ - ___, 177 L. Ed. 2d, at 663-664*.

[*635]** *554 F.3d 529*, affirmed in part, vacated in part, and remanded.

Counsel: Sri Srinivasan argued the cause for petitioner.

Michael R. Dreeben argued the cause for respondent.

Judges: Ginsburg, J., delivered the opinion of the Court, Part I of which was joined by Roberts, C. J., and Stevens, Scalia, Kennedy, Thomas, and Alito, JJ., Part II of which was joined by Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., and Part III of which was joined by Roberts, C. J., and Stevens, Breyer, Alito, and Sotomayor, JJ. Scalia, J., filed an opinion concurring in part and concurring in the judgment, in which Thomas, J., joined, and in which Kennedy, J., joined except as to Part III, *post*, p. 415.Alito, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 425.Sotomayor, J., filed an opinion concurring in part and dissenting in part, in which Stevens and Breyer, JJ., joined, *post*, p. 427.

Opinion by: GINSBURG

Opinion

[*367] **[**2907]** Justice **Ginsburg** delivered the opinion of the Court.

In 2001, Enron Corporation, then the seventh highest-revenue-grossing company in America, crashed into bankruptcy. We consider in this opinion two questions arising from the prosecution of Jeffrey Skilling, a longtime Enron executive, for crimes committed before the corporation's collapse. First, did pretrial **[****22]** publicity and community prejudice prevent Skilling from obtaining a fair trial? Second, did the jury improperly convict Skilling of conspiracy to commit "honest-services" wire fraud, *18 U.S.C. §§ 371*, *1343*, *1346*?

Answering no to both questions, the Fifth Circuit affirmed Skilling's convictions. We conclude, in common

with the Court of Appeals, that Skilling's fair-trial argument fails; **[*368]** Skilling, we hold, did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him. But we disagree with the Fifth Circuit's honest-services ruling. *HN1*[↑] *LEdHN[1]*[↑] [1] In proscribing fraudulent deprivations of "the intangible right of honest services," § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription. We therefore affirm in part and vacate in part.

I

Founded in 1985, Enron Corporation grew from its headquarters in Houston, **[****23]** Texas, into one of the world's leading energy companies. Skilling launched his career there in 1990 when Kenneth Lay, the company's founder, hired him to head an Enron subsidiary. Skilling steadily rose through the corporation's ranks, serving as president and chief operating officer, and then, beginning in February 2001, as chief executive officer. Six months later, on August 14, 2001, Skilling resigned from Enron.

Less than four months after Skilling's departure, Enron spiraled into bankruptcy. The company's stock, which had traded at $90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to comprehend what caused the corporation's collapse, the U. S. Department of Justice formed an Enron Task Force, comprising prosecutors and Federal Bureau of Investigation agents from around the Nation. **[***636]** The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being. In the years following Enron's bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up **[*369]** the corporation's chain of command: On July 7, 2004, a grand jury indicted **[****24]** Skilling, Lay, and Richard Causey, Enron's former chief accounting officer.

[2908]** These three defendants, the indictment alleged,

> "engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . 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." App. P5, p. 277a.

Skilling and his co-conspirators, the indictment continued, "enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige." *Id.,* P14, at 280a.

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud; in particular, it alleged that Skilling had sought to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services." *Id.,* P87, at 318a.[1] The indictment further charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading.

In November 2004, Skilling moved to transfer the trial to another venue; he contended that hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors. To support this assertion, Skilling, aided by media experts, submitted hundreds of news reports detailing Enron's downfall; he also presented affidavits from **[*370]** the experts he engaged portraying community attitudes in Houston in comparison to other potential venues.

The U.S. District Court for the Southern District of Texas, in accord with rulings in two earlier instituted Enron-related prosecutions,[2] denied the venue-transfer

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[1] *HN2*[↑] *LEdHN[2]*[↑] [2] The mail- and wire-fraud statutes criminalize the use **[****25]** of the mails or wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341 (mail fraud); § 1343 (wire fraud). The honest-services statute, § 1346, defines "the term 'scheme or artifice to defraud' " in these provisions to include "a scheme or artifice to deprive another of the intangible right of honest services."

[2] See *United States v. Fastow, 292 F. Supp. 2d 914, 918 (SD Tex. 2003)*; Order in *United States* v. *Hirko*, No. 4:03-cr-00093 (SD Tex., Nov. 24, 2004), Record, Doc. 484, p. 6. These rulings were made by two other judges of the same District. Three judges residing in the area thus independently found that defendants in Enron-related cases could obtain a fair trial in Houston.

motion. Despite "isolated incidents of intemperate commentary," the court observed, media coverage "ha[d] [mostly] been objective and **[****26]** unemotional," and the facts of the case were "neither heinous nor sensational." App. to Brief for United States 10a-11a.[3] Moreover, "courts ha[d] commonly" favored "effective **[***637]** voir dire . . . to ferret out **[**2909]** any [juror] bias." *Id*., at 18a. Pretrial publicity about the case, the court concluded, did not warrant a presumption that Skilling would be unable to obtain a fair trial in Houston. *Id.*, at 22a.

In the months leading up to the trial, the District Court solicited from the parties questions the court might use to screen prospective jurors. Unable to agree on a questionnaire's **[*371]** format and content, Skilling and the Government submitted dueling documents. On venire members' sources of Enron-related news, for example, the Government proposed that they tick boxes from a checklist of generic labels such as "[t]elevision," "[n]ewspaper," and "[r]adio," Record 8415; Skilling proposed more probing questions asking venire members to list the specific names of their media sources and to report on "what st[ood] out in [their] mind[s]" of "all the **[****28]** things [they] ha[d] seen, heard or read about Enron," *id.,* at 8404-8405.

The District Court rejected the Government's sparer inquiries in favor of Skilling's submission. Skilling's questions "[we]re more helpful," the court said, "because [they] [we]re generally . . . open-ended and w[ould] allow the potential jurors to give us more meaningful information." *Id.,* at 9539. The court converted Skilling's submission, with slight modifications, into a 77-question, 14-page document that asked prospective jurors about, *inter alia*, their sources of news and exposure to Enron-related publicity, beliefs concerning Enron and what caused its collapse, opinions regarding the defendants and their possible guilt or innocence, and relationships to the company and to anyone affected by its demise.[4]

[*372] In November 2005, the District Court mailed the questionnaire to 400 prospective jurors and received **[****30]** responses from nearly all the addressees. The court granted hardship exemptions to approximately 90 individuals, *id.,* at 11773-11774, and **[***638]** the parties, with the court's approval, further winnowed the pool by excusing another 119 for cause, hardship, or physical disability, *id.*, at 11891, 13594. The parties agreed to exclude, in particular, "each and every" prospective juror who said that a pre-existing opinion about Enron or the defendants would prevent her from impartially considering the evidence at trial. *Id.,* at 13668.

On December 28, 2005, three weeks before the date scheduled for the commencement of trial, Causey pleaded guilty. Skilling's attorneys immediately requested **[**2910]** a continuance, and the District Court agreed to delay the proceedings until the end of

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[3] Painting a different picture of the media coverage surrounding Enron's collapse, Justice Sotomayor's opinion relies heavily on affidavits of media experts and jury consultants submitted by Skilling in support of his venue-transfer motion. *E.g.,* post, at 428, 429-430, 431, 177 L. Ed. 2d, at 672, 673, 673, 674 (opinion concurring in part and dissenting in part) (hereinafter dissent); post, at 431, n. 2, 177 L. Ed. 2d, at 674, and 448, n. 10, 177 L. Ed. 2d, at 685; post, at 451, 177 L. Ed. 2d, at 686, and 459-460, n. 22, 177 L. Ed. 2d, at 691. These Skilling-employed experts **[****27]** selected and emphasized negative statements in various news stories. But the District Court Judge did not find the experts' samples representative of the coverage at large; having "[m]eticulous[ly] review[ed] all of the evidence" Skilling presented, the court concluded that "incidents [of news reports using] less-than-objective language" were dwarfed by "the largely fact-based tone of most of the articles." App. to Brief for United States 7a, 10a, 11a. See also post, at 429, 177 L. Ed. 2d, at 673 (acknowledging that "many of the stories were straightforward news items").

[4] Questions included the following: "What are your opinions about the compensation that executives of large corporations receive?"; "Have you, any family members, or friends ever worked for or applied for work with," "done business with," or "owned stock in Enron Corporation or any Enron subsidiaries and partnership?"; "Do you know anyone . . . who has been negatively affected or hurt in any way by what happened **[****29]** at Enron?"; "Do you have an opinion about the cause of the collapse of Enron? If YES, what is your opinion? On what do you base your opinion?"; "Have you heard or read about any of the Enron cases? If YES, please tell us the name of all sources from which you have heard or read about the Enron cases."; "Have you read any books or seen any movies about Enron? If YES, please describe."; "Are you angry about what happened with Enron? If YES, please explain."; "Do you have an opinion about . . . Jeffrey Skilling . . . [?] If YES, what is your opinion? On what do you base your opinion?"; "Based on anything you have heard, read, or been told[,] do you have any opinion about the guilt or innocence of . . . Jeffrey Skilling[?] If . . . YES . . . , please explain."; "[W]ould any opinion you may have formed regarding Enron or any of the defendants prevent you from impartially considering the evidence presented during the trial of . . . Jeffrey Skilling[?] If YES or UNSURE . . . , please explain."; "Is there anything else you feel is important for the court to know about you?" Record 13013-13026.

January 2006. *Id.,* at 14277. In the interim, Skilling renewed his change-of-venue motion, arguing that the juror questionnaires revealed pervasive bias and that news accounts of Causey's guilty plea further tainted the jury pool. If Houston remained the trial venue, Skilling urged that "jurors need to be questioned individually by both the Court *and* counsel" concerning their opinions of Enron and "publicity issues." *Id.,* at 12074.

The **[****31]** District Court again declined to move the trial. Skilling, the court concluded, still had not "establish[ed] that pretrial publicity and/or community prejudice raise[d] a presumption of inherent jury prejudice." *Id.,* at 14115. The questionnaires and *voir dire*, the court observed, provided **[*373]** safeguards adequate to ensure an impartial jury. *Id.,* at 14115-14116.

Denying Skilling's request for attorney-led *voir dire*, the court said that in 17 years on the bench:

> "I've found . . . I get more forthcoming responses from potential jurors than the lawyers on either side. I don't know whether people are suspicious of lawyers--but I think if I ask a person a question, I will get a candid response much easier than if a lawyer asks the question." *Id.,* at 11805.

But the court promised to give counsel an opportunity to ask followup questions, *ibid.,* and it agreed that venire members should be examined individually about pretrial publicity, *id.,* at 11051-11053. The court also allotted the defendants jointly 14 peremptory challenges, 2 more than the standard number prescribed by Federal Rule of Criminal Procedure 24(b)(2) and (c)(4)(B). *Id.,* at 13673-13675.

Voir dire began on January 30, 2006. The District **[****32]** Court first emphasized to the venire the importance of impartiality and explained the presumption of innocence and the Government's burden of proof. The trial, the court next instructed, was not a forum "to seek vengeance against Enron's former officers," or to "provide remedies for" its victims. App. 823a. "The bottom line," the court stressed, "is that we want . . . jurors who . . . will faithfully, conscientiously and impartially serve if selected." *Id.,* at 823a-824a. In response to the court's query whether any prospective juror questioned her ability to adhere to these instructions, two individuals indicated that they could not be fair; they were therefore excused for cause, *id.*, at 816a, 819a-820a.

After questioning the venire as a group,[5] the District Court brought prospective jurors one by one to the **[***639]** bench **[*374]** for individual examination. Although the questions varied, the process generally tracked the following format: The court asked about exposure to Enron-related news and the content of any stories that stood out in the prospective juror's mind. Next, the court homed in on questionnaire answers that raised a red flag signaling possible bias. The court then permitted each side **[****33]** to pose followup questions. Finally, after the venire member stepped away, the court entertained and ruled on challenges for cause. In all, the court granted one of the Government's for-cause challenges and denied four; it granted three of the defendants' challenges and denied six. The parties agreed to excuse three additional jurors for cause and one for hardship.

[2911]** By the end of the day, the court had qualified 38 prospective jurors, a number sufficient, allowing for peremptory challenges, to empanel 12 jurors and 4 alternates.[6] Before the jury was sworn in, Skilling objected to the seating of six jurors. He did not contend that they were in fact biased; instead, he urged that he would have used peremptories to exclude them had he not exhausted his supply by striking **[*375]** several venire members after the court refused to excuse them

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[5] Among other questions, the court asked whether sympathy toward the victims of Enron's collapse or a desire to see justice done would overpower prospective jurors' impartiality. App. 839a-840a.

[6] Selection procedures of similar style and duration took place in three Enron-related criminal **[****34]** cases earlier prosecuted in Houston--*United States* v. *Arthur Andersen LLP*, No. 4:02-cr-00121-1 (SD Tex.) (charges against Enron's outside accountants); *United States* v. *Bayly*, No. 4:03-cr-00363 (SD Tex.) (charges against Merrill Lynch and Enron executives for alleged sham sales of Nigerian barges); *United States* v. *Hirko*, No. 4:03-cr-00093 (SD Tex.) (fraud and insider-trading charges against five Enron Broadband Services executives). See Brief for United States 9 (In all three cases, the District 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."); Government's Memorandum of Law in Response to Defendants' Joint Motion to Transfer Venue in *United States* v. *Skilling*, et al., No. 4:04-cr-00025 (SD Tex., Dec. 3, 2004), Record, Doc. 231, pp. 21-28 (describing in depth the jury-selection process in the *Arthur Andersen* and *Bayly* trials).

for cause. Supp. App. 3sa-4sa (Sealed).[7] The court overruled this objection.

After the jurors took their oath, the District Court told them they could not discuss the case with anyone or follow media accounts of the proceedings. "[E]ach of you," the court explained, "needs to be absolutely sure that your decisions concerning the facts will be based only on the evidence that you hear and read in this courtroom." App. 1026a.

Following a four-month trial and nearly five days of deliberation, the jury found Skilling guilty of 19 counts, including the honest-services-fraud conspiracy charge, and not guilty of 9 insider-trading counts. The District Court sentenced Skilling to 292 months' imprisonment, 3 years' supervised release, and $45 million in restitution.

On appeal, Skilling raised a host of challenges to his convictions, including the fair-trial and honest-services arguments he presses here. Regarding the former, the Fifth Circuit initially determined that the volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice. *554 **[***640]** F.3d 529, 559 (2009)*.[8] The court also noted potential prejudice **[****36]** stemming from Causey's guilty plea and from the large number of victims in Houston--from the "[t]housands of Enron employees **[*376]** . . . [who] lost their jobs, and . . . saw their 401(k) accounts wiped out," to Houstonians who suffered spillover economic effects. *Id., at 559-560*.

The Court of Appeals stated, however, that "the presumption [of prejudice] is rebuttable," **[**2912]** and it therefore examined the *voir dire* to determine whether "the District Court empaneled an impartial jury." *Id., at 561* (internal quotation marks, italics, and some capitalization omitted). The *voir dire* was, in the Fifth Circuit's view, "proper and thorough." *Id., at 562*. Moreover, **[****37]** the court noted, Skilling had challenged only one seated juror--Juror 11--for cause. Although Juror 11 made some troubling comments about corporate greed, the District Court "observed [his] demeanor, listened to his answers, and believed he would make the government prove its case." *Id., at 564*. In sum, the Fifth Circuit found that the Government had overcome the presumption of prejudice and that Skilling had not "show[n] that any juror who actually sat was prejudiced against him." *Ibid.*

The Court of Appeals also rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest-services fraud. "[T]he jury was entitled to convict Skilling," the court stated, "on these elements": "(1) a material breach of a fiduciary duty . . . (2) that results in a detriment to the employer," including one occasioned by an employee's decision to "withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct." *Id., at 547*. The Fifth Circuit did not address Skilling's argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague. **[****38]** Brief for Defendant-Appellant Skilling in No. 06-20885 (CA5), p. 65, n. 21.

Arguing that the Fifth Circuit erred in its consideration of these claims, Skilling sought relief from this Court. We granted certiorari, *558 U.S. 945, 130 S. Ct. 393, 175 L. Ed. 2d 267 (2009)*, and now affirm in **[*377]** part, vacate in part, and remand for further proceedings.[9] We consider first Skilling's allegation of juror prejudice, and next, his honest-services argument.

II

Pointing to "the community passion aroused by Enron's collapse and the vitriolic media treatment" aimed at him, Skilling argues that his trial "never should have proceeded in Houston." Brief for Petitioner 20. And **[***641]** even if it had been possible to select impartial

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[7] Skilling had requested an additional peremptory strike each time the District Court rejected **[****35]** a for-cause objection. The court, which had already granted two extra peremptories, see *supra, at 373, 177 L. Ed. 2d, at 638*, denied each request.

[8] The Fifth Circuit described the media coverage as follows: "Local newspapers ran many personal interest stories in which sympathetic individuals expressed feelings of anger and betrayal toward Enron. . . . Even the [Houston] Chronicle's sports page wrote of Skilling's guilt as a foregone conclusion. Similarly, the Chronicle's 'Pethouse Pet of the Week' section mentioned that a pet had 'enjoyed watching those Enron jerks being led away in handcuffs.' These are but a few examples of the Chronicle's coverage." *554 F.3d at, 559* (footnote omitted).

[9] We also granted certiorari and heard arguments this Term in two other cases raising questions concerning the honest-services statute's scope. See *Black v. United States, 561 U.S. 465, 476, 130 S. Ct. 2963, 177 L. Ed. 2d 695, 2010 U.S. LEXIS 5253*; *Weyhrauch v. United States, 561 U.S. 476, 130 S. Ct. 2971, 177 L. Ed. 2d 705, 2010 U.S. LEXIS 5254*Today we vacate and remand those decisions in light of this opinion. *Black, post, p. 465, 2010 U.S. LEXIS 5253*; *Weyhrauch, post, p. 476, 2010 U.S. LEXIS 5254*.

jurors in Houston, "[t]he truncated voir dire . . . did almost nothing to weed out prejudices," he contends, so "[f]ar from rebutting the presumption of prejudice, the record below **[****39]** affirmatively confirmed it." *Id.,* at 21. Skilling's fair-trial claim thus raises two distinct questions. First, did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice? Second, did actual prejudice contaminate Skilling's jury?[10]

A

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HN3[↑] *LEdHN[3]*[↑] [3] The *Sixth Amendment* secures to criminal defendants the right to trial by an **[**2913]** impartial jury. By constitutional design, that trial occurs "in the State where the . . . Crimes . . . **[*378]** have been committed." Art. III, § 2, cl. 3. See also *Amdt. 6* (right to trial by "jury of the State and district wherein the crime shall have been committed"). The Constitution's place-of-trial prescriptions, however, do not impede transfer of the proceeding **[****40]** to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial--a "basic requirement of due process," *In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)*.[11]

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HN4[↑] *LEdHN[4]*[↑] [4] "The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel. Attorney General of Colo., 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907)* (opinion for the Court by Holmes, J.). When does the **[*379]** publicity attending conduct charged as criminal dim prospects that the trier can judge a case, as due process requires, impartially, unswayed by outside influence? Because most cases of consequence **[****42]** garner at least some pretrial publicity, courts have considered this question in diverse settings. We begin our discussion by addressing the presumption **[***642]** of prejudice from which the Fifth Circuit's analysis in Skilling's case proceeded. The foundation precedent is *Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)*.

Wilbert Rideau robbed a bank in a small Louisiana town, kidnaped three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession. Without informing Rideau, no less seeking his consent, the police filmed the interrogation. On three separate occasions shortly before the trial, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. Rideau moved for a change of venue, arguing that he could not receive a fair trial in the parish where the crime occurred, which had a population of approximately 150,000 people. The trial court denied the motion, and a jury eventually convicted Rideau. The Supreme Court of Louisiana upheld the conviction.

[2914]** We reversed. "What the people [in the community] saw on their television sets," we observed,

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[10] Assuming, as the Fifth Circuit found, that a presumption of prejudice arose in Houston, the question presented in Skilling's petition for certiorari casts his actual-prejudice argument as an inquiry into when, if ever, that presumption may be rebutted. See Pet. for Cert. i. Although we find a presumption of prejudice unwarranted in this case, we consider the actual-prejudice issue to be fairly subsumed within the question we agreed to decide. See this Court's Rule 14.1(a).

[11] Venue transfer in federal court is governed by *Federal Rule of Criminal Procedure 21*, which instructs that a "court must transfer the proceeding . . . 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." As the language of the Rule suggests, district-court calls on the necessity of transfer are granted a healthy measure of appellate-court respect. See *Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 245, 84 S. Ct. 769, 11 L. Ed. 2d 674 (1964)*. Federal courts have invoked the Rule to move certain highly charged cases, for example, the prosecution arising from the bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City. See *United States v. McVeigh, 918 F. Supp. 1467, 1474 (WD Okla. 1996)*. They have also exercised discretion to deny venue-transfer requests in cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting **[****41]** from the 1993 World Trade Center bombing, see *United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 U.S. Dist. LEXIS 12770 (SDNY, Sept. 15, 1993)*; *United States v. Yousef, No. S12 93 Cr. 180 (KTD), 1997 U.S. Dist. LEXIS 10449 (SDNY, July 18, 1997)*, aff'd *327 F.3d 56, 155 (CA2 2003)*, and the prosecution of John Walker Lindh, referred to in the press as the American Taliban, see *United States v. Lindh, 212 F. Supp. 2d 541, 549-551 (ED Va. 2002)*. Skilling does not argue, distinct from his due process challenge, that the District Court abused its discretion under Rule 21 by declining to move his trial. We therefore review the District Court's venue-transfer decision only for compliance with the Constitution.

"was Rideau, in jail, flanked by the sheriff and **[****43]** two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id., at 725, 83 S. Ct. 1417, 10 L. Ed. 2d 663*. "[T]o the tens of thousands of people who saw and heard it," we explained, the interrogation "in a very real sense *was* Rideau's trial--at which he pleaded guilty." *Id., at 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663*. We therefore "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire*," that "[t]he kangaroo court proceedings" trailing the televised confession violated due process. *Id., at 726-727, 83 S. Ct. 1417, 10 L. Ed. 2d 663*.

We followed *Rideau*'s lead in two later cases in which media coverage manifestly tainted a criminal prosecution. In *Estes v. Texas, 381 U.S. 532, 538, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)*, extensive publicity **[*380]** before trial swelled into excessive exposure during preliminary court proceedings as reporters and television crews overran the courtroom and "bombard[ed] . . . the community with the sights and sounds of" the pretrial hearing. The media's overzealous reporting efforts, we observed, "led to considerable disruption" and denied the "judicial serenity and calm to which [Billie Sol Estes] was entitled." *Id., at 536, 85 S. Ct. 1628, 14 L. Ed. 2d 543*.

Similarly, in *Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)*, news reporters extensively covered the **[****44]** story of Sam Sheppard, who was accused of bludgeoning his pregnant wife to death. "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," thrusting jurors "into the role of celebrities." *Id., at 353, 355, 86 S. Ct. 1507, 16 L. Ed. 2d 600*. Pretrial media coverage, which we characterized as "months [of] virulent publicity about Sheppard and the murder," did not alone deny due process, we noted. *Id., at 354, 86 S. Ct. 1507, 16 L. Ed. 2d 600*. But Sheppard's case involved more than heated reporting pretrial: We upset the murder conviction because a "carnival atmosphere" pervaded the trial, *id., at 358, 86 S. Ct. 1507, 16 L. Ed. 2d 600*.

In each of these cases, we overturned a "conviction obtained in a trial atmosphere that [was] utterly **[***643]** corrupted by press coverage"; ***HN5***[↑] ***LEdHN[5]***[↑] [5] our decisions, however, "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Murphy v. Florida, 421 U.S. 794, 798-799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)*.[12] See also, *e.g., Patton v. Yount, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 **[*381]** (1984)*.[13] Prominence does not necessarily **[**2915]** produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*. *Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)* (Jurors are not **[****45]** required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); *Reynolds v. United States, 98 U.S. 145, 155-156, 25 L. Ed. 244 (1879)* ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has

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[12] *Murphy* involved the robbery prosecution of the notorious Jack Murphy, a convicted murderer who helped mastermind the 1964 heist of the Star of India sapphire from New York's American Museum of Natural History. Pointing to "extensive press coverage" about him, Murphy moved to transfer venue. *421 U.S., at 796, 95 S. Ct. 2031, 44 L. Ed. 2d 589*. The trial court denied the motion, and a jury convicted Murphy. We affirmed. Murphy's trial, we explained, was markedly different from the proceedings at issue in *Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)*, *Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)*, **[****46]** and *Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)*, which "entirely lack[ed] . . . the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *421 U.S., at 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589*. *Voir dire* revealed no great hostility toward Murphy; "[s]ome of the jurors had a vague recollection of the robbery with which [he] was charged and each had some knowledge of [his] past crimes, but none betrayed any belief in the relevance of [his] past to the present case." *Id., at 800, 95 S. Ct. 2031, 44 L. Ed. 2d 589* (footnote omitted).

[13] In *Yount*, the media reported on Jon Yount's confession to a brutal murder and his prior conviction for the crime, which had been reversed due to a violation of *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. During *voir dire*, 77% of prospective jurors acknowledged they would carry an opinion into the jury box, and 8 of the 14 seated jurors and alternates admitted they had formed an opinion as to Yount's guilt. *467 U.S., at 1029-1030, 104 S. Ct. 2885, 81 L. Ed. 2d 847*. Nevertheless, we rejected Yount's presumption-of-prejudice claim. The adverse publicity and community outrage, we noted, were at their height prior to Yount's first trial, four years before the second prosecution; time **[****47]** had helped "sooth[e] and eras[e]" community prejudice, *id., at 1034, 104 S. Ct. 2885, 81 L. Ed. 2d 847*.

not read or heard of it, and who has not some impression or some opinion in respect to its merits."). A presumption of prejudice, our decisions indicate, attends only the extreme case.

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Relying on *Rideau*, *Estes*, and *Sheppard*, Skilling asserts that we need not pause to examine the screening questionnaires or the *voir dire* before declaring his jury's verdict void. We are not persuaded. Important differences separate **[*382]** Skilling's prosecution from those in which we have presumed juror prejudice.[14]

First, ***HN6***[] ***LEdHN[6]***[] [6] we have emphasized in prior decisions the size and characteristics of the community in which the crime occurred. In *Rideau*, for example **[***644]** , we noted that the murder was committed in a parish of only 150,000 residents. Houston, in contrast, is the fourth most populous city in the Nation: At the time of Skilling's trial, more than 4.5 million individuals eligible for jury duty resided in the Houston area. App. 627a. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard **[****48]** to sustain. See *Mu'Min v. Virginia, 500 U.S. 415, 429, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)* (potential for prejudice mitigated by the size of the "metropolitan Washington [D. C.] statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year"); *Gentile v. State Bar of Nev., 501 U.S. 1030, 1044, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)* (plurality opinion) (reduced likelihood of prejudice where venire was drawn from a pool of over 600,000 individuals).[15]

[2916]** Second, although news stories about Skilling were not kind, they contained no confession or other **[****49]** blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. Rideau's dramatically **[*383]** staged admission of guilt, for instance, was likely imprinted indelibly in the mind of anyone who watched it. Cf. *Parker v. Randolph, 442 U.S. 62, 72, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979)* (plurality opinion) ("[T]he defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him." (internal quotation marks omitted)). Pretrial publicity about Skilling was less memorable and prejudicial. No evidence of the smoking-gun variety invited prejudgment of his culpability. See *United States v. Chagra, 669 F.2d 241, 251-252, n. 11 (CA5 1982)* (***HN7***[] ***LEdHN[7]***[] [7] "A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.").

Third, unlike cases in which trial swiftly followed a widely reported crime, *e.g.*, *Rideau, 373 U.S., at 724, 83 S. CT. 1417, 10 L. Ed. 2d 663*, over four years elapsed between Enron's bankruptcy and Skilling's trial. Although reporters covered Enron-related news throughout this period, the decibel level of media attention diminished somewhat **[****50]** in the years following Enron's collapse. See App. 700a; *id.*, at 785a; *Yount, 467 U.S., at 1032, 1034, 104 S. Ct. 2885, 81 L. Ed. 2d 847*.

Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government.[16] In *Rideau*, *Estes*, and *Sheppard*, in marked contrast, the jury's verdict did not undermine in any way the supposition of **[***645]** juror bias. ***HN8***[] ***LEdHN[8]***[] [8] It would be odd for an appellate court to presume prejudice in a

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[14] Skilling's reliance on *Estes* and *Sheppard*is particularly misplaced; those cases involved media interference with courtroom proceedings *during* trial. See *supra, at 379-380, 177 L. Ed. 2d, at 642*. Skilling does not assert that news coverage reached and influenced his jury after it was empaneled.

[15] According to a survey commissioned by Skilling in conjunction with his first motion for a venue change, only 12.3% of Houstonians named him when asked to list Enron executives they believed guilty of crimes. App. 375a-376a. In response to the followup question "[w]hat words come to mind when you hear the name Jeff Skilling?", two-thirds of respondents failed to say a single negative word, *id.,* at 376a: 43% either had never heard of Skilling or stated that nothing came to mind when they heard his name, and another 23% knew Skilling's name was associated with Enron but reported no opinion about him, Record 3210-3211; see App. 417a-492a.

[16] As the United States summarizes, "[I]n *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, . . . but acquitted a former Enron executive. **[****51]** 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 . . . was $40 million." Brief for United States 9-10 (citation omitted).

case in which jurors' actions run counter to that presumption. See, *e.g.*, *United States v. Arzola-Amaya, 867 F.2d 1504, 1514* ***(*384)*** *(CA5 1989)* ("The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of [the] right to an impartial trial.").

4

Skilling's trial, in short, shares little in common with those in which we approved a presumption of juror prejudice. The Fifth Circuit reached the opposite conclusion based primarily on the magnitude and negative tone of media attention directed at Enron. But ***HN9***[↑] ***LEdHN[9]***[↑] [9] "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, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)*. In this case, as just noted, news stories about Enron did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact.[17]

[2917]** Nor did Enron's "sheer number of victims," *554 F.3d at, 560*, trigger a presumption of prejudice. Although the widespread community impact necessitated careful identification and inspection of prospective jurors' connections to Enron, the extensive screening questionnaire and followup *voir dire* were well suited to that task. And hindsight shows the efficacy of these devices; as we discuss *infra, at 389-390, 177 L. Ed. 2d, at 648*, jurors' links to Enron were either nonexistent or attenuated.

Finally, although Causey's "well-publicized decision to plead guilty" shortly before trial created a danger of juror **[*385]** prejudice, *554 F.3d at, 559*, the District Court took appropriate steps to reduce that risk. The court delayed the proceedings by two weeks, lessening the immediacy of that development. And during *voir dire*, the court asked about prospective jurors' exposure to recent publicity, including news regarding Causey. Only two venire members recalled the plea; neither mentioned Causey by name, and neither ultimately served on Skilling's jury. **[****53]** App. 888a, 993a. ***HN11***[↑] ***LEdHN[11]***[↑] [11] Although publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily--and, we are satisfied, it did not here--warrant an automatic presumption of prejudice.

Persuaded that no presumption arose,[18] we conclude that the District **[***646]** Court, in declining to order a venue change, did not exceed constitutional limitations.[19]

B

We next consider whether actual prejudice infected Skilling's jury. *Voir dire*, Skilling asserts, did not **[****54]** adequately detect and defuse juror bias. "[T]he record . . . affirmatively confirm[s]" prejudice, he maintains, because several seated jurors "prejudged his guilt." Brief for Petitioner 21. We disagree with Skilling's characterization of the *voir dire* and the jurors selected through it.

[*386] 1

HN12[↑] ***LEdHN[12]***[↑] [12] No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*. See *United States v. Wood, 299 U.S. 123, 145-146, 57 S. Ct. 177, 81 L. Ed. 78 (1936)* ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."). Jury selection, we have repeatedly emphasized, is "particularly within the province of the

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[17] The Fifth Circuit, moreover, did not separate media attention aimed at Skilling from that devoted to Enron's downfall more generally. Data submitted by Skilling in support of his first motion for a venue transfer suggested that a slim percentage of Enron-related stories specifically named him. App. 572a. **[****52]** ***HN10***[↑] ***LEdHN[10]***[↑] [10] "[W]hen publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact." *United States v. Hueftle, 687 F.2d 1305, 1310 (CA10 1982)*.

[18] The parties disagree about whether a presumption of prejudice can be rebutted, and, if it can, what standard of proof governs that issue. Compare Brief for Petitioner 25-35 with Brief for United States 24-32, 35-36. Because we hold that no presumption arose, we need not, and do not, reach these questions.

[19] The dissent acknowledges that "the prospect of seating an unbiased jury in Houston was not so remote as to compel the conclusion that the District Court acted unconstitutionally in denying Skilling's motion to change venue." *Post, at 445, 177 L. Ed. 2d, at 683*. The dissent's conclusion that Skilling did not receive a fair trial accordingly turns on its perception of the adequacy of the jury-selection process.

trial judge." *Ristaino v. Ross, 424 U.S. 589, 594-595, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976)* (internal quotation marks omitted); see, *e.g.*, *Mu'Min, 500 U.S., at 424, 111 S. Ct. 1899, 114 L. Ed. 2d 493*; *Yount, 467 U.S., at 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847*; **[**2918]** *Rosales-Lopez v. United States, 451 U.S. 182, 188-189, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981)* (plurality opinion); *Connors v. United States, 158 U.S. 408, 408-413, 15 S. Ct. 951, 39 L. Ed. 1033 (1895)*.

HN13[↑] ***LEdHN[13]***[↑] [13] When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the **[****55]** judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." *Mu'Min, 500 U.S., at 427, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.

HN14[↑] ***LEdHN[14]***[↑] [14] Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record--among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. See *Reynolds, 98 U.S., at 156-157, 25 L. Ed. 244*. In contrast to the cold transcript received by the appellate court, the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury **[*387]** service. We consider the adequacy of jury selection in Skilling's case, therefore, attentive to the respect due to district-court determinations **[***647]** of juror impartiality and of the measures **[****56]** necessary to ensure that impartiality.[20]

2

Skilling deems the *voir dire* insufficient because, he argues, jury selection lasted "just five hours," "[m]ost of the court's questions were conclusory[,] high-level, and failed adequately to probe jurors' true feelings," and the court "consistently took prospective jurors at their word once they claimed they could be fair, no matter what other indications of bias were present." Brief for Petitioner 10-11 (emphasis **[*388]** deleted). Our review of the record, however, yields a different appraisal.[21]

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[20] The dissent recognizes "the 'wide discretion' owed to trial courts when it comes to jury-related issues," *post, at 447, 177 L. Ed. 2d, at 684* (quoting *Mu'Min v. Virginia, 500 U.S. 415, 427, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)*), but its analysis of the District Court's *voir dire* sometimes fails to demonstrate that awareness. For example, the dissent faults the District Court for not questioning prospective jurors regarding their "knowledge of or feelings about" Causey's guilty plea. *Post, at 453, 177 L. Ed. 2d, at 687*. But the court could reasonably decline to ask direct questions involving Causey's plea to avoid tipping off until-that-moment uninformed venire members that the plea had occurred. Cf. App. 822a (counsel for Skilling urged District Court to find a way to question venire members about Causey "without mentioning anything"). Nothing inhibited defense counsel from inquiring about venire members' knowledge of the plea; indeed, counsel posed such a question, *id.*, at 993a; cf. *post, at 453, n. 14, 177 L. Ed. 2d, at 687* (acknowledging that counsel "squeeze[d] in" an inquiry whether a venire member had "read about any guilty pleas in this case over the last month or two" (internal quotation marks omitted)). From this Court's lofty and **[****57]** "panoramic" vantage point, *post, at 447, 177 L. Ed. 2d, at 684*, lines of *voir dire* inquiry that "might be helpful in assessing whether a juror is impartial" are not hard to conceive. *Mu'Min, 500 U.S., at 425, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. ***HN15***[↑] ***LEdHN[15]***[↑] [15] "To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id., at 425-426, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. According appropriate deference to the District Court, we cannot characterize jury selection in this case as fundamentally unfair. Cf. *supra, at 374, n. 6, 177 L. Ed. 2d, at 639* (same selection process was used in other Enron-related prosecutions).

[21] ***HN16***[↑] ***LEdHN[16]***[↑] [16] In addition to focusing on the adequacy of *voir dire*, our decisions **[****58]** have also "take[n] into account . . . other measures [that] were used to mitigate the adverse effects of publicity." *Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)*. We have noted, for example, the prophylactic effect of "emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." *Id., at 564, 565, 96 S. Ct. 2791, 49 L. Ed. 2d 683*. Here, the District Court's instructions were unequivocal; the jurors, the court emphasized, were dutybound "to reach a fair and impartial verdict in this case based solely on the evidence [they] hear[d] and read in th[e] courtroom." App. 1026a. Peremptory challenges, too, "provid[e] protection against [prejudice]," *United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 100 L. Ed. 1331 (1956)*; the District Court, as earlier noted, exercised its discretion to grant the defendants two extra peremptories, App. 1020a; see *supra, at 373, 177 L. Ed. 2d, at 638*.

[2919]** As noted, supra, at 370-372, 177 L. Ed. 2d, at 637-638, and n. 4, the District Court initially screened venire members by eliciting their responses to a comprehensive questionnaire drafted in large part by Skilling. That survey helped to identify prospective jurors excusable for cause and served as a springboard for further questions put **[****59]** to remaining members of the array. *Voir dire* thus was, in the court's words, the "culmination of a lengthy process." App. 841a; see 554 F.3d at, 562, n. 51 ("We consider the . . . questionnaire in assessing the quality of *voir dire* as a whole.").[22] In other Enron-related prosecutions, **[*389]** we note, District Courts, after inspecting venire **[***648]** members' responses to questionnaires, completed the jury-selection process within one day. See supra, at 374, n. 6, 177 L. Ed. 2d, at 639.[23]

The District Court conducted *voir dire*, moreover, aware of the greater-than-normal need, due to pretrial publicity, to ensure against jury bias. At Skilling's urging, the court examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members. See Mu'Min, 500 U.S., at 425, 111 S. Ct. 1899, 114 L. Ed. 2d 493. To encourage candor, the court repeatedly admonished that there were "no right and wrong answers to th[e] questions." *E.g.,* App. 843a. The court denied Skilling's request for attorney-led *voir dire* because, in its experience, potential jurors were "more forthcoming" when the court, rather than counsel, asked the question. Record 11805. The parties, however, were accorded an opportunity **[****61]** to ask followup questions of every prospective juror brought to the bench for colloquy. Skilling's counsel declined to ask anything of more than half of the venire members questioned individually, including eight eventually selected for the jury, because, he explained, "the Court and other counsel have covered" everything he wanted to know. App. 967a.

Inspection of the questionnaires and *voir dire* of the individuals who actually served as jurors satisfies us that, notwithstanding **[**2920]** the flaws Skilling lists, the selection process successfully secured jurors who were largely untouched by Enron's collapse.[24] Eleven of the seated jurors and alternates **[*390]** reported no connection at all to Enron, while all other jurors reported at most an insubstantial link. See, *e.g.*, Supp. App. 101sa (Juror 63) ("I once met a guy who worked for Enron. I cannot remember his **[***649]** name.").[25] As for pretrial publicity, 14 jurors and alternates specifically stated that they had paid scant attention to Enron-related news. See, *e.g.,* App. 859a-860a (Juror 13) (would "[b]asically" start out knowing nothing about the case because "I just . . . didn't follow [it] a whole lot"); *id.,*

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[22] The dissent's analysis undervalues the 77-item questionnaire, a part of the selection process difficult to portray as "cursory," post, at 455, 177 L. Ed. 2d, at 689, or "anemic," post, at 460, 177 L. Ed. 2d, at 691. Notably, the "open-ended questions about [prospective jurors'] impressions of Enron or Skilling" that the dissent contends should have been asked, post, at 455, 177 L. Ed. 2d, at 689, *were* asked--on the questionnaire, see supra, at 371-372, n. 4, 177 L. Ed. 2d, at 637. Moreover, the District Court gave Skilling's counsel relatively free rein to ask venire members about their responses on the questionnaire. See, *e.g.,* App. 869a-870a; *id.,* at 878a, 911a, 953a. The questionnaire plus followup opportunity to interrogate potential jurors surely gave Skilling's counsel "clear avenue[s] for . . . permissible inquiry." But see **[****60]** post, at 456, n. 17, 177 L. Ed. 2d, at 689. See also App. 967a (counsel for Skilling) ("Judge, for the record, if I don't ask any questions, it's because the Court and other counsel have covered it.").

[23] One of the earlier prosecutions targeted the "Big Five" public accounting firm Arthur Andersen. See supra, at 374, n. 6, 177 L. Ed. 2d, at 639. Among media readers and auditors, the name and reputation of Arthur Andersen likely sparked no less attention than the name and reputation of Jeffrey Skilling. Cf. supra, at 382, n. 15, 177 L. Ed. 2d, at 644.

[24] In considering whether Skilling was tried before an impartial jury, the dissent relies extensively on venire members *not* selected for that jury. See, *e.g.*, post, at 432, n. 4, 177 L. Ed. 2d, at 674 (quoting the questionnaires of 10 venire members; all were excused for cause before *voir dire* commenced, see Record 11891); post, at 433, n. 6, 177 L. Ed. 2d, at 675 (quoting the questionnaires of 15 venire members; none sat on Skilling's jury); post, at 436, n. 7, 177 L. Ed. 2d, at 677 (quoting *voir dire* testimony of 6 venire members; none sat on Skilling's jury); post, at 453-458, 177 L. Ed. 2d, at 688-691 (reporting at length *voir dire* testimony of Venire Members 17, 29, 61, 74, 75, and 101; none sat on Skilling's jury). ***HN17***[↑] ***LEdHN[17]***[↑] [17] Statements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function. Critically, as discussed infra, at 391-392, 177 L. Ed. 2d, at 648-649, the seated jurors showed little knowledge of or interest in, and were personally unaffected by, Enron's downfall.

[25] See **[****63]** also Supp. App. 11sa (Juror 10) ("knew some casual co-workers that owned Enron stock"); *id.,* at 26sa (Juror 11) ("work[s] with someone who worked at Enron"); *id.,* at 117sa; App. 940a (Juror 64) (two acquaintances lost money due to Enron's collapse); Supp. App. 236sa (Juror 116) (work colleague lost money as a result of Enron's bankruptcy).

at 969a (Juror 78) ("[Enron] wasn't anything **[****62]** that I was interested in reading [about] in detail . . . . I don't really know much about it.").[26] The remaining **[*391]** two jurors indicated that nothing in the news influenced their opinions about Skilling.[27]

The questionnaires confirmed that, whatever community prejudice existed in Houston generally, Skilling's jurors were not under its sway.[28] Although many expressed **[**2921]** sympathy for victims of Enron's bankruptcy and speculated that greed contributed to the corporation's collapse, these sentiments did not translate into animus toward Skilling. When asked whether they "ha[d] an opinion about . . . Jeffrey Skilling," none of the **[****65]** seated jurors and alternates checked the "yes" box.[29] And in response to the question whether "any opinion [they] may have formed regarding Enron or [Skilling] **[*392]** [would] prevent" their impartial consideration of the evidence at trial, every juror--despite options to mark "yes" or "unsure"--instead checked "no."

[*650]** The District Court, Skilling asserts, should not have "accept[ed] *at face value* jurors' promises of fairness." Brief for Petitioner 37. In *Irvin v. Dowd, 366 U.S., at 727-728, 81 S. Ct. 1639, 6 L. Ed. 2d 751*, Skilling points out, we found actual prejudice despite jurors' assurances that they could be impartial. Brief for Petitioner 26. Justice Sotomayor, in turn, repeatedly relies on *Irvin*, which she regards as closely analogous to this case. See *post, at 448, 177 L. Ed. 2d, at 685* (dissent). See also, *e.g., post, at 441-442, 458, 460, 464, 177 L. Ed. 2d, at 680-681, 690, 692, 694*. We disagree with that characterization of *Irvin*.

The facts of *Irvin* are worlds apart from those presented here. Leslie Irvin stood accused of a brutal murder and robbery spree **[****67]** in a small rural community. *366 U.S., at 719, 81 S. Ct. 1639, 6 L. Ed. 2d 751*. In the months before Irvin's trial, "a barrage" of publicity was "unleashed against him," including reports of his confessions to the slayings and robberies. *Id., at 725-726, 81 S. Ct. 1639, 6 L. Ed. 2d 751*. This Court's description of the media coverage in *Irvin* reveals why the dissent's "best case" is not an apt comparison:

> "[S]tories revealed the details of [Irvin's] background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator.

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[26] See also App. 850a (Juror 10) ("I haven't followed [Enron-related news] in detail or to any extreme at all."); *id.,* at 856a (Juror 11) (did not "get into the details of [the Enron case]" and "just kind of tune[d] [it] out"); *id.,* at 873a (Juror 20) ("I was out of [the] state when [Enron collapsed], and then personal circumstances kept me from paying much attention."); *id.,* at 892a (Juror 38) (recalled "nothing in particular" about media coverage); *id.,* at 913a (Juror 50) ("I would hear it on the news and just let it filter in and out."); *id.,* at 935a (Juror 63) ("I don't really pay attention."); *id.,* at 940a-941a (Juror 64) (had "[n]ot really" been keeping up with and did not recall any news about Enron); *id.,* at 971a (Juror 84) (had not read "anything at all about Enron" because he did not "want to read that stuff" (internal quotation marks omitted)); **[****64]** *id.,* at 983a (Juror 90) ("seldom" read the Houston Chronicle and did not watch news programs); *id*., at 995a-996a (Juror 99) (did not read newspapers or watch the news; "I don't know the details on what [this case] is or what made it what it is"); *id.,* at 1010a (Juror 113) ("never really paid that much attention [to] it"); *id.,* at 1013a (Juror 116) (had "rea[d] a number of different articles," but "since it hasn't affected me personally," could not "specifically recall" any of them).

[27] *Id.,* at 944a (Juror 67) (had not read the Houston Chronicle in the three months preceding the trial and volunteered: "I don't form an opinion based on what . . . I hear on the news"); *id.,* at 974a-975a (Juror 87) (had not "formed any opinions" about Skilling's guilt from news stories).

[28] As the D. C. Circuit observed, reviewing the impact on jurors of media coverage of the Watergate scandal, "[t]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." *United States v. Haldeman, 559 F.2d 31, 62-63, n. 37, 181 U.S. App. D.C. 254 (1976)*. See also *In re Charlotte Observer, 882 F.2d 850, 855-856 (CA4 1989)* ("[R]emarkably in the eyes of many," "[c]ases such as those involving the Watergate defendants, the Abscam defendants, and . . . John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which . . . were satisfactorily disclosed to have been unaffected (indeed, in some instances blissfully unaware of or untouched) by that publicity."); Brief for ABC, Inc., et al. as *Amici Curiae* 25-31 **[****66]** (describing other examples).

[29] One juror did not check any box, explaining that she lived in another State when Enron went bankrupt and therefore "was not fully aware of all the facts regarding Enron's fall [and] the media coverage." Supp. App. 62sa (Juror 20). Two other jurors, Juror 10 and Juror 63, indicated in answer to a different question that they had an opinion about Skilling's guilt, but *voir dire* established they could be impartial. See *infra, at 397-398, and 398, n. 33, 177 L. Ed. 2d, at 653*, and *654*.

> The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but [he] refused to confess. Finally, they announced [Irvin's] confession to the six murders and the fact of his indictment for four of them in Indiana. They reported [Irvin's] offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that [Irvin] had confessed to 24 burglaries (the *modus operandi* of these robberies **[****68]** was compared to that of the **[*393]** murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing **[**2922]** [Irvin's] execution . . . . Another characterized [Irvin] as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories [Irvin] was described as the 'confessed slayer of six,' a parole violator and fraudulent-check artist. [Irvin's] court-appointed counsel was quoted as having received 'much criticism over being Irvin's counsel' and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted [to] the murder of [one victim] as well as 'the robbery-murder of [a second individual]; the murder of [a third individual], and the slaughter of three members of [a different family].' *Ibid.*.

"[N]ewspapers in which the[se] stories appeared were delivered regularly to approximately 95% of the dwellings in" the county where the trial occurred, which had a population of only 30,000; "radio and TV stations, which likewise blanketed **[****69]** that county, also carried extensive newscasts covering **[***651]** the same incidents." *Id., at 725, 81 S. Ct. 1639, 6 L. Ed. 2d 751*.

Reviewing Irvin's fair-trial claim, this Court noted that "the pattern of deep and bitter prejudice" in the community "was clearly reflected in the sum total of the *voir dire*": "370 prospective jurors or almost 90% of those examined on the point . . . entertained some opinion as to guilt," and "[8] out of the 12 [jurors] thought [Irvin] was guilty." *Id., at 727, 81 S. Ct. 1639, 6 L. Ed. 2d 751* (internal quotation marks omitted). Although these jurors declared they could be impartial, we held that, "[w]ith his life at stake, it is not requiring too much that [Irvin] be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of **[*394]** the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id., at 728, 81 S. Ct. 1639, 6 L. Ed. 2d 751*.

In this case, as noted *supra, at 382-383, 177 L. Ed. 2d, at 644*, news stories about Enron contained nothing resembling the horrifying information rife in reports about Irvin's rampage of robberies and murders. Of key importance, Houston shares little in common with the rural community in which Irvin's trial proceeded, and circulation figures for Houston media sources were **[****70]** far lower than the 95% saturation level recorded in *Irvin*, see App. to Brief for United States 15a ("The *Houston Chronicle* . . . reaches less than one-third of occupied households in Houston." (internal quotation marks omitted)). Skilling's seated jurors, moreover, exhibited nothing like the display of bias shown in *Irvin*. See *supra, at 389-392, 177 L. Ed. 2d, at 648-649* (noting, *inter alia*, that none of Skilling's jurors answered "yes" when asked if they "ha[d] an opinion about . . . Skilling"). See also *post, at 444, 177 L. Ed. 2d, at 682* (dissent) (distinguishing *Mu'Min* from *Irvin* on similar bases: the "offense occurred in [a large] metropolitan . . . area," media "coverage was not as pervasive as in *Irvin* and did not contain the same sort of damaging information," and "the seated jurors uniformly disclaimed having ever formed an opinion about the case" (internal quotation marks omitted)). In light of these large differences, the District Court had far less reason than did the trial court in *Irvin* to discredit jurors' promises of fairness.

The District Court, moreover, did not simply take venire members who proclaimed their impartiality at their word.[30] As noted, all of Skilling's jurors **[**2923]** had already affirmed on their questionnaires **[****71]** that they would have no trouble basing **[*395]** a verdict only on the evidence at trial. Nevertheless, the court followed up with each individually to uncover concealed bias. This face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service. See *554 F.3d at, 562*

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[30] The court viewed with skepticism, for example, Venire Member 104's promises that she could "abide by law," follow the court's instructions, and find Skilling not guilty if the Government did not prove its case, App. 1004a; "I have to gauge . . . demeanor, all the answers she **[****72]** gave me," the court stated, and "[s]he persuaded me that she could not be fair and impartial, so she's excused," *id.,* at 1006a.

(The District Court made "thorough" credibility determinations that "requir[ed] more than just the [venire members'] statements that [they] could be fair."). The jury's not-guilty verdict on nine insider-trading **[***652]** counts after nearly five days of deliberation, meanwhile, suggests the court's assessments were accurate. See *United States v. Haldeman, 559 F.2d 31, 60, n. 28, 181 U.S. App. D.C. 254 (CADC 1976)*. Skilling, we conclude, failed to show that his *voir dire* fell short of constitutional requirements.[31] **[****73]**

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Skilling also singles out **[****74]** several jurors in particular and contends they were openly biased. See *United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)* (***HN19***[↑] ***LEdHN[19]***[↑] [19] "[T]he seating of any juror who should have been dismissed for cause . . . **[*396]** require[s] reversal."). In reviewing claims of this type, the deference due to district courts is at its pinnacle: "A trial court's findings of juror impartiality may be overturned only for manifest error." *Mu'Min, 500 U.S., at 428, 111 S. Ct. 1899, 114 L. Ed. 2d 493* (internal quotation marks omitted). Skilling, moreover, unsuccessfully challenged only one of the seated jurors for cause, "strong evidence **[**2924]** that he was convinced the [other] jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington, 369 U.S. 541, 557-558, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962)*. With these considerations in mind, we turn to Skilling's specific allegations of juror partiality.

Skilling contends that Juror 11--the only seated juror he challenged for cause--"expressed the most obvious bias." Brief for Petitioner 35. See also *post, at 460-461, 177 L. Ed. 2d, at 692* (dissent). Juror 11 stated that ?greed on Enron's part" triggered the company's bankruptcy and that corporate executives, driven by avarice, "walk a line that stretches sometimes the legality of something." **[****75]** App. 854a-855a. But, as the Fifth Circuit accurately summarized, Juror 11

> "had 'no idea' whether Skilling had 'crossed that line,' and he 'didn't say that' every CEO is probably a crook. He also asserted that he could be fair and require the government to prove its case, that he did not believe everything he read in the paper, that he did not 'get into the details' of the Enron coverage, that he did not watch television, and that Enron was 'old news.' *554 F.3d at, 563-564*.

Despite his criticism of greed, Juror 11 remarked that Skilling "earned [his] salar[y]," App. 857a, and said he would have "no problem" telling his co-worker, who had lost 401(k) funds due to Enron's collapse, that the jury voted to acquit, if that scenario came to pass, *id.,* at 854a. The District Court, noting that it had "looked [Juror 11] in the eye and . . . heard all his [answers]," found his assertions of impartiality credible. *Id.*, at 858a; cf. *supra, at 394, n. 30, 177 L. Ed. 2d, at 651*. We agree with the **[*397]** Court of Appeals that "[t]he express finding that **[***653]** Juror 11 was fair is not reversible error." *554 F.3d at, 564*.[32]

Skilling also objected at trial to the seating of six specific jurors whom, he said, he would have excluded had he not already exhausted his peremptory challenges. See *supra, at 374-375, 177 L. Ed. 2d, at 639-640*. Juror 20, he observes, "said she was 'angry' about Enron's collapse and that she, too, had been 'forced to forfeit [her] own 401(k) funds to survive layoffs.' " Reply Brief 13. But Juror 20 made clear during *voir dire* that she did not "personally blame" Skilling for the loss of her retirement account. App. 875a. Having not "pa[id] much attention" to Enron-related news, she "quite honestly" did not "have enough information to know" whether Skilling was probably guilty, *id.,* at 873a, and she "th[ought] [she] could be" fair and impartial, *id.,* at 875a. In light of these answers, the District Court did not

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[31] Skilling emphasizes that *voir dire* did not weed out every juror who suffered from Enron's collapse because the District Court failed to grant his for-cause challenge to Venire Member 29, whose retirement fund lost $50,000 due to ripple effects from the decline in the value of Enron stock. App. 880a. Critically, however, Venire Member 29 *did not sit on Skilling's jury*: Instead, Skilling struck her using a peremptory challenge. ***HN18***[↑] ***LEdHN[18]***[↑] [18] "[I]f [a] defendant elects to cure [a trial judge's erroneous for-cause ruling] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," we have held, "he has not been deprived of any . . . constitutional right." *United States v. Martinez-Salazar, 528 U.S. 304, 307, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)*. Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" exemplifies "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." *Id., at 316, 307, 120 S. Ct. 774, 145 L. Ed. 2d 792*.

[32] Skilling's trial counsel and jury consultants apparently did not regard Juror 11 as so "obvious[ly] bias[ed]," Brief **[****76]** for Petitioner 35, as to warrant exercise of a peremptory challenge.

commit manifest error in finding Juror 20 fit for jury service.

The same is true of Juror 63, who, Skilling points out, wrote on her questionnaire "that [Skilling] 'probably knew [he] w[as] breaking the law.' " Reply Brief 13. During *voir dire*, however, Juror 63 insisted that she did not "really have an opinion [about Skilling's guilt] either **[****77]** way," App. 936a; she did not "know what [she] was thinking" when she completed the questionnaire, but she "absolutely" presumed Skilling innocent and confirmed her understanding that the Government would "have to prove" his guilt, *id.,* at 937a. In response to followup questions from Skilling's counsel, she again stated she would not presume that Skilling violated any laws and could "[a]bsolutely" give her word that she could be fair. *Id.,* at 937a-938a. ***HN20***[↑] ***LEdHN[20]***[↑] [20]"Jurors," we have **[**2925]** recognized, "cannot be expected invariably to express themselves carefully or even consistently." *Yount, 467 U.S., at 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847*. See also *id., at 1040, 104 S. Ct. 2885, 81 L. Ed. 2d 847* ("It is here that the federal [appellate] **[*398]** court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty."). From where we sit, we cannot conclude that Juror 63 was biased.

The four remaining jurors Skilling said he would have excluded with extra peremptory strikes exhibited no sign of prejudice we can discern. See App. 891a-892a (Juror 38) (remembered no media coverage about Enron and said nothing in her experience would prevent her from being fair **[****78]** and impartial); Supp. App. 131sa-133sa, 136sa (Juror 67) (had no connection to Enron and no anger about its collapse); App. 969a (Juror 78) (did not "know much about" Enron); Supp. App. 165sa; App. 971a (Juror 84) (had not heard or read anything about Enron and said she did not "know enough to answer" the question whether she was angry about the company's demise). Skilling's counsel declined to ask followup questions of any of these jurors and, indeed, told Juror 84 he had nothing to ask because she "gave all the right answers." *Id.,* at 972a. Whatever Skilling's reasons for wanting to strike these four individuals from his jury, **[***654]** he cannot credibly assert they displayed a disqualifying bias.[33]

In sum, Skilling failed to establish that a presumption of prejudice arose or that actual bias infected the jury that tried him. ***HN21***[↑] ***LEdHN[21]***[↑] [21] Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to determine the facts impartially. "It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict **[*399]** based on the evidence presented in court." *Irvin, 366 U.S., at 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751*. Taking account of the full record, rather than incomplete exchanges selectively culled from it, we find no cause to upset the lower courts' judgment that Skilling's jury met that measure. We therefore affirm the Fifth Circuit's ruling that Skilling received a fair trial.[34]

III

We next consider whether Skilling's conspiracy conviction was premised on an improper theory of honest-services wire fraud. The honest-services statute, *§ 1346*, Skilling maintains, is unconstitutionally vague. Alternatively, he contends **[**2926]** that his conduct does not fall within the statute's compass.

A

To place Skilling's constitutional challenge in context, we first review the origin and subsequent application of the honest-services doctrine.

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[33] Although Skilling raised no objection to Juror 10 and Juror 87 at trial, his briefs in this Court impugn their impartiality. Brief for Petitioner 14-15; Reply Brief 13. Even if we allowed these tardy pleas, the *voir dire* testimony of the two jurors gives sufficient assurance that they were unbiased. See, *e.g.,* App. 850a-853a (Juror 10) (did not prejudge Skilling's guilt, indicated he could follow the court's instructions and make the Government prove its case, stated he could be fair to Skilling, **[****79]** and said he would "judge on the facts"); *id.,* at 974a (Juror 87) (had "not formed an opinion" on whether Skilling was guilty and affirmed she could adhere to the presumption of innocence).

[34] ***HN22***[↑] ***LEdHN[22]***[↑] [22] Our decisions have rightly set a high bar for allegations of juror prejudice due to pretrial publicity. See, *e.g., Mu'Min, 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493*; *Patton v. Yount, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)*; *Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)*. News coverage of civil and criminal trials of public interest conveys to society at **[****80]** large how our justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented. Trial judges generally take care so to instruct jurors, and the District Court did just that in this case. App. 1026a.

Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail- and wire-fraud laws, proscribed, without further elaboration, use of the mails to advance "any scheme or artifice to defraud." See *McNally v. United States, 483 U.S. 350, 356, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)* (internal quotation marks omitted). In 1909, Congress amended the statute to prohibit, as it does today, "any scheme or artifice to defraud, *or for obtaining money or property by means of false or* ***[****81]*** *fraudulent pretenses, representations, or promises*." *§ 1341* **[*400]** (emphasis added); see *id., at 357-358, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term "scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights.

In an opinion credited with first presenting the intangible-rights theory, *Shushan v. United States, 117 F.2d 110* ***[***655]*** *(1941)*, the Fifth Circuit reviewed the mail-fraud prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers. "It is not true that because the [city] was to make and did make a saving by the operations there could not have been an intent to defraud," the Court of Appeals maintained. *Id., at 119*. "A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official," the court observed, "would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public." *Id., at 115*.

The Fifth Circuit's opinion in *Shushan* stimulated the development of an "honest-services" doctrine. Unlike fraud **[****82]** in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, see, *e.g., United States v. Starr, 816 F.2d 94, 101 (CA2 1987)*, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. Cf. *McNally, 483 U.S., at 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services." See, *e.g., United States v. Dixon, 536 F.2d 1388, 1400 (CA2 1976)*.

" **[*401]** Most often these cases . . . involved bribery of public officials," *United States v. Bohonus, 628 F.2d 1167, 1171 (CA9 1980)*, but courts also recognized private-sector honest-services fraud. In perhaps **[****83]** the earliest application of the theory to private actors, a District Court, reviewing a bribery scheme, explained:

> "When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation **[**2927]** of the employee to the employer that he is honest and loyal to the employer's interests." *United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (Mass. 1942)*.

Over time, "[a]n increasing number of courts" recognized that "a recreant employee"--public or private--"c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment," *United States v. McNeive, 536 F.2d 1245, 1249 (CA8 1976)*; by 1982, all Courts of Appeals had embraced the honest-services theory of fraud, Hurson, Limiting the Federal Mail Fraud Statute--A Legislative Approach, 20 Am. Crim. L. Rev. 423, 456 (1983).[35]

[*656]** 2

In 1987, this Court, in *McNally* v. *United States*, stopped the development of the intangible-rights doctrine in its tracks. *McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the **[*402]** official partially controlled. *483 U.S., at 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. The prosecutor did not charge that, "in the absence of the

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[35] In addition to upholding honest-services prosecutions, courts also increasingly approved use of the mail-fraud statute **[****84]** to attack corruption that deprived victims of other kinds of intangible rights, including election fraud and privacy violations. See, *e.g., Cleveland v. United States, 531 U.S. 12, 18, n. 2, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)*; *McNally v. United States, 483 U.S. 350, 362-364, 107 S. Ct. 2875, 97 L. Ed. 2d 292, and nn. 1-4 (1987)* (Stevens, J., dissenting).

alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance." *Ibid.* Instead, the prosecutor maintained that the kickback scheme "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id., at 353, 107 S. Ct. 2875, 97 L. Ed. 2d 292*.

We held that the scheme did not qualify as mail fraud. "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of **[****85]** disclosure and good government for local and state officials," we read the statute "as limited in scope to the protection of property rights." *Id., at 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. "If Congress desires to go further," we stated, "it must speak more clearly." *Ibid*.

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Congress responded swiftly. The following year, it enacted a new statute "specifically to cover one of the 'intangible rights' that lower courts had protected . . . prior to *McNally:* 'the intangible right of honest services.' *Cleveland v. United States, 531 U.S. 12, 19-20, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)*. In full, the honest-services statute stated:

> ***HN23***[↑] ***LEdHN[23]***[↑] [23] "For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, *§ 1341*, and wire fraud, *§ 1343*], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *§ 1346*.

B

Congress, Skilling charges, reacted quickly but not clearly: He asserts that *§ 1346* is unconstitutionally vague. ***HN24***[↑] ***LEdHN[24]***[↑] [24] To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage **[**2928]** arbitrary and discriminatory **[****86]** **[*403]** enforcement." *Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)*. The void-for-vagueness doctrine embraces these requirements.

According to Skilling, *§ 1346* meets neither of the two due process essentials. First, the phrase "the intangible right of honest services," he contends, does not adequately define what behavior it bars. Brief for Petitioner 38-39. Second, he alleges, *§ 1346*'s "standardless sweep . . . allows policemen, prosecutors, and juries to pursue their personal predilections," thereby "facilitat[ing] opportunistic and arbitrary prosecutions." *Id.,* at 44 (quoting *Kolender, 461 U.S., at 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903*).

In urging invalidation of *§ 1346*, Skilling swims against ***HN25***[↑] ***LEdHN[25]***[↑] [25] our case law's current, which requires us, if we **[***657]** can, to construe, not condemn, Congress' enactments. See, *e.g., Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 571, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973)*. See also *United States v. National Dairy Products Corp., 372 U.S. 29, 32, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963)* (stressing, in response to a vagueness challenge, "[t]he strong presumptive validity that attaches to an Act of Congress").

Alert to § *1346*'s potential breadth, the Courts of Appeals have divided on how best to interpret the statute.[36] Uniformly, however, they have declined to throw **[****87]** out the statute as irremediably vague.[37]

[*404] We agree that *§ 1346* should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to

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[36] Courts have disagreed about whether *§ 1346* prosecutions must be based on a violation of state law, compare, *e.g., United States v. Brumley, 116 F.3d 728, 734-735 (CA5 1997)* (en banc), with, *e.g., United States v. Weyhrauch, 548 F.3d 1237, 1245-1246 (CA9 2008)*, vacated and remanded, ***post, p. 476, 130 S. Ct. 2971, 177 L. Ed. 2d 705***; whether a defendant must contemplate that the victim suffer economic harm, compare, *e.g., United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 973, 329 U.S. App. D.C. 149 (CADC 1998)*, with, *e.g., United States v. Black, 530 F.3d 596, 600-602 (CA7 2008)*, vacated and remanded, *post, p. 465, 130 S. Ct. 2963, 177 L. Ed. 2d 695*; and whether the defendant must act in pursuit of private gain, compare, *e.g., United States v. Bloom, 149 F.3d 649, 655 (CA7 1998)*, with, *e.g., United States v. Panarella, 277 F.3d 678, 692 (CA3 2002)*.

[37] See, *e.g., United States v. Rybicki, 354 F.3d 124, 132 (CA2 2003)* (en banc); *United States v. Hausmann, 345 F.3d 952, 958 (CA7 2003)*; *United States v. Welch, 327 F.3d 1081, 1109, n. 29 (CA10 2003)*; *United States v. Frega, 179 F.3d 793, 803 (CA9 1999)*; *Brumley, 116 F.3d at, 732-733*; *United States v. Frost, 125 F.3d 346, 370-372 (CA6 1997)*; *United States v. Waymer, 55 F.3d 564, 568-569 (CA11 1995)*; **[****88]** *United States v. Bryan, 58 F.3d 933, 941 (CA4 1995)*.

ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

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There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud. See Brief for Petitioner 39; Brief for United States 37-38; post, at 416, 422, 177 L. Ed. 2d, at 665, 668 (Scalia, J., concurring in part and concurring in judgment). Congress enacted § 1346 on the heels of *McNally* and drafted the statute using that decision's terminology. See **[**2929]** 483 U.S., at 355, 107 S. Ct. 2875, 97 L. Ed. 2d 292 ("intangible righ[t]"); id., at 362, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (Stevens, J., dissenting) ("right **[****89]** to . . . honest services").[38] As the Second Circuit observed in its leading analysis of § 1346:**HN26**[↑]

> **LEdHN[26]**[↑] [26] "The 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- and wire-fraud schemes **[***658]** to deprive others **[*405]** 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).[39]

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Satisfied that **HN27**[↑] **LEdHN[27]**[↑] [27] Congress, by enacting § 1346, "meant to reinstate the body of pre-*McNally* honest-services law," post, at 422, 177 L. Ed. 2d, at 668 (opinion of Scalia, J.), we have surveyed that case law. See infra, at 407-408, 410, 177 L. Ed. 2d, at 659-660, 661. In parsing the Courts of Appeals decisions, we acknowledge that Skilling's vagueness challenge has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency. See Brief for Petitioner 39-42 (describing divisions of opinions). See also post, at 417-420, 177 L. Ed. 2d, at 665-667 (opinion of Scalia, J.). While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes--schemes that were the basis of most honest-services prosecutions--there was considerable disarray over the statute's application to conduct outside that core category. In light of this disarray, Skilling urges us, as he urged the Fifth Circuit, to invalidate the statute *in toto*. Brief for Petitioner 48 (Section 1346 **[****91]** "is intolerably and unconstitutionally vague."); Brief for Defendant-Appellant Skilling in No. 06-20885 (CA5), p. 65, n. 21 ("[S]ection 1346 should be invalidated as unlawfully vague on its face.").

HN28[↑] **LEdHN[28]**[↑] [28] It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. See, **[*406]** *e.g.*, Hooper v. California, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895) ("The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." (emphasis added)). See also Boos v. Barry, 485 U.S. 312, 330-331, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); *Schneider v. Smith, 390 U.S. 17, 26, 88 S. Ct. 682, 19 L. Ed. 2d 799 (1968)*.[40] We have accordingly instructed

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[38] Although verbal formulations varied slightly, the words employed by the Courts of Appeals prior to *McNally* described the same concept: "honest services," *e.g.*, United States v. Bruno, 809 F.2d 1097, 1105 (CA5 1987); "honest and faithful services," *e.g.*, United States v. Brown, 540 F.2d 364, 374 (CA8 1976); and "faithful and honest services," *e.g.*, United States v. Diggs, 613 F.2d 988, 998, 198 U.S. App. D.C. 255 (CADC 1979).

[39] We considered a similar Court-Congress interplay in McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991), which involved the interpretation of the term "seaman" in the Jones Act, 46 U.S.C. App. § 688 (2000 ed.). The Act, we recognized, **[****90]** "respond[ed] directly to" our decision in ***The Osceola, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903)***, and "adopt[ed] without further elaboration the term used in" that case, so we "assume[d] that the Jones Act use[d] 'seaman' in the same way." 498 U.S., at 342, 111 S. Ct. 807, 112 L. Ed. 2d 866.

[40] "This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in Murray v. The Charming Betsy, 6 U.S. 64, 2 Cranch 64, 118, 2 L. Ed. 208 (1804), and has for so long been applied by this Court that it is beyond

[2930]** "the federal courts . . . to avoid constitutional difficulties by **[***659]** [adopting a limiting interpretation] if such a construction is fairly possible." *Boos, 485 U.S., at 331, 108 S. Ct. 1157, 99 L. Ed. 2d 333*; see *United States v. Harriss, 347 U.S. 612, 618, 74 S. Ct. 808, 98 L. Ed. 989 (1954)* ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague . . . . And if this general class of offenses can be made constitutionally definite by a reasonable construction **[****92]** of the statute, this Court is under a duty to give the statute that construction.").

Arguing against any limiting construction, Skilling contends that it is impossible to identify a salvageable honest-services core; "the pre-*McNally* caselaw," he asserts, "is a **[*407]** hodgepodge of oft-conflicting holdings" that are "hopelessly unclear." Brief for Petitioner 39 (some capitalization and italics omitted). We have rejected an argument of the same tenor before. In *Civil Service Comm'n* v. *Letter Carriers*, federal employees challenged a provision of the Hatch Act that incorporated earlier decisions of the United States Civil Service Commission enforcing a similar law. "[T]he several thousand adjudications of the Civil Service Commission," the employees maintained, were "an impenetrable jungle"--"undiscoverable, inconsistent, [and] incapable of yielding any meaningful rules to govern present or future conduct." *413 U.S., at 571, 93 S. Ct. 2880, 37 L. Ed. 2d 796*. Mindful that "our task [wa]s not to destroy the Act if **[****94]** we c[ould], but to construe it," we held that "the rules that had evolved over the years from repeated adjudications were subject to sufficiently clear and summary statement." *Id., at 571-572, 93 S. Ct. 2880, 37 L. Ed. 2d 796*.

A similar observation may be made here. Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: ***HN29***[↑] ***LEdHN[29]***[↑] [29] The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States v. Runnels, 833 F.2d 1183, 1187 (CA6 1987)*; see Brief for United States 42, and n. 4 (citing dozens of examples).[41] Indeed, the *McNally* case **[**2931]** itself, which spurred Congress to enact *§ 1346*, presented a paradigmatic kickback fact pattern. *483 U.S., at 352-353, 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. **[*408]** Congress' reversal of *McNally* and reinstatement of the honest-services **[***660]** doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.

As already noted, *supra, at 400-401, 177 L. Ed. 2d, at 668*, the honest-services doctrine had its genesis in prosecutions involving bribery allegations. See *Shushan, 117 F.2d at 115* (public sector); *Procter & Gamble Co., 47 F. Supp., at 678* (private sector). See also *United States v. Orsburn, 525 F.3d 543, 546 (CA7 2008)*. Both before *McNally* and after *§ 1346*'s

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debate." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988)*. See, *e.g.*, *New York v. Ferber, 458 U.S. 747, 769, n. 24, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)*; *NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-501, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979)*; *United States v. Thirty-seven Photographs, 402 U.S. 363, 368-370, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971)*; *Machinists v. Street, 367 U.S. 740, 749-750, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961)*; *United States v. Rumely, 345 U.S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953)*; *Winters v. New York, 333 U.S. 507, 517, 68 S. Ct. 665, 92 L. Ed. 840 (1948)*; *Crowell v. Benson, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932)*; *Lucas v. Alexander, 279 U.S. 573, 577, 49 S. Ct. 426, 73 L. Ed. 851, 1929-2 C.B. 273 (1929)*; *Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346, 48 S. Ct. 194, 72 L. Ed. 303, 65 Ct. Cl. 761, 1928 Dec. Comm'r Pat. 246 (1928)*; *Panama R. Co. v. Johnson, 264 U.S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748 (1924)*; *United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 407-408, 29 S. Ct. 527, 53 L. Ed. 836 (1909)*; *United States v. Coombs, 37 U.S. 72, 12 Pet. 72, 76, 9 L. Ed. 1004 (1838)* (Story, J.); *Parsons v. Bedford, 28 U.S. 433, 3 Pet. 433, 448-449, 7 L. Ed. 732 (1830)* (Story, J.). Cf. *Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)* **[****93]** (statute made it criminal to address "any offensive, derisive or annoying word" to any person in a public place; vagueness obviated by state-court construction of the statute to cover only words having "a direct tendency to cause acts of violence" by the addressee (internal quotation marks omitted)).

[41] Justice Scalia emphasizes divisions in the Courts of Appeals regarding the source and scope of fiduciary duties. *Post, at 417-419, 177 L. Ed. 2d, at 665-667*. But these debates were rare in bribe and kickback cases. **[****95]** The existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute; examples include public official-public, see, *e.g.*, *United States v. Mandel, 591 F.2d 1347 (CA4 1979)*; employee-employer, see, *e.g.*, *United States v. Bohonus, 628 F.2d 1167 (CA9 1980)*; and union official-union members, see, *e.g.*, *United States v. Price, 788 F.2d 234 (CA4 1986)*. See generally *Chiarella v. United States, 445 U.S. 222, 233, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980)* (noting the "established doctrine that [a fiduciary] duty arises from a specific relationship between two parties").

enactment, Courts of Appeals described schemes involving bribes or kickbacks as "core . . . honest services fraud precedents," *United States v. Czubinski, 106 F.3d 1069, 1077 (CA1 1997)*; "paradigm case[s]," *United States v. deVegter, 198 F.3d 1324, 1327-1328 (CA11 1999)*; "[t]he most obvious form **[****96]** of honest services fraud," *United States v. Carbo, 572 F.3d 112, 115 (CA3 2009)*; "core misconduct covered by the statute," *United States v. Urciuoli, 513 F.3d 290, 294 (CA1 2008)*; "most [of the] honest services cases," *United States v. Sorich, 523 F.3d 702, 707 (CA7 2008)*; "typical," *United States v. Brown, 540 F.2d 364, 374 (CA8 1976)*; "clear-cut," *United States v. Mandel, 591 F.2d 1347, 1363 (CA4 1979)*; and "uniformly . . . cover[ed]," *United States v. Paradies, 98 F.3d 1266, 1283, n. 30 (CA11 1996)*. See also Tr. of Oral Arg. 43 (counsel for the Government) ("[T]he bulk of pre-*McNally* honest services cases" entailed bribes or kickbacks); Brief for Petitioner 49 ("Bribes and kickbacks were *the* paradigm [pre-*McNally*] cases," constituting "[t]he overwhelming majority of prosecutions for honest-services fraud.").

In view of this history, there is no doubt that ***HN30***[↑] ***LEdHN[30]***[↑] [30] Congress intended *§ 1346* to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.[42] To preserve the **[*409]** statute without transgressing constitutional limitations, we now hold that *§ 1346* criminalizes **[****97]** *only* the bribe-and-kickback core of the pre-*McNally* case law.[43]

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[42] Apprised that a broader reading of *§ 1346* could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes. Cf. *Levin v. Commerce Energy, Inc., 560 U.S. 413, 427, 130 S. Ct. 2323, 176 L. Ed. 2d 1131, 2010 U.S. LEXIS 4380 (2010)*[31] ***HN31***[↑] "[C]ourts may attempt . . . to implement what the legislature would have willed had it been apprised of the constitutional infirmity."); *United States v. Booker, 543 U.S. 220, 246, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)* ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding.").

[43] Justice Scalia charges that our construction of *§ 1346* is "not interpretation but invention." *Post, at 422, 177 L. Ed. 2d, at 668*. Stating that he "know[s] of no precedent for . . . 'paring down' " the pre-*McNally* case law to its core, *Post at 422*, he contends that the Court today "wield[s] a power we long ago abjured: the power to define new federal crimes," *post, at 415, 177 L. Ed. 2d, at 664*. See also, *e.g., post, at 422, 423, 424, 177 L. Ed. 2d, at 669, 669, 670*. As noted *supra, at 405-406, 177 L. Ed. 2d, at 658-659*, and n. 40, ***HN32***[↑] ***LEdHN[32]***[↑] [32] cases "paring down" federal statutes to avoid constitutional shoals are legion. These cases recognize that the Court does not *legislate*, but **[****98]** instead *respects the legislature*, by preserving a statute through a limiting interpretation. See *United States v. Lanier, 520 U.S. 259, 267-268, n. 6, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)* (This Court does not "create a common law crime" by adopting a "narrow[ing] constru[ction]." (internal quotation marks omitted)); *supra, at 408, 177 L. Ed. 2d, at 660* and this page, n. 42. Given that the Courts of Appeals uniformly recognized bribery and kickback schemes as honest-services fraud before *McNally, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292*, and that these schemes composed the lion's share of honest-services cases, limiting *§ 1346* to these heartland applications is surely "fairly possible." *Boos v. Barry, 485 U.S. 312, 331, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)*; cf. *Clark v. Martinez, 543 U.S. 371, 380, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005)* (opinion for the Court by Scalia, J.) (when adopting a limiting construction, "[t]he lowest common denominator, as it were, must govern"). So construed, the statute is not unconstitutionally vague. See *infra, at 412-413, 177 L. Ed. 2d, at 662-663*; *post, at 421, 177 L. Ed. 2d, at 668*. Only by taking a wrecking ball to a statute that can be salvaged through a reasonable narrowing interpretation would we act out of step with precedent.

[2932]** 3

The Government urges us to go **[***661]** further by locating within *§ 1346*'s compass another category of proscribed conduct: "undisclosed self-dealing **[****99]** by a public official or private employee--*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." Brief for United States 43-44. "[T]he **[*410]** theory of liability in *McNally* itself was nondisclosure of a conflicting financial interest," the Government observes, and "Congress clearly intended to revive th[at] nondisclosure theory." *Id.,* at 44. Moreover, "[a]lthough not as numerous as the bribery and kickback cases," the Government asserts, "the pre-*McNally* cases involving undisclosed self-dealing were abundant." *Ibid.*

Neither of these contentions withstands close inspection. *McNally*, as we have already observed, *supra, at 401-402, 407, 177 L. Ed. 2d, at 656, 659*, involved a classic kickback scheme: A public official, in exchange for routing Kentucky's insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest. *483 U.S., at 352-353, 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. This was no mere

failure to disclose a conflict of interest; rather, the official conspired with a third party so that both would profit from wealth generated by public contracts. **[****100]** See *id., at 352-353, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. Reading *§ 1346* to proscribe bribes and kickbacks--and nothing more--satisfies Congress' undoubted aim to reverse *McNally* on its facts.

Nor are we persuaded that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for "some schemes of non-disclosure and concealment of material information," *Mandel, 591 F.2d at 1361*, they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of *§ 1346* must exclude this amorphous category of cases.

Further dispelling doubt on this point is the familiar principle that ***HN33***[⬆] ***LEdHN[33]***[⬆] [33] "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland, 531 U.S., at 25, 121 S. Ct. 365, 148 L. Ed. 2d 221* (quoting *Rewis v. United States, 401 U.S. 808, 812, 91 S. Ct. 1056, 28 L. Ed. 2d 493 **[*411]** (1971)*). "This interpretive guide is especially appropriate in construing *[§ 1346]* because . . . mail [and wire] fraud [are] predicate offense[s] under [the Racketeer **[****101]** Influenced and Corrupt Organizations Act], *18 U.S.C. § 1961(1) (1994 ed., Supp. IV)*, and the money laundering statute, *§ 1956(c)(7)(A)*." **[**2933]** *Cleveland, 531 U.S., **[**2933] at 25, 121 S. Ct. 365, 148 L. Ed. 2d 221*. Holding that honest-services fraud does not encompass **[***662]** conduct more wide ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government's less constrained construction absent Congress' clear instruction otherwise. *E.g., United States v. Universal C. I. T. Credit Corp., 344 U.S. 218, 221-222, 73 S. Ct. 227, 97 L. Ed. 260 (1952)*.

In sum, our construction of *§ 1346* "establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of 'overruling' *McNally*." Brief for Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch* v. *United States*, O. T. 2009, No. 08-1196, pp. 28-29. "If Congress desires to go further," we reiterate, "it must speak more clearly than it has." *McNally, 483 U.S., at 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292*.[44]

[*412] 4

HN34[⬆] ***LEdHN[34]***[⬆] [34] Interpreted to encompass only bribery and kickback schemes, *§ 1346* is not unconstitutionally vague. Recall that the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions. See *Kolender, 461 U.S., at 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903*. A prohibition on fraudulently depriving another of one's honest **[****103]** services by accepting bribes or kickbacks does not present a problem on either score.

As to fair notice, ***HN35***[⬆] ***LEdHN[35]***[⬆] [35] "whatever the school of thought concerning the scope and meaning of " *§ 1346*, it has always been "as plain as a pikestaff that" bribes and kickbacks constitute honest-services fraud, *Williams v. United States, 341 U.S. 97, 101, 71 S. Ct. 576, 95 L. Ed. 774 (1951)*, and the statute's *mens rea* requirement further blunts any notice concern, see, *e.g., Screws v. United States, 325 U.S. 91, 101-104, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945)* (plurality opinion). See also *Broadrick v. Oklahoma, 413 U.S. 601, 608, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)* (***HN36***[⬆] ***LEdHN[36]***[⬆] [36] "[E]ven if the outermost boundaries of [a statute are] imprecise, any such uncertainty has little relevance . . . where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions."). Today's decision clarifies that ***HN37***[⬆] ***LEdHN[37]***[⬆] [37] no other misconduct falls within *§ 1346*'s province. See *United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432*

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[44] If Congress were to take up the enterprise of criminalizing "undisclosed self-dealing by a public official or private employee," Brief for United States 43, it would have to employ standards of sufficient definiteness and specificity to overcome due process **[****102]** concerns. The Government proposes a standard that prohibits the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty," so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. *Id*., at 43-44. See also *id*., at 40-41. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made, and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

(1997) (HN38[↑] LEdHN[38][↑] [38] "[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute.").

As to arbitrary prosecutions, we perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition on bribes and kickbacks **[****104]** draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing--and **[***663]** defining--similar crimes. See, *e.g.,* 18 U.S.C. §§ 201(b), 666(a)(2); HN39[↑] LEdHN[39][↑] [39] 41 U.S.C. § 52(2)("The term 'kickback' **[**2934]** means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable **[*413]** treatment in connection with [enumerated circumstances]."). [45] See also, *e.g.,* United States v. Ganim, 510 F.3d 134, 147-149 (CA2 2007) (Sotomayor, J.) (reviewing honest-services conviction involving bribery in light of elements of bribery under other federal statutes); United States v. Whitfield, 590 F.3d 325, 352-353 (CA5 2009); United States v. Kemp, 500 F.3d 257, 281-286 (CA3 2007). A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.

C

It remains to determine whether Skilling's conduct violated § 1346. Skilling's honest-services prosecution, the Government concedes, was not "prototypical." Brief for United States 49. The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million." *Id.,* at 51.

The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. See Record 41328 (May 11, 2006 Letter from the Government to the District Court) ("[T]he indictment does not allege, and the government's evidence did not show, that [Skilling] engaged in bribery."). It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud.

[*414] Because the indictment **[****106]** alleged three objects of the conspiracy--honest-services wire fraud, money-or-property wire fraud, and securities fraud--Skilling's conviction is flawed. See Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) (HN40[↑] LEdHN[40][↑] [40] constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory). This determination, however, does not necessarily require reversal of the conspiracy conviction; we recently confirmed, in Hedgpeth v. Pulido, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) *(per curiam)*, that errors of the *Yates* variety are subject to harmless-error analysis. The parties vigorously dispute whether the error was harmless. Compare Brief for United States 52 ("[A]ny juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud.") with Reply Brief 30 (The Government "cannot show that the conspiracy conviction rested *only* on the securities-fraud theory, rather than the distinct, legally-flawed **[***664]** honest-services theory."). We leave this dispute for resolution on remand. [46]

[2935]** Whether potential reversal on the conspiracy count touches any of Skilling's other convictions is also an open question. All of his convictions, Skilling contends, hinged on the conspiracy count and, like dominoes, must fall if it falls. The District Court, deciding Skilling's motion for bail pending appeal, found this argument dubious, App. 1141a-1142a, but the Fifth Circuit had no occasion to rule on it. That court may do

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[45] Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application **[****105]** to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.

[46] The Fifth Circuit appeared to prejudge this issue, noting that, "if any of the **[****107]** three objects of Skilling's conspiracy offers a legally insufficient theory," it "must set aside his conviction." 554 F.3d at, 543. That reasoning relied on the mistaken premise that Hedgpeth v. Pulido, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) *(per curiam)*, governs only cases on collateral review. See 554 F.3d at, 543, n. 10. HN41[↑] LEdHN[41][↑] [41] Harmless-error analysis, we clarify, applies equally to cases on direct appeal. Accordingly, the Fifth Circuit, on remand, should take a fresh look at the parties' harmless-error arguments.

so on remand.

[*415] * * *

For the foregoing reasons, we affirm the Fifth Circuit's ruling on Skilling's fair-trial argument, vacate its ruling on his conspiracy conviction, and remand the case for proceedings consistent with this opinion.

It is so ordered.

Concur by: Scalia (In Part); Alito (In Part); **[****108]** Sotomayor (In Part)

Concur

Justice **Scalia**, with whom Justice **Thomas** joins, and with whom Justice **Kennedy** joins except as to Part III, concurring in part and concurring in the judgment.

I agree with the Court that petitioner Jeffrey Skilling's challenge to the impartiality of his jury and to the District Court's conduct of the *voir dire* fails. I therefore join Parts I and II of the Court's opinion. I also agree that the decision upholding Skilling's conviction for so-called "honest-services fraud" must be reversed, but for a different reason. In my view, the specification in 18 U.S.C. § 1346 (2006 ed.) that "scheme or artifice to defraud" in the mail-fraud and wire-fraud statutes, §§ 1341 and 1343 (2006 ed., Supp. II), includes "a scheme or artifice to deprive another of the intangible right of honest services" is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is "not to destroy the Act . . . but to construe it," ante, at 407, 177 L. Ed. 2d, at 659 (internal quotation marks omitted). But in transforming the prohibition of "honest-services fraud" into a prohibition of "bribery and kickbacks" it is wielding a power **[****109]** we long ago abjured: the power to define new federal crimes. See United States v. Hudson, 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812).

I

A criminal statute must clearly define the conduct it proscribes, see Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A statute that is unconstitutionally vague cannot be saved by a more precise indictment, see Lanzetta v. New **[*416]** Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939), nor by judicial construction that writes in specific criteria that its text does not contain, see *United States v. Reese, 92 U.S. 214, 219-221, 23 L. Ed. 563 (1876)*. Our cases have described **[***665]** vague statutes as failing "to provide a person of ordinary intelligence fair notice of what is prohibited, or [as being] so standardless that [they] authoriz[e] or encourag[e] seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Here, Skilling argues that § 1346 fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits. Brief for Petitioner 38-39, 42-44. In my view Skilling is correct.

The Court maintains that "the intangible right of honest services, " means the right not to have one's fiduciaries **[****110]** accept "bribes or kickbacks." Its first step in reaching **[**2936]** that conclusion is the assertion that the phrase refers to "the doctrine developed" in cases decided by lower federal courts prior to our decision in McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). Ante, at 404, 177 L. Ed. 2d, at 659. I do not contest that. I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally* -- what the Court calls "the pre-*McNally* honest-services doctrine," ante, at 407, 177 L. Ed. 2d, at 659. The problem is that that doctrine provides no "ascertainable standard of guilt," United States v. L. Cohen Grocery Co., 255 U.S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516 (1921), and certainly is not limited to "bribes or kickbacks."

Investigation into the meaning of "the pre-*McNally* honest-services doctrine" might logically begin with *McNally* itself, which rejected it. That case repudiated the many Court of Appeals holdings that had expanded the meaning of "fraud" in the mail-fraud and wire-fraud statutes beyond deceptive schemes to obtain property. 483 U.S., at 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292. If the repudiated cases stood for a prohibition of "bribery and kickbacks," one would have expected those words to appear in the opinion's description of the cases. In fact, **[*417]** they **[****111]** do not. *Not at all*. Nor did *McNally* even provide a consistent definition of the pre-existing theory of fraud it rejected. It referred variously to a right of citizens "to have the [State]'s affairs conducted honestly," id., at 353, 107 S. Ct. 2875, 97 L. Ed. 2d 292, to "honest and impartial government," id., at 355, 107 S. Ct. 2875, 97 L. Ed. 2d 292, to "good government," id., at 356, 107 S. Ct. 2875, 97 L. Ed. 2d 292, and "to have

public officials perform their duties honestly," *id., at 358, 107 S. Ct. 2875, 97 L. Ed. 2d 292*. It described prior case law as holding that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud," *id., at 355, 107 S. Ct. 2875, 97 L. Ed. 2d 292*.

But the pre-*McNally* Court of Appeals opinions were not limited to fraud by public officials. Some courts had held that those fiduciaries subject to the "honest services" obligation included private individuals who merely participated in public decisions, see, *e.g.*, *United States v. Gray, 790 F.2d 1290, 1295-1296 (CA6 1986)* (per curiam) (citing *United States v. Margiotta, 688 F.2d 108, 122 (CA2 1982))*, and even private employees who had no role in public decisions, see, *e.g.*, *United States v. Lemire, 720 F.2d 1327, 1335-1336, 232 U.S. App. D.C. 100 (CADC 1983)*; *United States v. Von Barta, 635 F.2d 999, 1007 (CA2 1980)*. Moreover, "to say that a man is a fiduciary only begins **[****112]** [the] analysis; it gives direction to further inquiry . . . . What obligations does he **[***666]** owe as a fiduciary?" *SEC v. Chenery Corp., 318 U.S. 80, 85-86, 63 S. Ct. 454, 87 L. Ed. 626 (1943)*. None of the "honest services" cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the "fraud" offense.

There was not even universal agreement concerning the *source* of the fiduciary obligation -- whether it must be positive state or federal law, see, *e.g.*, *United States v. Rabbitt, 583 F.2d 1014, 1026 (CA8 1978)*, or merely general principles, such as the "obligations of loyalty and fidelity" that inhere in the "employment relationship," *Lemire, supra, at 1336*. The decision *McNally* reversed had grounded the duty in general (not jurisdiction-specific) trust law, see *Gray, supra, **[*418]** at 1294*, a *corpus juris* festooned with various duties. See, *e.g., Restatement (Second) of Trusts §§ 169-185* (1976). Another pre-*McNally* case referred to the general law of agency, *United States v. Ballard, 663 F.2d 534, 543, n. 22 (CA5 1981)*, modified on other grounds by *680 F.2d 352 (1982)*, which imposes duties quite different from those **[**2937]** of a trustee. **[****113]** [1] See *Restatement (Second) of Agency §§ 377-398* (1957).

This indeterminacy does not disappear if one assumes that the pre-*McNally* cases developed a federal, common-law fiduciary duty; the duty remained hopelessly undefined. Some courts described it in astoundingly broad language. *Blachly v. United States, 380 F.2d 665 (CA5 1967)*, loftily declared that "[l]aw puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Id., at 671* (quoting *Gregory v. United States, 253 F.2d 104, 109 (CA5 1958))*. Other courts unhelpfully **[****114]** added that any scheme "contrary to public policy" was also condemned by the statute, *United States v. Bohonus, 628 F.2d 1167, 1171 (CA9 1980)*. See also *United States v. Mandel, 591 F.2d 1347, 1361 (CA4 1979)* (any scheme that is "contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing"). Even opinions that did not indulge in such grandiloquence did not specify the duty at issue beyond loyalty or honesty, see, *e.g., Von Barta, supra, at 1005-1006*. Moreover, the demands of the duty were said to be greater **[*419]** for public officials than for private employees, see, *e.g., Lemire, supra, at 1337, n. 13*; *Ballard, supra, at 541, n. 17*, but in what respects (or by how much) was never made clear.

The indefiniteness of the fiduciary duty is not all. Many courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud. See, *e.g., Von Barta, supra, at 1006* (collecting cases); *United States v. George, 477 F.2d 508, 512 (CA7 1973)*. There was, unsurprisingly, some dispute about that, at least in the context of acts by persons owing duties to **[***667]** the public. See *United States v. Price, 788 F.2d 234, 237 (CA4 1986)*. **[****115]** And even among those courts that did require something additional where a public official was involved, there was disagreement as to what the addition should be. For example, in *United States v. Bush, 522 F.2d 641 (1975)*, the Seventh Circuit held that material misrepresentations and active concealment were enough, *id., at 647-648*. But in *Rabbitt, 583 F.2d 1014*, the Eighth Circuit held that actual harm to the State was needed, *id., at 1026*.

Similar disagreements occurred with respect to private

[1] The Court is untroubled by these divisions because "these debates were rare in bribe and kickback cases," in which "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute," *ante, at 407, n. 41, 177 L. Ed. 2d, at 659*. This misses the point. The Courts of Appeals may have consistently found unlawful the acceptance of a bribe or kickback by one or another sort of fiduciary, but they have not consistently described (as the statute does not) any test for who is a fiduciary.

employees. Courts disputed whether the defendant must use his fiduciary position for his own gain. Compare *Lemire, , at 1335* (yes), with *United States v. Bronston, 658 F.2d 920, 926 (CA2 1981)* (no). One opinion upheld a mail-fraud conviction on the ground that the defendant's "failure to disclose his receipt of kickbacks and consulting fees from [his employer's] suppliers resulted in a breach of his fiduciary duties depriving his employer of his loyal and honest services." *United States v. Bryza, 522 F.2d 414, 422 (CA7 1975)*. Another opinion, however, demanded more than an intentional failure to disclose: "There must be a failure to disclose something which in the knowledge or contemplation **[****116]** of the employee poses an independent business risk to the employer." *Lemire, supra, at 1337*. Other **[**2938]** courts required that the victim suffer some loss, see, *e.g., Ballard, , at 541-542* -- a proposition that, of course, other courts **[*420]** rejected, see, *e.g.*, *United States v. Newman, 664 F.2d 12, 20 (CA2 1981)*; *United States v. O'Malley, 535 F.2d 589, 592 (CA10 1976)*. The Court's statement today that there was a deprivation of honest services even if "the scheme occasioned a money or property *gain* for the betrayed party," *ante, at 400, 177 L. Ed. 2d, at 655*, is therefore true, except to the extent it is not.

In short, the first step in the Court's analysis -- holding that "the intangible right of honest services" refers to "the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally*," *ante, at 404, 177 L. Ed. 2d, at 657*-- is a step out of the frying pan into the fire. The pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in **[****117]** order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time *§ 1346* was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out. [2]

II

The Court is aware of all this. It knows that adopting by reference "the **[***668]** pre-*McNally* honest-services doctrine," *ante, at 407, 177 L. Ed. 2d, at 659*, is adopting by reference nothing more precise than **[*421]** the referring term itself ("the **[****118]** intangible right of honest services"). Hence the *deus ex machina:* "[W]e pare that body of precedent down to its core," *ante, at 404, 177 L. Ed. 2d, at 657*. Since the honest-services doctrine "had its genesis" in bribery prosecutions, and since several cases and counsel for Skilling referred to bribery and kickback schemes as "core" or "paradigm" or "typical" examples, or "[t]he most obvious form," of honest-services fraud, *ante, at 408, L. Ed. 2d, at 660* (internal quotation marks omitted), and since two cases and counsel for the Government say that they formed the "vast majority," or "most" or at least "[t]he bulk" of honest-services cases, *ante, at 407-408, 177 L. Ed. 2d, at 659-660* (internal quotation marks omitted), THEREFORE it must be the case that they are *all* Congress meant by its reference to the honest-services doctrine.

Even if that conclusion followed from its premises, it would not suffice to eliminate the vagueness of the statute. It would solve (perhaps) the indeterminacy of what acts constitute a breach of the "honest services" obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the "fiduciary capacity" to which the bribery and kickback restriction applies. Does it apply only **[****119]** to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an **[**2939]** answer. Thus, even with the bribery and kickback limitation the statute does not answer the question, "What is the criterion of guilt?"

But that is perhaps beside the point, because it is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute. To say that bribery and kickbacks represented "the core" of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. But the doctrine

[2] Courts since *§ 1346*'s enactment have fared no better, reproducing some of the same disputes that predated *McNally*. See, *e.g., Sorich v. United States, 555 U.S. 1204, 1206, 129 S. Ct. 1308, 173 L. Ed. 2d 645 (2009)* (Scalia, J., dissenting from denial of certiorari) (collecting cases). We have previously found important to our vagueness analysis "the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out [a] statute in cases brought before them." *United States v. L. Cohen Grocery Co., 255 U.S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516 (1921)*. I am at a loss to explain why the Court barely mentions those conflicts today.

itself is much more. Among all the pre-*McNally* smorgasbord offerings of varieties of **[*422]** honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.

Thus, the Court's claim to "respec[t] the legislature," *ante, at 409, n. 43, 177 L. Ed. 2d, at 660* (emphasis deleted), is false. It is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; **[****120]** and entirely clear that that prohibited much more (though precisely what more is uncertain) than bribery and kickbacks. Perhaps it is true that "Congress intended *§ 1346* to reach *at least* bribes and kickbacks," *ante, at 408, 177 L. Ed. 2d, at 660*. That simply does not mean, as the Court now holds, that " *§ 1346* criminalizes *only*" bribery and kickbacks, *ante, at 409, 177 L. Ed. 2d, at 660*.

Arriving at that conclusion requires not interpretation but invention. The Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster. I know of no precedent **[***669]** for such "paring down," [3] and it seems to me clearly beyond judicial power. This is not, as the Court claims, *ante, at 406, 177 L. Ed. 2d, at 658*, simply a matter of adopting a "limiting construction" in the face of potential unconstitutionality. **[*423]** To do that, our cases have been careful to note, the narrowing construction must be "fairly possible," *Boos v. Barry, 485 U.S. 312, 331, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)*, "reasonable," *Hooper v. California, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895)*, or not "plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988)*. As we have seen **[****121]** (and the Court does not contest), *no court* before *McNally* concluded that the "deprivation of honest services" meant *only* the acceptance of bribes or kickbacks. If it were a "fairly possible" or "reasonable" construction, not "contrary to **[**2940]** the intent of Congress," one would think that *some* court would have adopted it. The Court does not even point to a *post-McNally* case that reads *§ 1346* to cover only bribery and kickbacks, and I am aware of none.

The canon of constitutional avoidance, on which the Court so heavily relies, see *ante, at 405-406, 177 L. Ed. 2d, at 658*, states that "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 407, 29 S. Ct. 527, 53 L. Ed. 836 (1909)*; see also *United States v. Rumely, 345 U.S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953)* (describing the canon as decisive "in the choice of fair alternatives"). Here there is no choice to be made between two "fair alternatives." Until today, no one **[****123]** has thought (and there is no basis for thinking) that the honest-services statute prohibited only bribery and kickbacks.

I certainly agree with the Court that we must, "if we can," uphold, rather than "condemn," Congress's enactments, *ante, at 403, 177 L. Ed 2d, at 656*. But I do not believe we have the power, in order to uphold an enactment, to rewrite it. Congress enacted the entirety of the pre-*McNally* honest-services law, the content of which is (to put it mildly) unclear. In prior vagueness cases, we have resisted the temptation to make all things **[*424]** right with the stroke of our pen. **[***670]** See, *e.g., Smith v. Goguen, 415 U.S. 566, 575, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)*. I would show the same restraint today, and reverse Skilling's conviction on the basis that *§ 1346* provides no "ascertainable standard" for the conduct it condemns, *L. Cohen, 255 U.S., at 89, 41 S. Ct. 298, 65 l. Ed. 2d 516*. Instead, the Court today adds to our functions the prescription of criminal law.

[3] The only alleged precedent the Court dares to describe is *Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973)*. That case involved a provision of the Hatch Act incorporating prior adjudications of the Civil Service Commission. We upheld the provision against a vagueness challenge -- not, however, by "paring down" the adjudications to a more narrow rule that we invented, but by concluding that what they held was not vague. See *id., at 571-574, 93 S. Ct. 2880, 37 L. Ed. 2d 796*. The string of cases the Court lists, see *ante, at 406, n. 40, 177 L. Ed. 2d, at 658* (almost none of which addressed claims of vagueness), have nothing to do with "paring down." The one that comes closest, *United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971)*, specified a time limit within which proceedings **[****122]** authorized by statute for the forfeiture of obscene imported materials had to be commenced and completed. That is not much different from "reading in" a reasonable-time requirement for obligations undertaken in contracts, and can hardly be described as a rewriting or "paring down" of the statute. The Court relied on legislative history anticipating that the proceedings would be prompt, *id., at 370-371, 91 S. Ct. 1400, 28 L. Ed. 2d 822*, and noted that (unlike here) it was not "decid[ing] issues of policy," *id., at 372, 91 S. Ct. 1400, 28 L. Ed. 2d 822*.

III

A brief word about the appropriate remedy. As I noted *supra, at 416, 177 L. Ed. 2d, at 665*, Skilling has argued that *§ 1346* cannot be constitutionally applied to him because it affords no definition of the right whose deprivation it prohibits. Though this reasoning is categorical, it does not make Skilling's challenge a "facial" **[****124]** one, in the sense that it seeks invalidation of the statute in all its applications, as opposed to preventing its enforcement against him. I continue to doubt whether "striking down" a statute is ever an appropriate exercise of our Article III power. See *Chicago v. Morales, 527 U.S. 41, 77, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)* (SCALIA, J., dissenting). In the present case, the universality of the infirmity Skilling identifies in *§ 1346* may mean that if he wins, anyone else prosecuted under the statute will win as well, see *Smith, supra, at 576-578, 94 S. Ct. 1242, 39 L. Ed. 2d 605*. But Skilling only asks that *his* conviction be reversed, Brief for Petitioner 57-58, so *the remedy* he seeks is not facial invalidation.

I would therefore reverse Skilling's conviction under *§ 1346* on the ground that it fails to define the conduct it prohibits. The fate of the statute in future prosecutions -- obvious from my reasoning in the case -- would be a matter for *stare decisis*.

* * *

It is hard to imagine a case that more clearly fits the description of what Chief Justice Waite said could not be done, in a colorful passage oft-cited in our vagueness opinions, *United States v. Reese, 92 U.S., at 221, 23 L. Ed. 563*:

> **[*425]** "The question, then, to be determined, is, whether we can introduce **[****125]** words of limitation into a penal statute so as to **[**2941]** make it specific, when, as expressed, it is general only.
>
> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government . . . .
> "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Justice Alito, concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Part II of the Court's opinion. I write separately to address petitioner's jury-trial argument.

The *Sixth Amendment* guarantees criminal defendants a trial before "an impartial jury." In my view, this requirement is satisfied so long as no biased juror is actually seated at trial. Of course, evidence of pretrial media attention and widespread community hostility may play a role in the bias **[***671]** inquiry. Such evidence may be important in assessing the adequacy of *voir dire*, see, *e.g.*, *Mu'Min v. Virginia, 500 U.S. 415, 428-432, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)*, **[****126]** or in reviewing the denial of requests to dismiss particular jurors for cause, see, *e.g.*, *Patton v. Yount, 467 U.S. 1025, 1036-1040, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)*. There are occasions in which such evidence weighs heavily in favor of a change of venue. In the end, however, if no biased juror is actually seated, there is no violation of the defendant's right to an impartial jury. See *id., at 1031-1035, 1040*; *Murphy v. Florida, 421 U.S. 794, 800-801, 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)*; see also *Rivera v. **[*426]** Illinois, 556 U.S. 148, 157-159, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)*; *United States v. Martinez-Salazar, 528 U.S. 304, 311, 316-317, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)*; *Smith v. Phillips, 455 U.S. 209, 215-218, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*.

Petitioner advances a very different understanding of the jury-trial right. Where there is extraordinary pretrial publicity and community hostility, he contends, a court must presume juror prejudice and thus grant a change of venue. Brief for Petitioner 25-34. I disagree. Careful *voir dire* can often ensure the selection of impartial jurors even where pretrial media coverage has generated much hostile community sentiment. Moreover, once a jury has been selected, there are measures that a trial judge may take to insulate jurors from media coverage during the course **[****127]** of the trial. What the *Sixth Amendment* requires is "an impartial jury." If the jury that sits and returns a verdict is impartial, a defendant has received what the *Sixth Amendment* requires.

The rule that petitioner advances departs from the text of the *Sixth Amendment* and is difficult to apply. It requires a trial judge to determine whether the adverse pretrial media coverage and community hostility in a particular case have reached a certain level of severity,

but there is no clear way of demarcating that level or of determining whether it has been met.

Petitioner relies chiefly on three cases from the 1960's -- *Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)*, *Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)*, and *Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)*. I do not read those cases as demanding petitioner's suggested approach. As the Court notes, *Sheppard* and *Estes*primarily "involved media interference with courtroom **[**2942]** proceedings *during* trial." *Ante, at 382, n. 14, 177 L. Ed. 2d, at 643*; see also *post, at 446, 177 L. Ed. 2d, at 683*(Sotomayor, J., concurring in part and dissenting in part). *Rideau* involved unique events in a small community.

I share some of Justice Sotomayor's concerns about the adequacy of the *voir dire* in this case and the trial judge's **[****128]** findings that certain jurors could be impartial. See *post, at 458-462, 177 L. Ed. 2d, at 691-692*. **[*427]** But those highly fact-specific issues are not within the question presented. Pet. for Cert. i. I also do not understand the opinion of the Court as reaching any question regarding a change of venue under *Federal Rule of Criminal Procedure 21*.

Because petitioner, in my view, is not entitled to a reversal of the decision below on the jury-trial question that is before us, I join the judgment of the Court in full.

Dissent by: Sotomayor (In Part)

Dissent

[*672]** Justice **Sotomayor**, with whom Justice **Stevens** and Justice **Breyer** join, concurring in part and dissenting in part.

I concur in the Court's resolution of the honest-services fraud question and join Part III of its opinion. I respectfully dissent, however, from the Court's conclusion that Jeffrey Skilling received a fair trial before an impartial jury. Under our relevant precedents, the more intense the public's antipathy toward a defendant, the more careful a court must be to prevent that sentiment from tainting the jury. In this case, passions ran extremely high. The sudden collapse of Enron directly affected thousands of people in the Houston area and shocked the entire community. The accompanying **[****129]** barrage of local media coverage was massive in volume and often caustic in tone. As Enron's one-time chief executive officer (CEO, Skilling was at the center of the storm. Even if these extraordinary circumstances did not constitutionally compel a change of venue, they required the District Court to conduct a thorough *voir dire* in which prospective jurors' attitudes about the case were closely scrutinized. The District Court's inquiry lacked the necessary thoroughness and left serious doubts about whether the jury empaneled to decide Skilling's case was capable of rendering an impartial decision based solely on the evidence presented in the courtroom. Accordingly, I would grant Skilling relief on his fair-trial claim.

[*428] I

The majority understates the breadth and depth of community hostility toward Skilling and overlooks significant deficiencies in the District Court's jury selection process. The failure of Enron wounded Houston deeply. Virtually overnight, what had been the city's "largest, most visible, and most prosperous company," its "foremost social and charitable force," and "a source of civic pride" was reduced to a "shattered shell." App. PP11, 13, pp. 649a-650a, 1152a. Thousands of the company's employees **[****130]** lost their jobs and saw their retirement savings vanish. As the effects rippled through the local economy, thousands of additional jobs disappeared, businesses shuttered, and community groups that once benefited from Enron's largesse felt the loss of millions of dollars in contributions. See, *e.g.*, 3 Supp. Record 1229, 1267; see also *554 F.3d 529, 560 (CA5 2009)* ("Accounting firms that serviced Enron's books had less work, hotels had more open rooms, restaurants sold fewer meals, and so on"). Enron's community ties were so extensive that the entire local U. S. Attorney's Office was forced to recuse itself from the Government's investigation into the company's fall. See 3 Supp. Record 608 (official press release).

With Enron's demise affecting the lives of so many Houstonians, local media coverage **[**2943]** of the story saturated the community. According to a defense media expert, the Houston Chronicle--the area's leading newspaper--assigned as many as 12 reporters to work on the Enron story full time. App. 568a-569a. The paper mentioned Enron in more than 4,000 articles during the 3-year period following the company's December 2001 bankruptcy filing. Hundreds of these articles discussed Skilling **[****131]** by name. See 3 Supp. Record 2114.

Skilling's expert, a professional journalist and academic with 30 years' experience, could not "recall another instance where a local paper dedicated as **[***673]** many resources to a single topic over such an extended period of time as the Houston Chronicle . . . dedicated to Enron." App. ¶ 32, at 570a. **[*429]** Local television news coverage was similarly pervasive and, in terms of "editorial theme," "largely followed the Chronicle's lead." *Id*., P11, at 559a; see also *id*., at 717a. Between May 2002 and October 2004, local stations aired an estimated 19,000 news segments involving Enron, more than 1,600 of which mentioned Skilling. 3 Supp. Record 2116.

While many of the stories were straightforward news items, many others conveyed and amplified the community's outrage at the top executives perceived to be responsible for the company's bankruptcy. A Chronicle report on Skilling's 2002 testimony before Congress is typical of the coverage. It began, "Across Houston, Enron employees watched former chief executive Jeffrey Skilling's congressional testimony on television, turning incredulous, angry and then sarcastic by turns, as a man they knew as savvy and detail-oriented pleaded **[****132]** memory failure and ignorance about critical financial transactions at the now-collapsed energy giant." App. 1218a. " 'He is lying; he knew everything,' said [an employee], who said she had seen Skilling frequently over her 18 years with the firm, where Skilling was known for his intimate grasp of the inner doings at the company. 'I am getting sicker by the minute.' " *Id*., at 1219a. A companion piece quoted a local attorney who called Skilling an "idiot" who was "in denial"; he added, "I'm glad [Skilling's] not my client." *Id*., at 592a-593a (internal quotation marks omitted).

Articles deriding Enron's senior executives were juxtaposed with pieces expressing sympathy toward and solidarity with the company's many victims. Skilling's media expert counted nearly a hundred victim-related stories in the Chronicle, including a "multi-page layout entitled 'The Faces of Enron,' " which poignantly described the gut-wrenching experiences of former employees who lost vast sums of money, faced eviction from their homes, could not afford Christmas gifts for their children, and felt "scared," "hurt," "humiliat[ed]," "helpless," and "betrayed." *Id*., P71, at **[*430]** 585a-586a. The conventional wisdom that blame for Enron's devastating implosion **[****133]** and the ensuing human tragedy ultimately rested with Skilling and former Enron Chairman Kenneth Lay became so deeply ingrained in the popular imagination that references to their involvement even turned up on the sports pages: "If you believe the story about [Coach Bill Parcells] not having anything to do with the end of Emmitt Smith's Cowboys career, then you probably believe in other far-fetched concepts. Like Jeff Skilling having nothing to do with Enron's collapse." 3 Supp. Record 811.

When a federal grand jury indicted Skilling, Lay, and Richard Causey--Enron's former chief accounting officer--in 2004 on charges of conspiracy to defraud, securities fraud, and other crimes, the media placed them directly in their crosshairs. In the words of one article, "there was one thing those whose lives were touched by the once-exalted company all seemed to agree upon: The indictment of former Enron **[**2944]** CEO Jeff Skilling was overdue." App. 1393a. Scoffing at Skilling's attempts to paint himself as "a 'victim' of his subordinates," *id*., at 1394a, the Chronicle derided "the doofus defense" that Lay and Skilling **[***674]** were expected to offer, *id*., at 1401a.[1] The Chronicle referred to the coming Skilling/Lay **[****134]** trial as "the main event" and "The Big One," which would **[*431]** finally bring "the true measure of justice in the Enron saga." Record 40002; App. 1457a, 1460a.[2] On the day the superseding indictment charging Lay was issued, "the Chronicle dedicated three-quarters of its front page, 2 other full pages, and substantial portions of 4 other

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[1] See also App. 735a (describing Enron as "hardball fraud" and noting that "Enron prosecutors have approached the case more like an organized crime investigation than a corporate fraud prosecution," a "tactic [that] makes sense" given "the sheer pervasiveness of fraud, corruption and self-dealing"); *id*., at 1403a ("Lay stood proudly in front of Enron's facade of success, while Skilling and his own prot[ege], [Andrew] Fastow, ginned up increasingly convoluted mechanisms for concealing the financial reality. . . . A court will decide the particulars, but yes, Ken Lay knew"); *id*., at 1406a, 1409a (describing Enron's collapse as "failure as a result of fraud" and criticizing Skilling for using "vitriol [as] a smokescreen" and "bolting for the door" just before Enron's stock price **[****135]** plummeted); 3 Supp. Record 1711 (discussing the role of Skilling and Lay in "the granddaddy of all corporate frauds").

[2] According to Skilling's media expert, local television stations "adopted these same themes" and "dr[o]ve them home through such vivid and repeated visual imagery as replaying footage of Skilling's . . . 'perp walk' when details about Skilling's upcoming trial [we]re discussed." App. ¶ 65, at 584a. During arraignment, news outlets "followed each man as he drove from his home to FBI headquarters, to the court, and back home, often providing 'color' commentary--such as interviewing former Enron employees for comment on the day's events." *Id*., P60, at 581a.

pages, all in the front or business sections, to th[e] story." *Id*., P57, at 580a-581a.

Citing the widely felt sense of victimhood among Houstonians and the voluminous adverse publicity, Skilling moved in November 2004 for a change of venue.[3] The District Court denied the motion, characterizing the media coverage as largely "objective and unemotional." App. to Brief for United States 11a. *Voir dire*, it concluded, would provide an effective means to "ferret out any bias" in the jury pool. *Id.*, at 18a; see *ante, at 370, 177 L. Ed. 2d, at 637*.

To that end, the District Court began the jury selection process by mailing screening questionnaires to 400 prospective jurors in November 2005. The completed questionnaires of the 283 respondents not excused for hardship dramatically illustrated the widespread impact of Enron's collapse on the Houston community and confirmed the intense animosity of Houstonians toward Skilling and his codefendants. More than one-third of the prospective jurors (approximately 99 of 283, by my count) indicated that they **[*432]** or persons they knew had lost money or jobs as a result of the Enron bankruptcy. Two-thirds of the jurors (about 188 of 283) expressed views about Enron or the defendants that suggested a potential predisposition to convict. In many instances, they did not mince words, describing Skilling as "smug," "arrogant," "brash," "conceited," "greedy," "deceitful," "totally unethical and criminal," "a **[****137]** crook," "the biggest liar on the face of the earth," and **[**2945]** "guilty as sin" (capitalization omitted).[4] Only about 5 **[***675]** percent of the prospective jurors (15 of 283) did not read the Houston Chronicle, had not otherwise "heard or read about any of the Enron cases," Record 13019, were not connected to Enron victims, and gave no answers suggesting possible antipathy toward the defendants.[5] The parties jointly stipulated to the dismissal **[*433]** of 119 members of the jury pool for cause, hardship, or disability, but numerous individuals who had made harsh comments about Skilling remained.[6]

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[3] Reporting on the change-of-venue motion, the Chronicle described Skilling as a "desperate **[****136]** defendant," and the Austin American-Statesman opined that while a change of venue may make sense "[f]rom a legal perspective," "from the standpoint of pure justice, the wealthy executives really should be judged right where their economic hurricane struck with the most force." *Id*., at 748a, 747a.

[4] See, *e.g.*, Juror 1 ("Ken Lay and the others are guilty as all get out and ought to go to jail"; Skilling is "[b]rash, [a]rrogant [and] [c]onceited"; "I find it morally awful that these people are still running loose"); Juror 70 ("Mr. Skilling is the biggest liar on the face of the earth"); Juror 163 (Skilling "would lie to his mother if it would further his cause"); Juror 185 ("I think [Skilling] was arrogant and a crook"); Juror 200 (Skilling is a "[s]killful [l]iar [and] crook" who did "a lot of the dirty work"; the defendants would "have to be blind, deaf, [and] stupid to be unaware of what was happening" **[****138]** (emphasis deleted)); Juror 206 (Skilling is "[t]otally unethical and criminal"; the defendants "are all guilty and should be reduced to having to beg on the corner [and] live under a bridge"); Juror 238 ("They are all guilty as sin--come on now"); Juror 299 (Skilling "initiated, designed, [and] authorized certain illegal actions"); Juror 314 (Lay "should 'fess up' and take his punishment like a man"; "[t]he same goes for Jeffrey Skilling. . . . He and his family . . . should be stripped of *all* of their assets [and] made to start over just like the thousands he made start all over"); Juror 377 (Skilling is "[s]mug," "[g]reedy," and "[d]isingenu[ous]"; he "had an active hand in creating and sustaining a fraud"). Defendants' Renewed Motion for Change of Venue, Record, Doc. 618 (Sealed Exhs.) (hereinafter Skilling's Renewed Venue Motion); see also App. 794a-797a (summarizing additional responses).

[5] Another 20 percent (about 59 of 283) indicated that they read the Chronicle or had otherwise heard about the Enron cases but did not report that they were victims or make comments suggesting possible bias against the defendants.

[6] See, *e.g.*, Juror 29 (Skilling is "[n]ot an honest man"); Juror **[****139]** 104 (Skilling "knows more than he's admitting"); Juror 211 ("I believe he was involved in wrong doings"); Juror 219 ("So many people lost their life savings because of the dishonesty of some members of the executive team"; Skilling was "[t]oo aggressive w[ith] accounting"); Juror 234 ("With his level of control and power, hard to believe that he was unaware and not responsible in some way"); Juror 240 (Skilling "[s]eems to be very much involved in criminal goings on"); Juror 255 ("[T]housands of people were taken advantage of by executives at Enron"; Skilling is "arrogant"; "Skilling was Andrew Fastow's immediate superior. Fastow has plead[ed] guilty to felony charges. I believe Skilling was aware of Fastow's illegal behavior"); Juror 263 ("Nice try resigning 6 months before the collaps[e], but again, he had to know what was going on"); Juror 272 (Skilling "[k]new he was getting out before the [d]am [b]roke"); Juror 292 (Skilling "[b]ailed out when he knew Enron was going down"); Juror 315 ("[H]ow could they not know and they seem to be lying about some things"); Juror 328 ("They should be held responsible as officers of this company for what happened"); Juror 350 ("I believe he greatly **[****140]** misused his power and affected hundreds of lives as a result"; "I believe they are all guilty. Their 'doings' affected not only those employed by Enron but many others as well"); Juror 360 ("I seem to remember him trying to claim to have mental or emotional issues that would remove him from any guilt. I think that is deceitful. It seems as though he is a big player in the downfall"); Juror 378 ("I believe

On December 28, 2005, shortly after the questionnaires had been returned, Causey pleaded guilty. The plea was covered in lead newspaper and television stories. A front-page headline in the Chronicle proclaimed that "Causey's plea wreaks havoc **[**2946]** for Lay, Skilling." Record 12049, n. 13; see also *ibid*. (quoting a former U. S. attorney who described the plea as "a serious blow to the defense"). A Chronicle editorial opined that "Causey's admission of securities fraud . . . makes less plausible Lay's claim that most of the guilty **[****141] [*434]** pleas were the result of prosecutorial pressure rather than actual wrongdoing." *Id.*, at 12391.

With the trial date quickly approaching, Skilling renewed his change-of-venue motion, arguing that **[***676]** both the questionnaire responses and the Causey guilty plea confirmed that he could not receive a fair trial in Houston. In the alternative, Skilling asserted that "defendants are entitled to a more thorough jury selection process than currently envisioned by the [c]ourt." *Id.*, at 12067. The court had announced its intention to question individual jurors at the bench with one attorney for each side present, and to complete the *voir dire* in a single day. See, *e.g.*, *id*., at 11804-11805, 11808. Skilling proposed, *inter alia*, that defense counsel be afforded a greater role in questioning, *id*., at 12074; that jurors be questioned privately *in camera* or in a closed courtroom where it would be easier for counsel to consult with their colleagues, clients, and jury consultants, *id*., at 12070-12072; and that the court "avoid leading questions," which "tend to [e]licit affirmative responses from prospective jurors that may not reflect their actual views," *id*., at 12072. At a minimum, Skilling asserted, **[****142]** the court should grant a continuance of at least 30 days and send a revised questionnaire to a new group of prospective jurors. *Id*., at 12074-12075.

The District Court denied Skilling's motion without a hearing, stating in a brief order that it was "not persuaded that the evidence or arguments urged by defendants . . . establish that pretrial publicity and/or community prejudice raise a presumption of inherent jury prejudice." *Id*., at 14115. According to the court, the "jury questionnaires sent to the remaining members of the jury panel and the court's voir dire examination of the jury panel provide adequate safeguards to defendants and will result in the selection of a fair and impartial jury in this case." *Id*., at 14115-14116. The court did agree to delay the trial by two weeks, until January 30, 2006.

[*435] The coming trial featured prominently in local news outlets. A front-page, eve-of-trial story in the Chronicle described "the hurt and anger and resentment" that had been "churn[ing] inside" Houstonians since Enron's collapse. *Id.*, at 39946. Again criticizing Lay and Skilling for offering a "doofus defense" ("a plea of not guilty by reason of empty-headedness"), the paper stated that **[****143]** "Lay and Skilling took hundreds of millions in compensation yet now fail to accept the responsibility that went with it." *Ibid*. The article allowed that the defendants' guilt, "though perhaps widely assumed, remains even now an assertion. A jury now takes up the task of deciding whether that assertion is valid." *Id*., at 39947. The next paragraph, however, assured readers that "it's normal for your skin to crawl when Lay or Skilling claim with doe-eyed innocence that they were unaware that something was amiss at Enron. The company's utter failure belies the claim." *Ibid*. (one paragraph break omitted); see also *id*., at 39904 (declaring that Lay and Skilling would "have to offer a convincing explanation for how executives once touted as corporate geniuses could be so much in the dark about the illegal activities and deceptive finances of their own company").

It is against this backdrop of widespread community impact and pervasive pretrial publicity that jury selection in Skilling's case unfolded. Approximately 160 prospective jurors appeared for *voir dire* at a **[**2947]** federal courthouse located "about six blocks from Enron's former headquarters." *554 F.3d at, 561*. Addressing them as a group, the **[****144]** District Court began by briefly describing the case and providing **[***677]** a standard admonition about the need to be fair and impartial and to decide the case based solely on the trial evidence and jury instructions. The court then asked whether anyone had "any reservations about your ability to conscientiously and fairly follow these very important rules." App. 815a. Two individuals raised their hands and were called forward **[*436]** to the bench. One told the court that he thought Lay and Skilling "knew exactly what they were doing" and would have to prove their innocence. *Id*., at 818a-819a. The second juror, who had stated on his written questionnaire that he held no opinion that would preclude him from being impartial, declared that he "would dearly love to sit on this jury. I would love to claim responsibility, at least 1/12 of the responsibility, for

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he knew, and certainly should have known as the CEO, that illegal and improper [activities] were rampant in Enron"; "I believe all of them were instrumental, and were co-conspirators, in the massive fraud perpetrated at Enron"). Skilling's Renewed Venue Motion.

putting these sons of bitches away for the rest of their lives." *Id*., at 819a-820a. The court excused both jurors for cause.

The court proceeded to question individual jurors from the bench. As the majority recounts, *ante, at 373-374, 177 L. Ed. 2d, at 638-639*, the court asked them a few general yes/no questions about their exposure to Enron-related news, often variations of, "Do **[****145]** you recall any particular articles that stand out that you've read about the case?" App. 850a. The court also asked about questionnaire answers that suggested bias, focusing mainly on whether, notwithstanding seemingly partial comments, the prospective jurors believed they "could be fair" and "put the government to its proof." *Id*., at 852a. Counsel were permitted to follow up on issues raised by the court. The court made clear, however, that its patience would be limited, see, *e.g.*, *id.*, at 879a, and questioning tended to be brief--generally less than five minutes per person. Even so, it exposed disqualifying biases among several prospective jurors who had earlier expressed no concerns about their ability to be fair.[7]

[*437] Once it identified 38 qualified prospective jurors, the court allowed the defense and Government to exercise their allotted peremptory challenges. This left 12 jurors and 4 alternates, who were sworn in and instructed, for the first time, "not [to] read anything dealing with this case or listen to any discussion of the case on radio or television or access any Internet sites that may deal with the case" and to "inform your friends and family members that they should not discuss with you anything they may have read or heard about this case." *Id*., at 1026a. Start to finish, the selection process took about five hours.

Skilling's trial commenced the next day and lasted four months. After several days of deliberations, the jury found Skilling guilty of conspiracy, 12 counts of securities fraud, 5 counts of making false representations to auditors, and 1 count of insider trading; it acquitted on 9 insider trading counts. The jury found Lay guilty on all counts.

On appeal, Skilling asserted that he had been **[****147]** denied his constitutional right to a **[**2948]** fair trial before an impartial jury. Addressing this claim, the Court **[***678]** of Appeals began by disavowing the District Court's findings concerning "community hostility." There was, the court concluded, "sufficient inflammatory pretrial material to require a finding of presumed prejudice, especially in light of the immense volume of coverage." *554 F.3d at, 559*. "[P]rejudice was [also] inherent in an alleged co-conspirator's well-publicized decision to plead guilty on the eve of trial." *Ibid*. The Court of Appeals, moreover, faulted the District Court for failing to "consider the wider context." *Id., at 560*. "[I]t was not enough for the court merely to assess the tone of the news reporting. The evaluation of the volume and nature of reporting is merely a proxy for the real inquiry: whether there could be a fair trial by an impartial jury that was not influenced by outside, irrelevant sources." *Ibid*. (internal quotation marks and footnote omitted). According to the Court of Appeals, "[t]he district court seemed to overlook that the **[*438]** prejudice came from more than just pretrial media publicity, but also from the sheer number of victims." *Ibid*.

Having determined that "Skilling **[****148]** was entitled to a presumption of prejudice," the Court of Appeals proceeded to explain that "the presumption is rebuttable, . . . and the government may demonstrate from the *voir dire* that an impartial jury was actually impanelled." *Id., at 561* (internal quotation marks omitted). Describing the *voir dire* as "exemplary," "searching," and "proper and thorough," *id., at 562*, the court concluded that "[t]he government [had] met its burden of showing that the actual jury that convicted Skilling was impartial," *id., at 564-565*. On this basis, the Court of Appeals rejected Skilling's claim and affirmed his convictions.

II

The *Sixth Amendment* right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court." *Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)*; see also *Sheppard*

[7] See App. 894a (Juror 43) (expressed the view that the defendants "stole money" from their employees); *id.*, at 922a (Juror 55) (admitted that she "lean[ed] towards prejudging" the defendants); *id.*, at 946a (Juror 71) (stated that she would place the burden of proof on the defendants); *id.*, at 954a-960a (Juror 75) (indicated that she could not set aside her view that there was fraud at Enron); *id.*, at 1003a-1006a (Juror 104) (stated that she questioned the defendants' **[****146]** innocence and that she "would be very upset with the government if they could not prove their case"); *id.*, at 1008a (Juror 112) (expressed that the view that the defendants were guilty).

v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Community passions, often inflamed by adverse pretrial publicity, can call the integrity of a trial into doubt. In some instances, this Court has observed, the hostility of the community **[****149]** becomes so severe as to give rise to a "presumption of [juror] prejudice." Patton v. Yount, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

The Court of Appeals incorporated the concept of presumptive prejudice into a burden-shifting framework: Once the defendant musters sufficient evidence of community hostility, the onus shifts to the Government to prove the impartiality of the jury. The majority similarly envisions a fixed point at which public passions become so intense that prejudice to a defendant's fair-trial rights must be presumed. The majority declines, however, to decide whether the presumption is rebuttable, as the Court of Appeals held.

[*439] This Court has never treated the notion of presumptive prejudice so formalistically. Our decisions instead merely convey the commonsense understanding that as the tide of public enmity rises, so too does the danger that the prejudices of the community will infiltrate the jury. The underlying **[***679]** question has always been this: Do we have confidence that the jury's verdict was "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"? **[**2949]** Patterson v. Colorado ex rel. Attorney General of Colo., 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907).

The **[****150]** inquiry is necessarily case specific. In selecting a jury, a trial court must take measures adapted to the intensity, pervasiveness, and character of the pretrial publicity and community animus. Reviewing courts, meanwhile, must assess whether the trial court's procedures sufficed under the circumstances to keep the jury free from disqualifying bias. Cf. Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975) (scrutinizing the record for "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair"). This Court's precedents illustrate the sort of steps required in different situations to safeguard a defendant's constitutional right to a fair trial before an impartial jury.

At one end of the spectrum, this Court has, on rare occasion, confronted such inherently prejudicial circumstances that it has reversed a defendant's conviction "without pausing to examine . . . the *voir dire* examination of the members of the jury." Rideau v. Louisiana, 373 U.S. 723, 727, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963). In *Rideau*, repeated television broadcasts of the defendant's confession to murder, robbery, and kidnaping so thoroughly poisoned local sentiment as to raise doubts that even the most careful *voir* ***[****151]*** *dire* could have secured an impartial jury. A change of venue, the Court determined, was thus the only way to ensure a fair trial. *Ibid.;* see also 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 23.2(a), p. 264 (3d ed. 2007) (hereinafter LaFave) ("The best reading **[*440]** of *Rideau* is that the Court there recognized that prejudicial publicity may be so inflammatory and so pervasive that the voir dire simply cannot be trusted to fully reveal the likely prejudice among prospective jurors").

As the majority describes, ante, at 379-380, 177 L. Ed. 2d, at 642, this Court reached similar conclusions in Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), and Sheppard, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600. These cases involved not only massive pretrial publicity but also media disruption of the trial process itself. Rejecting the argument that the defendants were not entitled to relief from their convictions because they "ha[d] established no isolatable prejudice," the Court described the "untoward circumstances" as "inherently suspect." Estes, 381 U.S., at 542, 544, 85 S. Ct. 1628, 14 L. Ed. 2d 543. It would have been difficult for the jurors not to have been swayed, at least subconsciously, by the "bedlam" that surrounded them. Sheppard, 384 U.S., at 355, 86 S. Ct. 1507, 16 L. Ed. 2d 600. Criticizing the trial courts' **[****152]** failures "to protect the jury from outside influence," id., at 358, 86 S. Ct. 1507, 16 L. Ed. 2d 600, the Court stressed that, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another [venue] not so permeated with publicity." Id., at 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600. *Estes* and *Sheppard* thus applied *Rideau*'s insight that in particularly extreme circumstances even the most rigorous **[***680]** *voir dire* cannot suffice to dispel the reasonable likelihood of jury bias.

Apart from these exceptional cases, this Court has declined to discount *voir dire* entirely and has instead examined the particulars of the jury selection process to determine whether it sufficed to produce a jury untainted by pretrial publicity and community animus. The Court has recognized that when antipathy toward a defendant pervades the community there is a high risk that biased

jurors will find their way onto the panel. The danger is not merely that some prospective jurors will deliberately hide their prejudices, but also that, as "part of a community deeply hostile **[**2950]** to the accused," "they may unwittingly [be] influenced" **[*441]** by the fervor that surrounds them. *Murphy, 421 U.S., at 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589*. **[****153]** To ensure an impartial jury in such adverse circumstances, a trial court must carefully consider the knowledge and attitudes of prospective jurors and then closely scrutinize the reliability of their assurances of fairness. Cf. *Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)* ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors").

Irvin offers an example of a case in which the trial court's *voir dire* did not suffice to counter the "wave of public passion" that had swept the community prior to the defendant's trial. *366 U.S., at 728, 81 S. Ct. 1639, 6 L. Ed. 2d. 751*. The local news media had "extensively covered" the crimes (a murder spree), "arous[ing] great excitement and indignation." *Id., at 719, 81 S. Ct. 1639, 6 L. Ed. 2d 751* (internal quotation marks omitted). Following Irvin's arrest, the press "blanketed" the community with "a barrage of newspaper headlines, articles, cartoons and pictures" communicating numerous unfavorable details about Irvin, including that he had purportedly confessed. *Id., at 725, 81 S. Ct. 1639, 6 L. Ed. 2d. 751*. Nearly 90 percent of the 430 prospective jurors examined during the trial court's *voir dire* "entertained some opinion as to guilt--ranging in intensity from mere suspicion **[****154]** to absolute certainty." *Id., at 727, 81 S. Ct. 1639, 6 L. Ed. 2d. 751*. Of the 12 jurors seated, 8 "thought petitioner was guilty," although "each indicated that notwithstanding his opinion he could render an impartial verdict." *Id., at 727, 724, 81 S. Ct. 1639, 6 L. Ed. 2d. 751*.

Despite the seated jurors' assurances of impartiality, this Court invalidated Irvin's conviction for want of due process. "It is not required," this Court declared, "that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id., at 722-723, 81 S. Ct. 1639, 6 L. Ed. 2d. 751*. The Court emphasized, however, that a juror's word on this matter is not decisive, particularly when "the build-up of prejudice [in the community] is clear **[*442]** and convincing." *Id., at 725, 81 S. Ct. 1639, 6 L. Ed. 2d 751*. Many of Irvin's jurors, the Court noted, had been influenced by "the pattern of deep and bitter prejudice shown to be present throughout the community." *Id., at 727, 81 S. Ct. 1639, 6 L. Ed. 2d. 751* (internal quotation marks omitted). The Court did not "doubt [that] each juror was sincere when he said that he would be fair and impartial to [Irvin], but . . . [w]here so many, so many times, admitted **[***681]** prejudice, such a statement of impartiality **[****155]** can be given little weight." *Id., at 728, 81 S. Ct. 1639, 6 L. Ed. 2d. 751*.

The media coverage and community animosity in *Irvin* were particularly intense. In three subsequent cases, this Court recognized that high-profile cases may generate substantial publicity without stirring similar public passions. The jury selection process in such cases, the Court clarified, generally need not be as exhaustive as in a case such as *Irvin*. So long as the trial court conducts a reasonable inquiry into extrajudicial influences and the ability of prospective jurors to presume innocence and render a verdict based solely on the trial evidence, we would generally have no reason to doubt the jury's impartiality.[8]

[2951]** The first of these cases, *Murphy, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589*, involved a well-known defendant put on trial for a widely publicized Miami Beach **[****156]** robbery. The state trial court denied his motion for a change of venue and during *voir dire* excused 20 of the 78 prospective jurors for cause. Distinguishing *Irvin*, this Court saw no indication in the *voir dire* of "such hostility to [Murphy] by the jurors who served in his trial as to suggest a partiality that could not be laid aside." *421 U.S., at 800, 95 S. Ct. 2031, 44 L. Ed. 2d 589*. Although some jurors "had a vague recollection of the robbery with which [Murphy] was charged and each had **[*443]** some knowledge of [his] past crimes," "none betrayed any belief in the relevance of [Murphy's] past to the present case." *Ibid.;* see also *ibid.*, n. 4 (contrasting a juror's "mere familiarity with [a defendant] or his past" with "an actual predisposition against him"). "[T]hese indicia of impartiality," the Court suggested, "might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory, but the circumstances

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[8] Of course, even if the jury selection process is adequate, a trial court violates a defendant's right to an impartial jury if it erroneously denies a for-cause challenge to a biased venire member who ultimately sits on the jury. See, *e.g.*, *United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)* ("[T]he seating of any juror who should have been dismissed for cause . . . would require reversal").

surrounding [Murphy's] trial [were] not at all of that variety." *Id., at 802, 95 S. Ct. 2031, 44 L. Ed. 2d 589*.

In a second case, *Yount, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847*, the defendant was granted a new trial four years after being convicted of murder. He requested a change of venue, citing pretrial publicity and the widespread **[****157]** local knowledge that he had previously been convicted and had made confessions that would be inadmissible in court. The state trial court denied Yount's motion and seated a jury following a 10-day *voir dire* of 292 prospective jurors. Nearly all of the prospective jurors had heard of the case, and 77 percent "admitted they would carry an opinion into the jury box." *Id., at 1029, 104 S. Ct. 2885, 81 L. Ed. 2d 847*. Declining to grant relief on federal habeas review, this Court stressed the significant interval between Yount's first trial--when "adverse publicity and the community's sense of outrage were at their height"--and his second trial, which "did not occur until four years later, at a time when prejudicial publicity was greatly diminished and community sentiment had softened." *Id., at 1032, 104 S. Ct. 2885, 81 L. Ed. 2d 847*. While 8 of the 14 seated jurors and **[***682]** alternates had "at some time . . . formed an opinion as to Yount's guilt," the "particularly extensive" *voir dire* confirmed that "time had weakened or eliminated any" bias they once may have harbored. *Id., at 1029-1030, 1034, n. 10, 1033, 104 S. Ct. 2885, 81 L. Ed. 2d 847*. Accordingly, this Court concluded, "the trial court did not commit manifest error in finding that the jury as a whole was impartial." *Id., at 1032, 104 S. Ct. 2885, 81 L. Ed. 2d 847*.

This **[****158]** Court most recently wrestled with the issue of pretrial publicity in *Mu'Min v. Virginia, 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)*. **[*444]** Mu'Min stood accused of murdering a woman while out of prison on a work detail. Citing 47 newspaper articles about the crime, Mu'Min moved for a change of venue. The state trial court deferred its ruling and attempted to seat a jury. During group questioning, 16 of the 26 prospective jurors indicated that they had heard about the case from media or other sources. Dividing these prospective jurors into panels of four, the court asked further general questions about their ability to be fair given what they had heard or read. One juror answered equivocally and was dismissed for cause. The court refused Mu'Min's request to ask more specific questions "relating to the content of news items that potential jurors might have read or seen." *Id., at 419, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. Of the 12 persons who served on the jury, "8 had at one time or another read or heard something about the case. None had indicated that he had formed an opinion about the **[**2952]** case or would be biased in any way." *Id., at 421, 111 S. Ct. 1899, 114 L. Ed. 2d 493*.

Rejecting Mu'Min's attempt to analogize his case to *Irvin*, this Court observed that "the cases differ both in the kind **[****159]** of community in which the coverage took place and in extent of media coverage." *500 U.S., at 429, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. Mu'Min's offense occurred in the metropolitan Washington, D. C., area, "which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year." *Ibid*. While the crime garnered "substantial" pretrial publicity, the coverage was not as pervasive as in *Irvin* and "did not contain the same sort of damaging information." *500 U.S., at 429-430, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. Moreover, in contrast to *Irvin*, the seated jurors uniformly disclaimed having ever formed an opinion about the case. Given these circumstances, this Court rebuffed Mu'Min's assertion that the trial court committed constitutional error by declining to "make precise inquiries about the contents of any news reports that potential jurors have read." *500 U.S., at 424, 111 S. Ct. 1899, 114 L. Ed. 2d 493*. The Court stressed, however, that its ruling was context specific: "Had the trial court in this case been confronted with the 'wave of public passion' **[*445]** 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 **[****160]** than it undertook here." *Id., at 429, 111 S. Ct. 1899, 114 L. Ed. 2d 493*.

III

It is necessary to determine how this case compares to our existing fair-trial precedents. Were the circumstances so inherently prejudicial that, as in *Rideau*, even the most scrupulous *voir dire* would have been "but a hollow formality" incapable of reliably **[***683]** producing an impartial jury? *373 U.S., at 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663*. If the circumstances were not of this character, did the District Court conduct a jury selection process sufficiently adapted to the level of pretrial publicity and community animus to ensure the seating of jurors capable of presuming innocence and shutting out extrajudicial influences?

A

Though the question is close, I agree with the Court that the prospect of seating an unbiased jury in Houston was not so remote as to compel the conclusion that the District Court acted unconstitutionally in denying Skilling's motion to change venue. Three considerations lead me to this conclusion. First, as the Court observes, *ante, at 382, 177 L. Ed. 2d, at 643*, the size and diversity of the Houston community make it probable that the jury pool contained a nontrivial number of persons who were unaffected by Enron's collapse, neutral in their outlook, and unlikely to be swept up in the **[****161]** public furor. Second, media coverage of the case, while ubiquitous and often inflammatory, did not, as the Court points out, *ante, at 382-383, 177 L. Ed. 2d, at 644*, contain a confession by Skilling or similar "smoking-gun" evidence of specific criminal acts. For many prospective jurors, the guilty plea of codefendant and alleged co-conspirator Causey, along with the pleas and convictions of other Enron executives, no doubt suggested guilt by association. But reasonable minds exposed to such information **[*446]** would not necessarily have formed an indelible impression that Skilling himself was guilty as charged. Cf. *Rideau, 373 U.S., at 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663* (a majority of the county's residents were "exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged"). Third, there is no suggestion that the courtroom in this case became, as in *Estes* and *Sheppard*, a "carnival" in which the "calmness and solemnity" **[**2953]** of the proceedings were compromised. *Sheppard, 384 U.S., at 358, 350, 86 S. Ct. 1507, 16 L. Ed. 2d 600* (internal quotation marks omitted). It is thus appropriate to examine the *voir dire* and determine whether it instills confidence in the impartiality of the jury actually selected.[9]

[*684]** B

In concluding that the *voir dire* "adequately detect[ed] and defuse[d] juror bias," *ante, at 385, 177 L. Ed. 2d, at 646*, the Court downplays the **[*447]** extent of the community's antipathy toward Skilling and exaggerates the rigor of the jury selection process. The devastating impact of Enron's collapse and the relentless media coverage demanded exceptional care on the part of the District Court to ensure the seating of an impartial jury. While the procedures employed by the District Court might have been adequate in the typical high-profile case, they did not suffice in the extraordinary circumstances of this case to safeguard Skilling's constitutional right to a fair trial before an impartial jury.

In conducting this analysis, I am mindful of the "wide discretion" owed to trial courts when it comes to jury-related **[****164]** issues. *Mu'Min, 500 U.S., at 427, 111 S. Ct. 1899, 114 L. Ed. 2d 493*; cf. *ante, at 386-387, 177 L. Ed. 2d, at 646-647*. Trial courts are uniquely positioned to assess public sentiment and the credibility of prospective jurors. Proximity to events, however, is not always a virtue. Persons in the midst of a tumult often lack a panoramic view. "[A]ppellate tribunals [thus] have the duty to make an independent evaluation of the circumstances." *Sheppard, 384 U.S., at 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600*. In particular, reviewing courts are well qualified to inquire into whether a trial court implemented procedures adequate to keep community prejudices from infecting the jury. If the jury selection process does not befit the circumstances of the case, the trial court's rulings on impartiality are necessarily called into doubt. See *Morgan, 504 U.S., at 729-730, 112 S. Ct. 2222, 119 L. Ed. 2d 492* (" 'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled' " (quoting *Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S. Ct.*

[9] Whether **[****162]** the District Court abused its discretion in declining to change venue pursuant to the Federal Rules of Criminal Procedure is a different question. See *Fed. Rule Crim. Proc. 21(a)* ("Upon 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"). As this Court has indicated, its supervisory powers confer "more latitude" to set standards for the conduct of trials in federal courts than in state courts. *Mu'Min v. Virginia, 500 U.S. 415, 424, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)*. While the circumstances may not constitutionally compel a change of venue "without pausing to examine . . . the *voir dire*," *Rideau v. Louisiana, 373 U.S. 723, 727, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)*, the widely felt sense of victimhood among Houstonians and the community's deep-seated animus toward Skilling certainly meant that the task of reliably identifying untainted jurors posed a major challenge, with no guarantee of success. It likely would have been far easier to empanel an impartial jury in a venue where the Enron story had less salience. I **[****163]** thus agree with the Court of Appeals that "[i]t would not have been imprudent for the [District] [C]ourt to have granted Skilling's transfer motion." *554 F.3d 529, 558 (CA5 2009)*. Skilling, however, likely forfeited any Rule 21 or supervisory powers claim by failing to present it either in his opening brief before the Fifth Circuit, see *id., at 559, n. 39*, or in his petition for certiorari, cf. *ante, at 378, n. 11, 177 L. Ed. 2d, at 641*.

1629, 68 L. Ed. 2d 22 (1981) (plurality opinion))); see also Mu'Min, 500 U.S., at 451, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (Kennedy, J., dissenting) ("Our willingness to accord **[**2954]** substantial deference to a trial court's finding **[****165]** of juror impartiality rests on our expectation that the trial court will conduct a sufficient *voir dire* to determine the credibility of a juror professing to be impartial").

[*448] 1

As the Court of Appeals apprehended, the District Court gave short shrift to the mountainous evidence of public hostility. For Houstonians, Enron's collapse was an event of once-in-a-generation proportions. Not only was the volume of media coverage "immense" and frequently intemperate, but "the sheer number of victims" created a climate in which animosity toward Skilling ran deep and the desire for conviction was widely shared. 554 F.3d at, 559-560.

The level of public animus toward Skilling dwarfed that present in cases such as *Murphy* and *Mu'Min*. The pretrial publicity in those cases consisted of dozens of news reports, most of which were "largely factual in nature." Murphy, 421 U.S., at 802, 95 S. Ct. 2031, 44 L. Ed. 2d 589. There was no indication that the relevant communities had been captivated by the cases or had adopted fixed views about the defendants. In contrast, the number of media reports in this case reached the tens of thousands, and **[***685]** full-throated denunciations of Skilling were common. The much closer analogy is thus to *Irvin*, which **[****166]** similarly featured a "barrage" of media coverage and a "huge . . . wave of public passion," 366 U.S., at 725, 728, 81 S. Ct. 1639, 6 L. Ed. 2d 751, although even that case did not, as here, involve direct harm to entire segments of the community.[10]

Attempting to distinguish *Irvin*, the majority suggests that Skilling's economic offenses were less incendiary than Irvin's violent crime spree and that "news stories about Enron contained nothing resembling the horrifying information rife in reports about Irvin's rampage of robberies and murders." Ante, at 394, 177 L. Ed. 2d, at 651. Along similar lines, the District Court described "the facts of this case [as] neither heinous nor sensational." App. to Brief for United States 10a. The majority also points to the four years that passed between **[*449]** Enron's declaration of bankruptcy and the start of Skilling's trial, asserting that "the decibel level of media attention diminished somewhat" over this time. Ante, at 383, 177 L. Ed. 2d, at 644. Neither of these arguments is persuasive.

First, while violent crimes may well provoke widespread community outrage more readily **[****167]** than crimes involving monetary loss, economic crimes are certainly capable of rousing public passions, particularly when thousands of unsuspecting people are robbed of their livelihoods and retirement savings. Indeed, the record in this case is replete with examples of visceral outrage toward Skilling and other Enron executives. See, *e.g.*, Record 39946 (front-page, eve-of-trial story describing "the hurt and anger and resentment . . . churn[ing] inside" the people of Houston). Houstonians compared Skilling to, among other things, a rapist, an axe murderer, and an al Qaeda terrorist.[11] As one commentator **[**2955]** observed, "[i]t's a sign of how shocked Houstonians are about Enron's ignominious demise that Sept. 11 can be invoked--and is frequently--to explain the shock of the company's collapse." 3 Supp. Record 544. The bad blood was so strong that Skilling and other top executives hired private security to protect themselves from persons inclined to take the law into their own hands. See, *e.g.*, App. 1154a ("After taking the temperature of Enron's victims, [a local lawyer] says the Enron executives are wise to take security precautions").

[*450] Second, the passage of time did little to soften community sentiment. Contrary to the Court's suggestion, ante, at 383, 177 L. Ed. 2d, at 644, this case in no way resembles *Yount*, where, by the time of the defendant's retrial, "prejudicial publicity [had] greatly diminished" and community animus had significantly

[10] One of Skilling's experts noted that, "[i]n cases involving 200 or more articles, trial judges granted a change of venue 59% of the time." App. ¶ 30, at 611a.

[11] See, *e.g.*, 554 F.3d at, 559, n. 42 ("I'm livid, **[****168]** absolutely livid . . . . I have lost my entire friggin' retirement to these people. They have raped all of us" (internal quotation marks omitted)); App. 382a ("Hurting that many elderly people so severely is, I feel, the equivalent of being an axe murderer. His actions were just as harmful as an axe murderer to the [community]" (alteration in original)); *id.*, at 1152a-1153a ("Not having the stuff of suicide bombers, Enron's executive pilots took full advantage of golden parachutes to bail out of their high-flying corporate jet after setting the craft on a course to financial oblivion. In a business time frame, Enron pancaked faster than the twin towers"); *id.*, at 1163a (noting that "Skilling's picture turned up alongside Osama bin Laden's on 'Wanted' posters inside the company headquarters").

waned. *467 **[***686]** U.S., at 1032, 104 S. Ct. 2885, 81 L. Ed. 2d 847*; see also *ibid*. (in the months preceding the defendant's retrial, newspaper reports **[****169]** about the case averaged "less than one article per month," and public interest was "minimal"). The Enron story was a continuing saga, and "publicity remained intense throughout." *554 F.3d at, 560*. Not only did Enron's downfall generate wall-to-wall news coverage, but so too did a succession of subsequent Enron-related events.[12] Of particular note is the highly publicized guilty plea of codefendant Causey just weeks before Skilling's trial. If anything, the time that elapsed between the bankruptcy and the trial made the task of seating an unbiased jury more difficult, not less. For many members **[*451]** of the jury pool, each highly publicized Enron-related guilty plea or conviction likely served to increase their certainty that Skilling too had engaged in--if not masterminded--criminal acts, particularly given that the media coverage reinforced this view. See *supra, at 433-434, 177 L. Ed. 2d, at 675*. The trial of Skilling and Lay was the culmination of all that had come before. See Record 40002 (noting that "prosecutors followed the classic pattern of working their way up through the ranks"). As the Chronicle put it in July 2005, shortly after the trial of several Enron Broadband Services executives ended without **[****170]** convictions: "The real trial, the true measure of justice in the Enron saga, begins in January. Let the small fry swim free if need be. We've got bigger fish in **[**2956]** need of frying." App. 1460a (paragraph breaks omitted); see also *ibid*. ("From the beginning, the Enron prosecution has had one true measure of success: Lay and Skilling in a cold steel cage").

Any doubt that the prevailing mindset in the Houston community remained overwhelmingly negative was dispelled by prospective jurors' responses to the written questionnaires. As previously indicated, *supra, at 431-433, 177 L. Ed. 2d, at 674-675*, more than one-third of the prospective jurors either knew victims of Enron's collapse or were victims themselves, and two-thirds gave responses suggesting an antidefendant bias. In many instances their contempt for Skilling was palpable. See nn. 4, 6, *supra*. Only a small fraction of the prospective jurors raised no red flags in their responses. And this was *before* **[****172]** Causey's guilty plea and the flurry of news reports that accompanied the approach of trial. One of Skilling's experts, a political **[***687]** scientist who had studied pretrial publicity "for over 35 years" and consulted in more than 200 high-profile cases (in which he had recommended against venue changes more often than not), "c[a]me to the conclusion that the extent and depth of bias shown in these questionnaires is the highest or at least one of the very highest I have ever encountered." App. ¶ ¶ 2, 7, at 783a, 785a (emphasis deleted).

[*452] 2

Given the extent of the antipathy evident both in the community at large and in the responses to the written questionnaire, it was critical for the District Court to take "strong measures" to ensure the selection of "an impartial jury free from outside influences." *Sheppard, 384 U.S., at 362, 86 S. Ct. 1507, 16 L. ed. 2d 600*. As this Court has recognized, "[i]n a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question." *Murphy, 421 U.S., at 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589*; see also *Groppi v. Wisconsin, 400 U.S. 505, 510, 91 S. Ct. 490, 27 L. Ed. 2d 571 (1971)* (" '[A]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated **[****173]** by the environing atmosphere' " (quoting *Frank v. Mangum, 237 U.S. 309, 349, 35 S. Ct. 582, 59 L. Ed. 969 (1915)* (Holmes, J., dissenting))). Perhaps because it had underestimated the public's antipathy toward Skilling, the District Court's 5-hour *voir dire* was manifestly insufficient to identify and remove biased

[12] Among the highlights: In 2002, Skilling testified before Congress, and other Enron executives invoked their *Fifth Amendment* rights; Enron auditor Arthur Andersen was indicted, tried, convicted, and sentenced on charges of obstruction of justice; the Enron Task Force charged Enron chief financial officer and Skilling-prot[ege] Andrew Fastow with fraud, money laundering, and other crimes; and at least two Enron employees pleaded guilty on fraud and tax charges. In 2003, the Enron Task Force indicted numerous Enron employees, including Ben Glisan, Jr. (the company's treasurer), Lea Fastow (wife of Andrew and an assistant treasurer), and more than half a dozen executives of Enron Broadband Services; several Enron employees entered guilty pleas and received prison sentences; and Enron filed its bankruptcy reorganization plan. In 2004, Andrew and Lea Fastow both **[****171]** pleaded guilty; Skilling and Causey were indicted in February; a superseding indictment adding Lay was filed in July; a number of additional Enron employees entered guilty pleas; and former Enron employees and Merrill Lynch bankers were defendants in a 6-week trial in Houston concerning an Enron deal involving the sale of Nigerian barges. In 2005, a 3-month trial was held in Houston for five executives of Enron Broadband Services; various pretrial proceedings occurred in the runup to the trial of Skilling, Lay, and Causey; and, three weeks before the scheduled trial date, Causey pleaded guilty to securities fraud.

jurors.[13]

[2957]** **[*453]** As an initial matter, important lines of inquiry were not pursued at all. The majority accepts, for instance, that "publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice." *Ante, at 385, 177 L. Ed. 2d, at 645*. Implying that the District Court undertook this inquiry, the majority states that "[o]nly two venire members recalled [Causey's] plea." *Ibid*. In fact, the court asked very few prospective jurors any questions directed to their knowledge of or feelings about that event.[14] Considering how much news the plea generated, many more than **[***688]** two venire members were **[****175]** likely aware of it. The lack of questioning, however, makes the prejudicial impact of the plea on those jurors impossible to assess.

The court also rarely asked prospective jurors to describe personal interactions they may have had about the case, or to consider whether they might have difficulty avoiding discussion of the case with family, friends, or colleagues during the course of the lengthy trial. The tidbits of information that trickled out on these subjects provided cause for concern. In response to general media-related questions, several prospective jurors volunteered **[****176]** that they had spoken with others about the case. Juror 74, for example, indicated that her husband was the "news person," that they had "talked about it," that she had also heard things "from work," and that what she heard was "all negative, of course." App. 948a. The court, however, did not seek elaboration **[*454]** about the substance of these interactions. Surely many prospective jurors had similar conversations, particularly once they learned upon receiving the written questionnaire that they might end up on Skilling's jury.

Prospective jurors' personal interactions, moreover, may well have left them with the sense that the community was counting on a conviction. Yet this too was a subject the District Court did not adequately explore. On the few occasions when prospective jurors were asked whether they would feel pressure from the public to convict, they acknowledged that it might be difficult to return home after delivering a not-guilty verdict. Juror 75, for instance, told the court, "I think a lot of people feel that they're guilty. And maybe they're expecting something to come out of this trial." *Id*., at 956a. It would be "tough," she recognized, "to vote not guilty and go back into **[****177]** the community." *Id*., at 957a; see also *id*., at 852a (Juror 10) (admitting "some hesitancy" about "telling people the government didn't prove its case").

With respect to potential nonmedia sources of bias, the District Court's exchange with Juror 101 is particularly troubling.[15] Although Juror 101 responded in the negative when asked whether she had "read anything in the newspaper that [stood] out in [her] mind," she volunteered that she "just heard that, between the two of them, [Skilling and Lay] had $43 million to contribute for their case and that there was an insurance policy that they could collect on, also." *Id*., at 998a. This information, **[**2958]** she explained, "was just something I overheard today--other jurors talking." *Ibid*. It seemed suspicious, she intimated, "to have an insurance policy ahead of time." *Id*., at 999a. The court

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[13] The majority points out that the jury selection processes in the three previous Enron trials that had been held in Houston were similarly brief. See *ante, at 388-389, 177 L. Ed. 2d, at 647*. The circumstances of those cases, however, were very different. In particular, the defendants had not been personally subjected to anything approaching the withering public criticism that had been directed at Skilling and Lay. As earlier noted, see, *e.g.*, *supra, at 451, 177 L. Ed. 2d, at 686*, it was the trial of Skilling and Lay that was widely seen as the climactic event of the Enron saga. Accordingly, my conclusion that the jury selection process in this unusual case did not suffice to select an impartial jury does not cast doubt on the adequacy of the processes used in the earlier Enron prosecutions. Moreover, in referencing the length of the voir dire in this case, I do not mean to suggest that length should be a principal measure of the adequacy of **[****174]** a jury selection process. Trial courts, including this one, should be commended for striving to be efficient, but they must always take care to ensure that their expeditiousness does not compromise a defendant's fair-trial right. I also express no view with respect to court-led versus attorney-led voir dire. *Federal Rule of Criminal Procedure 24(a)* gives district courts discretion to choose between these options, and I have no doubt that either is capable of producing an impartial jury even in high-profile cases so long as the trial court ensures that the scope of the voir dire is tailored to the circumstances.

[14] Juror 33 brought up the plea in response to the District Court's question about whether he "recall[ed] listening to any particular programs about the case." App. 888a. Juror 96, meanwhile, told the court that he read the "whole" Houston Chronicle every day, including "all the articles about Enron." *Id.*, at 992a. The court, however, did not ask any questions designed to elicit information about the Causey plea. Instead, Juror 96 remarked on the plea only after Skilling's counsel managed to squeeze in a followup as to whether he had "read about any guilty pleas in this case over the last month or two." *Id*., at 993a.

[15] Portions of the *voir dire* transcript erroneously refer to this prospective juror as "Juror 110." See, *e.g.*, *id*., at 996a.

advised her that "most corporations provide insurance for their officers and directors." *Ibid*. The court, however, did not investigate the matter further, even though it had earlier instructed prospective jurors not to talk to each other about the case. *Id*., **[*455]** at 843a. It is thus not apparent whether other prospective jurors also overheard the information **[****178]** and whether they too believed that it reflected unfavorably on the defendants **[***689]**; nor is it apparent what other outside information may have been shared among the venire members. At the very least, Juror 101's statements indicate that the court's questions were failing to bring to light the extent of jurors' exposure to potentially prejudicial facts and that some prospective jurors were having difficulty following the court's directives.

The topics that the District Court did cover were addressed in cursory fashion. Most prospective jurors were asked just a few yes/no questions about their general exposure to media coverage and a handful of additional questions concerning any responses to the written questionnaire that suggested bias. In many instances, their answers were unenlightening.[16] Yet the court rarely sought to draw them out with open-ended questions about their impressions of Enron or Skilling and showed limited patience for counsel's followup efforts. See, *e.g.*, *id*., at 879a, 966a.[17] When prospective **[*456]** jurors were more forthcoming, their responses tended **[****179]** to highlight the ubiquity and negative tone of the local news coverage, thus underscoring the need to press the more guarded members of the venire for further information.[18] Juror 17, for example, mentioned hearing a radio program that very morning in which a former Enron employee compared persons who did not think Skilling was guilty to Holocaust deniers. See *id*., at 863a ("[H]e said he thought that he would find them guilty automatically if he was on the jury because he said that it would be worse **[**2959]** than a German trying to say that they didn't kill the Jews").[19] Other jurors may well have encountered, and been influenced by, similarly incendiary rhetoric.

These deficiencies in the form and content of the *voir dire* questions contributed **[***690]** to a deeper problem: The District Court failed to make a sufficiently critical assessment of prospective jurors' assurances of impartiality. Although the Court insists otherwise, *ante, at 389, 177 L. Ed. 2d, at 650*, the *voir dire* transcript indicates that the District Court essentially took jurors at **[*457]** their word when they promised to be fair. Indeed, the court declined to dismiss for cause any prospective juror who ultimately gave a clear assurance of impartiality, no matter how much equivocation

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[16] The court's exchange with Juror 20 (who sat on the jury) is typical:

"Q. Do you remember reading any particular articles about this case or Mr. Lay or Mr. Skilling?

"A. Not until just recently this week, but nothing--

"Q. And there have been a lot of articles this week.

"A. Yeah. "Q. Do you recall any particular articles you've read in the last week or so?

"A. Not word for word, no. "Q. Did you read all the articles in the Sunday "Chronicle"?

"A. Some of them.

"Q. Which ones do you remember reading?

"A. The one about the trial, I think, **[****180]** and how the trial was going to work." Id., at 873a-874a.

[17] The majority's criticism of Skilling's counsel for failing to ask questions of many of the prospective jurors, cf. *ante, at 389, 177 L. Ed. 2d, at 648*, is thus misplaced. Given the District Court's express warning early in the *voir dire* that it would not allow counsel "to ask individual questions if [they] abuse[d]" that right, App. 879a, counsel can hardly be blamed for declining to test the court's boundaries at every turn. Moreover, the court's perfunctory exchanges with prospective jurors often gave counsel no clear avenue for further permissible inquiry.

[18] Although the District Court underestimated the extent of the community hostility, it was certainly aware of the ubiquity of the pretrial publicity, acknowledging that "all of us have been exposed to substantial media attention about this case." *Id*., at 841a. The court even made an offhand remark about one of the prior Enron prosecutions, "the Nigerian barge case," apparently expecting that the prospective jurors would understand the reference. *Id*., at 840a.

[19] Taking a more defendant-favorable line than most prospective jurors, Juror 17 stated that he "thought the guy [on the radio] was pretty **[****181]** narrow minded," that "everyone should be considered innocent totally until they get a chance to come [to] court," and that the Government might have been overzealous in some of its Enron-related prosecutions. *Id*., at 863a-864a. He added, however, that he "believe[d] there was probably some accounting fraud [at Enron]." *Id*., at 864a. The District Court denied the Government's request to remove Juror 17 for cause, but he did not ultimately sit on the jury.

preceded it. Juror 29, for instance, wrote on her questionnaire that Skilling was "not an honest man." App. 881a. During questioning, she acknowledged having previously thought the defendants **[****182]** were guilty, and she disclosed that she lost $50,000-$60,000 in her 401(k) as a result of Enron's collapse. *Id*., at 880a, 883a. But she ultimately agreed that she would be able to presume innocence. *Id*., at 881a, 884a. Noting that she "blame[d] Enron for the loss of her money" and appeared to have "unshakeable bias," Skilling's counsel challenged her for cause. *Id*., at 885a. The court, however, declined to remove her, stating that "she answered candidly she's going to have an open mind now" and "agree[ing]" with the Government's assertion that "we have to take her at her word." *Id*., at 885a-886a.[20] As this Court has made plain, jurors' assurances of impartiality simply are not entitled to this sort of talismanic significance. See, *e.g.*, *Murphy, 421 U.S., at 800, 95 S. Ct. 2031, 44 L. Ed. 2d 589* ("[T]he juror's assurances **[*458]** that he is equal to th[e] task cannot be dispositive of the accused's rights"); *Irvin, 366 U.S., at 728, 81 S. Ct. 1639, 6 L. Ed. 2d 751* ("Where so many, so many times, admi[t] prejudice, . . . a statement of impartiality can be given little weight").

Worse still, the District Court on a number of occasions accepted declarations of impartiality that were equivocal on their face. Prospective jurors who "hope[d]" they could presume innocence and did "not **[****184]** necessarily" think Skilling was guilty were permitted to remain in the pool. App. 932a, 857a. Juror 61, for instance, wrote **[**2960]** of Lay on her questionnaire, "Shame on him." *Id*., at 931a. Asked by the court about this, she stated that, "innocent or guilty, he was at the helm" and "should have known what was going on at the company." *Ibid.;* see also *id*., at 934a (Skilling is "probably" "in the same boat as" Lay). The court then asked, "[C]an you presume, as you start this trial, that Mr. Lay is innocent?" *Id*., at 932a. She responded, "I hope so, but you know. I don't know. I can't honestly answer that one way or the other." *Ibid.;* see **[***691]** also *id*., at 933a ("I bring in my past history. I bring in my biases. I would like to think I could rise above those, but I've never been in this situation before. So I don't know how I could honestly answer that question one way or the other. . . . I do have some concerns"). Eventually, however, Juror 61 answered "Yes" when the court asked if she would be able to acquit if she had "a reasonable doubt that the defendants are guilty." *Id*., at 933a-934a. Challenging her for cause, defense counsel insisted that they had not received "a **[****185]** clear and unequivocal answer" about her ability to be fair. *Ibid*. The court denied the challenge, stating, "You know, she tried." *Ibid*.

3

The majority takes solace in the fact that most of the persons actually seated as jurors and alternates "specifically stated that they had paid scant attention to Enron-related **[*459]** news." *Ante, at 390-391, 177 L. Ed. 2d, at 649, and n. 26*.[21] In context, however, these general declarations reveal little about the seated jurors' actual knowledge or views or the possible pressure they might have felt to convict, and thus cannot instill confidence that the jurors "were not under [the] sway" of the prevailing community sentiment. Cf. *ante, at 391, 177 L. Ed. 2d, at 649*. Jurors who did not "get into details" of Enron's complicated accounting schemes, App. 856a, nevertheless knew the outline of the oft-repeated story, including that Skilling and Lay had been cast as the leading villains. Juror 63, for instance, told the court that she "may have heard a little bit" about Enron-related litigation but had not "really pa[id] attention." *Id*., at 935a. Yet she was clearly aware of some specifics. On her questionnaire, despite stating

[20] The majority attempts to downplay the significance of Juror 29 by noting that she did not end up on the jury because Skilling used a peremptory challenge to remove her. See *ante, [****183] at 395, n. 31, 177 L. Ed. 2d, at 652*. The majority makes a similar point with respect to other venire members who were not ultimately seated. See *ante, at 389-390, n. 24, 177 L. Ed. 2d, at 648*. The comments of these venire members, however, are relevant in assessing the impartiality of the seated jurors, who were similarly "part of a community deeply hostile to the accused" and who may have been "unwittingly . . . influenced by it." *Murphy v. Florida, 421 U.S. 794, 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)*; see also *Irvin v. Dowd, 366 U.S. 717, 728, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)*. Moreover, the fact that the District Court failed to remove persons as dubiously qualified as Juror 29 goes directly to the adequacy of its *voir dire*. If Juror 29 made it through to the end of the selection process, it is difficult to have confidence in the impartiality of the jurors who sat, especially given how little is known about many of them. Cf. 6 LaFave § 23.2(f), at 288 ("The responses of those not seated casts light on the credibility of the seated jurors who were familiar with the same publicity").

[21] The majority also notes that about two-thirds of the seated jurors and alternates (11 of 16) had no personal Enron connection. *Ante, at 389-390, 177 L. Ed. 2d, at 649, and n. 25*. This means, of course, that five of the seated jurors and alternates did have connections to friends or colleagues who had lost jobs or money as a result of Enron's collapse--a fact that does not strike me as particularly reassuring.

that she had not followed Enron-related news, she wrote about "whistleblowers and **[****186]** Arthur Andersen lying about Enron's accounting," and she expressed the view that Skilling and Lay "probably knew they were breaking the law." Supp. App. 105sa-106sa. During questioning, which lasted barely four minutes, the District Court obtained no meaningful information about the actual extent of Juror 63's familiarity with the case or the basis for her belief in Skilling's guilt. Yet it nevertheless accepted her assurance that she could "absolutely" presume innocence. App. 937a.[22]

[2961]** **[*460]** Indeed, the District Court's anemic questioning did little to dispel similar doubts about the impartiality of numerous other seated jurors and alternates. In my estimation, more than half of those seated made written and oral comments suggesting active antipathy toward the defendants. The majority thus misses the mark when it asserts that "Skilling's seated jurors **[***692]** . . . exhibited nothing like the display of bias shown in *Irvin*." *Ante, at 394, 177 L. Ed. 2d, at 651*. Juror 10, for instance, reported on his written questionnaire that he knew several co-workers who owned Enron stock; that he personally may have owned Enron stock through a mutual fund; that he heard and read about the Enron cases from the "Houston Chronicle, all three Houston news channels, Fox news, talking with friends **[****188]** [and] co-workers, [and] Texas Lawyer Magazine"; that he believed Enron's collapse "was due to greed and mismanagement"; that "[i]f [Lay] did not know what was going on in his company, he was really a poor manager/leader"; and that the defendants were "suspect." Supp. App. 11sa-19sa. During questioning, he said he "th[ought]" he could presume innocence and "believe[d]" he could put the Government to its proof, but he also acknowledged that he might have "some hesitancy" "in telling people the government didn't prove its case." App. 851a-852a.

Juror 11 wrote that he "work[ed] with someone who worked at Enron"; that he got Enron-related news from the "Houston Chronicle, Channel 2 News, Channel 13 News, O'Reilly Factor, [and] talking with friends and co-workers"; that he regularly visited the Chronicle Web site; that "greed on Enron's part" caused the company's collapse; and that "[a] lot of people were hurt financially." Supp. App. 26sa-30sa. During questioning, he stated that he would have "no **[*461]** problem" requiring the Government to prove its case, but he also told the court that he believed Lay was "greedy" and that corporate executives are often "stretching the legal limits . . . . I'm not **[****189]** going to say that they're all crooks, but, you know." App. 857a, 854a. Asked whether he would "star[t] the case with sort of an inkling that because [Lay is] greedy he must have done something illegal," he offered an indeterminate "not necessarily." *Id*., at 857.[23]

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[22] As one of Skilling's jury experts observed, there is a "tendency in voir dire of jury pool members in high-profile cases to minimize their exposure to media, their knowledge of prejudicial information, and any biases they may have." App. ¶ 99, at 763a; see also *id*., ¶ 95, at 637a ("Those who perceive themselves or wish to be perceived **[****187]** as good citizens are reluctant to admit they cannot be fair"). For this reason, the fact that "none of the seated jurors and alternates checked the 'yes' box" on the written questionnaire when "asked whether they 'ha[d] an opinion about [Skilling],' " *ante, at 391, 177 L. Ed. 2d, at 649*, is of minimal significance, particularly given that the Causey plea and the impending trial received significant media coverage *after* the questionnaires were submitted.

[23] Many other seated jurors and alternates expressed similarly troubling sentiments. See, *e.g.*, Supp. App. 57sa-60sa (Juror 20) (obtained Enron-related news from the Chronicle and "local news stations"; blamed Enron's collapse on "[n]ot enough corporate controls or effective audit procedures to prevent mismanagement of corporate assets"; and was "angry that so many people lost their jobs and their retirement savings"); *id*., at 72sa-75sa (Juror 38) (followed Enron-related news from various sources, including the Chronicle; was "angry about what happened"; and "fe[lt] bad for those that worked hard and invested in the corp[oration] only to have it all taken away"); *id*., at 117sa-118sa (Juror 64) (had several friends who worked at Enron and lost money; heard about the Enron cases on the news; described the collapse as "sad" because "people lost jobs [and] money--lots of money"; and believed the Government "did the right thing" **[****190]** in its investigation); *id*., at 177sa-181sa (Juror 87) (received Enron-related news from the Chronicle, Channel 13 news, the O'Reilly Factor, Internet news sources, and friends, family, and co-workers; attributed Enron's collapse to "[p]oor management [and] bad judgment--greed"; lamented "[t]he sad state of the long-term loyal employees who are left with nothing in their retirement accounts"; and "admire[d] [the] bravery" of Enron whistleblower Sherron Watkins "for bringing the situation to the attention of the public, which stopped things from getting worse"); *id*., at 191sa-195sa (Juror 90) (heard Enron-related news from his wife, co-workers, and television; wrote that "[i]t's not right for someone . . . to take" away the money that the "small average worker saves . . . for retirement all his life"; and described the Government's Enron investigation as "a good thing"); *id*., at 221sa-225sa (Juror 113) (obtained information about Enron from a "co-worker [who] was in the jury pool for Mrs. Fastow's trial"; worked for an employer who lost money as a result of Enron's collapse; found it "sad" that the collapse had affected "such a huge number of people"; and thought

[2962] [*462]** While several seated jurors and alternates did not make specific comments **[***693]** suggesting prejudice, their written and oral responses were so abbreviated as to make it virtually impossible for the District Court reliably to assess whether they harbored any latent biases. Juror 13, for instance, wrote on his questionnaire that he had heard about the Enron cases from the "[n]ews." Supp. App. 42sa. The court questioned him for two minutes, during which time he confirmed that he had "heard what's on the news, basically," including "that the trial had moved from the 17th to the 31st." He added that the story "was all over the news on every detail of Enron." App. 858a-860a. No meaningful information about his knowledge or attitudes was obtained. Similarly, Juror 78 wrote that she had not followed Enron-related news but was aware that **[****192]** "[m]any people lost their jobs." Supp. App. 151sa. The court questioned her for less than 90 seconds. During that time, she acknowledged that she had "caught glimpses" of the coverage and "kn[e]w generally, you know, that the company went bankrupt" and that there "were some employees that went off and did their own businesses." App. 969a. Little more was learned.[24]

In assessing the likelihood that bias lurked in the minds of at least some of these seated **[****193]** jurors, I find telling the way in **[*463]** which *voir dire* played out. When the District Court asked the prospective jurors as a group whether they had any reservations about their ability to presume innocence and put the Government to its proof, only two answered in the affirmative, and both were excused for cause. *Id*., at 815a-820a. The District Court's individual questioning, though truncated, exposed disqualifying prejudices among numerous additional prospective jurors who had earlier expressed no concerns about their impartiality. See n. 7, *supra*. It thus strikes me as highly likely that at least some of the seated jurors, despite stating that they could be fair, harbored similar biases that a more probing inquiry would likely have exposed. Cf. *Yount, 467 U.S., at 1034, n. 10, 104 S. Ct. 2885, 81 L. Ed. 2d 847* (holding that the trial court's "particularly extensive" 10-day *voir dire* ensured the jury's impartiality).[25]

[2963]** The majority suggests, *ante, at 383-384, 395, 177 L. Ed. 2d, at 644-645, 651*, that the jury's decision to acquit Skilling on nine relatively **[***694]** minor insider trading charges confirms its impartiality. This argument, however, mistakes partiality with bad faith or blind vindictiveness. Jurors who act in good faith and sincerely believe in their own fairness may nevertheless harbor disqualifying prejudices. Such jurors may well acquit where evidence is wholly lacking, while subconsciously resolving closer calls against the defendant rather than giving him the benefit of the doubt. Cf. *United States v. McVeigh, 918 F. Supp. 1467, 1472 (WD Okla. 1996)* (Prejudice "may go unrecognized **[*464]** in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory **[****195]** attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses"). In this regard, it is significant that the Government placed relatively little emphasis on the nine insider trading counts during its closing argument, declining to explain its theory on those counts in any detail whatsoever. Record 37010.

"someone had to be **[****191]** doing something illegal"); *id*., at 236sa-237sa (Juror 116) (knew a colleague who lost money in Enron's collapse; obtained Enron-related news from the "Houston Chronicle, Time Magazine, local TV news [and] radio, friends, family, [and] co-workers, [and] internet news sources"; and noted that what stood out was "[t]he employees and retirees that lost their savings").

[24] Several other jurors fell into this category. Juror 67 wrote on his questionnaire that he had heard about Enron from the Chronicle and "Internet news sources." *Id*., at 133sa. He was questioned for 90 seconds, during which time he indicated that he had read an article on the Internet the preceding night "about the jury selection taking place today, stuff like that." App. 944a. Juror 99 wrote that she had not heard or read about the Enron cases and did not "know anything about" Enron. Supp. App. 210sa. The District Court questioned her for barely one minute. She stated that she had "[n]ot really" learned more about the case, but added that she had heard "this and that" from her parents. App. 995a-996a. The court did not press further.

[25] The majority suggests that the fact that Skilling "challenged only one of the seated jurors for cause" indicates that he did not believe the other jurors were biased. *Ante, at 396, 177 L. Ed. 2d, at 652*. Our decisions, however, distinguish claims involving "the partiality of an individual juror" from antecedent claims directed **[****194]** at "the partiality of the trial jury as a whole." *Patton v. Yount, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)*; see also *Frazier v. United States, 335 U.S. 497, 514, 69 S. Ct. 201, 93 L. Ed. 187 (1948)* ("[T]he two sorts of challenge[s] are distinct and are therefore to be dealt with separately"). If the jury selection process does not, as here, give a defendant a fair opportunity to identify biased jurors, the defendant can hardly be faulted for failing to make for-cause challenges.

The acquittals on those counts thus provide scant basis for inferring a lack of prejudice.

* * *

In sum, I cannot accept the majority's conclusion that *voir dire* gave the District Court "a sturdy foundation to assess fitness for jury service." Cf. *ante, at 395, 177 L. Ed. 2d, at 651*. Taken together, the District Court's failure to cover certain vital subjects, its superficial coverage of other topics, and its uncritical acceptance of assurances of impartiality leave me doubtful that Skilling's jury was indeed free from the deep-seated animosity that pervaded the community at large. "[R]egardless of the heinousness of the crime charged, the apparent guilt of the offender[,] or the station in **[****196]** life which he occupies," our system of justice demands trials that are fair in both appearance and fact. *Irvin, 366 U.S., at 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751*. Because I do not believe Skilling's trial met this standard, I would grant him relief.

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U.S.C.S., *Constitution, Amendments 5*, *6*; *18 U.S.C.S. § 1346*

6 Business Crime PP32.01, 32.03, 32.04 (Matthew Bender)

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L Ed Index, Mail Fraud; Pretrial Publicity; Wire Fraud

Validity, construction, and application of Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. § 1961 et seq.*)--Supreme Court cases. *139 L. Ed. 2d 945*.

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FEDERAL JURY CONVICTS FORMER ENRON CHIEF EXECUTIVES KEN LAY, JEFF SKILLING ON FRAUD, CONSPIRACY AND RELATED CHARGES

WASHINGTON, D.C. – A federal jury in Houston has convicted former Enron Chief Executive Officers Kenneth L. Lay and Jeffrey K. Skilling on charges including conspiracy, securities fraud, wire fraud, and making false statements, the Department of Justice announced today. The eight-woman, four-man jury returned its verdict today on its sixth day of deliberations, following 56 days of trial proceedings before U.S. District Judge Sim Lake.

Lay, 64, was convicted on all of the six counts with which he was charged: conspiracy, two counts of wire fraud and three counts of securities fraud. Lay was also convicted at a separate bench trial before Judge Lake of one count of bank fraud and three counts of making false statements to banks. The judge announced his verdict immediately after reading the jury verdict in the other case. Skilling, 52, was convicted on 19 of the 28 counts pending against him: conspiracy, 12 counts of securities fraud, one count of insider trading, and five counts of making false statements to auditors. Skilling was acquitted of nine insider trading counts.

Sentencing for both defendants is scheduled for Sept. 11, 2006, before Judge Lake at 1:30 p.m. CST. Potential maximum terms of imprisonment on the charges are as follows: five years on conspiracy, 10 years on each of the securities fraud charges, 10 years on each of the false statements to auditors charges, five years on the wire fraud charges, and 10 years on the insider trading charge. The defendants also face tens of millions of dollars in fines.

"The message of today's verdict is simple: our criminal laws will be enforced just as vigorously against corporate executives as they will be against street criminals," said Deputy Attorney General Paul J. McNulty, chairman of the President's Corporate Fraud Task Force. "No one – including the heads of Fortune 500 companies – is above the law."

"The jury has spoken. Enron's top executives perpetrated a series of lies designed to mislead analysts and the investing public," said Assistant Attorney General Alice S. Fisher of the Criminal Division. "People have the right to expect honesty and integrity in the marketplace. Today's verdict is the culmination of more than four years of hard work and dedication by the prosecutors and investigators, whose tireless efforts demonstrate the finest qualities of public service."

"Today's verdicts speak loudly about the right of investors and employees to be told the truth by their corporate leaders," said FBI Director Robert S. Mueller. "I want to commend the FBI Agents who worked on this case and on other Enron prosecutions for their unwavering commitment and dedication to get to the truth. The FBI and its partners will continue to aggressively pursue corporate fraud and other crimes – wherever we find it and at every level."

Today's convictions stem from a wide-ranging scheme that Lay, Skilling and other Enron executives engaged in at various times between at least 1999 and 2001, to deceive the investing public, the U.S. Securities and Exchange Commission and others about the true performance of Enron's businesses. The scheme was designed to make it appear that Enron was growing at a healthy and predictable rate, consistent with analysts' published expectations, that Enron did not have significant write-offs or debt and was worthy of investment-grade credit rating, that Enron was comprised of a number of successful business units, and that the company had an appropriate cash flow. It had the effect of inflating artificially Enron's stock price, which increased from approximately $30 per share in early 1998 to over $80 per share in January 2001, and artificially stemming the decline of the stock during the first three quarters of 2001.

The ongoing investigation into Enron's collapse is being conducted by the Enron Task Force, a team of federal prosecutors supervised by the Justice Department's Criminal Division and Special Agents from the FBI and IRS Criminal Investigation. The Task Force also has coordinated with and received considerable assistance from the Securities and Exchange Commission. The Enron Task Force is part of President Bush's Corporate Fraud Task Force, created in July 2002 to investigate allegations of fraud and corruption at U.S. corporations. To date, the efforts of the Corporate Fraud Task Force have resulted in 1,063 convictions, including the convictions of 167 corporate presidents and chief executive officers, and 36 chief financial officers.

# # #

06-328

Enron Scandal: The Fall of a Wall Street Darling

By TROY SEGAL | Updated Jan 19, 2021

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EXPAND +

The story of Enron Corporation depicts a company that reached dramatic heights only to face a dizzying fall. The fated company's collapse affected thousands of employees and shook Wall Street to its core. At Enron's peak, its shares were worth $90.75; just prior to declaring bankruptcy on Dec. 2, 2001, they were trading at $0.26.[1] To this day, many wonder how such a powerful business, at the time one of the largest companies in the United States, disintegrated almost overnight. Also difficult to fathom is how its leadership managed to fool regulators for so long with fake holdings and off-the-books accounting.

KEY TAKEAWAYS

- Enron's leadership fooled regulators with fake holdings and off-the-books accounting practices.

- The price of Enron's shares went from $90.75 at its peak to $0.26 at bankruptcy.[1]
- The company paid its creditors more than $21.7 billion from 2004 to 2011.

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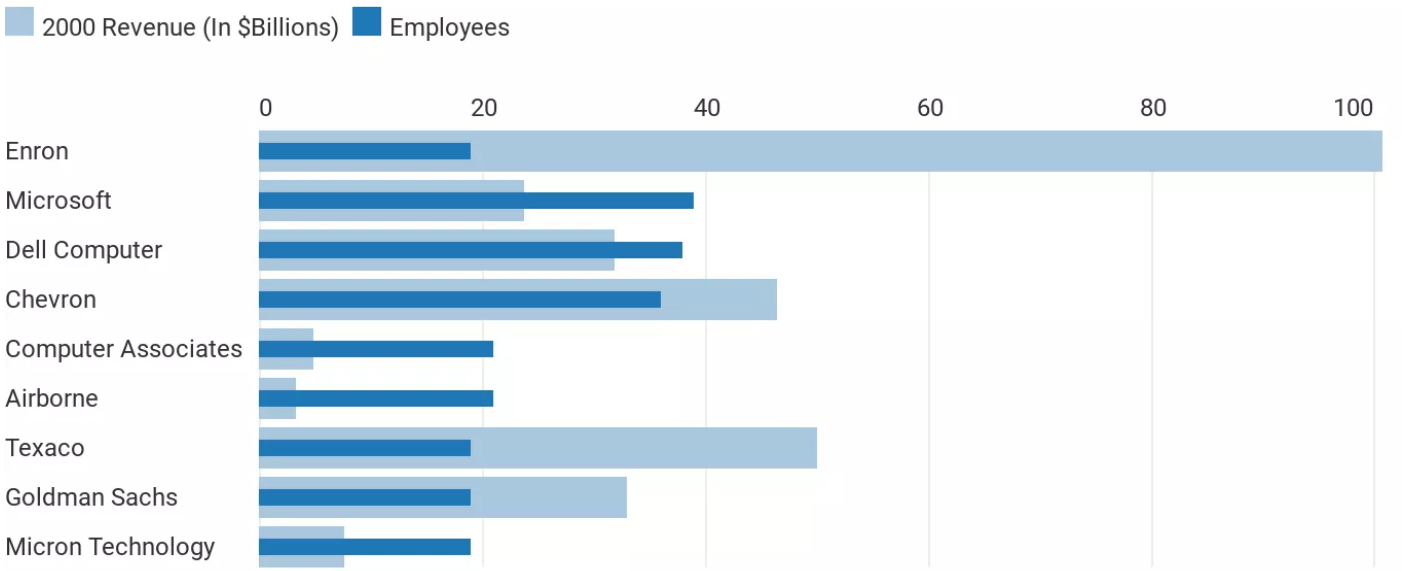
Why Enron Collapsed



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Enron's Energy Origins

Enron was formed in 1985 following a merger between Houston Natural Gas Company and Omaha-based InterNorth Incorporated. Following the merger, Kenneth Lay, who had been the chief executive officer (CEO) of Houston Natural Gas, became Enron's CEO and chairman. Lay quickly rebranded Enron into an energy trader and supplier. Deregulation of the energy markets allowed companies to place bets on future prices, and Enron was poised to take advantage. In 1990, Lay created the Enron Finance Corporation and appointed Jeffrey Skilling, whose work as a McKinsey & Company consultant had impressed Lay, to head the new corporation. Skilling was then one of the youngest partners at McKinsey. [4]

Skilling joined Enron at an auspicious time. The era's minimal regulatory environment allowed Enron to flourish. At the end of the 1990s, the dot-com bubble was in full swing, and the Nasdaq hit 5,000. [5] Revolutionary internet stocks were being valued at preposterous levels and, consequently, most investors and regulators simply accepted spiking share prices as the new normal.

Mark-to-Market

One of Skilling's early contributions was to transition Enron's accounting from a traditional historical cost accounting method to mark-to-market (MTM) accounting method, for which the company received official SEC approval in 1992.[6] MTM is a measure of the fair value of accounts that can change over time, such as assets and liabilities. Mark-to-market aims to provide a realistic appraisal of an institution's or company's current financial situation, and it is a legitimate and widely used practice. However, in some cases, the method can be manipulated, since MTM is not based on "actual" cost but on "fair value," which is harder to pin down.[7] Some believe MTM was the beginning of the end for Enron as it essentially permitted the organization to log estimated profits as actual profits.

Enron Hailed for Its Innovation

Enron created Enron Online (EOL) in Oct. 1999, an electronic trading website that focused on commodities. Enron was the counterparty to every transaction on EOL; it was either the buyer or the seller. To entice participants and trading partners, Enron offered its reputation, credit, and expertise in the energy sector.[8] Enron was praised for its expansions and ambitious projects, and it was named "America's Most Innovative Company" by *Fortune* for six consecutive years between 1996 and 2001.

Enron Share Price, Jan 2000-Dec 2002

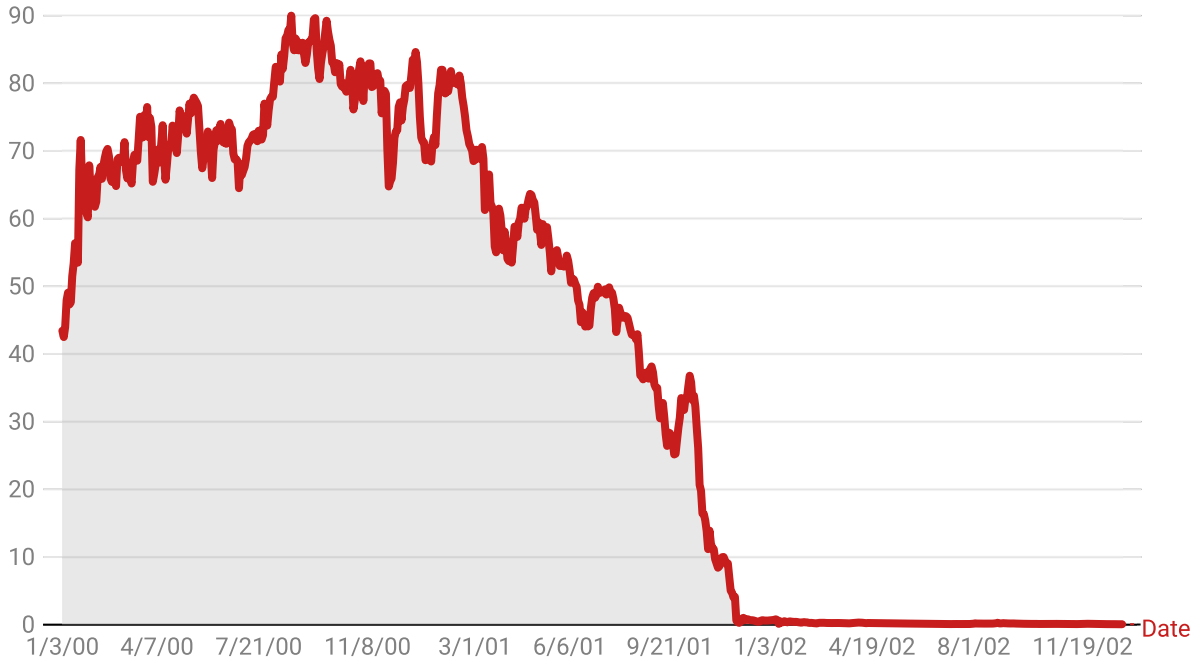

Chart: Investopedia • Get the data • Created with Datawrapper

video rental chain. In July 2000, Enron Broadband Services and Blockbuster entered a partnership to enter the burgeoning VOD market. The VOD market was a sensible pick, but Enron started logging expected earnings based on the expected growth of the VOD market, which vastly inflated the numbers.[9]

By mid-2000, EOL was executing nearly $350 billion in trades. When the dot-com bubble began to burst, Enron decided to build high-speed broadband telecom networks. Hundreds of millions of dollars were spent on this project, but the company ended up realizing almost no return.

When the recession hit in 2000, Enron had significant exposure to the most volatile parts of the market. As a result, many trusting investors and creditors found themselves on the losing end of a vanishing market cap.

The Wall Street Darling Crumbles

By the fall of 2000, Enron was starting to crumble under its own weight. CEO Jeffrey Skilling hid the financial losses of the trading business and other operations of the company using mark-to-market accounting.[10] This technique measures the value of a security based on its current market value instead of its book value. This can work well when trading securities, but it can be disastrous for actual businesses.

In Enron's case, the company would build an asset, such as a power plant, and immediately claim the projected profit on its books, even though the company had not made one dime from the asset. If the revenue from the power plant was less than the projected amount, instead of taking the loss, the company would then transfer the asset to an off-the-books corporation where the loss would go unreported. This type of accounting enabled Enron to write off unprofitable activities without hurting its bottom line.

The mark-to-market practice led to schemes that were designed to hide the losses and make the company appear more profitable than it really was. To cope with the mounting liabilities, Andrew Fastow, a rising star who was promoted to chief financial officer in 1998, developed a deliberate plan to show that the company was in sound financial shape despite the fact that many of its subsidiaries were losing money.[11]

Search in table

1985	Enron is formed following a merger between Houston Natural Gas Co. and InterNorth Inc.
1995	Enron is named "America's Most Innovative Company" by Fortune. The firm goes on to win this award for six consecutive years.
1998	Andrew Fastow is promoted to CFO, he ultimately spearheads the creation of a network of companies that hide Enron's losses.
2000	Enron's shares skyrocket to an all-time high of $90.56.
Feb. 12, 2001	Jeffrey Skilling replaces Kenneth Lay as CEO. However, Lay remains a member of the board of directors.
Aug. 14, 2001	Skilling resigns suddenly, and Lay takes over once again. Enron's broadband division also reports a massive $137 million loss. Analysts became weary of the company and subsequently drop their ratings for Enron's stock. In turn, the company's share price dives to $39.95, a 52-week low.
Oct. 12, 2001	Arthur Andersen legal counsel tells auditors to destroy all Enron files, except Enron's most basic documents.
Oct. 16, 2001	Enron reports a $618 million loss and $1.2 billion value write off. Enron's stock drops further to $38.84.
Oct. 22, 2001	Enron announces it's facing a SEC probe. Shares fall to around $20.75 that day, following the announcement.
Nov. 8, 2001	Enron admits it has been inflating its income by around $586 million since 1997.
Nov. 29, 2001	Arthur Andersen becomes another casualty of the Enron scandal as the SEC expands its investigation.
Dec. 2, 2001	Enron files for Chapter 11 bankruptcy. Its stock closes at $0.26
Jan. 9, 2002	The Justice Department launches a criminal investigation.
Jan. 15, 2002	Enron is suspended from the NYSE.
June 15,	Enron's accounting firm, Arthur Andersen is convicted of

How Did Enron Hide Its Debt?

Fastow and others at Enron orchestrated a scheme to use off-balance-sheet special purpose vehicles (SPVs), also known as special purposes entities (SPEs), to hide its mountains of debt and toxic assets from investors and creditors.[2] The primary aim of these SPVs was to hide accounting realities rather than operating results.

use the stock to hedge an asset listed on Enron's balance sheet. In turn, Enron would guarantee the SPV's value to reduce apparent counterparty risk.

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Although their aim was to hide accounting realities, the SPVs were not illegal. But they were different from standard debt securitization in several significant—and potentially disastrous—ways. One major difference was that the SPVs were capitalized entirely with Enron stock. This directly compromised the ability of the SPVs to hedge if Enron's share prices fell. Just as dangerous as the second significant difference: Enron's failure to disclose conflicts of interest.

between the company and the SPVs.[12]

Enron believed that their stock price would continue to appreciate—a belief similar to that embodied by Long-Term Capital Management, a large hedge fund, before its collapse in 1998.[13] Eventually, Enron's stock declined. The values of the SPVs also fell, forcing Enron's guarantees to take effect.

Arthur Andersen and Enron

In addition to Andrew Fastow, a major player in the Enron scandal was Enron's accounting firm Arthur Andersen LLP and partner David B. Duncan, who oversaw Enron's accounts. As one of the five largest accounting firms in the United States at the time, Andersen had a reputation for high standards and quality risk management.

However, despite Enron's poor accounting practices, Arthur Andersen offered its stamp of approval, signing off on the corporate reports for years.[14] By April 2001, many analysts started to question Enron's earnings and the company's transparency.

The Shock Felt Around Wall Street

By the summer of 2001, Enron was in freefall. CEO Kenneth Lay had retired in February, turning over the position to Jeffrey Skilling. In August 2001, Skilling resigned as CEO citing personal reasons. Around the same time, analysts began to downgrade their rating for Enron's stock, and the stock descended to a 52-week low of $39.95. By Oct. 16, the company reported its first quarterly loss and closed its "Raptor" SPV. This action caught the attention of the SEC.[15]

A few days later, Enron changed pension plan administrators, essentially forbidding employees from selling their shares for at least 30 days. Shortly after, the SEC announced it was investigating Enron and the SPVs created by Fastow. Fastow was fired from the company that day. Also, the company restated earnings going back to 1997. Enron had losses of $591 million and had $690 million in debt by the end of 2000. The final blow was dealt when Dynegy (NYSE: DYN), a company that had previously announced it would merge with Enron, backed out of the deal on Nov. 28. By Dec. 2, 2001, Enron had filed for bankruptcy.[16]

$74 billion

Bankruptcy

Once Enron's Plan of Reorganization was approved by the U.S. Bankruptcy Court, the new board of directors changed Enron's name to Enron Creditors Recovery Corporation (ECRC). The company's new sole mission was "to reorganize and liquidate certain of the operations and assets of the 'pre-bankruptcy' Enron for the benefit of creditors."[17] The company paid its creditors more than $21.7 billion from 2004 to 2011. Its last payout was in May 2011.

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Criminal Charges

conceal them from the SEC.[18] The conviction was overturned later, on appeal; however, the firm was deeply disgraced by the scandal and dwindled into a holding company.[19] A group of former partners bought the name in 2014, creating a firm named Andersen Global.[20]

Several of Enron's executives were charged with conspiracy, insider trading, and securities fraud. Enron's founder and former CEO Kenneth Lay were convicted on six counts of fraud and conspiracy and four counts of bank fraud. Prior to sentencing, he died of a heart attack in Colorado.[21]

Enron's former star CFO Andrew Fastow pled guilty to two counts of wire fraud and securities fraud for facilitating Enron's corrupt business practices. He ultimately cut a deal for cooperating with federal authorities and served more than five years in prison. He was released from prison in 2011.[22]

Ultimately, former Enron CEO Jeffrey Skilling received the harshest sentence of anyone involved in the Enron scandal. In 2006, Skilling was convicted of conspiracy, fraud, and insider trading. Skilling originally received a 17½-year sentence, but in 2013 it was reduced by 14 years. As a part of the new deal, Skilling was required to give $42 million to the victims of the Enron fraud and to cease challenging his conviction.[23] Skilling was originally scheduled for release on Feb. 21, 2028, but he was instead released early on Feb. 22, 2019.[24]

New Regulations After Scandal

Enron's collapse and the financial havoc it wreaked on its shareholders and employees led to new regulations and legislation to promote the accuracy of financial reporting for publicly held companies. In July 2002, President George W. Bush signed into law the Sarbanes-Oxley Act. The Act heightened the consequences for destroying, altering, or fabricating financial statements and for trying to defraud shareholders.[25]

> **Important:** As one researcher states, the Sarbanes-Oxley Act is a "mirror image of Enron: the company's perceived corporate governance failings are matched virtually point for point in the principal provisions of the Act." (Deakin and Konzelmann, 2003).

[26]

company boards of directors became more independent, monitoring the audit companies, and new measures are important mechanisms to spot and d to avoid accountability.

gest corporate bankruptcy to ever hit the financial m, Lehman Brothers, and Washington Mutual have ention to accounting and corporate fraud as its ears leading up to its bankruptcy, and its employees

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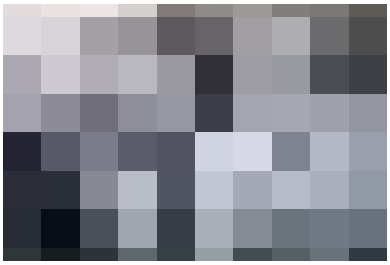

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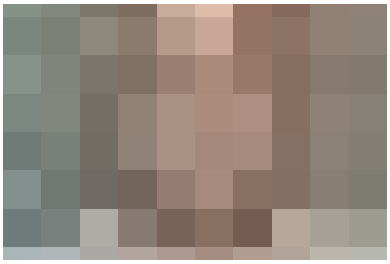

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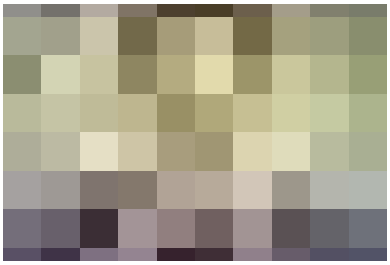

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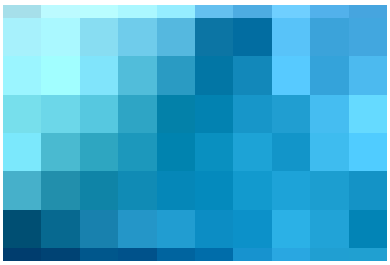

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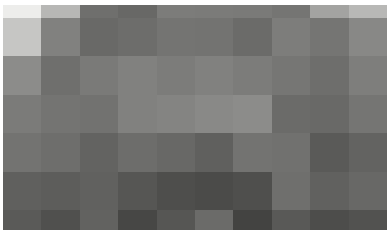

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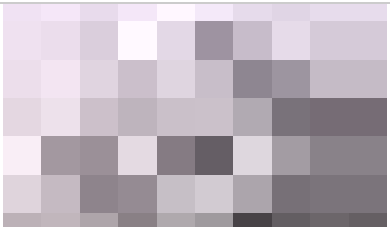

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Connick v. Thompson

Supreme Court of the United States

October 6, 2010, Argued; March 29, 2011, Decided

No. 09-571

Reporter
563 U.S. 51 *; 131 S. Ct. 1350 **; 179 L. Ed. 2d 417 ***; 2011 U.S. LEXIS 2594 ****; 79 U.S.L.W. 4195; 22 Fla. L. Weekly Fed. S 887

HARRY F. CONNICK, DISTRICT ATTORNEY, et al., Petitioners v. JOHN THOMPSON

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Thompson v. Connick, 578 F.3d 293, 2009 U.S. App. LEXIS 17728 (5th Cir. La., 2009)

Disposition: Reversed.

Core Terms

training, district attorney's office, violations, murder, deliberate indifference, armed robbery, municipal, blood, deliberately, obligations, swatch, rights, indifferent, failure to train, constitutional violation, constitutional right, district attorney, decisions, hair, lab, policymakers, police report, convicted, employees, notice, murder trial, blood type, crime lab, exculpatory, police officer

Case Summary

Procedural Posture

Plaintiff former prisoner sued defendant district attorney under *42 U.S.C.S. § 1983* for failure to train his prosecutors adequately about their duty to produce exculpatory evidence. The U.S. Court of Appeals for the Fifth Circuit affirmed a $ 14 million jury award by an evenly divided en banc court. Certiorari was granted on whether a district attorney's office could have been held liable for failure to train based on a single Brady violation.

Overview

The district attorney's office conceded that, in prosecuting the former prisoner for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under Brady v. Maryland. Because of the former prisoner's attempted armed robbery conviction, he elected not to testify in his own defense in his later trial for murder, and he was again convicted. His convictions were vacated after a reviewing court determined that the withheld evidence, a blood type test, was exculpatory. At a retrial for the murder, the jury found the former prisoner not guilty. The Court agreed with the district attorney that he was entitled to judgment as a matter of law because the former prisoner had not proven that the district attorney was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different Brady training. A pattern of similar constitutional violations by untrained employees was necessary to demonstrate deliberate indifference for purposes of failure to train. Because other Brady violations were not similar, they could not have put the district attorney on notice that specific training was necessary.

Outcome
The judgment of the United States Court of Appeals for the Fifth Circuit was reversed. 5-4 Decision; one opinion, one concurrence, one dissent.

LexisNexis® Headnotes

Civil Rights Law > ... > Scope > Law Enforcement Officials > General Overview

HN1[] **Scope, Law Enforcement Officials**

A district attorney's office may not be held liable under *42 U.S.C.S. § 1983* for failure to train based on a single Brady violation.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN2[] **Protection of Rights, Section 1983 Actions**

See *42 U.S.C.S. § 1983*.

Civil Rights Law > Protection of Rights > Immunity From Liability > Respondeat Superior Distinguished

Governments > Local Governments > Claims By & Against

HN3[] **Immunity From Liability, Respondeat Superior Distinguished**

A municipality or other local government may be liable under *42 U.S.C.S. § 1983* if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation. But, under *§ 1983*, local governments are responsible only for their own illegal acts. They are not vicariously liable under *§ 1983* for their employees' actions.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Governments > Local Governments > Claims By & Against

Civil Rights Law > ... > Immunity From Liability > Local Officials > Deliberate Indifference

HN4[] **Local Officials, Customs & Policies**

Plaintiffs who seek to impose liability on local governments under *42 U.S.C.S. § 1983* must prove that action pursuant to official municipal policy caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are actions for which the municipality is actually responsible. In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of *§ 1983*. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. A policy of inadequate training is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in Monell. To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. Only then can such a shortcoming be properly thought of as a city policy or custom that is actionable under *§ 1983*.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Deliberate Indifference

Civil Rights Law > Protection of Rights > Immunity From Liability > Respondeat Superior Distinguished

HN5[] **Local Officials, Deliberate Indifference**

Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's policy of inaction in light of notice that its program

will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the Constitution. A less stringent standard of fault for a failure-to-train claim would result in de facto respondeat superior liability on municipalities. Municipal liability under *42 U.S.C.S. § 1983* attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the relevant officials.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Deliberate Indifference

HN6 **Local Officials, Deliberate Indifference**

A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. Policymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action -- the deliberate indifference -- necessary to trigger municipal liability. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Criminal Law & Procedure > Counsel > Prosecutors

HN7 **Counsel, Prosecutors**

The role of a prosecutor is to see that justice is done. It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Lawyers' Edition Display

Decision

[*417]** District attorney's office held not liable under *42 U.S.C.S. § 1983* for failure to train prosecutors on basis of single violation of requirement--under *Brady v. Maryland (1963) 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, 1963 U.S. LEXIS 1615*--to disclose material exculpatory evidence to defense.

Summary

Procedural posture: Plaintiff former prisoner sued defendant district attorney under *42 U.S.C.S. § 1983* for failure to train his prosecutors adequately about their duty to produce exculpatory evidence. The U.S. Court of Appeals for the Fifth Circuit affirmed a $14 million jury award by an evenly divided en banc court. Certiorari was granted on whether a district attorney's office could have been held liable for failure to train based on a single Brady violation.

Overview: The district attorney's office conceded that, in prosecuting the former prisoner for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under Brady v. Maryland. Because of the former prisoner's attempted armed robbery conviction, he elected not to testify in his own defense in his later trial for murder, and he was again convicted. His convictions were vacated after a reviewing court determined that the withheld evidence, a blood type test, was exculpatory. At a retrial for the murder, the jury found the former prisoner not guilty. The Court agreed with the district attorney that he was entitled to judgment as a matter of law because the former prisoner had not proven that the district attorney was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different Brady training. A pattern of similar constitutional violations by untrained employees was necessary to demonstrate deliberate indifference for purposes of failure to train. Because other Brady violations were not similar, they could not have put the district attorney on notice that specific training was necessary.

Outcome: The judgment of the United States Court of Appeals for the Fifth Circuit was reversed. 5-4 Decision; one opinion, one concurrence, one dissent.

Headnotes

[*418]**

CIVIL RIGHTS §27 > DISTRICT ATTORNEY'S OFFICE -- FAILURE TO TRAIN > Headnote:
LEdHN[1] [1]

A district attorney's office may not be held liable under 42 U.S.C.S. § 1983 for failure to train based on a single Brady violation. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

CIVIL RIGHTS §22 > DEPRIVATION OF RIGHTS -- LIABILITY > Headnote:
LEdHN[2] [2]

See 42 U.S.C.S. § 1983, which provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

CIVIL RIGHTS §27 > LOCAL GOVERNMENT -- EMPLOYEES' ACTIONS -- VICARIOUS LIABILITY > Headnote:
LEdHN[3] [3]

A municipality or other local government may be liable under 42 U.S.C.S. § 1983 if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation. But, under § 1983, local governments are responsible only for their own illegal acts. They are not vicariously liable under § 1983 for their employees' actions. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

CIVIL RIGHTS §27 > MUNICIPAL LIABILITY -- OFFICIAL POLICY -- FAILURE TO TRAIN > Headnote:
LEdHN[4] [4]

Plaintiffs who seek to impose liability on local governments under 42 U.S.C.S. § 1983 must prove that action pursuant to official municipal policy caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are actions for which the municipality is actually responsible. In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. A policy of inadequate training is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in Monell. To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. Only then can such a shortcoming be properly thought of as a city policy or custom that is actionable under § 1983. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

[*419]**

CIVIL RIGHTS §27 > MUNICIPAL LIABILITY -- FAILURE TO TRAIN -- DELIBERATE INDIFFERENCE > Headnote:
LEdHN[5] [5]

Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's policy of inaction in light of notice that its program will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the Constitution. A less stringent standard of fault for a failure-to-train claim would result in de facto respondeat superior liability on municipalities. Municipal liability under 42 U.S.C.S. § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the relevant officials. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

CIVIL RIGHTS §27 > MUNICIPAL LIABILITY -- DELIBERATE

INDIFFERENCE -- FAILURE TO TRAIN > Headnote:
LEdHN[6][] [6]

A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. Policymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action--the deliberate indifference--necessary to trigger municipal liability. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

DISTRICT AND PROSECUTING ATTORNEYS
§3 > SEEKING JUSTICE > Headnote:
LEdHN[7][] [7]

The role of a prosecutor is to see that justice is done. It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Alito, JJ.)

Syllabus

[*51] [1353] [***420]** Petitioner the Orleans Parish District Attorney's Office concedes that, in prosecuting respondent Thompson for attempted armed robbery, prosecutors violated *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215*, by failing to disclose a crime lab report. Because of his robbery conviction, Thompson elected not to testify at his later murder trial and was convicted. A month before his scheduled execution, the lab report was discovered. A reviewing court vacated both convictions, and Thompson was found not guilty in a retrial on the murder charge. He then filed suit against the district attorney's office under *42 U.S.C. § 1983*, alleging, *inter alia*, that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations. The District Court held that, to prove deliberate indifference, Thompson did not need to show a pattern of similar *Brady* violations when he could demonstrate **[**1354]** that the need for training was obvious. The jury found the district attorney's office liable for failure to train and awarded Thompson damages. The Fifth **[****2]** Circuit affirmed by an equally divided court.

Held: A district attorney's office may not be held liable under *§ 1983* for failure to train its prosecutors based on a single *Brady* violation. *Pp.59-72, 179 L. Ed. 2d, at 425-433*.

(a) Plaintiffs seeking to impose *§ 1983* liability on local governments must prove that their injury was caused by "action pursuant to official municipal policy," which includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. *Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611*. **[***421]** A local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for *§ 1983* purposes, but the failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. Deliberate indifference in this context requires proof that city policymakers disregarded the "known or obvious consequence" that a particular omission in their training program would cause city employees to **[*52]** violate **[****3]** citizens' constitutional rights. *Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. *Pp. 59-62, 179 L. Ed. 2d, at 425-427*.

(b) A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference. *Bryan Cty., supra, at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Without notice that a course of training is deficient, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights. Thompson does not contend that he proved a pattern of similar *Brady* violations, and four reversals by Louisiana courts for dissimilar *Brady* violations in the 10 years before the robbery trial could not have put the district attorney's office on notice of the need for specific training. *Pp. 59-63, 179 L. Ed. 2d, at*

427-428.

(c) Thompson mistakenly relies on the "single-incident" liability hypothesized in *Canton*, contending that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training and that this "obviousness" showing can substitute for the pattern of violations ordinarily necessary to establish municipal culpability. In *Canton*, the Court theorized that if a city armed its police force and deployed them into the **[****4]** public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force, the failure to train could reflect the city's deliberate indifference to the highly predictable consequence, namely, violations of constitutional rights. Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training present in *Canton*'s scenario--police academy applicants are unlikely to be familiar with constitutional constraints on deadly force and, absent training, cannot obtain that knowledge--is absent here. Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. They receive training before entering the profession, must usually satisfy continuing-education requirements, often train on the job with more experienced attorneys, and must satisfy licensing standards and ongoing ethical obligations. Prosecutors not only are **[**1355]** equipped but are ethically bound to know what *Brady* entails and to perform legal research when they are **[****5]** uncertain. Thus, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training. The nuance of the allegedly necessary training also distinguishes **[***422]** the case from the example in *Canton*. Here, the prosecutors were familiar with the general *Brady* rule. Thus, Thompson cannot rely on the lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply **[*53]** cannot support an inference of deliberate indifference here. Contrary to the holding below, it does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts, as it must, to "a decision by the city itself to violate the Constitution." *Canton, 489 U.S., at 395, 109 S. Ct. 1197, 103 L. Ed. 2d 412* (O'Connor, J., concurring in part and dissenting in part). *Pp. 63-71, 179 L. Ed. 2d, at 428-433*.

578 F.3d 293, reversed.

Counsel: Stuart K. Duncan argued the cause for petitioners.

J. Gordon Cooney, Jr. argued the cause for respondent

Judges: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Alito, JJ., **[****6]** joined. Scalia, J., filed a concurring opinion, in which Alito, J., joined, post p.72. Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ., joined, post, p. 79.

Opinion by: THOMAS

Opinion

[*54] Justice **Thomas** delivered the opinion of the Court.

The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. Thompson was convicted. Because of that conviction Thompson elected not to testify defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish district attorney, for damages under Rev. Stat. §

1979, 42 U.S.C. § 1983. Thompson alleged that Connick had failed **[****7]** to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million, and **[**1356]** the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether HN1[↑] LEdHN[1][↑] [1] a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation. We hold that it cannot.

I

A

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr., in New Orleans. Publicity following the murder charge led **[***423]** the victims of an unrelated **[*55]** armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, Assistant District Attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is **[****8]** no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on Assistant District Attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

Williams tried the armed robbery case with Assistant District aAttorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and Special Prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. *State v. Thompson, 516 So. 2d 349 (La. 1987)*. In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. See *State ex rel. Thompson v. Cain, 95-2463 (La. 4/25/96), 672 So. 2d 906*; **[****9]** Thompson v. Cain, 161 F.3d 802 (CA5 1998). The State scheduled Thompson's execution for May 20, 1999.

[*56] In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction.[1] The Louisiana Court of Appeal then reversed Thompson's murder conviction, concluding that the armed robbery **[**1357]** conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. State v. Thompson, 2002-0361 (La. App. 7/17/02), 825 So. 2d 552. In 2003, the district attorney's office retried Thompson **[***424]** for Liuzza's murder.[2] The jury found him not guilty.

B

Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under § 1983 that the district attorney's office had violated *Brady* by failing **[*57]** to

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[1] After Thompson discovered the crime lab report, former Assistant District Attorney Michael Riehlmann revealed that Deegan had confessed to him in 1994 that he had "intentionally suppressed blood evidence in the armed robbery trial of John Thompson **[****10]** that in some way exculpated the defendant.? Record EX583; see also *id.*, at 2677. Deegan apparently had been recently diagnosed with terminal cancer when he made his confession. Following a disciplinary complaint by the district attorney's office, the Supreme Court of Louisiana reprimanded Riehlmann for failing to disclose Deegan's admission earlier. In re Riehlmann, 2004-0680 (La. 1/19/05), 891 So. 2d 1239.

[2] Thompson testified in his own defense at the second trial and presented evidence suggesting that another man committed the murder. That man, the government's key witness at the first murder trial, had died in the interval between the first and second trials.

disclose the crime lab report in his armed robbery trial. See *Brady, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215*. Thompson alleged liability under two theories: (1) The *Brady* violation was caused by an **[****11]** unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a *Brady* violation.[3] See Record EX608, EX880. Accordingly, the District Court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors. Id., at 1615.

Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over **[****12]** to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson $14 million in damages, and the District Court added more than $1 million in attorney's fees and costs.

After the verdict, Connick renewed his objection--which he had raised on summary judgment--that he could not have **[*58]** been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations. The District Court rejected this argument for the reasons that it had given in the summary judgment order. In that order, the court had concluded that a pattern of violations is not necessary to prove deliberate indifference when the need for training is "so obvious." *No. Civ. A. 03-2045, 2005 U.S. Dist. LEXIS 36499 (ED La., Nov. 15, 2005), App. to Pet. for Cert. [***425] 141a, 2005 WL 3541035, *13*. Relying **[****13]** on *Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*, the **[**1358]** court had held that Thompson could demonstrate deliberate indifference by proving that "the DA's office knew to a moral certainty that assistan[t] [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."[4] App. to Pet. for Cert. 141a *2005 U.S. Dist. LEXIS 36499, 2005 WL 3541035, *13*.

A panel of the Court of Appeals for the Fifth Circuit affirmed. The panel acknowledged that Thompson did not present evidence of a pattern of similar *Brady* violations, *553 F.3d 836, 851 (2008)*, but held that Thompson did not need to prove a pattern, *id., at 854*. According to the panel, Thompson demonstrated that Connick was on notice of an obvious need for *Brady* training by presenting evidence "that attorneys, often fresh out of law school, **[****14]** would undoubtedly be required to confront *Brady* issues while at the DA's Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful." *553 F.3d, at 854*.

[*59] The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. *578 F.3d 293 (CA5 2009) (per curiam)*. In four opinions, the divided en banc court disputed whether Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations, and, if so, what evidence would make that showing. We granted certiorari. *559 U.S. 1004, 130 S. Ct. 1880, 176 L. Ed. 2d 399 (2010)*.

II

The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with

[3] Because Connick conceded that the failure to disclose the crime lab report violated *Brady*, that question is not presented here, and we do not address it.

[4] The District Court rejected Connick's proposed deliberate indifference jury instruction--which would have required Thompson to prove a pattern of similar violations--for the same reasons as the summary judgment motion. Tr. 1013; Record 993; see also Tr. of Oral Arg. 26.

Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the **[****15]** need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.[5]

[*60] A

Title 42 U.S.C. § 1983 provides in relevant part:

> who, under color of any statute, ordinance, **[***426]** regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured **[****17]** by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[1359]** HN2[↑] LEdHN[2][↑] [2] "Every person

HN3[↑] LEdHN[3][↑] [3] A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. See Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). But, under § 1983, local governments are responsible only for "their *own* illegal acts." Pembaur v. Cincinnati, 475 U.S. 469, 479, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (citing Monell, 436 U.S., at 665-683, 98 S. Ct. 2018, 56 L. Ed. 2d 611). They are not vicariously liable under § 1983 for their employees' actions. See id., at 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611; Canton, 489 U.S., at 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412; Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (collecting cases).

HN4[↑] LEdHN[4][↑] [4] Plaintiffs who seek to impose liability on local governments under § 1983 must prove that "action pursuant to official municipal policy" caused their injury. Monell, 436 U.S., ***[*61]*** at 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611; see id., at 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically **[****18]** have the force of law. See *ibid.*; Pembaur, supra, at 480-481, 106 S. Ct. 1292, 89 L. Ed. 2d 452; Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). These are "action[s] for which the municipality is actually responsible." Pembaur, supra, at 479-480, 106 S. Ct. 1292, 89 L. Ed. 2d 452.

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation **[***427]** of rights is at its most tenuous where a claim turns on a failure to train. See Oklahoma City v. Tuttle, 471 U.S. 808, 822-823, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' " is

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[5] Because we conclude that Thompson failed to prove deliberate indifference, we need not reach causation. Thus, we do not address whether the alleged training deficiency, or some other cause, was the " 'moving force,' " Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (quoting Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and Polk County v. Dodson, 454 U.S. 312, 326, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981)), that "actually caused" the failure to disclose the crime lab report, Canton, supra, at 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412.

The same cannot be said for the dissent, however. Affirming the verdict in favor of Thompson would require finding both that he proved deliberate indifference and that he proved causation. Perhaps unsurprisingly, the dissent has not conducted the second step of the analysis, **[****16]** which would require showing that the failure to provide particular training (which the dissent never clearly identifies) "actually caused" the flagrant--and quite possibly intentional--misconduct that occurred in this case. See post, at 98, 179 L. Ed. 2d, at 449 (opinion of Ginsburg, J.) (assuming that, "[h]ad Brady's importance been brought home to prosecutors," the violation at issue "surely" would not have occurred). The dissent believes that evidence that the prosecutors allegedly "misapprehen[ded]" Brady proves causation. Post, at 104, n. 20, 179 L. Ed. 2d, at 453. Of course, if evidence of a need for training, by itself, were sufficient to prove that the lack of training "actually caused" the violation at issue, no causation requirement would be necessary because every plaintiff who satisfied the deliberate indifference requirement would necessarily satisfy the causation requirement.

"far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*"). To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton, 489 U.S., at 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. Only then "can such a shortcoming **[**1360]** be properly thought of as a city 'policy or custom' that is actionable under *§ 1983*." *Id., at 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412*.

HN5[↑] *LEdHN[5]*[↑] [5] " '[D]eliberate **[****19]** indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty., 520 U.S., at 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id., at 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. The city's " 'policy of inaction' " in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate **[*62]** the Constitution." *Canton, 489 U.S., at 395, 109 S. Ct. 1197, 103 L. Ed. 2d 412* (O'Connor, J., concurring in part and dissenting in part). A less stringent standard of fault for a failure-to-train claim "would result in *de facto respondeat superior* liability on municipalities . . . ." *Id., at 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412*; see also *Pembaur, supra, at 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452* (opinion of Brennan, J.) ("[M]unicipal liability under *§ 1983* attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . .").

B

HN6[↑] *LEdHN[6]*[↑] [6] A pattern of similar constitutional **[****20]** violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. *Bryan Cty., 520 U.S., at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action--the 'deliberate indifference'--necessary to trigger municipal liability." *Id., at 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations, *553 F.3d, at 851*, vacated, *578 F.3d 293* (en banc), he points out that, during the 10 years preceding his armed robbery trial, **[***428]** Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.[6] Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure **[****21]** to disclose blood evidence, a crime lab report, or physical or **[*63]** scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.[7]

C

1

Instead of relying on a pattern of similar *Brady* violations, Thompson relies **[**1361]** on the "single-incident" liability that this Court hypothesized in *Canton*. He contends that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training, and that this showing of "obviousness" can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

In *Canton*, the Court left open the possibility that, "in a

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[6] Thompson had every incentive at trial to attempt to establish a pattern of similar violations, given that the jury instruction allowed the jury to find deliberate indifference based on, among other things, prosecutors' "history of mishandling" similar situations. Record 1619.

[7] Thompson also asserts that this case is not about a "single incident" because up to four prosecutors may have been responsible for the nondisclosure of the crime lab report and, according to his allegations, withheld additional evidence in his armed robbery and murder trials. But contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide "notice to the cit[y] and the opportunity to conform to constitutional dictates . . . ." *Canton, 489 U.S., at 395, 109 S. Ct. 1197, 103 L. Ed. 2d 412* (O'Connor, J., concurring in part and dissenting in part). Moreover, no court has ever found any of the other *Brady* violations that Thompson **[****22]** alleges occurred in his armed robbery and murder trials.

narrow range of circumstances," a pattern of similar violations might not be necessary to show deliberate indifference. *Bryan Cty., supra, at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *Canton, supra, at 390, n. 10, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. Given the known frequency with which police attempt to arrest fleeing felons and the "predictability that an officer lacking specific tools to handle that situation will violate citizens' rights," the Court theorized that a city's decision **[****23]** not to train the officers about constitutional limits on **[*64]** the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. *Bryan Cty., supra, at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under *§ 1983* without proof of a pre-existing pattern of violations.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized **[***429]** single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal "[t]raining is what **[****24]** differentiates attorneys from average public employees." *578 F.3d, at 304-305* (opinion of Clement, J.).

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. See, *e.g.*, La. State Bar Assn. (LSBA), Articles of Incorporation, *La. Rev. Stat. Ann. § 37, ch. 4, App., Art. 14, § 7 (1988 West Supp.)* (as amended through 1985). These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules. Cf. *United States v. Cronic, 466 U.S. 648, 658, 664, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)* (noting that the presumption "that the lawyer is competent to provide the guiding hand that the defendant **[*65]** needs" applies even to **[**1362]** young and inexperienced lawyers in their first jury trial and even when the case is complex).

Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. See, *e.g.*, **[****25]** LSBA, Articles of Incorporation, Art. 16, Rule 1.1(b) (effective 1987); La. Sup. Ct. Rule XXX (effective 1988). Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. See, *e.g.*, Mass. Rule Prof. Conduct 1.1 and comment 6 (West 2006). Before Louisiana adopted continuing-education requirements, it imposed similar general competency requirements on its state bar. LSBA, Articles of Incorporation, Art. 16, EC 1-1, 1-2, DR 6-101 (West 1974) (effective 1971).

Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards **[****26]** to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. See, *e.g.,* LSBA, Articles of Incorporation, Art. 14, § 7 (1985); see generally *id.*, Art. 16 (1971) (Code of Professional Responsibility). Trial lawyers have a "duty to bring to bear such skill and **[***430]** knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Prosecutors have a special "duty to seek justice, not merely to **[*66]** convict." LSBA, Articles of Incorporation, Art. 16, EC 7-13 (1971); ABA Standards for Criminal Justice 3-1.1(c) (2d ed. 1980). Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the

defense. See, *e.g.*, LSBA, Articles of Incorporation, Art. 16, EC 7-13 (1971); ABA Model Rule of Prof. Conduct 3.8(d) (1984).[8] An attorney **[**1363]** who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment. See, *e.g.,* LSBA, Articles of Incorporation, Art. 15, §§ 5, 6 (1971); *id.*, Art. 16, DR 1-102; ABA Model Rule of Prof. Conduct 8.4 (1984).

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty., 520 U.S., at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Prosecutors are not only equipped **[*67]** but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal."[9] *Canton, 489 U.S., at 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same **[****29]** "highly predictable" constitutional danger as *Canton*'s untrained officer.

A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police **[***431]** officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule. Thompson's complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, "[i]n virtually every instance where a person **[****30]** has had his or her constitutional rights violated by a city employee, a *§ 1983* plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *489 U.S., at 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412* (citing *Tuttle, 471 U.S., at 823, 105 S. Ct. 2427, 85 L. Ed. 2d 791* (plurality opinion)).

[*68] Thompson suggests that the absence of any *formal* training sessions about *Brady* is equivalent to the complete absence of legal training that the Court imagined in *Canton*. But failure-to-train liability is concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.

We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not

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[8] The Louisiana State Bar Code of Professional Responsibility included **[****27]** a broad understanding of the prosecutor's duty to disclose in 1985:

"With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." LSBA, Articles of Incorporation, Art. 16, EC 7-13 (1971); see also ABA Model Rule of Prof. Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .").

In addition to these ethical rules, the Louisiana Code of Criminal Procedure, with which Louisiana prosecutors are no doubt familiar, in 1985 required prosecutors, upon order of the court, to permit inspection of evidence "favorable to the defendant . . . which [is] material and relevant to the issue of **[****28]** guilt or punishment," *La. Code Crim. Proc. Ann., Art. 718* (West 1981) (added 1977), as well as "any results or reports" of "scientific tests or experiments, made in connection with or material to the particular case," if those reports are exculpatory or intended for use at trial, *id., Art. 719.*

[9] Contrary to the dissent's assertion, see *post, at 108, n. 26, 179 L. Ed. 2d, at 456* (citing *post, at 96-98, 179 L. Ed. 2d, at 448-449*), a prosecutor's youth is not a "specific reason" not to rely on professional training and ethical obligations. See *supra, at 64-65, 179 L. Ed. 2d, at 429* (citing *United States v. Cronic, 466 U.S. 648, 658, 664, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*).

establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will **[**1364]** not suffice. *Canton, supra, at 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. The **[****31]** possibility of single-incident liability that the Court left open in *Canton* is not this case.[10]

2

The dissent rejects our holding that *Canton*'s hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their *Brady* obligation. It would instead apply the *Canton* hypothetical to this case, and thus devotes almost all of its opinion to explaining **[*69]** why the evidence supports liability under that theory. **[****32]** [11] But the dissent's attempt to address our holding--by pointing out that not all prosecutors will necessarily have enrolled in **[***432]** criminal procedure class--misses the point. See *post, at 106-107, 179 L. Ed. 2d, at 454-455*. The reason why the *Canton* hypothetical is inapplicable **[*70]** is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles.

By the end of its opinion, however, the dissent finally reveals that its real disagreement is not with our holding today, but with this Court's precedent. The dissent **[**1365]** does not see "any reason," *post, at 108, 179 L. Ed. 2d, at 456*, for the Court's conclusion in *Bryan County* that a pattern of violations is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train, *520 U.S., at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Cf. *id., at 406-408, 117 S. Ct. 1382, 137 L. Ed. 2d 626* (explaining why a pattern of violations is ordinarily necessary). But cf. *post, at 108, 179 L. Ed. 2d, at 455-456* (describing our reliance on *Bryan County* as "imply[ing]" a new ?limitation" on *§ 1983*). As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train **[****35]** the offending employee presents "difficult problems of proof," and we must adhere to a "stringent standard of fault," lest municipal liability under *§ 1983* collapse into *respondeat superior*.[12] *Bryan Cty., supra, at **[***433]** 406, 410, 117*

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[10] Thompson also argues that he proved deliberate indifference by "direct evidence of policymaker fault" and so, presumably, did not need to rely on circumstantial evidence at all. Brief for Respondent 37. In support, Thompson contends that Connick created a "culture of indifference" in the district attorney's office, *id.*, at 38, as evidenced by Connick's own allegedly inadequate understanding of *Brady*, the office's unwritten *Brady* policy that was later incorporated into a 1987 handbook, and an officewide "restrictive discovery policy," Brief for Respondent 39-40. This argument is essentially an assertion that Connick's office had an unconstitutional policy or custom. The jury rejected this claim, and Thompson does not challenge that finding.

[11] The dissent spends considerable time finding new *Brady* violations in Thompson's trials. See *post, at 81-90, 179 L. Ed. 2d, at 439-445*. How these violations are relevant even to the dissent's own legal analysis is "a mystery." *Post, at 81, n. 2, 179 L. Ed. 2d, at 439*. The dissent does not list these violations among the "[a]bundant evidence" that it believes supports the jury's finding that *Brady* training was obviously necessary. *Post, at 93, 179 L. Ed. 2d, at 446*. Nor does the dissent quarrel with our conclusion that contemporaneous or subsequent conduct cannot establish a pattern of violations. The only point appears to be to highlight what the dissent sees as sympathetic, even if legally irrelevant, facts.

In any event, the dissent's findings are highly suspect. In finding two of the "new" violations, the dissent belatedly tries to reverse the Court of Appeals' 1998 decision that those Brady **[****33]** claims were "without merit." Compare *Thompson v. Cain, 161 F.3d 802, 806-808 (CA5)* (rejecting Brady claims regarding the Perkins-Liuzza audiotapes and the Perkins police report), with *post, at 85-86, 179 L. Ed. 2d, at 442-443* (concluding that these were Brady violations). There is no basis to the dissent's suggestion that materially new facts have called the Court of Appeals' 1998 decision into question. Cf. *State v. Thompson, 2002-0361, p. 6 (La. App. 7/17/02), 825 So. 2d 552, 555* (noting Thompson's admission that some of his current Brady claims "ha[ve] been rejected by both the Louisiana Supreme Court and the federal courts"). Regarding the blood-stained swatch, which the dissent asserts prosecutors "blocked" the defense from inspecting by sending it to the crime lab for testing, *post, at 84, 179 L. Ed. 2d, at 441*, Thompson's counsel conceded at oral argument that trial counsel had access to the evidence locker where the swatch was recorded as evidence. See Tr. of Oral Arg. 37, 42; Record EX42, EX43 (evidence card identifying "One (1) Piece of Victims [sic] Right Pants Leg, W/Blood" among the evidence in the evidence locker and indicating that some evidence had been checked out); Tr. 401 (testimony from Thompson's counsel that he "[w]ent **[****34]** down to the evidence room and checked all of the evidence"); id., at 103, 369-370, 586, 602 (testimony that evidence card was "available to the public," would have been available to Thompson's counsel, and would have been seen by Thompson's counsel because it was stapled to the evidence bag in "the normal process"). Moreover, the dissent cannot seriously believe that the jury could have found Brady violations--indisputably, questions of law. See *post, at 89, n. 10, 92, n. 11, 179 L. Ed. 2d, at 444, 446*.

S. Ct. 1382, 137 L. Ed. 2d 626; see Canton, 489 U.S., at 391-392, 109 S. Ct. 1197, 103 L. Ed. 2d 412.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had **[****36]** proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront *Brady* issues while **[*71]** at the district attorney's office; (2) inexperienced prosecutors were expected to understand *Brady*'s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding *Brady* evidence would result in constitutional violations. 553 F.3d, at 854; App. to Pet. for Cert. 141a 2005 U.S. Dist. LEXIS 36499, 2005 WL 3541035, *13. This is insufficient.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." Canton, supra, at 395, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (O'Connor, J., concurring in part and dissenting in part). To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that **[****37]** it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. See Bryan Cty., supra, at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626; Canton, supra, at 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412. He did not do so.

III

HN7[↑] LEdHN[7][↑] [7] The role of a prosecutor is to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Ibid.* By their own admission, the prosecutors who tried Thompson's armed robbery case **[**1366]** failed to carry out that responsibility. But the only issue before us is whether Connick, as the policymaker for the district attorney's office, was deliberately indifferent to the need to train the attorneys under his authority.

We conclude that this case does not fall within the narrow range of "single-incident" liability hypothesized in *Canton* as **[*72]** a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern **[****38]** of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." Canton, supra, at 395, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (opinion of O'Connor, J.).

The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

It is so ordered.

Concur by: SCALIA

Concur

Justice **Scalia**, with whom Justice **Alito** joins, concurring.

I join the Court's opinion in full. I write separately only to address several aspects of the dissent.

1. The dissent's lengthy excavation of the trial record is a puzzling exertion. The question presented for our review is whether a municipality is liable for a single

[12] Although the dissent acknowledges that "deliberate indifference liability and *respondeat superior* liability are not one and the same," the opinion suggests that it believes otherwise. Post, at 109, n. 28, 179 L. Ed. 2d, at 456; see, *e.g.*, post, at 109, 179 L. Ed. 2d, at 456 (asserting that "the buck stops with [the district attorney]"); post, at 100, 179 L. Ed. 2d, at 451 (suggesting municipal liability attaches when "the prosecutors" themselves are "deliberately indifferent to what the law requires"). We stand by the longstanding rule--reaffirmed by a unanimous Court earlier this Term--that to prove a violation of § 1983, a plaintiff must prove that "the municipality's own wrongful conduct" caused his injury, not that the municipality is ultimately responsible for the torts of its employees. Los Angeles County v. Humphries, 562 U.S. 29, 38, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010); see id., at 562 U.S. 35, 36, 131 S. Ct. 447, 178 L. Ed. 2d 460 (citing Monell, 436 U.S., at 691, 105 S. Ct. 2427, 85 L. Ed. 2d 791).

Brady violation by one of its prosecutors, even though no pattern or practice of prior violations put the municipality on notice of a need for specific training that would have prevented it. See *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. That question is a legal one: whether a *Brady* violation presents one of those rare circumstances we hypothesized in *Canton*'s footnote 10, in which the need for training in constitutional requirements is so obvious *ex ante* that the municipality's failure to provide that training amounts to deliberate indifference **[****39]** to constitutional violations. See *Canton v. Harris, 489 U.S. 378, 390, n. 10, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*.

The dissent defers consideration of this question until the twenty-third page of its opinion. It first devotes considerable space to allegations that Connick's prosecutors misunderstood *Brady* when asked about it at trial, see *post, at 93-95, 179 L. Ed. 2d, at 447-448* (opinion of Ginsburg, J.), and to supposed gaps in the **[*73]** *Brady* guidance provided by Connick's office to prosecutors, including deficiencies (unrelated to the specific *Brady* violation at issue in this case) in a policy manual published by Connick's office three years after Thompson's trial, see *post, at 96-98, 179 L. Ed. 2d, at 448-449*. None of that is relevant. Thompson's failure-to-train theory at trial was not based on a pervasive culture of indifference to *Brady*, but rather on the inevitability of mistakes over enough iterations of criminal trials. The District Court instructed the jury it could find Connick deliberately indifferent if:

> "First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the constitution to be provided to an accused[;]
>
> "Second: The situation involved a difficult choice, or one that prosecutors **[****40]** had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed[; and]
> "Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights." App. 828.

[1367]** That theory of deliberate indifference would repeal the law of *Monell*[1] in favor of the Law of Large Numbers. *Brady* mistakes are inevitable. So are all species of error routinely confronted by prosecutors: authorizing a bad warrant; losing a *Batson*[2] claim; crossing the line in closing argument; or eliciting hearsay that violates the *Confrontation Clause*. Nevertheless, we do not have "*de facto respondeat superior* liability," *Canton, 489 U.S., **[***435]** at 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412*, for each such violation under the rubric of failure to train simply because the municipality does not have a professional educational program covering **[*74]** the specific violation in sufficient depth.[3] Were Thompson's theory the law, there would have been no need for *Canton*'s footnote to confine its hypothetical to the extreme circumstance of arming police officers with guns without telling them about the constitutional limitations upon shooting fleeing felons; the District Court's instructions **[****41]** cover every recurring situation in which citizens' rights can be violated.

That result cannot be squared with our admonition that failure-to-train liability is available only in "limited circumstances," *id., at 387, 109 S. Ct. 1197, 103 L. Ed. 2d 412*, and that a pattern of constitutional violations is "ordinarily necessary to establish municipal culpability and causation," *Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)*. **[****42]** These restrictions are indispensable because without them, "failure to train" would become a talismanic incantation producing municipal liability "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee"--which is what *Monell* rejects. *Canton, 489 U.S., at 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. Worse, it would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs," thereby diminishing the

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[1] *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*.

[2] *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*.

[3] I do not share the dissent's confidence that this result will be avoided by the instruction's requirement that " 'more likely than not the *Brady* material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence.' " *Post, at 101-102, n. 17, 179 L. Ed. 2d, at 452* (quoting Tr. 1100). How comforting that assurance is depends entirely on what proper training consists of. If it is not limited to training in aspects of *Brady* that have been repeatedly violated, but includes--as the dissent would have it include here--training that would avoid any one-time violation, the assurance is no assurance at all.

autonomy of state and local governments. *Ibid*.

2. Perhaps for that reason, the dissent does not seriously contend that Thompson's theory of recovery was proper. Rather, it accuses Connick of acquiescing in that theory at trial. See *post, at 102, 179 L. Ed. 2d, at 452*. The accusation is false. Connick's **[*75]** central claim was and is that failure-to-train liability for a *Brady* violation cannot be premised on a single incident, but requires a pattern or practice of previous violations. He pressed that argument at the summary judgment stage but was rebuffed. At trial, when Connick offered a jury instruction to the same effect, the trial judge effectively told him to stop bringing up the subject:

> "[Connick's counsel]: Also, as part of that definition in that **[****43]** same location, Your Honor, we would like to include language that says that deliberate indifference to training requires a pattern of similar violations and proof of deliberate indifference requires more than a single isolated act.
> "[Thompson's counsel]: That's not the law, Your Honor.
>
> **[**1368]** "THE COURT: No, I'm not giving that. That was in your motion for summary judgment that I denied." Tr. 1013.

[*436]** Nothing more is required to preserve a claim of error. See *Fed. Rule Civ. Proc. 51(d)(1)(B)*.[4]

3. But in any event, to recover from a municipality under *42 U.S.C. § 1983*, a plaintiff must satisfy a "rigorous" standard of causation, *Bryan Cty., 520 U.S., at 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626*; he must "demonstrate a direct causal link between the municipal action and the deprivation of federal rights," *id., at 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Thompson **[*76]** cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan's colleague Michael Riehlmann, in 1994 Deegan confessed to him--in the same conversation in which Deegan revealed he had only a few months to live--that he had "suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." App. 367; see also *id.*, at 362 ("[Deegan] told me . . . that he had failed to inform the defense of exculpatory information"). I have no reason to disbelieve that account, particularly since Riehlmann's **[****45]** testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan's misconduct for another five years, as a result of which he incurred professional sanctions. See *In re Riehlmann, 2004-0680 (La. 1/19/05), 891 So. 2d 1239*. And if Riehlmann's story is true, then the "moving force," *Bryan Cty., supra, at 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626* (internal quotation marks omitted), behind the suppression of evidence was Deegan, not a failure of continuing legal education.

4. The dissent suspends disbelief about this, insisting that with proper *Brady* training, "surely at least one" of the prosecutors in Thompson's trial would have turned over the lab report and blood swatch. *Post, at 98, 179 L. Ed. 2d, at 449*. But training must consist of more than mere broad encomiums of *Brady:* We have made clear that "the identified deficiency in a city's training program [must be] closely related to the ultimate injury." *Canton, supra, at 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. So even indulging the dissent's assumption that Thompson's prosecutors failed to disclose the lab report *in good faith*--in a way that could be prevented by training--what sort of training would have prevented the good-faith nondisclosure of a blood report not known to be exculpatory?

[*77] Perhaps **[****46]** a better question to ask is what *legally accurate* training would have prevented it. The dissent's suggestion is to instruct prosecutors to ignore the portion of *Brady* limiting prosecutors' disclosure obligations to evidence that is "favorable to an accused," *373 U.S., at 87, 83 S. Ct. 1194, 10 L.Ed. 2d 215*. Instead, the dissent proposes **[***437]** that "Connick could have communicated to Orleans Parish

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[4] The dissent's contention that "[t]he instruction Connick proposed resembled the charge given by the District Court," *post, at 102, n. 18, 179 L. Ed. 2d, at 452*, disregards his requested instruction concerning the necessity of a pattern of prior violations. It is meaningless to say that after "the court rejected [Connick's] categorical position," as it did, he did not "assail the District Court's formulation of the deliberate indifference instruction," *post, at 103, n. 18, 179 L. Ed. 2d, at 452*. The prior-pattern requirement was *part* of Connick's requested formulation of deliberate indifference: "To *prove deliberate indifference*, a plaintiff must demonstrate 'at least a pattern of similar violations arising from training that is so clearly inadequate **[****44]** as to be obviously likely to result in a constitutional violation.' " Record, Doc. 94, p. 18 (emphasis added).

prosecutors, in no uncertain terms, **[**1369]** that, '[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over.' " Post, at 97, n. 13, 179 L. Ed. 2d, at 449 (quoting Tr. of Oral Arg. 34). Though labeled a training suggestion, the dissent's proposal is better described as a *sub silentio* expansion of the substantive law of *Brady*. If any of our cases establishes such an obligation, I have never read it, and the dissent does not cite it.[5]

Since Thompson's trial, however, we have decided a case that appears to say just the opposite of the training the dissent would require: In Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), we held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." We acknowledged that "*Brady* . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence," but concluded that "the Due Process Clause requires a different **[*78]** result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id., at 57, 109 S. Ct. 333, 102 L. Ed. 2d 281. Perhaps one day we will recognize a distinction between **[****48]** good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference.

5. By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all--except for Deegan's (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training).[6] The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that *Brady* was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan's deliberate actions, it remains irrelevant to Connick's training obligations. For any *Brady* violation apart from Deegan's was surely on the very frontier of our *Brady* jurisprudence; Connick could not possibly have been on notice **[***438]** decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not *(and still have not)* recognized. As a consequence, even if I accepted the dissent's **[****49]** conclusion that failure-to-train liability **[**1370]** could be premised on a single *Brady* error, I could not agree that the lack of an accurate training regimen caused the violation Connick has conceded.

Dissent by: GINSBURG

Dissent

[*79] Justice **Ginsburg**, with whom Justice **Breyer**, Justice **Sotomayor**, and Justice **Kagan** join, dissenting.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated **[****50]** on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney's Office (District Attorney's Office or Office)

[5] What the dissent *does* cite in support of its theory comes from an unexpected source: Connick's testimony about what qualifies as *Brady* material. See post, at 98, n. 13, 179 L. Ed. 2d, at 449. ("Or Connick could have told prosecutors what he told the jury when he was asked whether a prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know **[****47]** the defendant's blood type: 'Under the law it qualifies as *Brady* material' " (quoting Tr. 872)). Given the effort the dissent has expended persuading us that Connick's understanding of *Brady* is profoundly misguided, its newfound trust in his expertise on the subject is, to the say the least, surprising.

[6] The dissent's only response to this is that the jury must have found otherwise, since it was instructed that " '[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor.' " Post, at 105, n. 20, 179 L. Ed. 2d, at 454 (quoting Tr. 1098). But this instruction did not require the jury to find that Deegan did not commit a bad-faith, knowing violation; it merely prevented the jury from finding that, if he did so, Connick was liable for a failure to train. I not only agree with that; it is part of my point.

cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*'s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed **[****51]** robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that **[*80]** inattention to *Brady* was standard operating procedure at the District Attorney's Office.

What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

I dissent from the Court's judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment **[****52]** **[***439]** Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility--made tangible by § 1983 liability--for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under § 1983 "where the failure . . . amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 **[**1371]** (1989). That standard is well met in this case.

I

I turn first to a contextual account of the *Brady* violations that infected Thompson's trials.

A

In the early morning hours of December 6, 1984, an assailant shot and killed Raymond T. Liuzza, Jr., son of a prominent New Orleans business executive, on the street fronting the victim's home. Only one witness saw the assailant. As recorded in two contemporaneous police reports, that **[*81]** eyewitness initially described the assailant as African-American, six feet tall, with "close cut hair." Record EX2-EX3, EX9.[1] Thompson is five feet eight inches tall and, at the time of the murder, styled his hair in a large "Afro." *Id.*, at EX13. The police reports of the witness' **[****53]** immediate identification were not disclosed to Thompson or to the court.

While engaged in the murder investigation, the Orleans Parish prosecutors linked Thompson to another violent crime committed three weeks later. On December 28, an assailant attempted to rob three siblings at gunpoint. During the struggle, the perpetrator's blood stained the oldest child's pant leg. That blood, preserved on a swatch of fabric cut from the pant leg by a crime scene analyst, was eventually tested. The test conclusively established that the perpetrator's blood was type B. *Id.*, at EX151. Thompson's blood is type O. His prosecutors failed to disclose the existence of the swatch or the test results.

B

One month after the Liuzza murder, Richard Perkins, a man who knew Thompson, approached the Liuzza family. Perkins did so after the family's announcement of a $15,000 reward for information leading to the murderer's conviction. Police officers surreptitiously recorded the Perkins-Liuzza conversations.[2] As

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[1] Exhibits entered into evidence in Thompson's § 1983 trial are herein cited by reference to the page number in the exhibit binder compiled by the District Court and included in the record on appeal.

[2] The majority endorses the Fifth Circuit's conclusion that, when Thompson was tried for murder, no *Brady* violation

documented **[****54]** on tape, Perkins told the family, "I don't mind helping [you] catch [the perpetrator], . . . but I would like [you] to help me and, you know, I'll help **[*82]** [you]." *Id.*, at EX479, EX481. Once the family assured Perkins, "we're on your side, we want to try and help you," *id.*, at EX481, Perkins intimated that Thompson and another man, Kevin Freeman, had been involved in Liuzza's murder. Perkins thereafter told the police what he had **[***440]** learned from Freeman about the murder, and that information was recorded in a police report. Based on Perkins' account, Thompson and Freeman were arrested on murder charges.

Freeman was six feet tall and went by the name "Kojak" because he kept his hair so closely trimmed that his scalp **[****55]** was visible. Unlike Thompson, Freeman fit the eyewitness' initial description of the Liuzza assailant's height and hair style. As the Court notes, *ante, at 56, n. 2, 179 L. Ed. 2d, at 423*, Freeman became the key witness for the prosecution **[**1372]** at Thompson's trial for the murder of Liuzza.

After Thompson's arrest for the Liuzza murder, the father of the armed robbery victims saw a newspaper photo of Thompson with a large Afro hairstyle and showed it to his children. He reported to the District Attorney's Office that the children had identified Thompson as their attacker, and the children then picked that same photo out of a "photographic lineup." Record EX120, EX642-EX643. Indicting Thompson on the basis of these questionable identifications, the District Attorney's Office did not pause to test the pant leg swatch dyed by the perpetrator's blood. This lapse ignored or overlooked a prosecutor's notation that the Office "may wish to do [a] blood test." *Id.*, at EX122.

The murder trial was scheduled to begin in mid-March 1985. Armed with the later indictment against Thompson for robbery, however, the prosecutors made a strategic choice: They switched the order of the two trials, proceeding first on the robbery indictment. **[****56]** *Id.*, at EX128-EX129. Their aim was twofold. A robbery conviction gained first would serve to inhibit Thompson from testifying in his own defense at the murder trial, for the prior conviction could be **[*83]** used to impeach his credibility. In addition, an armed robbery conviction could be invoked at the penalty phase of the murder trial in support of the prosecution's plea for the death penalty. *Id.*, at 682.

Recognizing the need for an effective prosecution team, petitioner Harry F. Connick, District Attorney for the Parish of Orleans, appointed his third-in-command, Eric Dubelier, as special prosecutor in both cases. Dubelier enlisted Jim Williams to try the armed robbery case and to assist him in the murder case. Gerry Deegan assisted Williams in the armed robbery case. Bruce Whittaker, the fourth prosecutor involved in the cases, had approved Thompson's armed robbery indictment.[3]

C

During pretrial proceedings in the armed robbery case, Thompson **[****57]** filed a motion requesting access to all materials and information "favorable to the defendant" and "material and relevant to the issue of guilt or punishment," as well as "any results or reports" of "scientific tests or experiments." *Id.*, at EX144, EX145. **[***441]** Prosecutorial responses to this motion fell far short of *Brady* compliance.[4]

[*84] First, prosecutors blocked defense counsel's inspection of the pant leg swatch stained by the robber's blood. **[****58]** Although Dubelier's April 3 response stated, "Inspection to be permitted," *id.*, at EX149, the swatch was signed out from the property room at 10:05 a.m. the next day, and was not returned until noon on April 10, **[**1373]** the day before trial, *id.*, at EX43, EX670. Thompson's attorney inspected the evidence

occurred with respect to these audio tapes "[b]ecause defense counsel had knowledge of such evidence and could easily have requested access from the prosecution." *Thompson v. Cain, 161 F.3d 802, 806-807 (1998)*; *ante, at 69, n. 11, 179 L. Ed. 2d, at 432*. The basis for that asserted "knowledge" is a mystery. The recordings secretly made did not come to light until long after Thompson's trials.

[3] At the time of their assignment, Dubelier had served in the District Attorney's Office for three and a half years, Williams, for four and a half years, Deegan, a recent law school graduate, for less than one year, and Whittaker, for three years.

[4] Connick did not dispute that failure to disclose the swatch and the crime lab report violated *Brady*. See Tr. 46, 1095. But cf. *ante, at 57-59, 179 L. Ed. 2d, at 423, 424* (limiting Connick's concession, as Connick himself did not, to failure to disclose the crime lab report). In Justice Scalia's contrary view, "[t]here was probably no Brady violation at all," or, if there was any violation of Thompson's rights, it "was surely on the very frontier of our Brady jurisprudence," such that "Connick could not possibly have been on notice" of the need to train. *Ante, at 78, 179 L. Ed. 2d, at 437*. Connick's counsel, however, saw the matter differently. "[A]ny reasonable prosecutor would have recognized blood evidence as Brady material," he said, indeed "the proper response" was "obvious to all." Record 1663, 1665.

made available to him and found no blood evidence. No one told defense counsel about the swatch and its recent removal from the property room. *Id.*, at EX701-EX702; Tr. 400-402. But cf. *ante, at 69, n. 11, 179 L. Ed. 2d, at 432* (Thompson's attorney had "access to the evidence locker where the swatch was recorded as evidence.").[5]

Second, Dubelier or Whittaker ordered the crime laboratory to rush a pretrial test of the swatch. Tr. 952-954. Whittaker received the lab report, addressed to his attention, two days before trial commenced. Immediately thereafter, he placed the lab report on Williams' desk. Record EX151, EX589. Although the lab report conclusively identified the perpetrator's blood type, *id.*, at EX151, the District Attorney's Office never revealed the report to the defense.[6]

[*85] Third, Deegan checked the swatch out of the property room on the morning of the first day of trial, but the prosecution did not produce the swatch at trial. *Id.*, at EX43. Deegan did not return the swatch to the property room after trial, and the swatch has never been found. Tr. of Oral Arg. 37.

"[B]ased solely on the descriptions" provided by the three victims, Record 683, the jury convicted Thompson of attempted armed robbery. The court sentenced him to 49.5 years without **[***442]** possibility of parole--the maximum available sentence.

D

Prosecutors continued to disregard *Brady* during the murder trial, held in May 1985, at which the prosecution's order-of-trial strategy achieved its aim.[7] By prosecuting Thompson for armed robbery first--and withholding blood evidence that might have exonerated Thompson of that charge--the District Attorney's Office disabled Thompson from testifying in his own defense at the murder trial.[8] As earlier observed, see *supra, at 82-83, 179 L. Ed. 2d, at 440*, impeaching use of the prior conviction would have severely undermined Thompson's credibility. **[**1374]** And because Thompson was effectively stopped from testifying in his own defense, the testimony **[****61]** of the witnesses against him gained force. The prosecution's failure to reveal **[*86]** evidence that could have impeached those witnesses helped to seal Thompson's fate.

First, the prosecution undermined Thompson's efforts to impeach Perkins. Perkins testified that he volunteered information to the police with no knowledge of reward money. Record EX366, EX372-EX373. Because prosecutors had not produced the audiotapes of Perkins' conversations with the Liuzza family (or a police summary of the tapes), Thompson's attorneys could do little to cast doubt on Perkins' credibility. In closing argument, the prosecution emphasized that Thompson presented no **[****62]** "direct evidence" that reward money had motivated any of the witnesses. *Id.*, at EX3171-EX3172.

Second, the prosecution impeded Thompson's impeachment of key witness Kevin Freeman. It did so by failing to disclose a police report containing Perkins' account of what he had learned from Freeman about the

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[5] The majority assails as "highly suspect" the suggestion that prosecutors violated *Brady* by failing to disclose the blood-stained swatch. See *ante, at 69, n. 11, 179 L. Ed. 2d, at 432*. But the parties stipulated in Thompson's *§ 1983* action, and the jury was so informed, that, "[p]rior to the armed robbery trial, Mr. Thompson and his attorneys were not advised of the existence of the blood evidence, that the evidence had been tested, [or] that a blood type was determined definitively from the swatch . . . ." Tr. 46. Consistent with this stipulation, Thompson's trial counsel testified that he spoke to "[t]he clerk **[****59]** who maintain[ed] the evidence" and learned that "[t]hey didn't have any blood evidence." *Id.*, at 401. And the District Court instructed the jury, with no objection from Connick, "that the nonproduced blood evidence . . . violated [Thompson's] constitutional rights as a matter of law." *Id.*, at 1095.

[6] Justice Scalia questions petitioners' concession that *Brady* was violated when the prosecution failed to inform Thompson of the blood evidence. He considers the evidence outside *Brady* because the prosecution did not endeavor to test Thompson's blood, and therefore avoided knowing that the evidence was in fact exculpatory. *Ante, at 77-78, 179 L. Ed. 2d, at 440-442*. Such a "don't ask, don't tell" view of a prosecutor's *Brady* obligations garners no support from precedent. **[****60]** See also *supra, at 83, n. 4, 179 L. Ed. 2d, at 441*; *infra, at 98, n. 13, 179 L. Ed. 2d, at 437*.

[7] During jury deliberations in the armed robbery case, Williams, the only Orleans Parish trial attorney common to the two prosecutions, told Thompson of his objective in no uncertain terms: "I'm going to fry you. You will die in the electric chair." Tr. 252-253.

[8] The Louisiana Court of Appeal concluded, and Connick does not dispute, that Thompson "would have testified in the absence of the attempted armed robbery conviction." *State v. Thompson, 2002-0361, p. 7 (7/17/02), 825 So. 2d 552, 556*. But cf. *ante, at 54, 55, 179 L. Ed. 2d, at 422, 423* (Thompson "elected" not to testify).

murder. See *supra, at 82, 179 L. Ed. 2d, at 439*. Freeman's trial testimony was materially inconsistent with that report. Tr. 382-384, 612-614; Record EX270-EX274. Lacking any knowledge of the police report, Thompson could not point to the inconsistencies.

Third, and most vital, the eyewitness' initial description of the assailant's hair, see *supra, at 81, 179 L. Ed. 2d, at 439*, was of prime relevance, for it suggested that Freeman, not Thompson, murdered Liuzza, see *supra, at 82, 179 L. Ed. 2d, at 439*. The materiality of the eyewitness' contemporaneous description of the murderer should have been altogether apparent to the prosecution. Failure to produce the police reports setting out what the eyewitness first said not only undermined efforts to impeach that witness and the police officer who initially interviewed him. The omission left defense counsel without knowledge that the prosecutors were restyling the killer's "close cut hair" into an "Afro."

Prosecutors **[****63]** finessed the discrepancy between the eyewitness' initial description and Thompson's appearance. They asked leading questions **[***443]** prompting the eyewitness to agree **[*87]** on the stand that the perpetrator's hair was "afro type," yet "straight back." Record EX322-EX323. Corroboratively, the police officer--after refreshing his recollection by reviewing material at the prosecution's table--gave artful testimony. He characterized the witness' initial description of the perpetrator's hair as "black and short, *afro style*." *Id.*, at EX265 (emphasis added). As prosecutors well knew, nothing in the withheld police reports, which described the murderer's hair simply as "close cut," portrayed a perpetrator with an Afro or Afro-style hair.

The jury found Thompson guilty of first-degree murder. Having prevented Thompson from testifying that Freeman was the killer, the prosecution delivered its ultimate argument. Because Thompson was already serving a near-life sentence for attempted armed robbery, the prosecution urged, the only way to punish him for murder was to execute him. The strategy worked as planned; Thompson was sentenced to death.

E

Thompson discovered the prosecutors' misconduct through a serendipitous **[****64]** series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. **[**1375]** *Id.*, at EX709. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself. *Id.*, at EX712-EX713.

On April 16, 1999, the State of Louisiana scheduled Thompson's execution. *Id.*, at EX1366-EX1367. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. See **[*88]** *supra, at 84, 179 L. Ed. 2d, at 441*. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan "had failed to turn over stuff that might have been exculpatory." Tr. 718. Riehlmann prepared an affidavit describing Deegan's disclosure "that **[****65]** he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson." Record EX583.

Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson's execution, *id.*, at EX590, and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. See, *e.g.*, *id.*, at EX617. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss],." *id.*, at EX882. After a full day's hearing, the court vacated **[***444]** Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

> "[A]ll day long there have been a number of young Assistant D. A.'s . . . sitting in this courtroom watching this, and I hope they take home . . . and take to heart **[****66]** the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work." *Id.*, at EX883.

The District Attorney's Office then initiated grand jury proceedings against the prosecutors who had withheld

the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be **[*89]** *Brady* material if prosecutors did not know Thompson's blood type. Tr. 986; cf. *supra, at 84-85, n. 6, 179 L. Ed. 2d, at 441*. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." Tr. 978-979. In protest, that prosecutor tendered his resignation.

F

Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. *State v. Thompson, 2002-0361, p. 10 (7/17/02), 825 So. 2d 552, 558*. The unlawfully procured robbery conviction, the court held, had violated Thompson's right to testify and thus fully present his defense in the murder trial. *Id., at 557*. The merits of several *Brady* claims arising out of the murder trial, the court observed, had therefore become "moot." *825 So. 2d, at 555*; see also Record 684.[9] But cf. *ante, **[**1376]** at 63, n. 7, 69, n. 11, 179 L. Ed. 2d, at 428* (suggesting that there were no *Brady* violations in the **[****67]** murder prosecution because no court had adjudicated any violations).[10]

[9] Thompson argued that "the State failed to produce police reports 'and other information' which would have identified 'eye- and ear-witnesses' whose testimony would have exonerated him and inculpated [Freeman], . . . and would have shown that [Perkins,] . . . who stated [he] heard [Thompson] admit to committing the murder[,] had been promised reward money for [his] testimony." *Thompson, 825 So. 2d, at 555*. In leaving these arguments unaddressed, the Louisiana Court of Appeal surely did not defer to the Fifth Circuit's earlier assessment of those claims, made on an anemic record, in *Thompson v. Cain, 161 F.3d 802*. Nor did the Louisiana Court of Appeal suggest that Thompson was "belatedly tr[ying] to reverse" the Fifth Circuit's decision. But cf. *ante, at 69, n. 11, 179 L. Ed. 2d, at 432*.

[10] The Court notes that in *Thompson* v. *Cain*, the Fifth Circuit rejected *Brady* claims raised by Thompson, characterizing one of those claims as "without merit." *Ante, at 69, n. 11, 179 L. Ed. 2d, at 432* (quoting *Thompson, 161 F.3d, at 807*); see *supra, at 81, n. 2, 179 L. Ed. 2d, at 439*. The Court, however, overlooks the date of that Fifth Circuit decision. It was rendered before revelation of the *Brady* **[****68]** violations in the armed robbery trial, before Thompson had the opportunity for discovery in his *§ 1983* suit, and before Thompson or any court was aware of the "close cut hair" police reports. See *Thompson, 161 F.3d, at 812, n. 8*. It is these later revelations, not the little Thompson knew in 1998, that should count. For example, the Fifth Circuit, in 1998, believed that Perkins' statement recorded in the police report did not "differ from Freeman's trial testimony." *Id., at 808*. But evidence put before the jury in 2007 in the *§ 1983* trial showed that the police report, in several material respects, was inconsistent with Freeman's trial testimony. Tr. 382-383.

Connick has never suggested to this Court that the jury in the *§ 1983* trial was bound by the Fifth Circuit's 1998 Brady rulings. That court "afford[ed] great deference to" the state trial court's findings, made after a 1995 postconviction relief hearing. *Thompson, 161 F.3d, at 805*. The jury in the *§ 1983* trial, of course, had far more extensive and accurate information on which to reach its decision. Moreover, as earlier noted, the same trial court that made the 1995 findings was, in 1999, outraged by the subsequently discovered **[****69]** Brady violations and by Connick's reluctance to bring those violations to light. See *supra, at 88, 179 L. Ed. 2d, at 443-444*. Certainly that judge would not have wanted the jury that assessed Connick's deliberate indifference in the *§ 1983* trial to defer to findings he earlier made on a notably incomplete record.

[*90] Undeterred by his assistants' disregard of Thompson's rights, Connick **[***445]** retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having "close cut" hair, the police report recounting Perkins' meetings with the Liuzza family, see *supra, at 81-82, 179 L. Ed. 2d, at 439-440*, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

II

On July 16, 2003, Thompson commenced a civil action under *42 U.S.C. § 1983* alleging that Connick, other officials of the Orleans Parish District Attorney's Office, and the Office **[****70]** **[*91]** itself, had violated his constitutional rights by wrongfully withholding *Brady* evidence. Thompson sought to hold Connick and the District Attorney's Office liable for failure adequately to train prosecutors concerning their *Brady* obligations. Such liability attaches, I agree with the Court, only when the failure "amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.' " *Ante, at 61, 179 L. Ed. 2d, at 427* (quoting *Canton v. Harris, 489 U.S., at 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412)*. I disagree, however, with the

Court's conclusion that Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the § 1983 case found for Thompson, **[**1377]** concluding that the District Attorney's Office had been deliberately indifferent to Thompson's *Brady* rights and to the need for training and supervision to safeguard those rights. "Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdic[t] rendered by the jury," *Patrick v. Burget, 486 U.S. 94, 98, n. 3, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*, I see no cause to upset the District Court's determination, affirmed by the Fifth Circuit, that "ample evidence . . . adduced at trial" supported the jury's verdict. **[****71]** Record 1917.

Over 20 years ago, we observed that a municipality's failure to provide training may be so egregious that, even without notice of prior constitutional violations, the failure "could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton, 489 U.S., at 390, n. 10, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. "[I]n light of the duties assigned to specific officers or employees," *Canton* recognized, "it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *Id., at 390, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. Thompson presented convincing evidence to satisfy this standard.

[*92] [*446]** A

Thompson's § 1983 suit proceeded to a jury trial on two theories of liability: First, the Orleans Parish Office's official *Brady* policy was unconstitutional; and second, Connick was deliberately indifferent to an obvious need to train his prosecutors about their *Brady* obligations. Connick's *Brady* policy directed prosecutors to "turn over what was required by state and federal law, but no more." Brief for Petitioners 6-7. The jury thus understandably rejected **[****72]** Thompson's claim that the official policy itself was unconstitutional. *Ante, at 57, 179 L. Ed. 2d, at 424*.

The jury found, however, that Connick was deliberately indifferent to the need to train prosecutors about *Brady*'s command. On the special verdict form, the jury answered yes to the following question:

> "Was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by [Connick's] failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?" Record 1585.

Consistent with the question put to the jury, and without objection, the court instructed the jurors: "[Y]ou are not limited to the nonproduced blood evidence and the resulting infringement of Mr. Thompson's right to testify at the murder trial. You may consider all of the evidence presented during this trial." Tr. 1099; Record 1620.[11] But cf. *ante, at 54, 59, 63, **[*93] [**1378]** n. 7, 179 L. Ed. 2d, at 422, 424, 428, 431*; *ante, at 72, 179 L. Ed. 2d, at 434* (Scalia, J., concurring) (maintaining that the case involves a single *Brady* violation). That evidence included a stipulation that in his retrial for the Liuzza murder, Thompson had introduced ten exhibits containing **[****73]** relevant information withheld by the prosecution in 1985. See *supra, at 90, 179 L. Ed. 2d, at 445*.

Abundant evidence supported the jury's finding that additional *Brady* training was obviously necessary to

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[11] The court permitted Thompson to introduce evidence of other *Brady* violations, but because "the blood evidence alone proved the violation [of Thompson's constitutional rights]," the court declined specifically "to ask the jury [whether] this other stuff [was] also *Brady*." Tr. 1003. The court allowed Thompson to submit proof of other violations to "sho[w] the cumulative nature . . . and impact [of] evidence . . . as to . . . the training and deliberate indifference . . . ." *Ibid.* But cf. *ante, at 69, n. 11, 179 L. Ed. 2d, at 431* (questioning how "these violations are relevant" to this case). Far from indulging in my own factfindings, but cf. *Ibid.*, I simply recite the evidence supporting the jury's verdict in Thompson's § 1983 trial. The Court misleadingly states that "the District Court instructed the jury that the 'only issue' was whether the nondisclosure [of the crime lab report] was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors." *Ante, at 57, 179 L. Ed. 2d, at 423*. The jury instruction the majority cites simply directed the jury **[****74]** that, with regard to the blood evidence, as a matter of law, Thompson's constitutional rights had been violated. Record 1614-1615. The court did not preclude the jury from assessing evidence of other infringements of Thompson's rights. Id., at 1585; see *Kyles v. Whitley, 514 U.S. 419, 421, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)* ("[T]he state's obligation under Brady . . . turns on the cumulative effect of all . . . evidence suppressed by the government . . . .").

ensure that *Brady* violations would not occur: (1) Connick, the Office's sole policymaker, misunderstood *Brady*. (2) Other leaders in the Office, who bore direct responsibility for training less experienced prosecutors, were similarly uninformed about *Brady*. (3) Prosecutors in the Office received no *Brady* training. (4) The Office shirked **[***447]** its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements. As a result of these multiple shortfalls, it was hardly surprising that *Brady* violations in fact occurred, severely undermining the integrity of Thompson's trials.

1

Connick was the Office's sole policymaker, and his **[****75]** testimony exposed a flawed understanding of a prosecutor's *Brady* obligations. Connick admitted to the jury that his **[*94]** earlier understanding of *Brady*, conveyed in prior sworn testimony, had been too narrow. Tr. 181-182. Even at trial Connick persisted in misstating *Brady*'s requirements. For example, Connick urged that there could be no *Brady* violation arising out of "the inadvertent conduct of [an] assistant under pressure with a lot of case load." Tr. 188-189. The court, however, correctly instructed the jury that, in determining whether there has been a *Brady* violation, the "good or bad faith of the prosecution does not matter." Tr. 1094-1095.

2

The testimony of other leaders in the District Attorney's Office revealed similar misunderstandings. Those misunderstandings, the jury could find, were in large part responsible for the gross disregard of *Brady* rights Thompson experienced. Dubelier admitted that he never reviewed police files, but simply relied on the police to flag any potential *Brady* information. **[****76]** Tr. 542. The court, however, instructed the jury that an individual prosecutor has a "duty . . . to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.*, at 1095; Record 1614. Williams was asked whether "*Brady* material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he's lying"; he responded simply, and mistakenly, "No." Tr. 381. The testimony of "high-ranking individuals in the Orleans Parish District Attorney's Office," Thompson's expert explained,[12] exposed "complete **[**1379]** errors . . . as to what **[*95]** *Brady* required [prosecutors] to do." *Id.*, at 427, 434. "Dubelier had no understanding of his obligations under *Brady* whatsoever," *id.*, at 458, the expert observed, and Williams "is still not sure what his obligations were under *Brady*," *id.*, at 448. But cf. *ante, at 57, 179 L. Ed. 2d, at 424* ("[I]t was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused.").

The jury could attribute the violations of Thompson's rights directly to prosecutors' misapprehension of *Brady*. The prosecution had no obligation to produce the "close-cut hair" **[***448]** police reports, Williams maintained, because newspaper reports had suggested that witness descriptions were not consistent with Thompson's appearance. Therefore, Williams urged, the defense already "had everything." Tr. 139. Dubelier tendered an alternative explanation for the nondisclosure. In Dubelier's view, the descriptions were not "inconsistent with [Thompson's] appearance," as portrayed in a police photograph showing Thompson's hair extending at least **[****78]** three inches above his forehead. *Id.*, at 171-172; Record EX73. Williams insisted that he had discharged the prosecution's duty to disclose the blood evidence by mentioning, in a motion hearing, that the prosecution intended to obtain a blood sample from Thompson. Tr. 393-394. During the armed robbery trial, Williams told one of the victims that the results of the blood test made on the swatch had been "inconclusive." *Id.*, at 962. And he testified in the *§ 1983* action that the lab report was not *Brady* material "because I didn't know what the blood type of Mr. Thompson was." Tr. 393. But see *supra, at 84, n. 5, 179 L. Ed. 2d, at 441* (District Court instructed the jury that the lab report was *Brady* material).

[*96] 3

Connick should have comprehended that Orleans Parish prosecutors lacked essential guidance on *Brady*

[12] With no objection from petitioners, the court found Thompson's expert, Joseph Lawless, qualified **[****77]** to testify as an expert in criminal law and procedure. Tr. 419, 426. Lawless has practiced criminal law for 30 years; from 1976 to 1979, he was an Assistant District Attorney, and thereafter he entered private practice. *Id.*, at 412. He is the author of Prosecutorial Misconduct: Law, Procedure, Forms (4th ed. 2008), first published in 1985. Tr. 414. The text is used in a class on ethics and tactics for the criminal lawyer at Harvard Law School and in the federal defender training program of the Administrative Office of the United States Courts. *Id.*, at 416.

and its application. In fact, Connick has effectively conceded that *Brady* training in his Office was inadequate. Tr. of Oral Arg. 60. Connick explained to the jury that prosecutors' offices must "make . . . very clear to [new prosecutors] what their responsibility [i]s" under *Brady* and must not "giv[e] them a lot of leeway." Tr. 834-835. But the jury heard ample evidence that Connick's Office gave prosecutors **[****79]** no *Brady* guidance, and had installed no procedures to monitor *Brady* compliance.

In 1985, Connick acknowledged, many of his prosecutors "were coming fresh out of law school," and the Office's "[h]uge turnover" allowed attorneys with little experience to advance quickly to supervisory positions. See Tr. 853-854, 832. By 1985, Dubelier and Williams were two of the highest ranking attorneys in the Office, *id.*, at 342, 356-357, yet neither man had even five years of experience as a prosecutor, see *supra, at 83, n. 3, 179 L. Ed. 2d, at 440*; Record EX746; Tr. 55, 571-576.

Dubelier and Williams learned the prosecutorial craft in Connick's Office, and, as earlier observed, see *supra, at 95, 179 L. Ed. 2d, at 447-448*, their testimony manifested a woefully deficient understanding of *Brady*. Dubelier and Williams told the jury that they did **[**1380]** not recall any *Brady* training in the Office. Tr. 170-171, 364.

Connick testified that he relied on supervisors, including Dubelier and Williams, to ensure prosecutors were familiar with their *Brady* obligations. Tr. 805-806. Yet Connick did not inquire whether the supervisors themselves understood the importance of teaching newer prosecutors about *Brady*. Riehlmann could not "recall that [he] was ever trained **[****80]** or instructed by anybody about [his] *Brady* obligations," on the job or otherwise. Tr. 728-729. Whittaker agreed it was possible for "inexperienced lawyers, just a few weeks out of law school with no training," to bear responsibility **[*97]** for "decisions on . . . whether material was *Brady* material and had to be produced." *Id.*, at 319.

Thompson's expert characterized **[***449]** Connick's supervision regarding *Brady* as "the blind leading the blind." Tr. 458. For example, in 1985 trial attorneys "sometimes . . . went to Mr. Connick" with *Brady* questions, "and he would tell them" how to proceed. Tr. 892. But Connick acknowledged that he had "stopped reading law books . . . and looking at opinions" when he was first elected District Attorney in 1974. *Id.*, at 175-176.

As part of their training, prosecutors purportedly attended a pretrial conference with the Office's chief of trials before taking a case to trial. Connick intended the practice to provide both training and accountability. But it achieved neither aim in Thompson's prosecutions, for Dubelier and Williams, as senior prosecutors in the Office, were free to take cases to trial without pretrying them, and that is just how they proceeded in Thompson's **[****81]** prosecutions. *Id.*, at 901-902; Record 685. But cf. *ante, at 65, 179 L. Ed. 2d, at 429* ("[T]rial chiefs oversaw the preparation of the cases.").

Prosecutors confirmed that training in the District Attorney's Office, overall, was deficient. Soon after Connick retired, a survey of assistant district attorneys in the Office revealed that more than half felt that they had not received the training they needed to do their jobs. Tr. 178.

Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. Tr. of Oral Arg. 55. But cf. *ante, at 68, 179 L. Ed. 2d, at 430-431*. His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced.[13] Because that did not happen in **[*98]** the District Attorney's Office, it was inevitable that prosecutors would misapprehend *Brady*. Had *Brady*'s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.[14]

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[13] To ward off *Brady* violations of the kind Connick conceded, for example, Connick could have communicated to Orleans Parish prosecutors, in **[****82]** no uncertain terms, that, "[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over." Tr. of Oral Arg. 34; *id.*, at 36 ("[I]f you have evidence that can conclusively establish to a scientific certainty the innocence of the person being charged, you have to turn it over . . . ."). Or Connick could have told prosecutors what he told the jury when he was asked whether a prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant's blood type: "Under the law it qualifies as *Brady* material. Under Louisiana law we must turn that over. Under *Brady* we must turn that over." Tr. 872. But cf. *ante, at 78, 179 L. Ed. 2d, at 437* (Scalia, J., concurring) (questioning how Connick could have been on notice of the need to train prosecutors about the *Brady* violations conceded in this case).

[14] The Court can scarcely disagree with respect to Dubelier, Williams, and Whittaker, for it acknowledges the "flagran[cy]"

4 **[**1381]**

Louisiana did not require continuing legal education at the time of Thompson's trials. Tr. 361. But cf. *ante, at 65, 179 L. Ed. 2d, at 429*. Primary responsibility for keeping prosecutors *au courant* with developments in the law, therefore, resided in the District Attorney's Office. Over the course of Connick's tenure as **[***450]** District Attorney, the jury learned, the Office's chief of appeals circulated memoranda when appellate courts issued important opinions. Tr. 751-754, 798.

The 1987 Office policy manual was a compilation of memoranda on criminal law and practice circulated to prosecutors from 1974, when Connick became District Attorney, through 1987. *Id.*, at 798. The manual contained four sentences, nothing more, on *Brady*.[15] This slim instruction, the jury **[*99]** learned, was notably inaccurate, incomplete, and dated. Tr. 798-804, 911-918. But cf. *ante, at 65, 179 L. Ed. 2d, at 429* ("Senior attorneys also circulated court decisions and instructional memoranda to keep the prose-cutors abreast of relevant legal developments."). For example, the manual did not acknowledge what *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*, made plain: Impeachment evidence **[****84]** is *Brady* material prosecutors are obligated to disclose.[16]

[*100] In sum, the evidence permitted the jury to reach the following conclusions. First, Connick did not ensure that prosecutors in his Office knew their *Brady* obligations; **[**1382]** he neither confirmed their familiarity with *Brady* when he hired them, nor saw to it that training took place on his watch. Second, the need for *Brady* training and monitoring was obvious to Connick. Indeed he so testified. Third, Connick's cavalier approach to his staff's knowledge and observation of *Brady* requirements contributed to a culture of inattention to *Brady* in Orleans Parish.

As earlier noted, see *supra, at 88-89, 179 L. Ed. 2d, at 444*, Connick resisted an effort to hold prosecutors **[***451]** accountable for *Brady* compliance because he felt the effort would "make [his] job more difficult." Tr. 978. He never disciplined or fired a single prosecutor for violating *Brady*. Tr. 182-183. The jury was told of this Court's decision in *Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*, a capital case prosecuted by Connick's Office that garnered attention because it featured **[****87]** "so many instances of the state's failure to disclose exculpatory evidence." *Id., at 455, 115 S. Ct. 1555, 131 L. Ed. 2d 490* (Stevens, J., concurring). When questioned about *Kyles*, Connick told the jury he was satisfied with his Office's practices and saw no need, occasioned by *Kyles*, to make any changes. Tr. 184-185. In both quantity and quality, then,

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of Deegan's conduct, see *ante, at 60, n. 5, 179 L. Ed. 2d, at 426*, and does not dispute **[****83]** that, pretrial, other prosecutors knew of the existence of the swatch and lab report.

[15] Section 5.25 of the manual, titled "*Brady* Material," states in full: "In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called Brady material--that is, information in the possession of the State which is exculpatory regarding the defendant. The duty to produce Brady material is ongoing and continues throughout the entirety of the trial. Failure to produce Brady material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of Brady issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory information possessed by the State." Record EX427.

[16] During the relevant time period, there were many significant developments in this Court's *Brady* jurisprudence. Among the *Brady*-related decisions this Court handed down were *United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)* ("This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence [in the *Brady* **[****85]** context]."); *Weatherford v. Bursey, 429 U.S. 545, 559-560, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)* ("*Brady* is not implicated . . . where the only claim is that the State should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial."); and *United States v. Agurs, 427 U.S. 97, 103, 104, 106-107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)* (*Brady* claim may arise when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," when defense counsel makes "a pretrial request for specific evidence" and the government fails to accede to that request, and when defense counsel makes no request and the government fails to disclose "obviously exculpatory" evidence). These decisions were not referenced in the manual that compiled circulated memoranda.

In the same period, the Louisiana Supreme Court issued dozens of opinions discussing Brady, including *State v. Sylvester, 388 So. 2d 1155, 1161 (1980)* (impeachment evidence must be disclosed in response to a specific request if it would create a "reasonable doubt that did not otherwise exist"); *State v. Brooks, 386 So. 2d 1348, 1351 (1980)* (Brady extends to **[****86]** any material information favorable to the accused); and *State v. Carney, 334 So. 2d 415, 418-419 (1976)* (reversible error if prosecution fails, even inadvertently, to disclose bargain with a witness).

the evidence canvassed here was more than sufficient to warrant a jury determination that Connick and the prosecutors who served under him were not merely negligent regarding *Brady*. Rather, they were deliberately indifferent to what the law requires.

B

In *Canton*, this Court spoke of circumstances in which the need for training may be "so obvious," and the lack of training "so likely" to result in constitutional violations, that policymakers who do not provide for the requisite training "can reasonably be said to have been deliberately indifferent to the need" for such training. *489 U.S., at 390, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. **[*101]** This case, I am convinced, belongs in the category *Canton* marked out.

Canton offered an often-cited illustration. "[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." *Ibid*., n. 10. Those policymakers, *Canton* observed, **[****88]** equip police officers with firearms to facilitate such arrests. *Ibid.* The need to instruct armed officers about "constitutional limitations on the use of deadly force," *Canton* said, is " 'so obvious,' that failure to [train the officers] could properly be characterized as 'deliberate indifference' to constitutional rights." *Ibid.*

The District Court, tracking *Canton*'s language, instructed the jury that Thompson could prevail on his "deliberate indifference" claim only if the evidence persuaded the jury on three points. First, Connick "was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused." Tr. 1099. Second, "the situation involved a difficult choice[,] or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed." *Ibid.* Third, "the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights." *Ibid.* Record 1619-1620; see *Canton, 489 U.S., at 390, and n. 10, 109 S. Ct. 1197, 103 L. **[***452]** Ed. 2d 412*; *Walker v. New York, 974 F.2d 293, 297-298 (CA2 1992)*.[17]

[*102] **[**1383]** Petitioners used this formulation of the failure to train standard in pretrial and post-trial submissions, Record 1256-1257, 1662, and in their own proposed jury instruction on deliberate indifference.[18]

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[17] Justice Scalia contends that **[****89]** this "theory of deliberate indifference would repeal the law of *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*," and creates a danger that " 'failure to train' would become a talismanic incantation producing municipal liability [i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee." *Ante, at 73-74, 179 L. Ed. 2d, at 434-435* (some internal quotation marks omitted). The District Court's charge, however, cautiously cabined the jury's assessment of Connick's deliberate indifference. See, *e.g.*, Tr. 1100 ("Mr. Thompson must prove that more likely than not the *Brady* material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence."). See also *id.*, at 1096-1097, 1099-1100.

The deliberate indifference jury instruction in this case was based on the Second Circuit's opinion in *Walker v. New York, 974 F.2d 293, 297-298 (1992)*, applying Canton to a *§ 1983* complaint alleging that a district attorney failed to train prosecutors about Brady. Justice Scalia's fears should be calmed by post-Walker experience in the Second Circuit. There has been no "litigation flood or even rainfall," *Skinner v. Switzer, 562 U.S. 521, 535, 131 S. Ct. 1289, 179 L. Ed. 2d 233, 2011 U.S. LEXIS 1905 (2011)*, **[****90]** in that Circuit in Walker's wake. See Brief for National Association of Criminal Defense Lawyers as Amicus Curiae 39 ("Tellingly, in the Second Circuit, in the nearly 20 years since the court decided Walker, there have been no successful lawsuits for non-Brady constitutional violations committed by prosecutors at trial (and no reported 'single violation' Brady case)." (citation omitted)); Brief for Center on the Administration of Criminal Law, New York University School of Law, et al. as Amici Curiae 35-36 (Walker has prompted "no flood of *§ 1983* liability").

[18] The instruction Connick proposed resembled the charge given by the District Court. See *supra, at 101, 179 L. Ed. 2d, at 451*. Connick's proposed instruction read: "Before a district attorney's failure to train or supervise constitutes deliberate indifference to the constitutional rights **[****91]** of citizens: (1) the plaintiff must show that Harry Connick knew 'to a moral certainty' that his employees will confront a given situation; (2) the plaintiff must show that the situation either presents the employee with a difficult choice . . . such that training or supervision will make the choice less difficult or that there is a history of employees mishandling the situation; and (3) the plaintiff must show that the wrong choice by the assistant district attorney will frequently cause the deprivation of a citizen's constitutional rights." Record 992 (citing *Canton, 489 U.S., at 390, 109 S. Ct. 1197, 103 L. Ed. 2d 412*; punctuation altered). But cf. *ante, at 74, 179 L. Ed. 2d, at 435* (Scalia, J., concurring) (criticizing "Thompson's theory" of deliberate indifference).

Petitioners, it is true, argued all along that "[t]o prove deliberate indifference, Thompson had to demonstrate a

Nor do petitioners dispute that **[*103]** Connick "kn[e]w to a moral certainty that" his prosecutors would regularly face *Brady* decisions. See *Canton, 489 U.S., at 390, n. 10, 109 S. Ct. 1197, 103 L. Ed. 2d 412*.

The jury, furthermore, could reasonably find that *Brady* rights may **[****92]** involve choices so difficult that Connick obviously knew or should have known prosecutors needed more than perfunctory training to make the correct choices. See *Canton, 489 U.S., at 390, and n. 10, 109 S. Ct. 1197, 103 L. **[***453]** Ed. 2d 412*.[19] As demonstrated earlier, see *supra, at 94-96, 179 L. Ed. 2d, at 447-448*, even at trial prosecutors failed to give an accurate account of their *Brady* obligations. And, again as emphasized earlier, see *supra, at 96-98, 179 L. Ed. 2d, at 448-449*, the evidence permitted the jury to conclude that Connick should have known *Brady* training in his office bordered on "zero." See **[**1384]** Tr. of Oral Arg. 41. Moreover, Connick understood that newer prosecutors needed "very clear" guidance and should not be left to grapple with *Brady* on their own. Tr. 834-835. It was thus "obvious" to him, the jury could find, that constitutional rights would be in jeopardy if prosecutors received slim to no *Brady* training.

Based on the evidence presented, the jury could conclude that *Brady* errors by untrained prosecutors would frequently cause deprivations of defendants' constitutional rights. The jury learned of several *Brady* oversights in Thompson's trials and heard testimony that Connick's Office had one of the worst *Brady* records in the country. Tr. 163. Because prosecutors faced considerable pressure to get convictions, *id.*, at 317, 341, and were instructed to "turn over what was required by state and federal law, but no more," Brief for **[*104]** Petitioners 6-7, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.

In sum, despite Justice Scalia's protestations to the contrary, *ante, at 72, 76, 179 L. Ed. 2d, at 434, 436*, the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office. Thompson demonstrated that no fewer than five prosecutors--the four trial prosecutors and Riehlmann--disregarded his *Brady* rights. He established that they kept **[****94]** from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial.[20]

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pattern of violations," eg. Brief for Appellants in No. 07-30443 (CA5), p. 41; see *ante, at 74-75, 179 L. Ed. 2d, at 435-436* (Scalia, J., concurring), but the court rejected their categorical position. Petitioners did not otherwise assail the District Court's formulation of the deliberate indifference instruction. E.g., Record 1662.

[19] Courts have noted the often trying nature of a prosecutor's *Brady* obligation. See, *e.g.*, *State v. Whitlock, 454 So. 2d 871, 874 (La. App. 1984)* (recognizing, in a case involving *Brady* issues in Connick's Office, that "it is usually most difficult to determine whether or not inconsistencies or omitted information in witnesses' statements are material to the **[****93]** defendant's guilt" (quoting *State v. Davenport, 399 So. 2d 201, 204 (La. 1981)*)).

[20] The jury could draw a direct, causal connection between Connick's deliberate indifference, prosecutors' misapprehension of *Brady*, and the *Brady* violations in Thompson's case. See, *e.g.*, *supra, at 94, 179 L. Ed. 2d, at 447* (prosecutors' misunderstandings of *Brady* "were in large part responsible for the gross disregard of *Brady* rights Thompson experienced"); *supra, at 95, 179 L. Ed. 2d, at 447* ("The jury could attribute the violations of Thompson's rights directly to prosecutors' misapprehension of *Brady*."); *supra, at 94-95, 179 L. Ed. 2d, at 447* (Williams did not believe *Brady* required disclosure of impeachment evidence and did not believe he had any obligation to turn over the impeaching "close-cut hair" police reports); *supra, at 95, 179 L. Ed. 2d, at 447* (At the time of the armed robbery trial, Williams reported that the results of the blood test on the swatch were "inconclusive."); *ibid.* ("[Williams] testified . . . that the lab report was not *Brady* material . . . ."); *supra, at 96, 179 L. Ed. 2d, at 448-449* (Dubelier and Williams, the lead prosecutors in Thompson's **[****95]** trials, "learned the prosecutorial craft in Connick's Office," "did not recall any *Brady* training," demonstrated "a woefully deficient understanding of *Brady*," and received no supervision during Thompson's trials); *supra, at 98, 179 L. Ed. 2d, at 449* ("Had *Brady*'s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court."); *supra, at 100, 179 L. Ed. 2d, at 450* (Connick did not want to hold prosecutors accountable for *Brady* compliance because he felt that doing so would make his job more difficult); *supra, at 100, 179 L. Ed. 2d, at 450* (Connick never disciplined a single prosecutor for violating *Brady*); *supra, at 103, 179 L. Ed. 2d, at 453* ("Because prosecutors faced considerable pressure to get convictions, and were instructed to turn over what was required by state and federal law, but no more, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense." (citations and internal quotation marks omitted)). But cf. *ante, at 60, n. 5, 179 L. Ed. 2d, at 426* ("The dissent believes that evidence that the

[*105] [1385]** C

Unquestionably, a municipality **[***454]** that leaves police officers untrained **[****97]** in constitutional limits on the use of deadly weapons places lives in jeopardy. *Canton, 489 U.S., at 390, n. 10, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. But as this case so vividly shows, a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less "deliberately indifferent" to the risk to innocent lives.

Brady, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant's fair trial right. See *Cone v. Bell, 556 U.S. 449, 451, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009)*. See also *United States v. Bagley, 473 U.S. 667, 695, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)* (Marshall, J., dissenting). Vigilance in superintending prosecutors' attention to *Brady*'s requirement is all the more important for **[*106]** this reason: A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out. Because the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light.

The Court nevertheless holds *Canton*'s example inapposite. It maintains that professional obligations, ethics rules, and training **[****98]** --including on-the-job training--set attorneys apart from other municipal employees, including rookie police officers. *Ante, at 64-68, 179 L. Ed. 2d, at 428-431*. Connick "had every incentive at trial to attempt to establish" that he could reasonably rely on the professional education and status of his staff. Cf. *ante, at 62, n. 6, 179 L. Ed. 2d, at 428*. But the jury heard and rejected his argument to that effect. Tr. 364, 576-577, 834-835.

The Court advances Connick's argument with greater clarity, but with no greater support. On what basis can one be confident that law schools acquaint students with prosecutors' unique obligation under *Brady*? Whittaker told the jury he did not recall **[***455]** covering *Brady* in his criminal procedure class in law school. Tr. 335. Dubelier's *alma mater*, like most other law faculties, does not make criminal procedure a required course.[21]

Connick suggested that the bar examination ensures that new attorneys will know what *Brady* demands. Tr. 835. Research indicates, however, that from 1980 to the present, *Brady* questions have not accounted **[****99]** for even 10% of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination.[22] A person sitting for the Louisiana Bar Examination, moreover, need **[*107]** pass only five of the exam's nine **[**1386]** sections.[23] One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.

The majority's suggestion that lawyers do not need *Brady* training because they "are equipped with the tools to find, interpret, and apply legal principles," *ante, at 70, 179 L. Ed. 2d, at 432*, "blinks reality" and is belied by the facts of this case. See Brief for Former Federal Civil Rights Officials and Prosecutors as *Amici Curiae* 13 (hereinafter Prosecutors Brief). Connick himself

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prosecutors allegedly 'misapprehen[ded]' *Brady* proves causation.").

I note, furthermore, that the jury received **[****96]** clear instructions on the causation element, and neither Connick nor the majority disputes the accuracy or adequacy of the instruction that, to prevail, Thompson must prove "that more likely than not the Brady material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of Brady evidence." Tr. 1100.

The jury was properly instructed that "[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor." Id., at 1098. Under that instruction, in finding Connick liable, the jury necessarily rejected the argument--echoed by Justice Scalia--that Deegan "was the only bad guy." Id., at 1074. See also id., at 1057; *ante, at 76, 179 L. Ed. 2d, at 424*. If indeed Thompson had shown simply and only that Deegan deliberately withheld evidence, I would agree that there would be no basis for liability. But, as reams of evidence showed, disregard of Brady occurred, over and over again in Orleans Parish, before, during, and after Thompson's 1985 robbery and murder trials.

[21] See Tulane University Law School, Curriculum, http://www.law.tulane.edu (select "Academics"; select "Curriculum") (as visited Mar. 21, 2011, and in Clerk of Court's case file).

[22] See Supreme Court of Louisiana, Committee on Bar Admissions, Compilation of Louisiana State Bar Examinations, Feb. 1980 through July 2010 (available in Clerk of Court's case file).

[23] See La. State Bar Assn., Articles of Incorporation, Art. 14, § 10(A), *La. Rev. Stat. Ann. § 37, ch. 4, App. (West 1974)*; *ibid.* (West 1988).

recognized that his prosecutors, because of their inexperience, were not so equipped. Indeed, "understanding and complying with *Brady* obligations are not easy tasks, and the **[****100]** appropriate way to resolve *Brady* issues is not always self-evident." Prosecutors Brief 6. "*Brady* compliance," therefore, "is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted," and "training remains critical." *Id.*, at 3, 7.

The majority further suggests that a prior pattern of similar violations is necessary to show deliberate indifference to defendants' *Brady* rights. See *ante, at 57-59, 179 L. Ed. 2d, at 424-425*, and *n. 4, 63-64, 179 L. Ed. 2d, at 428-429*.[24] **[*108]** The text of *§ 1983* contains no such limitation.[25] **[***456]** Nor is there any reason to imply such a limitation.[26] A district attorney's deliberate indifference might be shown in several ways short of a prior pattern.[27] This case **[**1387]** is one such instance. Connick, created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult.

A district attorney aware of his office's high turnover rate, who recruits prosecutors fresh out of law school and promotes them rapidly through the ranks, bears responsibility **[*109]** for ensuring that on-the-job training takes place. In short, the buck stops with him.[28] As the Court recognizes, "the duty to produce *Brady* evidence to the defense" is "[a]mong prosecutors' unique ethical obligations." *Ante, at 66, 179 L. Ed. 2d, at 430*. The evidence in this case presents overwhelming support for the conclusion that the Orleans Parish Office slighted its responsibility to the profession and to the State's system of justice by providing no on-the-job *Brady* training. Connick was not "entitled to rely on

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[24] *Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)*, reaffirmed "that **[****101]** evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Id., at 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626*. Conducting this inquiry, the Court has acknowledged, "may not be an easy task for the factfinder." *Canton v. Harris, 489 U.S. 378, 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*. *Bryan Cty.* did not retreat from this Court's conclusion in *Canton* that "judge and jury, doing their respective jobs, will be adequate to the task." *489 U.S., at 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. See also *Bryan County, 520 U.S., at 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626* (absent a pattern, municipal liability may be predicated on "a particular glaring omission in a training regimen"). But cf. *ante, at 68-70, 179 L. Ed. 2d, at 431-433* (suggesting that under no set of facts could a plaintiff establish deliberate indifference for failure to train prosecutors in their *Brady* obligation without showing a prior pattern of violations).

[25] When Congress sought to render a claim for relief contingent on showing a pattern or practice, it did so expressly. See, *e.g.*, *42 U.S.C. § 14141(a)* ("It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct **[****102]** by law enforcement officers . . . that deprives persons of rights . . . protected by the Constitution . . . ."); *15 U.S.C. § 6104(a)* ("Any person adversely affected by any pattern or practice of telemarketing . . . may . . . bring a civil action . . . ."); *49 U.S.C. § 306(e)* (authorizing the Attorney General to bring a civil action when he "has reason to believe that a person is engaged in a pattern or practice [of] violating this section"). See also *47 U.S.C. § 532(e)(2)-(3)* (authorizing the Federal Communications Commission to establish additional rules when "the Commission finds that the prior adjudicated violations of this section constitute a pattern or practice of violations").

[26] In the end, the majority leaves open the possibility that something other than "a pattern of violations" could also give a district attorney "specific reason" to know that additional training is necessary. See *ante, at 67, 179 L. Ed. 2d, at 430-431*. Connick, by his own admission, had such a reason. See *supra, at 96-98, 179 L. Ed. 2d, at 433*.

[27] For example, a prosecutor's office could be deliberately indifferent if it had a longstanding open-file policy, abandoned that policy, but failed to provide training to show prosecutors how to comply with their **[****103]** *Brady* obligations in the altered circumstances. Or a district attorney could be deliberately indifferent if he had a practice of paring well-trained prosecutors with untrained prosecutors, knew that such supervision had stopped untrained prosecutors from committing *Brady* violations, but nevertheless changed the staffing on cases so that untrained prosecutors worked without supervision.

[28] If the **[****104]** majority reads this statement as an endorsement of *respondeat superior* liability, *ante, at 70, n. 12, 179 L. Ed. 2d, at 432*, then it entirely "misses [my] point," cf. *ante, at 69, 179 L. Ed. 2d, at 432*. *Canton* recognized that deliberate indifference liability and *respondeat superior* liability are not one and the same. *489 U.S., at 385, 388-389, 109 S. Ct. 1197, 103 L. Ed. 2d 412*. Connick was directly responsible for the *Brady* violations in Thompson's prosecutions not because he hired prosecutors who violated *Brady*, but because of his own deliberate indifference.

prosecutors' professional training," *ante, at 67, 179 L. Ed. 2d, at 430*, for Connick himself should have been the principal insurer of that training.

* * *

For the reasons stated, I would affirm the judgment of the U. S. Court of Appeals for the Fifth Circuit. Like that court and, before it, the District Court, I would uphold the jury's verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right.

References

U.S.C.S., *Constitution, Amendment 14*; *42 U.S.C.S. § 1983*

3 Antieau on Local Government Law § 43.03 (Matthew Bender 2d ed.)

3 Civil Rights Actions PP10.04, 10.08 (Matthew Bender)

L Ed Digest, Civil Rights § 27

L Ed Index, District and Prosecuting Attorneys; Municipal Corporations and Other Political Subdivisions

Prosecution's failure to preserve potentially exculpatory evidence as violating criminal defendant's due process rights under Federal Constitution--Supreme Court cases. *102 L. Ed. 2d 1041*.

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence **[****105]** favorable to accused--Supreme Court cases. *87 L. Ed. 2d 802*.

Supreme Court's construction of Civil Rights Act of 1871 (*42 U.S.C.S. § 1983*) providing private right of action for violation of federal rights. *43 L. Ed. 2d 833*.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Cr. No. H-04-25
	§	
JEFFREY K. SKILLING and	§	Violations: 15 U.S.C. §§ 78j(b), 78m(a),
RICHARD A. CAUSEY,	§	78m(b)(2), 78ff; 18 U.S.C. §§ 371, 1343,
	§	2 and 3551 et seq.
Defendants.	§	

SUPERSEDING INDICTMENT

The Grand Jury charges:

INTRODUCTION

At all times relevant to this Superseding Indictment:

1. Enron Corp. ("Enron") was an Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas and power, construction and ownership of pipelines, power facilities and energy-related businesses, provision of telecommunications services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange and were bought, held, and sold by individuals and entities throughout the United States and the world. Enron and its directors, officers, and employees were required to comply with regulations of the United States Securities and Exchange Commission ("SEC"). Those regulations protect members of the investing public by, among other things, requiring that a company's financial information is fully and accurately recorded

and fairly presented to the public. The regulations require, among other things, that a company submit filings to the SEC in Washington, D.C. that include fair and accurate financial statements and management discussion and analysis of a company's business.

3. The price of Enron's stock was influenced by factors such as Enron's reported revenue, earnings, debt, cash flow, and credit rating, as well as its growth potential and ability to meet consistently revenue and earnings targets and forecasts. Enron's management provided guidance to the investing public regarding anticipated revenue and earnings for upcoming reporting periods. Such guidance was communicated in presentations and conference calls to securities analysts and in other public statements by Enron executives. Relying in part on the company's guidance, securities analysts disseminated to the public their own estimates of the company's expected performance. These earnings estimates, or analysts' expectations, were closely followed by investors. Typically, if a company announced earnings that failed to meet or exceed analysts' expectations, the price of the company's stock declined.

4. It was critical to Enron's ongoing business operations that it maintain an investment grade rating for its debt, which was rated by national rating agencies. An investment grade rating was essential to Enron's ability to enter into trading contracts with its counterparties and to maintain sufficient lines of credit with major banks. In order to maintain an investment grade rating, Enron was required to demonstrate that its financial condition was stable and that the risk that Enron would not repay its debts and other financial obligations was low. The credit rating agencies relied on, among other things, Enron's public filings, including its financial statements filed with the SEC, in rating Enron's debt. In addition, members of Enron's senior management met regularly with, and provided financial and other information to, representatives

of credit rating agencies. Two primary factors influencing Enron's credit rating and the willingness of banks to extend loans to Enron were Enron's total amount of debt and other obligations and its cash flow.

PRINCIPAL CONSPIRATORS

5. Defendant JEFFREY K. SKILLING was employed by or acted as a consultant to Enron from at least the late 1980s through early December 2001. From 1979 to 1990, SKILLING was employed by the consulting firm of McKinsey & Co., where he provided consulting services to Enron. In August 1990, Enron hired SKILLING. SKILLING held various executive and management positions at Enron and in January 1997, Enron promoted SKILLING to President and Chief Operating Officer ("COO") of the entire company, reporting directly to Enron's CEO and Chairman.

6. In February 2001, SKILLING was named President and CEO of Enron. On August 14, 2001, with no forewarning to the public, SKILLING resigned from Enron. As COO and CEO of Enron, SKILLING was the senior manager of the company's commercial operations and finances and one of its principal spokespersons with the investing public. SKILLING closely supervised on a day-to-day basis the activities of each of Enron's business units and the heads of those business units, as well as the activities of the senior Enron managers who conducted the company's financial and accounting activities. He routinely led and participated in presentations and conference calls with securities analysts and in other communications in which Enron provided the public with guidance concerning the company's performance. SKILLING signed Enron's annual reports filed on Form 10-K with the SEC and he signed quarterly and annual representation letters to Enron's auditors.

7. Defendant RICHARD A. CAUSEY was a certified public accountant and was an employee of Enron from 1991 through early 2002. From 1986 to 1991, while an employee of the accounting firm Arthur Andersen LLP ("Andersen"), CAUSEY sold audit services to Enron on behalf of Andersen, which served as Enron's outside auditor. In 1991, Enron hired CAUSEY as Assistant Controller of Enron Gas Services Group. From 1992 to 1997, CAUSEY served in various executive level positions at Enron. In 1998, CAUSEY was made Chief Accounting Officer ("CAO") of Enron and an Executive Vice-President.

8. As Enron's CAO, defendant RICHARD A. CAUSEY managed Enron's accounting practices. CAUSEY reported to Enron's Chairman and CEO, including to defendant JEFFREY K. SKILLING. Together with SKILLING, Enron's Chief Financial Officer ("CFO") Andrew S. Fastow, its Treasurer, and others, CAUSEY was a principal manager of Enron's finances. CAUSEY was also a principal manager of Enron's disclosures and representations to the investing public. He routinely participated in presentations and conference calls with securities analysts and in other communications in which Enron provided the public with guidance concerning the company's performance. CAUSEY signed Enron's annual reports filed on Form 10-K and its quarterly reports on Form 10-Q with the SEC and he signed quarterly and annual representation letters to Enron's auditors.

9. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY conspired with numerous Enron executives and senior managers in the scheme to defraud described in this Superseding Indictment. The coconspirators included, but were not limited to, former Enron CFO Andrew S. Fastow, who was a supervisor of such matters as Enron's structured finance, cash flow, and debt management activities; former Enron Treasurer Ben F.

Glisan, Jr., who reported to SKILLING and, at times, Fastow and also was a supervisor of Enron's structured finance, cash flow and debt management activities; former Enron North America ("ENA") and Enron Energy Services ("EES") CEO David W. Delainey, who reported to SKILLING and was a supervisor of the largest part of Enron's wholesale energy business and, later, of its retail energy business; former ENA CAO Wesley Colwell, who reported to CAUSEY and Delainey and managed the accounting for Enron's wholesale energy business; former Enron Global Finance Managing Director Michael Kopper, who reported to Fastow and conducted structured finance activities for Enron; and others.

SCHEME TO DEFRAUD

10. From at least 1999 through late 2001, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators engaged in a wide-ranging scheme to deceive the investing public, the SEC, credit rating agencies and others (the "Victims") about the true performance of Enron's businesses by: (a) manipulating Enron's finances so that Enron's publicly reported financial results would falsely appear to meet or exceed analysts' expectations; 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 in all material respects represent Enron's actual financial condition and performance, and omitted to disclose facts necessary to make those statements and representations truthful and accurate.

11. The scheme's objectives were, among other things, to report recurring earnings that falsely appeared to grow smoothly by approximately 15 to 20 percent annually; to meet or exceed the published expectations of securities analysts forecasting Enron's reported earnings-per-share and other results; to conceal and avoid publicly reporting any large "write-

downs" or losses; to persuade investors through false and misleading statements that Enron's profitability would continue to grow; to deceive credit rating agencies in order to maintain an investment-grade credit rating; to deceive the investing public about the true magnitude of growing debt and other obligations required to keep the company's varied and often unsuccessful business ventures afloat; to increase artificially Enron's reported cash flow in order to mask a growing disparity between the company's reported revenues and its actual earnings from operations; and to artificially inflate the share price of Enron's stock.

12. Due to the efforts of defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators, Enron's publicly reported financial results and filings and its public descriptions of itself, including in public statements made by or with the knowledge of SKILLING and CAUSEY, did not truthfully present the financial position, results from operations, and cash flow of the company and omitted to disclose facts necessary to make the disclosures and statements that were made truthful and not misleading. As a consequence, the financial appearance of Enron that SKILLING, CAUSEY and their coconspirators presented to the investing public concealed the real Enron.

13. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY were among the principal architects and operators of the scheme to manipulate Enron's reported financial results and to present Enron in a misleading manner. Together with their coconspirators, they set annual and quarterly earnings and cash flow targets ("budget targets") for the company as a whole and for each of Enron's business units. In furtherance of the scheme to defraud, SKILLING and CAUSEY, together with their coconspirators and others, predetermined Enron's budget targets and "backed into" those targets through, among other things, the use of

deceptive accounting devices.

14. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators set the targets by determining the numbers necessary for each Enron business unit to produce in order to meet Enron's mandates for growth and analysts' expectations, rather than by determining how much earnings and cash flow that a particular business unit could reasonably be expected to generate. On a quarterly and year-end basis, SKILLING and CAUSEY and others assessed Enron's progress toward its budget targets. When the budget targets were not met through actual results from business operations, the desired targets were achieved through the use of various earnings and cash flow "levers," including but not limited to those described in this Superseding Indictment. These levers were designed to manipulate Enron's finances and prop up its stock price by, among other things, filling earnings and cash flow shortfalls that were at times in the hundreds of millions of dollars. These shortfalls were referred to within Enron variously as the "gap," "stretch" or "overview."

15. As described more fully in this Superseding Indictment, many of the levers used by Enron to fill the shortfall between its budget targets and its actual performance were complex transactions designed primarily to achieve specific accounting results. The structure of many such transactions was inconsistent with the transactions' underlying economic substance. Other transactions actually were to Enron's financial detriment but were completed because they achieved desired accounting goals that could improve Enron's apparent performance. Often these transactions were completed in haste near, and at times after, the close of a financial reporting period.

16. From time to time, without regard to the actual performance of the

company, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators arbitrarily increased budget targets at or near the end of a quarter so that Enron could exceed analysts' expectations by falsely appearing to achieve and publicly reporting a higher than projected earnings-per-share result. At times, SKILLING and CAUSEY caused these revisions to earnings-per-share results even after the close of a quarter, when they knew that Enron had not in fact achieved the reported results and again without regard to the company's actual business performance for that quarter. Instead, to meet the increased earnings-per-share targets, Enron would employ one or more of the levers described in this Superseding Indictment.

17. The levers relied on by defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators to manipulate Enron's reported financial results included fraudulent accounting devices, as well as the fraudulent use of accounting techniques to create a false and misleading picture of Enron's business operations. In addition, the conspiracy included, at times, intentionally false and misleading representations, and omissions of material information, in Enron's communications with its outside auditor in order to ensure that the conspiracy's objectives were achieved. This combination of accounting maneuvers, coupled with misleading public statements and omissions about Enron's business performance by SKILLING, CAUSEY and others, enabled Enron to appear as a healthy and growing company that consistently met or exceeded its projected financial results through a sound business plan. In fact, as SKILLING and CAUSEY well knew, beginning at least in the fourth quarter of 1999, Enron consistently failed to meet budget targets through normal business operations and was able to appear successful only because of the scheme described in this Superseding Indictment.

18. For a time, the scheme of defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators to inflate artificially the share price of Enron's stock and to maintain Enron's credit rating at investment grade succeeded. The misleading portrayal of Enron's financial condition supported Enron's stock price and its credit rating. In early 1998, Enron's stock traded at approximately $30 per share. By January 2001, even after a 1999 stock split, Enron's stock had risen to over $80 per share and Enron had become the seventh-ranked company in the United States, according to the leading index of the "Fortune 500." Until late 2001, Enron maintained an investment grade credit rating.

19. During this time, the rise in Enron's stock price enriched defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators through salary, bonuses, grants of artificially appreciating stock and stock options, and prestige within their professions and communities. Between 1998 and 2001, SKILLING received approximately $200 million from the sale of Enron stock options and restricted stock, netting over $89 million in profit, and was paid more than $14 million in salary and bonuses. Between 1998 and 2001, CAUSEY received more than $14 million from the sale of Enron stock and stock options, netting over $5 million in profit, and was paid more than $4 million in salary and bonuses. Coconspirators, as well as other Enron executives and senior managers, sold hundreds of millions of dollars worth of Enron stock at artificially inflated prices.

20. In the end, the scheme of defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators collapsed. On August 14, 2001, SKILLING suddenly resigned from Enron, according to SKILLING and Enron, for "personal reasons." Enron's stock price, which had been declining since January 2001, fell sharply. On October 16,

2001, Enron announced purportedly "nonrecurring" losses of approximately $1 billion. Enron's stock declined further. On October 29 and November 1, 2001, the two leading credit rating agencies downgraded Enron's credit rating. On November 8, 2001, Enron announced its intention to restate its financial statements for 1997 through 2000 and the first and second quarters of 2001 to reduce previously reported net income by an aggregate of $586 million. On November 28, 2001, Enron's credit rating was further downgraded to "junk" status. On December 2, 2001, Enron filed for bankruptcy, making its stock, which less than a year earlier had been trading at over $80 per share, virtually worthless.

DEVICES EMPLOYED IN FURTHERANCE OF SCHEME

21. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators employed various devices in furtherance of the fraudulent scheme, including but not limited to:

a. manufacturing and manipulating earnings through fraudulent use of reserve accounts to mask volatility in Enron's wholesale energy trading earnings and conceal and retain large amounts of those trading earnings for later use in order to achieve desired earnings results;

b. manufacturing earnings and artificially improving Enron's balance sheet through fraudulent over-valuation of assets in Enron's merchant investment portfolio;

c. concealing large losses and failures in Enron's two highly-touted new businesses, EES and Enron Broadband Services ("EBS"), by manipulating Enron's "segment reporting" and using its reserved energy trading earnings to hide EES's losses, and by

manipulating expense accounting to hide the extent of EBS's losses;

d. manufacturing earnings by falsely touting Enron's EBS business in order to drive up Enron's stock price, then misleadingly presenting earnings from the resulting increase in Enron's share price as recurring earnings from energy operations;

e. structuring financial transactions in a misleading manner in order to achieve earnings objectives, avoid booking of large losses in asset values, and conceal debt, including through the fraudulent use of a purportedly third-party investment entity that in fact was not truly independent from Enron and which was used to achieve Enron's financial reporting objective and to enrich Enron executives and senior managers; and

f. structuring financial transactions in a misleading manner in order to conceal the amount of Enron's debt and to create the false appearance of greater cash flows.

22. Through the use of these devices, as well as others, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators presented and described Enron's financial results, which had been engineered to appear far more successful than they actually were, in a false and misleading manner in conferences with securities analysts, press releases, media statements, and other forms of communication with the investing public.

Manufacturing and Manipulating Reported Earnings through Improper Use of Reserves

23. Third Quarter 2000 through Third Quarter 2001: During 2000 and 2001, the profitability of Enron's wholesale energy trading business, primarily based in its Enron Wholesale business unit, dramatically increased for reasons including rapidly rising energy prices in the western United States, especially in California. This sudden and large increase in trading

profits, which exceeded $1 billion, if disclosed to the public, would have made it apparent that Enron Wholesale's revenues were closely tied to the market price for energy, and that Enron therefore was exposed to the risk of a decline in such prices. Such disclosure would have undermined Enron's description and presentation of itself as the dominant "intermediator" in the energy markets, rather than as a speculative (and therefore risky) trading company whose stock would trade at a much lower price-to-earnings ratio.

24. From the third quarter of 2000 through the third quarter of 2001, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators fraudulently used reserve accounts within Enron Wholesale to mask the extent and volatility of Enron Wholesale's windfall trading profits, particularly its profits from the California energy markets, to avoid reporting large losses in other areas of its business, and to preserve the earnings for use in later quarters in which Enron could improperly use them to meet analysts' expectations. By early 2001, undisclosed reserve accounts within Enron Wholesale, which prior to mid-2000 had held only tens of millions of dollars of Enron's energy trading earnings, contained over $1 billion in unreported earnings. SKILLING, CAUSEY and their coconspirators improperly planned to and did use hundreds of millions of dollars of those undisclosed reserved earnings for, among other things, ensuring that budget targets were met and that hundreds of millions of dollars in losses within Enron's EES business unit were successfully concealed from the investing public.

25. Second Quarter 2000: In mid-July 2000, well after the second quarter 2000 was over, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and others conceived and executed a plan artificially to support and inflate Enron's share price by

fraudulently reporting an earnings-per-share figure of 34 cents, as opposed to the 32 cents per share that analysts predicted Enron would report. SKILLING and CAUSEY were aware that Enron's performance for the quarter, even after Enron's use of earnings levers and manipulation of its budget targets, did not support an earnings per share figure of 34 cents.

26. In order to help achieve the earnings-per-share target that defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY wanted to report publicly, a senior Enron executive improperly released into earnings millions of dollars from a "prudency" reserve account in Enron's energy trading business, which purportedly existed so that Enron would not report more energy trading earnings than it actually expected to collect. This release of millions of dollars from the prudency reserve account was not done for legitimate business or accounting objectives. It was done solely to accomplish defendants SKILLING's and CAUSEY's desire to publicly report a higher earnings per share number than expected by securities analysts for the second quarter 2000, and thereby artificially inflate and support Enron's share price.

Manufacturing Earnings by Fraudulently Manipulating Asset Values

27. Enron executives and senior managers, including defendant RICHARD A. CAUSEY, engaged in a pattern of fraudulent conduct designed to generate earnings needed to meet targets by artificially increasing the book value of certain assets in Enron's large "merchant asset portfolio." This portfolio included interests in many energy-related businesses that were not publicly traded and, therefore, were valued by Enron according to its own internal valuation "models." Enron at times manipulated these models in order to produce results desired to meet earnings targets. For example, in the fourth quarter of 2000, under the direction of CAUSEY and others, Enron personnel fraudulently increased the value of one of the largest of Enron's

merchant assets, Mariner Energy, by $100 million in order to help close a budget shortfall.

Concealing EES Failures

28. In presentations to the investing public, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators heavily emphasized the performance and potential of EES as a major reason for past and projected increases in the value of Enron's stock, at one time attributing as much as half of Enron's total stock value to EES and EBS combined. To support what Enron already had said about EES, SKILLING, CAUSEY and their coconspirators concealed massive losses in EES's business through fraudulently manipulating Enron's "business segment reporting."

29. They accomplished this at the close of the first quarter of 2001 through a reorganization designed to conceal the existence and magnitude of EES's unexpectedly severe business failure. Enron hid that failure from the investing public by moving large portions of EES's business – which defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and others knew at the time otherwise would have to report hundreds of millions of dollars in losses – into Enron Wholesale, which was the Enron business segment housing most of the company's wholesale energy trading operations and income. As SKILLING, CAUSEY and others knew, Enron Wholesale would have ample earnings, including in the massive reserve accounts described above, to ensure that Enron Wholesale could absorb the huge losses that in fact were attributable to EES while at the same time continuing to meet Enron's budget targets. In public statements to securities analysts and others, SKILLING, CAUSEY and others acting at their direction explained the change in segment reporting solely as a means to improve efficiency. They omitted to disclose that the purported "efficiency" maneuver in fact concealed from the

public and other failures in the touted EES business unit, including huge losses in that business. Instead, SKILLING, CAUSEY and others stated publicly that EES was continuing to perform profitably and as expected.

Promoting EBS to Manufacture Earnings and Concealing Failure of EBS

30. "Rollout" of EBS: Beginning in 1999, defendant JEFFREY K. SKILLING and others sought artificially to support and inflate Enron's stock price by falsely characterizing Enron as a company whose earnings and future prospects were determined to a substantial extent by its telecommunications business, EBS. At that time, stocks of technology sector companies, commonly known as "dot-coms," generally traded at a significant premium on public securities markets. SKILLING and others referred to this plan as giving "dot-com luster" to Enron's share price. A centerpiece of this strategy to promote EBS as a major factor in Enron's earnings and share value was a dramatic presentation about EBS.

31. "Project Grayhawk": Knowing that Enron's presentation about EBS at its January 20, 2000 conference with securities analysts was designed to, and likely would, cause an immediate increase in Enron's stock price, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators constructed and approved a scheme to allow Enron to record and report as earnings from operations $85 million of what in reality was just the increase in Enron's share price caused by the EBS presentation. Through its energy trading and assets business, Enron recorded earnings from a partnership interest it held in a large energy investment named JEDI. JEDI's capital consisted, in part, of Enron stock. When Enron's stock price rose, the value of JEDI rose. In September 1999, JEDI hedged its Enron stock through a transaction with Enron that fixed the value of the Enron stock at a set price. Just before the January 20, 2000

analyst conference, Enron executed a series of transactions, in a project known as "Grayhawk," that temporarily removed the fixed hedge and replaced it with an open one that did not limit the upside gain to JEDI from increases in value of the Enron stock. After the conference, the fixed hedge was then reinstated at Enron's then higher share price. The purpose and effect of temporarily removing the fixed hedge was to enable Enron to capture increased value of JEDI from the dramatic increase in Enron's stock price as a result of its January 20, 2000 analyst conference. Enron then improperly reported and publicly described this gain as recurring operating income in its energy business and failed to disclose to the investing public the manipulative manner in which it had been able to recognize as income the appreciation of its own stock.

32. January 20, 2000 Analyst Conference: At the January 20, 2000 analyst conference, defendant JEFFREY K. SKILLING and his coconspirators knowingly made false and misleading statements about EBS. SKILLING stated, among other things, that EBS "has already established the superior broadband delivery network"; that EBS has "built this network . . . and we are turning on the switch"; that the critical "network control software" was in Enron's possession and incorporated and used in its network; and that Enron valued the business at $30 billion, which SKILLING called a "conservative" valuation. In SKILLING's presence, EBS's co-CEO Joseph Hirko stated that EBS possessed advance network control software and that it was no "pipe dream." In reality, EBS had neither the claimed broadband network in place, nor the critical proprietary network control software to run it. The claims about EBS remained only unproven concepts and laboratory demonstrations that SKILLING was advised would take years to complete and might never be realized. In addition, the valuation of the business was inflated

by billions of dollars over what internal and external valuations had advised SKILLING might be supportable.

33. First Quarter 2000 Earnings: SKILLING's and others' plan to boost Enron's stock price by aggressively touting EBS and to record earnings from that boost succeeded. On January 11, 2000, the date on which Enron removed the fixed hedge on the Enron stock in JEDI as part of "Project Grayhawk," Enron stock traded at approximately $47 per share. After the analyst conference on January 20, 2000, Enron stock rose to approximately $67 per share. The "Project Grayhawk" maneuver allowed Enron to recognize, through JEDI, approximately $85 million in earnings as a result of the manufactured bounce in the stock from the false and misleading presentation to analysts about EBS. Enron then misleadingly described these earnings in later presentations to analysts and in SEC filings as ordinary and recurring operating earnings from its energy business. Enron did not disclose its manipulation of the hedge on the Enron stock in JEDI to the investing public, nor did it disclose that approximately 20-percent of the earnings of Enron's largest business segment and the unit in which major Enron energy businesses were housed resulted not from business operations but solely from an increase in Enron's own stock price.

34. Concealment of EBS Failure: By late 2000, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and others well knew that EBS was a struggling business that was losing far larger than expected amounts of money. However, they took steps to ensure that EBS's financial results did not publicly reflect its problems. For example, during 2000, Enron structured a series of misleading, one-time financial transactions in EBS that were designed to manufacture earnings that Enron used to present the false impression that EBS was

progressing towards generating operating profits. Even with these transactions, EBS still was facing much larger than expected losses during the first quarter 2001. In order to ensure that EBS did not record in the first quarter 2001 losses that exceeded Enron's annual budgeted loss target for EBS, and in order to ensure that the quarterly budgeted loss target dictated by SKILLING and CAUSEY for the first quarter 2001 was met, CAUSEY and others acting at his direction fraudulently reduced, and caused to be fraudulently reduced, EBS's expenses for the first quarter of 2001.

Use of Special Purpose Entities and LJM Partnership to Manipulate Financial Results

35. Special Purpose Entities: One of the levers by which defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators ensured that Enron met financial reporting targets was the creation and use of Special Purpose Entities ("SPEs"). SPEs were used to achieve "off-balance-sheet" accounting treatment of assets and business activities so that Enron could present itself more attractively as measured by criteria favored by securities analysts, credit rating agencies, and others. Under applicable accounting rules, if a company conducted a transaction with an SPE that included at least a three-percent equity investment that was at risk and from an independent source, a company could, under certain conditions, treat the results of such a transaction as "deconsolidated," or excluded, from its own financial results. This meant that a company could record the earnings and cash flow from such a deal in its own results, but did not have to record liabilities such as debt in the transaction on its own balance sheet.

36. Creation of LJM Partnership: In June 1999, in order to have a purportedly independent third party available to provide this outside equity funding so that Enron could more

easily create and use SPEs to achieve its desired financial reporting results, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and others sought and obtained the approval of Enron's Board of Directors (the "Board") for CFO Fastow to create and serve as the managing partner of an investment partnership named LJM1 that would invest in SPEs for Enron. The Board later approved Fastow's participation in another even larger entity used to fund SPEs by Enron, LJM2 (the LJM entities are collectively referred to as "LJM" unless otherwise noted). LJM's business activity principally involved transactions with Enron and Enron affiliates.

37. As defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY well knew, LJM was not a legitimate third party acting independently from Enron. Instead, LJM was controlled by Fastow acting simultaneously in his capacity both as Enron's CFO and as the general partner in LJM. SKILLING, CAUSEY, Fastow and others then exploited Fastow's dual role as a means to ensure that LJM did not act as a truly independent third party investor would have, but rather as Enron's own vehicle to achieve its financial reporting objectives and as a means for Fastow and others to be heavily compensated for contributing to Enron's success in meeting its financial reporting objectives.

38. From approximately July 1999 through October 2001, Enron entered into transactions with LJM that defrauded the Victims. The transactions with LJM enabled Enron, among other things, to: (a) manipulate its reported financial results by readily and unobtrusively moving poorly performing assets off balance sheet, when in fact such off-balance-sheet treatment was improper; (b) conceal Enron's poor operating performance by engaging in transactions designed to close gaps between Enron's actual business results and its stated financial reporting goals; (c) manufacture earnings through sham transactions when Enron was having trouble

otherwise meeting its goals for a quarter or year; and (d) improperly inflate the value of Enron's investment portfolio by backdating documents when advantageous to Enron.

39. "Raptor" Hedges: Beginning in the spring of 2000, Enron and LJM engaged in a series of financial transactions with four SPEs called Raptor I, Raptor II, Raptor III and Raptor IV (collectively referred to as the "Raptors"). Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, Fastow, Enron Treasurer Ben F. Glisan, Jr., and their coconspirators used the Raptors to manipulate fraudulently Enron's reported financial results. They designed and approved Raptor I, among other things, to protect Enron from having to report publicly in its financial results decreases in value in large portions of its energy merchant asset portfolio and technology investments by hedging the value of those investments with an allegedly independent third party created by Enron and LJM, known as Talon.

40. As defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY well knew, however, the Raptor I structure was invalid under applicable accounting rules because Talon was not independent from Enron, and LJM's investment in Talon was not sufficiently at risk to qualify as outside equity. CAUSEY and Fastow had an oral side deal that LJM would receive its initial investment of $30 million in Talon plus a profit of $11 million from Enron, all prior to Talon engaging in any of the hedging transactions for which it was created. As a quid pro quo for this payment to LJM, Fastow agreed with CAUSEY that Enron employees could use Raptor I to manipulate Enron's balance sheet, including by allowing Enron employees, without negotiation or due diligence on behalf of LJM, to select the values at which the Enron assets were hedged with Talon. Defendant JEFFREY K. SKILLING was informed of and approved Fastow's deal with CAUSEY in order to ensure that Enron achieved the financial reporting goals

for which Raptor I was designed, even though it was clear that the Raptor I structure was not properly off Enron's balance sheet.

41. The defendant RICHARD A. CAUSEY, Fastow, Glisan, and others satisfied CAUSEY's and Fastow's side deal by manufacturing a transaction between Enron and Talon that generated a $41 million payment to LJM but had no legitimate business purpose for Enron. After satisfying the conditions of the side deal by providing LJM with a guaranteed return on its investment, Enron began to use Raptor I to hedge the value of Enron's assets. Enron employees manipulated the book values of Enron assets, many of which were expected to decline in value, before they were hedged, knowing that the Raptor I structure ensured that Enron would not suffer the financial reporting consequences of subsequent declines or large fluctuations in the value of those assets. CAUSEY and Fastow further used Raptor I fraudulently to promote Enron's financial position by back-dating a hedge to Enron's advantage, capturing an inflated stock value of one of the Enron assets at a time when they knew that value already had declined. The basic structure used in Raptor I, including CAUSEY's and Fastow's oral side deal, was repeated in the three successor fraudulent hedging devices known as Raptors II, III and IV.

42. Manufacturing Earnings and Concealing Debt through Purported Sales to LJM: In addition to the fraudulent Raptor hedging devices, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and other Enron senior managers, used LJM to conduct other transactions in order to achieve financial reporting objectives, usually purported asset sales that yielded reported earnings and cash flow and moved poorly performing assets temporarily off Enron's balance sheet. SKILLING, CAUSEY, Fastow, and others made undisclosed side agreements that guaranteed LJM against risk in certain of its transactions with Enron. These

included side agreements that CAUSEY, Fastow and others termed "Global Galactic," pursuant to which CAUSEY and Fastow rigged Enron-LJM deals so as to safeguard Enron's scheme to manipulate its reported financial results.

43. One such transaction involved LJM's "purchase" of Enron's interest in a company that was building a power plant in Cuiaba, Brazil (the "Cuiaba project"). On September 30, 1999, when no true third-party buyer could be found, Enron "sold" a portion of its interest in the Cuiaba project to LJM for $11.3 million. LJM agreed to "buy" this interest only because defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, Fastow and others, in an undisclosed side deal, agreed that Enron would buy back the interest, if necessary, at a profit to LJM. Based on this purported "sale," which was in fact an asset parking or warehousing arrangement, Enron improperly recognized approximately $65 million in income in the third and fourth quarters of 1999, when it was straining to meet budget targets designed to ensure that it achieved its earnings-per-share goals.

44. By 2001, the Cuiaba project was approximately $200 million over budget. Nonetheless, in the spring of 2001, defendants JEFFREY K. SKILLING, RICHARD A. CAUSEY and Fastow caused Enron to agree to buy back LJM's interest in the Cuiaba project at a considerable profit to LJM, in keeping with the undisclosed oral side deal. After agreeing to execute the repurchase, SKILLING, CAUSEY, Fastow and others decided to delay publicly consummating the deal until Fastow sold his interest in LJM so that Fastow's role in the transaction would not be disclosed. Because Fastow's role at LJM was coming under increased scrutiny, SKILLING, CAUSEY, Fastow and others sought ways to circumvent public disclosures about Fastow's dual roles in LJM and as Enron's CFO. Consequently, the repurchase was not

effected until after Enron filed its second quarter 2001 financial reports, in which no repurchase or agreement to repurchase was disclosed. In fact, Enron had agreed to the repurchase all along and it was accomplished just weeks after the second quarter filing with the SEC on the same terms as those agreed upon earlier.

45. Nigerian Barges: In the fourth quarter 1999 Enron pushed through several end-of-the-quarter transactions that were designed solely to achieve budget targets at a time when the company was struggling to produce earnings sufficient to ensure that Enron met analysts' expectations and Enron's predictions for earnings growth. One transaction used by Enron to ensure that its target was met in the fourth quarter of 1999 was a deal whereby Enron "sold" Merrill Lynch an interest in electricity-generating power barges moored off the coast of Nigeria. When Enron was unable to find a true buyer for the barges by December 1999, it parked the barges with Merrill Lynch so that Enron could record $12 million in earnings and $28 million in cash flow needed to meet budget targets.

46. Enron was able to induce Merrill Lynch to enter into the Nigerian barges transaction by promising that Merrill Lynch would receive a return of its investment plus an agreed-upon profit within six months. Enron conveyed this promise in the form of an oral "handshake" side-deal with Merrill Lynch that was concealed from Enron's auditor and the public. Because Merrill Lynch's supposed equity investment was not sufficiently "at risk," accounting rules prohibited Enron from treating the transaction as a sale from which it could record earnings and cash flow. In June 2000, Enron in fact delivered on its "handshake" promise to Merrill Lynch by producing LJM as a buyer for the Nigerian barges. Defendant RICHARD A. CAUSEY and Fastow agreed to include LJM's repurchase of the Nigerian barges from Merrill

Lynch at the agreed-upon profit to Merrill Lynch in their "Global Galactic" agreement concerning LJM deals designed to assist Enron in achieving its financial reporting objectives. In turn, CAUSEY assured that LJM would be bought out at a profit and paid a large fee for taking Merrill Lynch out of the transaction by the agreed-upon June 30, 2000 deadline.

False and Misleading Representations to Investing Public

47. In furtherance of the scheme to manipulate Enron's financial results and inflate its stock price, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and others presented and participated in the presentation of knowingly false and misleading statements about Enron's financial results, the performance of its businesses, and the manner in which its stock was and should be valued. These statements were disseminated to the investing public in conferences, conference calls, press releases, interviews, statements to members of the media, and SEC filings. They included, but were not limited to, those described in paragraphs 48 through 62 below.

48. First Quarter 2000 Analyst Call: On April 12, 2000, Enron held its quarterly conference call to discuss its earnings for the first quarter of 2000. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY were among the senior Enron managers who participated in the call and Enron's preparation for the call. SKILLING knowingly made false and misleading statements about Enron's operating earnings for the quarter and omitted to disclose facts necessary to make his statements not misleading. SKILLING stated that Enron's wholesale energy "assets and investments" business recorded earnings of $220 million for the quarter; that those earnings were "attributable to increased earnings from Enron's portfolio of energy-related and other investments"; that "this was a pretty good quarter for the energy-related

investment business in contrast to the drag it was over the last year"; and that the upswing in earnings in that portion of Enron's business was "basically the performance of the existing asset portfolios." Those statements were materially misleading because SKILLING omitted to disclose that, in reality, approximately $85 million of the $220 million in earnings were unrelated to the operating performance of Enron's energy business. Rather, as SKILLING well knew, through "Project Grayhawk," they were solely attributable to a scheme to generate earnings by manufacturing an increase in Enron's own stock price by heavily touting EBS at Enron's January 20, 2000 analyst conference.

49. Fourth Quarter 2000 Analyst Call: On January 22, 2001, Enron held its quarterly conference call with securities analysts to discuss its earnings for the fourth quarter of 2000. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY were among the senior Enron managers who participated in the call and Enron's preparation for the call. SKILLING knowingly made false and misleading statements about Enron's wholesale and retail energy trading businesses and omitted to disclose facts necessary to make his statements not misleading, including that "for Enron, the situation in California had little impact on fourth quarter results. Let me repeat that. For Enron, the situation in California had little impact on fourth quarter results." He further stated that "nothing can happen in California that would jeopardize" Enron's earnings targets for 2001 and that California business was "small" for Enron. In reality, as SKILLING well knew, Enron reaped huge profits in 2000 from energy trading in California and concealed hundreds of millions of dollars of those earnings in undisclosed reserve accounts for later use. Also, as SKILLING well knew, by late January 2001, California utilities owed EES hundreds of millions of dollars that EES could not collect and Enron had concealed large

reserves that it was forced to book for those uncollectible receivables within Enron Wholesale's books.

50. In support of Enron's claims that EBS continued to be successful and a major positive factor contributing to Enron's current and future stock price, a senior Enron manager misled analysts during the call about the source of EBS's earnings in the fourth quarter of 2000. After being directed by defendant JEFFREY K. SKILLING to answer a question about the source of EBS's revenues, the senior manager said that one-time, nonrecurring transactions such as sales of "dark fiber" and a "monetization," or sale, of part of EBS's nascent video-on-demand venture with the Blockbuster company accounted for only "a fairly small amount" of EBS's revenues. In truth, as Enron executives and senior managers including defendant RICHARD A. CAUSEY well knew, the sale of projected future revenues from the Blockbuster video-on-demand venture, which Enron abandoned just a quarter later, accounted for $53 million of EBS's fourth quarter 2000 revenues of $63 million.

51. January 25, 2001 Analyst Conference: Enron held its annual conference in Houston with securities analysts on January 25, 2001. At that conference, defendant JEFFREY K. SKILLING and coconspirators under his supervision, as a focal point of Enron's case for an increased stock value, knowingly made false and misleading presentations about the performance and potential of EBS and EES and omitted to disclose facts necessary to make his statements not misleading. SKILLING called all of Enron's major businesses, including EBS and EES, "strong franchises with sustainable high earnings power." With regard to EBS, he said that "our network's in place." He asserted that Enron's stock, which was then trading at over $80 per share, should be valued at $126 per share, attributing $63 of that alleged stock value to EBS and

EES. He stated that Enron was "not a trading business."

52. These statements were false and misleading and omitted facts necessary to make them not misleading. In reality, as defendant JEFFREY K. SKILLING well knew, EBS was performing very poorly and had made little commercial progress in 2000; EBS personnel had recommended shutting down or selling EBS's network; EBS had few revenue prospects for the upcoming year; and EBS had an unsupportable cost structure that, without correction, could potentially lead to substantial losses well in excess of those Enron had publicly forecast. Also, as SKILLING well knew, EES too was an unsuccessful business. Its modest earnings during 2000 largely resulted from one-time sales of investments unrelated to its retail energy contracting business; its existing retail energy contracts were overvalued by hundreds of millions of dollars; and it was owed hundreds of millions of dollars by the California utilities that it could not collect and that Enron was concealing within Enron Wholesale. In addition, as SKILLING well knew, Enron had made huge profits from speculative wholesale energy trading during 2000, particularly in the western United States, and had concealed hundreds of millions of dollars of those earnings in reserve accounts.

53. March 23, 2001 Analyst Call: Enron held a special conference call with securities analysts on March 23, 2001 in an effort to dispel growing public concerns about Enron's stock, which had fallen from over $80 per share to under $60 per share in less than two months. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY were among the senior Enron managers who participated in the call and Enron's preparation for the call. SKILLING knowingly made false and misleading statements, and omitted to disclose facts necessary to make his statements not misleading, in an effort to prop up Enron's stock. Among

other things, he stated that "Enron's business is in great shape" and "I know this is a bad stock market but Enron's in good shape," even though, as SKILLING well knew, both of Enron's showpiece new businesses, EBS and EES, were failing. He stated that Enron was "highly confident" of its income target of $225 million for the year for EES and that EES was seeing the "positive effect" of "the chaos that's going on out in California." In reality, even EES's existing contracts were overvalued by hundreds of millions of dollars. EES was owed hundreds of millions of dollars by the California utilities that it could not collect and Enron had concealed reserves it was forced to book for those receivables within Enron Wholesale. EES's new management was predicting that it would take a year or more for EES to become truly profitable.

54. Defendant JEFFREY K. SKILLING further stated that EBS "is coming along just fine" and that the company was "very comfortable with the volumes and targets and the benchmarks that we set for EBS." He said that EBS's two profit-and-loss centers, intermediation and content services, were "growing fast" and that EBS was not laying off employees but rather "moving people around inside EBS" and that this was "very good news." In reality, as SKILLING well knew, EBS was continuing to fail. Senior personnel at EBS had reported that the unit had an unsupportable cost structure and unproven revenue model. One senior EBS executive estimated that Enron would need to write-off, that is record as a loss, approximately half of EBS's $875 million book value. EBS was laying off employees and SKILLING had told employees based in Portland, Oregon that EBS would be centralized in Houston and jobs would be cut because of a "total meltdown" in the broadband industry.

55. First Quarter 2001 Analyst Call: Enron held its conference call with securities analysts to discuss its first quarter 2001 results on April 17, 2001. Defendants

JEFFREY K. SKILLING and RICHARD A. CAUSEY were among the senior Enron managers who participated in the call and Enron's preparation for the call. SKILLING made false and misleading statements in the call and omitted to disclose facts necessary to make his statements not misleading. SKILLING talked about continued "big, big numbers" in EES's energy contracting business. He falsely explained Enron's movement of EES's energy contract portfolio into Enron Wholesale by omitting any reference to EES's large losses or their transfer to Enron Wholesale and stating, "[W]e have such capability in our wholesale business that we were -- we just weren't taking advantage of that in managing our portfolio at the retail side. And this retail portfolio has gotten so big so fast that we needed to get the best -- the best hands working risk management there." While Enron reported modest first quarter earnings for EES of $40 million, in reality, as SKILLING well knew, EES was facing losses approaching one billion dollars, including overvalued contracts, uncollectible receivables with the California utilities, and huge costs from an increased California regulatory surcharge. As alleged in this Superseding Indictment, Enron had moved EES's energy trading portfolio into Enron Wholesale to conceal those losses.

56. Defendant JEFFREY K. SKILLING made further knowingly false and misleading statements about Enron's wholesale energy trading business, and omitted to disclose facts necessary to make his statements not misleading, including that "we remain confident that the situation in California will have no material impact on our financial condition and no adverse impact on 2001 earnings." He refused, when pressed by analysts, to provide any detail or specific numbers regarding Enron's reserves and to explain how Enron's reserves were allotted between EES and Enron Wholesale, stating only that "we have adequate reserves and other credit

offsets in place" to cover any exposure in California. In reality, as SKILLING well knew, Enron had concealed for later use hundreds of millions of dollars of year 2000 energy trading profits, much of them from the California market, in reserve accounts within Enron Wholesale that exceeded $1 billion, and had used those reserves to conceal hundreds of millions of dollars of potential losses to EES, much of them incurred in the California market.

57. Defendant JEFFREY K. SKILLING also made knowingly false and misleading statements, and omitted to disclose facts necessary to make his statements not misleading, about the success of EBS. He stated that "[o]ur network is now substantially complete" and that it "is just not the case" that Enron was reducing staff of EBS because it was getting out of the content services business. SKILLING also stressed that the reported losses in the unit were on target and "anticipated" and that the unit's capital expenditures were being reduced because it was "able to get access to connectivity without having to build it." In reality, as SKILLING well knew, the cost-cutting measures at EBS were instituted because the unit was continuing to fail and to lay off employees rather than redeploy them, and was incurring much larger than expected losses that could not be offset with projected future revenues.

58. A senior Enron manager made further false and misleading statements about EBS in the call, and omitted to disclose facts necessary to make his statements not misleading, including that revenues from selling portions of EBS's content business, as opposed to recurring earnings from operations, were only "about a third" of EBS's overall earnings and that EBS had only done "a little bit" of such sales in the past two quarters. In reality, as defendant JEFFREY K. SKILLING well knew, the sale of a portion of EBS's content business was the principal mechanism by which the unit had generated revenue in the last two quarters

and accounted for the majority of EBS's earnings for the first quarter of 2001. Only a very small percentage of the unit's revenues in either quarter was due to operations that could be expected to recur. Moreover, EBS had only been able to meet its target of $35 million in losses for the first quarter of 2001 through the combined efforts of the sale of portions of its content services business and the manipulation of the accounting for many of its expenses and allocations under the supervision of defendant RICHARD A. CAUSEY.

59. Second Quarter 2001 Analyst Call: Enron held its conference call with securities analysts to discuss its second quarter 2001 results on July 12, 2001. Defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY were among the senior Enron managers who participated in the call and Enron's preparation for the call. SKILLING made further knowingly false and misleading statements about the condition of Enron, and omitted to disclose facts necessary to make his statements not misleading, including that Enron had a "great quarter." He further stated that EES "had an outstanding second quarter" and was "firmly on track to achieve our 2001 target of $225 million" in earnings; that losses in EBS were due to "industry conditions" and "dried up" revenue opportunities; and that Enron's "new businesses are expanding and adding to our earnings power and valuation, and we are well positioned for future growth." A senior Enron manager also misled analysts about the movement of EES's energy contracting portfolio into Enron Wholesale, stating, "We just took the risk management functions and combined them because we just -- we were trying to get some more efficiency out of management of the overall risk management function."

60. In reality, as defendant JEFFREY K. SKILLING well knew, by the close of the second quarter of 2001, EBS had failed and its increased losses were because it had

stopped the one-time sales of portions of its business that had previously been the only significant source of its earnings. EES was facing hundreds of millions of dollars in concealed losses and was a year or more away from any prospect of success. As a whole, Enron was less than five months from bankruptcy and the accelerating pace of the company's decline was well known to SKILLING, who abruptly resigned on August 14, 2001.

61. Third Quarter 2001 Analyst Call: Enron held its quarterly conference call to discuss its third quarter 2001 earnings results with securities analysts on October 16, 2001. Defendant RICHARD A. CAUSEY was among the senior Enron managers who participated in the call and Enron's preparation for the call. For the first time during the duration of the scheme to manipulate its reported financial results, Enron conceded that it had suffered large losses, totaling approximately $1 billion, in certain segments of its business. These areas included many declining assets that had been concealed in the "Raptor" hedges as well as EBS. However, CAUSEY and others knowingly attempted to mislead the investing public about these losses in order to prevent the bad news from further devaluing Enron's stock price.

62. Enron misleadingly described the hundreds of millions of dollars in losses stemming from the "unwind," or abandonment, of the "Raptors" as "nonrecurring" losses, that is, a one-time or unusual earnings event. However, as defendant RICHARD A. CAUSEY well knew, over the course of prior quarters, Enron had characterized the positive earnings that it previously recognized, and then hedged, from these same assets as ordinary operating earnings that could be expected to recur. In addition, Enron did not disclose in its third quarter press release a substantial reduction in shareholder equity. Instead, Enron's Chairman/CEO only briefly mentioned in the call that "[i]n connection with the early termination [of the Raptor

structures], shareholders' equity will be reduced approximately $1.2 billion." In reality and as defendant RICHARD A. CAUSEY well knew, this disclosure, which immediately alarmed securities analysts because of its size and abnormality, resulted not from the termination of the "Raptor" structures, but principally from a huge accounting error by Enron in prior earnings results that Enron shortly would be forced to concede and correct.

False and Misleading Representations to Victims

63. In furtherance of the scheme to manipulate Enron's financial results and inflate its stock price, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY and their coconspirators filed and caused to be filed with the SEC false annual 10-K reports for the years ending December 31, 1999 and December 31, 2000, and false quarterly 10-Q reports for the quarters ending September 30, 1999, March 31, 2000, June 30, 2000, September 30, 2000, March 31, 2001 and June 30, 2001. Among other things, those filings contained materially false and misleading financial statements that misstated Enron's actual revenues and earnings and understated Enron's actual debt and expenses and materially false and misleading management descriptions and analysis of Enron's business, and they omitted to disclose facts necessary in order to make the disclosures made, in light of the circumstances under which they were made, not misleading. In addition, in furtherance of the scheme, SKILLING, CAUSEY and others knowingly misrepresented, concealed and hid, and knowingly caused to be misrepresented, concealed and hidden, the existence, goals and acts done in furtherance of the scheme, including by providing false, misleading and inaccurate information and making false representations to, among others, the Victims.

COUNT ONE
(Conspiracy to Commit Securities and Wire Fraud:
Scheme to Manipulate Reported Financial Results)

64. The allegations in paragraphs 1 through 63 are realleged as if fully set forth here.

65. In or about and between late 1999 and December 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, did knowingly and intentionally conspire (1) to willfully and unlawfully use and employ manipulative and deceptive contrivances and directly and indirectly (i) to employ devices, schemes and artifices to defraud; (ii) to make untrue statements of material fact and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) to engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with the purchase and sale of Enron securities and by use of the instruments of communication in interstate commerce and the mails, in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Rule 10b-5 of the SEC, Title 17, Code of Federal Regulations, Section 240.10b-5, and (2) to devise a scheme and artifice to defraud and obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and, for the purpose of executing such scheme and artifice, to cause interstate wire communications in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

66. In furtherance of the conspiracy and in order to carry out the objectives

thereof, on or about the dates listed below, in the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, committed and caused to be committed the following overt acts, among others:

a. In or about 1999, SKILLING, CAUSEY and others obtained the approval of Enron's Board at a Board meeting held in Houston, Texas for Enron's CFO Fastow to conduct transactions between Enron and LJM

b. On or about September 30, 1999, SKILLING, CAUSEY and others enabled Enron to "sell" to LJM for $11.5 million a portion of Enron's interest in a company that was building a power plant in Cuiaba, Brazil;

c. On or about November 15, 1999, SKILLING and CAUSEY caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's quarterly report on Form 10-Q for the period ending September 30, 1999;

d. In or about the fourth quarter of 1999, Enron employees caused Merrill Lynch to buy Enron electricity barges moored off the coast of Nigeria that Enron had been unable to sell, so that Enron could record $12 million in earnings and $28 million in cash flow needed for budget targets;

e. In or about January 2000, SKILLING, CAUSEY and others planned and approved the alteration of "hedges" on certain Enron stock held by the JEDI investment partnership so that Enron could record as operating earnings the increased value of JEDI's Enron stock holdings that SKILLING, CAUSEY and others planned to cause by Enron's announcements about its telecommunications business at its annual conference for securities analysts in Houston, Texas;

f. On or about January 20, 2000, SKILLING and others made false and misleading statements about Enron's telecommunications business at Enron's annual conference for securities analysts held in Houston, Texas;

g. On or about January 21, 2000, CAUSEY sold 45,000 shares of Enron stock, generating gross proceeds of $3,220,000;

h. On or about March 13, 2000, SKILLING and CAUSEY signed and caused to be delivered an annual management representation letter addressed to Enron's accountants in Houston, Texas;

i. On or about March 30, 2000, SKILLING and CAUSEY signed and caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's annual report on Form 10-K for the period ending December 31, 1999;

j. On or about April 12, 2000, SKILLING, CAUSEY and others conducted a quarterly conference call from Houston, Texas with securities analysts;

k. On or about April 25 and 26, 2000, SKILLING sold 96,217 shares of Enron stock, generating gross proceeds of $7,077,076.75;

l. On or about May 12, 2000, CAUSEY and SKILLING signed and caused to be delivered a quarterly management representation letter addressed to Enron's accountants in Houston, Texas;

m. On or about May 15, 2000, SKILLING and CAUSEY caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's quarterly report on Form 10-Q for the period ending March 31, 2000;

n. In or about the spring of 2000, SKILLING, CAUSEY and others designed and approved Enron's use of the Raptor structure in order to ensure that Enron would not have to report expected losses in the value of certain of its assets;

o. On or about and between July 17 and 19, 2000, after the second quarter ended, SKILLING, CAUSEY and others caused entries to be made in Enron's books and records in Houston, Texas, which entries improperly released funds from a reserve account solely to ensure that Enron reported a better earnings per share number than Enron actually achieved for the second quarter;

p. In or about the summer of 2000, in an undocumented side deal, CAUSEY and Fastow agreed that LJM would receive a guaranteed return of its $30 million investment in the first Raptor structure, together with a profit of $11 million on that investment, in exchange for which Enron would be permitted unilaterally to determine the value of the assets hedged in Raptor without negotiation or due diligence by LJM;

q. On or about August 11, 2000, SKILLING and CAUSEY signed and caused to be delivered a quarterly management representation letter addressed to Enron's accountants in Houston, Texas;

r. On or about August 14, 2000, SKILLING and CAUSEY caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's quarterly report on Form 10-Q for the period ending June 30, 2000;

s. In or about September 2000, CAUSEY and others caused Enron to purchase a "put" on its own stock from an entity involved in the Raptor structure, which had no business purpose for Enron but ensured that LJM received the complete return of its $30

million investment in the first Raptor structure, together with a profit of $11 million on that investment;

t. In or about September 2000, CAUSEY and others back-dated a portion of the Raptor I transaction to Enron's advantage, capturing a stock value of one of the Enron assets hedged in Raptor I at a time when they knew that value already had declined;

u. On or about September 6, 2000, CAUSEY and Fastow held a meeting in Houston, Texas to discuss Enron's and LJM's undocumented "Global Galactic" side agreement that LJM would be guaranteed against loss in certain of its transactions with Enron, and that other losses to LJM would be made up through other transactions with Enron;

v. On or about and between August 30, 2000 and September 5, 2000, SKILLING sold 86,441 shares of Enron stock, generating gross proceeds of $7,484,360;

w. On or about September 28, 2000, CAUSEY sold 80,753 shares of Enron stock, generating gross proceeds of $7,096,807.83;

x. On or about and between November 1 and November 7, 2000, SKILLING sold 138,668 shares of Enron stock, generating gross proceeds of $11,492,412.63;

y. On or about November 13, 2000, SKILLING and CAUSEY signed and caused to be delivered a quarterly management representation letter addressed to Enron's accountants in Houston, Texas;

z. On or about November 14, 2000, SKILLING and CAUSEY caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's quarterly report on Form 10-Q for the period ending September 30, 2000;

aa. On or about and between November 15, 2000 and June 13,

2001, pursuant to a written plan providing for sales of 10,000 shares per week, SKILLING sold 310,000 shares of Enron stock, generating gross proceeds of $20,985,247.42;

bb. In or about November 2000, CAUSEY and others approved Enron employees' manipulating the value of Mariner Energy on Enron's books in order to produce approximately $100 million in reported earnings;

cc. On or about January 22, 2001, SKILLING, CAUSEY and others conducted a quarterly conference call from Houston, Texas with securities analysts;

dd. On or about January 25, 2001, SKILLING and others planned and delivered an annual presentation in Houston, Texas to securities analysts;

ee. On or about February 23, 2001, SKILLING and CAUSEY signed and caused to be delivered an annual management representation letter addressed to Enron's accountants in Houston, Texas;

ff. On or about March 23, 2001, SKILLING, CAUSEY and others conducted a conference call from Houston, Texas with securities analysts;

gg. In or about March 2001, SKILLING, CAUSEY and others approved the transfer of large portions of EES's business, including areas where hundreds of millions of dollars in losses would need to be recorded, from EES into Enron Wholesale;

hh. On or about April 2, 2001, SKILLING and CAUSEY signed and caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's annual report on Form 10-K for the period ending December 31, 2000;

ii. On or about April 17, 2001, SKILLING, CAUSEY and others

conducted a quarterly conference call with securities analysts;

jj. On or about May 15, 2001, SKILLING and CAUSEY signed and caused to be delivered a quarterly management representation letter addressed to Enron's accountants in Houston, Texas;

kk. On or about May 15, 2001, SKILLING and CAUSEY caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's quarterly report on Form 10-Q for the period ending March 31, 2001;

ll. In or about the spring of 2001, SKILLING, CAUSEY and others caused Enron to agree to buy back LJM's interest in the Cuiaba project at a considerable profit to LJM;

mm. On or about July 12, 2001, SKILLING, CAUSEY and others conducted a quarterly conference call from Houston, Texas with securities analysts;

nn. On or about August 14, 2001, CAUSEY signed and caused to be delivered a quarterly management representation letter addressed to Enron's accountants in Houston, Texas;

oo. On or about August 14, 2001, CAUSEY caused to be filed via electronic transmission from Houston, Texas to the SEC in Washington, D.C. Enron's quarterly report on Form 10-Q for the period ending June 30, 2001;

pp. On or about September 17, 2001, SKILLING sold 500,000 shares of Enron stock, generating gross proceeds of $15,587,305.10;

qq. On or about October 16, 2001, CAUSEY and others conducted a quarterly conference call from Houston, Texas with securities analysts.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNT TWO
(Securities Fraud: Raptor Fraud)

67. The allegations in paragraphs 1 through 63 are realleged as if fully set forth here.

68. In or about and between spring 2000 and October 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, in a course of conduct involving the construction and use of Enron financial devices known as the Raptors, did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron securities and by the use of the instruments of communication in interstate commerce and the mails.

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS THREE THROUGH TEN
(Wire Fraud: Raptor Fraud)

69. The allegations of paragraphs 1 through 63 are realleged as if fully set forth here.

70. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, did for the purposes of executing such scheme and artifice transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures, and sounds, specifically the wire transfers of funds specified below among Enron, LJM and entities involved in the Raptor hedging structures.

Count	**Defendant(s)**	**Date**	**Wire Transfer**
3	JEFFREY K. SKILLING RICHARD A. CAUSEY	September 7, 2000	$41,000,000 from Enron Citibank account no. 00076486, New York, New York, to Talon 1 LLC Wilmington Trust Co. account no. 51419, Wilmington, Delaware
4	JEFFREY K. SKILLING RICHARD A. CAUSEY	September 7, 2000	$41,000,000 from Talon 1 LLC Wilmington Trust Co. account no. 51419, Wilmington, Delaware, to LJM2-Talon LLC Chase Manhattan account no. 323-156479, Houston, Texas

5	RICHARD A. CAUSEY	September 19, 2000	$6,000,000 from LJM2-Talon LLC Chase Manhattan account no. 323-156479, Houston, Texas, to Talon 1 LLC Wilmington Trust Co. account no. 51419, Wilmington, Delaware
6	RICHARD A. CAUSEY	September 19, 2000	$6,000,000 from Talon 1 LLC Wilmington Trust Co. account no. 51419, Wilmington, Delaware, to Enron Citibank account no. 00076486, New York, New York
7	JEFFREY K. SKILLING RICHARD A. CAUSEY	October 3, 2000	$41,000,000 from Enron Citibank account no. 00076486, New York, New York, to Timberwolf I LLC Wilmington Trust Co. account no. 51971, Wilmington, Delaware
8	JEFFREY K. SKILLING RICHARD A. CAUSEY	October 4, 2000	$41,000,000 from Timberwolf I LLC Wilmington Trust Co. account no. 51971, Wilmington, Delaware, to LJM2-Timberwolf LLC Chase Manhattan account no. 323-864104, Houston, Texas
9	RICHARD A. CAUSEY	October 13, 2000	$1,100,000 from LJM2-Timberwolf LLC Chase Manhattan account no. 323-864104, Houston, Texas, to Timberwolf I LLC Wilmington Trust Co. account no. 51971, Wilmington, Delaware

10	RICHARD A. CAUSEY	October 13, 2000	$1,100,000 from Timberwolf I LLC Wilmington Trust Co. account no. 51971, Wilmington, Delaware, to Enron Citibank account no. 00076486, New York, New York

(Title 18, United States Code, Sections 1343, 2 and 3551 et seq.)

COUNTS ELEVEN THROUGH SEVENTEEN
(Securities Fraud: Financial Statements)

71. The allegations of paragraphs 1 through 63 and 66(a) through 66(qq) are realleged as if fully set forth here.

72. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, in Enron Forms 10-K and 10-Q filed with the SEC in Washington, D.C., did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron securities and by the use of the instruments of communication in interstate commerce and the mails.

Count	Date	Report
11	March 30, 2000	Form 10-K for Enron for the Fiscal Year 1999
12	May 15, 2000	Form 10-Q for Enron for the First Quarter 2000
13	August 14, 2000	Form 10-Q for Enron for the Second Quarter 2000
14	November 14, 2000	Form 10-Q for Enron for the Third Quarter 2000
15	April 2, 2001	Form 10-K for Enron for the Fiscal Year 2000
16	May 15, 2001	Form 10-Q for Enron for the First Quarter 2001
17	August 14, 2001	Form 10-Q for Enron for the Second Quarter 2001

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS EIGHTEEN THROUGH TWENTY-THREE
(Securities Fraud: Presentations to Securities Analysts)

73. The allegations of paragraphs 1 through 63 are realleged as if fully set forth here.

74. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and

elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, in presentations to securities analysts, did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails.

Count	**Defendant(s)**	**Date**	**Presentation**
18	JEFFREY K. SKILLING RICHARD A. CAUSEY	April 12, 2000	First Quarter 2000 Analyst Conference Call
19	JEFFREY K. SKILLING RICHARD A CAUSEY	January 22, 2001	Fourth Quarter 2000 Analyst Conference Call
20	JEFFREY K. SKILLING	January 25, 2001	Annual Analyst Conference in Houston, Texas
21	JEFFREY K. SKILLING RICHARD A. CAUSEY	March 23, 2001	Analyst Conference Call to Discuss Enron Stock Price
22	JEFFREY K. SKILLING RICHARD A. CAUSEY	April 17, 2001	First Quarter 2001 Analyst Conference Call

23	JEFFREY K. SKILLING RICHARD A. CAUSEY	July 12, 2001	Second Quarter 2001 Analyst Conference Call

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS TWENTY-FOUR AND TWENTY-FIVE
(False Statements to Auditors in Connection With Annual Representation Letters)

75. The allegations in paragraphs 1 through 63 are realleged as if fully set forth here.

76. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, knowingly and willfully made and caused to be made materially false and misleading statements, and omitted to state material facts necessary in order to make statements made, in light of the circumstances under which the statements were made, not misleading, to accountants of Enron, an issuer of a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934, in connection with the audit and examination of the financial statements of Enron as required by law to be made, and the preparation and filing of documents and reports required to be filed with the SEC pursuant to rules and regulations enacted by the SEC.

77. Specifically, while agreeing that they were "responsible for the fair presentation of the financial statements," SKILLING and CAUSEY falsely represented to Enron's accountants that, among other things, (a) the statements and representations made in

Enron's financial statements were true; (b) Enron properly recorded or disclosed in its financial statements all agreements to repurchase assets previously sold; (c) Enron properly recorded or disclosed in its financial statements guarantees, whether written or oral, under which Enron was contingently liable; (d) Enron's unaudited quarterly financial data fairly summarized, among other things, the operating revenues, net income and per share data based upon that income for each quarter; (e) there was no material fraud or any other irregularities that, although not material, involved management or other employees who had a significant role in Enron's system of internal control, or fraud involving other employees that could have a material effect on the financial statements; (f) all related party transactions, including sales and guarantees (both oral and written), were properly recorded and disclosed; and (g) Enron made available to the accountants all financial records and related data; well knowing that these statements were false.

Count	**Defendant(s)**	**Date**	**Statement to Auditors**
24	JEFFREY K. SKILLING RICHARD A. CAUSEY	March 13, 2000	Annual Representation Letter in Connection with Enron Form 10-K for Year 1999
25	JEFFREY K. SKILLING RICHARD A. CAUSEY	February 23, 2001	Annual Representation Letter in Connection with Enron Form 10-K for Year 2000

(Title 15, United States Code, Sections 78m(a), 78m(b)(2), 78ff; Title 17, Code of Federal Regulations, Section 240.13b2-2; and Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS TWENTY-SIX THROUGH THIRTY
(False Statements to Auditors in Connection With Quarterly Representation Letters)

78. The allegations in paragraphs 1 through 63 are realleged as if fully set forth here.

79. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and elsewhere, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY, and others, knowingly and willfully made and caused to be made materially false and misleading statements, and omitted to state material facts necessary in order to make statements made, in light of the circumstances under which the statements were made, not misleading, to accountants of Enron, an issuer of a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934, in connection with the review of the financial statements of Enron as required by law to be made, and the preparation and filing of documents and reports required to be filed with the SEC pursuant to rules and regulations enacted by the SEC.

80. Specifically, while agreeing that they were "responsible for the fair presentation of the financial statements," SKILLING and CAUSEY falsely represented to Enron's accountants that, among other things, (a) the financial statements were presented in accordance with generally accepted accounting principles; (b) Enron properly recorded or disclosed in its financial statements guarantees, whether written or oral, under which Enron was contingently liable; (c) there was no fraud involving management or employees who had a significant role in internal control, or fraud involving others that could have a material effect on the financial statements; (d) all related party transactions, including sales and guarantees (both

oral and written), were properly recorded and disclosed; and (e) Enron made available to the accountants all financial records and related data; well knowing that these statements were false.

Count	Defendant(s)	Date	Statement to Auditors
26	JEFFREY K. SKILLING RICHARD A CAUSEY	May 12, 2000	Quarterly Representation Letter in Connection with Enron Form 10-Q for First Quarter 2000
27	JEFFREY K. SKILLING RICHARD A. CAUSEY	August 11, 2000	Quarterly Representation Letter in Connection with Enron Form 10-Q for Second Quarter 2000
28	JEFFREY K. SKILLING RICHARD A. CAUSEY	November 13, 2000	Quarterly Representation Letter in Connection with Enron Form 10-Q for Third Quarter 2000
29	JEFFREY K. SKILLING RICHARD A. CAUSEY	May 15, 2001	Quarterly Representation Letter in Connection with Enron Form 10-Q for First Quarter 2001
30	RICHARD A. CAUSEY	August 14, 2001	Quarterly Representation Letter in Connection with Enron Form 10-Q for Second Quarter 2001

(Title 15, United States Code, Sections 78m(a), 78m(b)(2), 78ff; Title 17, Code of Federal Regulations, Section 240.13b2-2; and Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS THIRTY-ONE THROUGH FORTY
(Insider Trading: JEFFREY K. SKILLING)

81. The allegations in paragraphs 1 through 63 are realleged as if fully set forth here.

82. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and elsewhere, defendant JEFFREY K. SKILLING knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff. Specifically, while in possession of material non-public information that Enron and its executives and senior managers, including SKILLING, had supplied and were continuing to supply materially false and misleading information to the investing public, including but not limited to Enron's publicly reported financial results and public statements of Enron's executives and senior managers, SKILLING sold shares of Enron stock and generated total proceeds of $62,626,401.90.

Count	**Date**	**Shares**	**Sale Price(s)**	**Gross Proceeds**
31	April 25, 2000	10,000	$73.875 $73.9375	$738,893.75

32	April 26, 2000	86,217	$74.00 $73.875 $72.50	$6,338,183.00
33	August 30, 2000	15,000	$86.125	$1,291,875.00
34	September 1, 2000	60,000	$87.00 $86.875 $87.25	$5,220,000.00
35	September 5, 2000	11,441	$85.00	$972,485.00
36	November 1, 2000	72,600	$83.2406 $83.0625	$6,041,023.50
37	November 2, 2000	20,000	$82.3381	$1,646,762.00
38	November 7, 2000	46,068	$82.5872	$3,804,627.13
39	November 15, 2000	10,000 per week for 31 weeks per written sales plan	$84.00 to $49.90	$20,985,247.42
40	September 17, 2001	500,000	$31.5061 $31.0822	$15,587,305.10

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS FORTY-ONE AND FORTY-TWO
(Insider Trading: RICHARD A. CAUSEY)

83. The allegations in paragraphs 1 through 63 are realleged as if fully set forth here.

84. On or about the dates set forth below, each such date constituting a separate count of this Superseding Indictment, within the Southern District of Texas and elsewhere, defendant RICHARD A. CAUSEY knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff. Specifically, while in possession of material non-public information that Enron and its executives and senior managers, including CAUSEY, had supplied and were continuing to supply materially false and misleading information to the investing public, including but not limited to Enron's publicly

reported financial results and public statements of Enron's executives and senior managers, CAUSEY sold shares of Enron stock and generated total proceeds of $10,316,807.83.

Count	Date	Shares	Sale Price(s)	Gross Proceeds
41	January 21, 2000	45,000	$72.00 $71.00	$3,220,000.00
42	September 28, 2000	80,753	$87.8829	$7,096,807.83

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

FORFEITURE ALLEGATIONS
(18 U.S.C.§§ 981 and 982, 28 U.S.C. § 2461)

85. As a result of the conspiracy, securities fraud and wire fraud offenses alleged in the Superseding Indictment, herein alleged and incorporated by reference for the purpose of alleging forfeitures to the United States of America pursuant to the provisions of Title 18, United States Code, Section 981, and Title 28, United States Code, Section 2461, defendants JEFFREY K. SKILLING and RICHARD A. CAUSEY shall, upon conviction of each such offense alleged in the Superseding Indictment, forfeit to the United States all property, real and personal, which constitutes or is derived from proceeds traceable to the alleged conspiracy and securities fraud offenses, wherever located, and in whatever name held, including, but not limited to the following:

86. With respect to defendant JEFFREY K. SKILLING, the following property:

(A) a sum of money equal to the amount of proceeds obtained as a result of the conspiracy, securities fraud and wire fraud offenses, for which the defendants are jointly and severally liable;

(B) real property known as 1999 McKinney Ave., #1008, Dallas, Texas;

(C) real property known as 10 North Briarwood Court, Houston, Texas;

(D) $50,000 in cash in MML Investors Services, Inc., BMA account number 251518;

(E) securities, listed in Attachment A, worth approximately $49,342,462.98, and $808,643.74 in cash, contained in Charles Schwab account number 8110-6773;

(F) $132,544.65 contained in Mass Mutual Financial Group Policy account number 11502764;

(G) $91,800.51 in cash contained in Southwest Bank account number 3229351 in the name of Veld Interests, Inc.

87. With respect to defendant RICHARD A. CAUSEY, the following property:

(A) a sum of money equal to the amount of proceeds obtained as a result of the conspiracy, securities fraud and wire fraud offenses, for which the defendants are jointly and severally liable;

(B) real property known as 39 North Regent Oak, The Woodlands, Texas;

(C) securities listed in Attachment B, worth approximately $2,589,020.98, contained in First Union account number 2005-0471;

(D) approximately $274,305.69 in Manulife North America Annuity account number 2107848;

(E) approximately $219,434.87 in Manulife North America Annuity account number 2106714;

88. In the event that any property described above as being subject to forfeiture, as a result of any act or omission by either defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to or deposited with a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty; it is the intent of the United States, pursuant to Title 18, United States Code, Section 982(b)(1), to seek forfeiture of any other property of defendants JEFFREY K. SKILLING and

RICHARD A. CAUSEY up to the value of the above described property in paragraphs 86 and 87.

Dated: Houston, Texas
February 18, 2004

A TRUE BILL

FOREPERSON

JOSHUA R. HOCHBERG
Acting United States Attorney

LESLIE R. CALDWELL
Director, Enron Task Force

By:
SAMUEL W. BUELL
SEAN M. BERKOWITZ
LINDA A. LACEWELL
KATHRYN H. RUEMMLER
Special Attorneys, Enron Task Force

LAUREL LOOMIS
PATRICK MURPHY
Trial Attorneys, Enron Task Force

Attachment A

List of Bonds held in SKILLING's Charles Schwab 8110-6673:

Description	**Par Value**	**Value as of 12/31/2003**
Alamo tex cmnty college 5.375% 17 due 11/1/17	3,355,000.00	$3,709,422.20
Allianceber multi mkt strategy A	1,505.85	$8,628.51
Delaware transn auth transn 4.50% 7/1/16	3,485,000.00	$3,616,210.25
Houston tex 5.375% 13 cmnty due 4/15/13	3,000,000.00	$3,349,560.00
Jefferson la 5.25% 18 sales tax due 12/1/18	2,770,000.00	$3,025,421.70
Minnesota pub facs 5%13 auth wtr due 3/1/13	2,000,000.00	$2,198,020.00
Minnesota pub facs 5% 15 auth wtr due 3/1/15	3,000,000.00	$3,259,440.00
Montgomery cnty 5.25% 13 genl oblig due 10/1/13	2,500,000.00	$2,835,850.00
New jersey st 6% 15 transn tr due 12/15/15	2,000,000.00	$2,400,500.00
Pasadena tex indpt genl oblig 5.0% 15 due 2/15/15	2,485,500.00	$2,696,920.80
Pflugerville tex 5.5% 13 genl oblig due 8/15/13	2,265,000.00	$2,557,411.50
Spartanburg cnty 4.25% 14 genl oblig due 3/1/14	3,320,000.00	$3,502,234.80
Standish Mellon Intl fixed income fund II	82,524.96	$1,895,598.22
University ala univ 5% 16 revs due 10/1/16	2,500,000.00	$2,700,875.00

University ala univ 5% 17 revs due 10/1/17	2,500,000.00	$2,680,075.00
Williamson cnty 5% 18 genl oblig due 4/1/18	2,500,000.00	$2,683,125.00
Wisconsin st 4.50% 16 transn rev due 7/1/16	3,000,000.00	$3,122,550.00
Wisconsin st 4.50% 17 transn rev due 7/1/17	3,000,000.00	$3,100,620.00
Total	43,764,530.81	$49,342,462.98

Attachment B

List of Securities held in CAUSEY's First Union Account No. 2005-0471:

Description	Shares	Value as of 12/31/2003	Type
Evergreen FBO Hedge Equities	2,719.67	$ 48,294.48	Mutual Fund
Clark Cnty Wash Pub Util Dist #001 Generation Sys dtd 12/1/00 FC 07/01/01	250,000	$280,537.50	Bond
District Columbia CTFS Partn Dists Pub Safety & Emergency cpn 4.75%	100,000	$100,792.00	Bond
E-470 Pub Hwy Auth Colo Rev Sr Ser A dtd 08/01/97 fc 03/01/98	120,000	$122,124.00	Bond
Elgin Ill Corp Purp G/O Unltd dtd 05/01/00 fc 01/01/01	100,000	$112,117.00	Bond
Harris Cnty Tex Ref Toll 5.125%	275,000	$297,896.50	Bond
Harris Cnty Tex Ref Toll 5.000%	225,000	$235,219.50	Bond
Howell Mich Pub Schs Ref G/O Unltd OID dtd 02/07/01 fc 11/01/01	250,000	$264,007.50	Bond
Huntsville Ala Health Care Auth Ser A B/E MBIA dtd 11/15/97 fc 06/01/98	100,000	$109,310.00	Bond
Lyon Cnty Nev Sch Dist Permanent Sch dtd 02/01/01/ fc 06/01/01	200,000	$223,854.00	Bond
Phoenix Ariz Civic Impt Corp Wstewtr Sys dtd 10/01/93 fc 01/01/94	275,000	$284,586.50	Bond
Rhode Island St & Providence Plantation Ctfs dtd 12/01/00 dfc 04/01/01	225,000	$247,887.00	Bond
Texas St Wtr Dev - Ser E & F dtd 08/01/97 fc 02/01/98	250,000	$262,395.00	Bond

BARRIERS TO ENTRY AND JUSTICE GINSBURG'S CRIMINAL PROCEDURE JURISPRUDENCE

Lisa Kern Griffin*

INTRODUCTION

In her twenty plus years on the United States Supreme Court, Justice Ruth Bader Ginsburg has issued momentous decisions and significant dissents concerning constitutional guarantees of equality. She is best known for her leadership—as an advocate, scholar, judge, and justice—on issues of gender discrimination.[1] Although one might expect related commitments to civil liberties to shape cases concerning the criminal justice process, Justice Ginsburg's mark on constitutional criminal procedure appears comparatively faint. Her contributions have been subtle,[2] and her cautious opinions at first seem disconnected from the clear principles established in the discrimination cases.[3]

Yet when Justice Ginsburg's criminal procedure decisions are considered through the lens of her broader jurisprudence on equality, some common commitments emerge. The argument for "equal citizenship stature"[4] relates to her efforts to remove the systematic barriers to entry that preclude access to the courts in criminal cases. Here too she seeks to protect the dignity of defendants facing official power. And through careful engagement with the facts of each case and a consistent focus on the prerequisites to fair adjudication, she has highlighted the due process obligations of prosecutors, demanded adequate representation of defendants, expanded the right to confront witnesses, and increased the jury's control over sentencing determinations.

This chapter reconsiders Justice Ginsburg's understated but important criminal procedure legacy. Notably, a comprehensive bibliography documenting her own prolific writings, together with the academic commentary and assorted tributes published through her first ten years on the Court, lists hundreds of publications, but not a single one concerning criminal procedure.[5] Part I assesses the perception of Justice Ginsburg's muted voice in the field. It describes her role in protecting existing trial rights from encroachment and articulating new requirements of procedural equality, and also characterizes those cases as consonant with her incremental approach. Justice Ginsburg's contributions have received little attention in part because her disposition to caution often produces outcomes that appear to favor the government, at least in the short term. Her opinion for the Court in *Perry v. New Hampshire*,[6] for example, surprised some observers by rejecting any special reliability screening for suggestive eyewitness identifications,[7] and Part I concludes with a discussion of that case.

When Justice Ginsburg writes from an internal perspective on the courts, however, and shifts her focus from reliability to opportunity, the volume of her voice increases. Part II describes Justice Ginsburg's efforts to ensure meaningful access to the criminal courts. Her opinions appear most animated when they

concern an aspect of the criminal justice process that reinforces inequality. And that concern may have found its fullest expression in a civil case: *Connick v. Thompson*.[8] In *Connick*, Justice Ginsburg issued a fierce dissent from the Court's decision to vacate a damages award in favor of a defendant who was wrongfully convicted after prosecutors suppressed exculpatory evidence.[9]

Part III connects Justice Ginsburg's advocacy for meaningful access to the criminal courts to her dedication to fair treatment in other realms. Intellectual history and personal experience complicate any justice's jurisprudence, and it can be difficult to trace beliefs in one area to decisions in another. Legacies are not always linear, but this chapter suggests that Justice Ginsburg's legacy is more integrated than previously thought. There is an unexplored connection between her perception of the role of the courts in remedying unfairness in the discrimination cases and in lowering barriers to entry in the criminal justice process.

I. INCREMENTAL PROTECTIONS AND RESTRAINED DECISIONS

Justice Ginsburg's criminal procedure jurisprudence appears mild because she has acted primarily to preserve existing liberties rather than to expand constitutional protections. By and large, she seems less active on behalf of criminal defendants than "one might expect from a Justice appointed by a Democratic president and hailing from the ACLU."[10] This perception is in keeping with "progressive criticism of Justice Ginsburg as an excessively cautious jurist."[11] And some commentators report the defense bar's assessment that her "support of defense-oriented positions is somewhat lacking in intensity" and thus has not had a significant impact.[12] Though she has in fact voted more frequently to protect defendants than most of her colleagues on the Rehnquist and Roberts Courts, Justice Ginsburg's record does not appear to favor defendants as much as the decisions of progressive icons such as Justices Brennan and Marshall did.[13]

This is so in part because Justice Ginsburg's intellectual instincts on the Court, as with her earlier litigation strategies, have been incremental across substantive areas of the law. As an advocate, she challenged classifications based on gender discrimination one at a time rather than attempting to prevail on a new constitutional theory aimed at broad social change. Often celebrated for these measured steps in the direction of what were ultimately historic advances in gender equality, Justice Ginsburg has repeatedly cited slow but steady forward motion as her preferred speed on the bench as well.[14] Indeed, she has self-identified as given to interstitial action, an approach that she believes "affords the most responsible room for creative, important judicial contributions."[15] She favors narrow rules, adheres closely to established precedents, and generally avoids grand pronouncements.[16] Her conception of the judicial role, as she stated in her confirmation hearings, is to "get it right and keep it tight."[17] This layered, gradual,

common-law approach to social progress extends to abortion rights, and Justice Ginsburg has famously expressed concern that the landmark *Roe v. Wade*[18] decision was an ill-timed sudden move that "ventured too far."[19]

Pragmatism characterizes many of Justice Ginsburg's criminal procedure decisions as well. She has employed her incremental approach not only to slowly advance social change but also to defend the remnants of Warren Court precedents. The Warren Court extended the right to counsel to indigent defendants charged with felonies, required that suspects undergoing custodial interrogation be advised of their right to remain silent and consult an attorney, and applied the exclusionary rule to state-court suppression of evidence seized in violation of the Fourth Amendment.[20] Justice Ginsburg has served on the Court during an era of erosion in those and other criminal procedure rights. Although approximately half of her decisions could be categorized as favoring the government, she often carefully constructs a narrow majority ruling, drafts a concurrence that mitigates the impact of the decision, or dissents to lay down a marker against future encroachment.[21] As Christopher Slobogin has observed, "rather than lambasting the majority for its blindness or illogic in broad and far-reaching language, [her] concurrences pay close attention to precedent and rely on precise 'lawyerly' analysis detailing how narrow the majority ruling is, or could be construed to be."[22]

In relation to other areas of the law, Justice Ginsburg has garnered few marquee opinion assignments concerning criminal procedure. Some of the majority opinions that she has authored fit within this narrow, cautious genre. One closely-followed decision, *Perry v. New Hampshire*,[23] concerned eyewitness identifications. Members of the defense community hoped the Court would address growing skepticism of eyewitness testimony, which is often persuasive evidence against criminal defendants, but flawed in terms of reliability. The Court, however, concluded that a fair opportunity for the defense to raise the soundness of an identification before a jury was sufficient to assure due process, even if the identification was made under suggestive circumstances.[24]

The witness in the *Perry* case had called the police to report seeing an African American man allegedly breaking into cars in the parking lot of her apartment complex. When the police arrived and questioned the witness in her apartment, the witness pointed out her kitchen window at a suspect, Barion Perry, standing in the parking lot. A month later, however, the witness could not identify Perry in a photo array. And at the time of the initial identification, Perry was standing next to a police officer in the still-dark parking lot, and was the only African American person there. Perry was charged with theft by unauthorized taking and criminal mischief, and he moved to suppress the parking lot identification on the ground that admission of a suggestive one-person show-up would violate due process. The New Hampshire trial court denied the motion and

admitted the identification. Perry was convicted of theft and appealed through the state courts to the Supreme Court.

The Supreme Court affirmed. Due process concerns, it reasoned, arise only when law-enforcement officers introduce the suggestive element themselves, and the improper police conduct creates a "substantial likelihood of misidentification."[25] In reaching that decision, Justice Ginsburg frustrated some observers by disregarding the mounting social science evidence calling the reliability of eyewitness identifications into question.[26] She reasoned, however, that the Constitution protected the defendant not by excluding the evidence but by affording an opportunity to persuade the jury that it is not credible.

Perry exemplifies Justice Ginsburg's emphasis on in-court process over on-the-street policing. She generally views law enforcement from a practical perspective, and she has imposed few new constraints on investigative practices. Justice Sotomayor presents something of a contrast, with notable decisions advancing a more expansive and technologically savvy understanding of privacy under the Fourth Amendment,[27] objecting to the narrowing scope of Fifth Amendment *Miranda* protections in custodial interrogations,[28] and dissenting from the Court's due process analysis in *Perry* itself.[29]

Justice Ginsburg's *Perry* opinion also reveals the way in which she privileges the context of the adversarial process over content-based exclusions. It is in keeping, for example, with her alliance with Justice Scalia to establish a reinvigorated Sixth Amendment right to confront witnesses, no longer tethered to the reliability of the hearsay statement a witness made.[30] "The potential unreliability of a type of evidence," she wrote in *Perry*, "does not alone render its introduction at the defendant's trial fundamentally unfair."[31] Justice Ginsburg further deferred to state and lower federal courts on the question whether evidence is sufficiently reliable to be admitted.

Where Justice Ginsburg does act to strengthen protections against law enforcement intrusion, it is often because she perceives a need to discourage misconduct. In *Perry*, for example, she noted the limited deterrence value of a contrary ruling, concluding that it would be difficult to dissuade law enforcement from engineering identifications through a case where only external facts and circumstances gave rise to the suggestiveness.[32] In other cases, however, she has resisted unfair manipulation of investigations, and objected to governmental end-runs around the rules.

For example, Justice Ginsburg has often advocated rules designed to prevent law enforcement from gaming encounters with suspects. As she acknowledged in *Perry*, police misconduct represents a systematic failure that raises a due process problem and may require an exclusionary remedy. In a recent Fourth Amendment case, *Kentucky v. King*,[33] she dissented to underscore the dangers of police-created exigencies.[34] Likewise, she has been vigilant about

police manipulation when it comes to the requirement of *Miranda* warnings, favoring a broad definition of "custody."[35] In addition, she has insisted that something more than an anonymous tip is required before an officer can claim reasonable suspicion for a stop,[36] and she recently expressed concern that police may dodge the warrant requirement by removing a party who refuses to consent to a search from the premises.[37] She has also opposed efforts to "constrict the domain of the exclusionary rule" to deterrence, fearing that would create perverse incentives for law enforcement to neglect the electronic databases that "form the nervous system of contemporary criminal justice operations."[38]

Overall, however, Justice Ginsburg proceeds from the premise that what happens in court matters more than how defendants got there. Her opinions suggest that individuals can best confront the power of the state from within the criminal justice process. And where the right to be heard has been vindicated,[39] then the adversarial system adequately protects equality and fairness. *Perry* helps to illuminate where her commitments lie. The core of her reasoning in *Perry* is that the trial process—including the right to counsel, the right to cross examine witnesses, the rules of evidence, expert testimony, carefully crafted jury instructions, and the requirement of proof beyond a reasonable doubt—suffices to caution juries against placing undue weight on flawed eyewitness testimony.[40]

II. Opportunity Jurisprudence and an Internal Perspective on the Courts

Justice Ginsburg's contributions to criminal procedure stem primarily from her attention to the power of individual defendants within the trial process rather than constraints on the power of the state. Where she perceives a fair playing field, Justice Ginsburg has often authored or joined pro-government decisions.[41] It is true that those decisions exist in some tension with her progressive instincts in other contexts.[42] But adjudicative criminal procedure often upends expectations in this way because it can create unusual affinities. For example, although Justice Ginsburg and Justice Sotomayor vote together often, they diverge in many criminal procedure cases. Justice Sotomayor's focus on expanding constitutional rights can put her at odds with Justice Ginsburg's trial-process approach. In contrast, Justice Ginsburg's vigilance about procedural safeguards has led her to support a less-frequent ally, Justice Scalia, in his decisions redefining the Confrontation Clause and expanding the domain of the jury.[43]

Moreover, Justice Ginsburg shares with some of her colleagues an internal perspective and a commitment to ensuring fairness within the existing system of criminal adjudication rather than changing its parameters. Even on a Court composed almost entirely of former appellate judges,[44] Justice Ginsburg stands out as a "lawyer's lawyer" and "judge's judge."[45] Whether appellate judges bring common temperaments and techniques to the docket is an open question. When

William Rehnquist joined the Court in 1972, former federal judges were in the minority, and earlier Courts had members with substantially more experience as governors, legislators, and cabinet members.[46] Empirical studies have questioned Chief Justice Roberts's contention that appellate judges on the Court are more likely to follow precedent and set aside policy preferences.[47] But he has recently made more nuanced statements about the justices' shared internal perspective on the Court's place in the American political process. In a 2013 appearance before the United States Court of Appeals for the Fourth Circuit, Chief Justice Roberts acknowledged that some of the questions before the Court might benefit from a broader view of public policy but could only be evaluated by the current Court through a "focused way of drilling in on the law."[48]

A hallmark of Justice Ginsburg's jurisprudence is that she is indeed adept at "drilling in on the law," and even more so at closely reading the factual record.[49] A meticulous review of the details of a case and the procedural complexities comports with her deliberate approach. But even through that lawyerly lens, Justice Ginsburg has a long view. She fully understands how litigation relates to policy and how to patiently pursue a principle through individual cases that are sometimes many years apart. She is not only one of the most seasoned litigators on the current Court but also the Court's most significant social movement advocate at present. She has firsthand experience of the eventual interplay between judicial decisionmaking and increased opportunity.[50]

Accordingly, over time, her constitutional criminal procedure decisions have helped to balance the government's power in the trial process. Even where she has not actively expanded defendant's rights, she has identified the "practical obstacles" to protecting those rights and has advocated the removal of those barriers.[51] She has, for example, rejected executive branch attempts to shift prosecutions arising from the war on terror away from the purview of the federal courts.[52] And she has guarded the right to be heard and mount a defense,[53] and the opportunity to cross examine witnesses and present facts to a jury.[54]

Perhaps Justice Ginsburg's primary concern in criminal cases has been ensuring that neither lack of means nor limited procedural prowess shuts defendants out of court. She has been particularly dedicated to preserving the right to counsel.[55] In *Alabama v. Shelton*,[56] she extended the right to counsel to proceedings where the defendant receives a suspended sentence.[57] Defendants who decide to appeal from a guilty plea also require counsel, as she argued in *Halbert v. Michigan*.[58] The state should never, she wrote, "bolt the door to equal justice" when indigent defendants seek appellate review of criminal convictions.[59] Nor should defendants be left without counsel when confronted with the complexities of the adversarial system. Ever practical, Justice Ginsburg has noted that 68 percent of the prison population did not complete high school and may lack basic literacy skills, and that alone can bar entry to the courts.[60] She also has written separately to underscore that procedural requirements are "a tall order for

a defendant of marginal literacy,"[61] to express concern about uncounseled convictions for driving under the influence,[62] and to suggest that judges are obligated to warn pro se litigants about the consequences of their legal decisions.[63]

The right-to-counsel cases fundamentally implicate Justice Ginsburg's commitment to fair access, and she views the function of public defenders broadly. She recognizes that there are "systematic failures across the country in the provision of defense counsel services to the indigent."[64] To begin to address those problems, she has argued for "expanding the situations in which the right to counsel obtains" and "policing the implementation of the right."[65] In *Maples v. Thomas*,[66] for example, she wrote a spare but searing description of the minimal resources and training supporting defense lawyers in capital cases in Alabama.[67] In that light, she found no procedural default when an attorney's abandonment of a client resulted in a missed deadline, which would have arbitrarily denied the defendant his "day in court."[68] And in *Vermont v. Brillon*,[69] she concluded that "delay resulting from a systematic breakdown in the public defender system" could be charged to the state.[70] She has also stated that she has "yet to see a death case, among the dozens coming to the Supreme Court on eve-of-execution stay applications, in which the defendant was well represented at trial."[71] Because she entrusts defense lawyers with maintaining some balance in the adversarial process, Justice Ginsburg has also held counsel to a high standard.[72]

Furthermore, a robust view of the jury's role follows from Justice Ginsburg's belief that safeguards in the adversarial trial best ensure fairness.[73] She has dissented in death penalty cases to underscore the importance of clear instructions to juries on the choices they confront.[74] And she allied herself with Justice Scalia in a series of decisions on jury determinations of sentencing facts. She voted with the majority in *Apprendi v. New Jersey*,[75] which requires jury findings of aggravating factors that increase criminal sentences beyond statutory maximums.[76] She later authored related opinions requiring that facts supporting a capital sentence be found by a jury,[77] and prohibiting judges from making factual findings giving rise to higher potential sentences.[78] In a 2005 sentencing case, *United States v. Booker*,[79] Justice Ginsburg's concern with mandatory sentencing guidelines encountered her resistance to abrupt systematic change.[80] She was the only justice to join the majority opinions on both substance and remedy, first agreeing that the mandatory federal Sentencing Guidelines violated the jury trial guarantees of the Sixth Amendment, but then joining with four different colleagues to conclude that the appropriate remedy was to give judges the discretion to apply them. Despite the decisive impact of switching her vote, she did not write at all in the case.

What may be the most telling criminal procedure opinion authored by Justice Ginsburg actually came in a civil case. Her dissent from the Court's decision in *Connick v. Thompson*[81] highlights the connection between fair play by

prosecutors and the right to be heard. It involves a defendant first denied access to exculpatory evidence necessary to his criminal trial and then stripped of the remedy he received in civil court for his related constitutional claim.

The case arises from the wrongful conviction of John Thompson for robbery and murder. Thompson spent eighteen years in prison for those convictions, fourteen of them on death row in solitary confinement twenty-three hours a day.[82] During his robbery trial, prosecutors withheld several pieces of exculpatory evidence, including a blood sample from the robbery crime scene establishing that the perpetrator's blood type was B.[83] Though prosecutors did not test Thompson's blood (which is type O), neither did they disclose to the defense that the forensic evidence, and a lab report conclusively identifying the perpetrator's blood type, existed. In fact, they took pains to conceal it by removing it from the property room during pretrial discovery. Prosecutors then used the robbery conviction to seek the death penalty in the subsequent murder trial, and to preclude Thompson from testifying in his own defense because of the impeachment effect of the prior conviction.

A defense investigator came across a microfiche copy of the laboratory report in police archives just before Thompson's sixth scheduled execution date in 2003.[84] The blood evidence ruled out Thompson's involvement in the robbery, and the trial court vacated that conviction. Thompson was also granted a new trial on the murder charge because the prosecution's "egregious" misconduct and intentional concealment of exculpatory evidence had prevented him from presenting a defense and testifying at trial. Upon retrial, Thompson was acquitted of the murder and released.

Thompson then sued for the violation of his federal civil rights under 42 U.S.C. § 1983. Pursuant to *Brady v. Maryland*,[85] due process requires the government to disclose to the defense any evidence in its possession that is both favorable and material to the defendant's guilt or punishment.[86] Thompson alleged that the New Orleans District Attorney's deliberate indifference to the need to train prosecutors on their constitutional obligations caused a constitutional violation. The central question was whether the harm to Thompson resulted from the District Attorney acting in his official capacity, or from the individual and independent violations of rogue prosecutors.[87] A jury found the District Attorney's Office liable and awarded Thompson $14 million in damages. The Fifth Circuit sustained the award, but in a 5-4 decision authored by Justice Thomas, the Supreme Court concluded that the District Attorney's Office could not be held liable for a single incident of wrongdoing.

In order to prevail, Thompson needed to demonstrate that the District Attorney was deliberately indifferent to the need to train his prosecutors about *Brady*'s command, and that the lack of training led to the *Brady* violation. An earlier case, *Canton v. Harris*,[88] had established that deliberate indifference may be shown when a policymaker ignores a pattern of similar constitutional

violations by untrained employees.[89] The Court in *Thompson* held, however, that the District Attorney was entitled to rely on prosecutors' general professional training and ethical obligations. Although the case was the third before the Supreme Court concerning misconduct by the New Orleans District Attorney's Office,[90] the Court also concluded that Thompson failed to show the necessary pattern of deliberate indifference to the constitutional obligation.[91]

Justice Ginsburg would have upheld the damages award in light of the "gross, deliberately indifferent, and long-continuing violation of [Thompson's] fair trial right."[92] The case serves as a self-contained demonstration of both the importance of enforcing *Brady* requirements and the role of section 1983 liability in doing so. Accordingly, Justice Ginsburg let the facts speak for themselves and dedicated her dissent—joined by Justices Breyer, Sotomayor, and Kagan—to a "lengthy excavation of the trial record."[93]

By exposing the root causes and net effects of pervasive noncompliance with *Brady* violations, she refuted the majority's conclusions that only a single violation occurred, and that the District Attorney was anything but deliberately indifferent to it:

> From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutor's conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.[94]

Although the evidence at issue was one crime lab report regarding blood-type evidence, several prosecutors over many years engaged in various acts to suppress it. The only thing isolated or unitary about the constitutional violation was "the sense that it culminated in the wrongful conviction and near execution of only a single man."[95] Moreover, the District Attorney's cavalier attitude toward training was not just "deliberate" but "flagrant."[96] When the supervisor had long ago "stopped reading law books," and the office had never disciplined a single prosecutor despite "one of the worst records" in the country concerning *Brady* violations, then breaches were not just predictable but inevitable. According to Justice Ginsburg, "the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office."[97] To conclude that a "culture of inattention" does not constitute disregard for "a known or obvious consequence" simply ignores the facts.[98]

Justice Ginsburg's dissent is an effort to bring those facts to light, not only to expose the injustice to Thompson but also to explain the broader hindrance to enforcement that the Court's decision created. Lax training and monitoring allow, or even encourage, prosecutors to ignore a right "fundamental to a fair trial."[99] Because "explicitly illegal policies are rarely put in place," insisting that "liability flows only from an explicit policy essentially immunizes policymakers who simply adopt a facially constitutional policy, or institute no policy at all, and then fail to prevent or implicitly condone unconstitutional conduct."[100] And prosecutorial concealment "is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability."[101]

The intensity with which Justice Ginsburg writes in *Connick* emphasizes her faith in the rigor of the adversarial system, and her view that it can only function if defendants have full and fair access to court. For Justice Ginsburg, *Brady* "is among the most basic safeguards brigading a criminal defendant's fair trial right," and a *Brady* violation "by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out."[102] Because the absence of the withheld evidence may result in the conviction of an innocent defendant, "it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light."[103] If a defendant does not know of a defense he might raise, then he has not been "let in" to court in the way that Justice Ginsburg envisions. Common sense dictates that defendants should not be compelled to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."[104] Moreover, narrowing definitions of prerequisites like "indifference" unduly restrict liability, and again deprive the defendant of legal recourse. Arising together, those issues yielded Justice Ginsburg's most forceful piece of writing surrounding a question of criminal procedure.

III. Common Commitments and Unexplored Connections

There is an unrecognized connection between remedying unfairness to individual defendants and Justice Ginsburg's resistance to "built-in headwinds" that have discriminatory effect.[105] At several points, links appear between the right to participate and be heard in the criminal justice process and her legacy on equality. Indeed, an opinion emphasizing prosecutors' duty to give defendants a fair opportunity to present a defense fits within Justice Ginsburg's small but significant collection of impassioned dissents.

Justice Ginsburg has stated that she writes separate opinions only where she believes them to be "really necessary."[106] She carefully "[c]hooses her ground" when dissenting,[107] and thus the decision to write at all is noteworthy. And *Connick* belongs in the even more select group of dissents so expressive of Justice Ginsburg's core constitutional concerns that she read from the bench to

underline the objection to the majority's decision. An oral dissent, she has explained, indicates "more than ordinary disagreement."[108] Most often she does not "announce," but when she wants to "emphasize that the court not only got it wrong, but egregiously so," reading a dissent can serve an "immediate objective."[109] It signals that the dissenter views the majority as "importantly and grievously misguided."[110]

Ledbetter v. Goodyear,[111] in which Justice Ginsburg delivered perhaps her best known dissent from the bench, sounds some of the same notes as her *Connick* opinion. The majority decision in *Ledbetter*, authored by Justice Alito, held that a woman had waited too long to sue for pay discrimination even though she was unaware for years that she was earning substantially less than her male coworkers at a tire plant. Justice Ginsburg emphasized that private sector employees do not ordinarily know what their colleagues are making:

> Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[112]

Because employees cannot "comprehend [their] plight," neither can they complain until the disparity becomes apparent. And as a result of the Court's decision, an employee's "initial readiness to give [the] employer the benefit of the doubt" would preclude a later challenge.[113]

What struck Justice Ginsburg about *Connick* relates to her central objection in *Ledbetter*. There, the plaintiff first suffered exclusion from full and fair participation in the workplace, and then was barred from court when she sought a remedy for that harm. Ledbetter did not know that she was paid less than her male counterparts until time extinguished her claim. Thompson's dilemma is substantively distinct but structurally similar. Thompson was unaware of exculpatory evidence that could exonerate him while he spent eighteen years in prison on a wrongful conviction. Then, though there was no question that he suffered a deprivation of his constitutional rights, the Court constructed a procedural impediment that precluded prosecutorial liability. Justice Ginsburg also understood and expressed in both cases how foreclosing a remedy would affect future employees seeking equal pay, or future defendants exposed to similar unfairness.[114]

Congress subsequently passed the Lilly Ledbetter Fair Pay Act of 2009, accepting an invitation that Justice Ginsburg extended from the bench and adopting the position she took in dissent. It is too soon to say whether her *Connick* dissent might similarly inspire new standards on the *Brady* front, but at a

minimum the decision has generated substantial commentary about the need to reconsider the mechanisms through which *Brady* is enforced.[115]

Justice Ginsburg's oral dissents have gathered strength across substantive areas,[116] and their broader strokes connect to her criminal procedure decisions. Recently, she has engaged in some negative incrementalism on both affirmative action and abortion rights.[117] In *Fisher v. University of Texas*,[118] she agreed that the University of Texas's admissions plan should stay in place but objected to the decision to send it back for the lower court to judge it against a more demanding standard, expressing some concern about the majority's strategy to diminish affirmative action over time.[119] Moreover, in *Gonzalez v. Carhart*,[120] she argued that treating women as incapable of making the difficult choices surrounding second-trimester abortions denied them equal protection.[121] And she read her dissent aloud to emphasize what she called the majority's "alarming" ruling and "effort to chip away" at abortion rights.[122]

Furthermore, Justice Ginsburg continues to make her strongest arguments through a scrupulous understanding of the record and a common sense view of the facts.[123] Her dissent in *Vance v. Ball State University*[124] challenged a restrictive definition of "supervisor," which in turn narrowed the conduct prohibited under Title VII of the Civil Rights Act of 1964.[125] In Justice Ginsburg's view, the majority's definition of supervisor—limited to the person with the authority to hire, fire, demote, promote, transfer or discipline an employee[126]—exhibited "remarkable resistance" to "workplace realities" and would leave many employees defenseless against those in their chain of command who could make their work life miserable without having "tangible" authority.[127] The following day, in *Shelby County v. Holder*,[128] Justice Ginsburg read a dissent from the bench objecting that to conclude from the nation's progress in protecting minority voters that the voting rights law was no longer needed was like "throwing away your umbrella in a rainstorm because you are not getting wet."[129]

Insisting on the realities—not only of workplaces and voting districts but of public defenders' and prosecutors' offices—has been a key feature of Justice Ginsburg's dissents. Employees do not ordinarily inquire about the salaries of their counterparts,[130] supervisory power is not confined to the individual who hires and fires,[131] constitutional protections can achieve some gains and remain necessary at the same time.[132] Nor do prosecutors suppress exculpatory evidence in coordination with several colleagues unless the office in which they work broadly tolerates circumvention of constitutional rights.[133] The *Connick* Court simply ignored the basic realities of a functioning District Attorney's Office to conclude that there was no deliberate indifference and that two decades of conduct involving many prosecutors constituted a single act.[134] A defendant deprived of the essential facts necessary to his defense, and then precluded from seeking recourse for that violation in court, has twice been excluded from the system. And when the Court relies on these fictions to hinder judicial enforcement

of constitutional rights, Justice Ginsburg views that as yet another failure of process.

There is thus an extent to which Justice Ginsburg's criminal procedure decisions harmonize with the underlying commitment of her broader jurisprudence. She is dedicated, she has said, to "the idea of essential human dignity, that we are all people entitled to respect from our Government as persons of full human stature, and must not be treated as lesser creatures."[135] According to Neil Siegel, this belief in "equal citizenship stature"[136] defines Justice Ginsburg's vision for "how government power should be exercised and how individual rights should be protected in the American constitutional order."[137] Her criminal procedure opinions are neither entirely consistent with each other nor perfectly consonant with the discrimination decisions, but there is an intriguing and important relationship between them.

Both sets of decisions, moreover, weave together fair process and equal access. In the gender discrimination cases, Justice Ginsburg has treated liberty and equality as interconnected values that "inform one another."[138] At times, she has used liberty arguments to protect equality,[139] and in the criminal procedure realm, she has shown how equality concerns can safeguard liberty interests. In a majority opinion in *M.L.B. v. S.L.J.*,[140] written early in her tenure on the Court, Justice Ginsburg recognized the relationship between equal protection and the illegitimacy of "fencing out would-be appellants based solely on their inability to pay core costs."[141] There, she held that indigent parents must be afforded an opportunity to appeal termination of parental rights whether or not they can pay for preparation of the trial record.[142] The rationale in the opinion was self-consciously imprecise because it comprehended more to the "essential fairness of the state-ordered proceedings anterior to adverse state action" than due process.[143]

Justice Ginsburg also perceives some shortcomings to criminal procedure rights conceptualized as constraints and instead concentrates on the government's affirmative obligations to ensure fair process.[144] She recognizes, however, that fundamental liberty interests sometimes provide the strongest support for access to the courts.[145] Consequently, neither the canonical gender discrimination decisions nor the quieter criminal procedure opinions can be described through "resort to easy slogans or pigeonhole analysis."[146] The two groups of cases, however, seem to coalesce around an ideal of opportunity, and an understanding of the importance of a fair playing field.[147]

CONCLUSION

Though they have received less attention than other areas of her jurisprudence, Justice Ginsburg's criminal procedure opinions resonate with her work against discrimination. Her conception of a fair criminal justice process is

infused with equality principles, and particularly with the conviction that the government should not foster inequality, and should work to remedy the effects of past injustices. She has focused on expanding opportunity within adjudication, more than on ensuring reliability or enlarging privacy in the ways that her progressive predecessors did. Once criminal defendants have access—to the exculpatory information that might allow them to mount a defense, to the attorneys necessary to do so, and to a duly empowered jury—then she believes that the adversarial process safeguards constitutional rights. That commitment is an insufficiently appreciated dimension of Justice Ginsburg's criminal procedure jurisprudence, and a connection that both informs and amplifies her other contributions.

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[1] *See* Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 739 (2002) ("American women's equality is a story of creative interpretation of the Equal Protection Clause and of advocates' bravado . . . . [l]ed with inventiveness and strategic brilliance by now-Justice Ruth Bader Ginsburg.").

[2] *See* Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 870 (2009).

[3] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

[4] Neil S. Siegel, *"Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision*, 43 NEW. ENG. L. REV. 799, 825 (2009).

[5] *See generally* Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391 (2004). *See also* Slobogin, *supra* note 2, at 870 ("To date, no one has taken a sustained look at Justice Ginsburg's approach to decision-making in the area of criminal procedure.").

[6] Perry v. New Hampshire, 132 S. Ct. 716 (2012).

[7] *Id.* at 730.

[8] Connick v. Thompson, 131 S. Ct. 1350 (2011).

[9] *Id.* at 1370–87 (Ginsburg, J., dissenting).

[10] Slobogin, *supra* note 2, at 870.

[11] Siegel, *supra* note 4, at 801.

[12] *See* Slobogin, *supra* note 2, at 876; *see also id.* at 887 (stating that some of Justice Ginsburg's criminal procedure decisions may have been lost opportunities and that "a bit more willingness to push the envelope might be worthwhile even for a judge who tends to [be] gradualist").

[13] Her record is, however, in keeping with her resistance to affixing "conservative" or "liberal" labels to jurisprudential trends, which she has pointed out tends to be the practice of unsuccessful litigants. *See generally* Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. L. & POL'Y REV 41 (1986).

[14] Justice Ginsburg has written that "[m]easured motions" seem right "for constitutional as well as common law adjudication," and that "[d]octrinal limbs too swiftly shaped" "may prove unstable." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992); *see also* Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1086 (2009).

[15] Ginsburg, *supra* note 14, at 1209.

[16] Slobogin, *supra* note 2, at 867.

[17] *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 56 (1993) (statement of Judge Ruth Bader Ginsburg) (internal quotation marks omitted).

[18] Roe v. Wade, 410 U.S. 113 (1973).

[19] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985); *see also* Adam Liptak, *Court is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, at A1 (recounting Justice Ginsburg's view that the Court moved too fast in *Roe* because the decision "'gave the anti-abortion forces a single target to aim at'").

[20] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[21] *See, e.g.*, Herring v. United States, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting).

[22] Slobogin, *supra* note 2, at 879.

[23] Perry v. New Hampshire, 132 S. Ct. 716 (2012).

[24] *Id.* at 730.

[25] *Id.* at 718 (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)) (internal quotation marks omitted).

[26] *See, e.g.*, BRANDON GARRETT, CONVICTING THE INNOCENT 145 (2011).

[27] United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

[28] Berghuis v. Thompkins, 560 U.S. 370, 400–01 (2010) (Sotomayor, J., dissenting).

[29] *Perry*, 132 S. Ct. at 730–40 (Sotomayor, J., dissenting).

[30] *See* Crawford v. Washington, 541 U.S. 36, 68–69 (2004); *see also* Michigan v. Bryant, 131 S. Ct. 1143, 1177 (2011) (Ginsburg, J., dissenting).

[31] *Perry*, 132 S. Ct. at 728.

[32] *See id.* at 726. Justice Ginsburg noted that the "crucial element of police overreaching" was missing, and therefore that the Due Process Clause was not implicated. *Id.* (quoting Colorado v. Connelly, 479 U.S. 157, 163, 167 (1986)).

[33] Kentucky v. King, 131 S. Ct. 1849 (2011).

[34] *See id.* at 1864 (Ginsburg, J., dissenting) ("The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant."); *see also* Arkansas v. Sullivan, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (agreeing that officers' subjective intentions are irrelevant for probable cause analysis but urging reconsideration in the event of an "epidemic of unnecessary minor-offense arrests"); Minnesota v. Carter, 525 U.S. 83, 108 (1998) (Ginsburg, J., dissenting) ("Human frailty suggests that today's decision will tempt police to pry into private

dwellings without warrant, to find evidence incriminating guests who do not rest there through the night.").

[35] *See* Howes v. Fields, 132 S. Ct. 1181, 1195 (2012) (Ginsburg, J., concurring in part and dissenting in part).

[36] Florida v. J.L., 529 U.S. 266, 274 (2000).

[37] *See* Fernandez v. California, 134 S. Ct. 1126, 1140 (2013) (Ginsburg, J., dissenting).

[38] Herring v. United States, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting); *see also* Arizona v. Evans, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (asserting that deterrence is an empirical question rather than a "logical" one).

[39] *Cf.* Smith v. Massachusetts, 543 U.S. 462, 476 (2005) (Ginsburg, J., dissenting) ("As a trial unfolds, a defendant must be accorded a timely, fully informed opportunity to meet the State's charges. I would so hold as a matter not of double jeopardy, but of due process.").

[40] Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012).

[41] *See, e.g.*, Rivera v. Illinois, 556 U.S. 148, 162 (2009) (holding that the erroneous denial of a peremptory challenge does not violate the Constitution because the defendant "received precisely what due process required: a fair trial before an impartial and properly instructed jury"); Vermont v. Brillon, 556 U.S. 81, 82 (2009) (attributing a public defender's trial delay to the defendant because a "contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds").

[42] In the discrimination decisions as well, however, Justice Ginsburg has emphasized entitlements themselves less than the question whether a disqualification applies to one group but not another. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

[43] *See* Crawford v. Washington, 541 U.S. 36 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[44] Justice Kagan is the exception.

[45] *See* Joyce A. Baugh, *Ruth Bader Ginsburg: A Judge's Judge and a Lawyer's Lawyer*, *in* SUPREME COURT JUSTICES IN THE POST-BORK ERA: CONFIRMATION POLITICS AND JUDICIAL PERFORMANCE 61–80 (2002).

[46] In 1954, the Court included Chief Justice Earl Warren, a former governor of California; Hugo L. Black, a former United States Senator; Felix Frankfurter, a former law professor; William O. Douglas, who had served as chairman of the Securities and Exchange Commission; and Robert H. Jackson, who had been the United States Attorney General. *See* Adam Liptak, *Judging a Court with Ex-Judges Only*, N.Y. TIMES, Feb. 17, 2009, at A14.

[47] *See, e.g.*, Lee Epstein, et al. *Circuit Effects: How the Norm of Federal Judicial Experience Biases the U.S. Supreme* Court, 157 U. PA. L. REV. 833, 853–64 (2009).

[48] Linda Greenhouse, *Justices on the Job*, N.Y. TIMES, July 24, 2013, http://opinionator.blogs.nytimes.com/2013/07/24/justices-on-the-job/.

[49] *See* David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts about Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 21–22 (2004) (discussing Justice Ginsburg's "lawyerly" approach and narrow focus on analyzing the particular context and the facts at hand).

[50] *See* Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41, 41 (2013).

[51] Kowalski v. Temser, 543 U.S. 125, 144 (2004) (Ginsburg, J., dissenting); *see id.* at 139–40 (objecting to the Court's conclusion that attorney lacked standing to sue on behalf of indigent criminal defendants because of the "incapacities under which these defendants labor and the complexity of the issues their cases may entail").

[52] As Neil Siegel writes, "a Justice whose basic approach to constitutional law is oriented around the ideal of essential human dignity, of full human stature, might be expected to respond skeptically to a President's assertion that there are, in effect, no judicially enforceable constitutional limits on his authority to declare someone an 'enemy combatant' and to indefinitely detain the individual or try him before a military commission." Siegel, *supra* note 4, at 831 (citing Boumediene v. Bush, 553 U.S. 723 (2008), Hamdan v. Rumsfeld, 548 U.S. 557 (2006), Hamdi v. Rumsfeld, 542 U.S. 507 (2004), Rasul v. Bush, 542 U.S. 466 (2004), and Rumsfeld v. Padilla, 542 U.S. 426 (2004)); *see also* Slobogin, *supra* note 2, at 875 (noting that Justice Ginsburg voted for the petitioner in "every one of the cases contesting the Bush Administration's attempts to exempt its war on terrorism from federal court jurisdiction"); *cf.* Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioner's claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.").

[53] *See, e.g.*, Smith v. Massachusetts, 543 U.S. 462, 475–80 (2005) (Ginsburg, J., dissenting); Shafer v. South Carolina, 532 U.S. 36, 54–55 (2001); *see also, e.g.*, Gray v. Netherland, 518 U.S. 152, 171–86 (1995) (Ginsburg, J., dissenting); Simmons v. South Carolina, 512 U.S. 154, 174–75 (1994) (Ginsburg, J., concurring).

[54] *See, e.g.*, Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709–19 (2011); Michigan v. Bryant, 131 S. Ct. 1143, 1176–77 (2011) (Ginsburg, J., dissenting); Cunningham v. California, 549 U.S. 270, 293 (2007).

[55] *See generally* Carol S. Steiker, *Raising the Bar:* Maples v. Thomas *and the Sixth Amendment Right to Counsel*, 127 HARV. L. REV. 468 (2013).

[56] Alabama v. Shelton, 535 U.S. 654 (2002).

[57] *See id.* at 674.

[58] Halbert v. Michigan, 545 U.S. 605 (2005).

[59] *Id.* at 621 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring in judgment)) (internal quotation marks omitted).

[60] *See id.*

[61] Kowalski v. Temser, 543 U.S. 125, 142 (2004) (Ginsburg, J., dissenting).

[62] Nichols v. United States, 511 U.S. 738, 765–66 (1994) (Ginsburg, J., dissenting).

[63] Pliler v. Ford, 542 U.S. 225, 235–37 (2004) (Ginsburg, J., dissenting).

[64] Steiker, *supra* note 55, at 471.

[65] *Id.* at 471 (discussing Harrington v. Richter, 131 S. Ct. 770 (2011), Vermont v. Brillon, 556 U.S. 81 (2009), Halbert v. Michigan, 545 U.S. 605 (2005), Rompilla v. Beard, 545 U.S. 374 (2005), Wiggins v. Smith, 539 U.S. 510 (2003), and Alabama v. Shelton, 535 U.S. 654 (2002)).

[66] Maples v. Thomas, 132 S. Ct. 912 (2012).

[67] *Id.* at 917.

[68] *See also* Lee v. Kenna, 534 U.S. 362, 366 (2002) (holding a state rule requiring a writing and specific showing to seek a continuance insufficient to bar federal habeas review because "caught in the midst of a murder trial and unalerted to any procedural defect in his presentation, defense counsel could hardly be expected to divert his attention from the proceedings rapidly unfolding in the courtroom and train, instead, on preparation of a written motion and affidavit").

[69] *Brillon*, 556 U.S. at 81.

[70] *Id.* at 94 (internal quotation marks and citation omitted). Justice Ginsburg has not, however, been similarly supportive of the right to proceed pro se. *See* Slobogin, *supra* note 2, at 874.

[71] Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, the Joseph L. Rah, Jr. Lecture at the Univ. of the D.C., David A. Clarke Sch. of Law (Apr. 9, 2001) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/ viewspeeches.aspx?Filename=sp_04-09-01a.html).

[72] *See* Florida v. Nixon, 543 U.S. 175, 190 (2004); *see also* Maples v. Thomas, 132 S. Ct. 912 (2012) (critiquing counsel's performance). Nor has Justice Ginsburg been forgiving of attorneys who make their own procedural errors. She once wrote that there was no need for a windfall when "counsel was not misled by any trial court statements or actions; rather, he neglected to follow plain instructions." Carlisle v. United States, 517 U.S. 416, 436 (1996) (Ginsburg, J., concurring).

[73] *See The Supreme Court 2006 Term—Leading Cases*, 121 HARV. L. REV. 225, 230 (2007); *cf.* J.E.B. v. Alabama, 511 U.S. 127, 151 (1994) (holding that peremptory challenges to exclude jurors based on gender violate the Equal Protection Clause).

[74] *See* Jones v. United States, 527 U.S. 373, 413 (1999) (Ginsburg, J., dissenting) (arguing that juries should not be presented with choices "clouded by misinformation," and that this jury was wrongly instructed that the defendant could receive a sentence other than life imprisonment if a death sentence was not imposed); Romano v. Oklahoma, 512 U.S. 1, 19 (1994) (Ginsburg, J., dissenting) (maintaining that the jury should not be relieved of responsibility for imposition of the death penalty); *cf.* Perry v. New Hampshire, 132 S. Ct. 716, 728–29 (2012) (explaining that careful jury instructions addressing the flaws in eyewitness identifications can educate and empower the jury).

[75] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[76] *Id.* at 475–76.

[77] *See* Ring v. Arizona, 536 U.S. 584, 602 (2002).

[78] *See* Cunningham v. California, 549 U.S. 270, 293 (2007).

[79] United States v. Booker, 543 U.S. 220 (2005).

[80] *Id.* at 244.

[81] Connick v. Thompson, 131 S. Ct. 1350 (2011).

[82] *Id.* at 1355.

[83] Other suppressed evidence in the case concerned a financial reward that the informant received from the victim's family and an eyewitness whose description of the perpetrator did not match Thompson. *Id.* at 1371–72 (Ginsburg, J., dissenting).

[84] Once the blood evidence surfaced, a former prosecutor also came forward to report that five years earlier, one of the original prosecutors on the Thompson case confessed to withholding evidence, after he learned that he was dying of cancer. *Id.* at 1374–75.

[85] Brady v. Maryland, 373 U.S. 83 (1963).

[86] *Id.* at 91–92.

[87] *Connick*, 131 S. Ct. at 1359 (citing Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 692 (1978)).

[88] Canton v. Harris, 489 U.S. 378 (1989).

[89] *Id.* at 388.

[90] *See* Smith v. Cain, 132 S. Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419 (1995).

[91] *Connick*, 131 S. Ct. at 1366. According to Justice Scalia's concurrence in *Connick*, *Canton* describes the *only* case in which a deliberate indifference claim could be premised on a single violation: the extreme circumstance of arming police officers untrained in the permissible use of deadly force. *Id.* at 1367–70 (Scalia, J., concurring).

[92] *Id.* at 1387 (Ginsburg, J., dissenting).

[93] *Id.* at 1366 (Scalia, J., concurring). Similar "excavations" by Justice Ginsburg do not always yield the conclusion that procedures were unfair. In her opinion for the Court in *Skilling v. United States*, for example, Justice Ginsburg engaged in an extensive analysis of the trial publicity and the voir dire questions themselves to determine that neither a presumption of prejudice nor actual bias prevented a fair trial in Enron's home venue of Houston. 130 S. Ct. 2896, 2907 (2010). Justice Sotomayor disagreed, concluding that prejudicial information about the Enron case was "deeply ingrained in the popular imagination." *Id.* at 2943 (Sotomayor, J., dissenting).

[94] *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

[95] *See* Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 721 (2011).

[96] *Connick*, 131 S. Ct. at 1380 n.14, 1387 (Ginsburg, J., dissenting).

[97] *Id.* at 1384; *see also* Bandes, *supra* note 95, at 726 (noting that there were thirteen additional pieces of evidence which, "once in [Thompson's] possession, helped [him] win an acquittal in his murder retrial").

[98] *Connick*, 131 S. Ct. at 1382 (Ginsburg, J., dissenting).

[99] *Id*. at 1384.

[100] Bandes, *supra* note 95, at 717.

[101] *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

[102] *Id.* at 1385.

[103] *Id.*

[104] Banks v. Dretke, 540 U.S. 668, 695 (2004).

[105] *See* Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination* (forthcoming chapter in this volume at 2) (2014).

[106] Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

[107] *Id.* at 8; *see also* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142–44 (1990); Nancy Gertner, *Dissenting in General*: Herring v. United States *in Particular*, 127 HARV. L. REV. 433, 433 (2013).

[108] Justice Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/sp_10-21-07.html).

[109] *Id.*

[110] *Id.*

[111] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3) (2012)).

[112] *Id.* at 645 (Ginsburg, J., dissenting).

[113] *Id.*; *cf.* Libretti v. United States, 516 U.S. 29, 54 (Ginsburg, J., concurring) (noting that one cannot waive a jury trial right of which one is not fully aware).

[114] *See, e.g.*, John Thompson, *The Prosecution Rests, but I Can't*, N.Y. TIMES, Apr. 10, 2011, at WK11 (maintaining that Thompson was not concerned about money damages but rather about accountability for the prosecutors involved, particularly given the 4,000 prisoners serving life without parole in Louisiana who do not have lawyers to seek post-conviction relief).

[115] *See generally, e.g.*, Hadar Aviram, *Legally Blind: Hyperadversarialism,* Brady *Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1 (2013); Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH. L. REV. 133 (2012); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639 (2013); Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329 (2012); Ellen Yaroshesky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913 (2012).

[116] *See* Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1.

[117] *See* Fisher v. Univ. of Texas, 133 S. Ct. 2411, 2432–33 (2013) (Ginsburg, J., dissenting); Gonzalez v. Carhart, 550 U.S. 124, 169–71 (2007) (Ginsburg, J., dissenting). Some see positive incrementalism on substantive commitments—such as the death penalty—as well. *See* Slobogin, *supra* note 2, at 878–79 (citing Kennedy v. Louisiana, 554 U.S. 407 (2008), Roper v. Simmons, 543 U.S. 551 (2005), and Atkins v. Virginia, 536 U.S. 304 (2002)). Indeed, Justice Ginsburg herself stated in a 2013 interview with New York radio station WQXR: "If I had my way there would be no death penalty. But the death penalty for now is the law, and I could say 'Well, I won't participate in those cases,' but then I can't be an influence." Interview by Marilyn Horne with Justice Ruth Bader Ginsburg, WQXR 105.9 FM (Feb. 2, 2013).

[118] *Fisher*, 133 S. Ct. at 2411.

[119] *See id.* at 2433 (Ginsburg, J., dissenting) ("'I have several times explained why government actors, including state universities, need not blind themselves to the still lingering, every day evident, effects of centuries of law-sanctioned inequality.'" (quoting Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting))).

[120] *Carhart*, 550 U.S. at 124.

[121] *Id.* at 169–71 (2007) (Ginsburg, J., dissenting). *See generally* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

[122] *Carhart*, 550 U.S. at 169 (Ginsburg, J., dissenting).

[123] *See* Vicki C. Jackson, Lee v. Kemna: *Federal Habeas Corpus and State Procedure*, 127 HARV. L. REV. 445, 448–49 (2013) ("In opinions across areas including gender equality, race equality, and reproductive freedom, Justice Ginsburg's attention to the facts is a welcome font of common law judicial sensibility.").

[124] Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

[125] *Id.* at 2455–66 (Ginsburg, J., dissenting).

[126] *Id.* at 2434 (majority opinion).

[127] *Id.*

[128] Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

[129] *Id.* at 2650 (Ginsburg, J., dissenting).

[130] *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3) (2012)).

[131] *See Vance*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting) ("The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions.").

[132] *See Shelby Cty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting) ("Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.").

[133] *See* Connick v. Thompson, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting); *cf.* Transcript of Oral Argument at 29, Smith v. Cain, 132 S. Ct. 627 (2012) (No. 10-8145) (statement of Justice Ginsburg) ("But how could it not be material? Here is the only eyewitness. Are you really urging that the prior statements were immaterial?").

[134] *Connick,* 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

[135] Ruth Bader Ginsburg, *Remarks of Ruth Bader Ginsburg at CUNY School of Law*, 7 N.Y. CITY L. REV. 221, 238 (2004).

[136] *See* Siegel, *supra* note 4, at 816 ("Affording 'equal dignity' to all Americans, including historically marginalized groups, constitutes the central purpose of Justice Ginsburg's constitutional vision.").

[137] *Id.* at 804.

[138] Karlan, *supra* note 14, at 1091; *see also* Siegel & Siegel, *supra* note 105, at 8 (explaining that Justice Ginsburg argued in sex discrimination cases both that "restricting women's liberty may be a means to the end of communicating inequality" and that "discriminating against women may diminish their opportunities to fashion fulfilling lives").

[139] *See* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823 (2007) ("In these early briefs, liberty talk and equality talk were entangled as emanations of different constitutional clauses."); *see also* Siegel, *supra* note 4, at 840–41.

[140] M.L.B. v. S.L.J., 519 U.S. 102 (1996).

[141] *Id.* at 120; *see also* Martha Minow, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), 127 HARV. L. REV. 461, 467 (2013).

[142] *M.L.B.*, 519 U.S. at 120.

[143] *Id*.

[144] *See* Ginsburg, *supra* note 19, at 384 (reasoning that an autonomy-based abortion right "places restraints, not affirmative obligations, on government").

[145] This would be true, for example, in cases concerning funding for the right to counsel. *See* Karlan, *supra* note 14, at 1092.

[146] *Id.* at 1091 (citing *M.L.B.*, 519 U.S. at 120).

[147] *See, e.g.*, Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 45 (2004) (stating that Justice Ginsburg has "extended her commitment to opportunity and equality far beyond gender discrimination").