IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

JEFFREY K. SKILLING, :

Petitioner : No. 08-1394

v. :

UNITED STATES :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, March 1, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

SRI SRINIVASAN, ESQ., Washington, D.C.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case 08-1394, Skilling v. United States.

Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN

ON BEHALF OF THE PETITIONER

MR. SRINIVASAN: Thank you, Mr. Chief Justice, and may it please the Court:

The dramatic collapse of Enron had profound reverberations experienced throughout the Houston economy and citizenry. Countless individuals in the Houston area were affected, as the court of appeals explicitly recognized, so much so that 60 percent of the jury venire affirmatively acknowledged in the responses to questionnaires that they would be unable to set aside their deep-seated biases or doubted their ability to do so, or that they were angry about Enron's collapse, an anger that was manifested in the vitriolic terms in which Petitioner Jeff Skilling was referred to repeatedly both in the questionnaires and in the community more generally.

The passions about this case were so intense and the connections to Enron ran so deep that the entire

United States Attorney's Office, all 150 or so attorneys, recused themselves from the investigation that culminated in this prosecution.

In those conditions, the court of appeals was correct in unanimously concluding that this was one of the very rare cases in which, because of the degree of passion and prejudice in the community, the process of voir dire cannot be relied upon to adequately ferret out and identify unduly biased jurors. And --

JUSTICE SOTOMAYOR: What do we take from trial counsel at the end of the voir dire process announcing that if he had had extra preemptory challenges, he would have used them only against 6 of the 12 people that were finally selected? If that's all he would have ejected, why couldn't a fair jury have been found?

MR. SRINIVASAN: Well, Your Honor, to be clear even one juror who should have been excluded and wasn't would have been enough, but --

JUSTICE SOTOMAYOR: That's a different -- that's a different question.

MR. SRINIVASAN: Sure.

JUSTICE SOTOMAYOR: You are taking a broader proposition and saying that the presumption could not under any set of circumstances be overcome, and that's

what I'm trying to probe.

MR. SRINIVASAN: Yes, Justice Sotomayor. The reason that trial counsel objected to six specific jurors at the juncture that Your Honor's referring to is that that corresponded to six cause objections that had been, in our view, erroneously denied. Now, that in no way suggests that we were satisfied with the remainder of the jury. We had made an objection --

JUSTICE SOTOMAYOR: I'm sorry. There was only one juror that had been challenged for cause against -- for which a preemptory challenge wasn't used. I thought that every other for-cause challenge ended up being excused on the basis of a preemptory challenge.

MR. SRINIVASAN: That's right, and that's what I was trying to say, Your Honor, that the reason why trial counsel identified six specific jurors was that there were six other jurors who would have been on the venire as to whom we had applied -- as to whom we had asserted a cause challenge that was denied, and because of that we had to use a preemptory to strike those jurors, which left us without --

JUSTICE SOTOMAYOR: But that means that there were six that were okay.

MR. SRINIVASAN: Well, no. There were six as -- there were six remaining as to which we didn't

have a corresponding for-cause objection that had been denied. But in no way indicates that we were satisfied with the other six.

From the very outset, we complained about this process. We said at the outset before trial that no juror could be seated in this case because the process of voir dire couldn't adequately be relied upon in these conditions.

JUSTICE SOTOMAYOR: Tell me what in the process itself, outside of your general proposition that no process could find fair jurors? What else in the process was deficient?

MR. SRINIVASAN: The process was deficient in a couple of respects, Your Honor: First, with respect to time and scope. The voir dire that the trial judge conducted was essentially an ordinary voir dire for ordinary circumstances. He announced before the fact that the voir dire would be conducted in a period of 1 day, and we objected to that.

He also announced that he would have limited questioning and that counsel would have very limited opportunity to follow up with additional questions. We also objected clearly and repeatedly to that. And that was manifested in the voir dire that occurred, because what the trial judge did is made two fundamental, we

think, mistakes in the way he conducted the voir dire.

One occurs with respect to those jurors as to whom they had laid bare their biases, and another occurs with respect to those jurors as to whom they didn't affirmatively acknowledge their biases, but, given the conditions that prevailed in the community, they might well have had biases that they didn't affirmatively acknowledge.

Now, with respect to the first, the mistake that, in our view, the trial judge made was to accept a simple assurance of fairness in the face of overt statements of bias and in conditions that confronted this community, where there was deep-seated community prejudice and animus that permeated the Houston -- that permeated the city of Houston, that kind of acceptance of a simple assurance of fairness in the face of repeated overt statements of bias shouldn't be countenanced.

And we think what the trial court should have done in that situation is to move to an additional juror. But instead of doing that, the trial court interviewed 46 jurors, nearly 8 more than the minimum that was necessary to constitute a jury in this case. And just to give this a frame of reference, the entire voir dire process in this case took 5 hours, and the trial judge interviewed each juror for approximately 4 and a half

minutes.

By way of comparison --

JUSTICE GINSBURG: But he did -- he did give time for counsel to ask additional questions, trial counsel.

MR. SRINIVASAN: He -- he did.

JUSTICE GINSBURG: He asked both sides if they had additional questions.

MR. SRINIVASAN: He gave some time, Justice Ginsburg, but he made clear before the voir dire began that that opportunity was going to be limited both in time and scope. With respect to scope -- and this is at page 11805 of the record -- what he said was that follow-up questioning would be permitted if it was reasonable and if it was related to the purposes for which the juror was brought before the bench.

And just to paint the picture a little bit, the -- the potential jurors were brought before the bench, and they were left standing, which I think reinforced the conception that this was going to be a rather quick affair and it was not going to allow the kind of extensive, meaningful follow-up that we thought was required.

And to give it a frame of reference, in the Oklahoma City bombing case, the prosecution of Timothy McVeigh, that proceeding was transferred from the city

of Oklahoma City to Denver, but even after the transfer, the trial judge conducted an 18-day voir dire with an average of 1 hour of interviews per juror; 18 days and 1 hour as compared with 5 hours and 4 and a half minutes. And we think the Oklahoma City experience is much more befitting of the kind of voir dire that's necessary in circumstances of community prejudice and passion of the kind that existed here.

JUSTICE GINSBURG: You made a change of venue motion at the outset, right?

MR. SRINIVASAN: We did. We --

JUSTICE GINSBURG: And I'm unaware of any case in which we have said a change is mandatory when what's involved is money rather than life or limb. Life or limb obviously was involved in the McVeigh case.

MR. SRINIVASAN: Sure, it was, Your Honor, and by no means would we in any way diminish the -- the profound human tragedy that accompanied the Oklahoma City case, but I think the reality of the sentiment on the ground in Houston was that Houston citizens, as we pointed out in our brief, in fact referred to the -- to what happened in the wake of the collapse of Enron in terms that were similar to the way they referred to terrorist attacks. They -- they in fact talked about it in terms of the 9/11 attack.

JUSTICE GINSBURG: Well, what was remarkable about some of those questionnaires, there were a lot of people didn't read the newspapers. There were a lot of people who indicated they really didn't know anything about this case.

MR. SRINIVASAN: That's true, Justice Ginsburg, but I'd like to clarify one aspect of that, if I could, and that's that our argument is not -- and it hasn't been at any point in this proceeding -- that pretrial publicity caused the passion and prejudice in the community. This is -- is very much a case in which pretrial publicity was a symptom rather than the cause.

Now, pretrial publicity, to be sure, stoked the passions that -- that already lay within the community, but really this was a case in which the passions existed regardless of pretrial publicity. And I think the juror questionnaires and the surveys and all the other evidence that we put before the district court manifests that. If you look at the juror questionnaires -- and they are -- there are several examples of situations in which particular jurors said that they were unaware of any of the pretrial publicity, they did not watch the news, they didn't read the newspapers, they hadn't seen the movies about Enron, but yet they

still said they had feelings about Jeff Skilling and Ken Lay.

Juror 63, a person who wound up on the panel, is a good example of that. She answered "no" to all the questions concerning her exposure to pretrial publicity, but then when she was asked whether she had views about the guilt or innocence of Jeff Skilling, she said yes, she did; and she elaborated on that by explaining that I think he probably knew he was breaking the law. So this is a person who, notwithstanding a lack of exposure to pretrial publicity --

JUSTICE GINSBURG: But there was some follow-up to that.

MR. SRINIVASAN: There -- there was a bit of follow-up to that, Your Honor, but I think the nature of the follow-up is -- is quite illuminating on what we think are some of the fatal flaws in this voir dire process. The follow-up --

JUSTICE ALITO: Do you really think that if -- if there had been a much more lengthy voir dire and if the trial judge had been more willing to -- to grant motions to dismiss for cause, that it would have -- that it would not have been possible to find a fair and impartial jury in the district?

MR. SRINIVASAN: Well, our first --

certainly, there should have been a more intensive voir dire, Justice Alito. Now, our first order of submission is that the proceedings should have been transferred, not necessarily because there don't in fact exist or there didn't in fact exist 12 unbiased jurors in the city of Houston.

Our point is a different one, and that is that in conditions where you have the level of passion and prejudice that permeated the Houston community, there's too great a risk that the process of voir dire and particularly the ordinary process of voir dire wouldn't be successful in identifying those 12 people. That's the danger.

And the other problem with the argument that the government makes with respect to the fact that there are 4 and a half million citizens in Houston, which I think is part of Your Honor's question, is that that would mean more if the trial judge had gone deeper into the jury pool than the mere 46 jurors he did interview. Because when he interviewed those 46 and stopped at that point, what we were left with was a jury panel as to which there was too great a danger of bias, too great a danger that they would bring their biases to bear with them in adjudicating Petitioner's guilt.

JUSTICE ALITO: Well, rule 21 says that the

judge must grant a transfer if the judge is satisfied that a prejudice against -- that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

MR. SRINIVASAN: Correct.

JUSTICE ALITO: Well, doesn't that suggest that if you could find a fair and impartial jury with an adequate voir dire, then the transfer need not be granted?

MR. SRINIVASAN: Well, I think it has to be read against the context of whether we can be confident that you can find that fair and impartial jury. I think in any -- I think we would say that in any community in which there is 4 and a half million people, there may, in fact, be 12 individuals who aren't so biased that they can't sit. The real danger, though, is that the ordinary process of voir dire, as this Court's decisions repeatedly recognize, in Mu'Min, in Patton, and Murphy and others, the ordinary process of voir dire in that situation can't be trusted to identify those people.

CHIEF JUSTICE ROBERTS: Because you think --

MR. SRINIVASAN: And that’s the danger here.

CHIEF JUSTICE ROBERTS: -- they’re going to lie, right?

MR. SRINIVASAN: I'm sorry.

CHIEF JUSTICE ROBERTS: Because you think they're going to lie?

MR. SRINIVASAN: No, that’s --

CHIEF JUSTICE ROBERTS: When they fill out the form and say this is what I've heard, and this -- I can fairly evaluate the law and the arguments?

MR. SRINIVASAN: No, no. No, Mr. Chief Justice. With respect, that's not -- that's not the only danger. I mean, that's -- that's part of it, but I think there's -- there's other ones that we would put forward before that one.

There’s two in particular: First, in a community like Houston, in the state of the -- the passion and prejudice that existed in Houston at the time of this trial, there’s a real concern that jurors will not feel fully free to return to that community delivering anything other than the conviction for which the -- the community desires. And that, I think, is an important concern that this Court's decisions identify.

And the other one, and this is in Murphy in particular, where there’s a substantial share of the community that's impassioned and prejudiced, as this one was, there’s a concern that even jurors who don't lay bare -- who don't affirmatively acknowledge their

biases -- are unwittingly subject to the same biases that permeate the community. And that sort of danger is -- is the reason that in these situations, we think transfer is required.

But even if transfer wasn't required, what needed to happen was a more extensive and intensive voir dire than happened here. The voir dire was deficient -- and Justice Ginsburg, this gets back to your question about juror 63. The voir dire was deficient in at least this respect. In conditions like those that permeated Houston, we think it's error to accept the assurance of fairness of a juror who has already laid bare their biases.

Now, juror 63, for example, she said she thinks she knew that Jeff Skilling -- she thinks that Jeff Skilling knew he was breaking the law. This is someone as to whom we ought to be very concerned. In our view, that person shouldn't get --

JUSTICE GINSBURG: Was there a challenge for cause against her?

MR. SRINIVASAN: There -- there wasn't a specific challenge for cause against her, Your Honor, but -- but again, we challenged everybody on the basis that voir dire wouldn't adequately ferret out biases in this case. And then we did challenge -- as Justice

Sotomayor's question about the six specific challenges that we lodged at the close of the voir dire, but before the jurors were sworn -- juror 63 was one of those jurors.

And so I think it was evident that juror 63 was not at all somebody who we were satisfied with. And the reason is, if you look at the nature of -- at the voir dire colloquy with her, the trial court asked her about that statement and asked her: You remember making this statement? Do you still feel that way? And her response was: I don't know.

And then she acknowledged: I have no further information to bring to bear on that question than I did then. And at that point, she has only fortified the bias that she brought with her, but the trial court was unsatisfied, and he continued to press. And then he asked her at some point: Can you apply the presumption of innocence? And she said yes. And then that was it.

But in our view, a -- a search for a -- -- what I think can fairly be described as a rote assurance of fairness can't be sufficient, given the very evident danger that someone like juror 63, who has already laid bare her biases, would bring her biases with her to the panel when she adjudicated Petitioner's guilt or innocence.

JUSTICE BREYER: How do you say we -- in

your opinion, if we agreed with your basic idea -- if, which is totally hypothetical.

MR. SRINIVASAN: Sure.

JUSTICE BREYER: If we agreed with that, how would we sketch the lines? That is, when does the jury -- does the judge have to do more than is ordinary, and what counts as more than ordinary? I mean, I -- what I have fear of, to put it out for you, is that jury selection can go on a very long time.

MR. SRINIVASAN: Right.

JUSTICE BREYER: And judges have to -- have to run their trials. And if we tell the judges that they have got to do more, that will become exaggerated, and they'll administer it in a way that will make it hard to select juries.

That's the harm I'm worried about. So I'm asking you, how would you sketch a line that prevents that harm?

MR. SRINIVASAN: Justice Breyer, it is by nature a contextual inquiry. The standard that this Court has articulated to identify the circumstances in which this sort of extra -- I think -- precaution is necessary is that there has to be, a quote, "wave of public passion," close quote, and that's the language that the Court has used in a number of its decisions.

Now, that may --

JUSTICE SOTOMAYOR: See, the problem with --

MR. SRINIVASAN: I'm sorry. Go ahead, Justice Sotomayor.

JUSTICE SOTOMAYOR: No. Finish Justice Breyer --

MR. SRINIVASAN: I -- I -- anticipating what you might feel, which is that that language may not be self-evident as to the circumstances in which a deeper inquiry is --

JUSTICE BREYER: I didn't ask you -- I just asked you to do your best.

MR. SRINIVASAN: Yes, and that --

JUSTICE BREYER: So we've got the wave of public passion --

MR. SRINIVASAN: Wave --

JUSTICE BREYER: And what about the second half?

MR. SRINIVASAN: Wave of public passion, and I guess the substrata that I would put beneath that, especially for this category of cases, is pervasive animus directed towards the defendant as responsible for a harm felt by the entire community.

JUSTICE BREYER: All right. Now, what's the second half? The second half, which I'm really worried about, is that we get into the business of running the

trial court's trials. So I want to know what it is that the trial court at that stage, in your opinion, other than transfer, has to do?

MR. SRINIVASAN: I think what the trial court has to do is two things, Your Honor: First, for a juror who has laid bare his or her biases, that juror should not be allowed on the panel, and an assurance of fairness from that sort of juror isn't enough. At the very least, Your Honor, on this category -- and then I'll go to my second point -- in a situation in which a juror has laid bare his or her biases, we think that juror shouldn't be seated.

But if you're going to entertain the thought of seating that person, at the very least this has to happen: They have to be forced to confront their assurance of fairness as against the many statements of bias that they may have uttered.

JUSTICE BREYER: What happens if -- I gather -- that a -- that a trial judge has a panel in front of him and people say, yes, I think he is guilty? And -- and the trial judge says, now, if you listen to the presumption, can you be fair? You look him in the eye, and if he says, yes, I can put this aside, trial judges do accept those jurors.

Now, if that is the practice, and others

would know more than me, then our -- our -- I'm worried about changing that ordinary practice.

MR. SRINIVASAN: To be clear, Justice Breyer, that ordinary practice would only be altered in the very rare category of cases that involve a wave of public passion. And -- and they would be altered in the following respect: That if somebody had laid bare their biases, the -- in our view, what should happen is that you should move to the next juror.

But even if you didn't do that, at least the following should happen, Justice Breyer, and that is that when somebody utters an assurance of fairness, that itself shouldn't be enough when the community is permeated with the sorts of biases that attended this proceeding. The jurors should at least be forced to reconcile their previous statements of bias with their utterance of fairness.

The other point I would make is this: That the danger that this Court has identified in conditions like those that pervaded the Houston community is that even with prospective jurors who don't affirmatively acknowledge their biases, there’s a danger that they may have biases they haven't brought to the fore. And we think what can't happen is what the trial judge did in this case, which is to refuse to question any of the

jurors on the basis of any response they gave in the questionnaire, other than responses that raised a red flag.

And we think if you curtail the inquiry in that regard, it doesn't allow for the sort of voir dire that's necessary to in order to be --

JUSTICE SOTOMAYOR: Can I look at --

MR. SRINIVASAN: -- in order to ferret out biases that may be latent.

JUSTICE SOTOMAYOR: Is there any place in the record I could look to see questions that you would have posed absent the judge's limitations?

MR. SRINIVASAN: There are, Justice Sotomayor. There's at R 12036, I think, is an --

JUSTICE SOTOMAYOR: I'm sorry. Repeat that.

MR. SRINIVASAN: I sorry. R 12036 is an important document, which is our renewed motion for change of venue and related relief. And that was after the questionnaire responses had been received.

And the point we made in that document is that as a consequence of the questionnaire responses, we already knew that a great deal of bias permeated the venire. And we proposed not only that the proceedings should be transferred, but also that a different sort of voir dire should be conducted than the one that

the trial court envisioned. And we laid out in that motion the sorts of things that we thought should be done.

And we did that in other places as well, Your Honor, but I think that would be a good place to look. But --

CHIEF JUSTICE ROBERTS: Counsel, can I -- perhaps it's time for you to shift gears, if I could --

MR. SRINIVASAN: Sure.

CHIEF JUSTICE ROBERTS: -- and move to the statutory question.

MR. SRINIVASAN: Sure.

CHIEF JUSTICE ROBERTS: I don't understand why it's difficult. The statute prohibits “scheme to deprive another of the intangible right of honest services.” Skilling owed the Enron shareholders honest services. He acted dishonestly in a way that harmed them. But I don't understand the difficulty.

MR. SRINIVASAN: Well, Mr. Chief Justice, I think part of the problem with that sort of rendition is that that -- I think nobody suggests that any dishonest conduct falls within the compass of this law, that no pre-McNally case suggests that. And I think the government doesn’t takes that position, either. If it did --

CHIEF JUSTICE ROBERTS: No, there has to be -- there has to be a right to honesty. In other words, it's not just in the abstract. And the shareholders had a right to his honest services.

MR. SRINIVASAN: But I don't think that you've advanced the ball, with all due respect, that much by saying there has a right to honest services, because I think what -- at the end of the day, what that would mean is that any situation in which there's a fiduciary duty or even if there's not a fiduciary duty, but at least any situation in which there is a fiduciary duty, a nondisclosure of deception would give rise to a Federal felony prosecution.

And that has never been the understanding under pre-McNally case law, and that shouldn't be the understanding now, because its sweep is breathtaking, and it's not something that we would ordinarily construe Congress to have intended.

Now, I think in -- in this case, there's several objections we have to the application of the honest services fraud statute to this case. We think the statute is unconstitutionally vague. We think it's particularly vague as applies to -- as applied to anything beyond the narrow category of bribes and kickbacks.

But I think in some ways the most

straightforward way to understand why the honest services fraud statute can't be applied validly in this case is to appreciate what I think is an evolution in the government's theory. And -- and at the time of Weyhrauch -- and this is at page 48 of the government's brief in Weyhrauch, just a few months ago. The government said that the honest services fraud statute, quote, "Nor does it cover an official whose interest is public knowledge."

So, at that point, I think we -- we would have believed that the honest services fraud statute can't be applied to Jeff Skilling, because his interest, as the government acknowledges, was public knowledge.

But the position that the government has taken now is that even though his interest was disclosed, he didn't disclose that he was acting in pursuit of that interest at the expense of the employer's interests, which I read to be contrary to the position that they took in the Weyhrauch case and, I think, which is problematic in two respects.

First, there is no pre-McNally understanding, none, that a disclosed interest can give rise to honest services liability. And, second, and maybe more importantly --

CHIEF JUSTICE ROBERTS: I'm sorry. A

disclosed interest?

MR. SRINIVASAN: A disclosed interest, where the interest is disclosed. All the cases dealt with situations in which the interest is undisclosed, as the government suggested would be the case in the Weyhrauch brief.

But -- but perhaps even more importantly, there is no pre-McNally understanding to the effect that acting in pursuit of an interest in compensation can give rise to honest services liability. And, in fact, in a post-McNally case, the Thompson case out of the -- out of the Seventh Circuit, Judge Easterbrook, we think, explained persuasively why pursuit of an interest in personal compensation shouldn't afford the gravamen of --

JUSTICE GINSBURG: And I thought part of the government's theory was not --

MR. SRINIVASAN: -- an honest services prosecution.

JUSTICE GINSBURG: -- wasn't limited to the compensation. It was essentially Skilling owned shares, and he had information that those shares were inflated. Shareholders owned shares. They didn't have that information. Skilling then sold those shares at a great profit to himself. And the shareholders were left

without that information. And then when the stock price plummeted, they all lost out.

I thought that the government was not limiting the -- its position to the compensation, but was also dealing with the share price.

MR. SRINIVASAN: I think, Justice Ginsburg, the government's theory on how the honest services fraud statute applies in this case is laid out at page 49 and 50. And the interest that the government identifies that was furthered by Petitioner Skilling's action is his interest in compensation. That's -- that's how the government, I think, describes it.

And the -- it's true, Your Honor --

JUSTICE SCALIA: What 49 and 50? Of the government's brief?

MR. SRINIVASAN: Of the government's brief.

And it's true, Your Honor, that the deception that they identify has to do with securities fraud. And I'll bracket for the moment that we think that the honest services fraud theory that was put before the jury is not at all commensurate with the one that's being asserted now.

But even if you take as a given that it's the theory now, the elements of honest services fraud under the government's theory are that the individual

would act in pursuit of his interest in his own compensation at the expense of the employer's interests in acquiring better information with which to make an informed decision.

And one of the fundamental problems we see with that approach is that it would threaten to convert almost any lie in the workplace into an honest services fraud prosecution for the following --

JUSTICE GINSBURG: May I -- I just don't -- because I'm looking at page 50. I thought this discussion goes from 50 to 52, and that the part on 52 certainly homes in on the share -- the shares.

MR. SRINIVASAN: It -- it does, Your Honor, but the interest at issue -- and I'm reading from page 50. This is in the middle of the first full paragraph on page 50. The government says, “That constitute” -- “That conduct constituted fraud.” The only question here is whether the public nature of petitioner's compensation scheme prevents his conduct from constituting honest services fraud.”

And then they go on: “Although the” -- “Although petitioner's basic compensation scheme was public, his scheme to artificially inflate the company's stock price by misrepresenting its financial condition, in order to derive additional personal

benefits" -- i.e., his compensation -- "at the expense of shareholders, was not" disclosed.

So I think the theory of application here is that because he was acting allegedly --

JUSTICE GINSBURG: Why -- why do you put in the "i.e."? Additional personal benefits could be both.

MR. SRINIVASAN: Because the stock is the compensation, Your Honor. There's -- there's no -- I think, in this sort of situation, there's not a disaggregation between the stock and the compensation. The stock was intimately tied to his compensation, and the personal benefit that, I think, was being received was that compensation interest.

I mean, the government can clarify that, but that's my understanding of the government's view.

JUSTICE GINSBURG: I think we'll ask the government to do that.

MR. SRINIVASAN: And the danger with that theory is that it would have the capacity to convert almost any workplace lie into a Federal felony, for the following reason: That, in a variety of situations, an employee might -- might engage in an act of deception to his employer with respect to a work-related matter. For example, suppose that there is an employer policy that says you can only use workplace computers for business

purposes, and when asked, the employee says that he is only using it for business purposes, but he is in fact using it for personal reasons. Well, at that point he will have made a deception to the employer. Arguably, it would be material, particularly given that it acts in the face of an employer policy, and it arguably was made in furtherance of the employer's personal interest in maximizing his compensation at the expense of the -- at the expense of the employer's interests in having better information with which to make an informed decision about the employee's future.

So for that reason as well, we think that the application of the honest services fraud --

CHIEF JUSTICE ROBERTS: What you've just explained is why you think the statute is very broad. You haven't explained why it's vague.

MR. SRINIVASAN: Well, there are two different arguments, Your Honor. Our threshold submission is the statute is unconstitutionally vague, and we believe that it's particularly vague as applied to a category that extends beyond bribes and kickbacks. And I haven't been through those arguments, but they're -- they're spelled out in our briefs.

Now, with respect to the remaining category, which is undisclosed self-dealing, even that category we

think is a problem in and of itself. But it's particularly problematic when it's applied to the realm of compensation for the reasons that I have outlined.

If the Court has no further questions, I'd like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

When Judge Lake approached this case with the question of how to select a jury, he had 15 years of experience in selecting juries, and he informed the parties that it was his experience that voir dire conducted by the trial judge is more effective at eliciting the potential biases of a juror than the oftentimes tendentious voir dire that's conducted by the parties.

He did not ignore the fact that the Enron collapse had a significant impact on the Houston community. He worked with the parties to develop a 14-page questionnaire, which I encourage the Court to look at, if the Court has not already done so. It's extraordinarily detailed. It has more than 70 questions

designed to ferret out any possible connections between the individual jurors and the Enron collapse. It asked for their views about the Enron collapse. It asked for whether --

JUSTICE SOTOMAYOR: Can you tell me of any other high-profile case comparable to this in which the voir dire lasted only 5 hours?

MR. DREEBEN: Judge -- Justice Sotomayor, I'm not familiar with the length of voir dire in particular cases. But I think that there is no --

JUSTICE SOTOMAYOR: Are you aware of any that's been reported where the selection was 5 hours only?

MR. DREEBEN: No, I'm not aware of any, but I don't think that there is any problem with this voir dire, and I think there is really --

JUSTICE BREYER: There's no problem? I went through the 200 pages, and I counted -- this is only my own subjective recounting of it, but I counted six of whom only one lasted, but I counted five others that they had to use peremptories on that include one juror, 29, who herself was a victim of this offense to the tune of $50,000 or $60,000. The judge said: I will not challenge her for cause.

I counted another, juror -- what's this one

-- juror number -- number's 74, who when he looked her square in the eye and said, "Can you be fair?" She said, "I can't say yes for sure. No."

Okay? So, in my own subjective account, there were five here, maybe six, certainly three, that perhaps if they'd had an appeal on peremptories, which apparently they don't, they might have said these should have been challenged for cause. So I'm concerned about the 5 hours, about the lack of excusal for cause, about the very, very brief questions that he provided to people who had said on the questionnaire they could be -- they could be biased. They said we think he's guilty, for example.

And all those are cause for concern. At the same time, I'm worried about controlling too much a trial judge. I've expressed those concerns. I know this is a special case. Half, almost, of the jury questionnaires they just threw out. And the community -- you know all the arguments there. You see what's worrying me. And I'm worried about a fair trial in this instance and to say -- and I'm genuinely worried, and -- and I'd like to hear your response to the kind of thing I'm bringing up.

MR. DREEBEN: Well, Justice Breyer, I think that there was a fair trial in this case, and I think

that a full reading of the voir dire reveals that individuals sitting from this vantage point with a cold record who were not there may have different viewpoints about --

JUSTICE BREYER: I'd never heard of an instance where a trial judge would not challenge for cause -- but I'm not saying it doesn't happen -- where the juror herself is a victim of the offense to the tune of $50,000 to $60,000. See, we are getting into an area that I'm not familiar with, but I think that that's not supposed to be.

MR. DREEBEN: I don't think that there's any per se disqualification. But even if there was, that juror did not sit, and this Court held in United States v. Martinez-Salazar that one of the purposes of peremptories is to protect against the occasional accidental error.

JUSTICE SOTOMAYOR: How -- but is it occasional or accidental? I think that's what Justice Breyer is getting at. With such a truncated voir dire and one in which the judge basically said to the lawyers, I'm not giving you much leeway at all, how can we be satisfied that there was a fair and impartial jury picked when the judge doesn't follow up on a witness who says, I'm a victim of this fraud? I don't know -- I would find

it strange that we would permit jurors who are victims of the crime to serve as jurors.

MR. DREEBEN: Well, none sat in this case. I don't think there is any claim that they did.

JUSTICE SOTOMAYOR: Well, but -- but the judge didn't strike her for cause. So isn't that symptomatic of not following through adequately?

MR. DREEBEN: I don't think that a -- what this Court may perceive as an error in the denial of one for-cause challenge --

JUSTICE BREYER: No, but it's not just one. There were like five, of which I have given you the worst, and they had to use up all their peremptories. And they can't appeal this. And it's that taken together, plus the one who sat, juror 11, provides, as they point out for the reasons they say, some cause for concern. And that's what I'm trying to get at.

MR. DREEBEN: Well, Justice Breyer, I think that reading the entire voir dire reflects that the judge was interested in determining whether these jurors were qualified to sit. He was not interested in having the voir dire used as a lobbying or a argumentative exercise by the lawyers. And as a result, he relied on the very extensive questionnaires to pinpoint the examples of areas in which further questioning was

necessary. And then he went and he, I think, did fairly allow sufficient inquiry into whether these jurors could sit. And I think one of the best examples of that is actually juror number 63, who Petitioner says was not properly voir-dired. And I think what juror number 63 illustrates -- and this is in the Joint Appendix at page 935a and then following -- is that, as this Court has remarked many times, the question of --

JUSTICE KENNEDY: Excuse me. What was the page? Nine --

MR. DREEBEN: 935a. This is in volume 2 of the Joint Appendix.

JUSTICE BREYER: Go ahead with it, but they didn't challenge 63 for cause, so I guess they waived it.

MR. DREEBEN: They did not challenge 63 for cause, but they -- but they came to this Court today and tried to use 63 as an object lesson of what was wrong with the voir dire. I actually think juror 63 illustrates not only what was right with the voir dire, but the immense distortion that Petitioners have attempted to perpetrate by putting together effectively a highlight reel of every bad headline in every Houston publication and claiming that the entire jurisdiction, all 4.5 million people virtually, were infected with

some sort of a pervasive prejudice that could not be ferreted out in voir dire.

If you look at what happened in juror number 63, she happens to be a 24-year-old who comes to court. She filled out a questionnaire that she said: I can be impartial. She did have the statement: I -- I think that probably Skilling is guilty of some crime. When the voir dire proceeds, it turns out that she's not one of these jurors who has been in the Houston culture pervasively exposed to what Petitioner says is prejudicial publicity. She was living in Austin at the time, going to school.

Then she's asked, “Are you watching major networks?” And she says, “No, I don't really watch the news at all. I'm a turtle person.”

“Do you recall anything that may have -- you've seen -- that you may have seen or heard on television about this case?” “No.”

And then the judge, after some more questioning about her that reveals that, among other things, Ken Lay is a member of the country club that her parents belong to, he asks her about the very question that Petitioners focus on as problematic: “Do you have any opinion about the guilt or innocence -- and you say, I think they probably were breaking the law?”

And her answer is: "I don't know. The only thing I can say is, anything I've ever heard even peripherally has not been, you know -- but that's what people say and, I mean, it's hard to know. People don't know what they are talking about."

And the judge says, “Well, I'm just trying to find out what you think.” She says, "I don't have an opinion either way."

JUSTICE BREYER: Let's try juror number -- let's try 76: Judge: "Here's the detail that really concerns me. You said, 'I think they're all guilty.'"

"Right."

"Now, there's nothing wrong with thinking that, if that's what you really think. You just need to tell us that.”

“Okay.”

“That's what you think, isn't it?”

“It's been a long time since I answered that questionnaire.”

“Right. Now, as you" --

Okay? Now, that’s -- that, as far as I could tell, is as close as I can get to a recantation of what she thought originally.

MR. DREEBEN: Well, Justice Breyer, this Court has recognized -- and it has recognized this as

long ago as Chief Justice Marshall in the Burr case -- that people come to court with opinions in highly publicized cases. We expect our jurors to be somewhat informed of civic affairs. They receive information through the media or through their friends, and they have light opinions. And they come to court, and the trial judge instructs them: This is a legal proceeding; you're going to hear evidence in court. What happened outside of the courtroom no longer matters. What matters is what has been presented in here. I'm going to instruct you that defendants have a presumption of innocence. Can you follow that?

And then the judge is the only person on the scene. We're not there, the court of appeals is not there; the judge is the only person on the scene to judge the jurors' inflection, the jurors' demeanor, the jurors' apprehension of the seriousness of the duty. And this Court has held that the standard for review of a determination of no removable bias for cause is manifest error.

JUSTICE KENNEDY: Were -- were these colloquies that are reported, the -- the pages we have just been reviewing, heard by the entire jury pool?

MR. DREEBEN: They were not --

JUSTICE KENNEDY: Or were they just -- where

the person -- the juror was standing in front of the bench for this?

MR. DREEBEN: That's correct, Justice Kennedy. This was not a case like Mu'Min, where in your concurrence -- your dissent, you pointed out that the colloquy occurred in the full presence of the -- of every other juror, and there was no individualized voir dire. Here there was individualized voir dire. Judge Lake had that juror right in front of him, eyeball to eyeball, and was able to make the kind of credibility assessment, taking into account all of the context, that no other judge can do.

And it's not to say that there's no judicial review of that on appeal. In the Irvin case, Irvin v. Dowd, which is really the Court's first case in this line, the Court noticed that there -- 90 percent of the jurors had an opinion that the defendant was guilty. It involved a highly sensationalized murder in rural counties in southern Indiana. There was a barrage of pretrial publicity. Eight of the 12 jurors said they had an opinion that the defendant was guilty.

The Court, after meticulously reviewing the voir dire, concluded that the judge had committed manifest error in accepting the representations of the jurors that they could be impartial. But this is

nothing like that.

JUSTICE KENNEDY: It's hard for me to think that the voir dire would have been much shorter even if there had been no showing of pervasive prejudice.

MR. DREEBEN: I think that what Judge --

JUSTICE KENNEDY: Five hours sounds to me about standard for a case of this difficulty.

MR. DREEBEN: I -- I think that's not necessarily correct at all, and it would not have been the case that in a normal trial there would have been as detailed a 14-page questionnaire as there was in this case, that was designed to elicit any and all connections to Enron.

Now, whether there may have been some individualized mistakes along the way, whether some of us would have preferred that the voir dire be more extensive, is not the issue; and unless this Court is prepared to set standards that are based either on a stopwatch or some sort of, you know, notion of how many days voir dire has to occur, it's going to be very difficult to administer a standard that says this was too little.

The Oklahoma City bombing case, it is true, took many, many days, but that was a capital case, and I know that this Court is well familiar that there are

numerous --

CHIEF JUSTICE ROBERTS: It took many days after it had been transferred.

MR. DREEBEN: It did, and Denver itself was exposed, probably almost as much as Oklahoma City, to the pretrial publicity, and a terrorist act of that magnitude, Mr. Chief Justice, really strikes at the heart of the entire nation. Judge Matsch, who sits in Denver --

CHIEF JUSTICE ROBERTS: It was very -- the atmosphere in Oklahoma City was very different from that anywhere else, in terms of the impact of the bombing on that particular community.

MR. DREEBEN: Agreed. It was 168 deaths. Many of them were children. There was a sense of -- of victimization in the part of the community that I don't think is comparable to what happened with a financial meltdown in Houston, a 4.5 million city with a robust economy and a trial that took place 4 years later, after numerous other Enron trials had already taken place in Houston, resulting in favorable verdicts for defendants, mistrials, acquittals of one defendant.

This very trial itself of Mr. Skilling resulted in nine acquittals on insider trading counts. Now, if you would think that the jury had some sort of

a substratum of subterranean bias that was ineradicable by the conventional techniques of voir dire that we have been using for 200 years, then insider trading where the defendant pockets personally, as a result of the exploitation of insider information -- you would think that would be the first place the jurors would go to vent --

CHIEF JUSTICE ROBERTS: Oh, no, no. No. They'd go to the statute that says honest services --

(Laughter.)

CHIEF JUSTICE ROBERTS: Right. It seems -- it seems -- I'm being flip. It seems that that's where you would focus your attention, if you think your community has essentially been fleeced by somebody because of his dishonesty.

MR. DREEBEN: I don't think so, Mr. Chief Justice, because the honest services component actually, and the component of this trial, was really a subset of the securities fraud. The essential gravamen of Petitioner's crimes were lying to Enron, lying to its shareholders about the health of the company in a financial sense, when, in fact, he knew that he had been engaging in numerous manipulations of earnings and schemes that are detailed in the briefs, in order to avoid Enron having to recognize that portions of its business were imploding.

And the victimization was of shareholders. That was expressed through securities fraud; it was expressed through insider trading. There were counts involving liars -- lying to auditors, and one object of a multi-count conspiracy charge involved an honest services object as well as a money or property fraud object, and as well as a securities fraud object.

Now, in our view Petitioner has essentially conceded that the honest services statute is not vague as applied and, therefore, facially unconstitutional. He all but acknowledges that bribes and kickbacks, which constitute the bulk of pre-McNally honest services cases, can be defined with precision. There is not an unconstitutional vagueness in it. And so I think at a minimum --

JUSTICE KENNEDY: Well, a concession that a bribe or a kickback scheme statute would not be vague is hardly a concession that this statute as written is not vague. In fact, I thought that was the point. The point is that the Court shouldn't rewrite the statute; that's for the Congress to do.

MR. DREEBEN: I don't think that in this case, Justice Kennedy, the Court needs to rewrite the statute so much as to recognize that what happened in McNally was this Court said that the mail fraud statute

has two clauses, scheme to defraud and scheme for obtaining money or property by false representations and pretenses. The government's position, in accordance with all of the lower courts, was that these two clauses set forth two separate crimes. Scheme to defraud was not limited to money or property. This Court disagreed, and it said, oh, yes, it was.

And what Congress did in responding was to invoke words that had appeared in this Court's decision in McNally, in the dissent written by Justice Stevens, in the lower court opinions, and intentionally -- as this Court put it in Cleveland v. United States -- cover one of the intangible rights that the lower courts had recognized before McNally, and that was the right to -- intangible right of honest services. And in the context of the pre-McNally honest services cases, that was well known to include at its core the bribery and kickback cases and, in the additional category, nondisclosure of a personal, conflicting, substantial interest.

JUSTICE SCALIA: Well, suppose you have a statute that -- that makes it criminal to -- to do any bad thing, okay? Now it's clear that murder would be covered. All right? Nobody would say that murder is not covered by that. Does -- does that make the statute non-vague?

MR. DREEBEN: No, Justice Scalia, but --

JUSTICE SCALIA: I mean, just because you can pick something that everybody would agree comes within a denial of honest services, doesn't -- doesn't mean that when you say nothing but honest services, you're saying something that -- that has sufficient content to -- to support a criminal prosecution.

MR. DREEBEN: But this is not like a statute, Justice Scalia, that says prohibiting any bad thing. It's a statute that responded to a decision of this Court in which a term of art, the intangible right of honest services, featured prominently. And Congress has --

JUSTICE SCALIA: And there were cases that -- that -- some of which included bribery, but others of which included a variety of -- of other actions, some of which were allowed by some courts and some of which were disallowed by some courts. There was no solid content to what McNally covered.

MR. DREEBEN: I think that there was a solid enough content for this Court to be able to respond to the McNally decision by giving shape to the crime in accordance with the paradigm cases that the lower courts had done and logical implications of those cases, just as if it had concluded, in accordance with Justice

Stevens's dissent, that the statute did protect intangible rights in the phrase “scheme to defraud.”

CHIEF JUSTICE ROBERTS: But if -- if you’re going to say that the statute refers to a term of art, the whole point of a term of art is that it’s a shorthand for defining something. And then -- but if you’re saying that it's a term of art that means the pre-McNally case law over the -- you know, all the different circuits and the district courts and that some knowledge of that, it -- it's descriptive of something, but it's not a term of art.

MR. DREEBEN: I think it's a term of art in the sense that it referred to a -- a body of law that until quite recently, when defendants began making vagueness arguments, was understood to refer to the kinds of schemes that had been prosecuted before this Court held that "scheme to defraud" was limited to money or property. And it --

CHIEF JUSTICE ROBERTS: No, I'm with you there. But then the kinds of cases -- that's where it gets fuzzy. I mean, you need lawyers and research before you get an idea of what the pre-McNally state of law was with respect to intangible -- the right to intangible services, of honest services. And I’m just wondering how clear does what that body of law is have

to be before you can say, you know what, when we tell you that right, you know that that's what it's referring to?

MR. DREEBEN: I think it's clear enough at the core, this Court can say so and can provide definition, and it can use its standard tools of interpretation of criminal statutes to dispose of cases that are at the periphery and ensure that there is --

CHIEF JUSTICE ROBERTS: It kind of -- it puts the prospective defendant, I guess, in an awfully difficult position, though, if he has got to wait. There's this common law evolution over time. You have two cases the government wins, one it loses, three -- and he's supposed to keep track of that. That doesn't sound like fair notice of what's criminal.

MR. DREEBEN: Well, Mr. Chief Justice, I don't think it puts a defendant in a very bad position at all, because this statute is only triggered when there's an intent to deceive, an intentional fraudulent act taken to deprive the victim of whatever right exists in question.

JUSTICE GINSBURG: What was -- Mr. Dreeben, what was the jury told when this honest services count was given to the jury? What was -- what were they told was the definition --

MR. DREEBEN: Well, the jury instruction, Justice Ginsburg, appears on page 1086a of the Joint Appendix. That's in volume 3 of the Joint Appendix. And I will describe the jury instruction, too, but I want to say at the outset that this jury instruction was drafted against the background of Fifth Circuit law, which I think did take a somewhat broader view of the honest services crime than the government has taken in this Court, and it has to be read against that background.

But the -- the instruction said that "to show that defendants deprived Enron and its shareholders of their right of honest services, the government must prove beyond a reasonable doubt that, in rendering some particular service or services, the defendant knew that his actions were not in the best interests of Enron and its shareholders or that he consciously contemplated or intended such actions, and that Enron and its shareholders suffered a detriment from the defendant's breach of his duty to render honest services."

So -- and this was against a background --

JUSTICE SCALIA: But it's circular, isn't it?

MR. DREEBEN: The -- I would agree, Justice Scalia. I've read this phrase many times, and

it does seem a little circular to me.

The introduction to this jury instruction says, "Honest services are the services required by the defendant's fiduciary duty to Enron and its shareholders under State law." So this was tried in a circuit that followed the State law principle that's at issue in the Weyhrauch case. The government defined the fiduciary duty in that way. But the essence of the fraud was that -- that Petitioner had a fiduciary duty to the shareholders of Enron to act in their best interests, and he betrayed that by acting contrary to the best interests of the shareholders, fraudulently upholding the price, and ultimately that constituted the crime.

Now, I think there's a --

CHIEF JUSTICE ROBERTS: So that covers the case that your friend put of the employee using the computer for personal use? That fits under this instruction?

MR. DREEBEN: Well, whether the employee had a fiduciary duty in that respect would be, I think, quite a litigable question. This case doesn't involve any subtle or arcane fiduciary duty. This is one of the basic fiduciary duties that any chief executive has, not to lie to shareholders about the financial condition of the company.

JUSTICE SCALIA: I'm sorry. The duty of an employee to provide honest services to his employer -- that's not included because the employee is not a fiduciary?

MR. DREEBEN: Not all employees are fiduciaries, no, Justice Scalia. I mean, most fiduciaries have a sort of heightened duty towards the --

JUSTICE SCALIA: Where do you get the fiduciary limitation?

MR. DREEBEN: I think that it's inherent in that --

JUSTICE SCALIA: All it says is "honest services." I would think that --

MR. DREEBEN: Well --

JUSTICE SCALIA: -- any employee has the obligation to provide honest services.

MR. DREEBEN: I think, Justice Scalia, that you cannot successfully attempt to understand Congress's reaction to this Court's decision in McNally without some cognizance of the McNally decision and the preexisting law.

JUSTICE KENNEDY: What authority do I look to, to see that some employees are fiduciaries and others are not?

MR. DREEBEN: That would be a standard agency law principle, Justice Kennedy, and --

JUSTICE KENNEDY: If I look in the Restatement of Agency, and they have a section that applies to fiduciaries and non-fiduciaries, both of whom are employees?

MR. DREEBEN: Normally, Justice Kennedy, no such complexities are necessary, and I think that this Court can resolve this case without introducing such complexities, because the core duties of loyalty that have formed the core of the honest services prosecutions are universal. They are equally applicable to agency.

JUSTICE KENNEDY: I would assume that any employee, even at the lowest level of the corporate structure, who has corporate property, a car or something, has a duty to protect that car for the employer.

MR. DREEBEN: But that's not an honest services case. The honest services cases are about conflicting interests and the misuse of official position.

I'm not even sure, in the personal computer use case, that the government could successfully show that the employee had misused his official position. This case is quite typical in that respect. Petitioner absolutely misused his official position to serve what

we say was his private interest in private gain.

JUSTICE ALITO: Were there any pre-McNally cases that involved a situation like this, where the benefit to the employee was in the form of the employee's disclosed compensation?

MR. DREEBEN: There were not to my knowledge, Justice Alito, and I would frankly acknowledge that this case is a logical extension of the basic principle that we have urged the Court to adopt in the nondisclosure cases. And the Court can evaluate whether it believes that that is legitimately within the scope of an honest services violation or not. But it should not obscure our fundamental submission, which is that there was a definable category of undisclosed conflict of interest cases, that a person furthered through his official actions that constituted honest services fraud. A good example of that is United States v. Keane, which was a Seventh Circuit decision.

Petitioner, in his reply brief, claims that Keane involved financial injury to Chicago as a result of an alderman's concealment of his interest in properties that the City was selling. Actually there were three separate schemes in Keane. In one of them, the court was quite clear that, even though the alderman got the same deal that every member of the public would

have gotten, it still was honest services fraud because he did not disclose his financial interest in that property to the council when the council was voting on it.

JUSTICE SOTOMAYOR: Could I -- the following hypothetical: I'm a councilperson in a jurisdiction that's considering a tax increase or a tax break, and I vote for the tax break, and I happen to have property that qualifies. Is that a breach of the statute?

MR. DREEBEN: It may well be, Justice Sotomayor. It depends, I think, on whether the tax break was something that basically all general members of the public were in a position to benefit from, which may well be the case if it's just a private residence, versus if it's a particularized business property interest that you have either acquired --

JUSTICE SOTOMAYOR: Please tell me what I look to, to discern -- if I'm a councilperson, to discern what needs to be disclosed or not disclosed?

MR. DREEBEN: I think in the first instance, you will inevitably, as a councilperson, turn to your local law. And I think this brings up an important point that was discussed in the Weyhrauch decision, which is that the mail fraud statute does not criminalize breaches of duty without more. There has to be a

showing of scienter, of a mens rea element of intent to deceive. And unless the government can point to something which shows that the individual knew that they had a duty to disclose and did not do that --

JUSTICE SOTOMAYOR: So could --

MR. DREEBEN: -- or -- if I could just finish this part of the answer -- or can point to circumvention-type activity, using of shell companies to conceal an interest, then the government is not going to be able to have an indictable case on honest services fraud. And I think what --

JUSTICE SCALIA: That doesn't give me a whole lot of comfort, I mean, just because there's an intent to deceive. An intent to deceive can be the basis for -- for terminating a contract. There's -- there's been fraud in the inducement or something of that sort. So I know I'm liable to have the contract terminated, and maybe for damages for the contract. And you say: And also, by the way, you know, you can go to jail for a number of years, because, oh, yes, it's very vague, but you intended to deceive, and that's all -- that's all you need to know.

MR. DREEBEN: But this Court has recognized in numerous cases, Justice Scalia, that a mens rea element requiring an intent to deceive, an intent to

violate the law, is exactly what helps prevent statutes that might otherwise be considered too vague from falling --

JUSTICE BREYER: You can -- well, you focus on what you just put together. You said intent to deceive, intent to violate the law. I believe in another case, you're saying they don't have to have an intent to violate the law because there was no State law that prohibited whatever was at issue.

So is the government now saying -- which is a big difference -- that you cannot convict somebody unless they know, i.e., they intend to violate a law that forbids the conduct in which they are engaging, other than this honest services law, or are you not saying that?

MR. DREEBEN: I'm not saying that, Justice Breyer.

JUSTICE BREYER: You're not saying that.

MR. DREEBEN: I'm saying that in the ordinary case --

JUSTICE BREYER: Then if you're not saying that, what the person has to carry around with them is an agency treatise.

(Laughter.)

MR. DREEBEN: Well, I think that what

happens, Justice Breyer, is that unless the government does have some sort of legal platform like that to show that there was knowledge of a duty, it's not possible for the government to bring its proof to the court and establish that the individual acted with the requisite mens rea, unless there is activity that reveals an intent to circumvent the law and to withhold the information, as in Justice Sotomayor's example, information about a property interest that might well affect the deliberations of the council. And that kind of evidence often requires use of offshore accounts --

JUSTICE BREYER: Yes, I mean, of course they intend to -- it's not the case that is obvious; it's the case that is not obvious that worries me, and --

MR. DREEBEN: I don't see any of those --

JUSTICE BREYER: -- in the case that is not obvious, of course they intend to withhold information. I agree with that. But the problem is they don't know it's unlawful to do so.

MR. DREEBEN: Justice Breyer, I think if you look at the cases in which this has happened, there is -- there's not like a deliberation on somebody's part -- oh, do I have to disclose or not disclose? What these cases are, are really outright criminal conduct in the form of conflicting interests that every fiduciary knows you

need to disclose this before you take official action to further that interest. That --

JUSTICE GINSBURG: Mr. Dreeben, would you clarify the issue that came up: Is the government's theory focused simply on the compensation or does it involve the sale of shares?

MR. DREEBEN: It involves the sale of shares as well. That was part of the compensation, and it's linked to it. But, Justice Ginsburg, if you look at the government's opening statement in this case, the government opened by saying, "You will see that defendants Lay and Skilling knew few -- a few key facts about the true condition of Enron, facts that the investing public did not know. With that information, defendants Lay and Skilling sold tens of millions of dollars of their own Enron stock."

And then continued: "When an investor buys a share of stock, an investor buys some rights in a publicly traded company. When an investor buys a share of stock, they buy the right to hear and receive truth from the chief executive officer. And, importantly, they buy the right to have their interests placed ahead of the chief executor officer every day of the week."

So there was, baked into this case at the outset, the notion that these officials were not acting

in the best interests of the shareholders. They were furthering their own interests by maintaining a high stock price so that they could profit from it.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Srinivasan, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF SRI SRINIVASAN

ON BEHALF OF THE PETITIONER

MR. SRINIVASAN: Thank you, Mr. Chief Justice.

A couple of quick points on the honest services fraud issue, and then a couple of points on the juror issue, if I might.

With respect to honest services fraud, first of all, I think that the government pointed to the jury instruction -- and, Justice Ginsburg, this goes to some questions that you had raised -- I think what's clear from the capacious nature of the jury instruction that was issued in this case is that the elements that the government say make Jeff Skilling guilty of honest services fraud weren't put before the jury or required to be found by the jury. And for that reason alone, the conviction against Jeff Skilling ought to be overturned.

Another point I'd make very quickly with respect to the sweep of the government's theory

concerning the workplace is, under our understanding, the duty of loyalty does extend to all employees. It does, and, therefore, the theory that they assert should apply in this case, I think, has devastating implications for workplace relations.

Now, with respect to the juror question, a couple of preliminary points, and then I'd like to walk the Court through just one aspect of the voir dire which I think exhibits the manifest flaws in the process the trial court conducted.

With respect to the question about the issuance of questionnaires, questionnaires were also issued in the Timothy McVeigh case. But I don't want to limit our comparison to Timothy McVeigh, because I think in response to some of the questions that were raised, I don't want to leave an impression that a multiple-day voir dire with the sort of extensive questioning that we think was required here is not in use in other cases that involve like crimes.

In the Martha Stewart case, for example, which was a financial case, there were 6 days of voir dire and after a questionnaire was issued. And in that case, the only reason you needed an extended voir dire was because of the celebrity status of the defendant. You didn't have the deep-seated community passion and

prejudice that characterized the Houston venue in this case.

So, I think it's not at all unusual to have that kind of extended voir dire, and, in fact, we would say it's absolutely necessary to assure that the defendant receives the fair and impartial jury to which he's entitled.

JUSTICE SCALIA: So either this was too little or Martha Stewart was too much?

(Laughter.)

MR. SRINIVASAN: Well, I think the former rather than the latter --

CHIEF JUSTICE ROBERTS: Well, but it's -- it's a different model of it. As Mr. Dreeben was explaining, if you have an experienced judge who goes through this all the time, I think it's reasonable for him to say: Look, bring the person in front of me. We've got a questionnaire. I can identify the problems, look him in the eye, and I've got a lot of experience picking a jury, and it's better to let me do it than to have the lawyers have 3 weeks to do it.

MR. SRINIVASAN: Well, you don't necessarily need all of that, Your Honor, but I think with respect to the way in which the district court, in fact, conducted this voir dire, if I could just take -- if I could just direct the Court's attention to one juror in

particular -- and, Justice Breyer, this is -- maps onto some of the points you were making. This is juror 61, and the relevant exchange is at pages 931a to 932a of the Joint Appendix, which is at -- in -- in volume 2.

And I think the way the trial court conducted the voir dire in this case exhibits the manifest flaws in his approach generally. This is someone who at page 932a, it's revealed, answered the question whether she was angry, whether there was anger about Enron, with yes, quote -- it was, quote, “based out of greed, hurt a lot of innocent people.”

And to paint the picture more fully, the person was also asked: Do you have an opinion about the collapse of Enron? To which the answer was, quote, “Yes, criminal, caused a huge shock wave which the entire community felt,” close quote.

Now, at 931a at the top, she was asked the question whether she had the opinion about Mr. Lay and her answer was, quote, “Shame on him.”

And then much of this was put before her in the course of the voir dire. In the middle of page 932a, the first answer -- she's asked the question: “Can you presume as you start this trial that Mr. Lay is innocent?” The answer is, “I hope so, but you know, I don't know. I can't honestly answer that one way or

another."

JUSTICE BREYER: Then on 932, she does answer it, and says, "He's assumed innocent." "And can you conscientiously carry out that assumption?" "I could honestly say I will give it my best."

MR. SRINIVASAN: Not until --

JUSTICE BREYER: And so the judge looks her in the eye and says -- fine.

MR. SRINIVASAN: Well, not -- not until this happens first, Justice Breyer, between 932a and 933a. And so she's asked, "So that might -- might your views about Ken Lay cloud your judgment relative to criminal responsibility?"

JUSTICE BREYER: I see. And I'll --

MR. SRINIVASAN: And her answer is --

JUSTICE BREYER: I'll read that again. But my question is, can we get a hold of these 238 questionnaires? Are they in the record in front of us?

MR. SRINIVASAN: I believe that they are. I think that they're certainly in the record before the court of appeals. So I think that they are.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. SRINIVASAN: Thank you.

CHIEF JUSTICE ROBERTS: Counsel.

The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)