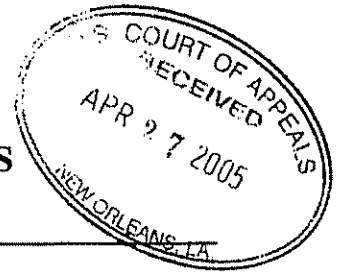


05-20319

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**



**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

v.

**DANIEL BAYLY,
Defendant-Appellant.**

**DEFENDANT-APPELLANT DANIEL BAYLY'S MOTION
FOR RELEASE ON CONDITIONS PENDING APPEAL**

**On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division
No. CR H-03-363**

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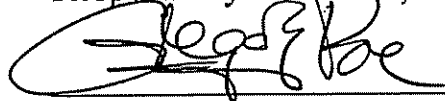
CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel for Defendant-Appellant Daniel Bayly certifies that the following persons and entities have an interest in the outcome of this appeal, No. 05-20319.

1. United States of America, Plaintiff-Appellee;
2. Matthew W. Friedrich, Attorney for Plaintiff-Appellee;
3. Kathryn Ruemmler, Attorney for Plaintiff-Appellee;
4. Daniel Bayly, Defendant-Appellant;
5. James A. Brown, Defendant-Appellant;
6. Dan O. Boyle, Defendant;
7. William R. Fuhs, Defendant,
8. Robert S. Furst, Defendant;
9. Robbins, Russell, Englert, Orseck & Untereiner LLP, Counsel for Defendant-Appellant Daniel Bayly (Lawrence S. Robbins, Gregory L. Poe, Alice W. Yao);
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 18. Carter Ledyard & Millburn LLP, Counsel for Defendant Robert S. Furst (Ira Lee Sorkin, Daniel J. Horwitz, of counsel);
 19. Howrey Simon Arnold & White, LLP, Counsel for Defendant Robert S. Furst (John W. Nields, Jr., William L. Webber);
 20. Merrill Lynch & Co., Inc.

Respectfully submitted,



GREGORY L. POE

STATEMENT OF JURISDICTION

Defendant-appellant Daniel Bayly requests release on conditions pending appeal from a judgment of conviction entered on one count of conspiracy (18 U.S.C. § 371) and two counts of wire fraud (18 U.S.C. §§ 1343, 1346) in the United States District Court for the Southern District of Texas, No. CR H-03-363 (Werlein, J.). See *United States v. Clark*, 917 F.2d 177, 179 (5th Cir. 1990). Following a six-week trial, Bayly was sentenced to 30 months of imprisonment, coupled with fines and restitution. (App. 1:65, 67-68.)¹ Although the district court concluded that Bayly is not likely to flee or to pose a danger to the community, and agreed that his appeal is not for the purpose of delay, the court denied his motion for release on conditions pending appeal on the ground that there is no substantial question of law or fact likely to result in reversal. (*Id.* at 77-78.)² Bayly has filed a notice of appeal from the underlying judgment and conviction. This Court has jurisdiction to consider this motion under FED. R. APP. P. 9(b) and 5TH CIR. R. 9.2 by virtue of its jurisdiction over the underlying appeal pursuant to FED. R. APP. P. 4(c) and 28 U.S.C. § 1291.

¹ Pursuant to 5TH CIR. R. 9.3, the transcript is contained in the Appendix To Defendant-Appellant Daniel Bayly's Motion For Release On Conditions Pending Appeal ("App."). References are in the format App. X:Y, where X represents the tab number, and, where applicable, Y represents the page number. The district court's written order will be submitted upon receipt.

² Bayly filed a motion for release pending appeal in the district court on March 25, 2005. That motion was lodged with this Court on April 18, 2005, and is included at App. 2.

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Defendant-appellant Daniel Bayly, by his attorneys, hereby moves, pursuant to FED. R. APP. P. 9(b) and 18 U.S.C. § 3143(b)(1), for release on conditions pending appeal. The district court readily found that Bayly is not likely to flee or pose a danger. (App. 1:77.) Indeed, the court explained, “[i]t may be that I’ve never had a defendant stand before me, probably in my years as a judge and having sentenced hundreds of people, that has had a more glowing and extraordinary record of being a good citizen than in this particular case.” (*Id.* at 57-58.)³ The court also found that the appeal is not for the purpose of delay. (*Id.* at 77-78.) Nevertheless, although acknowledging that “[p]erhaps [the Fifth Circuit] will see it differently” (*id.* at 78 (emphasis added)), the district court held that the appeal will not raise a “substantial question of law or fact” which, if resolved in Bayly’s favor, “is likely to result” in reversal. *United States v. Clark*, 917 F.2d 177, 179 (5th Cir. 1990). (See App. 1:78.)

We respectfully submit that Bayly will raise *several* substantial questions on appeal. On the central issue in the case – the nature of a promise made by Enron’s then-CFO, Andrew Fastow, who never testified at trial – the government was the beneficiary of three, independently reversible errors: Prosecutors were permitted to

³ The district court also granted Bayly a 4-level downward departure on this basis, finding that Bayly’s conduct in this case constituted “a marked deviation by the defendant from an otherwise law-abiding life,” and that the underlying transaction itself was “one of the smaller and more benign frauds committed” at Enron. (App. 1:19, 56, 58, 66.)

introduce inadmissible double hearsay; crucial evidence impeaching Fastow was erroneously excluded; and defendants were erroneously denied a defense-theory instruction. Even more fundamentally, the government proceeded under two criminal statutes that simply do not cover Bayly's conduct.

A substantial question is “a ‘close’ question or one that very well could be decided the other way,” and is “one of more substance than would be necessary to a finding that it was not frivolous.” *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985). Once it is determined that a legal issue is “close,” a defendant need only show that *if* the issue is decided in his favor, a reversal is more probable than not. *Id.* at 1025.

This was a very close case. The government relied solely on second-, third-, and fourth-hand hearsay evidence in its effort to prove what exactly Fastow had promised Merrill Lynch – the key factual issue in the case. If even *one* of the substantial questions raised in this appeal is resolved in Bayly's favor, Bayly's convictions on all three counts must be reversed.

I. The Factual Setting In Which The Legal Issues Arise

This case arises from Enron's efforts in late 1999 to sell its interest in three power barges moored off the coast of Nigeria. (App. 5, 6.) Potential buyers in negotiations with Enron were not prepared to close by year-end, yet Enron wanted

to book earnings from the sale in 1999. (*Ibid.*) At Enron's request, Merrill Lynch agreed to make the purchase, and a written agreement was consummated in late December 1999. (App. 3.) As a result of the transaction, Enron booked approximately \$12 million in earnings in the fourth quarter of 1999. (App. 4:2582.)

The central dispute at trial was whether the parties made an oral "side deal" under which Enron guaranteed that it would buy back Merrill Lynch's interest within six months. According to the government, during an (allegedly) crucial December 23, 1999 conference call (*id.* at 404), Fastow guaranteed to Bayly, who was the head of the Global Investment Banking Division at Merrill Lynch at the time, that, if necessary, Enron would buy back Merrill Lynch's interest in the barges. (*Id.* at 404-05.)⁴ The Fastow guarantee, according to the government, vitiated the sale, prohibited Enron from recognizing gain on the transaction, and rendered Enron's financial statements for the fourth quarter of 1999 false. (App. 4: 390. 6143, 6158-59, 6167-68.) The government called no witness who actually participated in the December 23 call.

The Merrill Lynch defendants – including Bayly – emphatically denied that

⁴ That very brief phone call was the last involvement Bayly ever had in the barge transaction; as the district court explained at sentencing, Bayly's involvement in this transaction "was of limited duration." (App. 1:56.) In fact, Bayly's total involvement in the deal lasted about an hour, spread over two days in December 1999, and only one material document offered at trial – an exculpatory one, at that (Government Exhibit 206) – even crossed his desk. (See App. 5.)

Enron had ever guaranteed to repurchase Merrill Lynch's interest. Instead, they maintained, Enron (through Fastow) made assurances only that it would find a third-party purchaser for Merrill Lynch's interest. (App. 4:469-70.) Significantly, the government conceded during a colloquy with the district court that assurances by Enron that it would find a third-party buyer for Merrill Lynch's interest would *not* prevent Enron from recognizing a gain and were therefore entirely lawful. (*Id.* at 4520.)

There was abundant evidence supporting the defendants' version. For example, after speaking with Enron Executive Vice President Jeff McMahon – in the conversation that ostensibly arranged the “oral side deal” in the first place – defendant Robert Furst described the arrangement simply as involving assurances that a third-party buyer would be found:

Enron is viewing this transaction as a *bridge* to permanent equity and they *believe* our hold will be for less than six months. * * *

* * * Enron is in active negotiations with several equity investors, including Marubeni. However, they are not able to close the transaction with a long-term holder by year end.

(App. 5 (emphasis added).) The next day, when the proposed barge transaction was considered by Merrill's Debt Markets Commitment Committee, the description of the “side deal” also focused on a sale to a third party (App. 6 (emphasis added)):

Enron is in active negotiations with several equity investors, including Marubeni. However, they are not able to close the transaction with a long-term holder by year-end. *Enron will facilitate our exit from the transaction with third party investors.* Dan Bayly will have a conference call with senior management of Enron confirming *this* commitment.

Dan Bayly *did* have the “conference call” anticipated in the foregoing document – on December 23 – and just as the document indicated, abundant evidence confirmed that Enron had offered only to find a third-party buyer. For example, in June 2000, when a partnership known as LJM2 purchased Merrill Lynch’s equity, the management of LJM2 explained that “Enron sold barges to Merrill Lynch (ML) in December of 1999, *promising that Merrill would be taken out by sale to another investor by June 2000.*” (App. 7 (emphasis added).)

But there was more: Fastow *expressly told the government, in the course of his cooperation, that he had not guaranteed that Enron would buy back Merrill Lynch’s interest.* Instead, according to the prosecutors’ *own summary*, Fastow confirmed the defendants’ version of the December 23 call with Bayly:

On the call, Fastow told Merrill that it could have a high level of confidence that an entity was interested in the barges and that entity, LJM2, would buy the barges after six months * * *. *Fastow did not say that Enron would buy back the barges, but represented instead that a third party would.* (App. 8 at Exhibit B (emphasis added).)

Last but not least, in June 2000 Merrill Lynch’s interest *was* purchased by a

third party – LJM2 – just as Fastow told the government. (App. 7.) Here again, the evidence strongly supported defendants’ account of the arrangement with Enron.

II. The Legal Issues On Appeal

To sell the jury on its competing version of events, the government obtained three crucial, but legally incorrect rulings. In addition, the government made two fundamental charging errors. *Each* of these issues meets the standard for release pending appeal.

First, the government offered an e-mail written by nontestifying co-defendant James Brown well after the alleged conspiracy had ended. In it, Brown purported to summarize the December 23 Fastow call (in which Brown had not participated). The district court admitted the e-mail against *Bayly* as a declaration against Brown’s penal interest – but only after *twice* refusing to admit the document and expressly calling its admissibility a “close” question.

Second, the government offered Fastow’s *hearsay* account of what he had supposedly said on the call. At the government’s insistence, however, the district court refused to permit the defense, under FED. R. EVID. 806, to impeach that hearsay account with the prior inconsistent account of the phone call that Fastow had given to the government in the course of his cooperation.

Third, the government blurred the fundamental distinction between its version

of the agreement (a guaranteed Enron buy back, which might preclude gain recognition) and the defense version (a promise to find a third-party buyer, which would *not* preclude gain treatment). The government did so by arguing that *both* types of agreement would be unlawful – thus contradicting a concession it had made during a colloquy with the district court. When defendants sought to overcome that confusion by seeking a defense-theory instruction on the point, the government prevailed on the district court to reject the proposed instruction.

Bayly will also challenge the government’s application of the “honest services” statute, 18 U.S.C. § 1346, to charge the Merrill Lynch defendants with causing a deprivation of Enron’s right to the honest services of its employees. To our knowledge, no court has *ever* permitted the use of § 1346 to cover a private transaction, like the one here, that served the employer’s interest, rather than the employee’s personal interest; did *not* involve bribes, kickbacks, or secret conflicts of interest; and did *not* involve concealment from the putative victim (Enron).⁵

A. Whether The Double-Hearsay Brown E-mail Was Erroneously Admitted

1. The District Court Expressly Characterized This Issue As A “Close” Question

The district court erroneously admitted into evidence a double-hearsay e-mail

⁵ We also incorporate by reference the challenge to the “books and records” charge made by James Brown in his separate motion for release pending appeal.

sent by co-defendant Brown to a Merrill Lynch colleague, Robert Lyons, more than a year after the December 23, 1999 conference call with Fastow, and months after the alleged conspiracy ended. (App. 9.) In an effort to persuade Lyons to accept an oral representation from Continental Airlines (“CAL”) in connection with a very difficult negotiation, Brown e-mailed Lyons as follows (emphasis added):

I’m not convinced yet that we can’t obligate CAL more than Frank indicated, but I’ve been on the road the last 3 days and haven’t been able to determine that. If its [sic] as grim as it sounds, I would support an unsecured deal provided we had total verbal assurances [sic] from CAL ceo or Cfo, and shulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and *promise to pay us back no matter what*. Deal was approved and all went well. What do you think?

Although Brown did not participate in the December 23 call, the e-mail loomed exceedingly large in the government’s effort to secure Bayly’s conviction. Indeed, it was the *only* document cited by the government in its pretrial memorandum that supposedly tied Bayly to the conspiracy. (See App. 10:24.)

Before trial, the government moved to admit the document against *all* the Merrill Lynch defendants, pursuant to FED. R. EVID. 804(b)(3), as a declaration against Brown’s penal interest. The district court observed – in language fully dispositive of this release-pending-appeal inquiry – that the admissibility of the Brown e-mail was

a *close call* with respect to these other five persons [*i.e.*, besides Brown himself] as to whether that would come in against them

(App. 11:74 (emphasis added)). Reflecting just how “close” the issue was, the court *twice denied* the government’s motion to admit the e-mail into evidence. (App. 12:6-7; App. 4:330-53.) Only on the third try did the government finally manage to get the document admitted under Rule 804(b)(3). (App. 4:2954-81, 3242.)

2. The Brown E-mail Contains Double Hearsay, And Neither Hearsay Layer Satisfies A Hearsay Exception

The Brown e-mail constitutes double hearsay: The e-mail itself is a hearsay statement of Brown, and Brown’s description of what Fastow (supposedly) said on the call is an additional level of hearsay because Brown, who was not a participant in the call, could only have learned what was said from someone else. (App. 8:6.)

a. The e-mail itself is not a declaration against Brown’s penal interest

Only a statement that “clearly and directly” implicates the declarant in criminal conduct meets the requirements of Rule 804(b)(3). *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1101 (5th Cir. 1981). Brown’s remarks certainly are not incriminating on their face – Brown did not inculcate himself *personally* in anything, nor did the conversation he purported to describe amount to “a confession” (*United States v. Pena*, 527 F.2d 1356, 1362 (5th Cir. 1976)). Moreover, at the time of the

e-mail, there was no governmental inquiry into the barge transaction, and Brown would not have had any reason to suppose that he might be *prosecuted* on the basis of his remarks to Lyons. What is more, Brown evidently believed (albeit erroneously) that *lawyers* were on the phone with Fastow. That makes it exceedingly unlikely that Brown regarded his account of the Fastow call as incriminating.

Nor did the government show that the Brown e-mail was “so trustworthy that adversarial testing would add little to its reliability.” *United States v. Flores*, 985 F.2d 770, 775 n.12 (5th Cir. 1993). In fact, the Brown e-mail’s description of the December 23 call was demonstrably *untrustworthy* for several reasons. The e-mail describes a conversation of which Brown had no first-hand knowledge. It does not identify Brown’s source of information concerning the Fastow call. It describes the call as involving “lawyers,” when it was undisputed at trial that no lawyers were on the Fastow call. Furthermore, Brown has expressly disavowed the accuracy of the e-mail under oath. Indeed, Brown explained, he deliberately “exaggerated” the Fastow statements in order to persuade Lyons to seek better assurances from Continental than Merrill Lynch had been able to get from Fastow. (App. 13:166-67.)

b. The government did not establish an exception covering the hearsay embedded in the Brown e-mail

Brown was not on the Fastow call, and so he would have to have learned about

the conversation from someone else. From whom did he hear about it? From a putative co-conspirator, or from someone else? When did he hear about it? During the course of the alleged conspiracy, or at some point between the end of the charged conspiracy and the creation of the e-mail? And under what circumstances did he learn whatever he learned? Was it in a conversation designed to promote the barge transaction, or in some other context?

No one knows – and more to the point, the government has offered nothing to prove these critical predicates to admit the hearsay embedded in the Brown e-mail. Indeed, with respect to another witness whose source of knowledge was unknown, the government conceded below that the rule against hearsay could not be satisfied. In particular, when Enron employee Frederick Lawrence testified that there was a commitment by Enron to buy back the barges from Merrill Lynch, the government acknowledged that his testimony was not admissible to prove the truth of the matter asserted precisely because Lawrence could not identify the person from whom he had obtained his information. (See App. 4:1774-76.) This Circuit takes such derelictions seriously. See, e.g., *Park v. Huff*, 493 F.2d 923, 932 (5th Cir. 1974) (reversing defendant's conviction because there was "no hint in the record" that the hearsay declarant "had personal knowledge" of the statement attributed to him at trial).

B. Impeachment Of Fastow's Hearsay Account Of The December 23 Conversation Under FED. R. EVID. 806

Having *admitted* the crucial Brown e-mail at the government's behest, the district court then *excluded* key evidence offered by defendants on the *same issue*. The government elicited a hearsay statement by Fastow that he had promised Merrill Lynch that Enron would buy back the barges. (See, *e.g.*, App. 4:3608, 3614 (testimony of former Enron Treasurer Benjamin Glisan).) This crucial but hotly disputed out-of-court statement by Fastow was obviously offered for its truth, and was a statement admissible, if at all, presumably as Fastow's co-conspirator statement under FED. R. EVID. 801(d)(2)(E).

By the time of the trial, however, Fastow was cooperating with the government. As we noted above, in stark contrast to the account proffered by the government at trial, Fastow told the government that he had *not* promised Merrill Lynch that Enron would buy back the barges. Instead, confirming the defendants' version of events, Fastow said that he had assured that Enron would find a third-party purchaser for Merrill Lynch's interest.

Under FED. R. EVID. 806, the defendants were entitled to impeach the Fastow statement introduced at trial with "any statement * * * inconsistent with the declarant's [*i.e.*, Fastow's] statement." See *United States v. Moody*, 903 F.2d 321,

328-29 (5th Cir. 1990). The defendants repeatedly sought to use Fastow's prior inconsistent statement to the government in just this fashion (*e.g.*, App. 4:2771-72, 3288-89), but at the government's request, the trial court rejected those efforts (*id.* at 4863-66). As a result, the jury never learned that Fastow *expressly denied* having made the ostensible guarantee on which the government's entire case rests.

This was legally wrong and grossly prejudicial. The government called *no first-hand witnesses to the Fastow call*. Instead, through its selective use of second-, third-, and fourth-hand hearsay witnesses, the government encouraged the jury to believe that Fastow had said something that he expressly denied to the government having said. Rule 806 entitled the defendants to contest that effort.

C. The Failure To Instruct The Jury On The Theory Of The Defense

The district court's evidentiary errors on the critical issue in the case were compounded by a fundamental instructional error. In support of their theory of defense – that Enron had promised only to produce a third-party purchaser – the defendants requested the following jury instruction:

Mr. Furst contends that the government has failed to prove any oral guaranty * * * that Enron would repurchase Merrill Lynch's interest in the barges * * *. **Indeed, he contends that the only commitment made by Enron or it's [sic] agents * * * was that Enron's agents would use their individual or collective efforts to find a third party to take Merrill Lynch out.** An agreement by one business to do it's [sic] best to re-market or assist in finding an independent third party to

buy an interest such as Merrill Lynch's interest in the Nigerian Barge transaction is not improper or illegal.

(App. 14 (emphasis added).) The request was denied. (App. 4:6049-51.)

“[W]hen a defendant properly requests an instruction on a theory of defense that is supported by some evidence, it is reversible error not to adequately present the theory.” *United States v. Therm-All, Inc.*, 373 F.3d 625, 638 (5th Cir. 2004) (internal quotation marks omitted). If *ever* there were a case that needed a theory-of-defense instruction, this was it. As we set out at length above, there was abundant evidence that the *only* oral agreement between Enron and Merrill Lynch was an agreement by Enron to find a third-party buyer. See *supra* at 4-6. The jury was entitled to know that the defendants should be acquitted if it credited that evidence.

To make matters worse, the government blurred the distinction between an agreement to find a third-party buyer and a “guaranteed buy back” by Enron – thus increasing the need for the defendants’ proposed instruction. The prosecutors *repeatedly* suggested to the jury in summation that it should convict solely on the basis that Enron promised that Merrill would be “taken out” in six months – without distinguishing between a repurchase by Enron, and a purchase by a third party. (See, *e.g.*, App. 4:6144, 6146.) Compounding matters further, the government called *no accounting expert* who could have helped the jury navigate the crucial legal and accounting differences between an agreement to find a third-party buyer and a

guaranteed Enron buy back.⁶

This is, in short, the very kind of case that this Court had in mind when it explained (*United States v. Fooladi*, 746 F.2d 1027, 1031-32 (5th Cir. 1984)) that:

[T]he trial judge's imprimatur on a defendant's theory is important. As the source of the law and the only neutral figure before the jury, his words are potent. That reality drives the idea that a defensive theory is best *expressed by the judge*.

D. The Errors Will Require The Verdict To Be Set Aside

On this equivocal and hotly contested record, each of the evidentiary and instructional errors *independently* should lead to a reversal of Bayly's conviction. The wrongly-*admitted* Brown e-mail asserting that Fastow had guaranteed that Merrill Lynch would be paid back "no matter what" cannot be said to have been harmless under any standard of review. The wrongly-*excluded* evidence impeaching Fastow on the nature of the alleged promise similarly must be said to have swayed the verdict. And the *instructional error* on the defense theory must be said to have undermined fair consideration by the jury.

To illustrate: Not only was the Brown e-mail the *only* document cited by the government in its pretrial memorandum supposedly tying Bayly to the conspiracy, but

⁶ There is no question that an agreement merely to find a third-party buyer *is* entirely lawful. Indeed, the government conceded as much – albeit grudgingly, and not in the form of admissible evidence before the jury. (App. 4:4520.) See also *Fisher v. Commissioner*, 30 B.T.A. 433, 440 (Tax Appeals 1934) (a sale with an option, but no obligation, to repurchase at a fixed price is a true sale, and is not a loan).

the government used the Brown e-mail to suggest to defense witness Katherine Zrike – Merrill Lynch’s chief legal counsel for investment banking – that she should reconsider her favorable testimony about Bayly’s honesty and integrity. (App. 4:4285-87.) The government argued in its opening summation that the Brown e-mail was “a critical document that you should focus on.” (*Id.* at 6274.) The government invoked the e-mail against Bayly yet again in its rebuttal summation. (*Id.* at 6508-09.) In short, as the government told the district court point blank: The Brown e-mail “is powerfully probative.” (*Id.* at 2973.) The damage from the exclusion of the Fastow impeachment evidence, as well as the damage from the rebuffed theory-of-defense instruction, independently was to the same effect.

E. The “Honest Services” Charges Were Legally Invalid

Bayly’s conviction also must be reversed because the government relied on a theory of fraud by deprivation of honest services that was legally invalid in the context of this case. The government neither charged nor proved the defining elements of private-sector honest services wire fraud – *i.e.*, a scheme in which employees secretly act in their own interest while purporting to act in their employer’s interest, such as in cases of bribery, kickbacks, or self-dealing. Because each count on which Bayly was convicted – conspiracy and wire fraud – charged as one of its multiple objects or purposes an invalid theory of fraud by deprivation of

honest services, and because the district court instructed the jury that it could convict Bayly if it concluded that *any one* of those alternative objects was proved (App. 4:6113-15, 6118, 6122-27), the jury's general verdict on each count must be reversed under the rule of *Yates v. United States*, 354 U.S. 298, 312 (1957).⁷

The government's theory relies upon 18 U.S.C. § 1346. That statute provides that, for purposes of the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." As this Circuit recognized in *United States v. Brumley*, 116 F.3d 728, 732 (5th Cir. 1997) (*en banc*), § 1346 was enacted by Congress "to overturn the Supreme Court's *McNally* [*v. United States*, 483 U.S. 350 (1987)] decision and to insist that the fraud statutes cover deprivations of intangible rights * * *." *Brumley* itself involved an alleged deprivation of the honest services by a *public* sector employee. Just as this Circuit went *en banc* to address vagueness concerns under Section 1346 in *public sector* cases, so too did the Second Circuit go *en banc* to address the scope of Section 1346 in *private sector* cases. *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003).

The Second Circuit explained that "[t]he private-sector honest services cases"

⁷ In the same connection, and with similar legal effect, we also incorporate by reference the challenge to the "books and records" charge made by James Brown in his separate motion for release on conditions pending appeal.

Congress had in mind when it enacted § 1346 “fall into two general groups, cases involving bribes or kickbacks, and cases involving self-dealing.” *Id.* at 139. “In the bribery or kickback cases,” the court observed, “a defendant who has or seeks some sort of business relationship or transaction with the victim secretly pays the victim’s employee (or causes such a payment to be made) in exchange for favored treatment.” *Ibid.* “In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer.” *Id.* at 140. From these two categories of private-sector cases, the Second Circuit derived the following standard (*id.* at 141-42):

[T]he term ‘scheme or artifice to deprive another of the intangible right to honest services’ in section 1346, when applied to private actors, means a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity * * * purporting to act for and in the interests of his or her employer * * * secretly to act in his or her or the defendant’s own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer * * *.

The Second Circuit’s standard for private sector cases dovetails perfectly with this Circuit’s standard for public sector cases. As the Fifth Circuit explained in the latter context, § 1346 is targeted at an employee who “us[es] his office to pursue his own account and not that of his employer.” 116 F.3d at 735. Put another way, § 1346 is designed to criminalize schemes that drive a deep wedge between the goals

of the employer and the goals of the employee. Whether through bribery, kickbacks, or undisclosed conflicts of interest, a “deprivation of the right to honest services” involves an employee who, while purporting to serve his employer, secretly feathers his own nest at the employer’s expense.

This case bears no resemblance to that paradigm. Whatever one thinks of the conduct of the Enron employees, they manifestly were neither charged nor proven to have been serving their “own interests instead” of Enron’s. *Rybicki*, 354 F.3d at 142. The purpose of the barge transaction, in the government’s view, was to inflate the value of Enron stock by accelerating earnings. To be sure, if the government’s theory is credited, the Enron employees went about this corporate purpose *improperly*. But as this Circuit observed in *Brumley*, impropriety, even illegality, does not, standing alone, constitute a deprivation of honest services. “[T]o hold otherwise that illegal conduct alone [would suffice] would have the potential of bringing almost any illegal act within the province of the mail fraud statute.” 116 F.3d at 734. It is only when the employee is serving his or another defendant’s interest “instead” of the company’s interest (*Rybicki*, 354 F.3d at 142) that the “right to honest services” has been violated. Or, as this Circuit put the matter in *Brumley*, “something close to bribery” is what Section 1346 has in mind. 116 F.3d at 734. Because the barge transaction was intended to serve a corporate purpose, and not the end of individual employees

“instead” (*Rybicki*, 354 F.3d at 141-42), the deal could not and did not violate Section 1346 (whatever else may be said about it).

Not only were the goals of the barge transaction fundamentally different from the paradigms enacted by Congress, but the means were different as well. The Enron employees received no bribes, took no kickbacks, and entered into no undisclosed conflicting relationships. Nor were the dealings with Merrill Lynch kept “secret” from Enron (at least, not in any way discernible to the Merrill Lynch defendants). To the contrary, high-level Enron officials were fully aware of, indeed were full participants in, the barge transaction. Enron’s inside and outside counsel (at Vinson & Elkins) were apprised of the transaction as well. (See App. 15, 16.)

To our knowledge, there is not a single pre-*McNally* decision that bears a resemblance to this case. Section 1346 simply cannot be used this way – but if it can, it is unconstitutional as applied due to the vagueness of its reach.

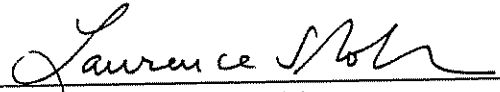
CONCLUSION

For the foregoing reasons, defendant-appellant Daniel Bayly should be released on conditions pending appeal in this case.

DATED this 27th day of April, 2005.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to 5TH CIR. R. 27.4, counsel for Daniel Bayly has conferred with counsel for the government concerning this motion. Counsel for the government has advised that they are opposed to the relief requested in this motion.

A handwritten signature in black ink, appearing to read "Gregory L. Poe", written in a cursive style.

GREGORY L. POE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing document was served via hand delivery on the government's counsel of record and via U.S. mail on counsel for defendants at the following addresses this 27th day of April, 2005:

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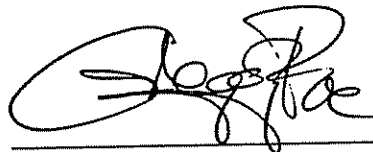
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