

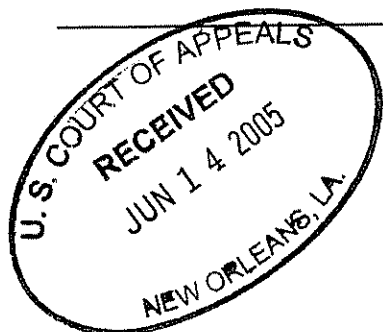
05-20319

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED

JUN 14 2005

CHARLES R. FULBRUGE III
CLERK



UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANIEL BAYLY,
Defendant-Appellant.

DEFENDANT-APPELLANT DANIEL BAYLY'S MOTION
FOR PANEL RECONSIDERATION OF MAY 31, 2005 ORDER
DENYING BAYLY'S MOTION FOR RELEASE 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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ATTORNEYS FOR DEFENDANT-APPELLANT DANIEL BAYLY

Defendant-appellant, Daniel Bayly, pursuant to FED. R. APP. P. 27(c) and 5TH CIR. R. 27.2 and 27.2.6, respectfully requests that a panel of this Court reconsider the May 31, 2005 denial, by the Honorable Carl E. Stewart, of Bayly's Motion for Release on Conditions Pending Appeal. The May 31 Order states that Bayly "has not shown that his appeal presents an issue that raises 'a substantial doubt (not merely a fair doubt) as to the outcome of its resolution.'" May 31 Order at 2 (quoting *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985)). We respectfully submit that Bayly's motion for release identifies *several* questions that are substantial under the governing standard in this Circuit.

Furthermore, the May 31 Order appears to have been issued without the benefit of the Supreme Court's decision in *Andersen v. United States*, 544 U.S. ____, No. 04-368 (May 31, 2005). In *Andersen*, the Court ruled unanimously that the Enron Task Force—which is prosecuting this case against Bayly—pressed for (and obtained from the district court) an interpretation of an obstruction statute that was far too generous to the government. Although that particular statute is not involved in Mr. Bayly's case, *Andersen's* message is fully applicable here. As in *Andersen*, the errors in the Enron Task Force's prosecution of Bayly flow from novel interpretations of statutes (and similarly unfounded rulings at trial) that allowed the government to secure a conviction lacking a proper basis in either law or fact.

This case arises out of a December 1999 transaction between Enron and Merrill

Lynch in which Merrill Lynch purchased an interest in three power-generating barges moored off the coast of Nigeria. (App. 5, 6.)¹ Enron's purpose in the transaction was to book a gain in the fourth quarter of 1999. (*Ibid.*) The central issue in the case was whether Enron (through its then-CFO, Andrew Fastow) guaranteed that it would buy back Merrill Lynch's interest by June 30, 2000, if a third-party buyer could not be found (which might preclude gain treatment on the transaction), or instead agreed simply to find a third-party buyer for Merrill Lynch's interest (which indisputably would *not* preclude gain treatment). (Bayly Motion at 1, 3, 4.) The government argued that Fastow guaranteed an Enron buyback; that the December 1999 transaction was thus a loan, not a sale; and that the gain was therefore booked falsely. (*Id.* at 3.) The defendants argued the converse—that Fastow had promised only to find a third-party buyer for Merrill Lynch's interest, and that the gain booked by Enron was thus entirely appropriate. As events actually unfolded, Merrill Lynch's interest *was* purchased by a third party (LJM2) at the end of June 2000. (*Id.* at 5.)²

¹ References to the Appendix to Defendant-Appellant Daniel Bayly's Motion For Release On Conditions Pending Appeal are in the format "App. X:Y," where X represents the tab number, and, where applicable, Y represents the page number. References to the Motion for Release are in the form "Bayly Motion [page number]." The government filed an Opposition on May 9, 2005. Bayly filed a Reply and a Supplemental Appendix on May 12, 2005. Bayly submitted the original and three copies of each filing. Counsel for Bayly understands, based on conversations with the case manager in the clerk's office, that copies of these filings will be provided to the panel in connection with this motion.

² Eventually, the three barges owned by LJM2 in which Merrill Lynch had owned an interest were sold with six other barges owned by Enron to yet another buyer, AES, in late 2000. (App. 1:19,

The fundamental errors in this case begin with the government’s novel and unduly creative use of an “honest services” theory in connection with the wire fraud statute. See 18 U.S.C. §§ 1343, 1346. As Bayly’s motion for release shows, the honest services charge in this case permitted a criminal conviction for conduct—the accelerated booking of gain—that was undertaken primarily on behalf of the alleged victim (Enron), which knew every aspect of the transaction, and not for the self-interest of the alleged conspirators. (Bayly Motion at 16-20.) No court ever has sanctioned such a broad application of the honest services statute—especially where, as here, no bribe or gratuity was provided to, nor were there any undisclosed conflicts of interest as to, the employees of the putative victim. (*Id.* at 19-20.) As in *Andersen*, the Enron Task Force in this case secured a conviction through application of an entirely unprecedented theory in a hotly-contested area of the law. If this Court agrees with our argument at the merits stage, then in light of the rule of *Yates v. United States*, 354 U.S. 298, 312 (1957), Bayly’s convictions necessarily will be reversed on all counts. (Bayly Motion at 17.) The government does not dispute that if our view of the limits of Section 1346 prevails, all three counts of conviction must

52.) As the district court put it: “the Nigerian barge assets were real, the negotiations with Nigeria for the sale of power generated from the barges were real, and a bona fide sale ultimately was consummated in the year 2000, producing an authentic profit for Enron in an amount of more than \$50 million.” (*Id.* at 19.)

be set aside.³

But the government's charging decisions are just the tip of the iceberg. Bayly's motion for release also identifies three other substantial questions:

First, the government consistently blurred the distinction between a guaranteed Enron buyback (which the government argued was plainly illegal) and a promise to find a third party buyer (which the government conceded, albeit out of the jury's presence, was *not* illegal). (Bayly Motion at 14.) Nevertheless, the district court refused to give a theory-of-defense instruction that would have allowed the jury adequately to navigate that crucial difference as it considered the evidence. (*Id.* at 13-14.) As we explain at greater length in our motion papers, it is *invariably* reversible error under the law of this Circuit to decline to give a defense-theory instruction which is supported by at least "some" evidence (there is overwhelming support here) and which is well founded in law (as this one was).

Second, the central factual question in the case was whether Fastow guaranteed an Enron buyback during a conference call with Bayly and others. (Bayly Motion at 1, 3, 4.) Fastow, who did not testify at trial, *denied to the government making any such guarantee*, but the government nevertheless sought to prove the opposite, by

³ For the reasons stated in codefendant James Brown's motion for release pending appeal, the books and records object in count 1 was similarly defective. See Expedited Application For Release Pending Appeal On Behalf Of James Arthur Brown at 9-12.

eliciting various hearsay accounts of what Fastow supposedly said. (*Id.* at 12.) The district court precluded the defendants from attempting to show, under FED. R. EVID. 806, what the declarant (Fastow) *actually did say*. Prompted by the prosecutors, the district court simply misapprehended the basic purpose of Rule 806. (*Id.* at 12-13.)

Third, after two previous unsuccessful attempts by the government, the district court admitted into evidence a double-hearsay e-mail that nontestifying codefendant Brown (who was not on the Fastow conference call) wrote more than one year after the material events in this case. (Bayly Motion at 9.) The e-mail—which states in part that Fastow promised to “pay [Merrill Lynch] back no matter what”—permeated the case against Bayly. (*Id.* at 8.) Brown himself denied the accuracy of the e-mail under oath in another proceeding, and as noted above, Fastow himself flatly denied to the government that he even made the statement attributed to him in the Brown e-mail. (*Id.* at 12.) Notably, in its opposition to the motion for release before this Court, the government *does not contest* that it failed to establish a hearsay exception for the first layer of hearsay in the e-mail (*i.e.*, Brown’s source of information).

This Court is required to “independently assess” Bayly’s motion for release, *United States v. Clark*, 917 F.2d 177, 179-80 (5th Cir. 1990), and thus is not permitted to defer to the district court in considering Bayly’s motion for release. The district court itself recognized, in denying Bayly’s motion for release pending appeal,

that “[p]erhaps [the Fifth Circuit will] see it differently.” (App. 1:78.) Respectfully, we submit that Bayly’s motion for release raises far more than a “substantial doubt” (see May 31 Order at 2 (citing *Valera-Elizondo*, 761 F.2d at 1024)) about the outcome as to all five issues discussed (directly or by incorporation) in the motion for release. See Bayly Motion at 6-20 & nn.5, 7. But even if this Court were to decide that a substantial doubt exists about only *one* of the questions, it is “more probable than not” that reversal will result, see *Valera-Elizondo*, 761 F.2d at 1024, for the reasons discussed in Bayly’s motion for release and reply.⁴

Here, as in *Andersen*, the Enron Task Force embarked on an unusually aggressive mission that resulted in Bayly’s conviction. The government’s extraordinary application of the honest services statute is reason enough to let Daniel Bayly stay with his family until the appeal is resolved. Needless to say, if Bayly’s conviction is eventually reversed, the time he would spend in prison could not be recaptured, and the toll that prison would take on him (as it would take on anyone) could not be undone. “It may be[,]” the district court observed, “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

⁴ The May 31, 2005 Order, which held only that Bayly had not shown the existence of a substantial question, does not address the second part of the applicable test.

a good citizen than in this particular case.” (App. 1:57-58.) “[T]here is no question in my mind[,]” the district court added, “that Mr. Bayly, in his life, has established a very, very high reputation. Certainly over 30 years, that reputation was earned as one who was an extraordinarily honest man, the highest integrity.” (*Id.* at 56.) Those are extraordinary words from a district judge who explicitly recognized that this Court might see this case differently on an independent review.

CONCLUSION

For the foregoing reasons, defendant-appellant Daniel Bayly respectfully requests that a panel of this Court reconsider the May 31, 2005 Order denying Bayly’s Motion For Release On Conditions Pending Appeal, and order that Bayly be released on appropriate conditions pending the resolution of his appeal.

DATED this 14th day of June, 2005.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to 5TH CIR. R. 27.4, counsel for Daniel Bayly conferred with Sangita Rao, counsel for the government, on June 8, 2005, to determine the government's position on defendant-appellant Daniel Bayly's motion for reconsideration of the May 31, 2005 order denying his motion for release on conditions pending appeal. Ms. Rao stated that the government opposes Bayly's motion for panel rehearing. Ms. Rao also stated that the government will decide whether to submit a written opposition after it reviews Bayly's written motion for reconsideration.



ALICE W. YAO

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 14th day of June, 2005:

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