No. 08-1394

In the Supreme Court of the United States

JEFFREY K. SKILLING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, to convict petitioner of conspiring to commit wire fraud by depriving his employer and its shareholders of the right to petitioner's honest services (18 U.S.C. 1343 and 1346), the government was required to prove that petitioner intended to obtain some private gain, and, if not, whether 18 U.S.C. 1346 is unconstitutionally vague.

2. Whether the court of appeals correctly held that petitioner was tried by an impartial jury despite any prejudicial pretrial publicity about the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulation, rule and guideline:

Miscellaneous:

In the Supreme Court of the United States

No. 08-1394

JEFFREY K. SKILLING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2009. A petition for rehearing was denied on February 10, 2009 (Pet. App. 136a-139a). The petition for a writ of certiorari was filed on May 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. 371

(Count 1); 12 counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 17 C.F.R. 240.10b-5 (Counts 2, 14, 16-20, 22-26); five counts of making false representations to auditors, in violation of 15 U.S.C. 78m(a), 78m(b)(2), and 78ff (Counts 31-32, 34-36); and one count of insider trading, in violation of 15 U.S.C. 78j(b) and 78ff and 17 C.F.R. 240.10b-5 (Count 51). He was sentenced to a total of 292 months of imprisonment, to be followed by three years of supervised release, and ordered to pay $45 million in restitution. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1a-135a.

1. Petitioner was the president, chief operating officer, and, for several months in 2001, the chief executive officer of Enron Corporation, a large publicly traded energy company based in Houston. The evidence at trial showed that between 1999 and 2001, petitioner and other Enron executives conspired to deceive Enron's shareholders, auditors, federal regulators, and the investing public about the company's financial condition and performance. Petitioner and his co-conspirators artificially inflated Enron's share price by reporting false earnings for the company and concealing large losses. In meetings and conference calls with investors, petitioner made false representations about the success of Enron's businesses. To ensure that Enron met or exceeded its announced earnings targets, petitioner authorized the manipulation of the company's financial accounting to conceal losses and falsely inflate earnings. Petitioner also entered into secret side deals with entities created by Enron's chief financial officer, Andrew Fastow, in order to hide losses at Enron. Pet. App. 2a-17a; Gov't C.A. Br. 6-62.

Shortly after petitioner resigned from Enron in August 2001, he sold 500,000 shares of Enron stock. At the time of the sale, petitioner knew that Enron had mounting debt and cash-flow problems and that several Enron components were suffering ongoing substantial losses that had not been disclosed publicly. Enron filed for bankruptcy four months later. Pet. App. 17a-18a; Gov't C.A. Br. 62-65.

2. a. On July 7, 2004, a federal grand jury in the Southern District of Texas returned a superseding indictment charging petitioner and Enron executives Kenneth Lay and Richard Causey with conspiracy and multiple counts of securities fraud, wire fraud, making false representations to auditors, and insider trading.[1] Pet. App. 18a; Gov't C.A. Br. 4-5. Count 1 of the indictment alleged that petitioner conspired with Lay and Causey to commit securities fraud, to commit wire fraud through a scheme to obtain money or property, and to commit wire fraud through a scheme to deprive Enron and its shareholders of the conspirators' honest services. Pet. App. 19a-20a; Superseding Indictment 36-39.

b. On November 8, 2004, petitioner and his co-defendants moved for a change of venue. Citing the "devastating" effects of Enron's collapse on the Houston area, the defendants contended that inflammatory pretrial publicity and pervasive community prejudice against former Enron executives would prevent a fair trial in Houston. Gov't C.A. Br. 136-137; Mem. in Supp. of Joint Mot. to Transfer Venue 1-4.

The district court denied the transfer motion. Mem. and Order (Jan. 19, 2005). After conducting a "[m]etic-

[1] The government dismissed the wire fraud counts before trial and dismissed three additional counts against petitioner at the close of its case. Gov't C.A. Br. 5.

ulous review of all the evidence and arguments presented by defendants," the court found that the media materials they submitted "failed to raise a presumption of prejudice." *Id.* at 7. In particular, the court found that the defendants had identified only "isolated incidents of intemperate commentary" in news coverage, and that "for the most part, the reporting appears to have been objective and unemotional" and had a "fact-based tone." *Id.* at 12. The court also rejected the defendants' claim that pervasive community prejudice warranted a presumption that the jury would not be fair and impartial. The court summarized data from surveys of the local jury pool relied on by the defendants and concluded that they had not shown "a reasonable likelihood that the court will be unable to impanel an impartial jury despite widespread knowledge of the case." *Id.* at 17-21. The court concluded that "defendants' evidence is insufficient to show that prejudicial publicity about this case has so saturated the local populace that defendants are unlikely to receive a fair trial from an impartial jury." *Id.* at 17.

Before trial, the court sent out 14-page jury questionnaires, asking prospective jurors about their relationship to Enron or to anyone affected by the company's collapse, their opinions about Enron and the government's investigation, their sources of information about the case, the periodicals they read, and the Internet sites they visited. The questionnaires also asked whether recipients were angry at Enron or had an opinion about the defendants or the defendants' guilt. Pet. App. 62a; Gov't C.A. Br. 139-140.

On January 4, 2006, after Causey entered a guilty plea, petitioner and Lay renewed their motion for a change of venue, arguing that the jury questionnaires

showed that potential jurors were biased and that publicity generated by Causey's plea further tainted the jury pool. Defs.' Renewed Mot. for Change of Venue 1-2. The district court denied the motion, finding that the defendants had not "establish[ed] that pretrial publicity and/or community prejudice raise a presumption of inherent jury prejudice in this case." Order (Jan. 23, 2006) at 1. The court reiterated that the jury questionnaires and its "voir dire examination of the jury panel provide adequate safeguards to defendants and will result in the selection of a fair and impartial jury." *Id.* at 1-2.

After reviewing the completed questionnaires, the parties agreed to excuse 119 potential jurors. Pet. App. 62a. The court addressed the remaining 164 venire members, explaining the importance of an impartial jury and inquiring whether "any of you have doubts about your ability to conscientiously and fairly follow these very important rules." *Ibid.* After excusing two prospective jurors who indicated that they could not be fair, the court again emphasized that the case was not about the collapse of Enron and that serving as a juror was not about looking "to right a wrong or to provide remedies for those who suffered from the collapse of Enron." *Ibid.* The court admonished the jurors that they could not "seek vengeance against Enron's former officers because of some wrongdoing they believe Enron or its officers may have committed," and that anyone who had such an attitude could not "be a fair and impartial juror." *Id.* at 62a-63a. The court then questioned the venire members about whether they knew any of a long list of persons involved in the case and questioned each juror who identified any connection about the nature of the relationship. *Id.* at 63a. Finally, the court ques-

tioned each member of the venire individually about his or her responses to the jury questionnaire and exposure to pretrial publicity and also allowed defense counsel to question the prospective jurors. *Ibid.*

The court granted three challenges for cause by the defendants and denied five of their challenges for cause. Gov't C.A. Br. 147. One juror petitioner had challenged for cause sat on the jury. Pet. App. 65a. After the jury was selected, defense counsel objected to six of the other jurors, stating that if additional peremptory challenges had been granted, they would have used them to strike those jurors. 1/30/06 Sealed Tr. 3.

c. On May 25, 2006, after a four-month trial, petitioner was convicted of conspiracy, 12 counts of securities fraud, five counts of making false representations to auditors, and one count of insider trading. Pet. App. 19a; Gov't C.A. Br. 5. The jury acquitted petitioner on nine counts of insider trading. Pet. App. 19a.

3. The court of appeals affirmed petitioner's convictions, but remanded for resentencing. Pet. App. 1a-135a. On appeal, petitioner argued, among other things, that his conspiracy conviction was flawed because one of its objects was legally invalid. In particular, he contended that the honest services theory was "legally insufficient," *id.* at 21a, because his conduct was designed to benefit Enron, "not to promote [petitioner's] interests at Enron's expense." Pet. C.A. Br. 60-71. Petitioner relied on *United States* v. *Brown*, 459 F.3d 509, 519-523 (2006), cert. denied, 550 U.S. 933 (2007), in which the Fifth Circuit held that employees who commit fraudulent acts to further corporate goals imposed by their superiors have not committed honest services fraud. The court of appeals rejected petitioner's claim, holding that "[t]he elements of honest-services wire fraud appli-

cable here are: * * * a material breach of a fiduciary duty imposed under state law * * * that results in a detriment to the employer." Pet. App. 29a. Such a detriment exists, the court stated, when the employee withholds information "that he had reason to believe would lead a reasonable employer to change its conduct." *Ibid.* The court concluded that "the jury was entitled to convict [petitioner] of conspiracy to commit honest-services wire fraud on these elements." *Ibid.* The court explained that *Brown* "creat[ed] an exception" for cases in which "the employer specifically directs the fraudulent conduct," but found that petitioner "never alleged that he engaged in his conduct at the explicit direction of anyone." *Id.* at 28a-29a.

Petitioner also argued that pretrial publicity and community prejudice required a presumption that any jury empaneled in Houston would not be fair and impartial, and that the jury that actually sat in his case was biased. Pet. C.A. Br. 121-173. The court of appeals agreed with petitioner that "inflammatory and pervasive" media coverage and the widespread effects of Enron's collapse on "countless people in the Houston area" were sufficient to raise a presumption of jury prejudice. Pet. App. 54a-60a. The court concluded, however, that the district court's "proper and thorough" voir dire "more than mitigated any effects of this prejudice." *Id.* at 62a-63a, 68a. The court noted that the district court, after "prescreening veniremembers based upon their responses" to an "extensive questionnaire," had conducted "searching" questioning of the prospective jurors, "requiring more than just the veniremembers' statements that he or she could be fair." *Id.* at 62a-63a. The court also found that the government "met its burden of demonstrating the impartiality of the empaneled

jury." *Id.* at 63a-68a. Observing that petitioner "failed to challenge for cause all but one of the jurors who actually sat," *id.* at 64a, the court affirmed the district court's finding that Juror 11, whom petitioner did challenge for cause, could be fair. *Id.* at 65a-67a (noting Juror 11's statements during voir dire that he had "no idea" as to petitioner's guilt and "would have no problem" telling a co-worker who had formerly worked at Enron that the jury had acquitted petitioner because the government failed to prove its case); see 1/30/06 Tr. 49-65.

The court remanded for resentencing, agreeing with petitioner that the district court erred in applying a four-level enhancement, under Sentencing Guidelines § 2F1.1(b)(8)(A) (2000), for substantially jeopardizing the safety and soundness of a financial institution. Pet. App. 131a-135a.

Petitioner filed a petition for rehearing en banc, arguing, as relevant here, that a conviction for honest services fraud requires "proof that the defendant committed wrongful acts *for his own personal gain* and *not* to further his employer's objectives." Pet. Reh'g Pet. 2 (emphasis in original). Petitioner also contended that he had not waived his objection to any seated juror and that the government failed to rebut the presumption of jury prejudice. *Id.* at 12-20. The court of appeals denied rehearing without opinion. Pet. App. 136a-138a.

ARGUMENT

Petitioner contends that the honest-services object of his conspiracy conviction was legally invalid because the jury was not required to find that he acted for private gain. Pet. 21, 23. He also contends that review is warranted because, he asserts, prejudicial pretrial pub-

licity created an irrebuttable presumption that he was denied an impartial jury. Pet. 33. Those claims do not warrant review, particularly because this case is in an interlocutory posture. In the alternative, the petition for certiorari should be held on the first issue for *Black* v. *United States*, 129 S. Ct. 2379 (2009) (No. 08-876), but in all other respects denied.

1. This Court's review is unwarranted at this time because this case is in an interlocutory posture. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 135a. The district court has indefinitely postponed that proceeding, however, because petitioner has indicated that he intends to file a new trial motion pursuant to Fed. R. Crim. P. 33(b)(1). Order (Apr. 29, 2009). That motion is expected to renew arguments that petitioner advanced on appeal but that the Fifth Circuit declined to address in the first instance. Pet. App. 91a-92a, 96a-97a n.73, 102a (explaining that petitioner must file a Rule 33 motion for a new trial to permit the district court to address certain issues). In particular, petitioner has alleged that the government withheld exculpatory evidence regarding a number of matters in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). After several extensions of the briefing schedule, petitioner's Rule 33 motion is now due on September 9, 2009, pursuant to the most recent extension request filed on August 3, 2009. Order (Aug. 4, 2009).

The interests of judicial economy would be best served by denying review in this Court while petitioner completes his challenge to his conviction on separate grounds in the district court. Following the resolution of petitioner's Rule 33 motion and the conclusion of any other proceedings that may prove necessary, petitioner,

if he remains convicted, will be resentenced. He can then, after appellate arguments, raise his current claims —together with any additional claims that arise in the district court—in a single petition for a writ of certiorari seeking review of the final judgment against him. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" most recent judgment). The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition). See generally Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002) (noting that the Court routinely denies interlocutory petitions in criminal cases).

2. Petitioner contends (Pet. 17-21) that this Court's review is warranted to resolve a conflict among the courts of appeals on whether a conviction for honest services fraud under 18 U.S.C. 1346 requires proof that the defendant intended by his conduct to obtain "private gain." Petitioner also contends (Pet. 23-26) that, absent some limiting construction, Section 1346 is unconstitutionally vague. Those questions do not merit review in this case because petitioner would not benefit even if his contentions were correct. The indictment against petitioner alleged that his conspiracy offense had three objects: to commit securities fraud, to commit wire fraud based on a deprivation of money property, and to commit wire fraud based on a deprivation of honest services. Pet. App. 19a-20a. In the court of appeals, petitioner

challenged only the honest-services theory; he did not challenge the legal theory underlying the securities fraud convictions. This Court has held that error on an alternative legal theory underlying a general verdict is subject to harmless-error analysis. *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam). Although the court of appeals seemingly confined *Hedgpeth* to cases on collateral review, Pet. App., 20a-21a n.10, this Court's harmless-error reasoning extends to the direct-review context as well, as petitioner appears to recognize. Pet. 14. In this case, petitioner was convicted on 12 separate substantive counts of securities fraud that corresponded to the securities-fraud object of the conspiracy. Those counts were based on petitioner's own conduct and were supported by overwhelming evidence. See Gov't C.A. Br. 6-60, 92-102. Accordingly, the jury's verdict on the conspiracy count would have been the same even without the honest services theory. Any error in that theory was therefore harmless beyond a reasonable doubt. *Neder* v. *United States*, 527 U.S. 1, 17 (1999).

Alternatively, if the Court does not deny the petition outright, the petition should be held on this issue for *Black*, *supra*. That case concerns the elements of private sector honest services fraud under Section 1346, including whether limitations on that offense are necessary to avoid constitutional infirmities.[2] The petitioner

---

[2] This Court has also granted certiorari in *Weyhrauch v. United States*, No. 08-1196 (June 29, 2009), which presents the question whether, to convict a state official under the federal mail fraud statute for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, the government must prove that the defendant violated a disclosure duty imposed by state law. It does not appear that petitioner's case would be affected by

in *Black* has challenged the jury instructions in his case on the ground that they did not require the jury to find that the alleged scheme to defraud contemplated "economic or other property harm" to the party deprived of honest services. Pet. Br. at i, *Black*, *supra* (No. 08-876). In the course of addressing that contention, this Court is likely to define the elements of honest-services fraud and thus to clarify the reach of Section 1346. Indeed, petitioner has filed an amicus curiae brief in *Black* arguing that he has an interest in the case "because it presents a distinct but related question concerning the scope of honest-services fraud under § 1346" and "[t]he result and reasoning of the Court's decision in th[at] case could directly affect his chances of obtaining the reversal of his conviction." Amicus Br. of Jeffrey K. Skilling at 2, *Black*, *supra* (No. 08-876). While petitioner also maintains that the Court should grant review in this case to address the "private gain" issue, the Court need not do so before it has resolved *Black*. And if that decision sheds light on the proper analysis of this case, the Court's customary practice would be to remand to allow the court of appeals to apply the new decision. Accordingly, if this Court does not deny review of this case for the reasons stated above, the Court should hold the petition for certiorari pending the decision in *Black* and then dispose of the petition as appropriate in light of the Court's resolution of that case.

3. Petitioner also contends (Pet. 26-37) that the court of appeals erred in rejecting his claim that he was deprived of an impartial jury by prejudicial pretrial publicity. He contends that the court of appeals' finding

---

Weyhrauch because breach of a state law duty was established in this case. Pet. App. 29a.

that pretrial publicity and the widespread effects of Enron's collapse warranted a presumption of jury prejudice required "automatic reversal" of his convictions, without consideration of whether an impartial jury was in fact empaneled. He also argues that the courts below failed to require the government to prove beyond a reasonable doubt that the jurors who actually sat were impartial. Petitioner's contentions are without merit, and they do not warrant further review.

a. This is not an appropriate case to review whether an appellate court's application of a presumption of jury prejudice requires automatic reversal because, as the government argued below, no such presumption was warranted here. "[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 554 (1976). A defendant who contends that prejudice from pretrial publicity should be presumed has an "extremely high" burden, *United States* v. *McVeigh*, 153 F.3d 1166, 1182 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999), because a presumption of prejudice is only "'rarely' applicable and is reserved for an 'extreme situation,'" *United States* v. *Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc) (quoting *Mayola* v. *Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981)), cert. denied, 129 S. Ct. 2790 (2009); see *United States* v. *Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995) (presumption is "reserved for only the most egregious cases"), cert. denied, 516 U.S. 1098 (1996). See also *Dobbert* v. *Florida*, 432 U.S. 282, 303 (1977) ("Unfairness of constitutional magnitude" will not be presumed "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'") (quoting *Murphy* v. *Florida*, 421 U.S. 794, 798 (1975)).

As the district court found, petitioner failed to show that pretrial publicity and community prejudice required a presumption that an impartial jury could not be empaneled in Houston. Petitioner was tried in the Houston Division of the Southern District of Texas, which consists of 13 counties and in 2004 had a population of at least 4.5 million people. Gov't C.A. Br. 152; see *Mu'Min* v. *Virginia*, 500 U.S. 415, 429 (1991) (evaluation of effect of pretrial publicity requires consideration of "the kind of community in which the coverage took place"); *United States* v. *De La Vega*, 913 F.2d 861, 865 (11th Cir. 1990) (330 news articles submitted by defendants could not have created inflamed atmosphere sufficient to presume prejudice in community of 1.8 million people), cert. denied, 500 U.S. 916 (1991). As this Court has explained, a "relevant" consideration in evaluating presumed prejudice claims is "[t]he length to which the trial court must go in order to select jurors who appear to be impartial." *Murphy*, 421 U.S. at 802-803. Thus, "[i]n a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question." *Id.* at 803. In *Irvin* v. *Dowd*, 366 U.S. 717, 727 (1961), for example, almost 90% of the venire harbored some opinion about the defendant's guilt and 62% of the 430 members of the venire were dismissed for cause. In *Patton* v. *Yount*, 467 U.S. 1025 (1984), this Court refused to presume prejudice even though "77% [of those on the venire] admitted they would carry an opinion into the jury box," *id.* at 1029, and 121 out of 163 venire members were dismissed for cause, 96 of whom testified that they had firm opinions about the case, *id.* at 1044-1045 (Stevens, J., dissenting). Unlike *Irvin* and *Patton*, in which the large majority of prospective jurors thought the defendants

were guilty, responses to the questionnaire the court distributed to the jury pool in this case showed that more than 60% of prospective jurors had not formed any opinion about petitioner's guilt. Gov't C.A. Br. 154.

Voir dire of the jury panel confirmed that most prospective jurors did not hold disqualifying opinions about petitioner. During individual voir dire, the court asked virtually every potential juror about his or her exposure to publicity concerning Enron's collapse and this case. Approximately 37 of the 46 potential jurors questioned stated that they had limited exposure to publicity about Enron and the defendants, had not paid attention to the publicity, or did not recall anything significant about the publicity. Gov't C.A. Br. 160; see *id.* at 142-143 (21 potential venire members, including ten who sat on the jury, told the court that they did not follow the news about Enron; many stated that they were not interested in details of the news coverage because they had not been directly affected); *id.* at 141-142 (approximately 22 prospective jurors, including nine who sat on the jury, did not subscribe to the *Houston Chronicle* or read it infrequently). Three other potential jurors were excused for cause on the defendants' motion or by joint consent without any inquiry into whether they had been exposed to publicity. *Id.* at 160. Of those venire members who recalled hearing news about Enron, most said that they did not remember very much or did not hear anything that made them think petitioner was guilty or that would interfere with their ability to decide the case on the evidence. *Id.* at 144-146. A jury pool in which more than 85% of the individuals questioned said that they had no significant exposure to pretrial publicity is not a panel that is fatally "saturated" with pretrial publicity. Cf. Pet. App. 55a.

The cases in which this Court has found a presumption of jury prejudice bear no resemblance to the facts of this case. In *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), a 20-minute film in which the defendant confessed to kidnapping and murdering a bank employee (after inquisition in his jail cell without counsel by the county sheriff) was aired three times on local television, before respective audiences of 24,000, 53,000, and 20,000 viewers, in a community of only 150,000 people. *Id.* at 723-727. The Court held that due process "required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" *Id.* at 727. In *Estes* v. *Texas*, 381 U.S. 532 (1965), the Court relied on the "rule announced in *Rideau*," *id.* at 550, that "the televising of a defendant in the act of confessing of a crime was inherently invalid under the Due Process Clause," *id.* at 538, to hold that the defendant was denied due process by the "televising and broadcasting of his trial." *Id.* at 535. Finally, in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the media not only reported numerous prejudicial rumors and accusations regarding the defendant, who was accused of murdering his pregnant wife, but was also allowed to invade the courtroom and interfere with the trial itself. *Id.* at 342-345, 356-357. The Court found that "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," and that the trial court failed to take adequate steps to avoid the "carnival atmosphere at trial." *Id.* at 355, 358-363; see *Murphy*, 421 U.S. at 799 (proceedings in *Estes* and *Sheppard* "were entirely lacking in the solemnity and sobriety to which a defendant is entitled").

This case does not involve the considerations that led the Court to presume jury prejudice in *Rideau*, *Estes*,

and *Sheppard*. Petitioner was charged with a corporate fraud that the district court found was "neither heinous nor sensational," Mem. and Order 10 (Jan. 19, 2005); the pretrial publicity did not include accounts of his confession or prior convictions; and the news media did not televise the proceedings, invade the courtroom, or create a "carnival atmosphere at trial." *Sheppard*, 384 U.S. at 358.

b. Even if a presumption of prejudice were warranted in this case, petitioner is incorrect in contending that conducting a criminal trial in a venue where pretrial publicity or other circumstances raise such a presumption requires automatic reversal of the defendant's conviction, without regard to whether the jurors who actually sat at trial were impartial. As relevant here, a rule of automatic reversal applies "only in a very limited class of cases," namely those in which the defect asserted "deprive[s] [the] defendant[] of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Neder*, 527 U.S. at 8-9; *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997). An impartial adjudicator is an element of fundamental fairness. See *Rose* v. *Clark*, 478 U.S. 570, 579 (1986) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis."). But a presumption of prejudice is not alone sufficient to require automatic reversal. Rather, when actual impartiality is shown, the conviction should be affirmed. Cf. *Remmer* v. *United States*, 347 U.S. 227, 229 (1954) (apparent attempt to bribe a juror "is, for obvious reasons, deemed presumptively prejudicial," but "[t]he presumption is not conclusive" and may be rebutted if the

government shows after a hearing that "such contact with the juror was harmless to the defendant").[3]

Pretrial publicity and community reaction may give rise to a presumption of jury prejudice, but the trial is not fundamentally unfair or unreliable when no biased juror actually sits, because the defendant has not been deprived of an impartial jury. See *Lockhart* v. *McCree*, 476 U.S. 162, 178 (1986) (an impartial jury is one that "will conscientiously apply the law and find the facts") (citation omitted); cf. *Rivera* v. *Illinois*, 129 S. Ct. 1446, 1450 (2009) ("[i]f all seated jurors are qualified and unbiased," erroneous denial of defendant's peremptory challenge does not warrant reversal). Here, petitioner was tried under the correct standard of proof, with the assistance of counsel, and before an unbiased judge and a jury which both courts below found was impartial. Any error in the district court's refusal to order a change of venue did not rise to the level of a fundamental defect warranting automatic reversal.

Contrary to petitioner's claim (Pet. 29-30), this Court has not held that jurors' statements during voir dire are categorically irrelevant in determining whether a presumption of jury prejudice requires reversal. In both *Estes* and *Sheppard*, the Court found prejudice based largely on media interference with the trial itself after the jury had been empaneled. *Estes*, 381 U.S. at 535-538; *Sheppard*, 384 U.S. at 343-349, 353-356, 358-359. In

---

[3] Petitioner contends that when a presumption of prejudice arises, the effects on individual jurors cannot be ascertained and thus automatic reversal is required. Pet. 29-31 (citing, *inter alia*, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). But while the effects of actual bias on a factfinder cannot be ascertained and thus require automatic reversal, the question whether prejudicial influences create actual bias can be ascertained. See, e.g., *Remmer*, 347 U.S. at 229-230.

Rideau, the Court found that pretrial publicity required reversal "without pausing to examine a particularized transcript of the voir dire," 373 U.S. at 727, but the publicity in that case was so extreme, exposing prospective jurors "repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged," that the Court found the confession effectively constituted Rideau's "trial—at which he pleaded guilty to murder"—and rendered the ensuing judicial proceedings a "kangaroo court." *Id.* at 726.

Petitioner also contends (Pet. 30-33) that the court of appeals' conclusion that a presumption of jury prejudice may be rebutted by the voir dire conflicts with decisions of other federal courts of appeals and state courts of last resort. Most of the cases petitioner cites did not apply a presumption of jury prejudice, however, and their statements about the potential significance of such a presumption are therefore dicta. Thus, in both of the Third Circuit decisions petitioner cites—*Riley* v. *Taylor*, 277 F.3d 261 (2001), and *Flamer* v. *Delaware*, 68 F.3d 736, 754 (1995), cert. denied, 516 U.S. 1088 (1996)—the court simply quoted from, but did not apply, an earlier decision that had posited (but not found) an extreme situation involving a "trial atmosphere" so "utterly corrupt" that the defendant could not receive a fair hearing. *Rock* v. *Zimmerman*, 959 F.3d 1237, 1252-1253 (3d Cir.), cert. denied, 505 U.S. 1222 (1992). In *United States* v. *Higgs*, 353 F.2d 281 (2003), cert. denied, 543 U.S. 999 (2004), the Fourth Circuit addressed the standards governing a motion for pre-trial change of venue but did not state, much less hold, that a presumption of prejudice arising from pretrial publicity requires automatic reversal of a conviction. See also *United States* v. *Baker*, 925

F.2d 728, 732 (4th Cir. 1991) (stating that if "the publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted[,] * * * a motion for a change of venue should be granted before jury selection begins"). And in *United States* v. *McVeigh*, 153 F.3d 1166 (1998), cert. denied, 526 U.S. 1007 (1999), the Tenth Circuit adverted to a hypothetical set of circumstances in which "publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial" as a matter of law, but the court noted that, "despite the proliferation of the news media and its technology, the Supreme Court has not found a single case of presumed prejudice in this country since * * * *Sheppard*." *Id.* at 1182.

The only published federal decision petitioner cites in which presumed prejudice was actually at issue is *Daniels* v. *Woodford*, 428 F.3d 1181 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007). There, the pretrial publicity identified the defendant as having killed two police officers and recounted his prior offenses, and the Ninth Circuit reversed only after considering both the nature and extent of the publicity and the results of the voir dire. *Id.* at 1210-1212; cf. *United States* v. *Maad*, 75 Fed. Appx. 599, 600 (9th Cir. 2003) (unpublished) (district court abused its discretion in denying motion for change of venue, in light of "confluence of extraordinary and unique events," which included vandalism of defendant's business shortly after the September 11 attacks, initial outpouring of support from the community, subsequent announcement that defendant was suspected of vandalizing his own business, and "negative reaction" against defendant).

The state court decisions petitioner cites that applied a presumption of jury prejudice do not establish that

petitioner would have been "entitled * * * to a new trial as a matter of law" in these jurisdictions, as he contends (Pet. 33) (emphasis omitted). In *State* v. *Clark*, 442 So. 2d 1129 (La. 1983), the court held that the defendant was entitled to a change of venue for his retrial for murder, citing the "massive media coverage" of the defendant's televised news conference while awaiting execution after his conviction at an earlier trial, in which he admitted his part in the armed robbery that led to the murder and insisted that he would rather be executed than serve a life sentence. *Id.* at 1131, 1134-1135. Because the defendant in *Clark* had not been retried, *id.* at 1131, the court had no occasion to consider whether the pretrial publicity would have required reversal of his conviction. In *Johnson* v. *State*, 476 So. 2d 1195 (Miss. 1985), the court found it "evident" that a presumption of jury prejudice "may be rebutted during voir dire." *Id.* at 1211; see *Gray* v. *State*, 728 So. 2d 36, 66 (Miss. 1998) (presumption "can * * * be rebutted if the State can prove from voir dire that the trial court impaneled a fair and impartial jury"), cert. denied, 526 U.S. 1055 (1999). The court reasoned that the presumption might, however, "become[], in effect, irrebuttable" based on a "combination" of circumstances, including not only prejudicial pretrial publicity but also "the capital nature of the offense," the presence of "crowds threatening violence to the accused," and charges of "mass or serial murders" or a crime "committed by a black person upon a white victim." *Johnson*, 476 So. 2d at 1213-1215. In *Ruiz* v. *State*, 582 S.W.2d 915 (Ark. 1979), the court presumed prejudice where the defendants were tried for the capital murder of two people in the county where the trial was held; pretrial publicity disclosed that the defendants had escaped from state prison, where they were serving

sentences for robbery and murder, and were also suspected of three other murders in Louisiana and Oklahoma; and the jury panel "included friends or acquaintances of one or both of the murdered men." *Id.* at 917, 920-921. After finding that the trial court's denial of the defendants' motion for change of venue "constituted prejudicial error," the court went on to "examine the record to determine * * * whether they did in fact receive a trial by a completely impartial jury." *Id.* at 921. The court described the voir dire of each juror who sat at the defendants' trial, finding that "several of them had formed an opinion that the [defendants] were guilty or would require proof of their innocence," and concluded that "the seating of this jury constituted reversible error." *Id.* at 922-924. Finally, in *Commonwealth* v. *Frazier*, 369 A.2d 1224 (Pa. 1977), the court reversed the defendant's conviction for abducting and murdering an 11-year-old girl, citing news reports that quoted the defendant's confession to police and detailed his prior criminal record, which "reached the homes of practically every potential juror" in the rural county of 100,000 residents. *Id.* at 1225-1229.

c. The court of appeals in this case correctly concluded that any presumption of prejudice was rebutted by the district court's "exemplary" voir dire, which ensured that petitioner received a fair trial by an impartial jury. See Pet. App. 62a-68a. The jury's acquittal of petitioner on nine of the counts with which he was charged demonstrates its impartiality. Petitioner does not cite any case in which this Court has held that a conclusive presumption of prejudice was required where the jury returned a verdict of not guilty on some charges.

Petitioner contends, however (Pet. 34) that the court of appeals erred in deferring to the district court's de-

terminations that prospective jurors could be impartial. He maintains that the district court should have been required to "start[] from an assumption that every potential juror was prejudiced" and should have conducted a "more probing" voir dire. This Court has made clear that a trial judge's determination of juror bias "is essentially one of credibility, and therefore largely one of demeanor," and for that reason is "entitled * * * to special deference." *Patton*, 467 U.S. at 1038 & n.14 (internal quotation marks omitted). Accordingly, "[a] trial court's finding of juror impartiality may 'be overturned only for manifest error.'" *Mu'Min* v. *Virginia*, 500 U.S. at 428 (quoting *Patton*, 467 U.S. at 1031). In addition, "[b]ecause the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) (plurality); see *Mu'Min*, 500 U.S. at 424, 427 (in both federal and state cases, "the trial court retains great latitude in deciding what questions should be asked on voir dire"; "[p]articularly with respect to pretrial publicity, * * * this reliance on the judgment of the trial court makes good sense"); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931) (trial court "ha[s] a broad discretion as to the questions to be asked" of prospective jurors).

In this case, as the court of appeals found, the district court conducted a "searching" voir dire, questioning prospective jurors individually about their exposure to pretrial publicity and responses to an extensive questionnaire concerning their opinions about Enron, their connections to the company or to anyone affected by its bankruptcy, and their sources of information about the

case. Pet. App. 62a-63a; see Gov't C.A. Br. 140-146. Petitioner asserts generally that more extensive questioning was "necessary to fully explore each juror's influences and potential biases," Pet. 34, but he does not suggest any additional lines of inquiry that the court failed to pursue in examining the prospective jurors.[4] Petitioner's fact-specific challenge to the sufficiency of the voir dire warrants no further review.

Petitioner also contends (Pet. 34-35) that the court of appeals did not require the government to prove beyond a reasonable doubt that no seated juror was biased. As the court of appeals explained, petitioner declined to challenge for cause 11 of the 12 jurors who convicted him. Pet. App. 64a-65a & n.53 (noting that the "only juror who sat that [petitioner] had challenged for cause was Juror 11"); see 1/30/06 Tr. 64, 75, 102, 114, 160, 204-205, 229. Petitioner contends that the court failed to require the government to prove beyond a reasonable doubt that Juror 11 was impartial, citing the juror's statements during voir dire that corporate CEOs are "greedy" and "walk a line that stretches sometimes the legality of something," and that he worked with a former Enron employee who lost money in his retirement plan. See Pet. App. 65a-66a.

As the court of appeals observed, however, Juror 11 also stated that he had "no idea" as to the defendants' guilt; that he would have "no problem" telling his coworker that the government failed to prove its case; that

---

[4] Petitioner asserts (Pet. 34) that the district court improperly denied him "individual voir dire," but, as the court of appeals found (Pet. App. 63a n.52), the court only twice limited questioning of prospective jurors by counsel for petitioner's co-defendant. The defense attorneys questioned 27 prospective jurors and declined to question the other 19 members of the venire. *Ibid.*; Gov't C.A. Br. 163-164.

he did not "get into details" of the Enron coverage; that he did not believe everything he read in the *Chronicle*; that the defendants "earned their salaries"; and that "greedy" did "not necessarily" mean "illegal," agreeing that "greed and ambition * * * are the same thing" and that he could "start this case with a clean slate that would require the government to prove its case." Pet. App. 65a-67a; 1/30/06 Tr. 58-64. Such "ambiguous and at times contradictory" responses to voir dire examination are not unusual and do not establish juror bias, even in a "highly publicized criminal case"; rather, "it is [the trial] judge who is best suited to determine competency to serve impartially." *Patton*, 467 U.S. at 1039; see *Murphy*, 421 U.S. at 800 (juror's expression of a "'preconceived notion as to the guilt or innocence of an accused'" does not demonstrate juror's impartiality; "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'") (quoting *Irvin*, 366 U.S. at 723). The district court observed Juror 11's demeanor and responses to questions and found that he could be impartial, 1/30/06 Tr. 65, and the court of appeals affirmed that finding, holding that the government "met its burden of showing that the actual jury that convicted [petitioner] was impartial." Pet. App. 63a-68a. Petitioner's disagreement with that finding by both courts below does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decision in *Black* v. *United States*, No. 08-876, and then disposed of as appropriate in light of this Court's decision in that case.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
NINA GOODMAN
Attorney

AUGUST 2009