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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>JAMIE OLIS, et al.</p>	<p>H-03-CR-217</p>
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**JAMIE OLIS' RESPONSE TO GOVERNMENT'S ANSWER
AND MOTION FOR SUMMARY JUDGMENT, AND MOTION
FOR RECONSIDERATION OF OLIS' MOTION FOR DISCOVERY**

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INTRODUCTION

The government's Answer starts with the cynical assertion that Olis should suffer a procedural default because the United States Attorney's Office ("USAO") successfully deceived Olis and his attorneys by concealing its interference with Olis's lawful access to defense funding. From there, the Answer devolves downward. Contrary to the government's contentions, the record establishes that (1) the USAO violated Olis' fundamental rights by interfering with his access to defense funding; (2) the government constructively and impermissibly amended the indictment; (3) the government presented false testimony from Jeffrey Heil, a key government witness; (4) the petit jury included an admittedly biased and unrehabilitated juror; (5) the jury instructions erroneously defined the elements of wire fraud and mail fraud; and (6) Olis received ineffective assistance of counsel.

Far from supporting the government's motion for summary judgment, the record establishes that Olis is entitled to relief. At a minimum, the Court should reconsider its denial of Olis' motion for discovery, grant that motion and set the matter for an evidentiary hearing. Alternatively, the Court should grant Olis' petition and vacate his conviction.¹

¹ On this record, the government's motion for summary judgment must be denied. See Government Answer to Motion to Vacate Pursuant to 28 U.S.C. § 2255, Motion for Summary Denial, and Supporting Memorandum of Law ("Gov't Answer," Docket # 346) at 82-87 (motion for summary judgment). Under Federal Rule of Civil Procedure 56(c), summary judgment is warranted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The government raises no issue that is subject to such a determination. Accordingly, summary judgment for the government is not warranted here.

DISCUSSION

I. THE USAO'S INTERFERENCE WITH OLIS' ACCESS TO FUNDS VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO PRESENT THE DEFENSE OF HIS CHOICE

Olis demonstrated in his § 2255 motion and accompanying filings that the United States Attorney's Office ("USAO") violated his Fifth and Sixth Amendment rights by using the deadly threat of indictment to force Dynegy to cut off Olis' access to defense funds. Memorandum of Points and Authorities in Support of Jamie Olis' Motion To Set Aside His Conviction Pursuant to 28 U.S.C. § 2255 ("§ 2255 Memorandum," Docket # 315) at 31-69. The government opposes this claim on several grounds, but none is persuasive. The government is not entitled to summary judgment with respect to this claim.

A. No Procedural Default

The government's primary contention is that Olis defaulted his interference claim by failing to raise it before trial. The government argues that Olis cannot demonstrate cause for his failure, or prejudice stemming therefrom. Gov't Answer at 8-32. But those arguments are wrong: the government and Dynegy conspired to conceal — and successfully concealed — the factual basis for the claim from Olis and his attorneys. As a result, there was no procedural default.

1. Cause

A § 2255 petitioner has adequate "cause" for failing to raise a constitutional claim when there existed "some external impediment preventing counsel from constructing or raising the claim." *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S. Ct. 1454, 1472 (1991)

(quoting *Murray v. Carrier*, 477 U.S. 478, 492, 106 S. Ct. 2639, 2648 (1986)). “For cause to exist, the external impediment, whether it be *government interference* or the *reasonable unavailability of the factual basis for the claim*, must have prevented petitioner from raising the claim.” *Id.* (emphases added); *see also United States v. Guerra*, 94 F.3d 989, 993 (5th Cir. 1996) (“Objective factors that constitute cause include . . . a showing that the factual or legal basis for the claim was not reasonably available to counsel at the prior occasion.”). Here neither the factual nor the legal basis for the constitutional claim was available to Olis before trial.

The government relies on evidence that Olis’ attorneys were aware before trial that Dynegy was delinquent in paying their bills. Gov’t Answer at 9-16. That is not in dispute. But the mere lack of payment by Dynegy was not sufficient to support — or even suggest — that the government had violated Olis’ constitutional rights. Government action is the *sine qua non* for a constitutional claim; and, as the government concedes elsewhere in its brief, Olis had no cognizable claim against the USAO absent evidence of governmental conduct. *See* Gov’t Answer at 32-39. Olis’ attorneys had no idea that the USAO caused Dynegy to withhold funds; indeed, they did not even realize that Dynegy’s decision to “escrow” funds meant that the firm would never pay for Olis’ defense. Declaration of Lloyd E. Kelley (“Kelley Decl.,” Docket # 318) Exhibit D at 84:15-85:3, 131:25-136:11, 134:16-135:11, 244:25-245:4; *see also* Olis Declaration in Support of His Motion to Set Aside His Conviction (“Olis Decl.,” Docket # 311) ¶ 3. The USAO, working in concert with Dynegy, contrived the escrow mechanism as a method of hiding from Olis the true situation and misleading his

attorneys to believe they would eventually be paid. See § 2255 Memorandum at 39-45.

Far from a procedural default, here the USAO succeeded in deceiving Olis and his attorneys, thereby ensuring that they proceeded to trial without experts and other necessary support, while unaware of the government's interference. Yet the government now argues that Olis is subject to a procedural default based upon the very facts that the USAO successfully concealed. This is the height of hubris, and it must not be countenanced.

The government also urges that trial counsel's awareness of the existence of the Thompson Memorandum put Olis on notice of the constitutional violation. Gov't Answer at 12-14. That suggestion misses the mark for two reasons. First, Olis' counsel, Terry Yates, did not understand that the Thompson Memorandum would by itself prevent Dynegy from fulfilling its contractual obligations to Olis. On the contrary, Yates believed that Dynegy decided to put funds in escrow in order to *circumvent* the implications of the Thompson Memorandum by putting the funds out of the company's reach. Kelley Decl. (Docket # 318) Ex. D at 65:23-66:12.

Second, Olis does not contend that the Thompson Memorandum alone violated his constitutional rights. Rather, it was the actions of the USAO, which improperly used the Thompson Memorandum to put pressure on Dynegy, that constituted the violation. Olis' trial counsel was not aware of the USAO's actions. As Yates testified in a civil proceeding, "If I had any idea [that the government had pressured Dynegy], I would [have] filed a motion, gone in front of Judge Lake." Kelley Decl. (Docket # 318) Ex. D at 84:24-85:1. Thus, the record defeats the government's assertion that Yates' familiarity with the Thompson Memorandum constituted notice of the government's wrongful

conduct.

For all of these reasons, Olis had more than adequate cause for failing to raise his claim before trial.

2. Prejudice

The government next asserts that Olis suffered no prejudice from the USAO's interference with his access to funding by Dynegy because (1) Olis had sufficient personal funds to support his defense, Gov't Answer at 18-19; (2) Olis' counsel would not have undertaken any additional defense steps even if he had received Dynegy's funding, *id.* at 19-25; and (3) the experts Olis would have hired would have provided little useful testimony, *id.* at 26-31. These assertions are factually and legally erroneous, and they are patently insufficient to support a motion for summary judgment. See Fed. R. Civ. P. 56(c).

a. The USAO's Misconduct Worked a Structural Error, Obviating the Need for an Intricate Inquiry Into Prejudice

As an initial matter, the government's proposed prejudice inquiry is unnecessary. As the *Stein* court observed, the constitutional violation at issue here is analogous to that at issue in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006), where the Supreme Court considered a violation of the defendant's Sixth Amendment right to counsel of choice. See *United States v. Stein* ("*Stein I*"), 435 F. Supp. 2d. 330, 369 (S.D.N.Y. 2006). The *Gonzalez-Lopez* Court held:

Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice — which is the right to a particular lawyer regardless of comparative effectiveness — with the right to effective counsel

— which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

126 S. Ct. at 2563. As the court explained in *Stein*, “[t]he government has interfered with [Olis’] right to be represented as [he] choose[s], subject to the constraints imposed by the resources lawfully available to [hi]m. This violation, like a deprivation of the right to counsel of [his] choice, is complete irrespective of the quality of the representation” Olis received. *Stein I*, 435 F. Supp. 2d at 369.

Put differently, the due process and Sixth Amendment errors that infected Olis’ trial were “structural errors.” *Id.* at 370-72. Structural errors have “consequences that are necessarily unquantifiable and indeterminate” and “defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.” *Gonzalez-Lopez*, 126 S. Ct. at 2564 (quotation marks and alterations omitted). For such errors, prejudice “is so likely that case-by-case inquiry into prejudice is not worth the cost.” *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984). The USAO’s misconduct here worked a structural error because it is impossible to completely reconstruct how Olis might have conducted his defense had he received full funding from Dynegy. It is certain, however, that the funds would have enabled him to better prepare for the unusually complex trial. The due process and Sixth Amendment violations were prejudicial because the government’s misconduct affected the “framework within which the trial proceed[ed].” *Gonzalez-Lopez*, 126 S. Ct. at 2564.

b. Olis Did Not Have Sufficient Resources to Replace Those Dynegy Owed

In any case, even if the Court conducts a detailed inquiry into prejudice, Olis must prevail. Contrary to the government's suggestion, Olis' own available resources were clearly insufficient to fund the defense of this extremely complex case.

Relying on the Revised Presentence Investigation Report ("PSR") prepared after Olis' conviction, which reflected the Olises' total financial resources as of December 1, 2003, the government asserts that Olis' net worth "was significant." Gov't Answer at 19; see PSR, Feb. 10, 2004, ¶ 76. However, aside from retirement accounts, which were subject to income tax and penalties if withdrawn, Olis and his wife had a total of \$60,298 in liquid assets. These liquid assets consisted of cash, funds in checking accounts and savings accounts, and the cash value of a life insurance policy. PSR, Feb. 10, 2004, ¶¶ 76-80. The remainder of the Olises' so-called "significant" assets consisted of the family car, some personal jewelry, a piano and two pieces of real property — primarily the family home. PSR, Feb. 10, 2004, ¶¶ 76, 81-84.

Most significantly, during the months leading up to the trial, Olis was unemployed. *Id.* ¶ 60. His wife gave birth to their daughter a month prematurely on September 26, 2003, a week before the trial commenced, and did not return to work until after the trial. *Id.* ¶ 60. As a result, the Olises' monthly expenses substantially exceeded their income, even after trial when Olis' wife returned to work. *Id.* ¶ 86. Thus, in the fall of 2003, at a time when Olis was not gainfully employed, he and his wife possessed limited resources and even more limited liquid assets, sustained a negative cash flow, and endured the premature birth of their first-born child.

To say the least, these were not auspicious circumstances in which to attempt to fund his defense in this extremely complex case. Indeed, the fees that were generated by Olis' trial attorneys greatly exceeded Olis' liquid assets, and that does not even contemplate experts and other ancillary services. *Compare* Docket # 318, Ex. D. at 120; PSR, Feb. 10, 2004, ¶ 76. The government suggests that Olis should have made decisions that would have rendered his young family destitute, but the law does not require such a Hobbesian choice. Furthermore, the record establishes that, in the absence of Dynegy's funding, Olis could not pay for his attorneys' legal fees, let alone for the reasonable legal support, experts and consultants and other ancillary services that his attorneys would have procured had Dynegy's funding been available to them. § 2255 Memorandum at 63, 66-69; Declaration of Terry Yates in Support of Olis' Motion to Set Aside Conviction Pursuant to 28 U.S.C. § 2255 ("Yates Decl."; Docket # 312) at ¶¶ 6-10; Olis Decl. (Docket # 311). Thus, contrary to the government's assertions, the record demonstrates that Olis' personal resources were insufficient to fund his defense.

The government also blithely contends that Olis himself served as an adequate substitute for the assistance of consulting and testifying experts. Gov't Answer at 23-24. But the notion that Olis himself could have acted as an expert for his counsel is absurd on its face and merits little response.

As any trial counsel knows, even the most knowledgeable and experienced client could never substitute for the evaluation of an expert. Regardless how accomplished or knowledgeable a client may be, his or her judgment cannot be objective or dispassionate. The client is, by definition, too close to the action. So the client cannot meaningfully replace the services of an expert consultant, let alone testify as an expert

witness.² In any case, the government cites no authority for the proposition that the client's own knowledge and expertise are sufficient to eliminate prejudice from the deprivation of experts and consultants.

c. Trial Counsel Would Have Used Dynegy's Funding

The government also avers that even if Dynegy had provided funds, defense counsel would not have undertaken additional defense tasks such as hiring experts. Gov't Answer at 19-25. That contention is directly contradicted by the declaration of Terry Yates (Docket # 312), which establishes that Dynegy's refusal to pay for the defense prevented him from undertaking numerous vital defense tasks, including hiring experts. See *id.* at ¶ 7.³ The fact that Yates did not undertake these vital steps in the absence of funding does not in any way undermine his declaration that he would have pursued them if funding had been available. Summary judgment on this ground would be entirely inappropriate; Olis is at least entitled to an evidentiary hearing so that the Court may determine whether his trial counsel would have retained experts and taken other necessary steps had the government not blocked his access to Dynegy's

² Furthermore, Olis could not serve as a testifying expert without abandoning his Fifth Amendment privilege against self-incrimination (a right that Olis exercised at trial). To the extent the government contends Olis' personal knowledge could have substituted for testifying experts like Dr. Bala Dharan, it is essentially arguing that its interference with Olis' right to prepare his defense could have been remedied if Olis relinquished a different constitutional right. But a defendant cannot properly be forced to choose between different constitutional rights. See *United States v. Fields*, 483 F.3d 313, 350 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1065 (2008); *United States v. Herrera-Ochoa*, 245 F.3d 495, 499-500 (5th Cir. 2001).

³ The government observes that Yates provided Olis with \$448,556.05 in unpaid services. Gov't Answer at 20. That observation is irrelevant. Nothing in the record suggests that experts, investigators, or additional staff would have been willing to represent Olis for free.

funding.⁴

d. Expert Testimony Would Have Rebutted the Government's Case

Finally, the government rehashes its unpersuasive argument that experts would have provided no testimony useful to Olis. Gov't Answer at 24-31. On the contrary, as we have demonstrated, expert testimony would have compellingly undermined the government's case.

Expert to Counter Heil's Testimony: The government asserts that Olis was not prejudiced by his inability to counter government witness Jeffrey Heil's trial testimony, in which he described the losses allegedly suffered by the University of California system, including losses of the employees' pension fund, as a result of Project Alpha. Specifically, the government avers that contradictory evidence, including that provided by an expert like Dr. Bala Dharan, would have had little effect because the jury heard all of the relevant information. Somewhat inconsistently and rather incredibly, the government continues to insist that Project Alpha did in fact cause the University system to lose over \$100 million, as Heil testified. Gov't Answer at 25-30.⁵

⁴ Moreover, if for some reason the Court determined that Yates' failure to hire experts or make other necessary preparations was not the fault of the government, such failures constitute ineffective assistance of counsel. See Part III.D, *infra*.

⁵ The government faults Olis for failing to seek a continuance of the trial "in order to review stock records from either Dynegy or UCRS." Gov't Answer at 25. But the government's witness list, provided just three days before trial, identified this witness only as "Jeff Heil, Oakland, Ca." Docket # 336, Appx. B. That, apparently, was the first notice and only information available to defense counsel concerning Mr. Heil before trial, and could not reasonably support any request for relief from the Court. Furthermore, the government's observation that appellate counsel was able to obtain University of California stock records with little trouble, see Gov't Answer at 25, is irrelevant. The government's witness list and pretrial disclosures concealed from

These arguments are frivolous. As set forth in the § 2255 Memorandum at 22-26, 54-63, the content of Heil's testimony, and the conclusions the government sought to draw therefrom, were false and misleading. Heil testified that the University system sold its investment in Dynegy at a huge loss after the company disclosed the SEC's objections to the accounting treatment of Project Alpha on April 25, 2002. Trial Transcript ("TTx") Day 7 at 215:25-222:20. He further testified that he focused on Dynegy's positive cash flow numbers as a primary motivating factor for his decision to have the University system purchase Dynegy stock. *Id.* 220:18-221:6. But all of this testimony was false.

It is now undisputed that the University system did not sell its Dynegy stock following the April 25, 2002 disclosure. To the contrary, the University bought 900,000 *additional* shares after the accounting issues were disclosed. See § 2255 Memorandum at 59; Declaration of Bala G. Dharan (Docket # 316) ¶¶ 11-12 & Ex. D. The disclosure of this fact alone would have destroyed Heil's credibility and the inferences that the government based upon it. Further, pleadings in *Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust v. Dynegy, Inc., et al.*, Case No. 4:02-cv-01571 (S.D. Tex.), a class-action lawsuit against Dynegy, demonstrate that the University system's investment officers were well aware by May 1, 2002, that Dynegy would be required to reclassify cash flows as revenue from financing rather than operations — but nonetheless recommended purchasing the additional 900,000 shares of Dynegy stock. See Declaration of Ted W. Cassman in Support of Jamie Olis' Motion

counsel the fact that Heil was from the University of California and would testify about its stock losses. Thus, Olis had no reason to seek the records before trial.

for Discovery (Docket # 328) ¶ 5 & Ex. B. That fact militates strongly against Heil's assertion that the University system was focused on Dynege's cash flows in making its investment decisions. Moreover, it is now established that the proposition that Project Alpha caused the University system to lose *any* money is speculative and inconclusive, at best. See § 2255 Memorandum at 58-63; Dharan Decl. (Docket # 316) ¶¶ 4-9. Yet the government blindly adheres to its baseless assertion that Project Alpha did cause harm to the University of California, despite the facts that (1) expert testimony persuasively demonstrates that the University system suffered no such harm, and (2) this Court has already decided the point against the government, *United States v. Olis*, Criminal No. H-03-217-01, 2006 WL 2716048 at *9 (S.D. Tex. Sept. 22, 2006) (“[I]t is not possible to estimate with reasonable certainty the actual loss to shareholders attributable to corrective disclosures about Project Alpha.”).

Predictably, the government also attempts to downplay the significance of Heil's false testimony at trial. Gov't Answer at 30. But that effort is also patently unavailing. Heil's testimony was crucial to the prosecution, and the inability of Olis' attorneys to effectively combat that testimony was devastating to the defense. The government relied extensively on Heil's testimony at trial: it highlighted the testimony in both its opening statement and closing arguments, and called Heil as its final witness. See § 2255 Memorandum at 22-26, 54-58. As the government urged during its argument on the defense *in limine* objection to his testimony, Heil's testimony was the only evidence the government presented concerning Olis' intent and motive; and in its closing argument the government was careful to emphasize the losses supposedly suffered by

the University's pensioners. *Id.* at 23-24, 55. Indeed, Heil's importance is demonstrated by the fact that the government *continues to rely on his testimony* for the now-discredited proposition that Dynegy's disclosures concerning cash flow were an important consideration for investors. See Gov't Answer at 56-57. By showing that the government's conclusions were factually and conceptually bankrupt, an expert like Dr. Dharan could have massively undermined the thrust of the government's case against Olis.

Expert on GAAP: The government also argues that Olis would not have been aided by expert testimony concerning Generally Accepted Accounting Principles ("GAAP"), arguing that it was not required to prove a GAAP violation. Gov't Answer at 30-31. But while the statutes with which Olis was charged may not by themselves require proof of a GAAP violation, the charges contained in the indictment did require proof that Dynegy's accounting treatment was substantively improper.

The grand jury charged that Project Alpha was a scheme to *falsely* report financing activity as operating cash flows. Indictment (Docket # 1) ¶ 15; see also *id.* ¶ 19 ("the Defendants and their coconspirators and agents well knew, intended, and believed [that] *Project Alpha was, in fact, a loan* structured to appear as a 5-year natural gas contract that *should have been disclosed as cash flows from financing activities*" (emphasis added)). The indictment alleged that Project Alpha employed a "100% hedging" strategy to insulate the involved banks from financial risk, and that reporting such an arrangement as operating income violated GAAP. Indictment ¶ 20. According to the indictment, the Defendants "falsely report[ed]" to the "Rating Agencies,

lenders, market and securities analysts, and the investing public” that the cash flows were operating income rather than financing activities. Indictment ¶ 21. The false reports “caused Dynegey’s cash flow from operations . . . to be materially overstated” and caused Dynegey’s financial statements to be misleading. Indictment ¶ 24.

Proof that Olis committed the crime charged in the indictment necessitated a showing that Dynegey’s accounting for Project Alpha was *incorrect*. Absent a constructive amendment (which did in fact occur, see Part II, *infra*), expert testimony concerning the propriety of Dynegey’s accounting treatment was vital to the defense. The government cannot have it both ways: either the prosecution constructively amended the indictment to exclude its allegations of improper accounting under GAAP, in which case reversal is required, or the indictment’s allegations of improper accounting were entailed in the offense of conviction, in which case the propriety of the accounting treatment was crucially important and Olis needed a testifying expert.

Expert to Show Arthur Andersen’s Conflict: The government apparently acknowledges that Arthur Andersen’s lack of independence with respect to Project Alpha was important impeachment material, but nonetheless insists that expert testimony on this subject would not have aided Olis. See Gov’t Answer at 31. The government asserts that trial counsel’s impeachment was sufficient, but it is wrong. Trial counsel made a limited showing that Arthur Andersen was receiving a contingency fee, but expert testimony would have provided the crucial next step: it would have showed that such a contingent fee arrangement rendered both Andersen’s SAS 50 opinion and Dynegey’s Forms 10-K and 10-Q, the documents that were the foundation for all of the charges, void and unreliable. See Jayson Decl. (Docket # 314) ¶¶ 4-7.

The expert would also have provided valuable impeachment evidence by showing that the contingent fee arrangement was unethical and improper, *id.* — a point never sufficiently established at trial.

For all of these reasons, the Court cannot grant summary judgment against Olis. Olis' claim clearly satisfies both the cause and prejudice requirements.

B. The USAO Violated Olis' Sixth Amendment Right to Counsel

As discussed in the § 2255 Memorandum at 51-52, Olis had a “right to . . . use [his] own funds to mount a defense.” *Stein I*, 435 F. Supp. 2d at 366; *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626, 109 S. Ct. 2646, 2652 (1989) (recognizing that an individual has the “right to spend his own money to obtain the advice and assistance of . . . counsel.”); *United States v. Rosen*, 487 F. Supp. 2d 721, 727-30 (E.D. Va. 2007) (same). The government violated this right by interfering with Olis' ability to access funding Dynegy was contractually obligated to provide.

The government does not contest the doctrinal existence of this Sixth Amendment right. Instead it argues that the USAO did not cause Dynegy to withhold defense funding — or, alternatively, did not “act” in a manner that satisfies the state action requirement. Gov't Answer at 32-37. The government also argues that Olis suffered no prejudice from the constitutional deprivation. *Id.* at 37-39. Those contentions are specious and unpersuasive. At the very least, genuine issues of material fact remain to be resolved.

1. The USAO Caused Dynegy to Withhold Funds

Olis agrees that his claim may succeed only if he shows both causation and

state action. But those are easy hurdles in this case.

The state-action doctrine is designed to determine when “seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 295, 121 S. Ct. 924, 930 (2001). The test is met where there is a “close nexus between the State and the challenged action,” such as where the state provides a private actor with significant encouragement or exercises coercive power. *Id.*, 531 U.S. at 295-96, 121 S. Ct. at 930 (citation omitted). Yet here there is no occasion for application of the state-action doctrine: while Dynegy breached its express contractual obligations by refusing to advance Olis’ legal fees, Olis does not claim in this proceeding that Dynegy violated his constitutional rights. Rather, the *government itself* effected the constitutional violation by causing Dynegy not to pay the fees — thereby unjustifiably depriving Olis of resources that would otherwise have been lawfully available for his defense. See § 2255 Memorandum at 33-45. Accordingly, there is no question that “state action” was present. The true question, as the government appears to recognize, is whether the state’s action caused the deprivation of Olis’ constitutional rights.

On the causation question, the government’s opposition boils down to an assertion that Dynegy acted independently without any pressure from the USAO. Gov’t Answer at 32-37. That assertion is obviously wrong, and in any event insufficient to support summary judgment.

a. Dynegy Clearly Intended to Pay for Olis’ Defense

As discussed in the § 2255 Memorandum at 33-36, it is incontrovertible that

Dynegy originally intended to pay for Olis' defense — even after indictment. Both Dynegy Inc.'s and Dynegy Holdings Inc.'s articles of incorporation required advancement to Olis. See Kelley Decl. (Docket # 318) Ex. B Vol I, 8:11-19; Ex. C 9:14-23; Exs. J & K. Further, as the government began investigating Project Alpha, Dynegy affirmed its already clear advancement obligation to Olis. On October 18, 2002, Dynegy's Board of Directors "ratifie[d], approve[d], adopt[ed] and confirm[ed] the advancement of expenses to" Olis and several other Dynegy officers and employees "with respect to reasonable expenses incurred by any such person in defending a civil or criminal action, suit or proceeding relating to his or her actions on behalf of Dynegy in connection with Project Alpha, in advance of the final disposition of such action." Kelley Decl. (Docket # 318) Ex. L. Likewise, Dynegy again ratified and reaffirmed its obligations to Olis in separate contractual arrangements consummated on March 5 and 6, 2003. Kelley Decl. (Docket # 318) Exs. N & O. Finally, in June 2003 — after Olis' indictment — Dynegy yet again reaffirmed its obligation to pay his defense costs. Kelley Decl. (Docket # 318) Ex. D at 18:4-21:24, 28:15-33:16; Ex. F at 15:5-17:4.

b. The USAO Caused Dynegy to Abandon Its Intention

But Dynegy did not pay for Olis' defense. The USAO directly convinced Dynegy to find a way to avoid making payments for Olis' defense. § 2255 Memorandum at 33-45. The following events, among others, establish both causation and state action:

- *January 10, 2003:* The United States Attorney for the Southern District of Texas, Michael Shelby, presented Dynegy's CEO Bruce Williamson with the Holder Memorandum, which suggested that payment of defense fees to employees the USAO deemed "culpable" could be a sign of a company's failure to cooperate.

- Kelley Decl. (Docket #318) Ex. B Vol. I 107:5-108:17, 145:12-146:10, 148:7-149:20, 155:23-156:16. At the January 10 meeting, Shelby “didn’t serve much up except the Holder memo,” and it was “served pretty cold.” *Id.* at Ex. B Vol. I, 155:23-156:3. Shelby essentially told Williamson, “If you don’t cooperate, we are going to get your company.” *Id.* at Ex. B at Vol. I at 156:4-10.
- *January 17, 2003*: Shelby sent Williamson a letter confirming Dynegey’s promise of full “cooperation” under the terms of the Holder Memorandum. This cooperation included extraordinary steps: the company waived its attorney-client and work product privileges, and made “available, on any topic with which [the government] need[ed] assistance, a consulting expert from the company.” Kelley Decl. (Docket # 318) Ex. B Vol. I 117:3-11, 148:7-149:20, 162:23-163:8, 172:2-7; Ex. Q (1/17/03 Shelby letter).
 - *January 20, 2003*: The Department of Justice released the Thompson Memorandum, a policy document superseding the Holder Memorandum. *Stein I*, 435 F. Supp. 2d at 338; Kelley Decl. (Docket # 318) Ex. R. The Holder Memorandum’s “language concerning cooperation and advancing of legal fees by business entities was carried forward without change.” *Stein I*, 435 F. Supp. 2d at 338. “Unlike its predecessor, however, the Thompson Memorandum was binding on all federal prosecutors.” *Id.* Apparently to reinforce the pressure he applied on January 10, Shelby sent a copy of the Thompson Memorandum to Williamson. Kelley Decl. (Docket # 318) Ex. B Vol. I, 145:25-146:10.
 - *June 10, 2003*: Olis was indicted. See Indictment (Docket # 1).

- *July 2003*: USAO attorneys called Dynegey's outside criminal counsel, Larry Finder. The government had learned that Dynegey was paying Olis' defense costs, and demanded to know why. Kelley Decl. (Docket # 318) Ex. G at 137:4-138:17. Finder informed the government that Dynegey had reached an undertaking agreement with Olis. *Id.* at 138:19-25. The government attorneys were not impressed by this contractual obligation. They asked whether state law required Dynegey to advance fees to Olis. *Id.* at 139:1-9. They told Finder to get them the operative Illinois statute, and he faxed it to them. *Id.* at 139:1-17; *Yates* Ex. 106 (Kelley Decl. Ex. U). A few days later, the government attorneys called Finder back and told him they did not believe Illinois law required Dynegey Inc. to reimburse Olis' fees. Finder Tx (Kelley Decl. Ex. G) at 151:21-152:5, 156:10-16. Finder reported this conversation to Williamson. *Id.* at 156:10-16.
- *July 18, 2003*: Williamson wrote to Shelby: "Larry [Finder] and I talked and I wanted to let you know directly that I am totally supportive of trying to modify our legal support posture. I have wanted to do so for some time. Larry can get you more details but I think we have a workable game plan to further support your efforts." Kelley Decl. (Docket # 318) Ex. V. Williamson testified that "modify our legal support posture" meant putting Olis' defense funds into escrow. Kelley Decl. (Docket # 318) Ex. B Vol. I, 73:2-7.
- *July 19, 2003*: Shelby replied to Williamson's email: "Thanks for looking into this. I think it in neither of our interests to have the company pay for the defense of individuals whose actions were so egregious." Kelley Decl. (Docket # 318) Ex.

V.

- *July 19, 2003*: Later that same day, Williamson wrote Shelby: "I just reviewed and approved a board resolution to change the process. Seems odd to me it takes a bOD resolution but oh well, I have a telephonic BOD meeting this week for some of the financing matters so we will add this to the agenda (s/b Wednesday) and then notify Olis and Foster Attorneys. I am no paying for Sharkey as it is so this impact is to Foster and Olis." Kelley Decl. (Docket # 318) Ex. W.
- *July 23, 2003*: After Dynegey's Board of Directors passed a resolution permitting the company to put Olis' defense funds in an escrow account, Finder emailed a copy of the resolution to Shelby, copying Williamson. Kelley Decl. (Docket # 318) Ex. X. Williamson replied: "Larry: thanks for sending. [¶] Michael: hope this helps." *Id.* Williamson testified that he directed Finder to share the resolution with the USAO "[a]s a show of good faith that we were trying to get as close to the standard of cooperation under the Thompson memo as we could." Kelley Decl. (Docket # 318) Ex. B at Vol. I, 107:8-11.

Finally, the issue was put to rest by the sworn testimony of Dynegey's CEO Bruce

Williamson:

[T]here was communications going on between the litigation team at Dynegey and the investigative team of the FBI and Department of Justice, and *they were not happy that we were continuing to provide financial support when the Thompson memo said the companies cooperating should not provide financial support. So the decision was made to escrow the funds* because that was the most that we could do to get as close to the standard of cooperation under the Thompson memo, which was provided by the Department of Justice. It was the standards of cooperation.

Kelley Decl. (Docket # 318) Ex. B at Vol. II, 105:20-106:9 (emphasis added). Thus, the evidence overwhelmingly contradicts the government's argument for a summary adjudication that the USAO did not cause Dynegy to withhold Olis' defense funding.

2. Prejudice

The government also contends that Olis suffered no cognizable prejudice from the USAO's violation of his right to present a defense, arguing that Olis' Sixth Amendment claim must fail because he cannot show that the USAO's misconduct rendered defense counsel's performance constitutionally inadequate under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Gov't Answer at 37-39. As an initial matter, that argument fails because Olis *has* demonstrated ineffective assistance. See Part III, *infra*; § 2255 Memorandum at 84-104. In any event, however, the argument fails because it seeks to apply the wrong legal standard.

In *Strickland*, the Court carefully distinguished between claims of government interference with the right to counsel and claims of ineffectiveness caused by counsel's own errors, and made clear that the standard it announced applied only in the latter category. 466 U.S. at 686, 692, 104 S. Ct. at 2063-64, 2067. As *Strickland* makes plain, where the government's own interference impairs a defendant's right to counsel, the defendant is entitled to a remedy even if counsel's performance is not rendered constitutionally ineffective. 466 U.S. at 692, 104 S. Ct. at 2067. Thus, the Court in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665 (1981), did not invoke the *Strickland* standard for prejudice applicable to ineffective assistance claims, but instead required only that the defendant show an "adverse impact upon the criminal

proceedings,” 449 U.S. at 367, 101 S. Ct. at 669, or “continuing prejudice” that “could not be remedied by a new trial or suppression of evidence,” 449 U.S. at 365 n.2, 101 S. Ct. at 668 n.2, in order to justify dismissal on the ground of government interference.

Considered under the proper standard, Olis has demonstrated prejudice arising from the violation of his Sixth Amendment right to counsel. As discussed in Part I.A.2, *supra*, the violation clearly had an “adverse impact on the criminal proceedings.” First, the government’s misconduct worked a structural error, and thus prejudice is presumed. Second, even if the Court does conduct a detailed inquiry into prejudice, Olis has demonstrated more than sufficient prejudice to withstand summary judgment. See Part I.A.2, *supra*; § 2255 Memorandum at 52-69.

C. The USAO Violated Olis’ Fifth Amendment Due Process Rights

The government’s conduct also contravened Olis’ Fifth Amendment right to due process. “Due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872, 102 S. Ct. 3440, 3449 (1982); *see also, e.g., California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984) (“Under the Due Process Clause . . . , criminal prosecutions must comport with prevailing notions of fundamental fairness.”). In the criminal context, the heart of the due process guarantee is, of course, a fair trial. *See, e.g., In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955) (“A fair trial . . . is a basic requirement of due process.”). “The right to a fair trial is a fundamental liberty.” *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692 (1976). The government’s unjustified, and unjustifiable, interference with Olis’

ability to defend himself violated that basic right.

1. The Fifth Amendment Provides a Legitimate Alternative Ground for Olis' Claim

The government argues that Olis' claim must be grounded solely in the Sixth Amendment. Gov't Answer at 39-41. But the due process right to a fair trial is independent of the Sixth Amendment right to counsel. To be sure, "the Constitution . . . defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland*, 466 U.S. at 684-685, 104 S. Ct. at 2063. Yet that amendment does not exhaust those elements. Were it otherwise, there would be no viable constitutional objection to, for example, a conviction based on less than proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970), one secured before a biased judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927), or one obtained by withholding exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), or proffering perjured testimony, *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959). Ultimately, "[t]he Constitution guarantees a fair trial through the Due Process Clauses." *Strickland*, 466 U.S. at 684-685, 104 S. Ct. at 2063.

Although distinct and independent, the rights to counsel and to a fair trial are of course related, in that deprivation of the right to counsel often results in a fundamentally unfair trial. Nonetheless, unless a reviewing court finds a violation that moots any remaining claims, it must separately consider whether each right was infringed. As the Supreme Court has explained, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, . . . we examine each constitutional provision in turn."

Soldal v. Cook County, 506 U.S. 56, 70, 113 S. Ct. 538, 548 (1992); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49-50, 114 S. Ct. 492, 499 (1993) (“We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another The proper question is not which Amendment controls but whether either Amendment is violated.”).

These principles apply with equal force in the Sixth Amendment context. See *Kirby v. Illinois*, 406 U.S. 682, 690-691 & n.8, 92 S. Ct. 1877, 1883 & n.8 (1971) (plurality opinion) (conduct that does not violate the right to counsel might still deny due process); *Moore v. Illinois*, 434 U.S. 220, 227, 98 S. Ct. 458, 464 (1977) (same); *United States v. Perez*, 387 F.3d 201, 204 (2d Cir. 2004) (“Because one touchstone of a fair trial is an impartial trier of fact, the [Sixth Amendment] right to an impartial jury also implicates due process rights.” (citation and internal quotation marks omitted)). Thus, should this Court conclude that the government’s conduct did not infringe Olis’ right to counsel, it would still need to address whether that conduct denied Olis a fair trial.

Likewise, a substantive due process claim is not precluded by the principle, first articulated in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989), that “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not . . . substantive due process, must be the guide for analyzing” challenges to that behavior. *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 813 (1994) (plurality opinion) (internal quotation marks omitted). As the Supreme Court more recently explained, that principle does not bar every substantive due process claim relating to the subject matter of a

specific constitutional amendment. *Graham* “does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments,” but only that “if a constitutional claim is covered by a specific constitutional provision, . . . the claim must be analyzed under the standard appropriate to that specific provision.” *County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S. Ct. 1708, 1715 (1998).

While the Sixth Amendment safeguards various specific rights related to criminal prosecutions, its protections do not exhaust the broader right to fairness in the criminal process, which lies at the heart of Olis’ Fifth Amendment claim. Accordingly, if the Court were to conclude that Olis’ claim is not properly analyzed as an aspect of the right to counsel, the claim would not be “covered by” the Sixth Amendment, but may nevertheless be protected by the Fifth Amendment’s guarantee against arbitrary and unfair government conduct. See *Lewis*, 523 U.S. at 843, 118 S. Ct. at 1715.

2. The USAO’s Conduct Violated Olis’ Due Process Rights

The government also briefly argues that the USAO’s conduct did not violate Olis’ Fifth Amendment rights, Gov’t Answer at 41-42, but it is incorrect. It is incompatible with fundamental fairness for the prosecution, absent a legitimate justification, to undermine an accused’s ability to defend himself at trial. “[O]ur adversarial system of justice . . . is premised on the well-tested principle that truth — as well as fairness — is best discovered by powerful statements on both sides of the question.” *Penson v. Ohio*, 488 U.S. 75, 84, 109 S. Ct. 346, 352 (1988) (internal quotation marks omitted). Government interference with a criminal defendant’s ability to present his “powerful statement[]” thus runs afoul of a cornerstone of our criminal justice system. Indeed,

“the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Barker v. Wingo*, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193 (1972). The government’s role is to make its case for conviction while leaving the defendant free to make his best case for acquittal — not to improve the chances of conviction by tying one of the defendant’s hands behind his back. See *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S. Ct. 2208, 2212 (1973) (“[T]he Due Process Clause . . . speak[s] to the balance of forces between the accused and his accuser.”). Put simply, it is fundamentally unfair for the government to impede the ability of those against whom it has brought criminal charges to respond to those charges as fully and vigorously as they are lawfully able. See *United States v. Bieganowski*, 313 F.3d 264, 291 (5th Cir. 2002) (“[T]he Fifth Amendment protects the defendant from improper governmental interference with his defense.”). That is precisely what the government did in this case. Without any legitimate justification, the USAO interfered with Olis’ receipt of money to which he had a contractual right, and thereby severely undermined Olis’ ability to prepare his defense.

That the Due Process Clause precludes the government from unjustifiably interfering with an accused’s ability to defend himself is hardly a novel concept; it is well established in several other contexts. For example, due process prohibits the government from seeking to gain a tactical advantage at trial by delaying the filing of an indictment. *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465 (1971); see also *United States v. Lovasco*, 431 U.S. 783, 795 n.17, 97 S. Ct. 2044, 2051 n.17 (1977) (noting government concession that “[a] due process violation might . . . be made out upon a showing of prosecutorial delay incurred in reckless disregard of

circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense”). Similarly, substantial government interference with testimony by defense witnesses — another way to hinder a defendant’s ability to defend himself — can violate due process if it is not driven by a legitimate purpose (such as safeguarding a witness’s privilege against self-incrimination). See, e.g., *Webb v. Texas*, 409 U.S. 95, 98, 93 S. Ct. 351, 353 (1972) (per curiam) (summarily reversing conviction because “the judge’s threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process”).⁶ Due process likewise bars prosecutors from depriving a defendant of a fair chance to contest the charges against him by withholding material exculpatory information that could aid in his defense. See, e.g., *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97 (“[T]he suppression by the prosecution of [material] evidence favorable to an accused . . . violates due process[.]”).

Government actions that limit a defendant’s access to funds he could otherwise lawfully use to fund his defense can unquestionably impair his ability to defend himself at trial, no less than government interference with defense witnesses or prosecutorial suppression of exculpatory evidence. When no legitimate justification exists, such interference with the defense violates the defendant’s due process right to a fair trial. That is precisely the situation here.

⁶ These two examples highlight the independence of Olis’ due process claim: each example relates to a provision of the Sixth Amendment (the Speedy Trial Clause and the Compulsory Process Clause, respectively), yet the case law makes clear that the relevant government conduct can also violate due process.

II. THE PROSECUTION CONSTRUCTIVELY AMENDED THE INDICTMENT IN VIOLATION OF OLIS' FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

Olis claims that the prosecution violated his Fifth Amendment rights by trying him on a charge fundamentally different from the one contained in the indictment. § 2255 Memorandum at 69-85. The government seeks summary judgment with respect to this claim on one essential ground — that there was no constructive amendment — although it casts its argument under two separate headings. Both arguments fail.

A. The Claim is Not Defaulted

The government first asserts that Olis defaulted the constructive amendment claim. Gov't Answer at 43. The government observes that Olis' trial counsel did not raise the objection, but Olis has asserted an ineffective assistance claim to excuse this failure. Implicitly acknowledging that failure to object to an unconstitutional constructive amendment constitutes ineffective assistance, see *Lucas v. O'Dea*, 179 F.3d 412, 418-19 (6th Cir. 1999), the government argues only that Olis' trial counsel was not ineffective because there was no constructive amendment. Gov't Answer at 43. Thus, the government's defense to Olis' claim succeeds or fails solely on the merits of the constructive amendment claim.

B. The Prosecutors Constructively Amended the Indictment

The government next argues that its attorneys did not amend the indictment against Olis. Gov't Answer at 44-59. But again it is incorrect.

The Fifth Amendment commands that a criminal defendant be tried only on charges presented in a grand jury indictment. “[T]he government may not obtain an

indictment alleging certain material elements or facts of a crime, then seek a conviction on the basis of a different set of elements or facts.” *United States v. Robles-Vertiz*, 155 F.3d 725, 728 (5th Cir. 1998). Yet that is exactly what occurred here.

The grand jury charged that Project Alpha was a scheme to *falsely* report financing activity as operating cash flows. Indictment (Docket # 1) ¶ 15; see also *id.* ¶ 19 (“the Defendants and their coconspirators and agents well knew, intended, and believed [that] *Project Alpha was, in fact, a loan* structured to appear as a 5-year natural gas contract that *should have been disclosed as cash flows from financing activities*” (emphasis added)). The indictment alleged that Project Alpha employed a “100% hedging” strategy to insulate the involved banks from financial risk, and that reporting such an arrangement as operating income violated GAAP. Indictment ¶ 20. According to the indictment, the Defendants “falsely report[ed]” to the “Rating Agencies, lenders, market and securities analysts, and the investing public” that the cash flows were operating income rather than financing activities. Indictment ¶ 21. The false reports allegedly “caused Dynegy’s cash flow from operations . . . to be materially overstated” and caused Dynegy’s financial statements to be misleading. Indictment ¶ 24.

At trial, however, the government made no attempt to prove that the purpose of Project Alpha was falsely to characterize loan proceeds as cash flow from operations. Instead, the government insisted that it mattered not at all whether the conspirators believed that the accounting for Project Alpha was correct. See § 2255 Memorandum at 70-75. Nor did it matter whether Olis and his alleged co-conspirators intended falsely

to characterize loan proceeds as cash flow from operations. *Id.* Instead, the government told the jury, the only question was whether Olis and his alleged co-conspirators concealed the outside hedges and tear-ups from Hecker, Andersen's engagement partner. *Id.*⁷

1. The Government's Recitation of the Indictment Accomplishes Nothing

The government's first "argument" in opposition to Olis' constructive amendment claim is a long recitation (with emphasis added here and there) of the charges in the indictment. Gov't Answer at 46-51. That recitation avails the government nothing. There is no dispute about the contents of the indictment; the question is whether the prosecution's trial presentation conformed to the charges in the indictment.

2. Jury Instructions Did Not Cure the Constitutional Violation

The government next implies — without directly arguing — that the Court's

⁷ The Court suggested in its March 3, 2008 Order (Docket # 344) that

the prosecutorial statements of which Olis complains did not amend the indictment but, instead, merely described the evidence required to prove the indictment's allegation that Olis and his co-conspirators caused Dynegy to publish financial statements on which the cash flow from Project Alpha — which they knew and believed to have been cash flow from financing — was reported as cash flow from operations.

Id. at 7-8. Olis respectfully disagrees. As discussed herein, the prosecution abandoned the theory of liability contained in the indictment, which posited that Dynegy's accounting treatment was incorrect, and instead asked the jury to convict on a *different* theory: that, regardless of the propriety of the accounting, Project Alpha was a fraud because Hecker did not know about certain facts. Such a bait-and-switch is unconstitutional. When one particular set of material facts is charged, the conviction must rest on proof of those facts. *Stirone v. United States*, 361 U.S. 212, 218-19, 80 S. Ct. 270, 274 (1960); *United States v. Chambers*, 408 F.3d 237, 242-44 (5th Cir. 2005); *United States v. Adams*, 778 F.2d 1117, 1125 (5th Cir. 1985)

instructions referencing the indictment somehow saved the unconstitutional prosecution. Gov't Answer at 51-53. As an initial matter, the government's implicit reading of the jury instructions is strained: the Court never plainly instructed the jury to consider the charges in the indictment rather than the modified theory that the prosecution presented during the trial. In any case, even giving the instructions a generous reading, they did not cure the constitutional violation. The usual presumption that jurors follow jury instructions is inapplicable here. Courts abandon that presumption where there is "an overwhelming probability that the jury will be unable to follow the court's instructions," *Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 3109 n. 8 (1987) (internal quotation marks omitted), or the court has a "reason to believe that the jury . . . was incapable of obeying curative instructions," *id.*

Here, without objection, the prosecution repeatedly informed the jury that it need not find (1) that the accounting treatment for Project Alpha was false because the transaction failed to comply with GAAP, or (2) that Olis and the other alleged conspirators knew or intended that the accounting treatment for Project Alpha would be false or incorrect. Yet each of these allegations were key elements of the charges in the indictment. Given the complexity of the case, it is unreasonable to suggest that the jury ignored the government's unrebutted invitation to disregard those allegations of the indictment in order to find Olis guilty. In fact, it is plain that the jurors did not follow any instruction to consider only the charges in the indictment because the prosecution did not prove those charges — and, indeed, expressly eschewed any attempt to do so. The usual presumption cannot overcome the incontrovertible fact that the jury did not follow the purported instructions. *Cf. United States v. McCarter*, 316 F.3d 536, 539-40

(5th Cir. 2002) (finding curative instructions insufficient because the trial evidence demonstrated a high likelihood that the jury failed to adhere to the instructions); *United States v. Singh*, 261 F.3d 530, 533 (5th Cir. 2001) (same).

3. The Government's Contention That It Proved the Allegations in the Indictment is Wrong

The government also asserts that it “proved, as alleged, that the statement in Dynegy’s financial statement that the \$300 million from Project Alpha was cash from operations was false because it was a half truth and effectively omitted material facts, that is, details surrounding the transaction that were hidden from Hecker.” Gov’t Answer at 53-54 (emphasis omitted). But that assertion mixes two propositions. The government did *not* prove that the financial treatment for Project Alpha was false or incorrect; indeed, it expressly eschewed any such proof. The government did seek to prove the second proposition — that Olis and his purported co-conspirators tried to hide information from Hecker — but that is a different charge.⁸ In short, the government continues to defend its prosecution *on the amended charge*.

⁸ Even as to that point, the government theory was contradicted by the statements of Helen Sharkey, Olis’ purported co-conspirator. Sharkey told the government that Hecker twice told Dynegy and the other participants in Project Alpha that “What I don’t see I don’t care about.” Docket # 313 Ex. B, 9/17/03 Notes at 7; 9/18/03 Notes at 1. In that context, the failure of Dynegy’s personnel to specifically inform Hecker about the hedges and tear-ups is hardly suspicious — the purported conspirators were simply following Hecker’s expressed preference. Moreover, the evidence established that Olis did not intend to hide the hedges and tear-ups from other Andersen personnel. To the contrary, he disclosed, and Andersen got the message. See, e.g., § 2255 Memorandum at 18-20, 77-78.

4. The Prosecution Was Required to Prove that Dynegey Sought an Incorrect Accounting Treatment for Project Alpha Because That Allegation Formed the Heart of the Charge in the Indictment

The government also recycles its misdirected argument that proof of a violation of GAAP is not necessary to obtain conviction under the statutes at issue here. Gov't Answer at 54-56. Whether or not that is true as a general matter, there is no doubt that the government was required to prove in this case that Dynegey's accounting treatment for Project Alpha was false or incorrect. *That was the gravamen of the charge contained in the indictment.* A constructive amendment is not rendered constitutional simply because the alternative facts presented at trial could constitute a crime under the statute charged, or even if the indictment could have been couched in general terms encompassing both the particular facts alleged in the indictment and those proved at trial. When only one particular set of material facts is charged, the conviction must rest on proof of those facts. *Stirone v. United States*, 361 U.S. 212, 218-19, 80 S. Ct. 270, 274 (1960); *United States v. Chambers*, 408 F.3d 237, 242-44 (5th Cir. 2005); *United States v. Adams*, 778 F.2d 1117, 1125 (5th Cir. 1985).⁹

⁹ The government relies on *United States v. Ebberts*, 458 F.3d 110 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1483 (2007), and *United States v. Rigas*, 490 F.3d 208 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1471 (2008), for the proposition that it was not required to prove any accounting impropriety, Gov't Answer at 54-56, but those cases are inapposite. In *Ebberts*, the defendant "argue[d] that the indictment was flawed because it did not allege that the underlying accounting was improper under GAAP." *Id.* at 125. Here, by contrast, the indictment alleged just that — but the government declined to attempt to prove the allegations. *Ebberts* did not consider any argument concerning constructive amendment and has no persuasive force here. Likewise, in *Rigas* the court did not consider the requirement of proving GAAP improprieties in the context of a constructive amendment claim — instead it affirmed the separate principle announced in *Ebberts* that a violation of GAAP is not a necessary element of securities fraud. 490 F.3d at 219-21. Notably, both *Ebberts* and *Rigas* recognize that compliance with GAAP may be relevant evidence of a defendant's intent. *Ebberts*, 458 F.3d at 125; *Rigas*, 490

5. The Indictment Did Not Charge a Scheme to Deceive Hecker

The government finally asserts that “[a] critical aspect of the scheme to defraud alleged and proved . . . was the deception of Hecker, the independent auditor.” Gov’t Answer at 57. This attempt to retroactively recast the allegations in the indictment to conform with the trial evidence fails.

As an initial matter, the indictment does not even mention Hecker. Rather, it alleges that Olis sought to hide facts from Andersen as a whole — an allegation that is demonstrably false. See, e.g., § 2255 Memorandum at 18-20, 77-78.

More importantly, the government’s suggestion that the charges in the indictment focus on the purported co-conspirators’ conduct towards Dynegy’s auditors is unsupportable. While the indictment does aver that the defendants hid information from the auditors, a fair reading reveals that the grand jury believed the defendants did so in service of the true alleged scheme: a plan to disseminate the purportedly *false* information that Project Alpha generated operating income.

For example, paragraph 21 of the Indictment alleges that the defendants

did intentionally conceal from Dynegy’s auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, the implementation and effect of the 100% hedging strategy and the “tear up” language. *In doing so, the Defendants . . . knew and intended* that Dynegy would and did *falsely* report to the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, by means of electronic filing of Quarterly Reports (“Forms 10-Q”) and an Annual Report (“Form 10-K”), that approximately \$300,000,000 of “cash flows from financing activities” were “cash flows from operating activities”

(Emphasis added.) Likewise, paragraph 24 of the Indictment states the alleged

F.3d at 220.

ultimate goal of the purported co-conspirators:

In this manner . . . the Defendants . . . caused Dynegy's cash flow from operations, and more specifically, from Risk-management activities, to be *materially overstated* in the second, third, and fourth quarters of 2001, and willfully omitted material facts necessary to make the statements made in Dynegy's financial statements, in the light of the circumstances in which they were made, not misleading, in documents filed with the SEC and intended for consideration by the Rating Agencies, lenders, market and securities analysts, and the investing public in connection with the purchase and sale of stock and securities of Dynegy, Inc.

(Emphasis added.) But the government never even tried to prove the central allegation that the accounting treatment was incorrect — in other words, there was no proof that “Dynegy's cash flow from operations” was “materially overstated.” Instead the government hinged its prosecution solely on the evidence that Hecker was duped. That was a different charge, and the indictment was constructively amended.¹⁰

III. OLIS' TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

Olis' final claim is that his conviction was obtained in violation of his Sixth Amendment rights because he received ineffective assistance of counsel during the

¹⁰ The government suggests that Olis' trial counsel “demonstrated an understanding” that the indictment charged a scheme to “hide information from Dynegy's auditors” Gov't Answer at 57-58. That assertion is both irrelevant and wrong. It is irrelevant because the Fifth Amendment prohibits the government from constructively amending the indictment's charges regardless whether defendant counsel understands those amendments. It is wrong because defense counsel's only proposed instruction — which was given by the Court — demonstrates that counsel failed to recognize that the government had abandoned its theory that the accounting treatment for Project Alpha was incorrect. Counsel submitted a “good faith” defense instruction that Olis relied upon Andersen's advice. See TTx Day 8 at 24:3-22. However, an assertion of good faith reliance on Anderson's advice was not a defense to the only charge that the government presented to the jury — i.e., that the coconspirators hid material facts from Hecker. Thus, the record demonstrates that defense counsel failed to apprehend the nature and significance of the government's constructive amendment.

trial and on direct appeal. § 2255 Memorandum at 85-105. The government's arguments for summary judgment with respect to this claim are again unavailing.

A. Counsel Provided Ineffective Assistance By Failing to Object to the Constructive Amendment

As discussed in Part II.A, *supra*, counsel's failure to object to the constructive amendment of an indictment constitutes ineffective assistance. See *Lucas v. O'Dea*, 179 F.3d 412, 418-19 (6th Cir. 1999); see also § 2255 Memorandum at 83-84. The government does not contest this point, but instead argues that Olis' trial and appellate counsel were not ineffective simply because there was no constructive amendment. Gov't Answer at 43. As discussed in Part II.B, *supra*, that argument is incorrect. The prosecution constructively amended the indictment, and counsel was ineffective for failing to object to that violation of Olis' fundamental rights.

B. Counsel Provided Ineffective Assistance by Failing to Object to the Inclusion of a Biased Juror on the Petit Jury, and to the Violation of Olis' Sixth Amendment Rights To Be Present and to Have Counsel Present

Olis claims that he suffered deprivations of several constitutional rights arising from the inclusion of a confessedly biased juror on his petit jury. § 2255 Memorandum at 87-95. The government's opposition to these claims cannot prevail.

1. Failure to Object to the Inclusion of a Biased Juror

The government — essentially ignoring cases cited in Olis' papers that are directly on point — rests its argument concerning the biased juror on the bald contention that "context" shows the juror was not biased. Gov't Answer at 60-64. But the Court is not permitted to engage in such an inference from "context."

The juror here openly confessed bias, writing:

I am sorry to inform you that *I will not be able to judge this case fairly*, knowing that my boss will not pay me for missed days and how my child will be getting home from school, because my income is the main source for my household. So, it is not fair for all that I remain on the jury. So, I'm asking you to please dismiss me from the case.

TTx Day 2, 121:22-122:4 (emphasis added). Where a juror makes such an “open declaration of her inability to be fair,” and neither the court nor counsel makes “any attempt at clarification or rehabilitation, there is no ambiguity in the record as to her bias; [the juror’s] express admission is the only evidence available to review.” *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001); see also *Virgil v. Dretke*, 446 F.3d 598, 607, 610 & n.52, 613 (5th Cir. 2006); *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976). “[W]ithout more, juror bias can always be presumed from such unequivocal statements.” *Hughes*, 258 F.3d at 460. Here, while the record reflects that the trial judge spoke to the juror *ex parte*, it does not reflect any determination that the juror could set aside her expressed bias and judge the case fairly.¹¹ Under *Virgil*, *Hughes*, and *Nell*, the Court must give dispositive credence to the juror’s unchallenged and unrehabilitated expression of bias. In short, the Court was — and is — required to take the juror at her word.¹²

¹¹ To the contrary, after speaking with the juror *ex parte* and suggesting to her that she ask her boss to pay her during her jury service, the Court reported that the juror “was not happy with that outcome, but I told her basically we could not excuse her I told her it was just too late.” TTx Day 2 at 224:20-225:7.

¹² The Court briefly suggested in its March 3, 2008 Order that the juror’s expression of bias need not be accorded importance because it occurred after voir dire. Docket # 344 at 9-10. But that fact has no legal significance. A criminal defendant has a constitutional right to have an impartial jury decide his guilt or innocence, see, e.g., *Virgil*, 446 F.3d at 605, not merely to impanel a seemingly unbiased jury. Thus, the

Both the government and the Court have suggested that the undirected nature of the juror's expressed bias militates against a finding of ineffective assistance. See Gov't Answer at 63; March 3, 2008 Order (Docket #344) at 10. But the asserted ambiguity of the juror's statement is legally irrelevant. So long as the "prejudicial fallout existed," it was immaterial "on which side the prejudice would fall." *Hughes*, 258 F.3d at 460 (quoting *Nell*, 526 F.2d at 1228).¹³

Contrary to the government's inapposite citations,¹⁴ *Virgil* and *Hughes* each directly hold that failing to seek to exclude, or at least rehabilitate, an admittedly biased juror is deficient performance under *Strickland*. *Virgil*, 446 F.3d at 610 ("We hold that

Supreme Court has long recognized that a verdict is void if jurors develop biases during the course of the trial. See, e.g., *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546 (1965) (overturning verdict where prosecution witnesses communicated with jurors during the course of the trial); see also *United States v. Maxwell*, 160 F.3d 1071, 1076-77 (6th Cir. 1998) (recognizing the propriety of dismissing a juror who alerted the court to potential taint during the trial).

¹³ Moreover, the ambiguity of the bias is certainly debatable. It is far more likely that Olis, and not the government, was the target of the juror's bias. The juror expressly mentioned her meager income in requesting to be released. At trial, the government unnecessarily presented evidence of Olis' substantial income in the years 1999-2002, TTx Day 7, 180:10-183:6, 191:14-193:8, and sought to drive the point home by eliciting testimony from Heil that the University of California pensioners who supposedly lost money as a result of Project Alpha included not just professors but mail room employees making approximately \$25,000 per year. TTx Day 7, 202:7-23. Unlike *Virgil* and *Hughes*, which concerned violent crimes, this case involved alleged financial improprieties. Thus, bias arising from perceived disparities in financial status or class was especially likely to be inflamed by the trial evidence.

¹⁴ For example, the government's citation to *United States v. Gibson*, 353 F.3d 21, 26 (D.C. Cir. 2003), Gov't Answer at 66, is not persuasive. In that case the juror made no direct expression of bias; rather, the defendant claimed, based upon purported "facial expressions," that the juror was biased. 353 F.3d at 25. The district court saw no evidence of this. *Id.* at 25-26. Where, as here, the juror directly expresses bias and the records reflects no rehabilitation, cases binding upon this Court mandate a different conclusion.

[the jurors'] unchallenged statements during voir dire that they could not be 'fair and impartial' obligated Virgil's counsel to use a peremptory or for-cause challenge on these jurors. Not doing so was deficient performance under *Strickland*."); *Hughes*, 258 F.3d at 463 ("The question whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction.").

The prejudice prong of the *Strickland* inquiry is likewise easily established. The *Virgil* court observed that "*Strickland*'s prejudice inquiry is process-based: Given counsel's deficient performance, do we have confidence in the process afforded the criminally accused?" 446 F.3d at 612. "Our criminal justice system is predicated on the notion that those accused of criminal offenses are innocent until proven guilty and are entitled to a jury of persons willing and able to consider fairly the evidence presented in order to reach a determination of guilt or innocence." *Id.* at 613. Olis "was denied these basic principles when [a] juror[] expressed [her] inability to serve fairly and impartially in his case." *Id.* "Had [Olis'] counsel" objected to the continued presence of the biased juror, "the trial judge would have been forced to rule, a ruling that counsel could have objected to and pursued as error on direct appeal. There is little doubt that such an error would have been sustained." *Id.* Thus, "[g]iven the fundamental nature of the impartial jury and the consistent line of Supreme Court precedent enforcing it," the Court "must conclude that 'the result of [Olis'] trial] is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" *Id.* (quoting *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069). "Such an

unreliable result dictates the conclusion that [Olis'] defense was prejudiced under *Strickland*.” *Id.*

Moreover, as in *Virgil*, “[t]he process-failure in this case stems as much from the unknown as from the known.” *Id.* “No effort was made to explore the depth or intensity of [the juror’s] bias toward [Olis].” *Id.* So far as the record reflects, “[n]o question was put to [the juror] as to whether [she] would be able to set aside [her] preconceived notions and adjudicate [Olis'] matter with an open mind, honestly and competently considering all the relevant evidence.” *Id.*

In sum, the Court cannot have “confidence in the adversarial process that resulted in” Olis’ conviction. “By law, [Olis] was prejudiced by the presence” of a partial juror. *Id.* at 613-14. Counsel’s failure to object to this fundamental violation was deficient and resulted in constitutionally ineffective assistance of counsel. *Id.* at 614; *Hughes*, 258 F.3d at 463-64.

2. Failure to Vindicate Olis’ Constitutional Rights to be Present and to Have Counsel Present

Olis also claims that counsel’s response to the biased juror issue was deficient for another reason: without seeking an informed waiver from Olis, counsel permitted the Court to conduct a critical stage of the proceedings out of the presence of both Olis and his counsel. Such *ex parte* conduct of critical proceedings violated Olis’ due process and Sixth Amendment rights to be personally present and to have assistance of counsel, and counsel’s acquiescence was therefore constitutionally ineffective. § 2255 Memorandum at 93-95.

The government resists Olis’ claim by citing to cases permitting judges to

conduct an *ex parte* communication with a juror to “inquire into . . . a minor occurrence.” See, e.g., *United States v. Gagnon*, 470 U.S. 522, 527, 105 S. Ct. 1482, 1485 (1985) (per curiam). But such cases are inapposite. In *Gagnon*, for example, a juror noticed a defendant sketching portraits of the jury, and expressed some concern to the district judge. *Id.*, 470 U.S. at 523-24, 105 S. Ct. at 1483. The judge — in the presence of defense counsel for only one of the several defendants — explained that the defendant was “an artist, meant no harm, and the sketchings had been confiscated. The juror was assured that Gagnon would sketch no more.” *Id.*, 470 U.S. at 524, 105 S. Ct. at 1483. The transcript of the *ex parte* proceeding was made available to all parties. *Id.* Finally, and perhaps most notably, “[t]he judge then elicited from [the juror] his willingness to continue as an impartial juror.” *Id.* The Supreme Court found that respondents excluded from such an *ex parte* conference “could have done nothing had they been at the conference, nor would they have gained anything by attending.” *Id.*, 470 U.S. at 527, 105 S. Ct. at 1485.

Plainly, the conference in *Gagnon* was not one in which the defendants’ presence (or that of their counsel) had any “relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.” *Id.*, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 108, 54 S. Ct. 330, 332, 333 (1934)); see also *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667 (1987); *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 455 (1983); *Faretta v. California*, 422 U.S. 806, 819 n.15, 95 S. Ct. 2525, 2533 n.15 (1975). The respondents in *Gagnon* therefore had no right to be present or have their counsel

present. But the same cannot be said in this case. Unlike in *Gagnon* — where there was never any real suggestion of bias and the record firmly established that the juror was not biased — *Virgil*, *Hughes*, and *Nell* establish beyond cavil that a juror's direct expression of bias raises a presumption that the juror is, in fact, biased. And since a defendant has a constitutional right to be tried by an impartial jury, see U.S. Const. amend. VI; *Virgil*, 446 F.3d at 605, a conference to explore an overt expression of bias relates directly to the question whether the defendant may be constitutionally tried by the jury as presently empaneled. Thus, a conference with a juror who has overtly expressed bias bears a substantial relation to a defendant's opportunity to defend against the charge. See *Hopt v. Utah*, 110 U.S. 574, 578, 4 S. Ct. 202, 204 (1884), *limited on other grounds by Illinois v. Allen*, 397 U.S. 337, 342-43, 90 S. Ct. 1057, 1060-61 (1970); *United States v. Hanno*, 21 F.3d 42, 46-47 (9th Cir. 1994). Olis had a right to be present, and to have his counsel present, at the Court's conference with the biased juror. Counsel's failure to vindicate these rights constituted ineffective assistance of counsel.

C. Counsel Provided Ineffective Assistance by Failing to Object to Erroneous Jury Instructions

Olis claims that his trial and appellate counsel were ineffective for failing to object to erroneous jury instructions concerning the wire and mail fraud charges and for failing to raise this issue on appeal. § 2255 Memorandum at 95-100. The government resists these claims by arguing that the instructions were correct, Gov't Answer at 69-81, but the government is wrong.

Additionally, the Court stated in its March 3, 2008 Order (Docket # 344) that:

the jury instructions of which [Olis] complains appear in the Fifth Circuit's Pattern Jury Instructions for criminal trials, and Olis has not shown why his attorney should not reasonably have concluded that they were adequate. See [*United States v. Fuchs*, 467 F.3d 889, 910 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1502 (2007)] (attorney could reasonably have concluded that the jury instructions that tracked the pattern instructions were adequate).

Id. at 10. Olis respectfully disagrees with this analysis.

1. The Fact that Jury Instructions Appear in the Fifth Circuit's Pattern Jury Instructions Does Not Insulate Them From Attack

The Court cited *Fuchs* for the proposition that failure to object to Pattern Jury Instructions is not ineffective assistance of counsel. But *Fuchs* cannot be read so broadly. That court did not purport to hold that counsel can *never* be ineffective for failure to object to a Pattern Jury Instruction. Rather, the court found no ineffectiveness where the instructions given were adequate to properly state the law. 467 F.3d at 903, 910-11.

The broad proposition that counsel could never be ineffective in failing to object to a Pattern Jury Instruction would be nonsensical. Even pattern instructions may be clearly wrong under governing law. See, e.g., *United States v. Svete*, No. 05-13809, ___ F.3d ___, 2008 WL 788407 at *7 (11th Cir. March 26, 2008) (finding 11th Circuit pattern jury instructions concerning the "scheme to defraud" element of mail fraud to be deficient and incorrect under established Circuit precedent, and reversing for a new trial). Moreover — and more commonly — an instruction may be proper in some instances but obviously improper in others. For example, an attorney who failed to object when a court read a pattern instruction concerning general intent in a fraud case would provide ineffective assistance.

Here, as discussed below, the challenged instructions were legally erroneous because they incorrectly defined the elements of the offense. Well established jurisprudence — including Supreme Court precedents — demonstrated the errors. Regardless of the fact that they were Pattern Jury Instructions, an objection was necessary and the failure to lodge one was ineffective.

2. Failure to Object to Erroneous Instruction Concerning Interstate Commerce Element of Wire Fraud

With respect to the wire fraud counts, the Court instructed the jury, “It is not necessary for the government to prove . . . that the material transmitted by wire was itself false or fraudulent.” TTx Day 8, 32:21-24. Olis’ counsel made no objection to this instruction. Nor was the issue raised on appeal. But the instruction was incorrect as a matter of law. See § 2255 Memorandum at 96-98. The government’s continued insistence that the instruction was correct, Gov’t Answer at 69-73, is based on a misconception of the law.

Generally, in mail fraud and wire fraud prosecutions the government is not required to prove that the mailed or wired material was itself false or fraudulent. However, that general principle is subject to an important caveat. The “*Parr* exception” holds that when a statement is required by law to be mailed or wired, then that statement cannot form the basis of a fraud conviction unless it is actually false or fraudulent. *United States v. Curry*, 681 F.2d 406, 412 (5th Cir. 1982) (“mailings of documents which are required by law to be mailed, and which are not themselves false and fraudulent, cannot be regarded as mailed for the purpose of executing a fraudulent scheme”) (citing *Parr v. United States*, 363 U.S. 370, 390-91, 80 S. Ct. 1171, 1183-84

(1960)). The wire fraud counts in this case charged a scheme involving the filing with the SEC of two Form 10-Qs and one Form 10-K. Indictment Counts 4-6. Such filings are required by law, see TTx Day 5, 48:4-15; Day 6, 72:10-16; 15 U.S.C. § 15m(a), 17 C.F.R. §§ 240.13a-13, 249.308a, 249.310, and thus the *Parr* exception applies. The government was required to prove that the wired material was false and fraudulent, and the instruction to the contrary was erroneous.

The government rests its opposition primarily on cases that recognize a limitation on the *Parr* exception. “[T]he *Parr* exception is . . . inapplicable [when the] mailings would not have been made but for [the defendant’s] alleged scheme to defraud.” *United States v. Caldwell*, 302 F.3d 399, 416 (5th Cir. 2002) (citing *Schmuck v. United States*, 489 U.S. 705, 713 n.7, 109 S. Ct. 1443 (1989)). But the *Schmuck* limitation does not apply here: the law required Dynegy to wire the financial statements at issue to the SEC regardless of the alleged conspiracy.

Perhaps recognizing the weakness of its position, the government continues to cite an out-of-Circuit case, *United States v. Green*, 786 F.2d 247 (7th Cir. 1986), and its progeny, *United States v. Busch*, 1992 WL 176488 (N.D. Ill. July 6, 1992) (unpublished). See Gov’t Answer at 70-72. However, as Olis has previously observed, see Olis’s Reply in Support of Motion for Release on Bond (Docket # 326) at 13-14, those cases do not provide a correct statement of the law in the Fifth Circuit. Nor is *Green* consistent with the majority of other Circuits that have addressed the issue. As the court stated in *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007):

Most other circuits to address the issue have interpreted *Parr* to hold that “mailings of documents which are required by law to be mailed, and which

are not themselves false and fraudulent, cannot be regarded as mailed for the purpose of executing a fraudulent scheme.” *United States v. Curry*, 681 F.2d 406, 412 (5th Cir. 1982); see *United States v. Cross*, 128 F.3d 145, 149-52 (3d Cir. 1997); *United States v. Gray*, 790 F.2d 1290, 1298 (6th Cir. 1986), *rev'd on other grounds sub nom. McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987); *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979) (alternative holding). A divided panel of the Seventh Circuit did not read *Parr* so broadly, see *United States v. Green*, 786 F.2d 247, 249-51 (7th Cir. 1986), but we think that the dissent in that case had the better of the argument. Not only did the *Green* majority opinion adopt an unconvincingly crabbed interpretation of *Parr*, but it failed to explain how a nonmisleading mailing compelled by law can be for the purpose of furthering a fraudulent scheme.

Id. at 1256.

The Court’s wire fraud instruction was clearly erroneous under binding Supreme Court and Fifth Circuit precedent, and Olis’ trial counsel had no justification for failing to object.

3. Failure to Object to Erroneous Instruction Concerning the “Scheme to Defraud” Element of The Mail and Wire Fraud Charges

Olis also claims that his trial and appellate counsel were ineffective because they failed to raise objections to erroneous jury instructions concerning the “scheme to defraud” element of the mail and wire fraud counts. § 2255 Memorandum at 98-100. The mail and wire fraud statutes proscribe “any scheme or artifice to defraud, or for *obtaining* money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. §§ 1341, 1343 (emphasis added). In instructing the jury on the mail and wire fraud charges against Olis, however, the Court improperly defined “scheme to defraud” as “any scheme to *deprive* another of money or property.” TTx Day 8, 30:7-9, 32:8-10 (emphasis added). The government defends the propriety of the instructions, Gov’t Answer at 73-76, and argues that language in the

indictment somehow remedied the error in the instructions, *id.* at 76-79. Those arguments are unpersuasive.

The government's contention that the jury instructions were correct relies solely upon *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316 (1987). But that case is inapposite. The *Carpenter* Court considered — and rejected — a defendant's argument that the mail and wire fraud statutes do not reach a scheme to misappropriate a victim's intangible right to confidential information. *Id.*, 484 U.S. at 25-27, 108 S. Ct. at 320-21. The Court found that such intangible rights do constitute "property," and are protected by the mail and wire fraud statutes. *Id.* The Court also rejected the argument that the scheme in question was not fraudulent in nature. *Id.*, 484 U.S. at 27-28, 108 S. Ct. at 321-22. Thus, the *Carpenter* Court did not even address the question whether a conviction may stand absent proof that the defendant sought to obtain property.¹⁵

Moreover, the government again fails to address the cases cited in Olis' § 2255 Memorandum that *are* on point. Despite the disjunctive "or" between the phrases "scheme or artifice to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," the Supreme Court twice has held — based on the history of the mail and wire fraud statutes and the meaning of the term "defraud" — that those phrases are to be read together as defining a single offense. *Cleveland v. United States*, 531 U.S. 12, 25-26, 121 S. Ct. 365, 374 (2000);

¹⁵ That the *Carpenter* Court did not address the question is hardly surprising. The scheme at issue there was one in which the defendants "misappropriat[ed]" and used a newspaper's confidential information. *Id.*, 484 U.S. at 23-24, 108 S. Ct. at 319-20. Thus, the defendants in *Carpenter* did obtain a victim's property, and the Court had no reason to rule upon the issue raised in Olis' papers.

McNally v. United States, 483 U.S. 350, 358-359, 107 S. Ct. 3875, 2881 (1987). Thus, it is clear that a scheme to defraud must seek to *obtain* property — not simply deprive another of property. *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993) (A “deprivation is a necessary but not a sufficient condition” of mail or wire fraud because “only a scheme to obtain money or other property from the victim by fraud violates” those statutes); *Monterey Plaza Hotel Ltd. P’ship v. Local 483 of Hotel Employees, Rest. Employees*, 215 F.3d 923, 926-27 (9th Cir. 2000) (“The purpose of the mail and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer”); *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) (“after *McNally* the elements of mail fraud remain unchanged except that the intent of the scheme must be to *obtain* money or property, [and] the [Supreme] Court made it clear that the intent must be to *obtain* money or property from the one who is deceived” (emphasis added)); *United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988) (Section 1341 “was intended by the Congress only to reach schemes ‘that have as their goal the transfer of something of economic value to the defendant.’”); *United States v. Alsugair*, 256 F. Supp. 2d 306, 312 (D.N.J. 2003) (“[I]n addition to an allegation that a defendant deprived a victim of money or property, the mail-fraud statute, 18 U.S.C. § 1341, requires an allegation that the defendant obtained money or property as well.”). These cases compel the conclusion that the Court’s wire fraud and mail fraud instructions were fundamentally deficient. See also § 2255 Memorandum at 98-100.

The government next argues that the instructions were somehow correct because the indictment alleged a conspiracy to obtain property. Gov’t Answer at 76-79.

But the indictment's charges do nothing to correct the erroneous jury instructions. As Olis has already demonstrated, the government did not prove the charges alleged in the indictment — and certainly did not prove that Olis intended to obtain any money or property.¹⁶

The indictment alleged that Olis intended to mislead the “Ratings Agencies, lenders, market and securities analysts, and the investing public.” Indictment (Docket # 1) ¶ 24. But there was no suggestion at trial that the ratings agencies, lenders, or market and securities analysts parted with any money or property, let alone that Olis and his alleged co-conspirators sought to obtain property from such sources. That leaves the investing public. However, there are three fundamental problems with the theory that the alleged conspirators sought to obtain money from the investing public.¹⁷

First, there was no proof at trial that Dynegy issued stock to investors, or that any of the alleged coconspirators bought or sold Dynegy stock, during the purported conspiracy. Nor was there proof that Dynegy or any alleged coconspirator sought to borrow money during the purported conspiracy, or obtained any interest rate reduction as a result of Project Alpha. Absent such proof, there was no showing that the alleged conspirators sought to obtain any money or property under the so-called “scheme to defraud.”

Second, the government never proved that Hecker's opinions were correct and that the outside hedges and linked tear-ups to which he objected were in fact violative

¹⁶ See also § 2255 Memorandum at 69-85.

¹⁷ See also § 2255 Memorandum at 73-75.

of GAAP. Instead, the government urged that it did not matter whether Hecker's opinions were right or wrong. Under that theory, it also did not matter whether the outside hedges and linked tear-ups caused Dynegey's financials to overstate cash flow from operations. But investors who purchase stock after reviewing *accurate* financial statements lose no money. Absent a GAAP violation or other falsehood, investors lost nothing and the alleged deception was immaterial.

Third, Foster testified that he and the alleged coconspirators intended to circumvent Hecker, but believed that the accounting was nevertheless correct. TTx Day 7, 102; see also TTx Day 7, 171:12-172:5. Absent a showing that Olis knew and intended that the outside hedges and linked tear-ups would destroy the desired accounting treatment, there was no proof that he intended and agreed to deprive anyone of money or property, let alone obtain it from them. Thus, even if the government proved an intent to fool Hecker, its evidence failed to establish that someone (i.e. the investing public) parted with money or property — or that Olis intended to obtain money or property as a result of that deceit.

Counsel's failure to object to these instructions was crucial. Had counsel obtained the proper instructions — advising that the alleged "scheme to defraud" required that Olis seek to obtain money or property — and had the jury followed those instructions, Olis would have been acquitted on the mail and wire fraud counts.¹⁸

¹⁸ The government briefly argues that error in Olis' mail or wire fraud convictions should not infect the conspiracy or securities fraud convictions. Gov't Answer at 79-81. Its argument misses the point, however. Olis does not contend that he could only have been convicted of the securities fraud charge on a *Pinkerton* theory, merely that the *Pinkerton* instruction may have been the basis for his conviction. Thus, under the cases and authorities cited in the § 2255 Memorandum at 100-02, the infirmities in

D. Counsel Provided Ineffective Assistance By Failing to Properly Prepare the Defense

The government entirely ignores the final — and crucial — ground for Olis' ineffective assistance claim. See § 2255 Memorandum at 104-05. In the unlikely event that the Court were to find no constitutional violation arising from the USAO's interference with defense funding, Olis claims that his trial counsel was constitutionally ineffective for failing to take the steps outlined in the § 2255 Memorandum at 31-69. Those steps — particularly retaining consulting and testifying experts — were obvious and vital necessities, and had they been taken, the result of Olis' trial would almost certainly have been different. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535-36 (2003) (failure to properly prepare the defense may constitute ineffective assistance of counsel).

1. Failure to Retain Consulting and Testifying Experts

It is well established that counsel's failure to retain experts when they are needed for the defense constitutes ineffective assistance of counsel under *Strickland*. See, e.g., *Draughon v. Dretke*, 427 F.3d 286, 289, 294-97 (5th Cir. 2005); *Soffar v. Dretke*, 368 F.3d 441, 476, 478-78 (5th Cir.), *amended on reh'g on other grounds*, 391 F.3d 441 (5th Cir. 2004); *Paine v. Massie*, 339 F.3d 1194, 1202-03 (10th Cir. 2003); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001), *remand order modified by stipulation*, 268 F.3d 485 (7th Cir. 2001); *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999); *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998); *United States v.*

Counts Three through Six infect Counts One and Two, and reversal is required on all counts.

Tucker, 716 F.2d 576, 581 (9th Cir. 1983). Here, as demonstrated in the § 2255 Memorandum at 54-66, there is a strong probability that the outcome of Olis' trial would have been different had his trial counsel presented expert testimony to (1) counter Heil's testimony concerning the loss investors purportedly suffered, and (2) counter Hecker's testimony by showing that Dynegy's accounting treatment for Project Alpha was proper and that Hecker suffered from a debilitating and unethical conflict of interest. See also Part I.A.2.d, *supra*; Olis's Reply in Support of Motion for Release on Bond (Docket # 326) at 6-9. Indeed, as the Tenth Circuit Court of Appeals recently acknowledged, "expert economic testimony is routine when a materiality determination requires the jury to decide the effect of information on the market." *United States v. Nacchio*, 519 F.3d 1140, 1155 (10th Cir. 2008); see also *id.* ("Armchair economics is not the way to decide complex securities cases").

As in *Nacchio*, expert testimony was crucial to Olis' defense, and the lack of such testimony was severely prejudicial. See *id.* at *12; § 2255 Memorandum at 54-66. Olis' trial counsel advances no justification for the failure to retain such experts other than the USAO's interference with defense funding. See Yates Decl. (Docket # 312). To the extent the Court finds that the government was not at fault for Yates' conduct of the defense, there is no reasoned explanation for counsel's failure to retain experts.

2. Failure to Make Other Necessary Preparation

Olis has also identified other steps counsel was required to take in order to meet an objective standard of reasonableness. As discussed in more detail in the § 2255 Memorandum at 66-69, Olis' trial counsel did not staff the trial team with enough

attorneys to properly review the evidence, an investigator to investigate facts and witnesses, a jury consultant to help with jury selection, or a database to store and use in searching the voluminous discovery materials. Especially given the complexity of the charges, counsel's failure to take these steps gives rise to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Likewise, trial counsel failed to introduce the crucial fact that Hecker twice told Dynegy and the other participants in Project Alpha that "What I don't see I don't care about." Docket # 313 Ex. B, 9/17/03 Notes at 7; 9/18/03 Notes at 1. That information was vital under the government's amended theory of prosecution. It casts in an entirely different light the failure of Dynegy's personnel to specifically inform Hecker about the hedges and tear-ups. In short, the purported conspirators were simply following Hecker's expressed desire not to be informed about matters outside the area of his narrowly-defined focus. Moreover, the evidence demonstrated that Olis clearly did not intend to hide the hedges and tear-ups from Anderson personnel: he disclosed them to Kelm, who included them in his model of the transaction. See, e.g., § 2255 Memorandum at 18-20, 77-78.

In any event, summary judgment is inappropriate with respect to this claim because the government has not even contested it.

**CONCLUSION AND MOTION FOR RECONSIDERATION
OF OLIS' REQUEST FOR DISCOVERY**

For all of the reasons presented above and in Olis' other papers before this Court, the government's motion for summary judgment cannot be sustained. All of Olis'

claims are meritorious, and in no instance do “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the [government] is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

Accordingly, Olis respectfully requests that the Court deny the government’s motion for summary judgment. Olis is entitled, at the very least, to an evidentiary hearing concerning each of his claims. Moreover, Olis is entitled to discovery to support his claims. Olis requests that the Court reconsider its denial of Olis’ motion for discovery (Docket # 327). Alternatively, Olis asks that his petition be granted and that his convictions be vacated.

Dated: May 2, 2008, Berkeley CA

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 2, 2008, I caused to be served a true and accurate copy of the attached Jamie Olis' Response to Government's Answer and Motion for Summary Judgment, and Motion for Reconsideration of Olis, Motion for Discovery, along with a Proposed Order, upon all parties to the above-titled case registered as Electronic Filing System users by filing the documents in this Court's ECF/Electronic Filing System.

/s/ Ted W. Cassman

Ted W. Cassman