

**05-20319**

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

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**v.**

**DANIEL BAYLY,**

**Defendant-Appellant.**

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**APPELLANT DANIEL BAYLY'S REPLY TO  
GOVERNMENT'S OPPOSITION TO RENEWED  
MOTION FOR RELEASE ON CONDITIONS PENDING APPEAL**

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

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The government's opposition – really more of a supplemental merits brief – does not justify keeping Dan Bayly in prison pending the disposition of this appeal. First, the government seeks to cultivate the false impression that Bayly's and Fuhs's appeals have nothing in common, and that the granting of Fuhs's renewed motion for bail pending appeal therefore is irrelevant to Bayly's request for identical relief. Fuhs's renewed motion, the government tells this Court, was "all but exclusively focused" on two claims "entirely unique" to Fuhs. Gov't Opp. 3. In fact, Fuhs's renewed motion devoted *twice* as much space to the arguments *adopted* by Fuhs — those relating to the Brown e-mail, the charging issues (honest services, money and property, and books and records), the FED. R. EVID. 806 issue concerning Andrew Fastow's pretrial statement to the government, and the blocked defense theory instruction — as it devoted to Fuhs's separate sufficiency and stipulation-related arguments. Fuhs Renewed Motion 2-3. Beyond that, the government's whole argument ignores the reason why Fuhs's counsel, in his briefs and at oral argument, focused on arguments unique to Fuhs: because Fuhs had formally adopted the many other arguments he had in common with Bayly and the other defendants, and those common arguments were being addressed by other counsel.<sup>1</sup>

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<sup>1</sup> The government also quotes from a prior panel's decision declining to grant bail, Gov't Opp. 2, but omits any reference to that panel's recognition that it could not, at that juncture, take into account all of the briefing and argument that ultimately would be presented on the merits. See 7/12/05 Order at 1 ("This ruling expresses no opinion regarding the ultimate determination of Bayly'[s] . . . appeal[']"). This Court has now had the benefit of full briefing and oral argument.

The government also fails in its efforts to suggest that Bayly — of whom the district court stated “[i]t may be that I’ve never had a defendant stand before me, probably in my years as a judge and having sentenced hundreds of people, that has had a more glowing and extraordinary record of being a good citizen than in this particular case[,]” Sent Tr. 57-58 — is somehow less deserving than Fuhs of release pending appeal. For example, just as it did in its appellate briefs and at oral argument, the government indiscriminately invokes the word “guarantee” without distinguishing between whether Fastow promised (and beyond that, whether Bayly could have understood Fastow to have promised) an *Enron buyback* if necessary, or instead promised a *third party buyout* through his LJM2 partnership if necessary. That now-familiar elision permits the government, yet again, to ignore that Enron properly could treat the Merrill transaction as a sale under accounting principles if Fastow promised that LJM2 would purchase Merrill’s interest. It also permits the government to ignore the unfairness that resulted at trial when it blocked the defense from using the Fastow *Brady* disclosure (in which Fastow had *denied* making an Enron buyback promise) and blocked a defense-theory instruction that would have allowed the jury to understand the crucial difference between an Enron buyback and a third party purchase.

Finally, the government inexplicably contends that, whereas Fuhs made a sufficiency argument based on proof of *mens rea*, Bayly has not made such a claim. Gov't Opp. 4. That is demonstrably untrue. The very *point* of Bayly's sufficiency argument is that the evidence failed to show that Bayly — who spent mere minutes on this transaction and, as the government has conceded, “played no further part in the [alleged] conspiracy” after his brief call with Fastow ended, Gov't Merits Br. 93 — had any understanding that the transaction could have violated the law. Our sufficiency argument identifies *multiple independent* respects in which the government's evidence was insufficient. First, as we have shown, the admissible evidence did not prove that Bayly understood Fastow to have promised an Enron buyback; at most, it shows that Bayly agreed that Enron would locate a third-party purchaser. Bayly Opening Br. 22-37; Bayly Reply Br. 8-15. What is more, the admissible evidence was insufficient to prove that Bayly intended to conceal the true deal from Enron's auditors or to facilitate false accounting. Bayly Opening Br. 37-40. The latter point is indistinguishable from the sufficiency argument that Mr. Fuhs has made.

Whatever result the Court ultimately may reach on the merits with respect to each of the appellants, we respectfully submit that a substantial question exists as to whether sufficient evidence supports Mr. Bayly's convictions — and that a

substantial question exists as to every other argument we have made on his behalf. Accordingly, Bayly should be released pending appeal.

**CONCLUSION**

For the reasons stated in the renewed motion for release and above, in his briefs, and at oral argument, appellant Daniel Bayly respectfully requests that his renewed motion for release on conditions pending appeal be granted.

Dated: April 4, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing document was served via hand delivery on the government's counsel of record and via U.S. mail on counsel for defendants-appellants at the following addresses this 4th day of April, 2006:

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