

MAY 09 2006

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

v.

JEFFREY K. SKILLING and
KENNETH L. LAY,

Defendants

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Cr. No. H-04-25 (S-2) (Lake, J.)

**UNITED STATES' MOTION TO BAR CLOSING
ARGUMENT ON MISSING WITNESSES**

The government moves to preclude the defendants from informing the jury during closing argument that any potential witness has invoked his or her privilege against self-incrimination or that the government could have called a witness who did not testify in this trial. Witnesses who refused to testify based on the Fifth Amendment are equally unavailable to both parties, and defendants should not be able to ask the jury to draw an adverse inference from the witnesses' refusal to testify. In the same vein, the government asks the Court to preclude defendants from arguing during summation that the government could have called other potential witnesses. Governing Fifth Circuit law makes clear that when a witness is equally available to both parties, neither party may comment on the witness's failure to testify. Defendants have failed to identify a single witness who is not equally available to both parties.

A. Witnesses who invoked the Fifth Amendment

As the Fifth Circuit has explained, the “probative force” of a potential witness’s refusal to answer questions based on the Fifth Amendment (or for any other reason) “is weak and. . . cannot be tested by cross-examination.” *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974); *accord United States v. Griffin*, 66 F.3d 68, 70 (5th Cir. 1995). As the court of appeals explained in *Lacouture*, it is as likely that a witness who invokes the privilege has testimony adverse to the defendants as it is that he or she has evidence favorable to the government. Accordingly, “neither side has the right to benefit from any inferences the jury may draw simply from the witness’ assertion of the privilege either alone or in conjunction with questions that have been put to him.” *Lacouture*, 495 F.2d at 1240; *accord United States v. Bowman*, 636 F.2d 1003, 1013 (5th Cir. 1981). On that basis, the *Lacouture* court upheld a district court’s order directing defense counsel not to comment on a witness’s failure to testify.

During the course of the trial, defendants have identified ten witnesses who would have invoked their Fifth Amendment privilege if called to testify: Rick Buy, Janet Dietrich, David Duncan, Joe Hirko, Georgeanne Hodges, John Lavorato, Jim McMahon, Kristina Mordaunt, Lou Pai, and Greg Whalley.¹ For the reasons explained in *Lacouture*,

¹ Defendants asserted in their motion to admit former testimony under Federal Rule of Evidence 804 that Duncan, Hirko, Hodges, Mordaunt, and Lavorato would invoke their Fifth Amendment privilege. More recently, in their motion to require the government to immunize certain witnesses, defendants identified Buy, Dietrich, Duncan, Hirko, Hodges, McMahon, Pai, and Whalley as witnesses who would invoke the Fifth

defendants should not be allowed to inform the jury during closing argument that any of these witnesses has declined to testify.

B. Other witnesses who did not testify

During the examination of former Enron General Counsel James Derrick, Jr., counsel for Mr. Lay engaged in the following questioning:

Q. Does it make sense to you that if Jeff McMahon truly had relative [sic] information about what Ms. Watkins was saying or, for that matter, if he had evidence in support of the task force theories of the case –

MR. HUESTON: I'm going to object to this.

MR. SECREST: I'm not finished yet.

MR. HUESTON: Pure argument about task force theories.

BY MR. SECREST:

Q. –that they would have called him as a witness in this case?

MR. HUESTON: Objection.

THE COURT: Objection is sustained.

BY MR. SECREST:

Q. Do you know of any reason preventing the task force from call Jeff –

MR. HUESTON: Objection. Clearly –

THE COURT: Sustained. You know that's not proper Mr. Secrest.

Amendment.

4/6/06 Tr. 11526-27.² Defendant Lay's attempt to suggest to the jury that the government could have called an individual who did not testify at trial suggests that defendants may make a similar argument in closing.

The court of appeals has held that if a witness is "equally available" to both parties, any negative inference from one party's failure to call that witness is impermissible." *United States v. Wilson*, 322 F.3d 353, 363 n.14 (5th Cir. 2003) (citing *McClanahan v. United States*, 230 F.2d 919, 925 (5th Cir. 1956)). Although a witness is not equally available to both parties simply because he is accessible for service of a subpoena, see *United States v. Gipson*, 593 F.2d 7, 9 (5th Cir. 1979), a potential witness is considered a "missing witness" only when he "is connected in some way to one of the parties and 'it might be expected that his testimony, if given, would corroborate' that party's theory of the case." *Wilson*, 322 F.3d at 363 n.14 (quoting *McClanahan*, 230 F.2d at 925). To show that the allegedly missing witness's testimony would corroborate the government's theory – and therefore that the defendants may comment on the witness's absence – defendants must show that "the missing witness has information 'peculiarly within his knowledge,' i.e., a party need not call a witness if her testimony would be cumulative." *Wilson*, 322 F.3d at 363 (quoting *Streber v. Commissioner of Internal Revenue*, 138 F.3d 216, 221-22 (1998)).

² As set forth above, Mr. McMahon informed defendants that he would have invoked his Fifth Amendment privilege if called, so it does "make sense" that he was not called as a witness.

In short, to be able to establish that any witness who was not called is a “missing witness,” defendant must show (1) that the witness is connected in some way to the government; (2) that the witness’s testimony would corroborate the government’s theory of the case; and (3) that the witness has information “peculiarly” within the witness’s knowledge. Defendants cannot meet this test. First, any witness who does not have a cooperation agreement with the government is not “connected” to the government within the meaning of *Wilson* and other Fifth Circuit cases. Those witnesses, including (among others) Rick Causey, Mark Frevert, or Steve Kean, are equally available to the defendants. Indeed, these three witnesses (and many others) appeared on defendants’ most recent witness list, and defendants have not claimed that they could not have called them to testify. The fact that neither party chose to call these witnesses does not give the defendants a basis to argue that the government would have called them if they corroborated the government’s theory of the case.

Second, although the government did not call as witnesses some former Enron employees with whom it has cooperation or non-prosecution agreements (such as Michael Kopper or Tim Despain), defendants have failed to establish that these witnesses were not available to them. Defendants have never asked the government to make those witnesses available or asserted that these witnesses would not testify for them if defendants called them. Nor have they made a showing that any of those witnesses have information “peculiarly with [the witness’s] knowledge” that would have resulted in non-cumulative,

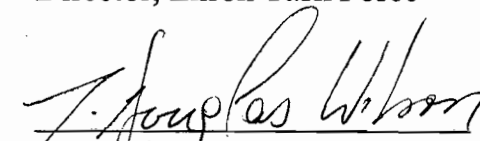
probative testimony that would have assisted the government. *See United States v. Wilson*, 322 F.3d at 363-64. Unless they make the requisite showing prior to closing argument, they should not be allowed to comment on the government's failure to call any witness with whom the government has a cooperation agreement.

In sum, Fifth Circuit law is clear that defendants may not comment on the government's failure to call witnesses who are either equally available or equally unavailable to both parties. Defendants have not identified a single witness who did not testify who is available only to the government. For that reason, the government asks that the Court preclude defendants from commenting on the government's failure to call any witness. A proposed order is attached.

Dated: May 9, 2006
Houston, Texas

Respectfully submitted,

SEAN M. BERKOWITZ
Director, Enron Task Force



J. Douglas Wilson
Enron Task Force

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2006, I caused a true and correct copy of the foregoing United States' Motion to Bar Closing Argument on Missing Witnesses to be served by electronic mail upon the following counsel of record:

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[PROPOSED] ORDER

Having considered the United States' Motion to Bar Closing Argument on Missing Witnesses, it is hereby ORDERED that during closing argument defendants shall not (1) inform the jury that any witness invoked his or her Fifth Amendment privilege or otherwise refused to testify; (2) inform or argue to the jury that the United States could have called as witnesses any person who did not testify at trial; (3) ask the jury to draw an adverse inference against the government because a potential witness did not testify; or (4) otherwise comment on the United States' failure to call a potential witness.

DATED: May __, 2006

Hon. SIM LAKE
United States District Judge

FILED
MAY 24 2006
CLERK OF COURT