

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Cr. No. H-03-0093
	§	
KEVIN HOWARD,	§	
	§	
Defendant	§	

**UNITED STATES' RESPONSE TO  
DEFENDANT'S MOTION TO VACATE CONVICTIONS  
DOCKET ENTRY 1247**

Relying on *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), defendant Kevin Howard has moved to vacate his convictions for conspiracy, wire fraud, and falsifying the books and records of Enron Corp. As explained in more detail below, in *Brown*, the Fifth Circuit interpreted the honest services provision of the federal fraud statutes, 18 U.S.C. § 1346, to exclude fraudulent conduct by corporate employees when that conduct is approved by corporate managers and furthers the corporate goal of increasing earnings. The United States concedes that under *Brown* the conduct that forms the basis for Howard's convictions on Counts One through Four does not fall within the honest services provision. Because a reviewing court cannot determine whether the jury relied on the honest services theory to convict Howard, his convictions on those counts must be vacated.

Howard is incorrect, however, in asserting that *Brown* undermines his conviction on Count 5 for falsifying Enron's books and records. That conviction rests on Howard's direct participation in the conduct that caused the falsification of Enron's books and records, and there is no reasonable possibility that Howard's conviction on the conspiracy count led the jury to convict him on the books and records count. Accordingly, this Court should deny Howard's motion to vacate Count Five and proceed to sentencing on that count.

### **BACKGROUND**

The Sixth Superseding Indictment alleged, and the evidence at trial showed, that in the fourth quarter of 2000, defendant Howard, Michael Krautz, and other coconspirators engaged in the creation of a sham joint venture between Enron Broadband Services (EBS) and two investors, nCube and "Thunderbird," an investment vehicle owned by an Enron-controlled investment fund called "Whitewing." The conspirators obtained the participation of nCube only by giving nCube an oral guarantee that its contribution was not at risk. The purpose of the joint venture was to "monetize" Enron's agreement with Blockbuster to obtain content for Enron's video-on-demand service. In a series of transactions, Howard and his coconspirators used the joint venture falsely to create \$111 million in earnings for EBS for the fourth quarter of 2000. Howard and his coconspirators intentionally violated applicable accounting rules and misrepresented the nature of the transaction to Enron's accountants. The coconspirators called the transaction "Project Braveheart."

Based on the Braveheart transaction, the Sixth Superseding Indictment charged Howard and Krautz with one count of conspiracy to commit wire fraud and to falsify the books and records of Enron. Count One alleged in part as follows:

On or about and between at least August 2000 and May 14, 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants KEVIN HOWARD and MICHAEL KRAUTZ, together with their co-conspirators, did knowingly and intentionally conspire to (a) devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds.

Counts Two through Four charged Howard and Krautz with wire fraud, in violation of 18 U.S.C. § 1343. Those counts alleged in part as follows: “the defendants KEVIN HOWARD and MICHAEL KRAUTZ, together with others, having devised a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right to honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice to defraud did transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures and sounds. . . .”

Court Five charged Howard and Krautz with falsifying Enron’s books and records, in violation of the 15 U.S.C. §§ 78m(b)(2)(A) and (B) and 78ff, and 17 C.F.R. §

240.13b2-1. That count does not mention the honest services provision or allege that the offense involved the deprivation of Enron's honest services.

At trial, the Court gave the following instruction on the elements of Count Five:

Count Five of the Indictment alleges that the defendants Kevin Howard and Michael Krautz falsified the books and records of Enron, a public corporation, in violation of the law of the United States. . . .

In order to find a defendant guilty of making false entries in books and records, the government must prove all of the following elements beyond a reasonable doubt as to that defendant:

First: That at the time of the alleged offense, Enron Corporation was an issuer of securities that were listed in a national stock exchange, or was an issuer of securities that was required to file quarterly and annual reports with the Securities and Exchange Commission;

Second: That the defendant falsified or caused to be falsified any book, record, or account of Enron Corporation with respect to a material fact;

Third: That such falsification caused the book, record or account to not, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of Enron Corporation; and

Fourth: That the defendant acted knowingly and willfully.

\* \* \*

A defendant may "falsify" the books of a public corporation by making an entry or causing another to make such entry in the books that causes the books to fail to reflect the true nature of the transaction or accurately reflect the disposition of the corporation's assets. The law does not direct that a defendant personally make the false -- that a defendant personally make the false entries in the book, record, or account. It is enough if he causes or directs others to do the work of making false entries for him.

Tr. 3205-07.

## ARGUMENT

### A. *United States v. Brown and Howard's honest services convictions*

In *United States v. Brown*, employees of Enron and Merrill Lynch conspired to defraud Enron and its shareholders of their right to the Enron employees' honest services by engaging in a sham sale of Nigerian power barges from Enron to Merrill Lynch. The purpose of the bogus sale was to allow Enron to book earnings on the sale and thereby meet its earnings targets for the fourth quarter of 1999. Merrill Lynch agreed to participate in the deal after receiving an oral guarantee from Andrew Fastow, Enron's Chief Financial Officer, that Merrill would not lose money in the transaction and that Enron would take Merrill out of the deal within six months. Merrill did not perform any due diligence on the deal and received a flat rate of compensation in return for its agreement to "buy" the barges. After six months, Enron arranged for LJM2, a Fastow-controlled entity, to buy the barges. Enron executives concealed the true nature of the deal from Enron's auditors.

Based on the barge transaction, Enron and Merrill Lynch employees were convicted of conspiring to commit wire fraud by depriving Enron and its shareholders of their intangible right to the Enron employees' honest services. A divided panel of the Fifth Circuit reversed the convictions. Although the panel majority acknowledged that the government's evidence provided a "very plausible, even strong case for a criminal deprivation of honest services," it held that the charged conduct fell outside the honest services provision. The court of appeals concluded as follows:

where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud.

*Brown*, 459 F.3d at 522. Judge Reavley dissented, arguing that “the behavior of the defendants falls squarely within the meaning of a ‘scheme or artifice to deprive another of the intangible right to honest services.’” *Id.* at 532-33 (Reavley, J., dissenting). On October 18, 2006, the court of appeals denied the government's petition for rehearing en banc.

The government concedes that as interpreted in *Brown*, the honest services provision, 18 U.S.C. § 1346, does not encompass the conduct charged in Counts One through Four of the Sixth Superseding Indictment and proved at trial.<sup>1</sup> As in *Brown*, the defendants in this case were Enron employees who conspired to engage in a sham transaction to meet a corporate earnings target. Because the fraudulent acts committed by defendants and their coconspirators were intended to pursue the “corporate goal” of meeting earnings targets, they did not deprive Enron of its “intangible right of honest

---

<sup>1</sup> The government does not concede that defendant's conduct in the Project Braveheart transaction did not deprive Enron of its honest services, only that conduct charged in the indictment and presented to the jury does not fall within the honest services provision as *Brown* interpreted it. Nor does the government concede that Howard's conduct did not violate the wire fraud statute without reference to the honest services provision. The conspiracy and wire fraud counts charged Howard with engaging in a scheme or artifice to defraud Enron of its right to his honest services and of its money and property, and the government's concession has no bearing on the government's ability to retry Howard for conspiracy and wire fraud under a money and property theory.

services,” as the *Brown* court defined that term. In addition, as in *Brown*, the jury was not asked to indicate the legal theory on which it based its verdict on Counts One through Four. See *Brown*, 459 F.3d at 518; *Yates v. United States*, 354 U.S. 298 (1957).

Accordingly, the government concedes that the jury’s verdict finding defendant Howard guilty on Counts One through Four must be vacated.

**B. *Brown* has no effect on Howard’s conviction on Count Five.**

Project Braveheart resulted in Enron’s recording \$53 million in earnings for the fourth quarter of 2000 that it could not have legitimately booked. That false statement of earnings forms the basis for the allegation in Count Five of the Sixth Superseding Indictment that Howard and Krautz “did directly and indirectly falsify and cause to be falsified books, records, and accounts” that Enron was required to keep by the Securities and Exchange Act of 1934. Howard’s conviction on Count Five therefore rests on the effect his fraudulent conduct had on Enron’s books and records, not on the alleged deprivation of Enron’s honest services. The Fifth Circuit’s decision in *Brown* interprets only the honest services provision, and nothing in that decision holds or suggests that a corporate employee’s intentional falsification of the books and records of the corporation does not fall within the “books and records” provision of Title 15.

Howard contends, however, that the Court must vacate his conviction on Count Five because the Court, without any objection from Howard or Krautz, gave a *Pinkerton* instruction at trial. That instruction, drawn directly from Fifth Circuit Pattern Instruction 2.22, explained to the jury:

A conspirator is responsible for offenses committed by other conspirators if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy. Therefore, if you have first found a defendant guilty of the conspiracy charged in Count One and if you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy, other conspirators committed the offenses in Counts Two through Five in furtherance of or as a foreseeable consequence of that conspiracy, then you may find a defendant guilty of Counts Two through Five even though the defendant may not have participated in any of the acts which constitute the offenses described in those counts.

Tr. 3197. The Court also informed the jury that “[a] separate crime is charged against each defendant in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually.” Tr. 3190-91.

Howard cites no authority to support his argument and it is without merit.

Although the Court gave a *Pinkerton* instruction, neither the evidence at trial nor the government’s closing argument suggested to the jury that it should convict the defendants of any count using a *Pinkerton* theory. To the contrary, the government’s evidence showed beyond a reasonable doubt that Howard directly participated in Project Braveheart and therefore that he directly caused the falsification of Enron’s earnings and therefore of its books and records. The government did not put on any evidence that another person actually falsified Enron’s books and records. Accordingly, the evidence could not have led the jury to convict Howard of Count Five because another conspirator committed the actual falsification of Enron’s books and records.

Nor did the government rely on a *Pinkerton* theory in argument to the jury. To the contrary, in its initial summation, the government expressly differentiated the fraud charges from the books and records violation. Thus, the prosecutor argued that the indictment “contains essentially two conspiracies . . . to defraud Enron and its shareholders of the Defendants' honest services as employees and of money and property -- that is, their salary and bonus. That's Conspiracy No. 1. Conspiracy No. 2 is the conspiracy to falsify the books and records of the company.” Tr. 3010. As to the books and records count, the prosecutor explained, “The last remaining actual count [Count Five], not a conspiracy count, not one that deals with a plan of some sort, relates to the actual recording of the fraudulent \$53 million.” Tr. 3011. That is the only specific mention of Count Five or the falsification of Enron’s books or records in the government’s initial closing argument. This argument could only have led the jury to consider the evidence of Howard’s participation in the books and records violation separately, and not to rely on a *Pinkerton* theory.

In rebuttal summation, the prosecutor made clear the government’s theory that Howard’s direct participation in Project Braveheart resulted in the falsification of Enron’s books and records. The prosecutor argued as follows:

In this case, none of the three legs to the stool exist. But it only takes you to find that one of the legs is missing to find that this was a fraud. Because the proof has shown that Michael Krautz knew that none of the three legs existed and that Kevin Howard knew that none of the three legs existed, that they had an agreement to falsify the transaction, that they took steps in furtherance of that agreement, that they sent wire communications through interstate commerce, the e-mails, in furtherance of this fraud and to commit

the fraud. Those were fraudulent acts in and of themselves. *And, as a result, Enron's book and records were falsified, that the filing that reflected the 60-million-dollar loss was false.* And you know that in this case, there are real victims, that it's not an amorphous piece of paper. It's not a transaction that didn't affect anyone. Because investors rely upon the stated losses and gains of the corporation to make their decisions as to whether to invest or not. *And that by causing the falsification of the book and record, the 10-K, filed March 31, 2001, by causing the falsification of those books and records, the defendants committed the criminal offense.*

They victimized the investing public. And that's what, in the bottom line, this is about, is the investing public have the right to be able to rely upon the books and records of the corporation and that they accurately reflect what is occurring. And in this case, you know that the books and records and the documentations to even back up those books and records were false, that they did not reflect what was occurring.

Tr. 3176-77. (emphasis added).

Finally, the Court's instructions pointed the jury toward considering the defendants' direct responsibility for the books and records violation. As set forth above, the instructions on Count Five directed the jury to determine whether Howard or Krautz "falsified or caused to be falsified" Enron's books and records. In addition, the Court explained that the defendants could be guilty if they personally made a false entry in a book or record or if they caused another to do so. These instructions focused the jury on whether either defendant violated the books and records provision by making the false entry or causing another to do so, and not on whether the defendant should be held liable for the actions of another conspirator.

In short, the record shows that the jury found Howard guilty of Count Five because it concluded that he directly caused false entries of Project Braveheart earnings in Enron's

books and records, not because it held Howard responsible for the foreseeable acts of other conspirators. This case therefore is identical to *United States v. Manarite*, 44 F.3d 1407 (9th Cir. 1995), in which the Ninth Circuit reversed defendants' convictions for conspiracy to commit mail and wire fraud because "the mail and wire fraud objects alleged in the conspiracy were legally insufficient to be federal offenses." *Id.* at 1414. The court held, however, that the reversal of defendants' conspiracy conviction did not require reversal of the substantive counts against them "despite the fact that the jury was given a *Pinkerton* instruction," because the substantive counts were not "based *solely* on *Pinkerton* coconspirator liability." *Id.* at 1414 n.9. Instead, the court found beyond a reasonable doubt that the jury would have convicted defendants as principals or aiders and abettor, with or without a *Pinkerton* charge. *Ibid.* The same is true here: because all the evidence showed that Howard was guilty of Count Five as a principal, there is no reason to believe that the jury relied on the *Pinkerton* instruction to convict him as a mere conspirator. *See also United States v. Choy*, 309 F.3d 602, 608 (9th Cir. 2002); *United*

*States v. Kaiser*, 660 F.2d 724, 732 (9th Cir. 1981). Accordingly, Howard's challenge to Count Five is without merit and should be rejected.

Respectfully submitted,

Alice S. Fisher  
Assistant Attorney General

Steven Tyrrell  
Chief, Fraud Section

BY s/Van S. Vincent  
J. Douglas Wilson  
Van S. Vincent  
Jonathan Lopez  
Enron Task Force

CERTIFICATE OF SERVICE

I hereby certify that a true correct copy of the foregoing was sent if registered, via the Court's electronic filing system, or if not registered, deposited in the United States Mail, postage prepaid to

Per Ramfjord, Esq.  
900 S.W. 5<sup>th</sup> Street  
Suite 2500  
Portland, OR 97204  
Fax No. (503) 220-2480  
***Counsel for Joseph Hirko***

Barry Pollack, Esq.  
Collier Shannon Scott, PLLC  
3050 K Street, N.W. Suite 400  
Washington, D.C. 20007  
Fax No. (202) 342-8451  
***Counsel for Mike Krautz***

Jim E. Lavine, Esq.  
770 S. Post Oak Lane  
Suite 620  
Houston, TX 77056  
Fax No. (713) 552-0746  
***Counsel for Kevin Howard***

Edwin J. Tomko, Esq.  
600 N. Pearl Street  
Suite 1600  
Plaza of the Americas, LB 175  
Dallas, TX 75201-2890  
Fax No. (214) 953-0695  
***Counsel for Rex Shelby***

J.A. "Tony" Canales  
Canales and Simonson P.C.  
2601 Morgan Avenue  
PO Box 5624  
Corpus Christi, TX 78465-5624  
Fax (361) 884-7023  
***Counsel for Scott Yeager***

William D. Dolan, III  
Venable Baetjer et al  
8010 Towers Crescent Dr  
Ste 300  
Vienna, Va 22181  
***Counsel for Kenneth Rice***

Samuel J. Buffone  
Ropes & Gray LLP  
1301 K Street, NW, Suite 800 East  
Washington, D.C. 20005-7008  
Fax (202) 626-3961  
***Counsel for Scott Yeager***

David L. Schwarz  
Kellogg Huber et al  
1615 M Street NW  
Ste 400  
Washington, D.C. 20036  
Fax (202) 326-7999  
***Counsel for Kevin Hannon***

s/Van S. Vincent  
Van S. Vincent