

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
FEB - 6 2006

UNITED STATES OF AMERICA

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MICHAEL N. COLBY, CLERK OF COURT

v.

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

JEFFREY K. SKILLING and
KENNETH L. LAY,

Defendants

**UNITED STATES' MOTION TO PRECLUDE USE OF
INDICTMENT IN CROSS-EXAMINATION**

During opening statement, both defendants displayed slides showing portions of the Superseding Indictment, attacked the allegations of the Indictment, and used the Indictment to challenge the government's ability to prove its case. Based on defendants' extensive use of the Indictment in opening, the government anticipates that the defendants will use the actual allegations of the Indictment to cross-examine government witnesses. Because the Indictment is not evidence and does not constitute a statement by any government witness, its allegations should not be displayed to witnesses, and defendants should be barred from asking government witnesses questions on cross-examination concerning the allegations of the Indictment.

BACKGROUND

Throughout their opening statements, defense counsel displayed portions of the Superseding Indictment on slides shown to the jury. For example, counsel for Skilling

displayed at least six different paragraphs of the Indictment. *See* 1/31/06 Tr. 435 (¶ 5); 443 (¶ 70); 448-49 (¶ 69); 456 (¶ 64); 460 (¶ 27); 463 (¶ 31). Likewise, counsel for Lay displayed several paragraphs of the Indictment. *See* 1/31/06 Tr. 507-10 (¶ 74), 512 (¶ 75). In displaying these paragraphs of the Indictment, defendants noted that the Indictment is “the official accusation document,” 1/31/06 Tr. 434, and argued that it contained “false charges.” 1/31/06 Tr. 506.

ARGUMENT

The Supreme Court long has recognized that “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam) (emphasis omitted). A district court “retains wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits” on cross-examination to avoid, among other things, harassment, prejudice, confusion of issues, or interrogation that is only marginally relevant or is repetitive. *See, e.g., United States v. Mussare*, 405 F.3d 161, 169 (3d Cir. 2005) (internal citation omitted). In particular, under Federal Rule of Evidence 611(a), the Court has an obligation to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” As the Fifth Circuit has

explained, Rule 611 "provides the district court with wide latitude to impose reasonable limits on cross-examination subject to the Sixth Amendment requirement that sufficient cross-examination be permitted to expose to the jurors facts from which they can draw inferences relating to the reliability of witnesses." *United States v. Martinez*, 151 F.3d 384, 390 (5th Cir. 1998). In addition, under Federal Rule of Evidence 403, the Court may exclude relevant evidence when its probative value is substantially outweighed "by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendants' use of the allegations of the Superseding Indictment to cross-examine a witness will interfere with the ascertainment of truth and will needlessly delay the trial and confuse the issues. As this Court has pointed out, the Superseding Indictment is not evidence. 1/26/06 Memorandum and Opinion at 4-5 (denying Defendant's Motion to Compel Production of Revised Statement in Compliance and One-Week Continuance). *See United States v. Anderson*, 174 F.3d 515, 524 (5th Cir. 1999); *United States v. Sutherland*, 656 F.2d 1181, 1202 (5th Cir. Unit A 1981); Fifth Circuit Pattern Jury Instruction 1.01. Instead, the Indictment is an accusatory document returned by the grand jury, and based on probable cause, not proof beyond a reasonable doubt. Its purpose is to ensure that a defendant is tried on charges returned by the grand jury and to provide notice to the defendant of the charges against him, not to definitively delineate the

evidence that the government must present at trial. *See Schmuck v. United States*, 489 U.S. 709, 718, 109 S. Ct. 1443, 1451 (1989); *Stirone v. United States*, 361 U.S. 212, 215-17, 80 S. Ct. 270, 272-73 (1960).

Allowing defendants to read, show, or otherwise confront government witnesses with specific allegations of the Indictment can only confuse the jury, without furthering the jury's understanding of the issues or its ability to assess the credibility of the witnesses. Moreover, displaying the Indictment to the jury or asking a witness about allegations of the Indictment improperly and inaccurately conveys to the jury that the government must prove every allegation in the Indictment beyond a reasonable doubt. As the Supreme Court has held, the government has no such obligation. *See United States v. Miller*, 471 U.S. 130, 136, 105 S. Ct. 1811, 1815 (1985) ("A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'"); *United States v. Malatesta*, 583 F.2d 748, 755 n.4 (5th Cir. 1978) (government does not have "to prove every word of the indictment").

Policy reasons also support this result. The more detailed an indictment, the greater the notice to the defendant of the government's evidence. But allowing the defendants to display the Indictment to the jury or use it to question the government's witnesses creates a disincentive for the government to include detail in an indictment. Defendants' right to cross-examination should not be construed to give the government an

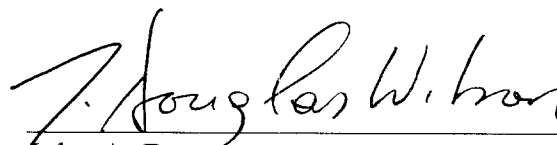
incentive to allege only the bare elements of the offense.

Finally, barring the defendants from using the allegations of the Indictment to cross-examine government witnesses will not prejudice them. The information in the Indictment is drawn from sources available to the defendants, and the government's proof of the Indictment's allegations will be supported by government exhibits. Defendants may use those exhibits, or any other admissible evidence, to cross-examine witnesses. The only purpose of showing the Indictment to the jury would be to ask the witness whether he or she agrees or disagrees with an allegation of the Indictment. That questioning could only confuse the witness (who may or may not have seen the Indictment before), and any answer the witness gives would not be helpful to the jury. For those reasons, the government does not intend to use the Indictment to question witnesses, and it submits that under Federal Rules of Evidence 403 and 611, the Court should bar defendants from using the allegations of the Indictment to cross-examine any government witness.

Dated: February 6, 2006
Houston, Texas

Respectfully submitted,

SEAN M. BERKOWITZ
Director, Enron Task Force

A handwritten signature in cursive script, reading "J. Douglas Wilson". The signature is written in black ink and is positioned above a horizontal line.

John A. Drennan
J. Douglas Wilson

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2006, I caused a true and correct copy of the foregoing United States' Motion to Preclude Use of Indictment in Cross-Examination to be served by electronic mail upon the following counsel of record:

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