UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

APR 13 2005

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA	§	
VS.	§	CR-H-04-25 (S-2)
RICHARD A. CAUSEY,	§	
JEFFREY K. SKILLING, and	§	
KENNETH L. LAY	§	

KENNETH L. LAY'S REPLY RE: SCHEDULING OF BANKING COUNTS

Introduction. As the Court originally proposed, Kenneth Lay believes the severed banking charges being pursued against him should *not* be tried this summer in advance of the main trial against him and his co-defendants, but should be tried in a bench-trial before the court while the jury is deliberating in the main case. This approach is not only more efficient than the one the Task Force now proposes, it minimizes the very palpable risk of intensifying, in advance of the main trial, already inflamed jury prejudices among the local venire. Put simply, the Task Force's pursuit of alleged violations of rarely, if ever, invoked banking regulations should not be permitted to influence the outcome of the main case.

The issue presented. During the scheduling conference of February 24 the Court made the following suggestion:

> The Court: But what I was thinking of, if Mr. Lay does want to waive his right to a jury trial as to those four counts, they could be tried to the Court while the jury is deliberating on the other counts. It's going to take this jury several days to sift through this mountain of evidence and reach verdicts. You all are going to be here anyway

> waiting for a verdict. It just seemed like an efficient use of everyone's time to do that.
>
> Of course, Mr. Lay is the master of his fate, at least his fate as to who will determine his fate, he's the master of it. (Doc. 306, p.20, Feb. 24, 2005)

It would have been an easy choice for Mr. Lay—since he had already filed a Jury Waiver, (Doc. 130, Aug. 9, 2004)—except that the Task Force had consistently refused to tell either the Court or counsel their position relative to the Government's right to a jury. In fact, the Task Force continued to refuse to commit through March 15, 2005, although Mr. Lay implored them to say one way or the other. On the date of that filing in response to the Court query about a Court Trial while the jury was out in the main case quoted above, Lay observed:

> At the outset, of course, irrespective of Mr. Lay's position, the government has refused to consent to any waiver of trial by jury in this case. *In preparing this Response to the Court inquiries, counsel for Mr. Lay directly asked the government (again) what its position would be regarding a trial to the Court of the banking charges under this alternative. Once again, the government has declined to answer this direct question.* This is not surprising. The government has failed or refused to take a position on this issue in the seven months since Mr. Lay first posed the question of waiving a jury. Absent the government's agreement to this alternative, it is pointless to consider it any further, *see* Fed. R. Crim. 23(a)(2), and we must conclude that the entire case—including the bank-related charges—will be tried to a jury. (emphasis supplied)(Doc. 305, p. 11, Mar. 14, 2005)

But now that the Task Force has at last committed to the waiver (Doc. 312, paragraph 1, Apr. 4, 2005) Mr. Lay's answer is to accept *the Court's* suggestion.

Benefits to all parties. First, and most importantly, the Court's wish not to deal with two panels (Doc. 305, p. 21, Mar. 14, 2005) will be accomplished.

Second, trial of Mr. Lay on the banking counts before the main case will intensify the media blizzard above what is already an intolerable level. We cannot lose sight of what a singular case we are dealing with. Jury selection in the main case, already an impossible task, would be hopeless. Win or lose, the landscape of public opinion would be detrimental to all defendants. If Mr. Lay were acquitted, as we expect, the public perception would likely be that the so-called "rich and powerful" always get off, thereby further inflaming community prejudice against him. If Mr. Lay were convicted, the publicity from that conviction would undoubtedly carry over to jury selection in the main case, *United States vs. Engleman,* 489 F. Supp. 48, 51-52 (E.D. Mo. 1980), and severely prejudice Mr. Lay's ability to testify in the main case. (*Both Mr. Causey and Mr. Skilling vigorously join in these observations.*)

Third, in the February 24, 2005 status conference, this Court went to great lengths in setting forth a Scheduling Order that was geared to not only accommodate the conflicting schedules of trial counsel but also to afford the parties a reasonable period of time to get ready for trial in an exceedingly complicated case. Having failed to obtain an order severing parties, Mr. Lay is now bound to coordinate his preparation for trial of the main case with his co-defendants. Deadlines were imposed by the Court with respect to the filing of motions, production of expert witness reports, disclosure of the final list of witnesses possessing potentially exculpatory information, *i.e.*, *Brady* and *Giglio* material, Rule 404(b) notices, production of trial exhibits and exhibit lists, production of trial witness lists, and motions *in limine* and responses to the same. *See,* Scheduling Order (Doc. 301, Feb. 24, 2005). In fact, this Court clearly stated in the above order that "...[t]his case will be controlled by the following schedule." Counsel for Mr. Lay believe

that the Court meant what it said and that the Scheduling Order in place shall be adhered to and that trial will commence on January 17, 2006. Although Mr. Lay is not involved in Rule 16, he is affected by all the other deadlines.[1]

Fourth, both sides and the Court will benefit from the economies of a court trial and the "dead time" involved in jury deliberation will be put to use.

Summary. This solution, *the direct acceptance of the Court's suggestion*, treats all three Defendants and the Task Force equally in that it neither disturbs the orderly run up to trial nor compliance with the docket control order already in place nor changes the calculus of jury selection in the main case.

Respectfully submitted,

MICHAEL RAMSEY
2120 Welch
Houston, Texas 77019
713-523-7878
713-523-7887 (Fax)

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[1] The Court did broach with counsel during the status conference the prospect of trying the severed bank related charges to the same jury who will have heard the main case after it has reached a verdict or to the Court while the jury is deliberating. While counsel for Mr. Lay observed at that time that trial of the bank related charges to the same jury was a novel idea, upon reflection and after conducting legal research, it became apparent that employing such a procedure was fraught with danger. Recently, counsel for Mr. Lay has responded to the Court's suggestion in a written submission addressing our concerns and opposing trial to the same jury of the banking charges. *See* Kenneth L. Lay's Response to Court's Inquiries Regarding Trial of the Banking Counts. (Doc. 305, Mar. 14, 2005)

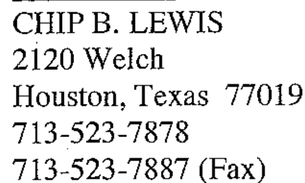
The Task Force responded to the Court's proposal and Mr. Lay's opposition to the idea—but not really. In fact, the prosecution chose not to even address the two alternatives offered by the Court but rather embarked on an unrelated diatribe, a screed, if you will, concerning the public's right to a "Speedy Trial". In its latest submission, the Task Force postures that the banking charges could be tried in "one week" and suggests that trial commence literally in a few weeks—May or June 2005. The truth of the matter is that the Government has never heretofore been concerned about the right to a Speedy Trial—be it the public's or Mr. Lay's. Mr. Lay had, indeed, previously sought a Speedy Trial and was even willing to waive his Sixth Amendment *right to a jury* on all charges against him to effectuate the same. But as the Court acknowledged during the status conference, that was before the motion to sever Mr. Skilling and Mr. Causey from the case was denied. The Government, for obvious tactical advantage, fought with "tooth and nail" to keep the three defendants joined for trial.

s/

BRUCE W. COLLINS
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 150
Dallas, Texas 75201
214-855-3000
214-855-1333 (Fax)

s/

GEORGE McCALL SECREST, JR.
BENNETT & SECREST, L.L.P.
808 Travis Street, 24th Floor
Houston, Texas 77002
713-757-0679
713-650-1602 (Fax)



CHIP B. LEWIS
2120 Welch
Houston, Texas 77019
713-523-7878
713-523-7887 (Fax)

Attorneys for Defendant, KENNETH L. LAY

Of Counsel:

s/

EARL SILBERT
DLA PIPER RUDNICK GRAY CARY US LLP
1200 19th Street, N.W.
Washington, D.C. 20036-2412
202-861-6250
202-223-2085 (Fax)

CERTIFICAT OF CONFERENCE

No Certificate of Conference is necessary with this filing.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 13th day of April, 2005, a true and correct copy of the foregoing Defendant Kenneth L. Lay's Reply Re: Schedule of Banking Counts has been delivered to the following, via email:

Daniel M. Petrocelli (DPetrocelli@OMM.com)
Matthew T. Kline (MKline@OMM.com)
O'MELVENY & MYERS, L.L.P.
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-6035

Ronald G. Woods (RonWoodsLaw@aol.com)
5300 Memorial, Suite 1000
Houston, TX 77007

Reid H. Weingarten (Rweingarten@steptoe.com)
Mark J. Hulkower (mhulkower@steptoe.com)
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, NW
Washington, D.C. 20036

Linda Lacewell (Linda.Lacewell2@usdoj.gov)
John Hueston (John.Hueston@usdoj.gov)
Sean Berkowitz (Sean.Berkowitz2@usdoj.gov)
Enron Task Force
DOJ Criminal Division
1400 New York Avenue, NW
10th Floor
Washington, D.C. 20530

MICHAEL RAMSEY

UNITED STATES DISTRICT COURT
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NO ORDER IS NECESSARY WITH THIS FILING.