Legal and Ethical Analysis – U.S Supreme Court:

Jeffrey K. Skilling v. Unites States

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This paper provides an ethical and legal analysis of the 2010 Supreme Court case regarding jury bias and conspiracy to commit "honest services" wire fraud - Jeffrey K. Skilling v. Unites States.

**Background**

Enron was formed in 1985 as the result of a merger. The company operated a 37,000-mile natural gas pipeline. Ken Lay became the Chief Executive Officer (CEO) in 1986 and the company grew to be very powerful. By 1999, Enron had “investments and assets valued over $20 billion and subsidiaries operating in over 50 countries”. (PBS) Enron continued operating and expanding its natural gas pipelines while, in 1999, adding the sale of broadband internet service to its portfolio. (PBS)

Jeffrey Skilling was hired by Enron in 1990 as the “chairman and chief executive officer of Enron Finance Corp”. (Biography) He then became the Chairman of Enron Gas Services in 1991. (Biography) Skilling became the Enron CEO in February 2001 and resigned 7 months later in August, 2001. During 2001, Enron was blamed for California’s energy crisis, declared a $638 million third-quarter loss, was the subject of a Securities and Exchange (SEC) commission investigation, and revised its statements from the prior 4 years to show and addition $586 million in losses. (PBS) The company collapsed into bankruptcy – 5,000 employees were laid off, employees heavily invested in company stock lost over $1 billion in retirement savings, and “investors claimed they lost $25 billion”. (Bloomberg)

The results of the government investigation showed that there had been “an elaborate conspiracy to prop up Enron's stock prices by overstating the company's financial well-being”. (Jeffrey K. Skilling v. Unites States). A trial convicted Skilling of multiple counts of fraud and conspiracy.

Jeffrey Skilling appealed one of the counts – for honest services fraud – and also claimed that he had not received a fair trial due to jury bias. In Jeffrey K. Skilling v. Unites States, the Supreme Court found no evidence of jury bias to justify a retrial; however, they did find that the honest services charge was incorrectly applied. (Jeffrey K. Skilling v. Unites States)

As a result of this case, a federal appellate court reviewed the influence of the honest services conviction on the fraud and conspiracy counts Skilling was found to be guilty of. In 2011, the court decided that the convictions on the other 18 counts were valid. (Emshwiller) Schilling filed another appeal with the Supreme Court for a new trial in November 2011. (Cohn)

**Legal and Ethical Facts**

* Jeffrey Skilling was convicted of honest services fraud, and appealed that conviction to the Supreme Court.
* Jeffrey Skilling appealed his convictions to the Supreme Court on the basis that he was not able to have a trial heard by an unbiased jury in Houston, Texas. Related to this:
	+ The court had pre-screened jurors for bias using a “77-question, 14-page” questionnaire. (Jeffrey K. Skilling v. Unites States)
	+ The jury pool was further narrowed using questions posed by the judge to each potential juror, under voir dire, which was established by Chief Justice Marshall in 1807 for United States v. Burr. (Jeffrey K. Skilling v. Unites States & Meringolo)
	+ Using those techniques, the juror pool was reduced from 400 to 38 people. Skilling had unsuccessfully challenged the seating of one juror, Juror 11, for bias. (Jeffrey K. Skilling v. Unites States)

**Key Legal Issues**

The key legal issues in this case are:

* Can a defendant receive a fair trial in an area that has been widely affected by the defendant’s actions and where there is pervasive pre-trial media coverage of the story?
* Is conspiracy to commit "honest services" wire fraud limited to bribery or kickbacks through a third party?

**Applicable Legal Rules and Observations**

***Honest Services Fraud***

The U.S Code Section 18, Chapter 63 does not specifically reference the need for the case to contain bribery or kickbacks. (USC) Instead, the details of the implementation of the law are found in precedent cases. Honest services cases for bries or kickbacks include *Williams* v. *United States*, 341 U.S. 97, 101, 71 S. Ct. 576, 95 L. Ed. 774, United States v. McNeive, 536 F.2d 1245, 1249 (CA8 1976), and Shushan v. United States, 117 F.2d 110. (Jeffrey K. Skilling v. Unites States)

The case does not provide any evidence that Skilling acted upon the promise of nor made and bribes or kickbacks. Therefore, the honest services fraud does not apply in this case. However, with respect to lying about the financial health of the company, he could have instead been charged with “material misrepresentation under securities fraud”. (Van Dyk)

***Jury Bias***

The 6th amendment of the U.S. Constitution provides the right to a trial “by an impartial jury”. Thus, bias in a jury would violate the defendant’s constitutional rights. Through the exercise of its 1st amendment right for freedom of the press, the media can create widespread bias in a jury pool. “Studies have shown that both [factual and emotional] pretrial publicity are linked to a higher probability of conviction and cause a general biasing effect among jurors.” (Meringolo) There was a significant level of media reporting in this case – the Skilling defense team submitted to the court hundreds of reports as well as expert analysis of their effect on the jury pool. (Jeffrey K. Skilling v. Unites States)

Jury pool bias created by media reports does not automatically necessitate relocating a trial. United States v. Brown, 540 F.2d 364, 378 (8th Cir. 1976) established that “the proper test to determine whether a motion for change of venue under [Federal Rules of Criminal Procedure ] Rule 21(a) should be granted is not whether a jury can be impaneled on which no juror has been exposed to pretrial publicity or formed a tentative opinion about the case; instead, the test asks whether the jurors are capable of putting aside any opinion formed on the basis of pretrial publicity and rendering “a verdict based solely on the evidence presented at trial.” (Meringolo)

The District Court did not move the trial, but instead employed two methods for selecting jurors – the first was an extensive questionnaire (Jeffrey K. Skilling v. Unites States) and the second was voir dire. The precedent of voir dire was established by Chief Justice Marshall in 1807 for United States v. Burr. (Meringolo) Consistent with the theory used in United States v. Brown, “Marshall ruled that mere exposure to the pretrial publicity was not, in and of itself, enough reason to dismiss a juror”. (Meringolo)

These precedents are consistent with the actions of the District Court in the handling of Skilling’s trial. The subsequent findings of the appellate court and Supreme Court that there was no need for a retrial due to jury bias are also consistent with these precedents.

**Legal Conclusion**

The Supreme Court accurately vacated the honest services charge and remanded that the appellate court review the extent to which the honest services conviction influences convictions on other counts. Based upon precedent cases, the honest services charge requires bribery or a kick back, neither of which was present in this case.

Although the likelihood had been shown through hundreds of media stories on the collapse of Enron and Skilling’s trial, the decision to not order a retrial was based on the fact that bias on the part of any particular juror was not proven. Also, any possible bias was unlikely to overturn the convictions based on the evidence provided and the care taken by the court to minimize and discourage juror bias.

**Key Ethical Issues**

The key ethical issue is how much the U.S. court system is obligated to do in order to protect the 6th Amendment rights of a high profile defendant.

**Support for Ethical Issues**

Under Kant’s categorical imperative, all people should be treated “as a free person equal to everyone else”. (Velasquez) The trial was conducted in an area that a higher court concurred met the presumption of juror prejudice: “The 5th Circuit Court of Appeals, which heard the defendant's appeal, partially agreed with the defendant and found a presumption of juror prejudice based on: (a) the negative media coverage; (b) co-defendant’s guilty plea; and (c) large number of victims in the greater Houston area.” (Hoffmeister) The 6th amendment provides Skilling to the right of a trial “by an impartial jury”. In order to ensure Skilling was treated like all other defendants with respect to jury impartiality, it would have been prudent to relocate the trial to an area less affected by the collapse of Enron. This does create a risk that the government would be seen as seeking out a jury that would be more lenient to the defendant, possibly violating the right to retributive justice of those who were harmed by the Enron collapse.

**Ethical Alternatives**

An ethical alternative is John Rawls’ retributive justice, where Skilling would deserve punishment for his wrong-doing. (Velasquez) Under this ethical theory, Enron employees in Houston who were harmed have a right to retributive justice - to attend the trial and have it conducted in the “of the State and district wherein the crime shall have been committed” (6th amendment). This would outweigh the desire to have the trial moved elsewhere, as long as due diligence (e.g., voir dire) was done to provide reasonable assurance that an impartial jury was selected.

**Ethical Conclusions**

One of the more difficult parts of criminal law is avoiding vilifying someone who seems to have caused harm to so many others. However, the 6thAmendment of the U.S. Constitution states that all citizens accused of a crime have a right to a fair trial. Did Skilling receive a verdict from an unbiased jury? It’s entirely possible that he did not, but the court took extensive protections to find as unbiased a jury as possible. Moving the trial outside of Houston might not have helped – the media coverage of the Enron scandal was nation-wide.

Nevertheless, the court was too hasty in its assessment of whether or not the jury pool in Houston was biased. Complaints from the defense that “80 percent of the 280 questionnaires …show ‘negative, heated, emotional answers’ about the defendants” (Fox) deserve more significant consideration, especially when a high court agrees with the presumption of juror prejudice. (Hoffmeister) Under Kant’s categorical imperative, no matter how the public may feel about a defendant, that defendant still deserves equal protection under the 6th Amendment. The trial should have been moved to a different city so that there is no question that Jeffrey Skilling received this protection.

 **References**

Jeffrey K. Skilling v. Unites States, 130 S. Ct. 2896; U.S. Supreme Ct (2010).

Emshwiller, J. (2011). “Enron's Skilling Loses Appeal”. The Wall Street Journal. Retrieved from <http://online.wsj.com/article/SB10001424052748704013604576247370342999508.html>

Cohn, S. (2011). “Enron's Skilling Appeals to Supreme Court, Again”. CNBC. Retrieved from <http://www.cnbc.com/id/45470034/Enron_s_Skilling_Appeals_to_Supreme_Court_Again>

Online News Hour. (2002). “The Rise and Fall of Enron”. PBS. Retrieved from <http://www.pbs.org/newshour/bb/infrastructure/power/enron_time.html>

“Jeffrey Skilling”. (2012). Biography.com. Retrieved from <http://www.biography.com/people/jeffrey-skilling-235386>

Brubaker, L. (2006). “Enron Workers Confront Lay, Skilling at Trial on Betrayal, Loss”. Bloomberg. Retrieved from <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=akY4I7mMcoYw&refer=us>

Meringolo, J. (2010). “The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus”. New York Law School. Retrieved from <http://www.nyls.edu/user_files/1/3/4/17/49/1156/Law%20Review%2055.4_03Meringolo.pdf>

United States Code. (2011). “18 USC Chapter 63 – Mail Fraud and Other Fraud Offenses”, U. S House of Representatives - Office of the Law Revision Counsel. Retrieved from <http://uscode.house.gov/download/pls/18C63.txt>

Van Dyk, D. (2010). “The Supreme Court's Ruling on 'Honest Services' Theft”. Time. Retrieved from [http://www.time.com/time/business/article/0,8599,1999768,00.html](http://www.time.com/time/business/article/0%2C8599%2C1999768%2C00.html)

Velasquez, M.C. (2012). Business Ethics: Concepts and Cases. In 7th Ed., Ethical Principles in Business (pp. 98, 117-118). New York, NY: Pearson Education, Inc.

U.S. Constitution. “6th Amendment”. Retrieved from <http://caselaw.lp.findlaw.com/data/constitution/amendment06/>

Fox News (2006). “Lay, Skilling Seek to Move Enron Trial”. Retrieved from [http://www.foxnews.com/story/0,2933,180678,00.html](http://www.foxnews.com/story/0%2C2933%2C180678%2C00.html)

Hoffmeister, T. (2010) “Presumed Prejudice, Actual Prejudice, No Prejudice: Skilling v. U.S.”. The American Society of Trial Consultants. Retrieved from <http://www.thejuryexpert.com/2010/07/presumed-prejudice-actual-prejudice-no-prejudice-skilling-v-u-s/>