TEXAS LAWYER

Honest-Services Issue Key to Skilling's Appeal at 5th Circuit

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Daniel Petrocelli, lead counsel for former Enron Corp. Chief Executive Officer Jeffrey Skilling, spent two intense weeks prepping for his argument as he attempted to convince a 5th U.S. Circuit Court of Appeals panel to throw out Skilling's criminal convictions.

Petrocelli, who had about 45 minutes on April 2 to argue his legal points and field questions from the three 5th Circuit judges hearing Skilling's appeal, says in an interview following the oral arguments in New Orleans that he spent the previous two weeks "holed up" with appellate specialists and members of the Skilling trial team, going over the briefs and the trial record. He says they did most of the preparation in Los Angeles but flew to New Orleans on Sunday, March 30, to finish their work.

Petrocelli, a partner in O'Melveny & Myers in Century City, Calif., says he wanted to be ready for any questions from the panel, which includes 5th Circuit Judges Jerry Smith and Edward Prado and U.S. District Judge Alia M. Ludlum of the Western District of Texas, who was sitting by designation. Kyle Boudreau, spokesman for the 5th Circuit, says Ludlum was assigned to the case by a routine process of designation, in which district judges are asked to sit on 5th Circuit panels.

That preparation paid off, Petrocelli says, because in his view the judges asked questions he expected them to ask, and many queries dealt with the "linchpin" of Skilling's appeal, which is whether the court should dismiss the convictions against Skilling because of the 5th Circuit's 2006 decision in United States v. Brown. In Brown, the court held that a corporate employee does not unlawfully deprive his employer of his "honest services" when the employee's conduct was in furtherance of the employer's stated goals.

Petrocelli told the panel that because of that opinion, which was decided after Skilling was

found guilty of 19 criminal charges, the judges should reverse Skilling's conviction on all charges. Petrocelli told the panel that the government's case was built on the honest-services theory of wire fraud, and because of that, the convictions should be reversed.

The honest-services theory is important, Petrocelli argued, because the indictment against Skilling alleged that he participated in a conspiracy based on several theories of law, including the theory of honest-services wire fraud. Because the jury delivered a general verdict, which does not specify which theory they used to convict Skilling of the criminal charges, the conviction must be reversed, Petrocelli argued in court.

In May 2006, a federal court jury in Houston convicted Skilling of 19 criminal charges, including one count of conspiracy, 12 counts of securities fraud, five counts of false statements to auditors and one count of insider trading in the highest-profile trial stemming from the collapse of Enron in late 2001. Kenneth Lay, former chairman of Enron, was convicted along with Skilling at that trial, but his conviction was thrown out after he died in July 2006.

But Douglas Wilson, an assistant U.S. attorney in San Francisco, told the three-judge 5th Circuit panel that Brown does not require reversal of Skilling's convictions.

"The Brown conspiracy was a conspiracy of means by which corporate ends were met," Wilson said in distinguishing the cases. "What we have here is a conspiracy of ends."

Wilson, who did not respond to e-mails or telephone messages left at his office on April 3, also argued that even if Brown taints Skilling's conspiracy conviction, the error is harmless and does not, for instance, affect Skilling's securities fraud convictions.

"The jury wasn't told they could convict them on these counts because of the conspiracy count," Wilson argued.

Wilson also argued that there is "no connection" between the honest-services theory of wire fraud and Skilling's conviction on one count of insider trading, which is related to stock he sold in September 2001, after he had left Enron.

Smith asked Petrocelli whether Brown conflicts with the 5th Circuit's 1997 opinion in United States v. Gray, in which basketball coaches were convicted of mail and wire fraud for fraudulently establishing the eligibility of some transfer students. But Petrocelli said there's no conflict and cited footnote 13 in Brown, which notes that the Gray court rejected the Gray defendants' argument that their conduct improved the basketball team and the university benefited from that conduct.

Petrocelli told the judges that Skilling acted "in pursuit of Enron's interest at all times," so Enron was not deprived of Skilling's honest services.

Wilson, in contrast, told the judges that the government believes Brown and Gray are

contradictory.

The Fastow Factor

A crowd of about 75 people, including members of Lay's defense team and at least one former member of the team of federal prosecutors who tried the case in 2006, attended the oral arguments in a small courtroom at the John Minor Wisdom Court of Appeals Building in New Orleans.

In the main brief in his appeal filed in 2007, Skilling makes four major arguments for why his conviction should be overturned. He alleges that the prosecution's case against him was based on an "untenable theory" of honest-services fraud; instructions given to the jury were erroneous; the Southern District of Texas venue for the trial was prejudicial, as was a shortened voir dire; and prosecutors engaged in misconduct by, among several actions, obstructing his access to witnesses and documents.

Skilling has been in a federal prison in Minnesota since December 2006, when he started serving his sentence of more than 24 years. In an interview following the arguments, Petrocelli says Skilling's "whole life is rolled up into today."

Petrocelli confirms by e-mail that he talked to Skilling after the arguments, and his client is "anxiously waiting" for the court to rule.

Skilling asks the 5th Circuit panel to reverse the conviction and remand the case to U.S. District Judge Sim Lake of Houston with instructions to dismiss it or retry it in a different venue. Alternatively, he asks the court to vacate his sentence and remand it for resentencing.

Additionally, in a supplemental brief filed in March, Skilling alleges that the Enron Task Force, which prosecuted the case against him, failed to provide him before trial with "vital exculpatory evidence" contained in raw notes from Federal Bureau of Investigation interviews, known as 302s, with Andrew Fastow, the former Enron CFO who testified for the government during Skilling's criminal trial. Skilling contends in the brief that much of the "suppressed evidence" directly relates to and refutes the prosecution's contention that Skilling orally agreed to secret side deals to manipulate Enron's financial statements. Sean Berkowitz, former director of the Enron Task Force and now a partner in Latham & Watkins in Chicago, did not return a telephone call seeking comment before presstime.

"This "side deal' theory underlies every count of conviction against Skilling. By depriving Skilling of key exculpatory evidence that Fastow conveyed in his interviews, the Task Force was able to skew the proof and convince the jury to accept Fastow's word over Skilling's," Skilling alleges in the brief.

For instance, Skilling alleges, Fastow testified at trial that Skilling knew about the so-called "Global Galactic Agreement," because Fastow "confirmed" it with him during a

meeting in the spring of 2001. However, Skilling alleges in the brief that the raw notes of Fastow's interviews impeach his testimony, because Fastow told the Enron Task Force he "doesn't think" he discussed it with Skilling.

Skilling alleges that because the "obviously exculpatory statement" was not included in the composite Fastow 302s given to Skilling, or in materials provided to Lake for in camera review of the raw notes, the 5th Circuit should reverse Skilling's convictions and provide other relief.

Skilling alleges that the task force's violations of the U.S. Supreme Court's 1963 decision in Brady v. Maryland are egregious and deliberate.

"In the 18 months leading up to Trial, the Task Force persistently represented to the district court that it understood its Brady obligations and that all Brady information, if any existed, had been or would be disclosed. . . . These representations were knowingly false, and the truth never would have come to light had this Court not ordered the disclosure of the raw notes," Skilling alleges in the supplemental brief.

Skilling further alleges that prosecutors engaged in conduct that was "willful, deliberate, and essential to securing convictions" and he urges the court to redress it.

Petrocelli told the court on April 2 that the notes "could not be a more material suppression of exculpatory information."

However, Wilson told the panel that any potentially exculpatory information in the notes was minimal, and Lake, the trial judge, had the vast majority of the notes during trial and chose not to turn them over to the defense.

The government alleged in its supplemental brief to the 5th Circuit that Lake was correct when he concluded that the raw notes did not contain enough Brady material to turn them over to Skilling.

Wilson argued last Wednesday that the notes do not create any doubt that the Global Galactic Agreement existed.

The government alleges in the supplemental brief that Skilling received more than 200 pages of 302s for Fastow prior to trial and the government provided the notes for those 302s to Lake so he could monitor Fastow's testimony and disclose any information to Skilling that could impeach Fastow. The government alleges that Skilling is now taking information in the notes out of context.

"Put in its proper context, and divorced from Skilling's hyperbolic rhetoric, each portion of the notes on which Skilling relies contains information that Skilling possessed prior to trial or that would have had minimal value in impeaching Fastow," the government alleges in its March supplemental brief to the 5th Circuit.

The government alleges Skilling received a fair trial and "Skilling's microscopic and misleading dissection of the Fastow notes" provide no basis to overturn the jury's verdict.

In September 2006, after he testified for the government at Skilling's trial, U.S. District Judge Kenneth Hoyt sentenced Fastow to six years in federal prison and two years of supervised release. Fastow had pleaded guilty to one count of conspiracy to commit securities fraud and one count of conspiracy to commit wire fraud.

Venue Concerns

In briefs to the 5th Circuit, Skilling's lawyers argued that his trial was not fair, because it took place in the Southern District of Texas where many people lost jobs after Enron's 2001 bankruptcy.

Prado asked Wilson during arguments for the government's response to the venue issue. Wilson urged the panel to read the trial voir dire transcript and noted that the jury acquitted Skilling of nine criminal charges.

During arguments Petrocelli didn't mention the venue issue. However, afterward he told reporters that if there's a new trial, he would strongly urge Lake to grant a change of venue.

A number of lawyers with roles in the trial attended the arguments, including Ron Woods, a solo practitioner in Houston who is a member of Skilling's defense team; Bruce Collins, a partner in Carrington, Coleman, Sloman & Blumenthal in Dallas who helped represent Lay during the trial; and Kathryn Ruemmler, a partner in Latham & Watkins in Washington, D.C., who was one of the lead federal prosecutors at the Skilling trial. Sidney Powell — the appellate lawyer for former Merrill Lynch & Co. executive James Brown in United States v. Brown — also attended the arguments.

In an interview, Powell, who has offices in Dallas and Asheville, N.C., says the 5th Circuit opinion in Brown "definitely" calls for a reversal in Skilling's appeal.

She says the judges didn't give much away by their questions during the oral arguments.

"They were playing their cards very close to the vest in asking questions of both sides. I think they realized they have a lot of digging and homework to do," says Powell.

"Once they look at the honest-services law carefully, they will see there isn't any precedent in any circuit in the country that supports the honest-service charges in the Skilling case any more than they did in Brown," she says.

Collins did not return a telephone call seeking comment before presstime on April 3, and Ruemmler declines comment.

Woods, who says he wasn't one of the lawyers who helped Petrocelli prepare for the arguments, says they went "extremely well" for Skilling's side because Petrocelli was able to answer all questions.

Notes Woods, "You never know what question they will ask."