Presumed Prejudice, Actual Prejudice, No Prejudice: Skilling v. U.S.

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Introduction

The U.S. Supreme Court recently decided Skilling v. U.S., a 110-page opinion written by Justice Ginsberg.[2] As some may recall, the case stemmed from the 2001 bankruptcy and ultimate collapse of Enron Corporation. At the time, it was the largest bankruptcy in the history of the United States. Jeffrey Skilling, the former CEO of Enron, was convicted in federal district court in Houston, Texas (where the former headquarters of Enron was located) of 19 fraud-related criminal counts; however, he was acquitted on nine other counts. He was sentenced to 292 months of imprisonment.

In Skilling, the two main arguments before the Supreme Court were: (a) did the pretrial publicity associated with defendant's trial prevent him from receiving a fair trial; and (b) is the Honest Services doctrine found in 18 USC §§1343 and 1346 (Mail/Wire Fraud) unconstitutionally vague? With respect to the first question, which is the focus of this article, the Supreme Court held that the defendant "did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him." As to the second question, the Supreme Court redefined the Honest Services doctrine to include only bribery and kickbacks. This resulted in the case being remanded to the 5th Circuit Court of Appeals for further review.

Initial Trial and Appeal

The pre-trial publicity issue was first raised in November 2004 when the defendant, prior to the start of his trial, requested a change of venue arguing that "hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors." As part of his change of venue motion, the defendant submitted, "hundreds of news reports detailing Enron's downfall, as well as affidavits from experts he engaged portraying community attitudes in Houston in comparison to other potential venues." The trial judge denied the motion finding that the pretrial publicity was insufficient to create a presumption that the defendant would not receive a fair trial. The judge noted that the media coverage "had been objective and unemotional, and the facts of the case were neither heinous nor sensational." Moreover the judge asserted, "effective voir dire would detect juror bias."

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. The 5th Circuit, however, did not

overrule the trial court because it found that the presumption of jury prejudice had been rebutted by the jury selection process. Specifically, the 5th Circuit held that "the volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice....however, that presumption is rebuttable, the court examined the voir dire, found it 'proper and thorough,' and [that] the District Court had empaneled an impartial jury."

Presumed Prejudice

In deciding Skilling, the Supreme Court further divided the defendant's fair trial argument into two distinct questions: (a) "did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice?" and (b) "did actual prejudice contaminate Skilling's jury?" With respect to the first question, the Supreme Court, unlike the 5th Circuit, found that the defendant had not established a presumption of juror prejudice. The question of whether presumed jury prejudice was rebuttable was left unanswered by the majority opinion. Justice Alito, however, in his concurring opinion did address this issue. He stated presumed jury prejudice was rebuttable and that "[c]areful voir dire can often ensure the selection of impartial jurors even where pretrial media coverage has generated much hostile community sentiment."

In finding no presumed jury prejudice, the Supreme Court distinguished the facts of Skilling from those in Rideau v. Louisiana,[3] which established the precedent for presumed jury prejudice. In Rideau, the defendant, who was charged with murder, had his jail cell confession televised three times to large local audiences. Since so many potential jurors from the small local community had viewed the confession, defense counsel for Rideau moved for a change of venue. The trial court denied the motion and the defendant was convicted of capital murder. In 1963, the Supreme Court overturned the defendant's conviction finding that the television confession along with the kangaroo court proceedings violated the defendant's due process rights. In Rideau, the Supreme Court, due to the presumed jury prejudice, found it unnecessary to even "examine a particularized transcript of the voir dire."

In differentiating Skilling from Rideau, the court drew the following distinctions.

(1) Unlike Rideau who was tried in a small local community, Skilling was tried in the 4th largest city in the U.S. Thus, in Skilling, there was a much greater likelihood of finding impartial jurors who had not been subject to the large volume of pre-trial publicity.

(2) The local news stories about Enron and Skilling, although not necessarily favorable, were not blatantly prejudicial like in Rideau.

(3) There was approximately a 4-year gap between Enron's bankruptcy and Skilling's trial.

(4) Skilling was acquitted on nine counts.

The Supreme Court went on to say that the 5th Circuit presumed juror prejudice based primarily on the magnitude and negative tone of the media attention directed at Enron. But "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial."[4] The Supreme Court made it clear that it wanted to reserve instances of "presumed prejudice" to those rare extreme occasions.

Actual Prejudice

After dispatching the defendant's argument concerning presumed jury prejudice, the Supreme Court moved on to the issue of actual jury prejudice. Here, the defendant asserted that the "[v]oir dire...did not adequately detect and defuse juror bias." This too was rejected by the Supreme Court, which held that the jury selection process as a whole to include voir dire was adequate to seat unbiased jurors. The majority made note of the 77-question 14-page juror questionnaire drafted primarily by defense counsel that was sent to 400 potential jurors. Of the approximately 374 people that responded to the questionnaire, the judge granted hardship exemptions to about 90 individuals and excused another 119 for cause.

As for the actual voir dire, the trial judge questioned potential jurors both individually and as a group. In addition, the judge permitted counsel for both sides the opportunity to ask a limited number of follow-up questions. The trial judge also afforded the defendant two additional peremptory challenges. The total time for voir dire was approximately five hours, which was highlighted by the defendant in his appeal. The Supreme Court, however, noted that there was "[n]o hard-and-fast formula dictat[ing] the necessary depth or breadth of voir dire." Furthermore, the Supreme Court stated that when pretrial publicity is an issue "primary reliance on the judgment of the trial court makes [especially] good sense."

Dissent

The dissent written by Justice Sotomayor focused on actual jury prejudice as she and the other dissenters appeared to be in agreement with the majority on the lack of presumed jury prejudice. Not surprisingly, the dissent painted a much different picture of the pretrial publicity that occurred prior to the trial calling it "massive in volume and caustic in tone." And, unlike the majority, the dissent pointed out numerous deficiencies in voir dire ranging from inadequate inquiry by the trial judge to the limited ability of the attorneys to ask follow-up questions of potential jurors. The dissent found that "the District Court's inquiry lacked the necessary thoroughness and left serious doubts about whether the jury empaneled...was capable of rendering an impartial decision." In addition, the dissent relying on Irvin v. Dowd[5] was less willing than the majority to accept the "jurors' promise of fairness" at face value.

Finally, the dissent called into question the total time spent on voir dire noting that the "5-hour voir dire was manifestly insufficient to identify and remove biased jurors" given the "extraordinary circumstances" surrounding the case. By way of comparison, other high-profile trials have had a much more extended voir dire e.g., Timothy McVeigh (18 days), Zacarias Moussaoui (14 days) and Dennis Kozlowski (7 days). These examples of extended voir dire occurred even after several of the aforementioned defendants had their trials moved.

Takeaways

There are several important concepts to take away from Skilling. First, trial courts receive significant deference in deciding whether a juror can be fair, and appellate courts are hesitant to overrule trial courts on this issue. Second, the presumed jury prejudice standard is very high and reserved for those rare situations like Rideau. Third, the length of voir dire in and of itself is not determinative of whether an impartial jury has been empaneled. In deciding this issue, the court is going to examine the entire jury selection process. Thus, juror questionnaires have gained even more value because they can make up for a truncated voir dire.

In fact, the Supreme Court went so far as to say that "[t]he questionnaires confirmed that, whatever community prejudice existed in Houston generally, Skilling's jurors were not under its sway."

Fourth and probably most interesting was the role of the justices' litigation experience or lack thereof on the holding of Skilling. According to one attorney who wrote a brief on behalf of the defendant, "[i]t is disconcerting to see the majority working so hard to demonstrate that the prudent course of action--a venue transfer--was not the better choice, especially when the only justice who has experience both as a district judge and with voir dire in high-profile cases is pointing out just how wrong things went in Mr. Skilling's trial."[6]

Some questions left unanswered by Skilling include whether or not presumed jury prejudice is ever rebuttable. The defendants argued that it couldn't be rebutted. Justice Alito, however, in his concurring opinion seems to think it can, but this issue was not taken up by the majority. This question may go unanswered for some time as cases like Skilling are rare and may become even more so in the future because the media saturation level found in Rideau is difficult to replicate in the Digital Age with so many various methods by which to obtain news.

References

[1] Thaddeus Hoffmeister is a law professor and serves as editor of a blog dedicated to juries: www.juries.typepad.com

[2] Skilling v. U.S., 561 U.S. ___ (2010)

[3]Rideau v. Louisiana, 373 U.S. 723 (1963)

[4] Nebraska Press Assn. v. Stuart, 427 U. S. 539 (1976)

[5] Irvin v. Dowd, 366 U.S. 717 (1960).

[6] Tony Mauro, In 4 Key Rulings, Supreme Court Limits Fraud Statutes' Reach, National Law Journal, June 25, 2010.

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Editor's Note

It's the dog days of summer here in the heart of Texas but this issue is sure to keep you glued to your computer screen! Once again, we have a variety of pieces that are thought-provoking and provocative but also carefully researched and written. To start us off, Sam Sommers reviews the research he's done over the past ten years and sets the record straight on what we know (and what we don't know) about race and jurors. All of our stock portfolios have taken hits and been on something of a stomach-wrenching course for the past while but Eric Rudich has been watching something odd: how Wall Street reacts to the litigation verdicts of publicly traded litigants. Read and learn. Daniel Denis has an eye toward numbers as well but his focus is on how to talk to jurors about probability so they "get it".

Doug Keene and I review the literature (the real literature) on the Millennials (also known as Generation Y) and discuss how you can use this knowledge to inform your litigation advocacy (and learn a bit about tattoos along the way). Alexis Robinson looks at the phenomenon of white guilt and how it plays into jury deliberations. Thaddeus Hoffmeister examines the impact of the Skilling verdict and what we need to consider as we move forward in a changed litigation arena. And finally, Desiree Griffin and Emily Patty take a look at the need for affect (aka emotion) in jury decision-making. Why even go outside? Make some coffee (or maybe a cool drink) and sit down to read the July issue of The Jury Expert! And, as always, please comment on our website so we know what you're thinking and what you're especially interested in and intrigued by.

Rita R. Handrich, Ph.D., Editor

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