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U.S. Supreme Court Narrows Scope of "Honest Services" Prosecution

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The United States Supreme Court recently handed down *Skilling v. United States*, a significant decision narrowing the "honest services" portion of the federal fraud statutes, 18 U.S.C. § 1346. *Skilling*, in which the Court vacated the conviction of former Enron chief executive officer Jeffrey Skilling, will deter prosecutors from bringing mail and wire fraud charges against corporate executives whose alleged acts of disloyalty do not involve the receipt of bribes or kickbacks.

Enron collapsed spectacularly in 2001. Skilling and other senior officers were indicted based on allegations that, among other things, they conspired to commit securities and wire fraud by depriving Enron and its shareholders of the "intangible right" to their "honest services," in violation of 18 U.S.C. § 1346. The Government's theory was that Skilling conspired to misrepresent Enron's fiscal health, thereby artificially inflating its stock price, and that he profited through the receipt of salary and bonuses and the sale of Enron stock. There was no evidence, however, that Skilling solicited or accepted bribes.

After a four month trial in Houston, the jury found Skilling guilty on multiple counts, including violation of the honest services statute, and he was sentenced to 292 months of imprisonment, three years of supervised release, and $45 million in restitution. The United States Court of Appeals for the Fifth Circuit affirmed and the Supreme Court granted certiorari.

In a decision by Justice Ginsburg, the Court affirmed in part, vacated in part, and remanded. A majority of the justices rejected Skilling's contention that the honest services statute is unconstitutionally vague.[1] The majority noted that for most of the Twentieth Century, Courts had construed the mail and wire fraud statutes to prohibit not only frauds in which the offender profits from the transaction in which the person he misleads loses money, but also cases in which the misled party loses nothing tangible. Cases of the second type commonly involved the bribery of public officials, which impair the victim's intangible right to honest services. The Supreme Court held in *McNally v. United States*, 483 U.S. 350 (1987), that the wire fraud statute does not encompass such intangible services cases. Congress responded by enacting Section 1346, which Skilling challenged as void for vagueness.

The majority "acknowledge[d] that Skilling's vagueness challenge has force," but concluded that the statute is amenable to a limiting construction, under which it is narrowed to apply to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." Within those limits – which the majority identified as the "core" of the pre-*McNally* honest services jurisprudence – the majority concluded that the statute is not void for vagueness. Turning to the facts of Skilling's case, the majority concluded that because Skilling did not solicit or accept bribes or kickbacks, he could not be convicted of violating the honest services statute, as charged. However, since the alleged conspiracy included other conduct (securities fraud and conventional "money-or-property" wire fraud), the Court remanded for the Fifth Circuit to determine whether the error was harmless and the conviction should stand. Justice Scalia, though concurring in the judgment, disagreed with the majority's limiting construction, which he considered a rewrite of the statute without support in a fair reading of its language.

The Court's holding raises issues regarding prior convictions in honest services wire and mail fraud prosecutions, where there were not kickbacks or bribes. The Court vacated two other such convictions. That leaves open whether the lower courts will vacate additional prior convictions that were based upon the older applications of the honest services wire and mail fraud statutes.

Skilling signals to prosecutors that honest services indictments are unlikely to survive unless supported by evidence that the defendant solicited or accepted bribes or kickbacks. The government's alternative proposed standard – which would have prohibited the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty" – left too many questions to satisfy the Court. The Court's unwillingness to accept this proposal, and the result it reached in this high-profile case, will cast a pall over other prosecutions and on-going investigations involving corporate officers and public officials whose conduct does not involve bribes or kickbacks.

Matthew J. Morris assisted Anthony Pacheco in drafting this alert.

[1] On other issues, a different majority of the justices rejected Skilling's initial arguments that he should have been tried in a venue other than Houston (where he contended that pretrial publicity and community prejudice prevented him from obtaining a fair trial) and that there were errors during voir dire.

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