

WINTER 2011

Reynolds Courts & Media Law Journal



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Out of Houston? The Venue Argument in the Skilling Case

By Walter H. Bush and Christopher B. Freeman

“Houston, we have a problem.”

Thus begins the Memorandum of Jeffrey Skilling in support of his Motion for Change of Venue in *United States v. Skilling, Lay and Causey*.¹

In this article we will track the course of proceedings in *Skilling* relating to the efforts of the former Enron CEO to demonstrate to the trial court that he could not get a fair trial in Houston and, post-conviction, to show not only that the refusal to transfer venue and the related rulings on the conduct of *voir dire* were in error, but also that his conviction was tainted with jury bias. The proceedings in *Skilling* from the trial court through the Supreme Court not only raise interesting and relevant issues of fair trial/pre-trial publicity in our evolving media environment, but also present a context in which to review and consider existing precedent in light of this evolution.

RIDEAU AND ITS PROGENY

The *Skilling* case was not the first time the Supreme Court wrestled with the issue of to what extent publicity both before and during a trial either presumptively or

actually impacts a criminal defendant’s right to a trial by fair and impartial jurors.

In the foundational case of *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Supreme Court held that the pretrial publicity in that case raised so great a presumption of prejudice that the defendant’s due process rights were violated that an examination of *voir dire* was unnecessary. Rideau had robbed a bank in a small Louisiana town, kidnapped three bank employees, and killed one of them.² Without Rideau’s consent and without counsel present, the police filmed their interrogation of Rideau and obtained his confession.³ On three separate occasions shortly before trial, the confession was broadcast on a local television station to audiences ranging from 20,000 to 53,000 individuals.⁴ In response, Rideau moved for a change of venue, arguing that he could not receive a fair trial in the town where the crime occurred, which had a population of only 150,000.⁵ The trial court denied his motion, and Rideau was convicted.

The Supreme Court reversed. Central to the Court’s holding was the fact that “to the tens of thousands of people who saw

1. Defendant Jeffrey Skilling’s Memorandum in Support of Joint Motion to Transfer Venue (S.D. Tex. Nov. 8, 2004), *U.S. v. Causey, et al.*, Case No. 4:04-cr-00025 (S.D. Tex. 2004).
2. *Rideau v. Louisiana*, 373 U.S. 723, 723-24 (1963).
3. *Id.* at 724.
4. *Id.*
5. *Id.* at 723.

and heard [the videotaped confession],” the interrogation “in a very real sense *was* Rideau’s trial—at which he pleaded guilty.”⁶ Under these circumstances, the Court “d[id] not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire*,” that “[t]he kangaroo court proceedings” following the televised confession violated due process.⁷

The Court dispelled of the notion that telecasting—a relatively new technology at that time—was dangerous because it was new

Two years later, in *Estes v. Texas*, the Supreme Court determined that “[m]assive pretrial publicity totaling 11 volumes of press clippings” had given a swindling case “national notoriety.”⁸ Pretrial hearings were carried live by both radio and television, and news photography was permitted throughout.⁹ At least 12 cameramen were present in the courtroom, and it “[wa]s conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings,” denying the defendant the “judicial serenity and calm to which [he] was entitled.”¹⁰

Although the bulk of the disruption occurred during pretrial proceedings, the Supreme Court asserted that “[pretrial publicity] may be more harmful than publicity during the trial for it may well set the

community opinion as to guilt or innocence.”¹¹ The Court dispelled of the notion that telecasting—a relatively new technology at that time—was dangerous because it was new: “It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness, but as Mr. Justice Douglas says, ‘the insidious influences which it puts to work in the administration of justice.’”¹²

In *Estes*, the televised pretrial hearing reached approximately 100,000 viewers, and the courtroom was a mass of wires, television cameras, microphones and photographers. The Supreme Court held this “emphasized the notorious nature of the coming trial, increasing the intensity of the publicity on the petitioner and[,] together with the subsequent televising of the trial beginning 30 days later[,] inherently prevented a sober search for the truth.”¹³ Finding a presumption of prejudice, the Supreme Court reversed the jury’s guilty verdict.

Finally, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), news reporters extensively covered the story of Sam Sheppard, who was accused of bludgeoning his pregnant wife to death.¹⁴ Having decided *Estes* during the prior term, the Supreme Court noted that the press coverage of the *Estes* trial was “not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard’s prosecution,” which the Court characterized as “months of virulent publicity.”¹⁵

6. *Id.* at 726.

7. *Id.* at 726–27.

8. *Estes v. Texas*, 381 U.S. 532, 535 (1965).

9. *Id.* at 536.

10. *Id.*

11. *Id.*

12. *Id.* at 541 (quoting Douglas, THE PUBLIC TRIAL AND THE FREE PRESS, 33 ROCKY MT. L.REV. 1 (1960)).

13. *Id.* at 550–551.

14. *Sheppard v. Maxwell*, 384 U.S. 333, 335–36 (1966).

15. *Id.* at 353–354.

Moreover, “bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard.”¹⁶ Jurors were forced to “run a gantlet [sic] of reporters and photographers each time they entered or left the courtroom.” The court even permitted the erection of a press table for reporters inside the bar and within a few feet of the jury box, which the Supreme Court found to be unprecedented.¹⁷ As it had in *Estes*, the Supreme Court held that “[i]n this atmosphere of a ‘Roman holiday’ for the news media,” the publicity both before and during trial was inherently prejudicial and deprived Sheppard of a fair trial consistent with due process.¹⁸

In each of these cases, the Supreme Court overturned a “conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage.” However, as the Court later explained in *Murphy v. Florida*, these decisions “cannot be made to stand for the proposition that juror exposure to ... news accounts of a crime ... alone presumptively deprives the defendant of due process.”¹⁹

Viewed against this backdrop, the proceedings in *Skilling* presented novel legal questions: even in a high-population venue such as Houston,²⁰ is pretrial publicity of a case involving what remains one of the biggest corporate criminal trials ever, and involving a corporation whose spectacular

collapse affected thousands, presumptively prejudicial to the right to a fair trial? Furthermore, are the standards different when the crimes alleged are financial, which potentially affect thousands of unknown persons in unknown ways, rather than gruesome and violent, but personal and affecting only those directly involved?

SKILLING’S MOTION TO CHANGE VENUE

Skilling contended that his trial must be transferred to another metropolitan venue, such as Phoenix, Denver, or Atlanta, and that he and his co-defendants²¹ could not receive a fair trial in Houston because:

- unlike any other venue, residents of Houston and its surrounding communities had a personal, emotional, and economic stake in the case, resulting from Enron’s dramatic rise and fall and the profound effect the company had on the region’s history;
- unlike any other venue, the media in Houston covered the demise of Enron and the ensuing criminal prosecutions with a fervent, inflammatory, and demonstrably prejudicial point of view;
- unlike any other venue, Skilling and his co-defendants were so uniformly vilified and demonized in the Houston area that they were widely presumed to be guilty until proven innocent; and
- unlike any other venue, *voir dire* and other lesser remedies would be wholly inadequate to eliminate the pervasive latent

16. *Id.* at 355.

17. *Id.*

18. *Id.* at 355, 363 (quoting *State v. Sheppard*, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (Ohio 1956)).

19. *Murphy v. Florida*, 421 U.S. 794, 798–99 (1975).

20. As of the 2000 census, the city of Houston had a population of 1,953,631, making it the fourth most populous city in the United States. U.S. Census Bureau, RANKING TABLES FOR INCORPORATED PLACES OF 100,000 OR MORE: 1990 AND 2000 (2001), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t5/tables/tab02.pdf>.

21. Skilling served as President and Chief Operating Officer (COO) of Enron from January of 1997 until February of 2001, and served as President and CEO from February of 2001 until August of 2001 when he resigned. His co-defendants were Kenneth Lay and Richard Causey. Lay served as Chief Executive Officer (CEO) and Chairman of the Board of Directors from shortly after Enron’s formation in 1985 until February of 2001, when he stepped down as CEO and continued as chairman. Causey served in various positions with the companies from 1992 until 1998, when he became Enron’s Chief Accounting Officer (CAO).

biases that existed in Houston against Skilling and his co-defendants.²²

In response, the Government contended that press coverage of the collapse of Enron and of the *Skilling* case had not been inflammatory and prejudicial; that most of the press coverage was objective, factual, and contained no mention of defendants by name; and that most of the cited coverage was not comprised of widely read front-page articles, but rather internal stories, Internet postings, letters to the editor and other items of low or, at best, uncertain readership. In addition, the Government noted that the most objectionable and vitriolic coverage occurred primarily in 2002, over three years before the *Skilling* defendants' trial. This significant passage of time, the Government argued, had been recognized by the Fifth Circuit as fundamental to the consideration of venue transfer.²³

The Government also contended that the mere fact that more people had *heard* of the case in Houston, as opposed to another major metropolitan area, was not a basis for exclusion because the Constitution does not require a jury comprised of people who do not read the newspaper; it requires a jury of people who have not formed unshakeable opinions and who will base their verdict on the evidence and the law.²⁴

The Government forcefully argued that considerations of venue also extend to the interests of the community directly affected by the crime in trying those charged with

crimes in that community.²⁵ Further, the Government noted that the presumption of community bias asserted by the *Skilling* defendants generally has been applied "only in cases 'wherein the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom, transforming the trial into an event akin to a three-ring circus.'"²⁶ A presumption of prejudice does not apply where the "news accounts complained of are straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness."²⁷

More important perhaps was the Government's trump card: the fact that two prior Enron-related criminal trials had already been conducted with mixed results for the prosecution using juror selection procedures of similar style and duration,²⁸ arguably demonstrating that even during peak periods of Enron pretrial publicity, fair and impartial juries could be impaneled efficiently by conducting a thorough and searching *voir dire*.

In reply, Skilling asserted that at the pretrial stage, where the Court has the ability to look forward, the standard is "anticipatory" and "preventative":

[Rule 21] evokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue. Succinctly, then, it is the well-grounded

22. Defendant Jeffrey Skilling's Memorandum in Support of Joint Motion to Transfer Venue, *U.S. v. Causey, et al.*, at 1, Case No. 4:04-cr-00025 (S.D. Tex. Nov. 8, 2004).

23. Government's Memorandum of Law in Response to Defendants' Joint Motion to Transfer Venue, *U.S. v. Causey, et al.*, at 2-3, Case No. 4:04-cr-00025, (S.D. Tex. Dec. 3, 2004).

24. *Id.* at 4.

25. *Id.* at 5 (citing *United States v. Means*, 409 F. Supp. 115, 117 (D. N.D. 1976) (citing Wright, Federal Practice and Procedure, § 341) ("The interest of a community that those charged with violations of its laws, be tried in that community, is not a matter to be cast aside lightly [V]ery rarely, and only in extreme cases, is a Rule 21(a) motion to be granted."))).

26. *United States v. O'Keefe*, 722 F.2d 1175, 1180 (5th Cir. 1983) (quoting *United States v. Capo*, 595 F.2d 1086, 1090-91 (5th Cir. 1979)).

27. *Id.* at 1180 (quoting *Calley v. Callaway*, 519 F.2d 184, 206 (5th Cir. 1975)) (internal punctuation omitted).

28. See *United States v. Arthur Andersen LLP*, No. 4:02-cr-00121-1 (S.D. Tex.); and *United States v. Bayly*, No. 4:03-cr-00363 (S.D. Tex.).

fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule.²⁹

The *Skilling* defendants argued that a change of venue is appropriate when there is a “reasonable likelihood” that pretrial publicity or other “outside influences” will prevent a fair trial,” citing Supreme Court and Fifth Circuit precedent.³⁰

THE COURT DENIES SKILLING’S MOTION FOR LACK OF A SHOWING OF PRESUMPTIVE PREJUDICE

The district court was not persuaded by Skilling’s arguments, finding that the defendants failed to raise a presumption of prejudice consistent with the principles established by *Rideau* and its progeny, and that, unlike many of the cases cited by the defendants in favor of a change of venue, the facts of *Skilling* were neither heinous nor sensational. In denying the motion to change venue, the court placed particular focus on the fact that the news accounts at issue did not constitute the type of inflammatory reporting of inherently prejudicial facts (e.g., prior convictions, escapes, arrests, prior or subsequent indictments, and/or confessions) needed to support a claim of presumptive prejudice under existing precedent. Further, the Court found that the defendants had “failed to persuade the court that prospective jurors who have formed preliminary opinions about the defendants’ conduct or who are connected to the case in

a way that would render them biased cannot be identified and excused during *voir dire*.”³¹ Despite the widespread knowledge of the facts underlying the *Skilling* case, the district court determined that a thorough *voir dire* would be sufficient to enable it to empanel an impartial jury.³²

CAUSEY’S GUILTY PLEA AND SKILLING’S RENEWED MOTION TO CHANGE VENUE

Following the district court’s order denying the defendants’ motion to change venue and its related rulings on the conduct of *voir dire*, trial was set to begin on January 30, 2006. Lengthy jury questionnaires were distributed to prospective jurors, asking them about their knowledge, views, and opinions of Causey, Skilling and Lay. But on December 28, 2005, Skilling’s co-defendant, Richard Causey, pled guilty and agreed to cooperate with the prosecution. All of these developments were widely reported in Houston.

As a result, Skilling filed a renewed motion for change of venue, and if venue transfer was denied, asking to expand and modify the *voir dire* process and to delay the trial until the furor of Causey’s plea deal could abate.³³ He argued that several items on the juror questionnaire referenced Causey by name, and grouped him with defendants Skilling and Lay, arguably associating Causey to Skilling and Lay in the minds of prospective jurors.³⁴ Indeed,

29. Reply Memorandum of Defendants Skilling and Causey in Support of Joint Motion to Transfer Venue, *U.S. v. Causey, et al.*, Case No. 4:04-cr-00025, (S.D. Tex. Dec. 20, 2004), at 4 (quoting *United States v. Marcello*, 280 F. Supp. 510, 513–14 (E.D. La. 1968)).
30. *Id.* (citing *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *Pamplin v. Mason*, 364 F.2d 1, 5–6 (5th Cir. 1966); *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979); and *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975)).
31. *U.S. v. Causey, et al.*, Case No. 4:04-cr-00025, Memorandum and Order of Court (S.D. Tex. Jan. 19, 2005).
32. The Court also disposed of Skilling’s request for a hearing on the motion, noting that hearings are not granted as a matter of course, but are held only when the defendant alleges sufficient facts which, if proven, would justify relief. *Id.* at 21 (citing *United States v. Smith*, 546 F.2d 1275, 1279–80 (5th Cir. 1977); and *United States v. Poe*, 462 F.2d 195 (5th Cir. 1972), *cert. denied*, 414 U.S. 84 (1973)).
33. Defendants’ Renewed Motion for Change of Venue and Related Relief, *U.S. v. Causey, et al.*, Case No. 4:04-cr-00025 (S.D. Tex. Jan. 4, 2006).
34. *Id.* at 5.

although the renewed motion focused on all of the publicity and evidence relating to potential juror bias, the Causey guilty plea was a central focus.

Skilling's renewed motion cited extensively to the potential jurors' questionnaire responses, arguing that they proved that Houstonians had been uniquely affected by Enron's bankruptcy: almost half of all jurors responded that they, their family, or their friends had some connection to Enron or its bankruptcy.³⁵ The motion also addressed the court's prior ruling on the conduct of *voir dire*, in which it ruled that the court, rather than counsel for the parties, would question the jury generally, permitting individual questioning of the jury only if the court determined that such was warranted.³⁶

Skilling contended that the defendants should be allowed to question each juror, one-by-one, in a closed courtroom, and out of the presence of other jurors and the public. In a supplemental filing in support of the renewed motion for change of venue, Skilling filed affidavits from renowned Houston criminal defense attorneys Dick DeGuerin, Richard "Racehorse" Haynes, and Stanley G. Schneider, all opining that for various reasons Skilling could not get a fair trial in Houston.³⁷

In a two-page order, the court denied Skilling's renewed motion, holding that defendants did not establish that pretrial publicity and/or community prejudice raised a presumption of inherent jury prejudice, and that jury questionnaires sent to the remaining members of the jury panel and

the court's *voir dire* examination of the jury panel provided adequate safeguards to the defendants and would result in the selection of a fair and impartial jury.³⁸

SKILLING'S CONVICTION AND APPEAL TO THE FIFTH CIRCUIT

On May 25, 2006, following a four-month trial and nearly five days of deliberation, the jury found Skilling guilty of nineteen counts, including one honest-services fraud conspiracy charge, and not guilty of nine insider-trading counts. The district court sentenced Skilling to 292 months' imprisonment, three years' supervised release, and \$45 million in restitution.

On appeal to the United States Court of Appeals for the Fifth Circuit, Skilling argued that there are two ways to show a right to a fair trial has been violated. First, he argued, reversal is required if actual prejudice "found its way into the jury box."³⁹ Second, "evidence of pervasive community prejudice is enough for reversal, even without the showing of a clear nexus between community feeling and jury feeling." In those cases, he said, prejudice is "presumed."⁴⁰

Skilling also pointed out that at trial the Government had conceded the magnitude of the tragedy caused by the crash of Enron, arguing at sentencing that the entire community was a "victim" of Skilling's alleged crimes and that not since the Kennedy assassination had a Texas city been so identified with such a devastating event with such far-ranging consequences.⁴¹

Skilling also argued that based solely on the jury questionnaires, the Government

35. *Id.* at 10–11, 16–17.

36. *Id.* at 25–31.

37. Supplemental Filing in Support of Defendants' Renewed Motion for Change of Venue and Related Relief, *U.S. v. Causey, et al.*, Case No. 4:04-cr-00025 (S.D. Tex. Jan. 17, 2006).

38. Order on Defendants' Renewed Motion for Change of Venue and Related Relief, *U.S. v. Causey, et al.*, Case No. 4:04-cr-00025 (S.D. Tex. Jan. 23, 2006).

39. Brief of Defendant-Appellant Skilling, at 122, *U.S. v. Skilling*, Appeal No. 06-20885 (5th Cir. Sept. 17, 2007) (citing *Calley v. Callaway*, 519 F.2d 184, 204 n.32 (5th Cir. 1975)).

40. *Id.* (citing *Rideau v. Louisiana*, 373 U.S. 723, 726–27 (1963); and *Pamplin v. Mason*, 364 F.2d 1, 4–5 (5th Cir. 1966)).

41. *Id.* at 127.

agreed to strike 119 of the 283 jurors—42 percent of the entire pool—by stipulation. Yet, he argued, many plainly biased jurors remained. For instance, one juror who the government refused to strike came to *voir dire* and called out for vengeance in open court: “I would dearly love to sit on this jury. I would love to claim responsibility, at least one-twelfth of the responsibility, for putting these sons of bitches away for the rest of their lives.”⁴² Others said: “they stole money;” “they knew exactly what they were doing;” and “if there was no fraud, then how did the company collapse?”⁴³ Skilling argued that no fair trial possibly could occur under these circumstances.

Further, Skilling contended that the district court’s orders denying a venue transfer completely ignored the far-reaching impact of Enron’s bankruptcy. There was no discussion of the harm caused to the community or the community’s emotional response. Rather than analyzing the unique facts of Skilling’s case, Skilling asserted, the court rigidly compared the case to *Rideau*, a case of robbery, kidnapping, and murder involving a televised confession in a town of 150,000. The court simply concluded that a venue transfer was precluded, Skilling argued, because his case was not on all fours with *Rideau*.⁴⁴

Skilling argued there were two major errors in the court’s analysis. First, it focused exclusively on “pre-trial publicity,” as if it were the exclusive source of community prejudice. Skilling maintained that prejudice could be presumed when any “outside influences affecting the community’s climate of opinion as to a defendant are inherently suspect.”⁴⁵ In other words, pre-trial publicity is not the end of the inquiry; it is just one form of evidence proffered to

show the prejudice within the community, Skilling argued. He also asserted that “the tragedy itself *causes* community sentiment; the media coverage *reflects, reinforces, and amplifies* the sentiment.”⁴⁶ Thus, by ignoring the impact of Enron’s bankruptcy, he continued, the court ignored the true source of Houston’s community prejudice.

Second, Skilling asserted that the court overlooked 40 years of law since *Rideau*. Courts have found venue transfers necessary in a wide variety of cases, involving both big cities and small towns, and both violent and non-violent crimes. Skilling argued that the size of the community, while relevant, has never been dispositive. Cases have been transferred from large metropolitan areas, and courts have transferred venue for such non-violent crimes as fraud, perjury, tax evasion, and even the “gift of one marijuana cigarette.”⁴⁷

Additionally, Skilling argued on appeal that the district court made two decisions that precluded a meaningful *voir dire*. First, despite acknowledging that “it’s going to be a challenging task to pick a fair jury,” the court limited *voir dire* to just one day, and potential jurors were questioned for slightly over five hours.⁴⁸

Second, the court decided to prohibit individual attorney *voir dire* and conduct limited *voir dire* itself. The court relied heavily on leading self-assessment questions (e.g., “Can you nevertheless be fair and impartial?”), and used them as a bright-line test: if a juror said they could *not* be fair, they were excused; if a juror said they *could* be fair, they remained in the pool. Skilling contended that there was no independent assessment of whether these assurances of impartiality were trustworthy: the court simply took jurors at their word. As long

42. *Id.* at 136.

43. *Id.*

44. *Id.* at 153.

45. *Id.* at 154 (citing *Pamplin*, *supra*, 364 F.2d at 5).

46. *Id.* (emphasis in original).

47. *Id.* at 155.

48. *Id.* at 157.

as they ultimately said they could be fair—even if they expressed hesitation—a cause challenge was denied, regardless of bias.⁴⁹

The Government responded that the 14-page questionnaire asked potential jurors about their jobs, education, political views and party affiliation; relationship to Enron and to anyone affected by the Enron collapse; opinions about Enron and the government's investigation; sources of information about the case; the periodicals they

Skilling contended that there was no independent assessment of whether these assurances of impartiality were trustworthy.

read; and the Internet sites they visited. The questionnaire also asked whether the recipient was angry at Enron, had an opinion about the defendants or the defendants' guilt, and, if so, whether the juror could put aside that opinion and decide the case based on the evidence at trial.⁵⁰ After reviewing the completed questionnaires, the parties agreed to excuse 119 potential jurors for "cause, hardship, and/or physical disability." Shortly before trial, the court noted that its review of the jury questionnaires left it "very impressed by the apparent lack of bias or influence from media exposure."⁵¹

Further, the Government emphasized the fact that the court allotted the defendants two additional peremptory challenges beyond the 10 allowed by Federal Rule of Criminal Procedure 24(b)(2). During jury selection, the court qualified 38 potential

jurors, a sufficient number to allow each party to exercise peremptory challenges and select a jury of 12 with four alternates. After instructing and questioning the entire venire, the court questioned each potential juror at the bench, in the presence of counsel. The court asked each juror about his or her responses to the questionnaire, then allowed all counsel to question the potential jurors. Jurors were questioned for between one and nine minutes, for an average for each of roughly four and a half minutes.⁵² Thus, the Government contended, there was no evidence of actual prejudice tainting the jury.

The Government additionally asserted that Skilling failed to raise a rebuttable presumption of prejudice by "demonstrat[ing] that the populace from which his jury was drawn was widely infected by a prejudice apart from mere familiarity with the case."⁵³ Because "every case of any consequence will be the subject of some press attention," the presumption "is only rarely applicable in the most unusual cases," and is less likely to be triggered by "pretrial publicity, which creates a smaller danger of prejudice than does sensationalism occurring throughout the trial."⁵⁴ Pretrial publicity, the Government argued—even pervasive, adverse publicity—does not inevitably lead to an unfair trial, and a change of venue should not be granted on a mere showing of widespread publicity.

THE FIFTH CIRCUIT OPINION

Although the Fifth Circuit acknowledged that "[i]t would not have been imprudent for the court to have granted Skilling's transfer motion[.]" it held that the district court's refusal to do so was not reversible error.⁵⁵

49. *Id.* at 161.

50. Brief for the United States as Appellee, *U.S. v. Skilling*, Appeal No. 06-20885 (5th Cir. Nov. 14, 2007), at 140.

51. *Id.*

52. *Id.* at 141.

53. *Id.* at 150 (quoting *Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir. 1980)).

54. *Id.* (quoting *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir. 1982) (internal citations omitted)).

55. *United States v. Skilling*, 554 F.3d 529, 558 (5th Cir. 2009).

As an initial matter, the court determined that Skilling had waived most of his argument by failing to challenge jurors for cause during *voir dire*. In fact, of the twelve jurors who sat on the jury, Skilling had objected for cause to only one, and he did not challenge any of the alternate jurors for cause.

However, the Fifth Circuit held that there was sufficient inflammatory pretrial material to require a finding of presumed prejudice, especially in light of the immense volume of coverage.⁵⁶ Its review of the record led the court to the conclusion that the community bias in the Houston area was “inflammatory,” which the court defined as “tending to cause strong feelings of anger, indignation, or other type of upset; [or] tending to stir the passions.”⁵⁷ Local newspapers ran many personal interest stories in which sympathetic individuals expressed feelings of anger and betrayal toward Enron. In fact, the *Houston Chronicle* alone ran nearly one hundred such stories. The appeals court determined that the stories were hard to characterize as non-inflammatory, even if the stories were simply reporting the facts.

Perhaps more importantly, the Fifth Circuit noted that the district court had not considered the wider context of the case. The trial court had merely assessed the tone of the news reporting; however, the evaluation of the volume and nature of reporting is merely a proxy for the real inquiry: whether there could be a “fair trial by an impartial jury” that was not “influenced by outside, irrelevant sources.”⁵⁸ The district court overlooked that the prejudice came from more than just pretrial media publicity, but also from the sheer number of victims—not only those directly affected by

Enron’s collapse, but also those in related industries who were similarly affected, such as accounting firms that serviced Enron’s books, the hospitality industry, and even restaurants. The Fifth Circuit found that the collapse of Enron affected countless people in the Houston area, and the district court failed to account for any of this non-media prejudice.

Although the Fifth Circuit determined that there was sufficient evidence to raise a presumption of prejudice, it noted that the “presumption is rebuttable, ... and the government may demonstrate from the *voir dire* that an impartial jury was actually impaneled in appellant’s case.”⁵⁹ “An effective *voir dire* generally is a strong disinfectant of community prejudice, but it is especially important in cases such as this one with a great deal of prejudice.”⁶⁰

Finding that the district court conducted a proper and thorough *voir dire*, the Fifth Circuit determined that the question before it was whether the Government met its burden to show that the court did not actually empanel a juror who was unconstitutionally prejudiced. In light of Skilling’s failure to challenge for cause any of the impanelled jurors save one, the court concluded that the Government met its burden.⁶¹

SKILLING’S APPEAL TO THE SUPREME COURT

With respect to his fair-trial claim, Skilling’s petition to the Supreme Court for writ of *certiorari* focused on the Fifth Circuit’s determination that the presumption of prejudice due to pre-trial publicity was rebuttable by showing “from the *voir dire* that an impartial jury was actually impaneled.”⁶² Skilling asserted

56. *Id.* at 559.

57. *Id.* (citing BLACK’S LAW DICTIONARY 794 (8th ed. 2004)).

58. *Id.* at 560 (quoting *U.S. v. Chagra*, 669 F.2d 241, 249).

59. *Id.* at 561 (citation omitted).

60. *Id.*

61. *Id.* at 564–65.

62. Petition for Writ of Certiorari, 2009 WL 1339243, at *1, 29, *Skilling v. United States*, No. 08-1394 (U.S. May 11, 2009) (citation omitted).

that Supreme Court precedent demanded the conclusion that once a presumption of prejudice is found, “the juror’s claims that they can be impartial *should not be believed*”⁶³, and *certiorari* should be granted to resolve the split in the federal circuits as to whether a presumption of prejudice was rebuttable.⁶⁴ Further, Skilling argued that if the presumption were rebuttable, then the government was required to prove “beyond a reasonable doubt” that no seated juror was actually affected by the media and community bias.⁶⁵

Skilling’s petition for *certiorari* was supported by the National Association of Criminal Defense Attorneys as *amicus curiae*, who similarly argued that “once a presumption of prejudice arises from extreme community hostility or pervasive hostile publicity, it cannot be rebutted through *voir dire*.”⁶⁶

Not surprisingly, following the grant of *certiorari* by the Supreme Court, Skilling’s appeal attracted interest from numerous groups, who filed *amicus* briefs in support of Skilling,⁶⁷ the Government,⁶⁸ and neither party.⁶⁹ Most notably, several media outlets, including ABC, CNN, the Associated Press, the *New York Times*, the *Washington Post*, and the Media Law Resource Center filed a brief as *amici curiae* in support of the Government.⁷⁰ Concerned that a more liberal standard for a presumption of prejudice due to pre-trial publicity would “impose new

pressures upon trial courts to limit public and press access in high profile cases,” the media *amici* argued that the Supreme Court “should make plain that a presumption of prejudice must be based upon more than the existence of significant publicity, but rather requires additional prejudicial factors. Particularly in a large metropolitan area such as Houston, substantial publicity alone should never be sufficient to sustain a presumption of prejudice.”⁷¹ They additionally asserted that declaring a pre-trial presumption of prejudice to be irrebuttable, as Skilling urged, would incentivize the restriction of press coverage “in the very criminal prosecutions of greatest concern to the public[,]” and that “[s]uch a step would both weaken the integrity of the judicial system and undermine public confidence in the courts.”⁷²

Skilling’s appeal to the Supreme Court raised two questions with respect to his fair-trial claim. First, did the district court err by failing to move the trial to a different venue based on a presumption of prejudice? Second, did actual prejudice contaminate Skilling’s jury?

Writing for the majority, Justice Ginsburg answered both questions in the negative. She explained that the Court’s prior decisions “cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... presumptively deprives the defendant of due

63. *Id.* (emphasis in original) (citation omitted).

64. *Id.* at *30–31.

65. *Id.* at *34–35.

66. Amicus Curiae Brief of National Association of Criminal Defense Lawyers in Support of Petition for a Writ of Certiorari, 2009 WL 1931228, at *12, *Skilling v. United States*, No. 08-1394 (U.S. June 10, 2009).

67. See, e.g., Amicus Curiae Brief of National Association of Criminal Defense Lawyers in Support of Petitioner and Urging Reversal, 2009 WL 5017531, *Skilling v. United States*, No. 08-1394 (U.S. Dec. 8, 2009).

68. Brief of ABC, Inc., et al. as Amici Curiae in Support of Respondent, 2010 WL 38361, *Skilling v. United States*, No. 08-1394 (U.S. Feb. 2, 2010).

69. Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Neither Party, 2009 WL 4919360, *Skilling v. United States*, No. 08-1394 (U.S. Dec. 16, 2009).

70. *Brief of ABC, Inc., et al.*, n.68, *supra*.

71. *Id.* at *1, 3.

72. *Id.* at *1.

process.”⁷³ “Prominence,” the Court asserted, “does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*.”⁷⁴

The Court found that important differences separated Skilling’s prosecution from those in which juror prejudice had been presumed, such as the size and characteristics of the community in which the crime occurred. Given the large, diverse pool of potential jurors, the Court found Skilling’s suggestion that 12 impartial individuals could not be impaneled “hard to sustain.”⁷⁵

Moreover, although the news stories about Skilling were not kind, the Court noted they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. Finally, Skilling’s jury acquitted him of nine insider-trading counts, and earlier Enron-related prosecutions yielded no overwhelming victory for the Government. In *Rideau*, *Estes*, and *Sheppard*, in marked contrast, the jury’s verdict did not undermine in any way the supposition of juror bias.⁷⁶

The opinion also took issue with Skilling’s characterization of the *voir dire* and the jurors selected through it. The Court noted that the district court had not simply taken venire members who proclaimed their impartiality at their word, as Skilling contended. Rather, all of Skilling’s jurors had already affirmed on their questionnaires that they would have no trouble basing a verdict only on the evidence at trial.

Thus, the Supreme Court majority held:

In sum, Skilling failed to establish that a presumption of prejudice arose or that actual bias infected the jury that tried him. Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to deter

mine the facts impartially. “It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.” Taking account of the full record, rather than incomplete exchanges selectively culled from it, we find no cause to upset the lower courts’ judgment that Skilling’s jury met that measure. We therefore affirm the Fifth Circuit’s ruling that Skilling received a fair trial.⁷⁷

In a lengthy dissent on the venue issue, Justice Sotomayor, joined by justices Stevens and Breyer, argued that the Court’s conclusion that Skilling received a fair trial before an impartial jury was in error, citing court precedent that “the more intense the public’s antipathy toward a defendant, the more careful a court must be to prevent that sentiment from tainting the jury.”⁷⁸ Sotomayor concluded that the district court’s inquiry lacked the necessary thoroughness, and left serious doubts about whether the jury impaneled to decide Skilling’s case was capable of rendering an impartial decision based solely on the evidence presented in the courtroom.

However, Justice Sotomayor found it necessary to determine how the *Skilling* case compared to the Court’s existing fair-trial precedents, asking, “Were the circumstances so inherently prejudicial that, as in *Rideau*, even the most scrupulous *voir dire* would have been ‘but a hollow formality’ incapable of reliably producing an impartial jury? If the circumstances were not of this character, did the District Court conduct a jury selection process sufficiently adapted to the level of pretrial publicity and community animus to ensure the seating of jurors capable of presuming innocence and shutting out extrajudicial influences?”⁷⁹

Justice Sotomayor suggested that perhaps because it had underestimated

73. *Skilling v. United States*, 130 S. Ct. 2896, 2902, 177 L.Ed.2d 619, ____ (2010).

74. *Id.* (emphasis in original).

75. *Id.*

76. *Id.*, 130 S. Ct. at 2916.

77. *Id.* at 2925 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1966)).

78. *Id.* at 2942 (Sotomayor, J., dissenting).

79. *Id.* at 2952 (quoting *Rideau*, 373 U.S. at 726).

the public's antipathy toward Skilling, the district court's five-hour *voir dire* was manifestly insufficient to identify and remove biased jurors, and that the deficiencies in the form and content of the *voir dire* questions contributed to a deeper problem:

Justice Sotomayor suggested that the district court's five-hour voir dire was manifestly insufficient to identify and remove biased jurors.

that the district court failed to make a sufficiently critical assessment of prospective jurors' assurances of impartiality. Adopting the argument urged by Skilling below, Justice Sotomayor said that the district court essentially took jurors at their word when they promised to be fair, and that the court declined to dismiss for cause any prospective juror who ultimately gave a clear assurance of impartiality, no matter how much equivocation preceded it. "As this Court has made plain," she stated, "jurors' assurances of impartiality simply are not entitled to this sort of talismanic significance."⁸⁰

The manner in which *voir dire* played out was also a telling factor to Justice Sotomayor's analysis. When the district court asked the prospective jurors as a group whether they had any reservations about their ability to presume innocence and put the Government to its proof, only two answered in the affirmative, and both were excused for cause. The district court's individual questioning, though truncated, exposed disqualifying prejudices among numerous additional prospective jurors who had earlier expressed no concerns about their impartiality.

She opined that this argument, however, mistook partiality with bad faith or blind

vindictiveness, and that jurors who act in good faith and sincerely believe in their own fairness may nevertheless harbor disqualifying prejudices. And while they may well acquit where evidence is wholly lacking, will subconsciously resolve closer calls against the defendant rather than giving him the benefit of the doubt.

In sum, Justice Sotomayor could not accept the majority's conclusion that *voir dire* gave the district court "a sturdy foundation to assess fitness for jury service," and that "taken together, the District Court's failure to cover certain vital subjects, its superficial coverage of other topics, and its uncritical acceptance of assurances of impartiality leave me doubtful that Skilling's jury was indeed free from the deep-seated animosity that pervaded the community at large."⁸¹

HOW MUCH COVERAGE IS TOO MUCH?

The Supreme Court's decision in *Skilling* is notable for the Court's refusal to expand its jurisprudence regarding the circumstances in which juror prejudice due to pretrial publicity will be presumed. Although the conduct of the *Skilling* trial may not have been the "media circus" the Supreme Court found so repugnant in *Estes* and *Sheppard*, or involved an ill-gotten televised confession to a heinous crime as in *Rideau*, the *Skilling* trial and the events that preceded it were undeniably newsworthy and the subject of extensive coverage.

The Court's analysis of the tone of such coverage to determine whether it was presumptively prejudicial ignored the magnitude of the tragedy caused by the crash of Enron and the particularized feelings of animosity toward the Enron defendants in the Houston community as a result of the collapse. Arguably, extensive, negative pretrial publicity was unnecessary in the *Skilling* trial to cause community prejudice. As Skilling contended on his appeal to the

80. *Id.* at 2959.

81. *Id.* at 2963.

Fifth Circuit, it is the tragedy that causes the community sentiment; the media coverage only reflects, reinforces, and amplifies the sentiment.

Further, in an age when news is no longer disseminated solely by traditional media, and where minor stories of limited publication quickly can go “viral” on Facebook, Twitter, or YouTube, it will be increasingly difficult for trial courts to accurately gauge the impact of trial publicity. Indeed, at least one criminal defendant recently unsuccessfully sought a new

trial on the basis of, *inter alia*, multiple reporters “Tweeting” during his trial and describing such things as the jurors’ reactions to various aspects of the proceeding.⁸² Although such conduct may not warrant a finding of presumptive prejudice, in the age of social media it is necessary that proper safeguards, such as extensive *voir dire* and strict instructions to jurors not to read, listen, follow, or watch anything concerning the case, be implemented to prevent actual prejudice from entering the jury box.

82. See Motion for New Trial and/or New Penalty Phase Hearing or the Imposition of a Life Sentence Without the Possibility of Release, *Connecticut v. Hayes*, No. CR07-0241859, (Conn. Super. Ct., New Haven Jud. Dist., Nov. 17, 2010); see also William Glaberson, *Cheshire Appeal Will Point to Twitter*, N.Y. TIMES, Dec. 1, 2010, <http://www.nytimes.com/2010/12/02/nyregion/02cheshire.html>. An appeal is expected. *Id.*

