Supreme Court Case Summaries: Professor Rory Little's Perspective

A Service from the ABA Criminal Justice Section, *http://www.abanet.org/crimjust*

These summaries are written by Professor Rory K. Little (littler@uchastings.edu), U.C. Hastings College of the Law, San Francisco, who has long presented "Annual Review of the Supreme Court's Term" program at the ABA's Annual Meetings. They represent his personal, unofficial views of the Justices' opinions. The original opinions should be consulted for their authoritative content.

The CJS hopes these summaries will be helpful to members, because they are different from the average news or blog account, in at least three ways: first, a detailed account of the rationale of ALL the opinions issued in a case, including nuances found in separate concurring and dissenting opinions; second, an account of the decision that is essentially "neutral" -- that is, not really a "perspective" in the sense of the author's personal opinions, but rather a straightforward account that can be relied upon by lawyers of all stripes; and then third, a bit of "inside baseball" analysis of some of the twists or nuances that are not apparent in the opinion.

U.S. Supreme Court Summaries – Criminal Cases June 24, 2010

1) Mail/Wire Fraud and "Honest Services" – Three cases:
Skilling v. United States
Black v. United States
Weyhrauch v. United Sates

2) Habeas Corpus – "Second or Successive" Petitions
Magwood v. Patterson (Warden)

Mail/Wire Fraud and "Honest Services" – Three cases:

Skilling v. United States, http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf
Black v. United States, http://www.supremecourt.gov/opinions/09pdf/08-876.pdf
Weyhrauch v. United Sates, http://www.supremecourt.gov/opinions/09pdf/08-876.pdf

On June 24, the Court issued its long-awaited opinions in the trio of "honest services" mail and wire fraud cases. **The Court (6-3) upheld the "honest services" statute, but limited it to schemes of "bribery and kickbacks."** Interestingly, in the lead case of former Enron CEO Jeff Skilling, the Court's major effort was spent not on mail fraud, but on the pretrial-publicity juror bias claims that Skilling presented, and the *Skilling* opinion will stand more as a major decision in that constitutional area than on the statutory definition (which is changeable by Congress) of mail fraud. Each holding (due process and mail fraud) was a 6-3 vote, but different Justices were the dissenters on each. And, perhaps significantly or perhaps not, this is the first decision in which the two women on the Court disagreed in written opinions, Justice Ginsburg writing the majority and Justice Sotomayor dissenting on the due process-fair trial ruling.

The various *Skilling* opinions consume 114 pages. The Court also eclipses what probably was not a record of three days ago (the six-page syllabus in *Humanitarian Law*

Prroject) with a nine-page syllabus here. Yes, there are a lot of pages here, but nine pages for an allegedly accessible "summary" of the opinion is, for the Court, pretty silly.

In *Black*, the Court applied its *Skilling* mail fraud ruling to hold that Conrad Black's jury instructions were erroneous, and remanded for a harmless-error analysis (as it did in Skilling). The Court also reversed the Seventh Circuit's ruling that Black had forfeited his jury instruction challenge by opposing the government's more-precise special verdict form, and provides an important discourse on courts of appeal imposing sanctions that the Federal Rules of Criminal Procedure don't specify, without notice.

Finally, in one sentence the Court simply vacated the Ninth Circuit's ruling in *Weyhrauch* and remanded for further proceedings in light of *Skilling*.

Summaries of the various Justices' opinions follow.

FIFTH AMENDMENT DUE PROCESS -- SIXTH AMENDMENT "IMPARTIAL JURY" REQUIRMENT (Pretrial publicity and adequate voir dire); and FEDERAL STATUTES (Mail/Wire Fraud and "Honest Services")

Skilling v. United States, No. 08-1394, 130 S.Ct. ___ (June 24, 2010), reversing in part, affirming in part 554 F.3d 529 (5th Cir. 2009).

Holdings: 1. Constitutional Due Process (6 [5-1] - 3): Despite extensive adverse pretrial publicity in Enron case, a "presumption" of juror bias was not warranted, a change of venue was not constitutionally required, and **the voir dire here was sufficient to ensure a fair trial.**

2. Mail Fraud (6-3): The mail/wire fraud statutes' definition of **a scheme depriving of "honest services" must be restricted to bribery or kickback schemes,** to avoid unconstitutional vagueness.

Facts: Honest Services: In 2001, Enron Corporation went bankrupt, and (relevant to the pretrial publicity discussion below), I will assume the reader is somewhat familiar with the massive adverse publicity and hostility this generated, against Enron, it's officers, and "corporate greed" in general, particularly in Houston where Enron, and this trial, were located. Skilling was Enron's CEO at the time, and he and Enron founder Kenneth Lay (who died after conviction) were indicted in 2004 for mail/wire fraud and securities fraud. The mail fraud counts charged that the defendants deceived their shareholders and the public regarding Enron's financial status through various deceptive schemes, and thus deprived Enron and its shareholders of "the intangible right of [their] honest services." Congress had expressly amended the mail fraud statute in 1987, after the Supreme Court's *McNally* (1987) decision limiting mail fraud to schemes to deprive of "money or property," to permit indictment for schemes to deprive of "honest services." The Courts of Appeal had diverged widely on precisely what the "honest services" concept required, but unanimously upheld it against constitutional vagueness attacks. Here, the Fifth Circuit upheld Skilling's mail fraud convictions without addressing his argument that "honest services" is unconstitutionally vague.

Impartial Jury Selection: Prior to his trial, Skilling moved for a change of venue due to massive adverse publicity. The showing of such publicity was quite impressive, although the district court described the publicity as "mostly … objective and unemotional" and not "sensational" – two findings that are frankly hard to accept on the record that both the majority and the dissent detail. The district court denied the change of venue motion, but agreed to implement special jury selection procedures. The court adopted the defense's more detailed jury questionnaire and sent out a 77-question 14-page document before trial. The

court also agreed to allow individual private questioning of each juror, including follow-up questioning by the lawyers. And the court allowed each defendant an extra peremptory challenge. Then, two weeks before jury selection was scheduled to begin, a third Enron co-defendant, Causey, pled guilty. The district court declined to send out a new questionnaire or move the trial, but did grant a two-week delay.

The selection of 12 jurors and 4 alternates took [only?] five hours. A number expressed opinions about the defendants' guilt and other biases, and many jurors were dismissed for cause. Skilling objected to the final jury. After a four-month trial, the jury convicted Skilling on 19 counts, but acquitted on 9 insider training counts. The Fifth Circuit ruled that a presumption of bias was, indeed, required on this record, but that the district court's "thorough" voir dire rebutted the presumption, and Skilling had not shown that any biased juror was actually seated. So his convictions, and lengthy sentence, were affirmed.

Ginsburg: Due Process (5-4, joined by Roberts, Scalia, Kennedy and Thomas): The Sixth Amendment guarantees a defendant trial in the district where the crime is committed. But constitutional due process, "if extraordinary local prejudice will prevent a fair trial," may require a change of venue. **[Ed. Note:** The Court does not make clear whether this is a Due Process "fair trial" case, or a Sixth Amendment "impartial jury" case.] But not here. First, this is not the "extreme" case that requires a "presumption" of prejudice. In some of our prior cases, "a trial atmosphere that was utterly corrupted by press coverage" demanded it; but "prominence does not necessarily produce prejudice," and "juror impartiality does not require ignorance" (*Irvin*, 1961). Unlike some prior cases, Houston is a huge metropolitan area with a diverse jury pool and it is "hard to sustain" the idea that 12 impartial jurors could not be found there. No evidence of a confession or other "smoking gun" evidence was publicized here. Four years elapsed between Enron's collapse and the trial. "And of prime significance," the jury here acquitted Skilling on 9 counts. Nor does the "sheer number of victims" require a presumption of prejudice; and here, "hindsight shows" that the empanelled "jurors' links to Enron were either nonexistent or attenuated." No venue change was constitutionally required. [**Ed. Note:** Interestingly, the Court unanimously agrees that a possibly more generous challenge to venue under FRCrP 21(a) is either not before the Court or forfeited. See dissent footnote 9. Skilling's lawyers must feel great about that.]

As for "actual prejudice" infecting Skilling's jury, "we disagree with Skilling's [and the dissent's] characterization of the *voir dire* and the jurors selected." [**Ed. Note:** The detailed and fact-specific analyses of the majority and dissent, of juror questions and responses, will mercifully be omitted here. Needless to say, the majority's and the dissent's chosen fact-details paint different pictures on the point.] But it is important to note how deferential appellate courts need to be, to district courts' assessments on the scene, which include not just local knowledge **[Ed. Note:** shall we also add local prejudices?] but also impressions of credibility and demeanor. The judge here took special measures and seemed attuned to the need to select fair jurors, and the record cannot support a conclusion that it was "fundamentally unfair." The judge "did not simply take venire members … at their word," but followed up individually with a "face-to-face opportunity to gauge" demeanor. Although Skilling claims bias here, at trial he only challenged one of the seated jurors for cause. "Taking account of the full record, rather than incomplete exchanges selectively culled from it," unconstitutional jury bias or selection is not proved.

Ginsburg: Mail/Wire Fraud and Honest Services (6-3, joined by Roberts, Stevens, Breyer, Alito and Sotomayor): When Congress enacted the "honest services" statute after *McNally*, it clearly intended to extend mail fraud to "at least bribery and kickback" schemes. In fact, the great bulk of such prosecutions involve bribery and kickbacks (as did *McNally*). We think there is substantial merit to the argument that extending the honest services concept beyond bribery and kickbacks is unconstitutionally vague, at least without further clear guidance from Congress. (And, footnote 45, Congress would have to take "particular care" if it tried to do this – we think it would be pretty hard.) But we think that Congress would prefer that the statute be upheld and restricted to this "salvageable core" meaning, rather than entirely stricken. The statute should be "construed rather than invalidated" if possible. We have used such a "limiting construction" technique before (see, *inter alia*, *Booker*), and our construction today "preserve[s] what Congress certainly intended the statute to cover." **[Ed Note:** The Court does not confront the idea that, if Congress intended to extend mail fraud beyond *McNally's* restriction to "money or property," then doesn't restricting "honest services" to bribery or kickbacks make the "honest services" amendment merely redundant? That is, don't all bribery and kickback schemes involve depriving someone of money or property?]

We will not go further as the government asks and include "undisclosed self-dealing" schemes within the mail fraud statute. It is too "amorphous" and the Circuit opinions have many "inconsistencies." [Ed. Note: The Court actually cites, on page 44, an amicus brief filed solely by "Albert W. Altschuler as *Amicus Curiae*" in *Weyhrauch*, an unusually specific public acknowledgment of assistance. The Court also cites to a CA2 opinion written by then-Judge Sotomayor in 2007.]

However, although Skilling's mail fraud convictions, which involved neither bribery or kickbacks, cannot stand, his securities fraud convictions might, and even his single conspiracy count might (although it alleged three separate violations including the now-invalid mail fraud), because such "*Yates*" errors are subjected to harmless error analysis (*Hedgpeth*, 2008). So, remanded.

Alito, concurring: In my view, the Sixth Amendment's guarantee of an "impartial jury" is satisfied "so long as no biased juror is actually seated at trial." "I share some of Justice Sotomayor's concerns about … voir dire in this case and the trial judge's findings" of impartiality. "But those highly fact-specific issues are not within the question presented." So I don't join the Court's opinion on the jury, but I concur in the result.

Scalia dissenting in part (joined by Justices Thomas and, in part, Kennedy): I agree about the jury issues. But I don't think the Court has the power to "invent" a definition of mail fraud not specified by Congress. The "honest services" statute is impermissibly vague and we should simply strike it. Federal courts do not have the power "to define new federal crimes." **[Ed. note**: It is interesting to contrast Justice Scalia's strong statement of the constitutional void-for-vagueness doctrine here, with the majority opinion's rejection of a vagueness claim in *Humanitarian Law Project* just three days ago.] I agree with the majority that what Congress intended in 1987 was to re-capture the courts of appeals' concept of "honest services" that existed before *McNally*. But that concept was not limited to bribery and kickbacks, and not one of the many lower court opinions ever used those words. (This is a bit of an overstatement, the majority cites two such cases.) Instead, the courts of appeals embraced a remarkably diverse and "indeterminate" set of ideas, that were "hopelessly undefined." Out of the "smörgåsbord" [yes, Justice Scalia makes sure to include

these vowel symbols] of conflicting lower court decisions, bribery and kickbacks is "a dish the Court has cooked up all on its own." It is "clearly beyond judicial power" for us to exercise a "paring down" function. Congress can, if it wants to.

Sotomayor dissenting (joined by Stevens and Breyer): **[Ed. Note:** Justice Sotomayor's opinion is 40 pages long and consists mostly of disturbing fact-specific examples of media and juror biases against Skilling, largely not repeated here.] The majority "understates the breadth and depth pr community hostility toward Skilling, and overlooks significant deficiencies in the district Court's jury selection process." After detailed review, I have "serious doubts" about whether Skilling's jury "was capable of rendering an impartial decision," so I would grant relief. I agree with the "honest services" portion of the opinion.

The ties and impact of Enron on the Houston community was extremely huge. The entire U.S. Attorneys office there recused. The expert analysis of media said the hostility and pervasiveness was unprecedented. Jurors that responded to the questionnaire showed this. *E.g.*, "biggest liar on earth;" "I believe they are all guilty." Jurors did not always tell the truth, *e.g.*, one juror (not seated) who had said on the questionnaire that he could be impartial, said when examined "I would love to claim responsibility for putting these sons of bitches away." "Formalistic" analysis is inadequate; "the inquiry is necessarily case-specific." "A jury's word" on impartiality" is not decisive" in all cases, particularly where immense community prejudice can be shown. I do agree that a change of venue was not constitutionally required (but maybe under Rule 21(a) if not forfeited). The district court's voir dire was not thorough, it was "cursory" and its questioning was "anemic" at times. Lots of suggestions of bias weren't followed up on and the judge "accepted declarations of impartiality that were equivocal on their face." Meanwhile, Enron was a "once-in-a-generation" event. Skilling hired private security guards to protect him. The passage of time actually heightened the hostility. "The extraordinary circumstances of this case" lead me to conclude that Skilling's "right to a fair trial before an impartial jury" was violated.

FEDERAL RULES (Special Verdict forms and Objections to Jury Instructions)

Black v. United States, No. 08-876, 130 S.Ct. ____ (June 24, 2010), reversing 530 F.3d 596 (7th Cir. 2008).

Holding (9 [6-2-1] – 0): Where a defendant preserves his objections to jury instructions by objecting, **he does not "forfeit" the objection by opposing a government-proferred special verdict form that might obviate the jury instruction difficulty, at least not without notice** that FRCrP 57(b) requires.

Facts: Black and codefendants were tried for mail fraud, on two theories. One was that they "stole millions" from their company (*i.e.*, deprived of money or property) through deceit, and the other was that their deceit deprived the company of their "honest services" as company executives. After a four-month trial, the jury was instructed on both theories; defendants objected to the "honest services" instruction but were overruled. But to "aid appellate review," the government then asked the court to employ a special verdict form that would show, if the jury convicted, whether it used the "money or property" or "honest services" theory, or both. The defendants objected to any special verdict form (as opposed to a standard "general verdict" of guilty or not guilty). Instead, the defendants proposed that if the jury convicted, they be asked which theory they had

used. The district judge rejected this post-verdict inquiry idea, and the government then dropped its objection to using a general verdict form. The jury convicted defendants of mail fraud. On appeal, the Seventh Circuit ruled that defendants had "forfeited" their objection to the honest services instruction, by opposing the special verdict form that would have clearly indicated whether the jury had relied on that theory or not, and thus could possibly have "mooted" the honest services objection (if the jury had not, in fact, relied on that theory).

Ginsburg (joined by Roberts, Stevens, Breyer, Alito, and Sotomayor. Scalia, joined by Thomas, and Kennedy, concur in part and in the judgment): First, because this case did not involve kickbacks or bribery, the prosecution on a broader theory, and the jury instructions on honest services, were invalid. We also rule that the **defendants did not "forfeit" their objections, as a matter of interpretation under the Federal Rules of Criminal Procedure.** First, the Rules do not expressly authorize "submission of special questions to the jury." This "counsels caution," although "we do not mean to suggest that special verdicts in criminal cases are never appropriate." Second, Rule 30(d) provides what defendants must do to preserve an objection to jury instructions (state the "specific objection and the grounds"), and they undisputedly did that here. Third, the federal rules do not permit the court of appeals to "devise a forfeiture sanction unmoored to any federal statute or rule," at least without notice to the defendants, because Rule 57(b) requires notice for any sanction "imposed for noncompliance with any requirement not in federal law or federal rules." So, just as in *Skilling*, we remand for consideration of harmless error.

Scalia, concurring in part, with Thomas: I join the Court's opinion with two exceptions. First, I don't think we should rely on an Advisory Committee Note, as the majority does, because it is "not authoritative." Second, the honest services instruction here was wrong because that part of the statute is void, as I said in *Skilling*, not because their was no bribery or kickbacks.

Kennedy, concurring in part: I joined Justice Scalia in *Skilling*, and that opinion makes clear my view that "to convict a defendant based on an honest services fraud theory, even one limited to bribes or kickbacks," would be unconstitutional.

Habeas Corpus – "Second or Successive" Petitions

Magwood v. Patterson (Warden),
http://www.supremecourt.gov/opinions/09pdf/09-158.pdf

With an unusual array of Justices, the Supreme Court ruled in favor of a capital defendant on federal habeas on June 24, in a 5-4 vote, with Justice Thomas writing the majority and joined by Justice Scalia (as well as Justices Stevens, Breyer and Sotomayor). Meanwhile, the dissenters were Justices Kennedy, Roberts, Ginsburg and Alito, an unusual combination. But this confused array is simply reflective of the Court's confused precedents attempting to apply Congress's confusing 1996 AEDPA statute. Bottom line: if you succeed in obtaining a new judgment from your state court after an initial federal habeas petition, the first petition from that new judgment (at least if challenging only the new sentence) is not "second or successive," even if it presents claims that might have been raised in the prior habeas petition from the prior judgment. "An error made a second time is still a new error."

HABEAS CORPUS – First petition from a new judgment not "second or successive" even if claims might have been raised in prior federal habeas petition.

Magwood v. Patterson (Warden), No. 09-158, 130 S.Ct. ___ (June 24, 2010), reversing 555 F.3d 968 (11th Cir. 2009).

Holding: When a petitioner obtains a new judgment imposing his state court capital sentence, after succeeding on challenge to the sentence in a federal habeas petition, a second federal habeas petition filed to challenge that new sentencing judgment is not dismissable as "second or successive," even if the claims to attack the sentence in the new habeas petition might have been raised in the prior habeas petition from the old judgment.

Facts: Like all Supreme Court habeas cases, this one is procedurally somewhat complex, even though the question to be decided ends up being relatively simple. Magwood was convicted of shooting an Alabama sheriff and sentenced to death in 1981. **[Ed. Note:** Wow! 29 years ago – Magwood was then 27 years old.] Although there was no finding of a statutory aggravating factor at the time, the state courts ruled that shooting a sheriff while on duty or for official acts is "by definition" aggravating to make the defendant death-eligible. In addition, the state courts did not consider Magwood's mental problems as a mitigating circumstance. In a federal habeas petition from the final state court judgment **[Ed. Note:** filed 8 days before his scheduled execution in 1984], Magwood presented a challenge to his death sentence based on the failure to find the mental health mitigating circumstance, and the district court ordered that Magwood be resentenced for that error. Magwood did not at that time present any claim relating to the absence of a statutory aggravating factor.

On remand, the state court conducted what it said was "a complete and new assessment of all the evidence, arguments of counsel, and law," and after considering Magwood's mental problems as a mitigator, it again imposed a death sentence. Magwood's attorney in this resentencing did not present any argument relating to the absence of a statutory aggravator.

After his state court resentencing, Magwood filed appeals, and for the first time argued that his death sentence was unconstitutional because he had no fair notice that his offense could make him death eligible for a nonstatutory aggravating circumstance. Also (presumably through new counsel) Magwood argued that his resentencing attorney had rendered unconstitutional ineffective assistance for not raising that argument. The state courts denied his claims, finding that his nonstatutory aggravator claim had previously been settled by the Alabama courts. Magwood then filed a federal habeas petition raising the same two constitutional claims. The district court found that this was not a "second or successive application," which might require dismissal under AEDPA (28 U.S.C. § 2244(b)), because it was the first petition from the new judgment. The federal habeas court then ruled for Magwood on the merits. But the Eleventh Circuit reversed, ruling that because the nonstutuory aggravator constitutional claim could have been presented in Magwood's initial habeas petition, but wasn't, his second petition raising that claim was "second or successive" and was required to be dismissed under AEDPA.

Thomas (5-4, joined by Stevens, Scalia, Breyer and Sotomayor): We think the text of the statute requires that **Magwood's first petition from a new judgment not be treated as "second or successive."** Section 2244(b) is not a "claims-focused statute." Rather, it "must be interpreted with respect to the judgment challenged," because the federal habeas statute, § 2254, focuses on "the

judgment" that authorizes the state custody that is challenged. "It is well-settled that the phrase ["second or successive"] does not simply refer to all § 2254 applications filed second or successively in time." *Panetti v. Quarterman* (2007). The state's and the dissents's arguments regarding AEDPA's "purpose" are speculative and cannot override the text. [The Court discusses various pre- and post-AEDPA precedents, notes some confusion among them, but points out that none of them involved a first federal habeas petition from a new state court judgment after resentencing, even though a second petition overall.] Neither can pre-AEDPA "abuse of the writ" precedents override the now-governing statutory text. "Pre-AEDPA cases cannot affirmatively define the phrase 'second or succesive' as it appears in AEDPA." There is a "complex history" to the phrase, and "we must rely on the current text." Even in a close precedent here, *Burton v. Stewart* (2007 *per curiam*), we noted that "the case might have been different had there been a 'new judgment intervening between the two habeas petitions.'"

Thus we hold that "this is Magwood's *first* application challenging the intervening judgment. ….An error made a second time is still an error." By the way, we think the dissent's claim that "abusive" claims will now be authorized is "greatly exaggerated." "Abuse of the writ" principles will still apply, but not to first petitions from new sentencing judgments. Magwood is not here challenging his initial conviction, but only the sentence part of his new judgment. Moreover, the State's procedural default arguments as to Magwood, although rejected by the district court, still remain for the Court of Appeals to review here, on remand.

Breyer, concurring (joined by Stevens and Sotomayor): I don't join part IV-B of the majority, because I want to emphasize that the majority "neither purports to alter nor does alter our holding in *Panetti*…. [T]he Court's decision today and our decision in *Panetti* fit comfortably together."

Kennedy dissenting (joined by Roberts, Ginsburg and Alito): "By misreading precedents," the majority decides that a prisoner may file a second petition that presents previously unraised claims even if it constitutes an "abuse of the writ." This contravenes the "design and purpose of AEDPA." We said in *Panetti* that a court must look first to the "claim" in a second petition, and decide if there was a "full and fair opportunity" to raise it. If there was, then the petition is "successive" and should be dismissed. The habeas statute is not textually tied to the "judgment," as *Panetti* holds – the part of a different part of the habeas statutes that the majority cites for this is irrelevant to the 2244(b) statute.

Here, the alleged error "could have and should have" been raised in Magwood's first federal habeas petition. It is true that "no previous case from this Court has dealt with the precise" procedural posture here; but our conclusion that it should be viewed as "successive" because it is abusive flows from the *Panetti* analysis. Magwood had a full and fair opportunity to raise his claim the first time he filed, and the "new" judgment that did not address that issue should make no difference. The majority's addition of a "same judgment" qualifier to "second or successive" is "atextual." And its suggestion that its "new judgment" rule extends only to the sentencing part of the judgment, and not the underlying conviction, goes even further away from text.

Finally, the majority's decision "disregards AEDPA's principles of comity, finality and federalism." The Court's reassurance that abusive claims will be easily disposed of is "cold comfort to overworked state district attorneys, who will now have to waste time and resources writing briefs and analyzing dozens of claims that should be barred by abuse-of-the-writ principles." Congress did not intend such an "irrational result." The majority "create[s] a new loophole that

petitioners can exploit," and "my respectful submission" is that the majority is wrong.