

Professor Gershowitz appeared in Mary Flood's column in the Houston Chronicle about Jeffrey Skilling's case being accepted by the Supreme Court.

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Skilling review fuels debate over Enron prosecutors

By MARY FLOOD

Was it faulty prosecution or brilliant defense work that made Jeff Skilling's case the third Enron-related conviction to be chosen for scrutiny by the very selective U.S. Supreme Court?

It previously ruled on the case of Enron's accountants, the Arthur Andersen firm, and former Enron broadband executive Scott Yeager. Legal experts say it's unusual for the court to take up so many cases stemming from one matter.

Some say it shows prosecutors were too aggressive and creative with the law; others suggest it shows what a lot of money and skilled defense lawyers can do post-trial.

The Supreme Court gets about 10,000 requests a year and typically picks fewer than 80 cases to hear, usually ones raising legal issues that might prompt the high court to overturn lower courts' rulings. It generally reverses 65 percent to 75 percent of the cases it hears, and that's what it did in the prior two Enron-related cases it heard.

In the case of Andersen, convicted by a jury of obstruction of justice, the court unanimously ruled in 2005 that a trial judge's jury instructions were flawed and sent the case back for trial. But by then Andersen, once among the world's top accounting firms, had been destroyed and prosecutors did not push for a retrial.

In the Yeager case, the Supreme Court ruled this year that the broadband executive cannot be retried on some charges because a jury in 2005 acquitted him of intertwined charges in the same alleged scheme.

Skilling, the former Enron CEO who was convicted on 19 counts and is serving a 24-year prison term, raised two issues in convincing the court to review his convictions.

He contends that pretrial publicity and the effect of Enron's collapse on the Houston community tainted the jury pool.

He also says that some of his convictions were based on the theory that he failed to provide "honest services" to his employer and that the term isn't clearly defined in the law.

"This is a slap at the prosecution," Houston lawyer David Berg said. "These cases were over-indicted and showed an absence of a sense of justice."

Barry Pollack, a Washington lawyer who tried two Enron cases, agreed.

"The Enron Task Force doesn't have a great record on appeal," Pollack said.

After the court announced Tuesday it would take up Skilling's case, a Department of Justice spokeswoman said prosecutors would not comment.

In addition to the Supreme Court cases, Pollack noted, a circuit appeals court overturned several Enron-related cases alleging sham sales of power-generation barges.

“When you are too aggressive and creative and take novel approaches, it can backfire,” he said.

Jacob Frenkel, a Washington lawyer and former federal prosecutor, said prosecutors look for opportunities to develop new, aggressive theories to expand their arsenal and Enron was an opportunity for that.

“The government has used the Enron cases, beginning with Arthur Andersen, to stretch the elastic on legal theories,” he said. Frenkel called the Enron case “the prosecutor's lab” for pushing the honest services fraud theory.

Adam Gershowitz, a University of Houston law professor who has followed the Enron cases, doesn't think it was prosecutors pushing the envelope to criminalize business failures that led to the three cases being chosen.

“A better explanation is that lots of money buys good lawyers. Jeff Skilling's case likely would never have made it to the Supreme Court if he didn't have an exceptional legal team with the smarts and manpower to spot, tee up and preserve a huge number of legal issues,” Gershowitz said.

Gershowitz said when you combine an enormous legal defense machine and a complicated case raising numerous legal issues, you have a situation where multiple instances of Supreme Court review are possible.

Philip Hilder, a Houston lawyer who represented Enron witnesses and used to be a federal prosecutor, thinks it was the defense work, too.

“This underscores the difficulty of prosecuting a white-collar case where the defendant is well-funded, putting them on par with the government,” Hilder said.