



Five Years Later, Skilling's Sentence Is Still Up in the Air

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On Sunday, October 16, 2011, [an op-ed article by founding partner Jeff Ifrah and associate Jeff Hamlin](#) appeared in the *Houston Chronicle*. The article discusses the upcoming resentencing of former Enron CEO Jeffrey Skilling and the fact that it is now close to the fifth anniversary of his conviction.

The following is the full text of the article:

Five years later, Skilling's sentence is still up in the air

Oct. 23, 2011, will mark the five-year anniversary of Jeffrey Skilling's sentencing and, remarkably, no one yet knows what the former Enron CEO's final sentence will be.

In May 2006, Skilling was convicted in the wake of Enron's collapse on one count of conspiracy, 12 counts of securities fraud, five counts of making false statements to auditors and one count of insider trading. Five months later, U.S. District Judge Sim Lake sentenced Skilling to 292 months – more than 24 years – in prison and assessed \$45 million to be paid in restitution.

But given the vagaries of the federal sentencing system, Skilling, who is now serving time in a prison in Englewood, Colo., could end up serving that same 24 years, or significantly more time, or even significantly less time, for the crimes that he committed as leader of Enron. Skilling is currently scheduled for release on Feb. 21, 2028, when he will be 74 years old. He could, however, end up getting out of prison well before that and still in the prime of life – or he might serve what amounts to a life sentence.

Since the sentencing, Skilling's legal team has achieved some victories. In January 2009, the U.S. Court of Appeals for the 5th Circuit vacated Skilling's sentence on the grounds that the district court misapplied the federal sentencing guidelines. The next year, however, the U.S. Supreme Court held that the trial record didn't support a conviction on one of the prosecution's key theories – conspiracy to commit "honest services" wire fraud. But Skilling suffered a defeat last April, when the 5th Circuit upheld his conspiracy conviction and found this "honest services" error to be harmless.

With all that, though, Skilling still needs to be resentenced, and Judge Lake has not yet set a date for the resentencing.

The federal system under which Skilling was sentenced tries to bring about fairness and uniformity by assigning a number to each defendant, depending on the crime of which he or she was convicted, and then pushing that number up or down based on various





factors specified in the sentencing guidelines. That final number determines how many months the person must serve. Under the guidelines in effect when Skilling committed his crimes at Enron, he started with a “base offense level” of 6. At his initial sentencing, the court chose to increase that number all the way up to level 40. This 34-level jump included a four-level increase for “substantially jeopardizing the safety and soundness of a financial institution.”

That four-level increase could make a lot of difference. The sentencing judge applied the increase based on a finding that Skilling’s conduct caused Enron’s bankruptcy, which, in turn, caused devastating losses to Enron’s corporate retirement funds. Taken together, Skilling’s sentence level and his lack of a criminal history gave him a sentencing range of 292 to 365 months. The court imposed a sentence at the bottom of that range. That’s where the current 24-year sentence came from.

On appeal, Skilling argued that the district court’s application of the four-level increase was erroneous because Enron’s retirement plans were not “financial institutions” under the guidelines. The 5th Circuit agreed, finding that Enron’s Corporate Savings Plan and Employee Stock Ownership Plan did not fall within the guidelines’ definition of a “financial institution.”

We will see what impact this ruling will have on Skilling’s sentence. The judge could simply eliminate the four-level boost. That would give Skilling a sentence between 188 to 235 months. If the court opts for the bottom of the range as it did the first time, Skilling’s sentence will be 15 years and eight months – roughly nine years less than his current sentence.

Alternatively, the court could keep Skilling’s sentence at 24 years, or even make it more draconian by using a catch-all provision of the guidelines known as Section 5K2.0. Under Section 5K2.0, the court may increase a sentence to account for aggravating circumstances “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.” The prosecution might argue this way: Because Judge Lake mistakenly thought that the “financial institutions” provision applied, he didn’t consider the catch-all provision. Now that the appeals court has ruled out the “financial institutions” increase, Section 5K2.0 provides the only means to account for the harm Skilling caused thousands of Enron employees who lost their retirement savings.

To determine how high to go under Section 5K2.0, the judge could look to a later version of the guidelines. In 2003, the U.S. Sentencing Commission revised the guidelines to include a four-level increase for a crime that endangered the solvency or financial security of an organization that was publicly traded or employed at least 1,000 people or substantially endangered the solvency or financial security of 100 or more victims. That sounds a lot like what happened at Enron. In fact, it’s possible that the



commission added these provisions precisely because the harms Skilling caused weren't adequately addressed under the existing guidelines. Of course, the 2003 revisions don't strictly apply to Skilling; he committed his crimes before then. But the revisions could help the judge make his ruling.

Thus Skilling could be resentenced to 24 years, his original sentence, or even more. A four-level increase would easily support another 24-year sentence. A six-level increase would give him a sentencing range of 30 years to life.

But the judge won't likely go in this direction. For one, courts rarely increase a defendant's sentence the second time around in the absence of new evidence. Also, the judge could have given Skilling a 30-year sentence the first time but decided to look at the bottom of the range instead. We are not aware of any new evidence to support a harsher result. Finally, codefendants Richard Causey and Andrew Fastow are currently serving sentences in the five- to six-year range. Skilling's initial sentence was already four to five times greater, by comparison. The sentencing judge is not likely to make that disparity any larger. If he does, our prediction is that another round of appeals is sure to follow.

Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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