

CRIMINAL LAW: EXAMINATION
Tuesday, March 28, 2006

Professor Houck
9:00am

INSTRUCTIONS

1. This is a closed book exam. No books or study materials of any kind are permitted.
2. You have three hours to answer these questions. Please restrict your answers to the questions asked. Please also supply authority for those points you believe are controlling. If not otherwise stated, you should refer to the law of your jurisdiction.
3. This is a 90-point exam. The questions are weighted as indicated. I reserve the right to allocate up to 10 additional points for an outstanding answer, up to 10 additional points total. Allocate your time accordingly.
4. In your answers, please also observe the following:
 - answer the question
 - write on one side of a page only
 - write legibly (if I can't read it, it isn't there)
 - no relevant facts are intentionally omitted; if you believe a fact is necessary to the answer, please state what you are assuming and why.
5. For your convenience, the full RICO statute is attached.
6. In several questions, including those treating Enron, Jeffrey Skilling, Kenneth Lay and Marion Barry, the facts have been altered for purposes of the exam and should not otherwise be taken as true.
7. Keep your head. There is nothing here beyond you.

I. Mr. Skilling and Mr. Lay

Jeffrey Skilling and Kenneth Lay are on trial under various Securities laws (among others) for criminal fraud relating to the collapse of the Enron Corporation, for which both, during the period alleged, served as CEO. Section 32 of the Securities Act imposes criminal sanctions for a "willful" violation of the Act, which among other things prohibits fraudulent statements. Section 10 of the Act also makes it unlawful to "use or employ in connection with the purchase or sale of any security any manipulative or deceptive device or contrivance in contravention of such rules" as the Securities and Exchange Commission (SEC) may promulgate. SEC rule 10-b-5 states:

- "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
- (a) To employ any device, scheme, or artifice to defraud,
 - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
 - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
- in connection with the purchase or sale of any security."

One of the Section 32 counts involves the vending of Enron broadband services, both program content and distribution channels, to subscribing companies on the representation that Enron had the infrastructure in place to provide these services. ("Don't worry, we're arranging for that," and "We've got it covered"). In fact the company was scrambling to find these services, and in the end did not succeed. Skilling later explained to the press that it was common business practice to develop a program like this "on the come"; "you have to start somewhere," he stated, calling the practice "fake it till you make it." Apparently he did not coin the phrase. Lay says that he had no idea that Enron was making such representations, nor would he have approved them.

One of the Rule 10-b-5 counts relates to several high-risk ventures launched by Enron subordinates, financed with Enron stock, in and of itself not an unlawful practice. When Enron stock prices began to fall, even slightly, however, these ventures were in financial trouble; they had decreasing assets. If the ventures, and losses, belonged to Enron, then Enron was in much worse trouble. Sensing the trouble, Enron secured an audit by Arthur Anderson approving the ventures as separate, and, later, a legal opinion from the firm of Vincent and Elkins to the same effect. Meanwhile, Skilling and Lay went on aggressive campaigns to assure their employees, stockholders, Wall Street stock analysts and the media that Enron was in sound financial condition. Within a few hectic weeks the entire empire collapsed, and Enron declared bankruptcy. Both Skilling and Lay deny detailed knowledge of the nature of the high-risk ventures, particularly the degree of Enron investment in them, and to the extent they did know they claim that they were perfectly legal, and if not, that they believed that they were.

Question 1 (15 pts.): Please assess their defenses.

Assume now that Enron did not collapse, but the Securities and Exchange Commission (the stock cops) received tips and then witness/low-level participant statements that the above activities were taking place and were placing employees and investors at high risk. SEC staff is convinced that Enron is fatally corrupt, and want to charge it directly under RICO and "take it down."

Question 2 (15 pts.): How may the Commission proceed to do so? What difficulties might it face, and how would they be resolved?

II. Short Cuts

Question 3 (10 pts.): Supreme Court's Blakely decision (followed by Booker extending its holding to federal cases) has been down for four years. The Attorney General is still seething: ("Just another one-way street for criminals," he tells you). He asks you to make recommendations concerning a legislative response. Q: What does he mean ("one-way street"), and what are your recommendations?

Question 4 (10 pts.): We remember Eglehoff, charged with 1st degree Murder in Montana. Only assume, now, that Montana has repealed its statute to re-allow evidence of voluntary intoxication. What homicide charges would be possible were Montana to track Common Law, and what charges were it to track the law of your jurisdiction?

Question 5 (10 pts.): We return to Katherine Ann Power (aka Metzger), waiting in the "switch" car on a side street in Boston while her companions rob the bank and the officer is killed, only she is arrested this time and convicted of Murder. As a matter of constitutional law, may she receive the death penalty?

Question 6 (10 pts.): Consider Justice Scalia's observations on RICO in Northwestern Bell: If the government can't make more sense out of the requirement of a "pattern of racketeering activity," that does not bode well for the day when such a challenge [to the constitutionality of the statute] when it comes.

- A. Please analyze such a challenge. B. If the Court were to rule that for this reason RICO is unconstitutional, could Congress simply drop "pattern" from the statute?

Question 7 (10 pts.): "*Gay Panic' Defense Encounters Trouble*" (*Times Picayune*, Oct. 18, 1999). As you may have read (and as mentioned in class in another context), this case involved two young men in a bar in Wyoming who claimed they were propositioned for a homosexual act by the deceased, Mathew Shepard. Shepard was later found brutally beaten and tied to a wire fence outside of town. The defendants were charged with First Degree Murder (intentional and premeditated homicide, in this state). They offered evidence of "gay panic" or "homosexual panic" syndrome, built on the theory that a person with latent homosexual tendencies will have an uncontrollable, violent reaction when propositioned by a gay person. "I am concerned about where this is going," said the presiding judge, outside the presence of the jury. "We do not have any gay panic defense, and I don't know if I'm going to allow it." Please assess the admissibility and effect, if admissible, of this evidence.

Question 8. (10 pts): "*Mayor trusted old friend all the way to the end*". Washington Post, Jan. 20, 1990. The DC Police have been looking for a way to charge Mayor Marion Barry for many years. They hear he likes prostitutes. Not just anyone, though. He is discriminating. They discover that a former girlfriend of Barry is on the street, hard times, may be selling sex for money, has a couple of convictions. They arrest her for Vagrancy under a statute long invalidated by the courts as unconstitutional and threaten her with long jail time as a third offender (not true, for minor offenses). She agrees, instead, to give them Barry. She calls Barry up, several times, naughty talk, until he agrees to a rendezvous at the Marriott Hotel. He'll have to pay, she says, times are hard, but it'll be fun, like old times. He agrees. Doesn't take all that much persuasion. But no sooner had they jumped into the bed together than the police come in, on cue, and arrest Barry for prostitution and conspiracy to commit prostitution. Prostitution in DC, which has adopted the Model Penal Code in full, is defined as "the practice of sexual intercourse with another for compensation", or the "solicitation by one person of another for sexual intercourse for compensation". Evaluate the charges and outcomes under DC law.

RICO STATUTE

Sec. 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts).

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Sec. 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use

or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Sec. 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

Sec. 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a XYZZY violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.