

No. 10-20621

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**UNITED STATES OF AMERICA,
APPELLEE**

v.

**JAMES A. BROWN
APPELLANT**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

**OPPOSITION OF THE UNITED STATES TO BROWN'S MOTION TO STRIKE THE
GOVERNMENT'S BRIEF, DISQUALIFY ALL JUSTICE DEPARTMENT ATTORNEYS,
AND ABATE THE BRIEFING SCHEDULE**

The government opposes appellant James Brown's motion to strike the government's brief, to disqualify all Department of Justice attorneys from this case, and to abate the briefing schedule in this appeal. In support of this opposition, the government, through the undersigned counsel, states as follows:

1. As noted in the government's corrected brief—lodged with the Court on February 24, 2011, and filed on March 2—Brown appeals the denial of a new trial on charges that he perjured himself and obstructed justice before the Enron grand jury.

2. In a motion filed today, Brown asks the Court to strike the government’s brief, disqualify all Department of Justice attorneys from the case, abate the appeal, appoint an independent prosecutor to “determine an ethical course of conduct on a schedule to be set by this Court,” and grant Brown any other appropriate relief. Mot. 20. Brown seeks such relief based on the fact that the name of the Assistant Attorney General for the Department of Justice’s Criminal Division, Lanny A. Breuer, appears on the government’s brief. As Brown notes (*id.* at 2 n.1, 5), Mr. Breuer recused himself from any involvement in this case in view of his prior representation, while in private practice, of Brown’s co-defendant Daniel Bayly.

3. The undersigned counsel drafted the government’s brief and at no time consulted with Mr. Breuer. Partly for that reason, he was unaware until today of Mr. Breuer’s prior representation of Bayly, that Mr. Breuer is recused from the case, and that the Acting Assistant Attorney General for this matter is Mythili Raman, Principal Deputy Assistant Attorney General and Chief of Staff of the Criminal Division.¹ As

¹ As reflected in Brown’s motion to strike (Mot. 2 n.1), district-court pleadings that related to Brown’s motion to dismiss the indictment for alleged selective prosecution (Dkt. 1136) referred to the fact that Mr. Breuer was recused from the case. *See, e.g.*, Dkt. 1187 at 5. But because Brown has not appealed as to that issue, the undersigned did not review those pleadings when he reviewed the separate (and voluminous) new-trial pleadings relevant to the *Brady v. Maryland*, 373 U.S. 83 (1963), issue presented in Brown’s opening brief. And Mr. Breuer’s name does not appear anywhere on the district court docket sheet, so far as an electronic search of the .PDF version of that document reflects.

Ms. Raman attests in a declaration attached as Exhibit A, Mr. Breuer has not participated on the government's behalf in any aspect of this case, at any stage.

Although the undersigned counsel represented the United States in Brown's first appeal in 2005 and 2006, the undersigned had no involvement in the case between March 2007 and December 2010, when he was assigned the responsibility of drafting the government's brief in the instant appeal. Mr. Breuer was confirmed as Assistant Attorney General in April 2009, when the undersigned was not involved in the case. The undersigned was not thereafter informed of Mr. Breuer's recusal from the case, had no cause to consult with Mr. Breuer, and did not do so.

4. It is standard practice in the Criminal Division's Appellate Section to include Mr. Breuer's name *ex officio* on briefs drafted in the Section and filed in the United States Courts of Appeals, even when Mr. Breuer has not personally reviewed the brief at issue.² It is that practice, and only that practice, that led the undersigned to include Mr. Breuer's name on the brief. The undersigned indicated as much to Brown's counsel when counsel contacted the government concerning the potential

² A Westlaw search similar to the one Brown conducted confirms that practice, reflecting that Mr. Breuer's name generally appears on briefs filed by Appellate Section attorneys in the courts of appeals (and drafted by Appellate Section attorneys in Supreme Court cases), and that it generally does not appear on court of appeals briefs filed by Assistant United States Attorneys on behalf of their respective United States Attorney.

motion to strike. *See* Mot. 22.

Brown contends (Mot. 18) that “Mr. Breuer’s appearance on the cover and signature page” of the government’s brief cannot be viewed as a *pro forma* or *ex officio* matter because Mr. Breuer’s name “has appeared on only 84 briefs across the circuits in the last three years.” But every Appellate Section brief the undersigned has filed in the United States Courts of Appeals since the Division initiated the above-described practice has included Mr. Breuer’s name *ex officio*, although Mr. Breuer did not personally review the briefs in those cases. Indeed, when the undersigned began drafting the government’s brief in this appeal, he borrowed the template and typeface he uses for almost every Appellate Section brief that he files in the United States Courts of Appeals. In short, the inclusion of Mr. Breuer’s name was a clerical error of the same sort described in *United States v. Goot*, 894 F.2d 231, 236 (7th Cir. 1990) (cited at Mot. 18 n.14) (“the government’s failure to remove [the] preprinted name” of the United States Attorney who had previously represented the defendant “should not be construed as more than clerical inattention on its part”).

5. Brown appears to concede (Mot. 14) that “prudential screening of incoming government lawyers subject to former client conflicts of interest * * * is not technically required.” He further acknowledges that even where a government attorney is personally barred from participating in a case on behalf of the government,

“there is *no* automatic or presumed imputation of this bar to his new colleagues,” who may thus “participate in the case against the [recused] lawyer’s former client” (not to mention one of the client’s co-defendants). *Id.* at 13. The commentary to the Model Rules of Professional Conduct, from which this Court derives guidance (*Horaist v. Doctor’s Hosp. of Opelousas*, 255 F.3d 261, 266 (5th Cir. 2001); *cf. Hernandez v. Johnson*, 108 F.3d 554, 560 (5th Cir. 1997) (citing Rule 1.11 in the Sixth Amendment context)), bears this out: “Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.” MODEL RULES OF PROF’L CONDUCT R. 1.11(d) cmt. [2].

6. Brown contends that the foregoing principles are “not the end of the matter,” because, according to Brown, Mr. Breuer *has* participated in this case. Mot. 13. But Brown offers no support for his “inference[s]” to that effect. *Id.* at 3; *see id.* at 3-4, 16-17. Again, as the attached declaration of Ms. Raman attests, Mr. Breuer is recused from the case. Ex. A. He has not participated on behalf of the government in any aspect of the case, including the drafting and reviewing of the government’s brief in this appeal. Rather, when the undersigned drafted the government’s brief, it was reviewed within the Criminal Division’s Appellate Section and by Patrick

Stokes, the Deputy Chief of the Criminal Division's Fraud Section, but it was not reviewed by anyone in Mr. Breuer's office. Brown does not offer any support for a contrary conclusion.

7. For the foregoing reasons, Brown's motion to strike the government's brief, to disqualify all Department of Justice attorneys from the case, to abate the appeal, and to appoint an "independent prosecutor to investigate these issues and determine an ethical course of conduct on a schedule to be set by this Court" (Mot. 20) should be denied. For the same reasons, and contrary to Brown's request (*id.* at ii), the government believes oral argument on the motion is unnecessary. Finally, because the clerical error described above was solely the government's (*cf. Goot*, 894 F.2d at 236), the government would, if the Court deems it necessary, submit a substitute brief removing Mr. Breuer's name and replacing it with that of Ms. Raman, the Acting Assistant Attorney General for this matter.

Respectfully submitted,

s/ Stephan E. Oestreicher, Jr.

STEPHAN E. OESTREICHER, JR.

Attorney, Appellate Section

Criminal Division, U.S. Department of Justice

950 Pennsylvania Avenue, N.W., Room 1264

Washington, DC 20530

(202) 305-1081

Stephan.Oestreicher@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing Opposition of the United States to Brown's Motion to Strike the Government's Brief, Disqualify All Justice Department Attorneys, and Abate the Briefing Schedule was this day delivered by electronic case filing to the Clerk of the Court and to counsel for Brown at the following addresses:

Sidney Powell
Torrence E. Lewis
SIDNEY POWELL, P.C.
3831 Turtle Creek Blvd. #5B
Dallas, TX 75214
(214) 653-3933
sidneypowell@federalappeals.com

Daniel K. Hedges
PORTER & HEDGES LLP
1000 Main Street, 36th Floor
Houston, TX 77002
(713) 226-6000
dhedges@porterhedges.com

DATED: MARCH 16, 2011

s/ Stephan E. Oestreicher, Jr.
STEPHAN E. OESTREICHER, JR.
Attorney, Appellate Section
Criminal Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 1264
Washington, DC 20530
(202) 305-1081
Stephan.Oestreicher@usdoj.gov

CERTIFICATE OF DIGITAL SUBMISSION

The undersigned counsel certifies that:

- (1) there were no privacy redactions to be made in the foregoing Opposition of the United States to Brown's Motion to Strike the Government's Brief, Disqualify All Justice Department Attorneys, and Abate the Briefing Schedule;
- (2) the Digital Form version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk; and
- (3) the Digital Form version electronically filed with the Court on this day has been scanned for viruses with McAfee VirusScan Enterprise, version 8.7.0i, which is continuously updated, and according to that program is free of viruses.

DATED: MARCH 16, 2011

s/ Stephan E. Oestreicher, Jr.
STEPHAN E. OESTREICHER, JR.
Attorney, Appellate Section
Criminal Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 1264
Washington, DC 20530
(202) 305-1081
Stephan.Oestreicher@usdoj.gov