# 07-3042-cr

## 06-3999-cr

*To Be Argued By:*
STANLEY S. ARKIN

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

*Appellant,*

—against—

JEFFREY STEIN, JOHN LANNING, RICHARD SMITH, JEFFREY EISCHEID, PHILIP WIESNER, MARK WATSON, LARRY DELAP, STEVEN GREMMINGER, GREGG RITCHIE, RANDY BICKHAM, CAROL G. WARLEY, CARL HASTING, RICHARD ROSENTHAL,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR DEFENDANT-APPELLEE JEFFREY EISCHEID

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee Jeffrey Eischeid respectfully submits this brief in support of the District Court's order dismissing the indictment against him. Eischeid does not intend to reiterate the arguments made by his co-appellees, and joins in those arguments in their entirety. Instead, Eischeid submits this brief to provide a separate response to the Government's suggestion that, even if it engaged in sanctionable conduct by deterring KPMG from paying legal fees, it timely cured any harm and showed its basic good faith by later declaring KPMG free to do as it wished. Specifically, we argue that the Government's conduct overall during the course of the Grand Jury investigation, including the formation and implementation of the Deferred Prosecution Agreement ("DPA") with KPMG, constitutes an aggravating circumstance that reveals the Government's malignant intentionality to coerce pleas of guilty and, otherwise, to undermine an effective defense for all of the appellees and Eischeid in particular.

As set forth below, the totality of the Government's conduct demonstrates that it has twisted the notion of corporate cooperation, so that it means uttering only the words that the Government authorized. For years prior to the commencement of this prosecution, KPMG senior management and tax experts assured its employees and customers, as well as the Government, that the tax strategies challenged here were lawful. Yet in the DPA the Government compelled

KPMG and its employees – upon pain of corporate death – to adhere to a "Statement of Facts" declaring that the challenged conduct was fraudulent and unlawful, thus seeking to deprive appellees of the witnesses and background information to prove a defense of no *scienter*. The DPA imposes this obligation "in litigation" or otherwise, specifically prohibiting KPMG employees or agents from departing from the new religion installed by the United States Attorney's Office for the Southern District of New York.

Eischeid has been particularity impacted by this conduct. The present indictment was spawned by a Senate hearing at which Eischeid was designated by KPMG as its official spokesman – and prior to which hearing Eischeid was advised by KPMG counsel – to set forth KPMG's long-held position that the tax strategies were entirely lawful. The Government has directly challenged Eischeid's testimony in its indictment, accusing him of committing a conspiratorial overt act during his testimony before the Senate, in addition to its basic charge that the strategies were fraudulent. The DPA, however, directly impedes Eischeid's access to the witnesses and evidence that would permit him to defend these charges. In this way, the Government has intentionally exacerbated its original interference with Eischeid's right to counsel. The Government's conduct in this case is, and has been, "conscience-shocking," downright dishonest and mean-spirited.

## PROCEDURAL BACKGROUND

With respect to the motion to dismiss based upon interference with payment of legal fees, Eischeid respectfully refers the Court to the detailed procedural background set forth in the Stein Joint Brief.[1] In addition to that motion, Eischeid separately moved to dismiss the indictment on the ground that the terms of the DPA constituted prosecutorial misconduct. (Docket Nos. 245, 246 and 375.) That motion was denied in an order dated April 4, 2006. (A-784-790.)[2] In this appeal by the Government pursuant to 18 U.S.C. § 3731, this Court has jurisdiction to consider all such arguments to the extent that they provide an alternative ground on which to affirm the District Court's dismissal of the indictment. *United States* v. *Marasco*, 487 F.3d 543, 547 n.4 (8th Cir. 2007); *United States* v. *Becker,* 929 F.2d 442, 447 (9th Cir. 1991); *United States* v. *Swaravski*, 557 F.2d 40, 49 (2d Cir. 1977).

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[1] Reference to the "Stein Joint Brief" is to the Brief for Appellees Jeffrey Stein, John Lanning, Richard Smith, Randy Bickham, and Richard Rosenthal. As noted above, pursuant to F.R.A.P. 28(i), Eischeid joins in all of the arguments made in the Stein Joint Brief, as well as the other briefs submitted by his co-defendants. *See United States* v. *Martinez-Rios, Sr.*, 143 F.3d 662, 672 n.4 (2d Cir. 1998).

[2] Citations in the form "A-__" herein refer to Volumes I and II of the Appendices No. 07-3042-CR. Citations in the form "Smith A-__" refer to Volumes I-III of the Appendices No. 06-3999-CR.

## STATEMENT OF FACTS

The undisputed facts demonstrate that the Government's misconduct, taken in its totality, had an especially prejudicial effect on Eischeid's ability to prepare and present an effective defense to the Government's charges.

### A. KPMG Develops and Approves the Tax Strategies

The tax strategies that form the basis for the charges against Eischeid were developed and sold by KPMG for a period of approximately four years beginning in or about 1996. During that time, Eischeid was a partner of the firm, having begun his career at KPMG in 1981. (Docket No. 1117, Ex. A ¶ 2.) KPMG's decision to market tax consulting services was promoted by the highest levels of its management. (A-252-262; A-247 ¶ 3.) The strategies were approved by KPMG after an exhaustive vetting process, and the Company's approval of the strategies was communicated widely within KPMG. These approvals involved:

- KPMG's Washington National Tax Center, a highly skilled internal "think tank" that specialized in diverse areas of tax law;
- The head of KPMG's Department of Professional Practice, the firm's professional responsibility monitor;
- The Chairman of KPMG's Tax Department;
- The law firm of Brown & Wood, which issued formal Opinion Letters affirming the validity and propriety of the strategies;
- Numerous law firms and other professionals who represented the taxpayers who used the strategies; and

- Renowned experts who prepared thorough and persuasive expert reports.

(A-247 ¶ 2.)

As of early 2000, by which time almost every transaction at issue in the indictment had been completed, the strategies at issue had never been declared illegal or in any way improper by any court. Indeed, as of that time the IRS had not even issued the "Notice" calling any of them into question. (*See* A-264-266.)

### B. KPMG Uses Eischeid To Defend The Strategies

In October of 2003, in anticipation of media coverage of the strategies, KPMG's then-Chairman wrote a memorandum to all KPMG partners in which he reiterated that KPMG provided "appropriate tax-planning services ... which [are] fully supported by the Internal Revenue Code and related regulations." (A-286-287.) At or about the same time, the strategies came under investigation by the United States Senate. Just prior to the Senate hearings, KPMG's CEO distributed a memorandum to Eischeid and other KPMG partners, stating that the strategies "were complex and technical, but were also consistent with the laws in place at the time . . . ." (A-289-291 at A-290.)

KPMG sent Eischeid to appear before the Senate in defense of the strategies. (*See* A-1469-70 ¶¶ 1-3.) Prior to appearing before the Senate, Eischeid was advised by KPMG's then-counsel, Willkie Farr & Gallagher LLP, that they "were not aware of any conflict between [Eischeid] and KPMG," and also that KPMG

had stated that there was "no reason why joint representation in [the] matter would not be appropriate." (A-307.) Eischeid was prepared for his Senate testimony by KPMG's lawyers, and was sent to Congress by KPMG to present and defend a formal statement defending their legality. (A-1469-70 ¶ 1; A-301-305.) In that statement, KPMG declared:

> The strategies presented to our clients in the past were complex and technical, *but were also consistent with the laws in place at the time* . . . .

(A-301 ¶ 2 (emphasis added).)

### C. <u>KPMG Is Compelled to Turn Against Eischeid</u>

Soon after the Senate hearings, however, in early 2004 KPMG was made a target of a grand jury investigation. Since Eischeid had been put forward at the Senate Hearings as one of its spokespersons prepared by its lawyers, it was not surprising when, in February of 2004, he received a letter from the Government indicating that he was a subject of the investigation. (Docket No. 1117 ¶ 1; A-825.) Significantly, the Government's investigation eventually encompassed charges of conspiracy based directly upon Eischeid's testimony before the Senate. (Smith A-192.)

Against this backdrop, therefore, when Eischeid received the "subject" letter in early 2004, Eischeid immediately retained experienced individual counsel. (Docket No. 1117 ¶ 1.) Shortly thereafter, his counsel took steps to confirm that

KPMG would be advancing Eischeid's fees. (Docket No. 1117 ¶¶ 2-3.) Yet contrary to the practice that had been in place throughout Eischeid's tenure at KPMG – and as a direct result of improper Government Pressure – Eischeid's counsel was informed that his legal fees would be "capped" and that no fees at all would be paid if Eischeid failed to "cooperate" with the Government. (Smith A-1268-1269; Smith A-1225; Smith A-1221-1222.) "Cooperation" in this context meant waiving Eischeid's Fifth Amendment rights – not a sensible defense strategy when faced with an extremely aggressive prosecutorial team inspired by recent Senate hearings, and prepared to charge serious crimes where no clear *corpus delecti* even existed.[3]

### D. <u>The Deferred Prosecution Agreement's "Statement of Facts"</u>

The Government did much more than burden Eischeid's access to counsel. It also set out to improperly deny him access to and distort the central body of evidence that would have formed the basis of his defense, and likely has had considerable success in its efforts. During the grand jury investigation, the DOJ made clear to KPMG that, absent total capitulation, the firm would be indicted and

[3] *See KPMG in Wonderland,* Wall St. J., Oct. 6, 2005, at A14 ("[T]he tax shelters in this case have never been brought before a judge so their legality and legitimacy has never been settled as a point of law. . . . That gives this KPMG trial an Alice-in-Wonderland quality; the accused are on trial for promoting a fraudulent tax shelter that has never been proved to be fraudulent in the first place.")

thus destroyed.[4] In order to avoid that fate, KPMG negotiated a "Deferred Prosecution Agreement," pursuant to which the Government agreed not to prosecute KPMG in exchange for a payment by KPMG of $456 million, as well as a series of other promises. (*See* A-317-396.)

As part of that agreement, the Government required KPMG to admit to a "Statement of Facts." (A-318; A-332; A-383-392.) The process by which this particular document was generated paints a stark picture of a company fighting for its life and ultimately willing to abandon all of the employees who had relied upon its prior representations on the subject. On March 17, 2005, KPMG's attorneys sent a proposed statement of facts to the Government. (A-1056; A-1135-1150.) Importantly, that document contained no conclusions as to the "state of mind" of KPMG or its employees. (*See id.*)

The Government rejected KPMG's proposal, and made clear that it would require outright admission of knowing criminal conduct and fraud on the part of KPMG and its tax partners. (A-1167-1181.) The Government stated to KPMG that the statement of facts constituted its "leverage," and that it intended to use the document in its dealings with third parties. (A-1183-1192 at A-1186.) Notably, though, the "facts" proposed by the Government were so at odds with the truth that

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[4] There can be no dispute that during the negotiations over the terms of the DPA, KPMG was aware that its existence was at stake. For example, in a meeting on April 26, 2005, a KPMG representative stated to U.S. Attorney David Kelly that "[c]riminal charges will bring about the end of the firm." (A-1087; *see also* A-1167-1181).

when they were presented to KPMG's then-general counsel Joseph Loonan (a man whose testimony the Government invokes in this Court), he wrote:

> The recitation presented is not of "facts" but of conclusions based on some facts, distortions of facts and adverse inferences. This recitation, in large part, ***is in itself false, misleading and unsupportable.***

(A-1163 (emphasis supplied).)

Despite those reservations, when KPMG later agreed to the DPA, it was required to ratify a "Statement of Facts" that – just as the Government demanded – also contained sweeping statements concerning the purported fraudulent nature of all of the strategies. (A-383-392.) In these respects, the Statement of Facts directly contradicted every statement that KPMG's representatives previously made concerning the strategies, including the statements that Eischeid had been offered up to defend in the Senate. Thus, even though KPMG had defended the strategies in the Senate as "consistent with the laws in place at the time and still applicable today" (A-302), in the Statement of Facts KPMG declared that the strategies were "unlawful" and "fraudulent." (A-383 ¶ 2.) And while KPMG had proudly described to the Senate the "rigorous review process[es]" it had applied to the strategies (A-302), KPMG claimed in the Statement of Facts that "the firm's internal control systems failed to prevent the improper and illegal conduct." (A-383 ¶ 4.)

The DPA's Statement of Facts also purports to address Eischeid's testimony before the Senate – testimony he had provided with KPMG's support and preparation – and characterizes it as "false," "misleading" and "evasive." (A-392 ¶ 34.) Of particular importance to Eischeid, the DPA also explicitly prohibits KPMG, its partners, employees or agents from taking any position, in any context, that is inconsistent with the Statement of Facts. Specifically, KPMG "shall not, through its attorneys, agents, partners or employees, make any statement, *in litigation* or otherwise, contradicting the Statement of Facts . . . ." (A-332 (emphasis supplied).)

## ARGUMENT

### I. THE GOVERNMENT ENGAGED IN MISCONDUCT IN ADDITION TO ITS INTERFERENCE WITH THE PAYMENT OF LEGAL FEES THAT AGGRAVATED THE HARM TO THE APPELLEES AND TO EISCHEID IN PARTICULAR

#### A. The Government's Conduct Must Be Examined In Its Entirety

In this case, the Government engaged in a pattern of pernicious conduct that is entirely at odds with its most fundamental obligations:

> The United States Attorney is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . .
>
> He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

> calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger* v. *United States*, 295 U.S. 78, 88 (1935).

In defending itself on appeal, however, the Government does not forthrightly justify its conduct. Instead, it suggests that its wrongdoing was cured – or can be mitigated – by after-the-fact assertions to the effect that KPMG was free to do what it wished, by a mere delay of the trial, or by minor logistical steps such as creating an electronic database. (*See* Govt. Br. at 28-29, 42-43.)[5] Yet in making its arguments the Government also ignores the fact that its misconduct, when considered in its totality as it must be, intentionally aggravated the harm caused by the core constitutional violation – the cutting off of Eischeid's legal fees. *See United States* v. *Edenfield*, 995 F.2d 197, 200 (11th Cir. 1993) (analysis of prosecutorial misconduct defense requires examination of "totality of circumstances"); *United States* v. *Koubriti,* 435 F. Supp. 2d 666, 678 (E.D. Mich. 2006) (same); *United States* v. *Dyman*, 739 F.2d 762, 768 (2d Cir. 1984) (examining entirety of record). As if the United States Attorney's Office were Spanish Inquisitors compelling a new truth, the Government required KPMG to

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5 The Government's continued reliance on KPMG's supposed "free will" brings to mind a recent statement by Syria's Interior Minister, who, after Syrian President Bashar al-Assad was re-elected by 97% of the voters in an election in which no opposition was permitted, proudly claimed that, "[t]his great consensus shows the political maturity of Syria and the brilliance of our democracy." *Syria's Assad Wins Another Term*, BBC News, May 29, 2007, available at http://newsbbc.co.uk/1/hi/world/middle_east/6700021.stm. (last viewed Jan. 11, 2008).

turn against Eischeid and its other former partners, in favor of a broad new partnership with the Government, bent on stripping Eischeid of the crucial evidence and support he otherwise would have enjoyed in responding to the Government's charges. And by doing so at the very outset of its novel and long-running prosecution, the Government plainly hoped to coerce defendants like Eischeid into pleas of guilty – pleas based not upon a rational weighing of potential outcomes, but on a raw judgment that even defending the case would constitute economic suicide.[6]

### B. The DPA And Its Implementation Are An Unconstitutional Burden On Eischeid's Right To Prepare And Present A Defense

The unconstitutional disparity in access to legal resources caused by the Government was aggravated by the DPA, which constitutes an improper effort to (i) guarantee an outcome in the Government's favor on key factual issues, and (ii) deprive the appellees of access to key evidence.

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6 As for the effect on Eischeid's ability to defend himself in this case, the undisputed facts speak for themselves. The Government has conceded that $3.3 million would be a "very conservative estimate" of what it would cost to defend this case. (A-1661.) Eischeid has already paid approximately $1 million to his counsel. (Docket No. 1117 ¶ 7.) As of July 2007, Eischeid – a man far from retirement and with two children to put through college – possessed a total of $2.02 million in additional assets, including illiquid home equity and retirement accounts, a substantial portion of which are subject to penalties and withholding in the event Eischeid becomes obligated to invade them. (Docket No. 1117 ¶¶ 7-13 & Attachment.) Thus, even assuming that Eischeid was able to defend this case at the very lowest estimated cost, he would be wiped out as a result. Moreover, the better view of the evidence is that a truly first-class defense would approximate $10 million. (Docket No. 1117 ¶ 12; A-1661.) As a result of the Government's misconduct, therefore, Eischeid could never afford the quality legal representation required to defend this matter.

When it comes to the gathering and presentation of evidence in a criminal case, the Fifth Amendment prohibits the Government from (i) "intentionally distort[ing] the fact finding process," *United States* v. *Baker*, 10 F.3d 1374, 1414 (9th Cir. 1993), *overruled on other grounds*, *United States* v. *Nordby*, 225 F.3d 1053 (9th Cir. 2000), or (ii) "[s]ubstantial[ly] interfer[ing] with a defense witness' free and unhampered choice to testify . . . ." *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980). *See also United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) (due process clause violated where former co-defendant's plea agreement included a requirement that he would not testify for the defendant); *United States v. Vavages,* 151 F.3d 1185, 1191 (9th Cir. 1998) (reversing conviction where the prosecutor threatened to claim that a witness had breached plea agreement if she provided alibi testimony for defendant); *United States* v. *Leung,* 351 F. Supp. 2d 992 (C.D. Cal. 2005) (dismissing indictment where plea agreement barred co-defendant from providing information or assistance).

The Sixth Amendment also requires that a criminal defendant be provided a fair opportunity to present a defense based upon the facts. The Supreme Court has described this right as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, **the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies**.

*Taylor* v. *Illinois*, 484 U.S. 400, 409 (1988) (quoting *Washington* v. *Texas*, 388 U.S. 14, 19 (1967)) (emphasis added). The Second Circuit has explained: "The right to establish a defense by presenting witnesses serves the truth-seeking function of the trial process by protecting against the dangers of judgments 'founded on a partial . . . presentation of the facts.'" *United States* v. *Williams*, 205 F.3d 23, 29 (2d Cir. 2000) (internal citation omitted).

The scripted "Statement of Facts" included in the DPA plainly violates these principles. It is especially prejudicial in this case given that (i) the United States Government has never proven the strategies to be unlawful despite having numerous opportunities to do so; and (ii) during the relevant period the entire management structure of KPMG defended the strategies as being in compliance with governing law. The lawfulness of the strategies is an issue on which Eischeid stood a substantial chance of prevailing, to say the very least – so long as the deck was not unfairly and unlawfully stacked against him.[7]

There can be no doubt that the DPA acted to distort the truth and silence witnesses. In August of 2005, just prior to KPMG's entry into the DPA, a group of

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[7] Indeed, just recently a court has rejected a government effort to prove that the strategy called BLIPS (one of the main strategies at issue in this case) was inherently unlawful, and also concluded that the professional opinions supporting the challenged treatment of BLIPS were objectively reasonable when issued. (*See Klamath Strategic Inv. Fund* v. *United States,* 440 F. Supp. 2d 608 (E.D. Tex. 2006); Docket No. 929; *but see Klamath Strategic Inv. Fund* v. *United States,* 472 F. Supp 2d 885 (E.D. Tex 2007) (holding that on particular facts of the case, the transaction lacked economic substance, yet also concluding that taxpayers "reasonably believed" that the challenged tax treatment was "more likely than not the proper treatment").

then-current and former KPMG Board members and partners authored an extensive memorandum criticizing KPMG's intended entry into the deal with the DOJ. The authors of that memorandum argued, among other things, that "everybody looked at" the strategies and "[n]obody said anything about illegal or unlawful," and that "these strategies were developed and reviewed and approved by some of the brightest professionals in the firm." (A-482-492 at 485.) These individuals also expressed fear that their jobs would be in jeopardy and their lives otherwise destroyed if they came forward publicly with these views. (*Id.* at A-482-483, 491-492.) Under the DPA, these individuals can no longer have any doubt on that score. There are two other potential witnesses, James Brasher and John Chopack, who were employed by KPMG during the relevant period and who assisted in the sale and marketing of tax strategies. (*See* A-494-495.) Supportive testimony by these men and others like them would violate the DPA and lead to the certain loss of these witnesses' jobs. This represents an intolerable burden on Eischeid's right to present witnesses in his favor. *See United States* v. *Bell*, 506 F.2d 207, 223 (D.C. Cir. 1974) ("It goes without saying that a prosecutor cannot by plea bargain or otherwise prevent a witness from appearing and testifying for the defense. Any understanding of this kind would be wholly improper and no member of the Bar should condone or participate in such an arrangement.");

*United States* v. *Hatch*, 926 F.2d 387, 395 (5th Cir. 1991) (the government may not threaten to revoke witness' plea agreement if he testifies for defendant).

Investigating, interviewing and persuading such witnesses to testify in support of Eischeid would have been difficult enough without access to substantial legal fees. By adding the threat inherent in the DPA, the Government has rendered the task Herculean. And, just as in the case of KPMG's original decision to cut off legal fees, the Statement of Facts cannot be realistically "recanted" by KPMG, nor can the massive chilling effect on potential key witnesses ever be successfully repaired. (*See* A-881-882.)

### C. <u>**Eischeid Suffered Particular Prejudice**</u>

The foregoing misconduct caused a special and aggravated harm to Eischeid. KPMG and its attorneys specifically prepared and held him out before the Senate to deliver its original position – the one that KPMG held before its Government-induced conversion to a new gospel – that the challenged tax strategies were vetted by KPMG and were in compliance with the law at all times. Indeed, the Government not only required all KPMG witnesses to testify that the tax strategies were fraudulent, but also required KPMG to disavow the testimony that Eischeid had offered before the Senate, and to characterize it as "misleading" and "evasive." (A-392 ¶ 34.)

In the District Court, the Government sought to defend the Statement of Facts by arguing that it binds only "KPMG" but "not each of its employees." (Docket 346 at 43.) But the DPA specifically provides that KPMG "shall not, *through its attorneys, agents, partners, or employees*, make any statement, in litigation or otherwise, contradicting the Statement of Facts." (A-332 ¶ 15.) On its face, therefore, this language directly interferes with Eischeid's access to potential testimony by who might possess evidence that would tend to support Eischeid's view that the tax strategies were lawful, or that would demonstrate the truthfulness of his testimony before the Senate. Moreover, the obligation specifically governs statements made "in litigation . . . ." (A-332 ¶ 15.) Given the Government's overall conduct in this case, there is no basis on which to believe that it will refrain from taking full advantage of the threat inherent in the DPA.

Finally, the Government also required that KPMG agree in the DPA to waive the attorney-client and work product privileges only in favor of the Government. (A-326-327.) Thus, even though the Government is aware that KPMG had previously declared the challenged tax strategies to be lawful, and therefore that the advice rendered to Eischeid was in all probability consistent with this view, the Government has demanded, by contract, that any such information be disclosed to the Government *but kept from Eischeid*. It is impossible to articulate a reason – aside from sheer tactical advantage and the desire to hobble

those it now declares infidels – that the Government might have for obtaining privileged information from KPMG yet keeping it from Eischeid and the other appellees.

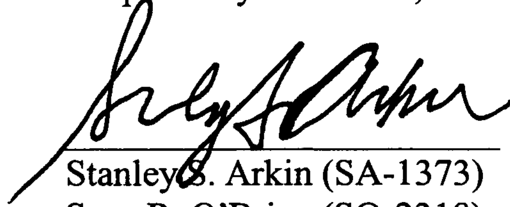
The Government's conduct in this case was "conscience-shocking" because it was deliberate, it was widespread, and because it was designed to undermine the core values that a prosecutor is sworn to uphold. *See County of Sacramento* v. *Lewis*, 523 U.S. 833, 849 (1998) ("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of conduct most likely to rise to the conscience-shocking level").

## CONCLUSION

For all of the foregoing reasons, Defendant-Appellee Jeffrey Eischeid respectfully requests that the Court affirm the Order of dismissal issued by the District Court.

Dated: New York, New York
January 11, 2008

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,821 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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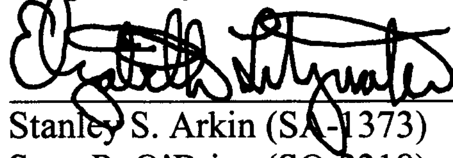
Respectfully submitted,



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