

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

-against-

Docket No. 07-3042-cr

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,

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

Defendants-Appellees.

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BRIEF OF APPELLEE CARL D. HASTING

Appellee Carl D. Hasting adopts the arguments contained in the briefs submitted by the other Appellees. Additionally, Appellee Hasting calls to the Court's attention certain facts pertaining to him, which were undisputed below. While, as the district court found, the government's misconduct pervasively affected the entire proceeding, these additional specific facts clearly demonstrate palpable prejudice to Hasting resulting from the Government's interference with his right to counsel.

Mr. Hasting's right to retain counsel free from Government interference was infringed long before he was indicted.

As Mr. Hasting avers in his declaration in support of his motion to dismiss, the Government's interference had serious consequences:

First, in the pre-indictment phase, Mr. Hasting was told by his former counsel that if he did not "cooperate with the Government," which included being interviewed by the Government, KPMG would cease payment of his legal fees and would not consider paying any fees over and above the previously set "cap." As Mr. Hasting averred (and the Government did not dispute):

...both my legal counsel and I believed that if I refused to be interviewed by the government, then I could possibly be jeopardizing the funding [of] my entire legal defense in this case. I therefore agreed to be interviewed by the Government. If KPMG had not conditioned its payment of my fees on "cooperation," then I would never have agreed to be interviewed by the Government.

(A. 966, 967).

Mr. Hasting also averred in the Court below (without dispute by the Government) that he was denied counsel of choice by KPMG's refusal to advance fees for his defense. As Mr. Hasting stated (Docket Entry 1046, Amended Declaration of June 15, 2007, p. 2):

I was originally represented by attorney Roger M. Olsen who was extremely experienced and qualified to represent me in this proceeding. He was also the attorney I wished to represent me throughout this proceeding. However, once the Government coerced KPMG to cease paying my legal fees, I could no longer afford Mr. Olsen's services and had to seek other representation. I hired Russell M.

Gioiella, not because he was my first choice, but because I believed I could afford his services. I believe Mr. Gioiella to be a competent attorney, but clearly not the attorney I would have chosen to represent me had the Government not coerced KPMG into refusing to pay my legal fees in this case.

The havoc created by the Government's interference with Mr. Hasting's ability to retain counsel continued and intensified after he retained Litman, Asche & Gioiella, LLP ("LAG"). Shortly after the retention, Mr. Hasting fell behind in payments to LAG. Relations between Mr. Hasting and his counsel deteriorated to the point where LAG was forced to move to be relieved as Mr. Hasting's counsel on April 30, 2007. In denying that motion, the District Court nonetheless observed (Docket Entry 1047, p. 4):

There has been serious acrimony between Messrs. Hasting and Gioiella, all of it relating to and born of the failure of Mr. Hasting to comply with the retainer agreement. Some fairly ugly things have been said by Mr. Hasting.

According to Mr. Hasting, whatever Mr. Hasting's ability to pay for his defense from his own funds may have been at the time of his indictment, that ability evaporated in October 2006 when he was abruptly terminated from his job as a result of the indictment (A. 965). At that point, Mr. Hasting found himself unemployed and the sole supporter of a wife and five children (Id). Mr. Hasting averred that he had a negative net worth (Id). Mr. Hasting

asserted that "I lack assets and income sufficient to pay my attorneys and fund my defense. For that matter, I lack the funds to even live in New York for the duration of a trial." (A. 965). In its Memorandum and Order denying LAG's motion to be relieved, the District Court found (Docket Entry 1047, p. 3):

At this point, Mr. Hasting's financial circumstances appear to be dire. According to a balance sheet he submitted, as of March 1, 2007, he had \$60,000 in cash, owned a house with equity of less than \$45,000, and owed almost \$400,000 to HSBC and on his credit card. His net worth and cash flow are substantially negative. The monthly payments on the mortgages on the house and the HSBC loan exceed his projected monthly income.

Based on the information before me, I provisionally find that Mr. Hasting lacks the ability to pay Mr. Gioiella's fees or, for that matter, to retain any private counsel to handle this case.

When the District Court denied LAG's motion to be relieved as Mr. Hasting's counsel (that denial is currently pending on appeal with this Court [07-2817-cr]), the District Court stated that it would appoint LAG as involuntary CJA counsel upon the request of Mr. Hasting. (Docket Entry 1047, p. 8) That request was made. The conflict inherent in the shotgun wedding between Mr. Hasting and LAG which the District Court compelled is apparent even in this Court: While LAG is required to represent Mr. Hasting on

this appeal, LAG is simultaneously pursuing its own appeal against Mr. Hasting, seeking to reverse the District Court's decision not to relieve LAG as Mr. Hasting's counsel.

In sum, as a direct result of the Government's interference with KPMG's advancement of fees on behalf of Mr. Hasting, he was faced with the prospect of undergoing the rigors of pre-trial preparation (including the examination of up to 22 million documents) and a trial estimated to be in the range of six to eight months without counsel of his choice. Indeed, Mr. Hasting would not even have the benefit of any retained counsel, but would be saddled with an involuntary appointed counsel with whom Mr. Hasting has a record of demonstrated hostility.

Conclusion

Mr. Hasting has been significantly and permanently prejudiced by the Government's interference with his ability to retain counsel.

For the reasons expressed in the briefs of other counsel and above, the order appealed from should be affirmed.

Dated: New York, New York
January 11, 2008

Respectfully submitted,

Litman, Asche & Gioiella, LLP

By: /s/Russell M. Gioiella
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,120 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief was typed using New Courier Typeface: 12 Points for the body of the brief, and 10 Points for the footnotes.

Dated: New York, New York
January 11, 2008

/s/ Richard M. Asche

Richard M. Asche

CERTIFICATE OF SERVICE

This is to certify that on January 11, 2008, I caused the within Appellee's Brief on behalf of Carl Hasting to be personally served upon the following parties:

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I also caused the within document to be served, with consent of counsel, upon to the co-defendants in this action, by email at appeal@steindef.com.

I further certify that I am an attorney admitted to practice law in the state of New York, and that I am not a party to this action.

Dated: New York, New York
January 11, 2008

/s/ Russell M. Gioiella
Russell M. Gioiella