

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
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ORDER

March 7, 2011

BEFORE

FRANK H. EASTERBROOK, Chief Judge

Nos.: 09-1265, 09-1287, 09-1376, 09-1602, 09-2093 and 09-2109	UNITED STATES OF AMERICA, Plaintiff - Appellee v. PAUL SCHIRO, also known as THE INDIAN, et al., Defendants - Appellants
Originating Case Information:	
District Court No: 1:02-cr-01050 Northern District of Illinois, Eastern Division District Judge James B. Zagel	

The following is before the court: **RESPONSE TO RULE TO SHOW CAUSE**, filed on March 4, 2011, by counsel for the appellant in appeal no. 09-1287.

On February 6, 2009, more than two years ago, Frank Calabrese, Sr., appealed his criminal conviction and sentence. On February 23, 2009, the court appointed Joseph R. Lopez to represent Calabrese.

Lopez sought and obtained multiple extensions of time to file the opening brief. After almost two years had passed, the court's order of January 21, 2011, set a final deadline of February 14 and warned counsel that no further extensions would be granted in the absence of extraordinary circumstances.

No brief appeared by February 14, but on February 9 Lopez filed an untimely motion for a further extension. Circuit Rule 26 requires a motion at least seven days before the brief's due date; this motion was two days late. The motion contended that illness and a recent blizzard in Chicago had delayed the brief's preparation. The court granted an extension to February 22 and added that no more time would be allowed under *any* circumstances.

On February 22 Lopez filed, not a brief, but a "status report" informing the court that a brief would appear by February 28. The court treated this as a motion for additional time and denied it. The order also directed Lopez to show cause why he should not be relieved as Calabrese's lawyer and placed on the list of persons ineligible for appointments under the Criminal Justice Act.

The response, which was filed on March 4, is astonishing. Lopez told us that he has never commenced working on Calabrese's brief but that in fall 2010, when the appeal had already been pending a year and a half, he delegated that task to attorney Robert L. Caplan, who had been Calabrese's retained trial counsel—and, having delegated the work, Lopez maintains, he should not be held responsible for delay. The response is accompanied by an affidavit from Caplan stating that he is a solo practitioner whose cash-flow needs have led him to put paying work ahead of CJA work. Caplan admits that he could have finished the brief sooner, but put it aside so that he could handle other matters that were likely to produce income faster.

It is clear from the response and the accompanying affidavit that neither Lopez nor Caplan is fit to be appointed under the CJA. Both will be placed on the list of persons ineligible for appointment. Both will be placed on a separate list of lawyers who, when handling paid appeals, will not be allowed more than two extensions of time to file opening briefs.

Only one lawyer was appointed to represent Calabrese in this appeal: Joseph R. Lopez. Appointed counsel bears personal responsibility for representing his client and cannot avoid that responsibility by delegating the work to someone else. This is not to say that there is anything wrong with delegation; it is common. My point is that the appointed attorney is responsible for performance, and, if the delegatee does not get the work done, then the appointed lawyer must withdraw the delegation and do the work himself. Lopez apparently never considered doing this and has left his client in the lurch.

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As for Caplin: A lawyer who accepts an assignment must complete it in a timely fashion. If CJA work is low on Caplin's list of priorities, he should not have agreed to prepare this brief. The court set deadlines for the brief's completion. By agreeing to do the work, Caplin agreed to meet those deadlines. He decided not to meet his professional responsibilities. Indeed, despite the fact that the "status report" of February 22 said that a brief would be filed by February 28, that did not occur. The response of March 4 said that a brief would be tendered later that day; that has not occurred either. Caplin's affidavit says that March 7 would be more realistic. The history of un-kept promises leads me to be skeptical. This is unprofessional conduct.

Lopez is relieved as Calabrese's appellate lawyer. Both Lopez and Caplin are placed on the two lists I have mentioned. The court will appoint another attorney to represent Calabrese. His appeal is severed from the appeals of his co-defendants, which will proceed without the delay needlessly caused by Lopez and Caplin. The newly appointed lawyer should obtain from Caplin any drafts prepared so far, and Caplin has a duty to assist his successor. (If newly appointed counsel finds it possible to file a brief swiftly, he also should file a motion to put all of the co-defendants' appeals back together.)

Neither Lopez nor Caplin will be compensated under the Criminal Justice Act for their woeful performance in this appeal.