NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-07-1261-PaMkKu
SERGIO and SANDRA RENTERIA,	Bk. No. 02-01943
Debtors.	
SERGIO and SANDRA RENTERIA,	
Appellants,	
v.	**M E M O R A N D U M**[1]
ROBERT P. ABELE, Chapter 7 Trustee,	
Appellee.	

Argued by Video Conference and Submitted
on November 29, 2007

Filed - December 14, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Before: PAPPAS, MARKELL and KURTZ,[2] Bankruptcy Judges.

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1. This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

2. Hon. Frank Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

Upon motion of the chapter 7[3] trustee, Robert E. Abele ("Trustee"), the bankruptcy court entered an order directing debtors Sergio and Sandra Renteria ("Debtors") to turn over to Trustee approximately $200,000 in insurance proceeds paid to them after the filing of their bankruptcy petition. Debtors appealed. Because Debtors have provided an inadequate record to the Panel which does not allow us to conduct any meaningful review of the bankruptcy court's order, we DISMISS the appeal.

FACTS

Debtors filed a voluntary petition for relief under chapter 12 of the Bankruptcy Code on April 26, 2002. Abele was appointed to serve as chapter 12 trustee.

On October 30, 2003, Hartford Steam Boiler Inspection and Insurance Company ("Hartford") issued policy number FBP2293752 (the "Policy") to Debtors, providing coverage to them for any damages to the pumps on Debtors' farm.

On December 2, 2003, the bankruptcy court, acting pursuant to § 1204(a), found that Debtors had grossly mismanaged the business of the estate, and removed them as debtors-in-possession. The court ordered that Trustee assume operating powers and serve as the responsible person for the estate, as set forth in § 1202(b)(5).

On or about February 18, 2004, some two months after they were divested of their debtor-in-possession authority to manage

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3. Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

the farm business, Debtors contacted Hartford regarding repairs they had allegedly made to the pumps on the farm, and sought payment under the Policy. Although Hartford questioned whether the pump repairs had been made and paid for by Debtors, it eventually paid Debtors $203,507.19. Debtors did not inform Trustee that they had contacted Hartford nor, later, that they had received any payments.

In the meantime, Trustee, joined by creditors United States, acting on behalf of the Farm Service Agency ("FSA"), and OXBOW Int'l Corp., moved to convert the case to chapter 7, or to dismiss it, on March 22, 2004. According to Trustee, Debtors had repeatedly misled the bankruptcy court regarding the amount of estate funds they used for purchasing a mobile home on the property, improperly transferred in excess of $60,000 of estate funds to family members, and failed to produce documents and information requested by Trustee. Hearings were conducted on May 25, and June 7, 2004. The bankruptcy court concluded that Debtors had misrepresented to the court the source of funds used to purchase personal assets and other uses of post-petition assets. Tr. Hr'g 91:8 (June 7, 2004). It ordered the case converted to chapter 7 on June 18, 2004. Trustee was appointed to serve as chapter 7 trustee.

On October 18, 2004, Trustee commenced an adversary proceeding against Debtors seeking to deny discharge under § 727(a). Trustee alleged that Debtors repeatedly misrepresented to the court factual information regarding assets of the estate, failed to keep adequate records of farming operations and failed to comply with the court's instructions to turn over documents

and information requested by Trustee, sold secured assets without the knowledge or permission of the secured creditors, entered into financing arrangements with third parties without disclosing their bankruptcy status to those parties and without seeking court approval of such financing contracts, and transferred $60,000 of estate funds to their daughters in 2003.

Without admitting any of the allegations, on November 9, 2004, Debtors stipulated that a judgment could be entered denying Debtors a discharge. The bankruptcy court entered a judgment denying discharge on December 9, 2004.

Trustee asserts, and Debtors do not contradict, that he was not informed that Debtors had made a claim on the Policy, or that they had received payments from Hartford, until early 2005. On December 12, 2005, Trustee filed a Motion for Turnover of Bankruptcy Estate Funds (the "Turnover Motion"). The Turnover Motion sought an order directing Debtors to pay $203,507 to Trustee, representing the payments they received from Hartford for repair of the pumps.

Debtors filed a response to the Turnover Motion on May 12, 2006, in which they did not deny they had sought and obtained the insurance funds. Instead, Debtors asserted that they would offer evidence at a hearing that some of the payments from Hartford were used for pump repairs, or reimbursement for repairs, and that the remainder of the funds were for repairs to pumps leased to Debtors' daughters, which were not property of the estate. There is no indication in the record that Debtors ever provided this evidence to Trustee or the bankruptcy court.

On July 19, 2006, a federal grand jury indicted Debtors and

their daughter, Kayla Taylor. The record does not include the indictment. But according to the briefs of the parties, the indictment charges that Debtors conspired to impede and impair the functions of FSA, disposed of property pledged as security to FSA, made false statements to influence a loan, made false statements in a bankruptcy case, and concealed assets in their bankruptcy case.

Trustee moved for summary judgment on the Turnover Motion on October 5, 2006 (the "Summary Judgment Motion"). He argued that Debtors had provided no evidence to rebut the Turnover Motion, nor did they assert any valid defense. On November 3, 2006, Debtors requested an extension of time to respond to the Summary Judgment Motion. Debtors argued that portions of the criminal indictment were identical to the allegations in the Turnover Motion and Summary Judgment Motion, and that Debtors had been instructed by counsel in their criminal case to invoke their Fifth Amendment privilege against self-incrimination on matters related to the Turnover Motion.

The bankruptcy court conducted hearings on Debtors' request for an extension of time to respond on February 6 and April 5, 2007. Debtors then filed a Request for Stay of the Turnover Motion and Summary Judgment Motion on May 7, 2007. This pleading did not address the substantive issues in Trustee's motions, nor did it allege that disputed issues of fact existed. Debtors' sole argument was that any proceedings related to the Turnover Motion should be stayed pending resolution of the criminal proceedings.

The bankruptcy court convened a hearing on Debtors' motion

to stay proceedings on the Turnover Motion and the Summary Judgment Motion on May 23, 2007. On June 13, 2007, the bankruptcy issued its order denying Debtors' request for stay and granting Trustee's Summary Judgment Motion and Turnover Motion. The order indicates that the court had reviewed the pleadings and documentary evidence, considered the oral arguments of the parties at the May 23, 2007, hearing, and granted its order "in light of the record of this case, and for the reasons stated on the record at the May 23, 2007 hearing." The bankruptcy court's order directed Debtors to turn over the $203,507 to Trustee, or to "request a hearing if Debtors assert they have no ability to comply with this order."

Debtors timely appealed this order on June 22, 2007.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (E). We have jurisdiction pursuant to 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court abused its discretion in denying Debtors' request to stay proceedings related to the Turnover Motion pending a resolution of the criminal proceedings.[4]

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4. In Debtors' statement of issues on appeal, they also challenge "whether the court erred in granting the Trustee's Motion for Summary Judgment on the Trustee's Motion for Turnover." However, in their Opening Brief, Debtors concede this issue: "[Debtors] concede that, in the absence of a stay, the Trustee is entitled to summary judgment[.]" Debtors' Opening Br. at 5 n.1.

STANDARD OF REVIEW

The decision to stay civil proceedings in the face of pending criminal proceedings is "reserved to the inherent discretion of the trial court." Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995). A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. In re Hansen, 368 B.R. 868, 875 (9th Cir. BAP 2007). To reverse for abuse of discretion we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001).[5]

DISCUSSION

Both the record on appeal provided by Debtors, and their brief, are inadequate to allow the Panel to perform a meaningful review of the bankruptcy court's decision. As a result, this

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5. Debtors suggest that, "since the bankruptcy court issued no factual findings, the Panel should review the order denying a stay de novo. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)." Debtors' Opening Br. at 5 n.1. Debtors note elsewhere in their brief that "the bankruptcy court did not issue written findings of fact or conclusions of law[.]" Debtors' Opening Br. at 5 n.2. (emphasis added). While the bankruptcy court may not have engaged in finding facts in connection with granting Trustee's Summary Judgment Motion, we do not know, but are skeptical, whether no fact findings by the bankruptcy court are implicated in its decision to deny Debtors' request for a stay of proceedings. Indeed, since its June 13, 2007, order denying Debtors' request recites that it is founded upon "the reasons stated on the record at the May 23, 2007 hearing," it would appear likely that the bankruptcy court granted relief upon relevant facts in Debtors' bankruptcy case. Moreover, we note that Cooter & Gell does not require the Panel to employ a de novo review even if no factual findings were made by the bankruptcy court. That decision discusses an award of sanctions under Fed. R. Civ. P. 11. Apparently, it was because of their view of the standard of review that Debtors elected not to submit a transcript of the May 23, 2007 hearing. This was a critical mistake.

appeal will be dismissed.

Debtors did not comply with Rule 8009(b)(5) and (9)[6], and 9th Cir. BAP Rule 8006-1.[7] Significantly, Debtors did not provide a transcript of the hearing conducted by the bankruptcy court concerning their request for a stay and the Turnover Motion, even though the court decided to deny a stay "for the reasons stated on the record at the May 23, 2007 hearing[.]"

If findings of fact or conclusions of law are made orally on the record, a transcript of those findings is mandatory for appellate review. In re McCarthy, 230 B.R. 414, 416 (9th Cir. BAP 1999). Our McCarthy decision was based on long-standing Ninth Circuit precedent that failure to provide relevant transcripts may require dismissal of the appeal. Jones v. City of Santa Monica, 382 F.3d 1052,1056 (9th Cir. 2004); Dela Cruz v. Cruz (In re Estate of Dela Cruz), 279 F.3d 1098, 1102 (9th Cir. 2002); Syncom Capital Corp. v. Wade,[8] 924 F.2d 167, 169 (9th Cir.

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6. "Appendix to Brief. If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following: . . . ; (5) The opinion, findings of fact or conclusions of law filed or delivered orally by the court and citations of the opinion if published. . . . ; (9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel. . . ." Rule 8009(b).

7. "The excerpts of the record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel. The Panel is required to consider only those portions of the transcript included in the excerpts of the record. Parties shall consult local bankruptcy rules with regard to the proper procedure for ordering transcripts or for indicating that transcripts are not necessary." 9th Cir. BAP Rule 8006-1.

8. McCarthy cited Syncom and earlier cases for the proposition that failure to provide relevant transcripts may justify dismissal of an appeal. The Jones and Cruz decisions show that the proposition retains vitality.

1991); In re Ashley, 903 F.2d 599, 603 n.1 (9th Cir. 1990); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 877 F.2d 787, 789-90 (9th Cir. 1989); Southwest Admin'rs, Inc. v. Lopez, 781 F.2d 1378, 1378-80 (9th Cir. 1986); Thomas v. Computax Corp., 631 F.2d 139, 141 (9th Cir. 1980). In the specific context of a review of the BAP's authority to dismiss an appeal, the Ninth Circuit has observed that failing to include a relevant transcript partly justified the BAP's decision to dismiss the appeal. Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187, 1189 (9th Cir. 2003).

Debtors' failure to provide a transcript of the May 23, 2007, hearing was not inadvertent; it was intentional: "Debtors, by their attorney, hereby give notice that they will not be requesting a transcript in connection with the appeal filed on June 22, 2007." Dkt. no. 593. At oral argument, the Panel questioned counsel for Debtors about the omission of the transcript from the record. Counsel responded by representing that the bankruptcy court made no explanations, findings of fact or conclusions of law at the hearing. He asked counsel for Trustee to agree with him in that regard, but counsel for Trustee did not agree, representing instead that the bankruptcy court provided an explanation of its views concerning the issues in the context of various colloquies with counsel at the hearing.

The precedent in this circuit is unequivocal that a trial court's decision whether to stay civil proceedings in the face of pending criminal proceedings is reviewed for abuse of discretion, and that an appellate court reviewing such a decision should examine the trial court's findings based on seven criteria.

Keating, 45 F.3d at 324.[9] The bankruptcy court explicitly wrote that its decision was "in light of the record of this case, and for the reasons stated on the record at the May 23, 2007 hearing." Under these circumstances, the Panel is unwilling to rely upon representations of Debtors' counsel as to what was, or was not, said by the bankruptcy judge, at the March 23, 2007 hearing. Absent a transcript, we are simply unable to perform the review mandated by our court of appeals of the bankruptcy court's decision denying a stay of the Turnover Motion proceedings.[10]

We are also unable to obtain the transcript by other means. While it need not do so, this Panel may, in appropriate cases, independently consult the bankruptcy court's docket to supplement the record on appeal. In re E.R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989). However, even were the Panel inclined to search the record for necessary information, in this case, no

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9. In this context, the Keating court indicated it must first consider whether a party's Fifth Amendment rights were implicated in the civil proceeding sought to be stayed. If the civil proceedings have Fifth Amendment implications, Keating then listed six additional criteria to be considered by a trial court: 1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. Keating, 45 F.3d at 903.

10. We fail to comprehend the logic of Debtors' counsel's position that a transcript was not critical in this appeal. If counsel were correct that the bankruptcy court did not make findings nor explain the reasons for its decision on the record at the March 23, 2007 hearing, such would support Debtors' position that the bankruptcy court abused its discretion in not granting a stay of the turnover proceedings.

transcript of the May 23, 2007, hearing appears in the docket of the bankruptcy court.

Moreover, the hearing transcript is not the only critical document missing from the record on appeal. Debtors argue on appeal that a stay by the bankruptcy court of the Turnover Motion was required because, according to their Opening Brief, "not only [are] the civil and criminal allegations identical but the debtors, if convicted, would likely face as part of any sentence the very same financial consequences (restitution) that the Trustee seeks." Debtors' Opening Br. at 7. But though they base their arguments on the purported similarities between the indictment and Trustee's Turnover Motion, Debtors' excerpts of record include no information about, or pleadings from, the criminal case whatsoever. At the very least, to support the alleged nexus between the criminal and bankruptcy proceedings and their Fifth Amendment arguments, Debtors should have provided the Panel a copy of the criminal indictment. Failure to include such an essential document violates Rule 8009(b)(4).[11],[12]

Debtors' record on appeal is deficient in other ways. They

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11. "Appendix to Brief. If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following: . . . ; (4) Any other orders relevant to the appeal. . . ." Rule 8009(b).

12. We acknowledge that, pursuant to Fed. R. Evid. 201, we could exercise our discretion to obtain a copy of the indictment as a public document from the district court's criminal case file. If we did, we could only examine it as a statement of allegations, and not for the truth of any of those allegations. Further, we are unable to take judicial notice of any supporting documentation in the criminal case which is subject to "reasonable dispute." Fed. R. Evid. 201(b). Under these circumstances, we decline any opportunity to search the district court's record for the indictment or other pleadings of import in this appeal.

failed to consecutively number the pages in their excerpts, to provide a proper table of contents as required by 9th Cir. BAP Rule 8009(b)-1(b)(2) and (3), and their excerpts did not include the notice of appeal as mandated by Rule 8009(b)(8).

Debtors' Opening Brief is also lacking. It does not include a separate statement of the standard of appellate review as required by Rule 8010(a)(1)(C). It also appears that Debtors' counsel did not carefully review the text of the brief for overt contradictions. For example, footnote 1 on page 5 indicates,

> Because (a) the bankruptcy court did not issue written findings of fact or conclusions of law, (b) the pendency of the federal indictment is not disputed by the Trustee, (c) appellants concede that in the absence of a stay, the Trustee is entitled to summary judgment, appellants have not submitted a separate Appendix. See Ehrenberg v. Cal. State Fullerton [(In re Beachport Enter.)], 396 F.3d 1083, 1088 (9th Cir. 2005).

(Emphasis added.) This statement is an obvious mistake. The same day Debtors filed this Opening Brief, they also filed excerpts of the record (i.e., an "appendix"). In filing the excerpts, counsel may have realized that the suggestion that excerpts were unnecessary is simply wrong, since Rule 8009(b) requires submission of excerpts to a bankruptcy appellate panel. Nothing in Beachport Enter. suggests otherwise. Instead, in that decision, our court of appeals held that the BAP should make reasonable efforts to work with a moderately deficient record; it certainly did not countenance an appellant's failure to submit an essential transcript or, as here, multiple critical documents.

Although some of these Rule violations, considered in isolation, would not justify the severe sanction of dismissing an appeal, taken together, the failure to provide transcripts and

other critical documents to this Panel justifies dismissal. Morrissey, 349 F.3d at 1193. ("[T]he inadequacy of the record and the briefing afforded the BAP little choice but to affirm summarily"); Hall v. Whitley, 935 F.2d 164, 165 (9th Cir. 1991) ("[L]itigants should be aware that failure to provide transcripts or other required materials may well result in dismissal of the appeal or other sanctions").

In reaching this conclusion, we are mindful of our court of appeals' instructions that the Panel consider the impact of the dismissal on the parties, alternative sanctions, and the relative culpability of the attorney and his client. Beachport Enter., 396 F.3d at 1087 (citing In re Donovan, 871 F.2d 807, 808 (9th Cir. 1989)(per curiam)); Morrissey, 349 F.3d at 1190 ("The selection of the sanction to be imposed must take into consideration the impact of the sanction and the alternatives available to achieve assessment of the penalties in conformity with the fault). We have done so.

We doubt dismissal of this appeal will seriously compromise Debtors' rights since, given the limited information we have been provided, it appears the bankruptcy court almost surely exercised proper discretion in denying a stay of the Turnover Motion. Debtors were under a continuing obligation to surrender property of the bankruptcy estate to Trustee. § 521(a)(4) (providing that debtor shall "surrender to the trustee all property of the estate . . . whether or not immunity is granted [to debtor] under section 344 . . . ."). In most situations, complying with a turnover order does not implicate the Fifth Amendment rights of a party, even when there is a pending criminal case on similar

issues:

> The question is not of testimony, but of surrender, -- not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep.

In re Harris, 221 U.S. 274, 279 (1911) (Holmes, J.). See also, In re Fuller, 262 U.S. 91, 93-94 (1923) ("A man who becomes a bankrupt . . . has no right to delay the legal transfer of the possession and title of any of his property to the officers appointed by law for its custody or for its disposition[.]") These cases remain good law and form the basis for more contemporary rulings that turnover of property of the estate is not a testimonial act and does not implicate Fifth Amendment rights. In re Ross, 156 B.R. 272, 277 (Bankr. D. Idaho 1993) (turnover of assets of bankruptcy estate is not a testimonial act and thus not within the scope of the Fifth Amendment); In re Devereux, 48 B.R. 645-46 (Bankr. S.D. Cal. 1985) (order for debtor to turn over all property of the estate to the trustee did not violate Fifth Amendment); In re Kaufman, 35 B.R. 6 (Bankr. D. Hawaii 1983) (privilege against self-incrimination not infringed if debtor is required to turn over property of the estate).

Even if Debtors' Fifth Amendment rights might be implicated by the turnover order, the Constitution does not require a stay of civil proceedings pending the outcome of the related criminal proceedings. Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989). "In the absence of substantial prejudice to the rights of the parties involved, parallel [civil and criminal] proceedings are unobjectionable under our

jurisprudence." SEC v. Dresser Indus., 628 F.2d 1368, 1374 (D.C. Cir. 1980).

The decision by the trial court whether to stay civil proceedings under such circumstances should be made "in light of the particular circumstances and competing interests involved in the case." Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995) (quoting Molinaro, 889 F.2d at 902).[13] Although a debtor's Fifth Amendment rights are only one of seven criteria the trial court should consider in deciding whether to grant a stay of civil proceedings in light of a contemporaneous criminal case, Keating, 45 F.3d at 903, Debtors' Opening Brief, which consists of only eight pages, devotes but a single paragraph to any analysis of the Keating criteria. We do not find that short argument compelling, and as we have noted, the Panel can not comply with the direction to review the record in light of the Keating criteria if we do not have a transcript of the hearing.

We also believe that there is no effective alternative to dismissal to deal with the deficient record in this appeal. Debtors have already benefitted from, and the bankruptcy estate has been burdened by, Debtors' considerable delay in turning over the insurance money to Trustee. There is evidence in the record

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13. Rather than rely upon Ninth Circuit case law, in their Opening Brief (there was no reply brief), and at oral argument, Debtors lean heavily on the district court's decision in Par Pharm. Sec. Litig., 133 F.R.D. 12 (S.D.N.Y. 1990) for the proposition that "The great weight of authority requires the Court to stay these proceedings." Par Pharm., 133 F.R.D. at 13. Of course, this trial court decision is not binding on this Panel. Indeed, for authority, it cites decisions of other trial courts in the 2nd Circuit (plus two references to the D.C. Circuit for general principles).

that Debtors are in possession of the funds and may have dissipated some of them. The bankruptcy court was presumably reluctant, and justifiably so, to stay the Turnover Motion any longer, given Debtors' track record in the bankruptcy case. Recall, the record shows Debtors were removed as debtors-in-possession during the chapter 12 case because they grossly mismanaged the estate; the case was converted to a chapter 7 case based upon Debtors' misrepresentations to the bankruptcy court; and Debtors stipulated to a denial of discharge in the chapter 7 case in the face of allegations of further wrongdoing. Under these circumstances, we decline to allow Debtors any further opportunity to rehabilitate the record on appeal.

Finally, while we have some concern regarding the briefing, it does not appear that Debtors' counsel is incompetent, or that dismissal "may inappropriately punish the appellant for the neglect of counsel." Donovan, 871 F.2d at 808. As noted above, Debtors' failure to produce the hearing transcript was not negligent; it was an intentional decision by Debtors' counsel, as was the original decision to oppose the Turnover Motion and Summary Judgment Motion which was made by Debtors at the direction of their criminal counsel. In other words, Debtors have not been victimized by inadequate counsel. Instead, it appears Debtors, presumably in consultation with their lawyers, find themselves in this predicament largely because of the strategic decisions made in defending this litigation.

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CONCLUSION

Debtors, by choice and omission, have not provided this Panel with an adequate record to allow it to perform a meaningful review of the bankruptcy court's decision denying a stay of the Turnover Motion proceedings. As a result, this appeal is DISMISSED.