IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	

GOVERNMENT'S REPLY TO DEFENDANT'S RESPONSE
TO GOVERNMENT'S MOTION TO SET TRIAL DATE

The United States respectfully opposes defendant's request that the Court "defer action" and "not set a trial date" until the Supreme Court resolves his as yet unfiled petition for *certiorari*. The defense provides no legal basis for the requested inaction, and, indeed, there is none. On the contrary, the Fourth Circuit's mandate means that this case is now ready to move forward to trial. The defense did not ask the Fourth Circuit to hold the mandate, as it could have. Nor has the defense sought a stay from the Supreme Court, the court obviously in the best position to know whether *certiorari* will be granted. The defense's request of this Court for a stay not only flouts the established procedure for obtaining such relief, but it invites the Court simply to ignore the mandate and deprive the public of a speedy trial. The Court should reject defendant's position, proceed with the litigation in this case, and set a trial date. A contrary ruling would send a troubling message to terrorists, such as the defendant, that they can bring the criminal justice system to a halt due to litigation costs. Indeed, if there is any case that demands the commitment of resources, it is one where thousands of Americans have been murdered by terrorists.

A. The Defense Position is Unsupported

1. The Mandate Must Be Followed

On October 13, 2004, the Fourth Circuit denied the defendant's Petition for Rehearing *En Banc*. The defense did not seek a stay of the Fourth Circuit's mandate under Fed. R. App. P. 41(d)(2) and the mandate issued on October 21, 2004, returning this case to this Court for trial. The mandate cannot be ignored, as the defense requests. See, e.g., South Atlantic Ltd. P'ship of Tenn. v. Riese, 356 F.3d 576, 584 (4th Cir. 2004) ("when this court remands for further proceedings, a district court must, except in rare circumstances, implement both the letter and spirit of the . . . mandate") (internal quotation marks and citations omitted); United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993) ("a lower court generally is bound to carry the mandate of the upper court into execution") (internal quotation marks and citations omitted); see also Yong v. I.N.S., 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000) ("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority"). The defense has not yet sought a stay from the Supreme Court and it is unlikely that the Supreme Court would grant such relief given the absence of an application to the Fourth Circuit to stay or recall the mandate. See S. Ct. Rule 23(3) ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below . . . .").[1]

[1] Even if defendant properly sought a stay, such a motion would fail on the merits. In Barefoot v. Estelle, 463 U.S. 880, 895-896 (1983), the Court set forth a three-part standard for granting a stay: "there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari* or the notation of

The Fourth Circuit unequivocally stated: "This case is remanded to the District Court for further proceedings consistent with the Court's opinion." The letter and spirit of the mandate commands that the litigation of this case must go forward.

2. This Court May Not Enter a Stay

Defendant's request that this Court freeze all further litigation pending the outcome of his *certiorari* petition is a transparent endeavor to end-run the rules for when and how a stay may be granted. The provision that normally grants courts the authority to issue stays pending *certiorari* is not even applicable here in light of the interlocutory nature of the Fourth Circuit's ruling. Title 28 U.S.C. § 2101(f) provides:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of *certiorari* from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . .

See also Fed. R. App. P. 41(d)(2). As the statute makes clear, authority to stay the mandate in this case is vested in the Court of Appeals and the Supreme Court. See In re Stumes, 681 F.2d 524 (8th Cir. 1982) (only appeals court judge or Supreme Court justice can stay judgment pending party's *certiorari* petition); Harris v. City of Virginia Beach, 923 F. Supp. 869, 872-73 (E.D.Va. 1996), rev'd on other grounds, 110 F.3d 59, 1997 WL 144071 (4th Cir. 1997) (unpublished); Mister v. Illinois Central RR Co., 680 F. Supp. 297 (S.D. Ill. 1988);

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probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." (emphasis added). As discussed below, there is little likelihood that the Supreme Court will grant *certiorari* at this time because it can review the issue raised on appeal post-conviction.

Studiengesellschaft Kohle v. Novamont Corp., 578 F. Supp. 78, 79-80 (S.D.N.Y. 1983).

The Supreme Court has long recognized that an appellate court is in a better position than a district court "to judge first whether the case is one likely under our practice to be taken up by us on certiorari, and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate." Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923) (cited in Studiengesellschaft, 578 F. Supp at 80). Accordingly, defendant's arguments that his petition for *certiorari* contains important and compelling issues likely to be taken up by the Supreme Court are arguments that should have been made to the Fourth Circuit or to the Supreme Court. The defense's failure to do so telegraphs their recognition that applications to the Fourth Circuit or Supreme Court would not have succeeded.

The fact of the matter is that it is highly unlikely that the Supreme Court will review this case, at this time, because it can review the issue raised on appeal post-conviction. The Supreme Court rarely grants review of interlocutory petitions for *certiorari*. See American Construction Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372, 384 (1893); see also Virginia Military Institute v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring). To its credit, the defense in its response has not withdrawn its earlier agreement with this assessment. The failure by any member of the Fourth Circuit even to request a poll on defendant's Petition for Rehearing *En Banc* only underscores the accuracy of this assessment. See Rubin v. United States, 524 U.S. 1301 (1998) (failure of any members of the Court of Appeals to request a vote for rehearing *en banc* supports denial of motion for stay).

B. Speedy Trial Implications

The defense position also offends interests embodied in the Speedy Trial Act. Normally, a defendant must be tried within 70 days, which may be extended to 180 days, after the Government takes an interlocutory appeal from the dismissal of charges. 18 U.S.C. § 3161(d)(2). For other interlocutory appeals, such as in this case, delay resulting from an interlocutory appeal is excluded from the time computation for Speedy Trial Act purposes. 18 U.S.C. § 3161(h)(1)(E). We recognize that the parties agreed early on that this case was "complex" for purposes of the Speedy Trial Act and that, therefore, trial could occur beyond the standard 70 days mandated by the Act. See Order dated 12/27/01 (docket no. 18). By doing so, however, the Government did not cede the strong public interest in a timely trial. See United States v. Darrell, 147 F.3d 315, 318 (4th Cir. 1998) (noting the strong public interest in a speedy trial); United States v. Keith, 42 F.3d 234, 238 (4th Cir. 1994) (same); United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992) ("The Act is intended both to protect the defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved.").

Moreover, the "complex case" section of the Speedy Trial Act requires the Court to make a finding that the "ends of justice served by [continuing the case beyond the 70-day time limit] outweigh the best interest of the public and the defendant in a speedy trial." The defense's argument based on the "expenditure of scarce judicial resources" does not meet the "ends of justice" standard. Cf. United States v. Stoudenmire, 74 F.3d 60, 64 n. 4 (4th Cir. 1996) (congested court docket cannot justify an ends of justice continuance).

By noting the Speedy Trial implications of defendant's position, we do not seek a trial within 70 days, nor do we abandon our position that this case is "complex." It certainly is.

Moreover, we are cognizant of the District Court's case-management authority. Our position is simply that endless delays of any prosecution undermine the public's confidence in the criminal justice system and that those concerns are substantially heightened in a case that carries the obvious importance that this prosecution holds.

We are troubled by the defense's suggestion that financial considerations should drive the decision-making process. We simply cannot fathom explaining to the families of the 3,000 dead victims from 9/11 that this case will be further delayed because of the budgetary problems in the Public Defender's Office.

C. Budgetary Concerns

The core of the defense opposition focuses upon their concern over the potential waste of funds that would be expended by their trial preparation. Concomitantly, the defense argues that they will need substantial time to prepare for trial and cite, as an example, the amount of discovery that they have received while the case has been on appeal. See Defense Response at 2 n. 4.

The Court can fully address the concerns of both sides by simply setting this case for trial while the defense pursues their *certiorari* petition. If the Supreme Court (surprisingly) grants *certiorari*, the trial date can be rescheduled. If *certiorari* is denied, the case can proceed to trial in a much more expeditious manner. We also understand from the Administrative Office of the Courts that a firm trial date will allow defense counsel to seek the additional funding that they need to prepare their defense—work that will need to occur regardless of the Supreme Court's ruling on the defense petition.

In essence, the defense wants the trial in this case simply to go away or be significantly

curtailed. As the Fourth Circuit's mandate indicates, however, the defense hope is in vain.

D. Defense Submission of Questions

The defense concludes their response by raising the issue of a "procedure with regard to the missing witnesses" pursuant to the Fourth Circuit's decision. See United States v. Moussaoui, 382 F.3d 453, 479 (4th Cir. Sept. 13, 2004). Although the prosecution has no role in this process, we respectfully submit that this procedure should have already begun and, if it has not, the defense should immediately begin the procedure. There simply is no reason to delay this procedure.

Conclusion

For the foregoing reasons, the Government respectfully requests that the Court proceed with the litigation of this case and set the case for trial to begin with jury selection on April 25, 2005, and opening statements/evidence on Tuesday, May 31, 2005. Because of the exceptional importance of this issue to the Government, we respectfully request a hearing on this motion.

Respectfully submitted,

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Certificate of Service

I certify that on the ___th day of November, 2004, a copy of the foregoing Government's Reply was faxed and mailed to the following:

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