

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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UNITED STATES OF AMERICA :

- v. - : **02 Cr. 395 (JGK)**

AHMED ABDEL SATTAR, et al., :

Defendants. :

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**GOVERNMENT’S MEMORANDUM IN RESPONSE
TO THE COURT’S ORDER REGARDING ITS POWER TO
REVOKE DEFENDANTS’ BAIL AND OPPOSITION TO DEFENDANTS’
MOTION TO STAY SURRENDER PENDING ISSUANCE OF THE MANDATE**

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

KARL METZNER
MICHAEL D. MAIMIN
Assistant United States Attorneys
- Of Counsel -

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The Government respectfully submits this memorandum in response to the Court’s order, dated November 17, 2009, that “the parties should advise the Court forthwith whether the Court has the power now to revoke the bail for defendants Stewart and Yousry and to order them to surrender forthwith, or whether the Court must await the issuance of the mandate.”¹ For the reasons set forth below, and as implicitly recognized by Stewart and Yousry throughout the course of their appeal, the Court has the power now to revoke the bail for defendants Stewart and Yousry and to order them to surrender forthwith, and so should

¹ The undersigned was not aware of the Court’s second order of November 17, 2009 — directing the parties to make submissions by 2:00 p.m. on November 18 — until approximately 2:25 p.m. on November 18. The Government apologizes for the oversight, and requests that the Court consider this submission notwithstanding its tardiness.

deny their motion to stay surrender pending issuance of the mandate.

I. Factual Background

Superseding Indictment S1 02 Cr. 395 (JGK) (the “Superseding Indictment” or “S1 Indictment”) was filed on November 19, 2003, in seven counts. Count One charged Sattar, Stewart, and Yousry with conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371. Count Two charged Sattar with conspiracy to kill and kidnap persons in a foreign country, in violation of Title 18, United States Code, Section 956(a)(1) and (a)(2)(A). Count Three charged Sattar with solicitation of crimes of violence, in violation of Title 18, United States Code, Section 373. Count Four charged Stewart and Yousry with conspiracy to provide and to conceal the provision of material support to the conspiracy to kill and kidnap charged in Count Two, in violation of Title 18, United States Code, Section 371. Count Five charged Stewart and Yousry with providing and concealing the provision of material support to the conspiracy to kill and kidnap charged in Count Two, in violation of Title 18, United States Code, Sections 2339A and 2. Counts Six and Seven charged Stewart with making false statements to the United States Department of Justice and its agency, the Bureau of Prisons, in violation of Title 18, United States Code, Section 1001.

Trial began on May 19, 2004, and ended on February 10, 2005, when Sattar, Stewart, and Yousry were convicted on all counts charged in the Superseding Indictment. On October 16, 2006, this Court sentenced all three defendants. Sattar was sentenced to 288 months’ incarceration, to be followed by five years’ supervised release, and a mandatory \$300 special

assessment. Stewart was sentenced to 28 months' incarceration, to be followed by two years' supervised release, and a mandatory \$500 special assessment. Yousry was sentenced to 20 months' incarceration, to be followed by two years' supervised release, and a mandatory \$300 special assessment.

At the sentencing proceeding, Stewart and Yousry requested that their bail be continued pending appeal. Over the Government's objection, the Court granted that request, pursuant to 18 U.S.C. §§ 3143(b)(1) and 3145(c). (Sent. Tr. 128-32). Among the other necessary factors for continued release, the Court stated that "there are substantial questions which, if decided in favor of the appellants, would likely result in the reversal or a new trial on all counts on which imprisonment has been imposed." (Sent. Tr. 130). *See* 18 U.S.C. § 3143(b)(1)(B)(i)&(ii).

All three defendants timely appealed their convictions. The Government cross-appealed the defendants' sentences.

On November 17, 2009, the Second Circuit issued its opinion in the consolidated appeal, upholding the defendants' convictions on all counts and remanding for resentencing following consideration of particular factors with respect to Stewart – in particular, whether she committed perjury at trial or otherwise obstructed justice and whether her conduct as a lawyer triggers the special-skill/abuse of trust enhancement under the United States Sentencing Guidelines. (Slip Op. 124-25). The Court of Appeals also "directed [this Court] to revoke Stewart's and Yousry's bail pending appeal and to order them to surrender to the

United States Marshal to begin serving their sentences forthwith as directed by” this Court. (Slip Op. 2; *see also id.* 7, 125).

In response to the opinion of the Second Circuit, this Court issued an order that “the parties should advise the Court forthwith whether the Court has the power now to revoke the bail for defendants Stewart and Yousry and to order them to surrender forthwith, or whether the Court must await the issuance of the mandate.” (Docket Entry 969).

II. Discussion

A. This Court Retains Authority Over the Defendants’ Bail Conditions During the Pendency of An Appeal

This Court has the authority now, and has had the authority throughout the pendency of the defendants’ appeals, to modify or revoke the defendants’ bail and to order their immediate surrender, which this Court should do in light of the Second Circuit’s decision. The defendants’ motion to stay surrender should therefore be denied.

The procedures for requesting bail pending appeal demonstrate that a district court retains jurisdiction over bail issues, even after a notice of appeal has been filed. To begin with, section 3143(b) of Title 18 of the United States Code, which governs requests for bail pending appeal, anticipates review by “the judicial officer” of such a request from a defendant “who has filed an appeal or a petition for a writ of certiorari.” 18 U.S.C. § 3143(b); *accord United States v. Capanelli*, No. 01 Cr. 1121 (CSH), 2004 WL 1542247, at *4 (S.D.N.Y. July 9, 2004) (district court retains jurisdiction to decide § 3143(b) motion even after appeal filed); *United States v. Smith*, 595 F. Supp. 2d 953, 956 n.1 (S.D. Iowa

2009) (section 3143(b) “confers limited jurisdiction upon district courts to decide this issue”). Further, the Second Circuit has held that a defendant’s motion for bail pending appeal must ordinarily be submitted to the district court in the first instance, even if a notice of appeal has already been filed. *United States v. Hochevar*, 214 F.3d 342, 343-44 (2d Cir. 2000). Rule 9(b) of the Federal Rules of Appellate Procedure anticipates that the court of appeals will usually be reviewing district court rulings on motions for bail pending appeal, rather than deciding them in the first instance. Fed. R. App. P. 9(b); *Hochevar*, 214 F.3d at 343.

The Second Circuit and numerous other courts have confirmed a district court’s continuing jurisdiction over bail issues while an appeal is pending. *See, e.g., United States v. Queen*, 847 F.2d 346, 350 (7th Cir. 1988) (Rule 46 and § 3143(b) “permit district courts to determine whether convicted defendants should be released pending their appeal, and under what conditions”); *United States v. Catino*, 562 F.2d 1, 4 (2d Cir. 1977) (district court retains jurisdiction to review, alter, or amend conditions of release). As the Seventh Circuit has recognized,

In view of the fact that, during the pendency of an appeal, facts may come to light which render it advisable for the district court to alter the conditions upon which the defendant has been released, or to revoke his bond altogether, the same statute which explicitly empowers the district court to impose conditions upon release pending appeal, implicitly empowers the court to make such adjustments in those conditions as circumstances may necessitate.

United States v. Black, 543 F.2d 35, 37 (7th Cir. 1976).

Indeed, both Stewart and Yousry have repeatedly recognized this Court’s authority

to modify their bail conditions during the pendency of their appeals. In particular, since filing her notice of appeal, defendant Stewart has sought and received 25 modifications of her release conditions to allow her to travel extensively. (*See* Docket Entries 914, 929, 931, 933, 934, 936, 940, 941, 942, 943, 944, 947, 948, 949, 951, 952, 953, 954, 955, 956, 957, 960, 962, 966, 968). Defendant Yousry obtained two such modifications. (*See* Docket Entries 959, 965). Indeed, just over one week ago, Stewart sought, and received, modifications of bail from this Court allowing her “to attend a New Jersey News Legacy honoring her friends Sandra King and Ray Brown” and to “travel to Watertown, Massachusetts, to visit her friend, Virginia Gernes.” (Docket Entry 968). Although the Government initially objected to these modifications (and later took no position), it never did so on the basis of a claim that the Court was without authority to modify or revoke bail.

Because the mandate has not yet issued, the defendants’ appeals technically remain pending. But numerous decisions specifically recognize the authority and discretion of a district court to revoke bail after the issuance of an appellate opinion but before the issuance of the mandate. In *United States v. Krzyske*, 857 F.2d 1089 (6th Cir. 1988), the Sixth Circuit reviewed the pertinent authorities and recognized that a district court has the authority to revoke a defendant’s bail following the rejection of the defendant’s appeal on the merits in an appellate opinion, but before the mandate had issued. *Id.* at 1091. A previous Sixth Circuit panel had agreed, noting that “[t]he order to vacate appellant’s bonds and rearrest them is not related to or governed by the issuance of the mandate of this court.” *United*

States v. Elkins, 683 F.2d 143, 145 (6th Cir. 1982) (affirming jurisdiction and discretion of district court to revoke bail upon issuance of appellate opinion affirming convictions). District courts have ruled similarly. *See, e.g., United States v. Nissenbaum*, No. CRIM.A. 00-570, 2001 WL 34082287 (E.D. Pa. Mar. 26, 2003) (revoking bail even though mandate stayed pending petition for writ of certiorari to United States Supreme Court, because “there is little chance the Supreme Court will grant certiorari to hear this case”); *United States v. Cocivera*, No. CRIM. A. 94-365, 1997 WL 9795, at *1 n.1 (E.D. Pa. Jan. 9, 1997) (“the fact that the Third Circuit has not issued a mandate does not negate this court’s jurisdiction”); *United States v. Sullivan*, 631 F. Supp. 1539, 1541 (E.D. Pa. 1986) (district court has “the power to revoke bail under 18 U.S.C. § 3143(b), before the circuit court’s mandate is issued”). *Accord* David G. Knibb, *Federal Court of Appeals Manual* § 34:15 (5th ed.) (“[W]hen a criminal conviction is upheld on appeal, in the interim before receipt of the mandate the district court may conduct a sentencing hearing, revoke bail, or order a convicted defendant to commence his sentence.”) (footnotes omitted).

B. Defendants Stewart and Yousry Should Be Remanded Immediately

Pending the issuance of the mandate, 18 U.S.C. § 3143(b) governs the continued release of defendants Stewart and Yousry. Because both have been convicted of violating 18 U.S.C. § 2339A, the provisions of § 3143(b)(2) apply, which requires categorically that any person convicted of such an offense and sentenced to a term of imprisonment “be detained.” 18 U.S.C. § 3143(b)(2).

Notwithstanding the mandatory language of § 3143(b)(2), “an exception permits release of mandatory detainees who meet the requirements for release under § 3143(b)(1), and ‘if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.’” *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991) (quoting 18 U.S.C. § 3145(c)). To satisfy the requirements of § 3143(b)(1), “the trial judge must find that the person poses no risk of flight and no danger to the community during release and that the appeal ‘raises a substantial question of law or fact likely to result in’ reversal, a new trial, or a reduced sentence, and is not interposed for purposes of delay.” *Id.* (quoting 18 U.S.C. § 3143(b)(1)). Only after making these findings does the trial court consider whether the presence of exceptional circumstances would making detention inappropriate. *Id.*

In light of the opinion of the Second Circuit issued on November 17, Stewart and Yousry cannot satisfy the requirements for continued bail pending appeal. At sentencing, this Court reasoned that the legal issues surrounding the defendants’ convictions under 18 U.S.C. § 2339A presented “substantial questions of law” sufficient to satisfy that requirement. (Sent. Tr. 130-31). The Court relied on the same issues to find the presence of “exceptional circumstances” under § 3145(c). (Sent. Tr. 131-32). But now three circuit judges have unanimously affirmed this Court’s rulings on those issues, specifically discussing at length and rejecting the defendants’ attacks on their § 2339A convictions. It is simply impossible to conclude that, with only the remote possibility of panel rehearing,

rehearing en banc, or Supreme Court review remaining, the defendants' appeal still raises a "substantial question of law or fact" or presents "exceptional reasons" justifying bail. Once the mandate issues, defendant Stewart's sentence will be remanded, but only for this Court to determine whether to increase it; the fact that both Stewart and Yousry now face substantial prison sentences cannot be rationally disputed.

III. Conclusion

Defendants Stewart and Yousry were convicted on February 10, 2005. They were not sentenced until October 16, 2006, and have remained free on bail throughout an extensive appeal process that has lasted more than three years. But in light of the unanimous decision of the Second Circuit, the circumstances justifying their continued release no longer exist. As a result, consistent with the Second Circuit's explicit directive that both Stewart and Yousry should "surrender to the United States Marshal to begin serving their sentences forthwith," (Op. 7), the Government requests that bail as to Stewart and Yousry be vacated and that they be immediately remanded.

Respectfully submitted,

PRETT BHARARA
United States Attorney

By:

KARL METZNER
MICHAEL D. MAIMIN
Assistant United States Attorneys
(212) 637-2476 / -2338

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for the defendants on November 18, 2009.

Karl Metzner