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November 18, 2009

BY ECF and FACSIMILE

Hon. John G. Koeltl
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: USA v. Ahmed Abdel Sattar et al
including **MOHAMMED YOUSRY**
S-1 02 Cr. 395 (JGK)

Dear Judge Koeltl:

By Orders dated November 17, 2009, you have directed submissions on the subject of whether the Court has the "ability" to issue an order directing Mohamed Yousry to surrender forthwith to begin serving his twenty month prison sentence. On multiple grounds, we believe that the Court lacks the authority to direct an immediate surrender to the United States marshal by our client, and lacks the authority to alter the self-surrender provision contained in the Judgment.

First, no mandate has issued in this matter pursuant to Rule 41 of the the Federal Rules of Appellate Procedure, and pursuant to United States v. Rivera, 844 F.2d 916 (2nd Cir. 1988), the Court lacks jurisdiction to alter the bail conditions of a defendant who is in total compliance with all of the conditions of his bail, such as Mr. Yousry. Second, as part of his sentence, Mr. Yousry was directed to self-surrender upon designation to a facility by the Bureau of Prisons. This condition of sentence was incorporated into the Criminal Case Judgment signed by the Court and filed in the case on October 26, 2006. Such conditions may not be altered as they are part of the final Judgment and no provision of law allows for their alteration at this stage of the case. Moreover,

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as will be set forth herein, it will violate Mr. Yousry's Fifth Amendment Double Jeopardy rights to subject him now to the added punishment which will accompany immediate surrender to the United States marshal.

1. Jurisdiction in the district court is lacking while the matter is on Appeal.

Courts in this Circuit have clearly held that "jurisdiction follows the mandate," Rivera 841 F.2d at 921, and that while a matter is on appeal, jurisdiction is exclusively in the appellate court until issuance of the mandate. And while United States v. Black, 543 F.2d 35, 37 (7th Cir. 1978), holds that filing a notice of appeal does not "render the district judge powerless or without jurisdiction to enforce the conditions of a bond" and that the district court retains "jurisdiction ... for the limited purposes of reviewing, altering, or amending the conditions under which the court released the defendant," this case has never been followed in the Second Circuit, and language in at least one Second Circuit case calls the applicability of Black's holding into serious question.

In United States v. Ostrer, 584 F.2d 594 (2nd Cir. 1978) the defendant was at liberty on bail pending appeal following a conviction for securities fraud. He sought serial relief on direct appeal and then on federal habeas grounds and made multiple motions seeking a new trial, but ultimately lost on all of his efforts. After denial of his habeas petition, the defendant was ordered to surrender to begin serving his three year prison sentence. After a denial by the Supreme Court to review the matter, the defendant's surrender was noticed for a date certain, but he then filed a petition for writ of habeas corpus, which was denied, although the district court continued bail "until the Court of Appeals shall determine the [defendant's] appeal ... or otherwise direct." Ostrer, 584 F.2d at 596. The denial of habeas relief was then affirmed and the Court of Appeals specifically directed that "the mandate issue forthwith." Id. The Second Circuit explained that it made the direction as to the mandate specifically so that the defendant, who had been at liberty for five years following his conviction, should finally have to surrender to begin serving his sentence. It is noteworthy, however, that the Court did not simply order that the defendant surrender before issuance of the mandate, but rather ordered the immediate issuance of the mandate. The Second Circuit explained that in this manner, and by implication only in this manner, the defendant could be compelled to surrender:

[T]he effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court returning it to the forum whence it came. The practical effect of the mandate's issuance, at least with respect to appellant's facing criminal sentences, is to authorize the executive branch to insure compliance with whatever sentence was imposed by the district court.

Id. at 598.

To order Mr. Yousry's surrender to the marshal in advance of the issuance of the mandate will require ignoring the Second Circuit's explanation of the nature and purpose of the mandate, and its effect on the timing of the executive's duty to secure compliance with the terms of the sentence imposed. Accordingly, the district court lacks authority and should not order surrender in advance of the mandate.

2. Requiring Immediate Surrender to the Marshal Will Deny Mr. Yousry the Protections Afforded by the Double Jeopardy clause of the Fifth Amendment.

The Double Jeopardy Clause, which provides that "no person [shall] be subject for the same offense to be twice put in jeopardy of life or limb," has been held to also protect against "multiple criminal punishments for the same offense." See, United States v. Hudson, 522 U.S. 93 (1997).

The provision in Mr. Yousry's Judgment providing for self-surrender is a part, and an important part, of the defendant's sentence. It will have a substantial impact on the life he will experience during incarceration. This is because the condition of self-surrender to a BOP designated facility is not only a matter of convenience for the defendant, and something favored by BOP, but, more importantly, it lowers an inmate's BOP scoring level, which in turn affects an inmate's place of confinement, level of security, and program availability.¹

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The most recent BOP Program Statement on the subject sets forth facts relating to the inmate classification system, stating that classification is "necessary to place each inmate in the most

Changing this provision of the sentence will, therefore, subject Mr. Yousry to a multiple and a greater punishment in violation of his rights under the Double Jeopardy Clause if his manner of entering the prison system is changed from a person who self-surrenders, to one who is incarcerated in a local jail until designation, and then transported to the designated facility once one is selected by BOP. Thus, the Court is not empowered to order immediate surrender to the U.S. Marshal.

3. The Judgment Plainly calls for Self-Surrender upon Designation.

The Judgment in this matter specifically states that Mr. Yousry is to "surrender for service of sentence at the institution designated by the Bureau of Prisons." In order for the defendant to now be subject to a different requirement, the specific terms of the Judgment containing the conditions and specifications of the sentence must be changed. Pursuant to Rule 35 of the Federal Rules of Criminal Procedure, a sentence may be "correct[ed]" by the court if it "result[ed] from arithmetical, technical, or other clear error." Rule 36 provides that the Court is empowered, after giving "appropriate" notice and at "any time" to "correct a clerical error in a judgment ...". Neither of these rules, however, permit the district court to now change the condition in defendant's Judgment that he surrender "at an institution designated by the Bureau of Prisons," and to now require him to immediately surrender to the United States marshal. Thus, the court lacks authority to make such an order.

CONCLUSION

For all of the foregoing reasons, it is submitted that the Court lacks authority to order an immediate surrender by Mr. Yousry

appropriate security level institution that also meets their program needs and is consistent with the Bureaus's mission to protect society." Importantly, an inmate permitted to self-surrender -- defined by BOP to mean an "inmate ... not escorted by a law enforcement officer to either the U.S. Marshal's Office or to the place of confinement" -- receives three points off his or her "Security Point Total." The Security Point Total in turn specifically dictates the requisite level of security of the inmate's confinement and, therefore, his place of designation. See, "Federal Bureau of Prisons Program Statement", Number 5100.08, dated September 12, 2006. The BOP statement may be accessed at www.bop.gov/policy/progstat/5100_08.

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to the United States marshals. To the extent applicable to Mr. Yousry, Mr. Yousry requests permission to join in any arguments of co-counsel for his co-defendant, Lynn Stewart.

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cc: All Counsel (by US Mail)