UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, :

– *against* – :

LYNNE STEWART, :

Defendant. :

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S1 02 Cr. 395 (JGK)

MOTION TO STAY SURRENDER PENDING ISSUANCE OF THE MANDATE FROM THE COURT OF APPEALS

Introduction

This Motion[1] addresses the Court's November 17, 2009, and November 18, 2009, Orders with respect to whether the Court "must await the issuance of the mandate[]" from the Court of Appeals before the Court can, "as directed by the Court of Appeals," *id*., revoke Ms. Stewart's bail and order her surrender. For all the reasons set forth below, it is respectfully submitted that absent issuance of the mandate, the Court does not possess authority to revoke Ms. Stewart's bail.

As detailed below, Second Circuit case law establishes that jurisdiction does not return to the District Court until the mandate issues. While the cases listed by the Court in its November 18, 2009, Order suggest otherwise in circumstances peculiar to those cases, each of those cases

[1] This submission, directed by the Court in its November 17, 2009, Order, is styled as a "motion" for a particular form of relief because, consistent with the Court's direction that it be filed by ECF (as well as by facsimile to Chambers), in order for a submission to qualify for ECF filing it must conform to the October 8, 2009, "Protocol for Criminal Motions," issued by Chief Judge Preska (and the ECF system does not accept traditional letter briefs, in which form this "motion" would heretofore have been submitted).

predate the long line of Second Circuit cases setting forth the principle that "[s]imply put, jurisdiction follows the mandate." *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) (citation omitted). Moreover, as discussed below, at least four Circuits are in accord with that rule, and longstanding Supreme Court precedent provides the same guidance.

Accordingly, it is respectfully submitted that the Court's authority to revoke Ms. Stewart's bail must await issuance of the mandate from the Court of Appeals.

ARGUMENT

SECOND CIRCUIT PRECEDENT ESTABLISHES THAT THE DISTRICT COURT LACKS JURISDICTION UNTIL THE MANDATE ISSUES

A. *The Second Circuit's Rule That Only Issuance of the Mandate Returns Jurisdiction to the District Court*

As noted above, in *United States v. Rivera*, the Second Circuit, in the context of determining when the Speedy Trial clock commenced following remand from the Circuit, declared categorically that "[s]imply put, jurisdiction follows the mandate." 844 F.2d at 921, *citing Ostrer v. United States*, 584 F.2d 594 (2d Cir. 1978). That rule has been followed since. *See, e..g,, Doe v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006) (Court rejects government's suggestion for rendering the case moot because district court did not possess jurisdiction to entertain government's proposed motion until mandate issued), *citing Rivera*, 844 F.2d at 921; *Ostrer*, 584 F.2d at 598; *United States v. Rodgers*, 101 F.3d 247, 251-52 (2d Cir. 1996). *See also United States v. Zedner*, 555 F.3d 68, 79-81 (2d Cir. 2008); *id*., at 82-83 (Pooler, J., *dissenting*).[2]

[2] In *Zedner*, the majority declined to address the impact of the failure of the mandate to issue (with respect to commencement of a retrial after a Speedy Trial reversal) because the defendant, who had failed to return to the U .S., was not entitled to such consideration due to the

In *Ostrer*, the Second Circuit explained that "[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." 584 F.2d at 598.[3] In *Ostrer*, the mandate had issued forthwith (in conformity with the Court's express order), *id*., at 596, and the Court repeatedly noted that the mandate had issued (forthwith) in stating the bases for its conclusions. *Id*., at 598-99. Similarly, the District Court's prior opinion in *Ostrer* had noted that "[o]nce mandate has issued, [the] defendant is without bai[,]l" *United States v. Ostrer*, 422 F. Supp. 108, 110 (S.D.N.Y. 1976) and that the "mandate is the equivalent of an order of surrender." At 110 (citation omitted).

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fugitive disentitlement doctrine. 555 F.3d at 75-77, 81. However, the majority in *Zedner* did not quarrel with the dissent's citation to the rule (and to *Rivera*, *Doe v. Gonzales*, and *Rodgers*) that the district court does not possess jurisdiction until issuance of the mandate. Rather, the majority pointed out that "[t]his is not a matter of subject matter jurisdiction; it is purely a question as to the timing of the respective jurisdictions of this Court and the district court with respect to a prosecution that is plainly within federal subject matter jurisdiction." 555 F.3d at 80. Also, in dissent, Judge Pooler rejected the government's contention that *United States v. Frias*, 521 F.3d 229 (2d Cir. 2008) had somehow altered the mandate rule, pointing out that "*Frias* limited its discussion to *time limits*, not mandates." 555 F.3d at 82 n. 3 (emphasis in original), *citing Frias*, 521 F.3d at 231-34.

[3] Issuance of the mandate is governed by Rule 41, Fed.R.App.P., which provides as follows:

> (a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
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> (b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
>
> (c) Effective Date. The mandate is effective when issued.

In *Rivera*, the Court also noted that the mandate is not merely a ministerial formality; rather, "issuance of the mandate is an event of considerable institutional significance." 884 F.2d at 921. As the Court cautioned, it would not agree "that the mandate 'issued' simply because it should have been issued, or because the panel may have intended it to issue, or because the statute commands it to issue." *Id*. *See also id*. ("[n]or is the mandate deemed issued merely upon the filing of an opinion or summary order").

Research establishes that eight Circuits also adhere to the rule that in the context of the Speedy Trial clock, only the mandate re-vests the District Court with jurisdiction. *See, e.g., United States v. Long*, 900 F.2d 1270, 1276 (8th Cir. 1990); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987); *United States v. Felton*, 811 F.2d 190 (3d Cir. 1987); *United States v. Robertson*, 810 F.2d 254, 259 n. 6 (D.C.Cir. 1987); *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985); *United States v. Rush*, 738 F.2d 497, 509 (1st Cir. 1984); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981); *United States v. Cook*, 592 F.2d 877, 880 (5th Cir. 1979).[4]

In *Rush*, cited and quoted in *Rivera*, 844 F.2d at 921, the First Circuit held that "it is the date on which the mandate is issued which determines when the district court reacquires jurisdiction for further proceedings." 738 F.2d at 509 (citation omitted). Moreover, the Supreme Court has long recognized that "an appeal suspends the power of the court below to proceed further in the cause[.]" *Hovey v. McDonald*, 109 U.S. 150, 157 (1883). *See also United States v. v. Ellenbogen*, 390 F.2d 537, 542-543 (2d cir. 1968).

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[4] Two of those Circuits, the Eighth in *Long*, and the Eleventh in *Lasteed*, require that the mandate be *received* by the district court before jurisdiction is re-established in the district court.

In *Ellenbogen*, the mandate had issued, and the Supreme Court had denied an application for bail pending decision on the petition for *certiorari*. In that context, consistent with the mandate rule, the Second Circuit held that the District Court lacked authority to modify the sentence during pendency before Supreme Court (although could do so later pursuant to the pre-existing Rule 35, Fed.R.Crim.P.). 390 F.2d at 542.

Thus, the rule in the Second Circuit is that a district court is without jurisdiction until the mandate issues.[5] In *Rodgers*, the Court identified three exceptions to the rule: (1) when a district court issues a permanent injunction when a party is appealing the issuance of a preliminary injunction. *See Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996); (2) when a defendant files a frivolous appeal from a district court's order denying a motion to dismiss based upon double jeopardy, the district court retains jurisdiction to proceed to trial. *Salerno*, 868 F.2d at 539-540; and (3) when a plainly unauthorized notice of appeal, filed arbitrarily, confers on the Circuit the power simply to dismiss the appeal. *Rodgers*, 101 F.3d at 251-252.[6]

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[5] Also consistent with this proposition is the Second Circuit's opinion in *United States v. Camacho*, 302 F.3d 35 (2d Cir. 2002), now codified in Rule 12.1, Fed.R.App.P. (effective December 1, 2009), which permits the District Court to act only to maintain the *status quo*, *i.e.*, to deny a motion for a new trial filed pursuant to Rule 33, Fed.R.Crim.P. However, if the district court indicates a willingness to grant such a motion, it must await a formal remand conferring jurisdiction for that purpose.

[6] Ms. Stewart also intends, either this afternoon or tomorrow as soon as the papers are ready, to file with the Second Circuit panel a motion for reconsideration seeking delay of Ms. Stewart's surrender until she is designated to a particular Bureau of Prisons facility. The motion is based on (a) the disadvantage to defendants with respect to security classification if they are not afforded the opportunity to surrender directly to the designated facility (an accommodation this Court ordered in the Judgment); and (b) Ms. Stewart's medical situation, which includes bladder surgery previously scheduled for December 7, 2009. It is respectfully requested that the Court not order Ms. Stewart's surrender until the Second Circuit decides that motion, which will include a request for a stay of its direction to this Court to revoke Ms. Stewart's bail and order her surrender. Of course, that stay would be necessary only if this Court determines that it need

B. *The Three Cases Cited In the Court's November 18, 2009, Order*

The three cases cited by the Court in its November 18, 2009, Order, do not alter the analysis set forth above. In *United States v. Catino*, 562 F.2d 1 (2d Cir. 1977), the issue was whether the conditions of a bond set pretrial continued to apply when the defendant's bail was continued on appeal. In citing *United States v. Black*, 543 F.2d 35, 37 (7th Cir. 1976), for the proposition that a district court retains jurisdiction over the terms of a bond it has issued, the Court in *Catino* discussed neither the date the mandate issued – and it is unclear from the opinion whether the mandate had issued, but it is noteworthy that the surrender was ordered for March 17, 1975, which was well after the Second Circuit's opinion, and one week before *certiorari* was denied March 24, 1975) – nor the impact of the non-issuance of the mandate would have had on district court jurisdiction. Also, to the extent *Catino* is inconsistent with the mandate rule as it currently exists, *Rivera* and its unbroken progeny have superseded it.

Moreover, *Black* itself provides jurisdiction "empower[ing a district court] to revoke or forfeit the defendant's bond during the pendency of an appeal *for any of the reasons which would have supported an initial denial of the defendant's application for release*." 543 F.2d at 37 (emphasis added). That does not apply here, as Ms. Stewart has complied with all conditions of release, and the same the same standards for release apply. The only change is that the Second Circuit has revoked Ms. Stewart's bail and directed the District Court to order Ms. Stewart's surrender – a power capable of exercise only upon issuance of the mandate.

Also, in *Black*, as well as in the third case cited in the Court's November 18, 2009, Order, *United States v. Krzyske*, 857 F.2d 1089 (6th Cir. 1988), the legal standard for revoking bail was

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not await issuance of the mandate to implement the Second Circuit's direction.

different than that applied in the Second Circuit. While in those cases the Circuits determined there was little chance *certiorari* would be granted, thereby justifying the District Courts' revocation of bail, in the Second Circuit bail pending appeal is not dependent on predicting results. Rather, as the Second Circuit stated in *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985), "we do not believe . . . [Congress] intended . . . [to] make such bail dependent upon the willingness of a trial court to certify that it is likely to be reversed." 761 F.2d at 124 (citations and internal quotation marks omitted). Instead, as the Court in *Randell* explained, "the language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal." *Id.*, *quoting United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985). *See also Kyzyske*, 857 F.2d at 1093 (Merritt, J., *dissenting*) [disagreeing with the Sixth Circuit's interpretation of the "substantial question" language in 18 U.S.C. §3143(b)]. Nothing has changed in that regard since the Court made its findings to that effect at sentencing.

Thus, the three cases are inapposite. Also, to the extent *Black* and *Krzyske* are in conflict with *Rivera* and the Second Circuit's mandate rule, they either predate *Rivera* and its progeny, and/or are eclipsed by that Second Circuit precedent.

Conclusion

Accordingly, for all the reasons set forth above, and in all the papers and proceedings heretofore had herein, it is respectfully submitted that Ms. Stewart's surrender be stayed pending issuance of the mandate by the Court of Appeals.

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New York, New York

Respectfully submitted,

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