

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3062

September Term 2008

1:08-cr-00334-HHK-1

Filed On: July 8, 2009

United States of America,

Appellee

v.

Charles E. Coughlin,

Appellant

Consolidated with 09-3063

BEFORE: Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion to stay proceedings in district court, appellee's motion to summarily dismiss and opposition to appellant's emergency motion to stay proceedings, the motion for leave to file appellant's response memorandum in excess of page limitations, and the lodged response to the motion to dismiss and reply in support of the emergency motion for stay, it is

ORDERED that the motion for leave to exceed the page limits be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motion to dismiss be denied and the motion for stay granted, and that the ongoing trial in No. 08cr00334 be stayed pending further order of the court. Under the unusual circumstances presented by this case, a stay of the trial is warranted. The Supreme Court's opinion in Yeager v. United States, 129 S. Ct. 2360 (Jun. 18, 2009), which effectively reversed the law of this circuit with respect to the double jeopardy analysis to be applied when a jury acquits on some counts and fails to reach a verdict on others, issued in the middle of appellant's retrial upon the counts as to which the jury had failed to reach a verdict following the first trial. Appellant moved before the retrial began to bar that trial on double jeopardy grounds, acknowledging his double jeopardy claim was without merit under the then-prevailing law of the circuit, but pointing out the Supreme Court had granted certiorari in Yeager to consider the issue. The district court denied appellant's motion, and the case

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proceeded to trial. After the retrial commenced, the Supreme Court decided Yeager, and appellant promptly renewed his motion to bar retrial and, within the 10-day period provided by Fed. R. App. P. 4(b)(1)(A)(i), appealed the district court's pretrial denial of his initial motion. In denying the renewed motion, the district court concluded that double jeopardy did not bar retrial, but expressly acknowledged that appellant's motion was not frivolous with respect to two of the counts. Appellant then appealed that ruling. There is no evidence of bad faith on the part of appellant in the timing or presentation of the motions to bar retrial.

Although we are mindful of the resources that have been expended to date on the retrial, a stay of that trial is appropriate in light of the timely filing of the notices of interlocutory appeal, see Abney v. United States, 431 U.S. 651 (1977), and the district court's express decision not to characterize the double jeopardy claim as frivolous as to two of the counts, see United States v. Dunbar, 611 F.2d 985 (5th Cir. 1980) (en banc). In the interest of fairness and efficiency, we stay the trial as to the remaining two counts as well. It is

FURTHER ORDERED, on the court's own motion, that this appeal be expedited, and that the parties file, within 10 days of the date of this order, a joint proposed briefing schedule. To resolve the issues presented by this appeal, we must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other matter." Yeager, 129 S. Ct. at 2367 (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)). Appellant is responsible for providing the portions of the transcript necessary to his argument. See Fed. R. App. P. 10.

The Clerk is directed to schedule this case for oral argument on the first available date following the conclusion of briefing.

The administrative stay entered July 1, 2009, is hereby dissolved.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Sabrina M. Crisp
Deputy Clerk/LD