

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 1:21-cr-626 (PLF)
	:	
DEREK COOPER GUNBY,	:	
	:	
Defendant.	:	

**GOVERNMENT’S RESPONSE TO
DEFENDANT’S MOTION TO STAY PROCEEDINGS**

Defendant Derek Gunby has moved to stay this case “pending the outcome of a consolidated appeal on the issue of the government’s practice of pursuing vindictive retaliatory superceding [sic] indictments against Jan. 6 misdemeanor defendants who choose to go to trial.” Motion to Stay Proceedings (“Motion”) (ECF No. 79) at 1. Perhaps recognizing that no such appeal exists, Gunby “prays for an order staying proceedings in this case pending the outcome of the Hatchet Speed case in the D.C. Circuit.” *Id.* at 11. This motion is frivolous and should be denied. First, the “consolidated appeal” cited in the Motion does not exist, there is no appealable order in this case, and any appeal would be untimely. Second, the existence of an appeal in an unrelated case does not allow for a stay in Gunby’s case (particularly where the underlying issue on appeal is not one that lends itself to consolidation).

RELEVANT BACKGROUND

On October 12, 2021, the United States charged Gunby by information with entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); disorderly conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D); and parading, demonstrating or picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G). *See* Information (ECF No. 14). Subsequently, on September 4, 2023, a grand jury charged Gunby in

an indictment with the same four charges plus obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2). *See* Indictment (ECF No. 69).

When told about the forthcoming indictment, Gunby responded by filing an “emergency notice regarding the United States’ unconstitutional threats to retaliate against Gunby for demanding jury trial and declining plea offer” in which he “pray[ed] for the protection of this Court and asks the Court to take notice of the government’s treachery, bad faith and perfidy.” Emergency Notice (ECF No. 65) at 1, 3. The government responded to Gunby’s “emergency notice” as if it were “a motion predicated on alleged prosecutorial vindictiveness.” Response to Defendant’s “Emergency Notice” (ECF No. 66) at 2. The Court treated Gunby’s notice the same way, and, on September 1, 2023, found that Gunby had “presented no . . . evidence” of vindictiveness. Memorandum Opinion and Order (ECF No. 68) at 2.

Trial in this case is scheduled to begin October 31, 2023. On October 2, Gunby filed the instant motion seeking a stay. In it, he alleges that he “has identified an unconstitutional, systematic pattern and practice in this federal court district” of the government “pursuing vindictive retaliatory superceding [sic] indictments against Jan. 6 misdemeanor defendants who choose to go to trial.” Motion at 1. According to Gunby, there are eleven cases (including his) where, “after the defendant expressed his innocence and intent to exercise his or her right to trial, federal prosecutors added (or threatened to add) an additional, 20-year felony charge (obstruction of an official proceeding under 18 U.S.C. § 1512).” *Id.* at 3. The procedural posture of each case he identifies (at 2) is as follows:

1. Gunby
 - a. Trial set for October 31, 2023.
2. Deborah Lee, No. 21-cr-303 (D.D.C.)

- a. Trial set for May 20, 2024.
3. Hatchett Speed, No. 23-3078 (D.C. Cir.)
 - a. Convicted on March 7, 2023, after a bench trial. Sentenced on May 8, 2023.
Currently on appeal.
4. Stephanie Baez, No. 21-cr-507 (D.D.C.)
 - a. Charged in second superseding indictment on September 27, 2023.
5. Mark Sahady, No. 21-cr-134 (D.D.C.)
 - a. Trial set for February 26, 2024.
6. Joseph Irwin, No. 21-cr-589 (D.D.C.)
 - a. Trial set for January 22, 2024.
7. Leo Kelly, No. 23-3140 (D.C. Cir.)
 - a. Convicted on May 9, 2023, after a jury trial. Sentenced on August 18, 2023.
Currently on appeal.
8. Patrick Montgomery, No. 21-cr-46 (D.D.C.)
 - a. Charged in third superseding indictment on August 19, 2022.
9. Richard Barnett, No. 23-3086 (D.C. Cir.)
 - a. Convicted on January 23, 2023, after a jury trial. Sentenced on May 24, 2023.
Currently on appeal.
10. Darrell Neely, No. 23-3166 (D.C. Cir.)
 - a. Convicted on May 25, 2024, after a bench trial. Sentenced on September 5, 2023.
Currently on appeal.
11. Anthime Joseph Gionet, No. 22-cr-132 (D.D.C.)
 - a. Pleaded guilty on July 22, 2022. Sentenced on January 10, 2023. No appeal filed.

ARGUMENT

The Court should deny Gunby’s motion for a stay as meritless. When evaluating whether to issue a stay, “a court considers four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The third and fourth factors “merge” when a party moves for a stay against the government *Id.* at 435. A stay “‘is not a matter of right, even if irreparable injury might otherwise result.’” *Id.* at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). The party seeking the stay bears the burden of “mak[ing] out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.” *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). None of these factors weighs in favor of staying this case.

1. Gunby has no likelihood of success on the merits

First, Gunby has not “made a strong showing that he is likely to succeed on the merits.” This is so for a variety of reasons. As this Court recognized, Gunby has “presented no . . . evidence” of prosecutorial vindictiveness that would justify dismissal of the § 1512(c)(2) count in this case. *See* Memorandum Opinion and Order (ECF No. 68) at 2. Although the Court allowed Gunby to file a motion to dismiss the indictment “[s]hould [he] have facts or law to support a claim of prosecutorial vindictiveness,” *id.* at 3, Gunby has not done so.

Separately, to the degree Gunby seeks to stay this case “pending the outcome of a consolidated appeal on the issue of the government’s practice of pursuing vindictive retaliatory

superceding [sic] indictments against Jan. 6 misdemeanor defendants who choose to go to trial,” Motion at 1, no such consolidated appeal exists. As noted above, of the eleven cases Gunby cites as evidence of the government’s allegedly “unconstitutional” practice, *id.*, only three are currently on appeal. In none of those cases has the defendant moved to consolidate his appeal with others, much less had such a motion granted.

Nor has Gunby attempted to establish that he is likely to succeed in having his case—which is currently pending trial—somehow consolidated with other cases on appeal. According to Gunby, he “intends to seek a collateral order in the Speed appeal to join the cases of Gunby, Baez, Montgomery, and Lee for proper determination of this issue.” Motion at 11. But, other than *Speed*, the other cases cited by Gunby are all pending trial. In none of those cases has the defendant noticed an appeal. And even if they had, the denial of the motion to dismiss based upon vindictive prosecution is not an appealable order. “Under the final-judgment rule” embodied in 28 U.S.C. § 1291, courts of appeals “ordinarily do not have jurisdiction to hear a defendant’s appeal in a criminal case prior to conviction and sentencing.” *United States v. Andrews*, 146 F.3d 933, 936 (D.C. Cir. 1998). This rule applies to appeals from the denial of motions to dismiss an indictment. *See, e.g., Parr v. United States*, 351 U.S. 513, 515-16 (1956); *United States v. Brizendine*, 659 F.2d 215, 226 (D.C. Cir. 1981). Except for a narrow double jeopardy exception, *see generally Andrews*, 146 F.3d at 936-37, “the denial of a motion to dismiss an indictment is not a final order and generally is not appealable.” *United States v. Pi*, 174 F.3d 745, 747 (6th Cir. 1999); *see United States v. MacDonald*, 435 U.S. 850, 852 (1978) (“the denial of a pretrial motion in a criminal case generally is not appealable”); *Abney v. United States*, 431 U.S. 651, 663 (1977) (holding that the court of appeals lacked jurisdiction over the appeal from an order denying a motion to dismiss an indictment for failure to state an offense).

Moreover, any appeal from this Court’s September 1, 2023 Order addressing Gunby’s “Emergency Notice” would be untimely. A notice of appeal must be filed within the 14-day period set out in Federal Rule of Appellate Procedure 4(b)(1)(A), which provides, in pertinent part, that “in a criminal case, a defendant’s notice of appeal must be filed in the district court without 14 days after . . . the entry of . . . the judgment.” In this case, the Order was entered on the docket on September 1, 2023 (ECF No. 68). Accordingly, any notice of appeal was due to be filed by September 15, 2023.¹ When the government asserts an objection to an untimely notice of appeal—which it would here—the court of appeals will dismiss it. *United States v. Byfield*, 522 F.3d 400, 402-403 (D.C. Cir. 2008); *United States v. Singletary*, 471 F.3d 193, 196-197 (D.C. Cir. 2006). *See also United States v. Lopez*, 562 F.3d 1309, 1314 (11th Cir. 2009). Indeed, it is “obviously desirable from the perspective of the parties and the court for untimely appeals to be promptly dismissed.” *Singletary*, 471 F.3d at 196 (“[I]f the appeal of petition for review was filed out-of-time, . . . then a motion to dismiss is appropriate”) (citing the published *Frequently Asked Questions, United States Court of Appeals for the District of Columbia Circuit* (2006)).

Gunby thus cannot make “a strong showing that he is likely to succeed on the merits”: there is no evidence to support his underlying prosecutorial vindictiveness claim; there is no existing “consolidated appeal” addressing that issue; Gunby cannot bring an interlocutory appeal from the denial of a motion to dismiss the indictment; and an interlocutory appeal from this Court’s September 1, 2023, order would be dismissed as untimely.

¹ *See* Fed. R. App. P. 4(b)(6) (“A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket”).

2. *Gunby Will Not Be Irreparably Injured Absent a Stay*

Gunby also cannot show that he “will be irreparably injured absent a stay.” Rather, if Gunby proceeds to trial in three weeks and is convicted, he can appeal his conviction and can raise the prosecutorial vindictiveness issue then. In this respect, Gunby “stands in no different position than any other criminal defendant who loses a pretrial motion attacking an indictment on the ground that the underlying criminal statute is unconstitutional. The district court’s order in such a case . . . would be fully reviewable on appeal should the defendant be convicted.” *United States v. Cisneros*, 169 F.3d 763, 768-69 (D.C. Cir. 1999). As Judge Howell recently recognized, a defendant is not “irreparably harmed without a stay” simply “because ‘he will be forced to go to trial’ before his appeal on violations of his constitutional rights is heard.” *United States v. González-Valencia*, No. 16-65-1 (BAH), 2022 WL 3978185, at *6 (D.D.C. Sept. 1, 2022).

For this reason, too, there is no merit to Gunby’s alternative request that the Court stay his case “pending the outcome of the Hatchet Speed case in the D.C. Circuit.” Motion at 11. Gunby can vindicate his rights by going to trial and, if convicted, appealing that conviction. Indeed, that is how criminal cases work. Were every criminal case stayed while a potentially applicable issue was litigated on appeal in a separate case, the criminal justice system would grind to a halt. That is why, for example, no district court case involving a charge under 18 U.S.C. § 1512(c)(2) has been stayed while the D.C. Circuit addresses the meaning of that statute’s use of the term “corruptly” in *United States v. Robertson*, No. 22-3062 (argued May 11, 2023). It is also why interlocutory appeals are generally not allowed in criminal cases: “it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is ‘effectively’ unreviewable if review is to be left until later.” *Will v. Hallock*, 546 U.S. 345, 353 (2006).

This approach makes particular sense here, where the issue is a fact-based one that turns on the circumstances of each individual case. To succeed on a claim of vindictive prosecution, a defendant must show “that the increased charge was ‘brought *solely* to ‘penalize’ [him] and could not be justified as a proper exercise of prosecutorial discretion.” *United States v. Slatten*, 865 F.3d 767, 799 (D.C. Cir. 2017) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.12) (emphasis in *Slatten*). By its very nature, this standard is evidence-based and must be done on a case-by-case basis. *See Slatten*, 865 F.3d at 799 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (prosecutors’ decisions “are presumed to be proper absent clear evidence to the contrary.”); *see also United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002) (“To prove actual vindictiveness requires objective evidence that the prosecutor’s actions were designed to punish a defendant for asserting his legal rights. Such a showing is normally exceedingly difficult to make.”) (quoting *Maddox v. Elzie*, 238 F.3d 437, 466 (D.D. Cir. 2001)). Gunby’s ability to appeal following any conviction precludes him from showing the irreparable injury necessary to obtain a stay.

3. *Harm to the government and the public interest weighs heavily against a stay*

Finally, potential harm to the government and the public interest both weigh heavily against a stay. As the Supreme Court has recognized, and the D.C. Circuit emphasized, “in criminal cases” the “‘encouragement of delay is fatal to the vindication of the criminal law.’” *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (quoting *United States v. MacDonald*, 435 U.S. 850, 852 (1978)). Additionally, “[t]he government also faces irreparable harm because, as more time passes, the government’s . . . evidence continues to age, which hurts witnesses’ ability to recollect those events clearly at trial.” *González-Valencia*, 2022 WL 3978185, at *7. Thus, the “[p]ublic interest . . . favors speedy trials[.]” *Id.*

Because none of the applicable factors weigh in favor of a stay, the Court should deny Gunby's Motion.

Respectfully submitted,

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
D.C. Bar No. 481052

By: /s/ Kyle M. McWaters
Kyle M. McWaters
Assistant United States Attorney
D.C. Bar No. 241625
601 D Street NW
Washington, DC 20003
(202) 252-6983
kyle.mcwaters@usdoj.gov