Exhibit A

Initial Motion to Certify Defendants' Interlocutory Appeal as Frivolous and to Proceed with Trial

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 08 CR 888
	)	
v.	)	Honorable James B. Zagel
	)	
ROD BLAGOJEVICH and ROBERT BLAGOJEVICH.	)	

Government's Motion to Certify Defendants' Interlocutory Appeal as Frivolous and to Proceed with Trial

The United States of America, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully moves to certify the defendants' interlocutory appeal as frivolous and to proceed with trial. In further support of the motion, the government states as follows:

1. On May 7, 2010, the defendants filed a notice of appeal. R. 350. The notice appears to identify two pre-trial rulings by this Court, namely, the two most-recent rulings denying the defendants' motions to continue the trial date until after the Supreme Court rules on the pending cases challenging the honest services theory of fraud liability, 18 U.S.C. § 1346.[1] As this Court recalls, this Court had previously denied earlier requests for continuance, relying on (1) the complete factual overlap between the fraud counts and the other counts (that is, the criminal conduct underlying the fraud counts was also charged in other counts under different statutes); (2) legal arguments would not properly be included in the parties opening statements,

[1]In the notice of appeal, the defendants refer to an April 15, 2010 motion filed by Robert Blagojevich, which is presumably R. 309, and an April 27, 2010 motion filed by Rod Blagojevich, which is presumably R. 334.

and the parties would be barred from mentioning the phrase "honest services"; and (3) even if the Supreme Court ruled on the pending cases right before the Court's summer recess, the district court could still fashion the jury instructions (or the government could dismiss the honest services charges) because the trial is scheduled to last well beyond the end of June.

2. The government has filed a motion to dismiss the appeal in the Seventh Circuit. A copy of that motion is attached as Exhibit 1. Although the government has sought expedited treatment of that motion by the Seventh Circuit, in light of the imminency of the trial's start (June 3, 2010), and in light of the pre-trial matters that this Court must resolve as the trial approaches, the government asks this Court to certify the appeal as frivolous so that this Court may retain jurisdiction to rule on pre-trial matters.

3. The Seventh Circuit has repeatedly stated that, notwithstanding the filing of a notice of appeal, a district court may proceed with trial if an appeal is frivolously filed:

> Courts of appeals may dismiss the appeals and award sanctions, . . . but district courts have their own resources. In interlocutory double jeopardy cases . . . a district court may certify to the court of appeals that the appeal is frivolous and get on with the trial.

Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989) (citing *United States v. Dunbar*, 611 F.2d 985 (5th Cir.1980) (*en banc*), *cited with approval in United States v. Cannon*, 715 F.2d 1228, 1231 (7th Cir.1983)) (also citing *United States v. Byrski*, 854 F.2d 955, 956 n. 1 (7th Cir.1988); *United States v. Grabinski*, 674 F.2d 677, 679-80 (8th

Cir.1982)). *See also Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("And when a notice of appeal from an interlocutory order is a frivolous effort to block the normal progress of litigation, the district judge may so certify and continue with the case." (citing *McMath v. Gary*, 976 F.2d 1026 (7th Cir.1992), and *Apostol*, 870 F.2d at 1338-39).

4. Although continuing to exercise jurisdiction should be cautiously done when a notice of appeal has been filed, here the defendants' appeal is doomed because there is not even appellate jurisdiction over it. As the attached motion to dismiss explains, there is no final decision under 28 U.S.C. § 1291, no collateral order, and no injunction under 28 U.S.C. § 1292(a)(1). *See* Exhibit 1. Accordingly, this Court should deem the appeal to be frivolous and proceed to resolve pre-trial matters as they arise.

5. Indeed, the general rule against two courts exercising jurisdiction at the same time might not even be implicated at all. There is "an important limitation on the rule that just one court at a time possesses jurisdiction: the doctrine applies only to those aspects of the case involved in the appeal." *Kusay*, 62 F.3d at 194 (internal quotation omitted). Because the defendants' appeal involves only the denials of the continuance, this Court is free to continue to resolve all the other pending pre-trial matters, none of which implicate the continuance.

6. Accordingly, the government requests that this Court certify the appeal as frivolous and retain jurisdiction over pre-trial matters.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: s/Edmond E. Chang

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

> Government's Motion to Certify Defendants' Interlocutory Appeal as Frivolous and to Proceed with Trial,

was served on May 7, 2010, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

/s/ Edmond E. Chang

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Exhibit 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	USCA No. 10-2135
Plaintiff-Appellee,	)	Appeal from the United States
	)	District Court for the Northern
v.	)	District of Illinois, Eastern Division
	)	
ROD BLAGOJEVICH and	)	Judge James B. Zagel
ROBERT BLAGOJEVICH	)	
	)	USDC No. 08 CR 888
Defendant-Appellant.	)	

Government's Motion to Dismiss on an Expedited Basis Defendants' Interlocutory Appeal for Lack of Jurisdiction

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the United States of America, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully moves this Court to dismiss this appeal for lack of jurisdiction and asks for expedited treatment of this motion in light of the June 3, 2010 trial date. In support of its motion, the government states as follows:

Statement

1. The defendants are charged in the second superseding indictment with a variety of federal offenses, including racketeering, racketeering conspiracy, wire fraud, attempted extortion, solicitation of a bribe and conspiracy to do so, and conspiracy to extort. R. 231. The trial is scheduled to begin on June 3, 2010.

2. Today, on May 7, 2010, the defendants filed a notice of appeal. R. 350. The defendants purport to appeal two pre-trial rulings of the district court denying the defendants' motions to continue the trial date until after the Supreme Court rules on the pending cases challenging the honest services theory of fraud liability, 18 U.S.C.

§ 1346.[1] The district court had previously denied earlier requests for continuance, relying on (1) the complete factual overlap between the fraud counts and the other counts (that is, the criminal conduct underlying the fraud counts was also charged in other counts under different statutes); (2) legal arguments would not properly be included in the parties opening statements, and the parties would be barred from mentioning the phrase "honest services"; and (3) even if the Supreme Court ruled on the pending cases right before the Court's summer recess, the district court could still fashion the jury instructions (or the government could dismiss the honest services charges) because the trial is scheduled to last well beyond the end of June.[2]

Argument

3. The government moves this Court to dismiss the appeal for lack of appellate jurisdiction and to expedite the treatment of this motion.

4. *No "Final Decision" under Section 1291.* This Court has no jurisdiction over the district court's orders denying the defendants' motion to continue the trial. Those orders are not final, appealable judgments as required by 28 U.S.C. § 1291. The jurisdiction of the Courts of Appeals is limited to appeals from "final decisions of the district court." § 1291. By requiring parties to "raise all claims of error in a single appeal following final judgment on the merits," the final judgment rule serves to

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[1]In the notice of appeal, the defendants refer to an April 15, 2010 motion filed by Robert Blagojevich, which is presumably R. 309, and an April 27, 2010 motion filed by Rod Blagojevich, which is presumably R. 334.

[2]The government responded to the earlier motion for continuance on March 15, 2010. R. 268.

prevent piecemeal litigation and ensures the efficient administration of justice. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The concerns animating the final judgment rule are "especially compelling in the administration of criminal justice," where the interest in finality is particularly acute. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *see also United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (the policy embodied in 28 U.S.C. § 1291 "is at its strongest in the field of criminal law").

5. A final decision typically does not occur "until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (internal quotation marks omitted). In criminal cases "this prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). Because the defendants have not even been tried, let alone convicted or sentenced, the district court's orders denying the continuance motions fall outside the Court's jurisdiction under the final judgment rule.

6. *Continuance Denial is Not a Collateral Order.* Although there do exist "collateral orders" that do not terminate the litigation but may be equated to final judgments for purposes of § 1291, that category is a "small class," *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)), and cannot be stretched to save the defendants' appeal here. To fall within the limited class of interlocutory orders that are

immediately appealable under the collateral order doctrine, an order must (1) "conclusively determine[] the disputed question," (2) "resolve[] an important issue completely separate from the merits of the action," and (3) be "effectively unreviewable on appeal from a final judgment." *Mohawk Industries*, 130 S. Ct. at 604 (citation omitted).

7. The Supreme Court interprets these requirements "with the utmost strictness" in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 265 (1984). In fact, the Court has found only three types of pretrial orders to meet the requirements of the collateral order doctrine: (1) orders denying a motion to reduce bail, *see Stack v. Boyle*, 342 U.S. 1 (1951); (2) orders denying a motion to dismiss an indictment based on Double Jeopardy, *see Abney v. United States*, 431 U.S. 651 (1977); and (3) orders denying a motion to dismiss based on Speech or Debate Clause grounds, *see Helstoski v. Meanor*, 442 U.S. 500 (1979). In each of these cases, the nature of the right at issue was such that it would be irretrievably lost if appellate review were postponed until after trial. Although criminal defendants have sought to expand this list, the Supreme Court has steadfastly refused. *E.g.*, *Midland Asphalt Corp.*, 489 U.S. at 800 (no jurisdiction to review order denying motion to dismiss indictment based on prosecutorial misconduct in disclosing grand jury materials); *Flanagan*, 465 U.S. at 266 (order disqualifying counsel); *Hollywood Motor Car Co.*, 458 U.S. at 270 (order denying motion to dismiss indictment based on prosecutorial vindictiveness); and *MacDonald*, 435 U.S. at 860 (order denying motion to dismiss indictment based on

violation of speedy trial right). In each of these cases, the Court recognized that any constitutional violation asserted by the defendant could be remedied after trial and conviction by vacating the conviction and dismissing the indictment or ordering a new trial. *See also United States v. Celani*, 748 F.2d 363, 365-66 (7th Cir. 1984) (order denying appointment of defense counsel not immediately appealable); *United States v. Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983); *United States v. Rosario*, 677 F.2d 614, 617 (7th Cir. 1982).

8. The defendants' appeal does not satisfy the requirements for the collateral order doctrine. A denial of a continuance is not "effectively unreviewable on appeal from a final judgment." *Mohawk Industries*, 130 S. Ct. at 605. As this Court and the government are well aware, the erroneous denial of a trial continuance (subject to the abuse of discretion standard of review) is reviewable on appeal after a final judgment. *E.g.*, *United States v. Santos*, 201 F.3d 953, 958 (7th Cir. 2000). Thus, the collateral order doctrine does not provide a basis for appellate jurisdiction.

9. *Continuance Denial is Not in the Nature of an Injunction.* As of this moment, the defendants have not yet filed a Docketing Statement, which presumably would explain the defendants' rationale for why there is appellate jurisdiction. Seventh Circuit Rule 3(c)(1) (incorporating Circuit Rule 28(a)). But the notice of appeal does cite "28 USC section 1291(a)(1)." R. 350 at 1. Assuming that the defendants intended to cite 28 U.S.C. § 1292(a)(1), rather than § 1291 (which has no sub-sections), that provision – which deals with injunctions – does not apply.

10. Section 1292(a)(1) authorizes appellate jurisdiction over "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ." That provision does not provide jurisdiction in this case. Indeed, at least one court has questioned whether 28 U.S.C. 1292(a)(1) applies in the criminal context at all. *See Miller v. United States*, 403 F.2d 77, 78 (2d Cir. 1968) (Friendly, J.) ("[W]e strongly doubt whether § 1292(a)(1) applies to criminal cases at all.").

11. In any event, this Court has made clear that simply characterizing or labeling a motion as one for injunctive relief is insufficient to bring that motion within the jurisdictional grant of § 1292(a)(1). *See United States v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982). In *Dorfman*, the defendant sought to appeal the district court's order denying a motion to suppress evidence. The defendant argued that even if the motion to suppress did not fall within the collateral order doctrine, there was appellate jurisdiction under § 1292(a)(1) because the denial of their motion to suppress could be viewed as tantamount to the denial of injunctive relief. The Court rejected the defendants' argument because "[i]f defendants were correct . . . the policy against pretrial appeals on suppression issues in criminal appeals would be 'side-stepped.'" *Id.* at 1223 (quoting *Smith v. United States*, 377 F.2d 739, 742 (3d Cir. 1967)). *See also In re Grand Jury Investigation of Violations* (General Motors Corp.), 318 F.2d 533, 536 (2d Cir. 1963) ("The Supreme Court scarcely intended that the important policy pronouncements in *Cobbledick* and *Di Bella* [against piecemeal appeals] could be side-stepped by baptizing . . . a motion to suppress as one for an injunction."). The

jurisdiction of this Court is determined not by the title a defendant puts on his appeal or motion, or the relief requested, but by the nature of the underlying claim. *Cf. United States v. Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983) ("Cannon's motion, whatever he chose to title it, was an attempt to interpose his due process claim to bar retrial. . . . The denial of a motion to dismiss an indictment on the basis of prosecutorial misconduct is neither a final appealable order not a proper subject of interlocutory appeal.").

12. Finally, expedited disposition of this motion is appropriate. The trial is set to begin in less than four weeks, and the district court has additional pending pre-trial matters to resolve. There ought to be no jurisdictional confusion this close to the trial's commencement. To be sure, the government will be promptly asking the district court to certify the appeal as frivolous and proceed with pre-trial matters, *Apostol v. Gallion*, 870 F.2d 1325, 1339 (7th Cir. 1989), but it would also be appropriate for this Court to decide the motion to dismiss on an expedited basis in order to definitively resolve the issue. Moreover, the defendants, having filed the appeal and having a duty to consider appellate jurisdiction, ought to be in a position to promptly respond to this motion. And it is worth noting that the notice of appeal was filed 16 days after the April 21st denial of the second continuance motion, and 7 days after the April 30th denial of the third motion.

13. The United States respectfully requests that this Court dismiss the defendants' appeal for lack of jurisdiction, and to expedite the disposition of this motion.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: Edmond E. Chang

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v.	)	Northern District of Illinois,
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ROD R. BLAGOJEVICH and	)	08 CR 888
ROBERT BLAGOJEVICH,	)	
	)	
Defendants-Appellants.	)	Honorable James B. Zagel

CERTIFICATE OF SERVICE

I, EDMOND E. CHANG, hereby certify that on May 7, 2010, I caused a hard copy and an electronic copy of the foregoing GOVERNMENT'S MOTION TO DISMISS, to be served upon the following by first-class, postage-paid mail:

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