

No. 21-11083

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,

Plaintiff–Appellee,

v.

Alex Nain Saab Moran,

Defendant–Appellant.

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:19-cr-20450-RNS-1
The Honorable Robert N. Scola, Jr.

Defendant-Appellant’s Opposition to Motion for Extension

DAVID B. RIVKIN, JR.
LEE A. CASEY
ELIZABETH P. FOLEY
RICHARD B. RAILE
JENNA M. LORENCE
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Attorneys for Defendant-Appellant

Certificate of Interested Persons

Pursuant to Rule 26.1-1 of this Court, Appellant certifies that the below listed persons and entities have interests in the outcome of this case:

Barr, Jonathan R., Counsel for Defendant

Casey, Lee, Counsel for Defendant

Comisión de Administración de Divisas (Commission for the Administration of Currency Exchange), International Interested Party

Foley, Elizabeth P., Counsel for Defendant

Gonzalez, Juan Antonio, Acting U.S. Attorney SDFL

Guardia Nacional Bolivariana de Venezuela (Bolivarian National Guard of Venezuela), International Interested Party

Keown, Lindy K., Counsel for Defendant

Kramer, Alexander J., Department of Justice, Criminal Division

Lorence, Jenna M., Counsel for Defendant

Lunkenheimer, Kurt K., United States Attorney

McQuaid, Nicolas L., Department of Justice

Miranda, Annika M., United States Attorney's Office, SDFL

New, Jonathan, Counsel for Defendant

Raile, Richard B., Counsel for Defendant

Rivkin Jr., David B., Counsel for Defendant

Romano, John A., Department of Justice, Criminal Division

Saab Moran, Alex Nain, Defendant

Sanders, Jeremy R., Department of Justice, Criminal Division

Scola, Jr., Robert N., United States District Court Judge

Servicio Nacional Intergrado de Administración Aduanera y Tributaria
(National Integrated Service for the Administration of Customs Duties and
Taxes), International Interested Party

Smachetti, Emily M., United States Attorney's Office

Sombuntham, Nalina, United States Attorney's Office, SDFL

Vargas, Alvero Pulido, Co-Defendant

Wangsgard, Kendall, Counsel for Defendant

Zink, Robert, Department of Justice, Criminal Division

The United States Government has alleged that the Bolivarian Republic of Venezuela and its instrumentalities are victims in this case, which the country's government has denied. There has been no finding of fact on this issue.

Corporate Disclosure Statement

There is no nongovernmental corporate party to this proceeding, and no association of persons, form, partnerships, or corporations that have an interest in this case or the outcome of the appeal.

August 25, 2021

Respectfully submitted,

/s/ David B. Rivkin
DAVID B. RIVKIN, JR.
LEE A. CASEY
ELIZABETH P. FOLEY
RICHARD B. RAILE
JENNA M. LORENCE
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Attorneys for Defendant-Appellant

Opposition to Government's Motion for Extension

The undersigned counsel ordinarily consent to reasonable requests for briefing extensions. But the request in this case is prejudicial to the Defendant-Appellant Alex Nain Saab Moran, and it is unreasonable.

In this exceptional case, the Government has chosen to prosecute a diplomat who is plainly immune from prosecution under the Vienna Convention on Diplomatic Relations and customary international law. Despite that immunity, Mr. Saab is currently in custody in Cabo Verde, has been in custody for more than 440 days, and is opposing the Government's extradition proceedings that will prove unnecessary if and when this Court finally holds the Government to honor its international obligations. A 30-day extension would further frustrate Mr. Saab's right to prompt adjudication of this meritorious defense. Meanwhile, the Government has had Mr. Saab's opening brief since July 6, 2021, affording its counsel ample time to prepare an appellee brief. Granting the Government's motion would only aggravate the prejudice Mr. Saab has already suffered from his unlawful detention and reward the Government for what appears to be either procrastination or poor staffing choices. The motion should be denied.

1. Mr. Saab is a diplomat of Venezuela. As detailed in his appellant brief (filed July 6, 2021), Mr. Saab was unlawfully arrested in Cabo Verde while on a humanitarian, diplomatic mission to Iran to obtain food, fuel, and supplies to assist Venezuela in its fight against Covid-19. Russia and Iran have publicly recognized Mr. Saab's status as a Venezuelan diplomat, and the United Nations, the African Union, and ECOWAS have called for diplomatic dialogue to resolve

this dispute and honor Mr. Saab's diplomatic immunity. Mr. Saab has asserted immunity throughout this case, beginning with his January 21, 2021 filing in the District Court. Yet he remains under arrest to this day.

2. The district court refused even to consider Mr. Saab's assertion of immunity "until he is physically present" in the United States, Dist.Ct.Dkt. 46 at 5—a ruling that requires Mr. Saab to surrender immunity in order to assert immunity. *See* Saab Opening Br. at 32–37. Mr. Saab timely appealed, and this appeal was docketed more than five-and-a-half months ago, on April 5, 2021. In the meantime, Mr. Saab has been subject to continued custody in Cabo Verde, where he has—under orders of Venezuela—resisted the Government's proceedings to extradite him to the United States. Mr. Saab has remained in custody for more than 440 days.

3. Under those circumstances, the Government's request for a 30-day briefing extension is prejudicial to Mr. Saab, who reasonably seeks an expeditious ruling on his assertion of immunity. A 30-day delay in this case greatly increases the risk that Mr. Saab may be extradited and subject to United States custody—at the expense of his diplomatic immunity—before this Court adjudicates his assertion of that same immunity. And, in all events, a 30-day delay would amount to yet another 30 days of unlawful detention for Mr. Saab (either in Cabo Verde or in the United States) and another 30 days before his claim to immunity may be vindicated. It would also mean another 30 days of delay for Mr. Saab's diplomatic mission to Tehran and another 30-day delay in any other diplomatic missions Mr. Saab may be called upon to conduct for Venezuela.

Supreme Court precedent commands that immunity defenses be adjudicated “at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). The Government’s request for delay contravenes that command.

4. The requested delay would aggravate the substantial delay that has already plagued this case, which in turn would aggravate the irreparable harm to Mr. Saab. Although the Government did not move to dismiss Mr. Saab’s appeal, the Court on its own motion issued a jurisdictional question on May 28, 2021, asking the parties to brief whether the appeal is properly before the Court. By operation of Eleventh Circuit Rule 31-1(d), that jurisdictional question postponed the Government’s appellee briefing due date until the jurisdictional question was resolved. That did not occur until August 6, 2021. Order, Aug. 6, 2021. This case therefore has already seen a delay of *more than three months*. All that time, Mr. Saab remained in detention, with no ability to obtain a ruling on his assertion of immunity.¹

¹ The Government notes that Mr. Saab obtained a 14-day briefing extension, but that is not analogous to the Government’s request. First, the Government too could likely have obtained a 14-day extension by putting in a phone call to the clerk of court. *See* 11th Cir. R. 31-2(a). The Government instead seeks a 30-day extension and cannot be heard to complain that Mr. Saab is availing himself of the opportunity to file this opposition brief. Second, the Government has already had the equivalent of a 30-day extension. And third, the extension had no impact on the case or Mr. Saab’s detention because, by virtue of the jurisdictional question, the Government’s appellee briefing deadline was subjected to a stay.

5. For the same reasons, the Government's request for more delay is unreasonable. Because the Court's *sua sponte* jurisdictional question did not stay Mr. Saab's briefing deadline, Jurisdictional Question Notice, May 28, 2021, the Government was served with Mr. Saab's opening brief on July 6, 2021. By the time the Government's brief is currently due (September 7), the Government's counsel will have had 63 days with Mr. Saab's opening brief. The Government therefore has already had the equivalent of a 30-day briefing extension.

6. The Government's counsel does not explain why that time has not proven sufficient to prepare an appellee brief. There is no reason Mr. Sanders could not have been working on a brief for more than a month and a half by now.² And the Government's citation of the many matters Mr. Sanders has been assigned appears to reflect, at most, poor staffing decisions by the Government, which has under its employment too many lawyers to count. There is no reason, for example, the Government had to staff this appeal with an attorney who "was not counsel for the Government during the proceedings in the district court and had limited prior familiarity with this case." Mot. 2. The district-court attorneys

² It would be no response that the Court's jurisdictional ruling did not issue until August 6. The Government was aware that a Seventh Circuit decision *United States v. Bokhari*, 757 F.3d 664 (7th Cir. 2014), squarely supports Mr. Saab's appeal to this Court, holding that application of the so-called "fugitive disentitlement" doctrine against a defense of a right not to be tried triggers the collateral-order doctrine. *Id.* at 670; Saab Jurisdictional Br. at 6. This case was always a poor candidate for summary dismissal because the Court would have been required to create a circuit split on a motions ruling for that to occur. Indeed, *the Government did not move to dismiss this case*, betraying as disingenuous any contention that it believed the case was a serious candidate for summary dismissal.

not only performed competently for the Government, but they in fact prevailed below. Whatever justification the Government might offer for these decisions is beside the point: Mr. Saab should not have to suffer indefinite detention at the expense of his immunity from prosecution based on the Government's choice to overwork Mr. Sanders.

In short, the requested 30-day extension would impose substantial harm to Mr. Saab in the form of continued physical detention and frustration of his diplomatic mission and reward the Government from either poor time management or poor case staffing decisions. In that unique circumstance, the extension request is unwarranted and should be denied.

August 25, 2021

Respectfully submitted,

/s/ David B. Rivkin
DAVID B. RIVKIN, JR.
LEE A. CASEY
ELIZABETH P. FOLEY
RICHARD B. RAILE
JENNA M. LORENCE
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

This document complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 1,267 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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/s/ David B. Rivkin

DAVID B. RIVKIN

BAKER & HOSTETLER LLP

1050 Connecticut Ave., N.W.

Washington, DC 20036

(202) 861-1731 (phone)

(202) 861-1783 (fax)

drivkin@bakerlaw.com

Counsel for Defendant–Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

/s/ David B. Rivkin

DAVID B. RIVKIN

BAKER & HOSTETLER LLP

1050 Connecticut Ave., N.W.

Washington, DC 20036

(202) 861-1731 (phone)

(202) 861-1783 (fax)

drivkin@bakerlaw.com

Counsel for Defendant–Appellant