UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re Grand Jury Subpoena

No.: 19-1287

MEMORANDUM IN SUPPORT OF APPELLANT'S WAIVER OF THE 30 DAY PERIOD PURSUANT TO 18 U.S.C. 1826 (b)

Comes Now, Appellant, by counsel, and respectfully files the below memorandum in support of her motion to extend the time for filing her opening brief from March 26, 2019 to March 29, 2019 pursuant to her stipulation with the government contained in the *Motion to Extend Time to File Opening Brief.* This memorandum addresses the question of whether an appellant being confined for civil attempt may waive her right to a determination on the merits of her appeal within thirty days of her notice of appeal. The appellant desires to and expressly does waive her right to such a determination pursuant to the parameters discussed in her *Motion to Extend Time.* She respectfully asserts that she cannot properly brief the issue in this matter by March 26, 2019 for the reasons stated in her *Motion to Extend*.

MEMORANDUM

The Recalcitrant Witness Statute, 28 U.S.C. 1826, contains within it provisions for appeal, including the provision that an appeal from an order of civil confinement must be disposed of within thirty days. In those Circuits that have considered the question of whether the thirty day rule is extendable, all but one have determined that it is not jurisdictional, and that a witness may either waive the time limit, or that a court may release a contemnor for any time extending beyond the thirty days. The Fourth Circuit appears to have joined in this consensus.

Overall, the circuits appear to concur with In re Grand Jury Proceedings, 605 F.2d 750, 751–52 (5th Cir. 1979), which supported an extension of several months, saying "In many §1826 cases, it is not possible within the 30-day period for a record to be prepared and forwarded to this court, for the parties to write briefs, and for the court then to give full consideration to the appeal." Citing to this case, the Fourth Circuit points out that flexibility in §1826 appeals is necessary, and that the thirty-day rule can be accommodated by the release of a confined contemnor in the interim between the thirty days and the time at which the Court rules. In re July 1979 Term Special Grand Jury, 656 F.2d 64 (4th Cir 1981) ("The appellate court retains flexibility to consider the appeal fairly and completely; and the contempt order retains some of its coercive force, because the threat and actuality of re-incarceration loom on the horizon.").

Here, Ms. Manning has agreed not to seek release in such an interim period.[1] As "the 30-day provision was inserted in reaction to a Senate bill that would have denied bail to contemnors during the pendency of their appeals" it can be assumed to be waivable by the witness. This has certainly been the practice in many circuits, some of which simply ignore the rule without comment, and many of which have explicitly held the limitation not to be jurisdictional. The statute was designed to assure prompt release from custody of meritorious contemnors rather than to deprive the trial or appellate court of jurisdiction in the matter, which would bar consideration of contempt-related appeals after the 30-day period had expired. In re Rosahn, 671 F.2d 690, 694 (2d Cir.1982).

Many circuits have simply "extended" the 30-day period even though the contemnor is confined, and decided the appeal in the extended period, though not within the 30-day period,

[1] She does, however, intend to request bail pending appeal on independent grounds, a fact of which the government is aware.

e.g., In re Grand Jury Proceedings, Gravel, 605 F.2d 750, 751–52 (5th Cir.1979). Others simply ignore the period, e.g., In re Grand Jury Investigation: Appeal of Hartzell, 542 F.2d 166 (3d Cir.1976), *cert. denied,* 429 U.S. 1047, 97 S.Ct. 755, 50 L.Ed.2d 762 (1977); In re Grand Jury Proceedings, 994 F. Supp. 2d 510 (S.D.N.Y. 2014). Several circuits follow a procedure of deciding the appeal of a confined contemnor within the period and issuing an explanatory opinion later, *e.g.*, United States v. Pacella, 622 F.2d 640, 642 n. 2 (2d Cir.1980). Counsel has found no case in which a court has found it lacked jurisdiction at the end of the period and dismissed the appeal, whether vacating the contempt judgment or not.

For the foregoing reasons, we encourage the panel to exercise their considerable discretion and grant the three day extension and corollary extensions to the government, and the court itself, with the understanding that Ms. Manning agrees to waive the thirty-day rule in order to appropriately brief this appeal, and not to seek release on the basis of the extended time.

Respectfully submitted,
CHELSEA MANNING
By Counsel

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/s/ Chris Leibig
CHRISTOPHER LEIBIG

(VSB#40594)
114 N. Alfred Street
Alexandria, Virginia 22314
703-683-431 O
chris@chrisleibiglaw.com

/s/ Sandra C. Freeman
SANDRA C. FREEMAN
(VSB# 78499)
5023 W. 120th Avenue, #280 ‘
Broomfield, Colorado 80020
720-593-9004
sandra.c.freeman@protonmail.com

/s/ Moira Meltzer-Cohen
MOIRA MELTZER-COHEN
(*pro hac vice* pending)
277 Broadway, Suite 1501
New York, NY 10007
347-248-6771
mo_at_law@protonmail.com

/s/ Vincent J. Ward
VINCENT J. WARD
(*pro hac vice* pending)
Freedman Boyd Hollander Goldberg
Urias & Ward, P.A
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102
505-842-9960
vjw@fbdlaw.com