IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 96-20152-D |
| | ) | |
| JAMES ELKINS, | ) | |
| | ) | |
| Defendant. | ) | |

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## REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SHOW CAUSE WHY THE UNITED STATES SHOULD NOT BE HELD IN CONTEMPT

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Before the court is the March 25, 2003 motion of the defendant, James Elkins, to have the United States show cause why it should not be held in contempt for a failure to comply with an August 19, 1997 order of the District Judge Bernice B. Donald instructing the United States to disgorge rents, profits, and $6,511.26 in interest associated with seized property. The motion was referred to the United States Magistrate Judge for a report and recommendation. For the following reasons it is recommended that Elkins' motion be granted.

James Elkins was indicted on August 26, 1996, on charges of manufacture, possession, and distribution of marijuana and conspiracy. Between December 1996 and May 1997, the government initiated civil forfeiture actions pursuant to 21 U.S.C. § 881 to seize a number of Elkins' assets including property, vehicles, and $39,307.95 in United States currency that was deposited to a suspense account. Elkins sought an adversarial hearing to test the probable cause determination of the judge who issued the ex parte in rem seizure warrants for the properties, and, in the alternative, the release of certain assets to enable him to retain counsel. Based on Elkins' assertions that he could not pay his attorney fees without release of some of the assets then under the government's control, Judge Donald granted Elkins' motion on August 19, 1997. Order on Motion for Adversary Hearing, *United States v. Elkins*, Docket Entry 298, Criminal Case. No. 96-20152-D (W.D. Tenn. Aug. 19, 1997). The order was entered in both the instant criminal case and also in the civil forfeiture case, *United States v. One Parcel of Property Located at 2556 Yale Avenue*, Civil Case No. 96-3270D (W.D. Tenn. Aug. 19, 1997).

In the same August 19, 1997 order, the court, sua sponte, found that the government's actions in seizing the real properties without notice to Elkins or without a pre-deprivation hearing deprived Elkins of property without due process of law in violation of the Fifth Amendment's due process guarantees. As a remedy for that violation, the court determined that Elkins was entitled to the rents and profits earned on the real properties during the period of illegal seizure as well as interest on money held in the government's suspense account which contained the proceeds for the sale of two parcels of Elkins' real property. The court ruled:

> [A]s the government's failure to afford Defendants notice and a meaningful preseizure hearing constituted a violation of the Due Process Clause, the court orders the government to disgorge all rents and profits that have been collected to date on the seized properties . . . [and] to pay the Elkins $6,511.26 to account for the interest accrued (at 8% per annum) on the suspense account.

*Id.* at 9. This ruling is at issue in the instant motion.

The government did not pay the $6,511.26.[1] On January 26, 1999, Elkins filed a motion in the instant criminal case to compel the government's compliance. (Docket Entry No. 539.) The United States responded that it had no obligation to pay because the August 19, 1997 order had not been reduced to a judgment and therefore the time for its appeal had not run and that it intended to appeal the order when it became final. That motion is still pending; in it, the parties cite substantially the same arguments they present in the instant motion.

In the instant motion, filed March 25, 2003, Elkins now moves for an order to show cause why the government should not be held in contempt for failing to comply with the August 19, 1997 order. In its response, the government raises two arguments: (1) the August

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[1] The government did not realize any rents or profits from the real properties, and thus only the $6,511.26 payment is at issue.

17, 1999 order has not been reduced to a judgment and therefore the time for appealing the order has not yet run, which is essentially the same argument raised in its response to Elkins' pending motion to compel compliance; and (2) the August 17, 1999 order should be vacated as void because the district court had no authority to award pre-judgment interest against the United States. In the alternative, the government asks that its response to Elkins' motion to show cause be treated as a motion for relief from a judgment or order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the judgment is void.

As to the government's argument that it has no obligation to pay the $6,511.26 because the August 17, 1999 order is only a provisional order for relief and the time to appeal it has not yet run, the government relies on 28 U.S.C. § § 1291 and 1292. Section 1291 grants jurisdiction to the court of appeals for "appeals from all final decision of the district courts of the United States." 28 U.S.C. § 1291. Section 1292 grants jurisdiction to the appeals court for certain interlocutory decisions dealing with injunctive relief and receiverships and also where the district court certifies that the order involves a controlling question of law. 28 U.S.C. §§ 1291 and 1292. None of these situations applies here.

As a general rule, a party is entitled to a single appeal at the end of his cause, 28 U.S.C. § 1291; and, at that time, all "claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). This does not, however, preclude interlocutory review of all orders. Despite the "final decision" rule of § 1291, other decisions may be appealed under the collateral order doctrine. The Supreme Court explained the collateral order doctrine in *Digital Equipment Corporation*:

> The collateral order doctrine is best understood not as an exception to the "final decision" rule laid down by Congress in § 1291, but as a "practical construction" of it. We have repeatedly held that the statute entitles a party to appeal not only from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment" but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system," nonetheless be treated as "final." The latter category comprises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. Immediate appeals from such orders, we have explained, do not go against the grain of a § 1291, with it subject of efficient administration of justice in the federal courts.

*Id.* at 867-68 (internal citations omitted).

The government relies on *United States v. Michelle's Lounge*, 126 F.3d 1006, 1009 (7th Cir. 1997) for the proposition that the collateral order doctrine does not apply to an order releasing funds to pay defense attorney fees, i.e., that the August 17, 1999 order is not conclusive as to the government's obligation to pay. In *Michelle's Lounge*, the Seventh Circuit held that a district court's order in a civil forfeiture proceeding releasing assets of a claimant for use by the claimant to pay attorney fees in a parallel criminal proceeding in which he was a defendant was not appealable as a collateral order. The Seventh Circuit pointed out that the government should have requested a certificate of appealability from the district court.

*Michelle's Lounge* is not dispositive of the present situation. First and foremost, *Michelle's Lounge* was a civil case and is not controlling as to interlocutory appeals in a criminal case. Also, if it is appropriate to treat the August 19, 1997 order as an order in a civil case, as the government suggests, because the order was filed in both the civil and criminal proceedings, the government has not shown why it did not request a certificate of appealability for interlocutory appeals in civil cases under 28 U.S.C. § 1292(b).

Moreover, the government has failed to address why it did not appeal the August 17, 1999 order in accordance with 18 U.S.C. § 3731. That section provides that:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court . . . . requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on

> an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay . . . .

18 U.S.C. § 3731. That section further provides that "[t]he appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted." *Id.* Here, the order was issued before jeopardy attached and before Elkins' guilty plea.

Regardless of whether the August 17, 1999 order was appealable interlocutory, it is well-established that parties have a duty to promptly abide by court orders issued by a court of proper jurisdiction. *See, e.g., Maness v. Meyers*, 419 U.S. 449, 458 (1975). "The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" *Maness,* 419 U.S. at 459 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947)). This is true even if the order is invalid. *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991). "Disobedience of an invalid court order may be punished as criminal contempt." *Id.* at 1401.

The United States adduces no fact or law excusing it from its duty to abide by the order pending appeal. Its arguments about the order's finality, appealability, and voidability are not

**accompanied by any legal authority persuading this court that disobedience to the order is justified on such grounds. Indeed, if a party disagrees with an order, he may, in lieu of compliance, refuse to obey the order, and litigate questions in contempt proceedings.**

**This course of action has been embraced by both the United States Supreme Court and by the Sixth Circuit. "Compliance is not the only course open to the respondent . . . he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him."** ***The Dow Chem. Co. v. The Chamber of Commerce of the United States*****, 519 F.2d 352, 355 (6th Cir. 1975) (quoting with approval** ***United States v. Ryan*****, 402 U.S. 530, 532 (1971), in deciding that an order for discovery sanctions is not a final order for purposes of appeal).** ***Accord Bowen v. Zack*****, Civil Cases Nos. 96-4156/96-4226, 1996 U.S. App. LEXIS 30958 (6th Cir. 1996)(finding a discovery order non-appealable because a party could seek review by failing to comply and litigating the matter in a sanction or contempt proceeding). If the district court should reject the government's arguments in that proceeding, they will then be ripe for appeal.** ***Dow Chem. Co.*****, 519 F.2d at 355.**

**Alternatively, the government asks that its response herein be treated as Rule 60(b) motion for relief from a void judgment or**

order. The government asserts that the judgment is void because sovereign immunity protects the United States from pre-judgment interest assessments.

Rule 60(b) has no application in criminal proceedings such as the case sub judice. Nothing prohibits the government from filing a Rule 60 motion in the civil forfeiture action. In addition, it is not clear that the $6,511.26 award constitutes interest. In *United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 504 (6th cir. 1998), the Sixth Circuit held that interest on a seized res becomes part of the res and is not simple prejudgment interest.

It is therefore submitted that the United States should be ordered to appear and show cause for its failure to comply with the court's order. This will permit all its arguments as to finality, appealability, and voidness to be fully litigated and preserved for appeal. *See, e.g., United States v. DeParcq*, 164 F.2d 124 (7th Cir. 1947) (finding no criminal contempt when the order allegedly violated was void); *United States v. United Mine Workers*, 330 U.S. 258, 301 (1947)(discussing, in the appeal of a criminal contempt action, the defendants' attack on the district court's decision to extend the restraining order they allegedly violated).

## RECOMMENDATION

The United States has introduced no authority definitively excusing it from its duty to obey the orders of the district court judge. It is submitted that the United States should be ordered to appear and show cause for its failure to obey the August 17, 1999 order so that its arguments concerning the finality and voidability of the order may fully be litigated and, if necessary, preserved for appeal. Accordingly, this court recommends that Elkins' motion be granted.

Respectfully submitted this 17th day of April, 2003,

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE