

No. 10-10038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellant,

v.

DAVID NOSAL,

Defendant/Appellee.

SECOND MOTION TO STAY THE MANDATE

The United States, through its undersigned counsel, hereby moves to stay the mandate in the above-captioned case for a second time. The Solicitor General has filed an application with the United States Supreme Court for a 30-day extension of time, to and including August 8, 2012, within which to file a petition for a writ of certiorari in this case. Accordingly, the government asks that this Court stay the issuance of the mandate for 30 days or, if a certiorari petition is filed, until the petition is finally resolved.

1. In 2008, a federal grand jury returned a 20-count superseding indictment charging defendant-appellee David Nosal with violating several criminal statutes, including 18 U.S.C. § 1030(a)(4). Before trial, Nosal moved to dismiss counts 2 and 4-7 of the indictment on the ground that these counts did not sufficiently

allege that Nosal had “exceeded authorized access” within the meaning of 18 U.S.C. § 1030. After initially rejecting Nosal’s argument, the district court later granted Nosal’s motion for reconsideration and dismissed the counts in question for failure to state an offense. The government filed this interlocutory appeal, and a panel of this Court reversed the district court’s decision on April 28, 2011. Nosal then filed a petition for rehearing en banc, which this Court granted on October 27, 2011. On April 10, 2012, an en banc panel of this Court affirmed the district court’s dismissal of counts 2 and 4-7 of the superseding indictment in this case.

2. On June 29, 2012, the Solicitor General applied to the United States Supreme Court for a 30-day extension of time, to and including August 8, 2012, within which to file a petition for a writ of certiorari in this case. This application is attached (Attachment 1).

3. There is good cause for the stay. If the mandate is not recalled, the district court will obtain jurisdiction over this case, and the Speedy Trial Act clock may begin to run. Accordingly, the case could go to trial, and the issue presented by the government’s appeal could become moot.

4. Nosal is not currently in custody.

5. On June 29, 2012, an attorney for the government contacted Nosal’s

attorney and left a voicemail message informing him that the government intended to file this motion and asking him for his position on the motion. At the time of this filing, the government had not yet heard back from Nosal's attorney.

For the foregoing reasons, this Court should grant the motion to stay the mandate.

DATED: July 2, 2012

Respectfully submitted,

MELINDA HAAG
United States Attorney

BARBARA J. VALLIERE
Chief, Appellate Division

s/ Jenny C. Ellickson
JENNY C. ELLICKSON
Trial Attorney

KYLE F. WALDINGER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tyle L. Doerr
TYLE L. DOERR
Appellate Paralegal Specialist

ATTACHMENT

1

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

UNITED STATES OF AMERICA, APPLICANT

v.

DAVID NOSAL

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, respectfully requests a 30-day extension of time, to and including August 8, 2012, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the en banc court of appeals was entered on April 10, 2012. Unless extended, the time for filing a petition for a writ of certiorari will expire on July 9, 2012. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals, which is reported at 676 F.3d 854, is attached.

1. David Nosal was an executive at Korn/Ferry International, an international executive search firm. After leaving the company, he convinced some Korn/Ferry employees to start a competing

business with him and to obtain confidential information from a proprietary Korn/Ferry database to use in the new business. Although the employees had log-in credentials to access the database, company policy prohibited their use of the database for non-Korn/Ferry business purposes.

A grand jury in the Northern District of California indicted Nosal on numerous counts, including five counts of violating the Computer Fraud and Abuse Act, 18 U.S.C. 1030 (CFFA or Act). As relevant here, the Act provides a criminal penalty for whoever "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value." 18 U.S.C. 1030(a)(4). The Act defines the phrase "exceeds authorized access" as "access[ing] a computer without authorization and * * * us[ing] such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." 18 U.S.C. 1030(e)(6). The indictment alleged that Nosal had aided and abetted the former Korn/Ferry employees in "exceed[ing their] authorized access" to the database with intent to defraud.

Nosal moved to dismiss these counts on the ground that the statute covers only individuals who access computer files that they have no permission to access, not individuals who have permission to access computer files for some purposes but access the files for

a non-approved purpose. The district court ultimately agreed with Nosal and granted the motion to dismiss. A panel of the court of appeals reversed and remanded. See United States v. Nosal, 642 F.3d 781 (9th Cir. 2011).

2. The en banc court of appeals affirmed the dismissal of the CFFA counts. See United States v. Nosal, 676 F.3d 854 (9th Cir. 2012). The court determined that the pertinent provisions of the CFFA “target[] the unauthorized procurement or alteration of information, not its misuse or misappropriation.” Id. at 863 (internal quotation marks omitted). The court also expressed concern that, unless it adopted a “narrow[]” interpretation of the statute, the statute could be read to “criminalize any unauthorized use of information obtained from a computer.” Id. at 858-859. The court therefore held that a person “exceeds authorized access” only if he is authorized to access some data or files but accesses without authorization other data or files, and not when he uses data he has permission to access for an unauthorized purpose. Id. at 854-858. In its decision, the en banc Ninth Circuit stated that it “decline[d] to follow [its] sister circuits.” Id. at 863.

Judge Silverman, joined by Judge Tallman, dissented. Those judges viewed the phrase “exceeds authorized access” as plainly encompassing a person who is “is authorized to use a computer for a certain purpose but goes beyond those limitations.” 676 F.3d at 864 (quoting LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1133 (9th

Cir. 2009)). The dissenting judges observed that the provisions at issue are expressly limited to persons who exceed their authorized access knowingly and with intent to defraud, and the provisions do not extend to persons who simply violate computer use restrictions. Id. at 864, 866-867.

3. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to assess the legal and practical impact of the court's ruling and, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

JUNE 2012