

NO. 07-1311

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE JUDGE KRIEGER
DISTRICT COURT NO. 1:05-cr-00545-MSK

**NACCHIO'S REPLY BRIEF IN SUPPORT OF HIS RENEWED EMERGENCY
APPLICATION FOR RELEASE PENDING SUPREME COURT RESOLUTION
OF A PETITION FOR CERTIORARI AND MOTION FOR A STAY OF THE
DISTRICT COURT'S ORDER TO SURRENDER**

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Dated: April 10, 2009

Counsel for Defendant-Appellant

Joseph P. Nacchio respectfully submits this reply in support of his motion for bail pending certiorari and for a stay of his surrender date. The government's brief does not refute Nacchio's showing that he is entitled to bail and deserves only a brief response.

First, the government's claim that the *en banc* court already resolved this issue is meritless. The *en banc* court did not explicitly or implicitly decide whether Nacchio's petition for certiorari raised a substantial question. That issue was not before the *en banc* court and it could not have known what issues Nacchio would raise in his petition or how he would raise them.¹ And the *en banc* court did not even consider the issues regarding materiality or the jury instructions. The grant of *en banc* review did not encompass those issues and neither party briefed them.

Second, the government misstates the standard for bail by conflating the requirement that the petition present a "substantial question" with the requirement that the substantial question presented must be one that, if accepted on appeal, will be "likely" to produce an acquittal or a new trial. The government thereby attempts to manufacture a requirement that a grant of certiorari must be "more likely than not." Opp. 7-8.

Nacchio's motion to this Court (at 8-10) shows that this Court's precedents, and those of the Supreme Court, are directly contrary. Nor is there any merit to the suggestion that the

¹ For example, although the *en banc* court held that the district judge's decision to exclude Fischel "rested on *Daubert* grounds" App.15-16a, 11a n.6, 19a (and the government now argues that the *en banc* court held that the most "'natural' reading of the trial judge's decision 'indicates that the basis for the ruling' was Rule 702," Opp.18), Nacchio has pointed out in his petition that this reading of the record is quite unnatural given that the district judge himself stated when denying bail pending appeal in July 2007 that *Daubert* was *not* "the main bas[is] on which the Court rested its decision." App.350a. The Supreme Court often summarily reverses when a court makes such obvious errors.

Bail Reform Act displaced prior precedent making clear that a likelihood of success is not required. Nacchio's motion explains why "reasonable chance" of certiorari is the proper standard and the issues raised in his petition meet that standard.

Third, the government notably fails to mention, let alone defend, the district court's assertion that Nacchio failed to establish that his petition was not filed for the purpose of delay. That is consistent with the government's prior filings, since it has never taken the position that Nacchio's appeal or petition have been for purposes of delay. Even if this Court denies bail, we respectfully request that it correct the district court's erroneous holding on this issue.

CONCLUSION

This Court should stay the district court's order to surrender to allow the Court (and if necessary the Supreme Court) sufficient time to consider the merits of Nacchio's bail application,² and then should grant continued bail pending Supreme Court resolution of a petition for certiorari.

² In Nacchio's motion filed on April 8 he requested a stay of one week from a denial of bail by the Supreme Court. The district court set Nacchio's reporting date for one week from its denial of bail, and we believe a week is an appropriate time frame to permit the Bureau of Prisons and Nacchio to make orderly arrangements for his surrender. If this Court believes that a week is too long, we simply request that this Court stay his surrender date following any denial of bail for a sufficient period of time to permit an orderly surrender.

Respectfully submitted,

s/ Maureen E. Mahoney

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CERTIFICATION OF DIGITAL SUBMISSIONS

I, Maureen E. Mahoney, hereby certify that:

(1) there were no privacy redactions to be made in the documents submitted on April 10, 2009, and every document submitted in Digital Form or scanned PDF format is an exact copy of the written document that was sent to the Clerk; and

(2) the digital submissions have been scanned for viruses using McAfeeAgent Version 4.0.0.1345, McAfee VirusScan Enterprise Workstation, Virus Definitions 4.0.5544, McAfee Anti-Spyware Enterprise Module, version 8.0.0.989, last updated on April 10, 2009, and, according to the program, are free from viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **NACCHIO'S REPLY BRIEF IN SUPPORT OF HIS RENEWED EMERGENCY APPLICATION FOR RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI AND MOTION FOR A STAY OF THE DISTRICT COURT'S ORDER TO SURRENDER** with the Clerk of the Court for the United States Court of Appeal for the Tenth Circuit by using the appellate CM/ECF system on this 10th day of April, 2009. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I further certify that some of the participants in this case are not registered CM/ECF users and on the 10th day of April, 2009, I caused copies of the foregoing **NACCHIO'S REPLY BRIEF IN SUPPORT OF HIS RENEWED APPLICATION FOR RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI AND MOTION FOR A STAY OF THE DISTRICT COURT'S ORDER TO SURRENDER** to be sent via electronic mail to:

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