

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2012

4 (Submitted: November 27, 2012 Decided: December 27, 2012)

5 Docket No. 12-2423-cr

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7 UNITED STATES OF AMERICA,

8 Appellant,

9 - v -

10 STEVEN MOSKOWITZ, ANDREW TEPFER, aka AVI, SEYMOUR EISENBERG, aka
11 JIMMY, GEORGE SPERANZA, THOMAS CAVANAGH, FRANK NICOLOIS,

12 Defendants,

13 MICHAEL METTER,

14 Defendant-Appellee.

15 -----

16 Before: SACK, CHIN, and LOHIER, Circuit Judges.

17 Defendant-appellee Michael Metter has made a motion
18 pursuant to Federal Rule of Appellate Procedure 27 and Local Rule
19 27.1 to dismiss for want of appellate jurisdiction the
20 government's appeal from an order of the United States District
21 Court for the Eastern District of New York (Dora L. Irizarry,
22 Judge) suppressing evidence sought to be employed in a criminal
23 trial in which Metter is a defendant. Metter contends that
24 despite the U.S. Attorney's certification in accordance with 18
25 U.S.C. § 3731 "that the appeal is not taken for purposes of delay
26 and that the evidence that has been ordered suppressed

1 constitutes substantial proof of facts material in the
2 proceeding," the government has not in fact satisfied section
3 3731's requirements. We join every circuit to have considered
4 the issue in concluding that the U.S. Attorney's certification
5 conclusively establishes that the evidence is a substantial proof
6 of a material fact in satisfaction of section 3731. We therefore
7 deny the defendant's motion to dismiss this appeal.

8 Maranda E. Fritz, Hinshaw & Culbertson
9 LLP, New York, NY, for Defendant-
10 Appellee.

11 David C. James, Roger Burlingame, Nathan
12 Reilly, for Loretta E. Lynch, United
13 States Attorney for the Eastern District
14 of New York, Brooklyn, NY, for
15 Appellant.

16 PER CURIAM:

17 Defendant-Appellee Michael Metter moves pursuant to
18 Federal Rule of Appellate Procedure 27 and Local Rule 27.1 to
19 dismiss the government's interlocutory appeal from an order of
20 the United States District Court for the Eastern District of New
21 York (Dora L. Irizarry, Judge) suppressing certain evidence in
22 connection with a criminal trial in which Metter is a defendant.
23 He maintains that we are without jurisdiction over the appeal.
24 We conclude that we have jurisdiction under paragraph two of 18
25 U.S.C. § 3731. Metter's motion is denied. He is directed to
26 file a scheduling notification proposing a deadline for his brief
27 on the merits. See Local Rule 31.2.

1 **BACKGROUND**

2 On October 14, 2010, a grand jury sitting in the
3 Eastern District of New York returned a superseding indictment
4 against Metter and six codefendants. The indictment alleged that
5 Metter had participated in a fraudulent scheme related to
6 transactions in the common stock of Spongetech Delivery Systems,
7 Inc. ("Spongetech"), a corporation of which Metter was, at all
8 relevant times, the president and chief executive officer.

9 In May and November 2010, the government secured
10 warrants to seize computers from Spongetech's offices and
11 Metter's home, and data from Metter's personal email account.
12 All told, law enforcement recovered the contents of sixty-one
13 Spongetech hard drives, including Spongetech's email server, the
14 contents of four of Metter's personal hard drives, and a
15 "snapshot" of activity on Metter's email account (collectively,
16 the "Seized Materials"). But the government did not promptly
17 conduct a forensic review of the Seized Materials.

18 On May 25, 2011, Metter filed a motion to suppress the
19 Seized Materials. He argued, in relevant part, that the
20 government's delay in conducting a forensic review constituted an
21 unreasonable execution of the warrants that authorized seizure of
22 that evidence, in contravention of the Fourth Amendment. The
23 government conceded that it had yet to review the Seized
24 Materials, but it argued that its delay was not "unreasonable."
25 The district court sided with Metter, granting his motion and

1 ordering blanket suppression of the Seized Materials. United
2 States v. Metter, 860 F. Supp. 2d 205, 216 (E.D.N.Y. 2012).

3 The government immediately appealed, asserting
4 appellate jurisdiction under 18 U.S.C. § 3731.

5 **DISCUSSION**

6 Section 3731 of Title 18 of the United States Code,
7 authorizes, in certain circumstances, interlocutory appeals by
8 the United States from district court orders in criminal cases.
9 Relevant here is the second paragraph of section 3731, which
10 provides:

11 An appeal by the United States shall lie to a
12 court of appeals from a decision or order of
13 a district court suppressing or excluding
14 evidence or requiring the return of seized
15 property in a criminal proceeding, not made
16 after the defendant has been put in jeopardy
17 and before the verdict or finding on an
18 indictment or information, if the United
19 States attorney certifies to the district
20 court that the appeal is not taken for
21 purpose of delay and that the evidence is a
22 substantial proof of a fact material in the
23 proceeding.

24 18 U.S.C. § 3731.

25 Paragraph two thus appears to provide three
26 requirements for appealability: "[t]here was an order of a
27 district court excluding evidence; a United States attorney filed
28 the proper certification; and the appeal was taken within 30
29 days." United States v. Helstoski, 442 U.S. 477, 487 n.6 (1979).
30 It is undisputed that the government has satisfied these
31 requirements here: the district court issued a May 17, 2012 order

1 suppressing the Seized Materials; on June 15, 2012, Loretta E.
2 Lynch, the U.S. Attorney for the Eastern District of New York,
3 certified to the district court that the "appeal is not taken for
4 purposes of delay and that the evidence that has been ordered
5 suppressed constitutes substantial proof of facts material in the
6 proceeding"; and the government filed a notice of appeal the same
7 day, within 30 days of the district court's order.

8 Yet Metter maintains that we lack jurisdiction. He
9 contests the U.S. Attorney's certification that the Seized
10 Materials are "substantial proof of facts material in the
11 proceeding." The government, he argues, represented several
12 times in the proceedings before the district court that it had
13 not yet conducted a review of the Seized Materials -- indeed,
14 this was the basis for Metter's suppression motion. And because
15 the government did not review the Seized Materials, he continues,
16 the U.S. Attorney had no basis upon which to rest her
17 certification of substantiality and materiality.

18 The government argues in reply that the U.S. Attorney's
19 certification should be treated as conclusive under section 3731
20 as to whether the suppressed evidence is a "substantial proof of
21 a fact material in the proceeding." It argues, in other words,
22 that our jurisdictional inquiry begins and ends with timely
23 filing of the certification itself -- we thus need not look
24 behind the certification to determine its veracity or
25 correctness, and an appellee may not move to dismiss an appeal on
26 the basis that the certification is untrue or incorrect.

1 Although we have yet to hold as much, every circuit to
2 have considered the question has reached the conclusion urged by
3 the government. In re Grand Jury Investigation, 599 F.2d 1224,
4 1226 (3d Cir. 1979) ("The district court having received this
5 certification, we are not required by section 3731 to evaluate
6 independently the substantiality or the materiality of the
7 contested material."); United States v. Centracchio, 236 F.3d
8 812, 813 (7th Cir. 2001) ("We therefore treat as conclusive of
9 our jurisdiction over a Paragraph 2 appeal the submission of the
10 certification required by the statute."); United States v.
11 Johnson, 228 F.3d 920, 924 (8th Cir. 2000) ("[W]e need not
12 examine whether [the suppressed evidence] would actually be
13 substantial proof of a material fact. The government has so
14 certified; that suffices."); United States v. W.R. Grace, 526
15 F.3d 499, 506 (9th Cir. 2008) (en banc) ("[W]e now hold that a
16 certification by a United States Attorney . . . that the appeal
17 is not taken for the purpose of delay and that the evidence is
18 substantial proof of a fact material in the proceeding is
19 sufficient for purposes of establishing our jurisdiction under
20 § 3731."), overruling United States v. Loud Hawk, 628 F.2d 1139,
21 1150 (9th Cir. 1979). We now join our sister circuits in this
22 regard.

23 We are persuaded that for purposes of section 3731, the
24 U.S. Attorney's timely certification is conclusive as to whether
25 the suppressed evidence is substantial proof of a material fact.
26 We begin with section 3731's text, which "shall be liberally

1 construed to effectuate its purposes." 18 U.S.C § 3731.
2 Semantically, section 3731 provides that jurisdiction "shall
3 lie . . . if the United States attorney certifies . . . that the
4 appeal is not taken for purpose of delay and that the evidence is
5 a substantial proof of a fact material in the proceeding." Id.
6 (emphases added). We see nothing in that language to establish
7 that the government is also required to prove either or both of
8 what we read as parallel requirements -- "not taken for purpose
9 of delay" and "substantial proof of a fact material in the
10 proceeding" -- and decline to impose such an obstacle absent even
11 a hint to that effect from the statutory text. See Johnson, 228
12 F.3d at 923-24; W.R. Grace, 526 F.3d at 505; see also Helstoski,
13 442 U.S. at 487 n.6 ("[T]he purpose of [§ 3731] was to remove all
14 statutory barriers to Government appeals" (quotation
15 marks omitted)).

16 Viewing the issue from our own perspective, moreover,
17 we think a contrary rule too impracticable to be what Congress
18 intended. As the Seventh Circuit put it, "Paragraph 2 appeals
19 are usually from orders suppressing or excluding evidence, and
20 there is no basis on which, in advance of trial, we could
21 determine that the evidence that the government wished to use was
22 so unimportant to any rational prosecutorial strategy that the
23 appeal was frivolous." Centracchio, 236 F.3d at 813.

24 We emphasize, as did the Ninth Circuit, that "we are
25 not diluting a standard implicit in the certification
26 requirement." W.R. Grace, 526 F.3d at 507. Certification is not

1 to be treated as no more than an "administrative formality." Id.
2 at 508. So, although we agree that "since the Solicitor General
3 must in any event approve federal government appeals, there is no
4 significant danger that the appeal will be frivolous,"
5 Centracchio, 236 F.3d at 813, we nevertheless reiterate our
6 expectation that the government will "carefully analyze[] the
7 case before deciding to appeal," United States v. Romaszko, 253
8 F.3d 757, 760 (2d Cir. 2001). While we are confident that the
9 U.S. Attorney will carry out her certification responsibilities
10 in good faith, we note that our power to impose direct sanctions
11 is a sufficient guarantor that the government will not overstep
12 itself in this regard.¹ See W.R. Grace, 526 F.3d at 507.

13 We conclude that the U.S. Attorney's certification that
14 "the evidence is a substantial proof of a fact material in the
15 proceeding" is conclusive of that issue for purposes of section
16 3731, and is therefore alone sufficient to vest us with
17 jurisdiction under section 3731 of timely appeals from orders

¹ Although the rule we adopt here obviates any need to examine further the U.S. Attorney's certification, we have reviewed the materials submitted by the parties and think sanctions plainly unwarranted.

1 suppressing evidence.² Because the requirements of section 3731
2 are satisfied here, we have jurisdiction over this appeal.

3 We have considered Metter's remaining contentions and
4 find them to be without merit.³ Metter's motion to dismiss the
5 appeal is denied. He is directed to file a scheduling
6 notification proposing a deadline for the filing of his brief on
7 the merits. See Local Rule 31.2.

8 CONCLUSION

9 For the foregoing reasons, Metter's motion to dismiss
10 the appeal for want of appellate jurisdiction is denied. He is
11 directed to file forthwith a scheduling notification proposing a
12 deadline for the filing of his brief on the merits. See Local
13 Rule 31.2.

² The rule we adopt renders the U.S. Attorney's certification conclusive only as to the issue of jurisdiction. We in no way suggest that a certification is conclusive as to any matter that may be relevant to the merits of the appeal. See United States v. W.R. Grace, 526 F.3d 499, 506 (9th Cir. 2008) (en banc). Nor should our conclusion be read to limit in any way our discretion to dismiss an appeal under Fed. R. App. P. 3(a) where the required certification is not timely filed. See Romaszko, 253 F.3d at 760.

³ Metter argues that this motion is not governed by the rule we adopt today because he challenges not the correctness of the U.S. Attorney's substantiality and materiality determination, but her very basis for making such a determination. It seems obvious to us that underlying the U.S. Attorney's certification that the suppressed evidence is substantial and material is the premise that she has an understanding of the nature of the evidence sufficient to make that judgment. And we think, to the extent the concepts are separable, that it follows a fortiori from the principle that a certification's averment of substantiality and materiality is not subject to an appellee's challenge that neither is the existence of a basis upon which that averment rests.