NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 16-3794

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UNITED STATES OF AMERICA

v.

FREDERICK H. BANKS,

Appellant

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Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal Action No. 2-15-cr-00168-001)
District Judge: Honorable Mark R. Hornak

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Submitted Under Third Circuit L.A.R. 34.1(a)
March 7, 2019

Before: AMBRO, RESTREPO, and GREENBERG, Circuit Judges

(Opinion filed March 11, 2019)

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OPINION*

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AMBRO, Circuit Judge

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix A

Frederick Banks was indicted in 2015 by a grand jury in the Western District of Pennsylvania on charges of cyberstalking, wire fraud, identity theft, and fraud on the court. Banks's appointed counsel quickly alerted the District Court of concerns regarding his mental status; throughout the proceedings Banks made statements both in person and in his filings that were, in the Court's words, "unrelated to the charges against [him], the proceedings in this Court, or any form of fundamental reality." The Court ordered him examined by a psychiatrist, Dr. Robert Wettstein. Dr. Wettstein's report, filed in December 2015, found that Banks was psychotic and delusional, but nonetheless concluded that he was competent to stand trial. Dr. Wettstein reached no firm conclusion as to whether Banks was competent to waive his Sixth Amendment right to counsel and represent himself.

The District Court held a competency hearing that same month but did not make any determination at that time, and in April 2016 it ordered Banks committed to the custody of the Attorney General for further examination. The examining psychiatrist, Dr. Heather Ross, concluded that Banks was so completely delusional that he was not competent to stand trial, let alone to represent himself at trial. The Court held another competency hearing on September 30, 2016, and on the basis of Dr. Ross's report ordered Banks committed to the Attorney General's custody for treatment and to determine whether he could ever be restored to competency. Banks filed this notice of appeal on October 3, 2016, the same day as the District Court's memorandum order setting out the result of the hearing. But on May 28, 2017, Banks filed a joint motion to

stay this appeal pending completion of the proceedings in the District Court, which a panel of this Court granted on June 23, 2017.

Meanwhile, the Warden at the facility to which Banks had been committed filed a report in April 2017 that Banks had been examined by Dr. Allisa Marquez, a staff psychiatrist at the facility, and that Dr. Marquez determined that Banks was not truly delusional or psychotic but rather had a personality disorder, and that all of his seemingly delusional statements were deliberately made and under his control. On December 12, 2017, the District Court issued a new opinion weighing all of the psychiatric evidence in the case and concluding that Banks was competent to stand trial but not competent to represent himself. Banks, acting *pro se* despite the Court's order, filed a notice of appeal challenging this ruling on December 22, 2017. That appeal was docketed at No. 17-3822.

In April 2018 the parties informed the Court that the stay of appeal in this case should no longer continue. It lifted the stay and the case proceeded to briefing. Banks's brief raised only one issue: whether the District Court erred in its determination that Banks was not competent to represent himself. The Government's brief argued that the Court's decision was not an abuse of discretion and thus should be affirmed. It also asserted that our Court lacks appellate jurisdiction for two reasons. First, "Banks has briefed the wrong appeal," Appellee's Br. at 24. His briefing addresses the District Court's ruling from December 2017, but this appeal was taken in October 2016, challenging the Court's order of October 3, 2016. Second, the Government contends that orders resolving a defendant's competency to represent himself may not be challenged by interlocutory appeal.

We agree with the Government that we lack appellate jurisdiction. Interlocutory appeal is available only where an order (1) finally and conclusively determines an issue, that is (2) separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *United States v. Wright*, 776 F.3d 134, 140 (3d Cir. 2015); *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This rule applies with particular strictness in criminal cases. *See Flanagan v. United States*, 465 U.S. 259, 265 (1984). The Government contends that a district court ruling on a defendant's competency never qualifies for interlocutory appeal, as the ruling may always be revised throughout the proceedings (*i.e.*, is not final) and can in any event be reviewed on appeal should the defendant be convicted after trial. *Indiana v. Edwards*, 554 U.S. 164 (2008), for instance, in which the Supreme Court established that a defendant who is competent to stand trial may nevertheless be incompetent to represent himself, came to the Court on direct appeal from a final judgment of conviction. *Id.* at 169.

We need not decide whether a competency ruling could ever be the subject of a proper interlocutory appeal, however, because this appeal is improper in any event. The October 3, 2016 order challenged here did not conclusively resolve the issue of Banks's competency, as the Court issued a new (and different) ruling on that topic fourteen months later. If Banks can properly appeal the District Court's competency determination on an interlocutory basis, he would have to challenge the December 2017 order—which he has also done, in No. 17-3822. The appeal before us today is not a proper way to raise those concerns.

Insofar as Banks tries to argue in his reply brief that the October 2016 order was appealable as a commitment order, *see* Reply Br. at 2–6, his merits brief did not raise any issues relating to his commitment, only to the ultimate determination of his incompetency to proceed *pro se*. Any challenge to the October 2016 order in its capacity as a commitment order is therefore waived; it would likely also be moot at this point, as it appears Banks is no longer subject to commitment.

Accordingly, the appeal is dismissed.

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District Judge: Honorable Mark R. Hornak

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Submitted Under Third Circuit L.A.R. 34.1(a)
March 7, 2019

Before: AMBRO, RESTREPO, and GREENBERG, Circuit Judges

**JUDGMENT**

This cause came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on March 7, 2019.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the appeal of the judgment of the District Court entered on October 3, 2016, is hereby

dismissed. Costs are not taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: March 11, 2019
Lmr/cc: Laura S. Irwin
Michael L. Ivory
Marvin Miller

**Certified as a true copy and issued in lieu of a formal mandate on** 04/02/19

**Teste:** Patricia A Dodszuweit

**Clerk, U.S. Court of Appeals for the Third Circuit**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No. 2:15-cr-00168 |
| | ) | |
| FREDERICK H. BANKS | ) | Judge Mark R. Hornak |
| | ) | |
| Defendant. | ) | |

**ORDER**

AND NOW, this 3rd day of October, 2016, the Court having ordered two competency evaluations of Defendant Frederick H. Banks, and following competency hearings held on December 30, 2015 and September 29, 2016, and for the reasons stated on the record at length in its findings and conclusions on the record at the conclusion of the competency hearing of September 29, 2016, the Court finds and concludes by a preponderance of the evidence—after careful review of Mr. Banks' numerous filings as well as the written psychiatric and psychological assessments by Dr. Robert Wettstein and Dr. Heather Ross respectively, along with their sworn testimony, the sworn testimony and statements on the record of Mr. Banks, and for the reasons stated on the record in open Court in the presence of Mr. Banks and counsel for all parties—that Mr. Banks is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him, unable to assist properly in his defense, and unable to represent himself in this or any other criminal proceeding.

Mr. Banks is hereby committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d). The Attorney General shall hospitalize Mr. Banks for treatment in a suitable facility for such a reasonable period of time, not to exceed four months, as is necessary

Appendix B

to determine whether there is a substantial probability that in the foreseeable future Mr. Banks will attain the capacity to permit these proceedings to go forward.

IT IS FURTHER ORDERED that the Attorney General or his designee shall file a status report with this Court at the earliest possible date, not later than November 14, 2016, setting forth the course of treatment provided to Mr. Banks, his compliance, his response thereto, the opinion of treating medical and psychological personnel as to whether there is a substantial probability that in the foreseeable future Mr. Banks will attain mental competency such that he would be able to understand the nature and consequences of these proceedings, to assist properly in his defense, and to undertake his own defense as he has stated he desires to do, and/or whether there is a substantial probability that Mr. Banks will attain competency within any additional time period that may later be requested by the Attorney General.

FURTHER, for the reasons stated at length on the record in open Court in the presence of the Defendant and all counsel, the Court ORDERS that the various *pro se* motions and written statements filed by Mr. Banks (notwithstanding his representation by legal counsel) are resolved as follows: ECF Nos. 87, 91, 93, 94, 95, 107, 113, 114, 117, 120, 124, 127, 139, 140, 143, 150, 151, 152, 163, 171, 173 are each denied without prejudice to their potential reassertion after the conclusion of the competency proceedings; ECF Nos. 102, 119, 125, 137, 172, 176, 177, 178, 185, 186, 187, 195, 196, 197, 198, and 204 are denied and/or dismissed as the case may be. The Motion to Withdraw filed by Mr. Roe at ECF No. 73 is denied without prejudice, the Court concluding that there is no record basis at the point to remove Mr. Roe as counsel for Mr. Banks, and that it appears to the Court that based on his advocacy on behalf of Mr. Banks and all of the other matters appearing of record, that representation can continue under prevailing law.

IT IS FURTHER ORDERED pursuant to 18 U.S.C. § 3161(h)(4) that the time period during which Mr. Banks is hospitalized pursuant to this Order, and all time thereafter until this Court finally resolves all competency issues as to Mr. Banks, is deemed excludable delay by definition under the Speedy Trial Act, and futher that the ends of justice served by taking such action outweigh the best interest of the public and Mr. Banks in a speedy trial; the failure to grant such a continuance in the proceedings would likely make the holding of such proceedings impossible and/or result in a miscarriage of justice. 18 U.S.C. § 3161(h)(8)(B)(i).

Mark R. Hornak
United States District Judge

Dated: October 3, 2016

cc: All counsel of record

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Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and GREENBERG*, Circuit Judges

**SUR PETITION FOR REHEARING**

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: May 31, 2019
CLW/cc: Laura S. Irwin, Esq.
Michael L. Ivory, Esq.
Marvin Miller, Esq.
Mr. Frederick Banks

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* Senior Judge Greenberg is limited to panel rehearing only.

Appendix D

Additional material from this filing is available in the Clerk's Office.