
No. 25-13969

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

TIMOTHY BURKE,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT TO FLORIDA
TAMPA DIVISION
CASE NO. 8:24-cr-00068-KKM-TGW

APPELLEE'S RESPONSE IN OPPOSITION TO THE GOVERNMENT'S
MOTION FOR A FURTHER EXTENSION OF TIME, AND MOTION TO
DISMISS THE APPEAL FOR FAILURE TO PROSECUTE

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

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

No. 25-13969

TIMOTHY BURKE,
Defendant-Appellee.

**APPELLEE’S RESPONSE IN OPPOSITION TO THE GOVERNMENT’S
MOTION FOR A FURTHER EXTENSION OF TIME, AND MOTION TO
DISMISS THE APPEAL FOR FAILURE TO PROSECUTE**

Appellee moves for dismissal of the appeal under Fed. R. App. P. 31(c) for the reasons set forth below:

The Government told this Court what it would do if the Solicitor General did not authorize this appeal: “if he does not authorize this appeal, we will immediately ask this Court to dismiss the appeal.” Doc. 19 at 2. The Solicitor General has not authorized the appeal. The Government has not moved to dismiss. Instead, on the day its brief was due, it sought a fourth extension (a request for transcripts also resulted in a continuance) and repeated the same promise. Doc. 22 at 2, 4.

Mr. Burke opposes the extension and moves to dismiss. The Government concedes that its appeal “cannot proceed *further* without the Solicitor General’s authorization.” Doc. 22 at 3 (emphasis added). The question is whether the government can proceed at all without such authorization. Almost ten months after the district court dismissed the Wiretap Act counts, the Government offers no

authorization, no merits brief, and no factual support showing good cause or actual diligence apart from a conclusion attributed to no one in the Office of the Solicitor General: “We are working diligently.” *Id.* at 4. Regardless of whether the Tampa prosecutors want to proceed, there is no record upon which this court may rely that the *Office of Solicitor General is diligently prosecuting the appeal* as required by 18 U.S.C. § 3731, that the “good cause” under Fed. R. App. P 26(b) has been demonstrated with particularity, Fed. R. App. P 27(a)(2)(A), or any reason to depart from 11th Cir. R. 31-2(d) that a second or later briefing extension is “extremely disfavored,” “granted rarely,” and available only upon “extraordinary circumstances that were not foreseeable at the time the first request was made.”

The government asserts that issues related to their choices on how to prosecute a journalist for obtaining and disclosing information he is alleged to have downloaded from the Internet are “novel and complex” and may have ramifications in “other cases and other contexts.” Doc. 22 at 4. That circumstance is neither new nor unforeseeable.

In *United States v. Salisbury*, 158 F.3d 1204, 1206–07 (11th Cir. 1998) this Court dismissed a Government appeal for noncompliance with 18 U.S.C. § 3731, emphasizing that the statute protects against needless delay and the burden an impending criminal proceeding places on the accused, even one not incarcerated. *Salisbury* also rejected “simple negligence” as an excuse. *Id.* at 1207. Other circuits

likewise require concrete justification before excusing noncompliance with § 3731. *Salisbury* citing *United States v. Carrillo-Bernal*, 58 F.3d 1490, 1497 (10th Cir.1995); *United States v. Hanks*, 24 F.3d 1235, 1239 (10th Cir.1994); *United States v. Miller*, 952 F.2d 866, 876 (5th Cir.1992). Here the defect is the absence, after repeated extensions, of the authorization necessary to proceed at all. The Government answers that Mr. Burke is not detained and that his release conditions have been modified. Doc. 22 at 4. *Salisbury* rejected the premise that release eliminates prejudice: pretrial restraints remain a deprivation of liberty, and an impending prosecution weighs heavily on an accused. *Id.* at 1207.

Mr. Burke has been adjudicated guilty of nothing. Yet the appeal keeps the prosecution suspended, leaves his journalistic materials in Government custody, keeps him from publishing newsworthy content, continues his jeopardy and constitutional speedy trial and laches issues, and prevents him from using district-court process to secure evidence for his defense while memories fade and third-party evidence could be lost. The harm extends beyond Mr. Burke. The unresolved prosecution maintains the threat that journalists may be prosecuted for obtaining and reporting information readily accessible to the public. The district court found that the Government's "mere-acquisition" theory could expose ordinary access to email, messages, video calls, and browsing activity to criminal investigation, creating "serious First Amendment concerns." Doc. 217 at 11, 21. That cloud persists every

day the Government preserves an unauthorized appeal without briefing or dismissing it.

Congress required diligence precisely because a Government appeal interrupts a criminal case while burdens continue to accumulate. The Government received the additional time it said would resolve the authorization question. It has offered no facts demonstrating extraordinary circumstance, no particularized good cause, and no evidence of diligence. Here an appropriate remedy is to extinguish the continuing threat created by an appeal the Solicitor General has not authorized.

The Court should deny the motion for a further extension and dismiss the appeal for failure to prosecute it diligently. Fed. R. App. P. 31(c); 18 U.S.C. § 3731.

Dated: July 31, 2026

Respectfully submitted,

s/ Michael P. Maddux

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CERTIFICATE OF COMPLIANCE

This response and motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 978 words. It complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

s/ Michael P. Maddux
Michael P. Maddux, Esq.

CERTIFICATE OF SERVICE

I certify that on July 31, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will serve notice of electronic filing on all counsel of record.

s/ Michael P. Maddux
Michael P. Maddux, Esq.

No. 25-13969-DD

In the
**United States Court of Appeals
for the Eleventh Circuit**

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

TIMOTHY BURKE,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
No. 8:24-CR-68-KKM-TGW-1

**UNITED STATES' RESPONSE TO MOTION TO DISMISS
APPEAL FOR FAILURE TO PROSECUTE**

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August 7, 2026

In the United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

No. 25-13969-DD

TIMOTHY BURKE,
Defendant-Appellee

**United States' Response to Motion to Dismiss Appeal for
Failure to Prosecute**

In his response to the United States' July 31, 2026 motion for an extension of time, appellee Timothy Burke asks this Court to dismiss this appeal for failure to prosecute. This Court should deny that request.

As we explained in our latest extension request, we have again sought an extension of time to file our brief because the Solicitor General has not yet decided whether this appeal should go forward. As this Court is well aware, the United States may not brief this appeal—or for that matter, move to dismiss it—without the Solicitor General's authorization. Thus far, everyone else who is required to take part in this process (the United States Attorney's Office; the Appellate Section of the Department of Justice's Criminal Division; an Assistant to the Solicitor General; and the Deputy Solicitor General) has made their recommendation on whether the appeal should proceed. *See* 28

C.F.R. § 0.20(b); *Justice Manual* §§ 2-1.000(a), 2-2.110, 2.2.111, 9-2.170(6).

Other interested components have also provided their views. We are now awaiting the final word from the Solicitor General himself.

As we have explained, if the Solicitor General declines to authorize the appeal, we will immediately notify opposing counsel and move to dismiss this appeal. If he authorizes the appeal, we will endeavor to promptly complete and file the United States' brief in accordance with any parameters set by the Solicitor General. (This appeal presents a complicated issue concerning the scope of the Wiretap Act, 18 U.S.C. §§ 2510 and 2511. Any parameters the Solicitor General establishes will be important, as the determination whether the communications at issue are “wire” or “electronic,” or both, will likely have significant consequences in other criminal-justice contexts.)

We acknowledge that this process has taken a long time, and we don't intend to minimize the delay or its effect on Mr. Burke. But his concern over “the continuing threat” of this appeal, Motion Response (Doc. 23) at 5, is not an appropriate one. The threat of this appeal for him is that the district court's ruling will be reversed. That's a consequence that every appellee faces. Mr. Burke should not be able to avoid on this basis the possibility that this Court will rule that the district court erred, and reinstate the indictment as charged.

Likewise unavailing is Mr. Burke's reliance on *United States v. Salisbury*, 158 F.3d 1204 (11th Cir. 1998), which dismissed an appeal because of the

United States’ “failure to comply with the certification requirements of 18 U.S.C. § 3731.” *Id.* at 1206. The provision at issue there—which applies to appeals from suppression orders—allows such appeals “if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.” 18 U.S.C. § 3731. That required certification “ensur[es] that the prosecutor carefully analyzes the case before deciding to appeal.” *Salisbury*, 158 F.3d at 1207. (The United States filed the certification a month later. *Id.*) The certification also serves to inform the district court of the United States Attorney’s recognition that an appeal might be justified.

As Mr. Burke recognizes, that certification requirement does not apply to appeals from orders dismissing indictments. *See* 18 U.S.C. § 3731. And, in any event, the required internal procedure outlined above ensures that the Department of Justice, as a whole, carefully analyzes every case before proceeding with an appeal. Furthermore, the district court itself invited the United States to “appeal this decision and postpone trial until the Eleventh Circuit clarifies the law regarding the Wiretap Act interception offenses.” Doc. 217 at 316. So the district court seemingly recognized that its rulings might reasonably warrant an interlocutory appeal.

Again, we apologize for the delay, we are continuing to “diligently prosecute[]” this appeal, *see* 18 U.S.C. § 3731, and we will notify the Court of

the Solicitor General's decision as soon as we have it. But dismissal of the appeal is not warranted.

For these reasons, this Court should deny Mr. Burke's motion to dismiss this appeal.

Respectfully submitted,

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Certificate of Compliance with Type-Volume Limitation

This motion, which contains 691 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).



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Certificate of Service

I certify that on August 7, 2026, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

MICHAEL MADDUX, ESQ.
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s/ David P. Rhodes
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