No._____

IN THE SUPREME COURT OF THE UNITED STATES

FELIPE VINAGRE-HERNANDEZ, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a motion for detention filed before an indictment or information charging a person has been obtained is a pretrial motion within the meaning of the Speedy Trial Act.

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Felipe Vinagre asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 7, 2019.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals is reported, *United States v. Vinagre-Hernandez*, 925 F.3d 761 (5th Cir. 2019), and is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 7, 2019. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Title 18 U.S.C. § 3161 provides in pertinent part:

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

. . .

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

. . .

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion[.]

STATEMENT

Petitioner Felipe Vinagre was arrested in the West Texas desert on the night of May 11, 2017. Fifth Circuit Electronic Record on Appeal (EROA) 9-11. Border Patrol agents watching the desert though an infrared scope had seen a group of people moving north. The individuals in the group appeared to be carrying backpacks. EROA.196-99, 222-24; 252-55. As the group approach the Indian Rock Windmill, the agents lost sight of it, and decided to head in to investigate. EROA.203-05, 208, 245-46. As the agents approached the area with a dog and flashlights, they saw people scatter and run. EROA.245-48. One man did not run; he was found in a wash with bundles of marijuana. EROA.249-50. Vinagre was arrested about a mile from the spot where the marijuana was found. EROA.262.

A criminal complaint was filed against Vinagre on May 12, alleging that he had aided and abetted the possession with intent to distribute of 145 kilograms of marijuana., in violation of 21 U.S.C. § 841. EROA.9-11. Thirty two days after Vinagre's arrest, a one-count indictment was filed charging him with knowingly possessing and with aiding and abetting the possession of more than 100 kilograms of marijuana. EROA.24-25. Vinagre later wrote to the court, pointing out that the indictment was filed more than 30 days after his arrest. He alleged the indictment was therefore "void." EROA.40. The district court made no ruling on Vinagre's speedy trial complaint.

Vinagre went to trial and he testified in his own defense. He denied that he was part of the group that had been carrying marijuana. EROA.297-98; EROA.306. He testified that

he had never met the man named Reynoso who was also arrested in the desert on the night of May 11 until they were jailed together in Van Horn. EROA.297-98.

Vinagre told the jury that he had traveled by bus from Mexico City to Chihuahua and then on to Ojinaga. EROA.299. Vinagre hoped to make it to Salt Lake City, Utah. To get him there, his friend, Isidro Perez, had arranged to pay 6,000 pesos to smugglers in Ojinaga. EROA.308-11; EROA.316. Perez had used the same smugglers. EROA.308.

Vinagre stayed three days in Ojinaga; while he was there one of the people he was with bought him shoes. EROA.298-300. He was brought upriver from Ojinaga in a white or gray pickup truck, and crossed into the United States on May 7. EROA.302. As Vinagre understood it, he was to be picked up in Valentine, Texas, to be moved along to Salt Lake City. EROA.312. The jury found Vinagre guilty of the marijuana charge.

Vinagre appealed, raising two issues, the sufficiency of the evidence against him and the late filing of the indictment against him. He argued that the indictment charging him was returned outside of the 30-day period provided by the Speedy Trial Act, 18 U.S.C. § 3161. The government, he argued, could not exclude time under the Speedy Trial Act simply by filing a motion to detain rather than an indictment or information. A motion to detain filed before a valid charging document exists was not, he contended, a pretrial motion within the meaning of the Act because there was no charge upon which a trial could be held. The Fifth Circuit rejected both Vinagre's sufficiency and his speedy trial arguments. On the speedy trial issue, the court of appeals found that motions for detention filed before an indictment has been returned are pretrial motions and therefore the time

during which they pend is excludable time under 18 U.S.C § 3161(h(1)(D). 925 F.3d at 765-66.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE ON WHAT CONSTITUTES A PRETRIAL MOTION WITHIN THE MEANING OF THE SPEEDY TRIAL ACT.

The Speedy Trial protects the rights of individuals to and the public interest in the swift administration of justice. *Bloate v. United States,* 559 U.S. 196, 211 (2010). As part of the structures provided to achieve those goals, the Act requires that an indictment or information charging an individual must be filed within 30 days of his arrest. 18 U.S.C. § 3161(b). When the government fails to indict an individual within 30 days, the Act requires dismissal of a later indictment as untimely if it contains the same charge or charges that were lodged by criminal complaint at the time of the defendant's arrest. 18 U.S.C. § 3162(c); s*ee, e.g., United States v. Velasquez,* 890 F.2d 717, 719 (5th Cir. 1990).

The Act 's computation scheme does not necessarily count the all the days of a proceeding. Instead, it excludes specified periods from the time limits it sets. Among those exclusions is the time taken up by "any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D); *see also Bloate,* 559 U.S. at 210-11. The statute does not define pretrial. This case presents the Court with the opportunity to clarify whether a government

motion for detention, filed before indictment or information, is a pretrial motion within the meaning of § 3161(h)(1)(D).

The Fifth Circuit in this case held that a motion by the government for detention of an arrested individual is a pretrial motion that automatically excludes the time the motion is pending from the calculation of the 30-day indictment or information period of § 3161(b). 925 F.3d at 765-66. That holding appears to contradict the plain meaning of the Speedy Trial Act and the purposes behind the Act. The better reading of "pretrial" is it means that period of time when a charging document has been filed that allows a person to be brought to trial.

It is well settled that, in interpreting a statute, a court must "begi[n] with the language of the statute itself, and that is also where the inquiry should end" if a statute's "language is plain." *Culbertson v. Berryhill,* 139 S. Ct. 517, 521-22 (2019) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Trust,* 136 S. Ct. 1938, 1946 (2016)). "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (quoting *BP America Production Co. v. Burton,* 549 U.S. 84, 91 (2006)); *see also Leocal v. Ashcroft,* 543 U.S. 1, 9 (2004) (plain-meaning analysis gives words their "ordinary or natural" meaning). Congress did not define the term pretrial. Thus, its meaning "has to turn on the language as we normally speak it[.]"*Watson v. United States*, 552 U.S. 74, 79 (2007) (citing, *inter alia*, *Asgrow Seed Co. v. Winterboer,* 513 U.S. 178, 187 (1995)).

Pretrial, as used in the usual sense, indicates the time after a criminal (or civil) legal proceeding is initiated and before the matter is tried before a jury or the bench. The key fact for deciding whether a motion is a pretrial motion is therefore whether an adequate document has been filed to initiate a legal case that may proceed to trial.

A federal criminal case may be tried only upon an indictment (or if an accused waives indictment, on an information) charging a cognizable offense upon which an individual may be made to stand trial. *Cf. Stirone v. United States*, 361 U.S. 212, 217 (1960). Without a valid indictment (or information) a person may not be tried on a federal criminal charge. U.S. CONST. amend. V. Because there is no possibility that a trial can be held in the absence of an indictment (or information), a motion filed before indictment or information cannot be considered a pretrial motion. This is because there is no possibility of a trial. Once an indictment is filed a motion to detain may properly be considered a pretrial motion, because a document and charge exist upon which a federal trial may be held. When no indictment has been filed, no charge exists that may be tried. Matters before an indictment is filed cannot therefore be considered pretrial matters..

This Court's jurisprudence supports the concept that there is an important distinction between pre-indictment and pretrial. For constitutional speedy trial purposes, the Court has differentiated between the two and held that the two distinct periods are governed by different law. *Compare Barker v. Wingo*, 407 U.S. 514, 530-33 (1972) (Fifth Amendment governs pre-indictment delay claims) *with Doggett v. United States*, 505 U.S. 647, 651 (1992) (delay after indictment governed by Sixth Amendment). The difference between

pre-indictment and pretrial should play the same defining role under the Speedy Trial Act. A motion cannot be a pretrial motion under the Act if there is no indictment that would allow a trial. If there is no possibility of a trial, then a time period cannot be considered to be pretrial, that is, before trial, in the usual sense of the word. We do not use pretrial to refer to all the days of one's life until one is brought to trial. If we did, most people would live and die in a pretrial state. The plain and common meaning of pretrial is the time between the filing of an initiating document upon which a trial may be held and the trial on such a document. *Cf. Watson*, 552 U.S. at 79 (plain meaning is ordinary meaning).

Nothing in the Fifth Circuit's opinion directly addresses this issue. The court of appeals found the phrase any pretrial motion to "be quite expansive," 925 F.3d at 766, but it did not explain why it should be so expansive as to cover all of the days of one's life before indictment. Indeed, it does not appear that any court of appeals has delved into whether the period after arrest but before indictment can be called pretrial. The Eighth Circuit has rejected a distinction between pre-indictment time and post-indictment time. It held an indictment to be timely though filed after the statutory 30-day period because "'Motions excludable under subsection (F) include *any pretrial motion* and are not limited to those motions enumerated' in Federal Rule of Criminal Procedure 12(b)(2)." *United States v. Moses*, 15 F.3d 774, 776-77 (8th Cir. 1994) (quoting *United States v. Hohn*, 8 F.3d 1301, 1305 (8th Cir. 1993)). *Hohn*, however, was a trial 70-day claim, not a pre-indictment claim, and no one had disputed the timeliness of the indictment in that case. The

Sixth Circuit in *United States v. Bowers,* 834 F.2d 607, 609 (6th Cir. 1987) excluded time for a motion to detain, but did not explain its reasoning.

The two Third Circuit cases that touch upon the motion-to-detain issue were not faced with a motion to detain file before indictment. In both *United States v. Lattany,* 982 F.2d 866, 829-73 (3d Cir. 1992) and *Government of Virgin Islands v. Duberry,* 923 F.2d 317, 318-21 (3d. Cir. 1991) an indictment had been timely filed before a detention motion was filed and thus the pretrial/pre-indictment issue was not presented. Nor does this Court's decision in *United States v. Tinklenberg,* 563 U.S. 647, 650 (2011) resolve the issue. In *Tinklenberg,* the Court concluded that, under §3161(h)(1)(D), the period of delay resulting from any pretrial motion was "automatically" excluded. That decision does not, however, define what pretrial means, and it does not undertake to explain whether the difference between pre-indictment and pretrial recognized in the constitutional speedy trial context by *Barker* and *Doggett* applies equally to the statutory speedy trial analysis.

This case presents the Court with an opportunity to determine that issue. Congress acted to protect a person's Fifth Amendment right to indictment and Sixth Amendment right to speedy trial by setting the time limits contained in § 3161. As part of that protection, Congress required an indictment within 30 days of arrest. It would appear that allowing the government to extend its own time by filing a motion to detain the defendant before an indictment exists frustrates the Fifth Amendment guarantee and defeats the goals of the Speedy Trial Act. This Court has written that the Act "was designed with the public interest firmly in mind" and "[t]hat public interest cannot be served, the Act recognizes, if

defendants may opt out of the Act entirely." *Zedner v. United States*, 547 U.S. 489, 503 (2006). The prohibition on opting out of the Act and the interests of the public in speedy justice apply equally to both the defense and the government. The government should not be allowed to opt out of the 30-day indictment rule by filing a motion to detain before indictment and having that motion prolong the indictment period. Such an interpretation of the Act permits the prosecution to control the speedy trial clock, not the courts or Congress, a result difficult to reconcile with the protections Congress afforded both the individual and societal interests in swift justice under the Act.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

/s/ Philip J. Lynch
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Counsel for Petitioner

DATED: August 20, 2019.