No. 19-5722

ORIGINAL

IN THE
Supreme Court of the United States

MOSES SHEPARD,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

Respondent.

10

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that a 30/70 day Clock be reset on the "filing and making public" of a "subsequent" indictment. The Act does not mention the "superseding" indictments over which Circuits are now split as to their correct definition and or whether such "subsequent" indictments are excluded. This chaotic state of affairs caused the trial Judge herein to docket a Judge-created subsequent indictment, then, four years later, delete it, then, docket it again, all while failing to acknowledge this *sua sponte* filing was a § 3161(d)(1) subsequent indictment, and, thus, concomitant plain error when failing to reset the 30/70 day Clock due merely to their having defined the word of art "superceding" to be in conflict with this Court's precedent and that of their own supervising Circuit court.

The question presented is:

1) Whether (as the Eleventh Circuit holds), under § 3161(d)(1), a "subsequent replacement indictment" "restarts the clock *regardless* of how the prior indictment was dismissed," or (as others hold), "superseding" indictments are automatically excluded; collaterally, whether the words of art "subsequent" vis-à-vis "superseding" should be clarified in the context of § 3161(d)(1); and,

2) The judgments below automatically vacated due to plain errors self-evident from the record under S.Ct. Rule 24(1)(a), or otherwise, e.g., failure to reset the STA Clock and thereby violate the Speedy Trial Act-Clause, Indictment of a Grand Jury Clause, Due Process Clause and Notice Clause, by docketing a § 3161(d)(1) indictment without acknowledging the reset concomitant 30/70 Day STA Clock, as required by § 3161(d)(1), and by *U.S. v. Rojas-Contreras*, 474 U.S. 231 (1985), where two Supreme Court Justices concurred that, "the 30-day and 70-day periods were intended to operate in tandem"; as well as,

3) Constructive amendment of that constitutionally-insufficient [subsequent] indictment, by broadening the charges at trial, thereby circumventing the 5th Amendment Indictment of a Grand Jury Clause, among other plain errors.

LIST OF PARTIES

All parties appear in the cover page case caption.

RELATED CASES

- *U.S. v. Shepard*, No. 4:10-cr-01032-CKJ, abbreviated herein as "CR 10-1032," in the U.S. District Court for the District of Arizona. Judgment entered May 16, 2012, at CR 842.

- *Shepard v. U.S.*, No. 4:15-cv-00504-CKJ, abbreviated herein as "CV 15-504," in the U.S. District Court for the District of Arizona. Judgment entered May 25, 2018, at CV 89, and Order CV 88, denying §2255 habeas to vacate CR 10-1032 automatically, seen at App. F.

- *Shepard v. U.S.*, No. 4:10-cr-01032-CKJ, U.S. District Court for District of Arizona. Judgment entered Jan. 11, 2019, at CR 938, denying FRCvP 60(b) motion to correct error in habeas order; copied at *Shepard v. U.S.*, No. 4:15-cv-00504-CKJ, U.S. District Court of Arizona. Judgment entered Jan. 11, 2019, CV 101, at App. B.

- *Shepard v. U.S.*, No. 18-15988, U.S. Ninth Circuit Court of Appeals. Judgment entered Dec. 20, 2018, denying motion to vacate District Court habeas order.

- *Shepard v. U.S.*, No. 19-15446, U.S. Ninth Circuit Court of Appeals. Judgment entered May 23, 2019, denying FRCvP 60(b) motion to vacate U.S. District Court habeas order due to plain error, seen at App. A.

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CONSTITUTIONAL PROVISIONS

IN THE Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner ("Movant") requests a writ be issued to review the below judgments, which, to Movant's knowledge, have only been made public on PACER.

OPINIONS BELOW

United States Court of Appeals for the Ninth Circuit order seen at Appendix A, under *Shepard v. U.S.*, case No. 19-15446, entered May 23, 2019.

United States District Court for the District of Arizona, at Appendix B, *Shepard v. U.S.*, No. 4:15-cv-00504-CKJ, entered January 11, 2019, at CV 101. Copied at CR 938, in *Shepard v. U.S.*, No. 4:10-cr-01032-CKJ, entered January 11, 2019.

JURISDICTION

On May 23, 2019, the Ninth Circuit entered an order seen at Appendix A in case No. 19-15446 aka *Shepard v. U.S.*, denying a timely-filed FRCvP 60(b)(4) motion to vacate an incorrect § 2255 Habeas order. This brief was timely-filed within ninety (90) days of entry of said Ninth Circuit order. Jurisdiction is invoked under 28 USC § 1254(1). Because Movant shall be under supervised release ("SR") until August 10, 2020, this filing can be construed—in whole, or in part—as a Habeas filing.

> [At the time {Movant} filed...§ 2255 Motion {Movant} was subject to **supervised release** term and thus was {still} **in "custody**." *Matus-Leva v. U.S.*, 287 F.3d 758 (9th Cir 2002)] *U.S. v. Rosales-Martinez*, 2014 U.S. Dist. LEXIS 15859. Cf. *Jones v. Cunningham*, 371 U.S. 236, 242-43: [While petitioner {is free} from immediate *physical* imprisonment, {Respondent} imposes conditions which significantly confine and restrain {petitioner's} freedom; this is enough to keep {petitioner} **in** the **"custody" of** {Respondent} within the meaning of **the habeas corpus statute**; if {petitioner} can prove his allegations **this custody** is violating the Constitution.]

CONSTITUTIONAL PROVISIONS INVOLVED

Statutory Criteria to Reset the 30/70 Day Speedy Trial Act ("STA") Clock

Section 3161(d)(1) of Title 18 of the United States Code provides in part:

> [If ***any*** indictment...***is*** **dismissed** upon motion of **the defendant**, **or** ***any*** **charge**...is dismissed ***or otherwise dropped***, and **thereafter** a...indictment is ***filed*** charging...the ***same*** offense ***or*** an offense based on the ***same*** conduct ***or*** arising from the same...episode, the provisions of subsections...**(c)** of ***this*** section ***shall*** **be applicable** with respect to such ***subsequent***...indictment.]

Section 3161(c)(1)-(2) of Title 18 of the United States Code provides in part:

> [Trial...***shall*** **commence** within ***seventy*** days ***from*** the ***filing*** date (***and making public***) of ***the***...indictment...Trial shall ***not*** **commence** less than ***thirty*** days.]

Relevant Bill of Rights Clauses Affected by the Reset 30/70 Day STA Clock

> [The accused shall enjoy the **right** to a ***speedy*** **trial**.] Speedy Trial Clause, 6th Amend., U.S. Const.

> [No person shall be held...unless on a...***indictment of a grand jury***.] Indictment of a Grand Jury Clause, 5th Amend., US Const.

> [No person shall be...**deprived of ... liberty, or property, without** ***due process*** **of law**.] Due Process Clause, 5th Amend., US Const.

> [{The accused} shall...be ***informed*** of the **nature and cause of the accusation**.] **Notice Clause**, 6th Amend., U.S. Const.

Concomitant Automatic Vacatur due to Plain Error aka Structural Defects

> [Plain error affecting substantial rights] is reversible. *U.S. v. Olano*, 507 US 725 (1993)

> [For purposes of appellate review in criminal cases, the federal constitutional errors sometimes called **structural defects**...defy analysis by harmless error standards...without this basic protections...no criminal punishment could be regarded as fundamentally fair.] *U.S. v. Gonzalez-Lopez*, 548 US 140 (2006)

> Denial of constitutional, [substantive], fundamental rights are [**structural**] in nature and [**per se prejudicial**], requiring [**automatic reversal**] because their

results on the [trial mechanism] are [unquantifiable and indeterminate]. [All structural defects lead to automatic reversal.] *Fulminante*, 499 US 279 (1991)

[A limited class of fundamental **constitutional errors** are so intrinsically harmful {i.e. [affect substantial rights]} as to **require automatic reversal** without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair.] *Neder v. U.S.*, 527 US 1, 7 (1999)

[The proverbial bell has been rung and cannot be unrung.] *In re Symbol Techs*, 2015 U.S. Dist. LEXIS 131478 (E.D.N.Y. 2015). Cf. *Digital Equipment v. Desktop Direct*, 511 U.S. 863 (1994), [that bell cannot be unrung.]

Circuit Split Re: Subsequent (Replacement) Indictment & Reset STA Clock

[**An *important* issue** is whether the speedy trial clock is tolled **or *restarts*** with a new seventy day period upon a **superseding** indictment. While many circuits make a distinction between whether the former indictment was dismissed based on the governments motion (in which case the time period is tolled) **or** whether the indictment is dismissed based on a motion **by the defendant or by the court *sua sponte* (in which case the clock *restarts*),** the Eleventh Circuit made clear that a superseding indictment restarts the clock ***regardless of how* the prior indictment was dismissed**. In *U.S. v. West,* the Court held: According to the Act and case law in this circuit, the government's dismissal of West's original indictment, and the ***subsequent*** **(replacement)** indictment, triggered a new seventy-day time period. *See* 18 U.S.C. § 3161(d)(1)...*U.S. v. West,* 142 F3d 1408, 1412 (11th Cir 1998)... the preceding law shall be applicable to the case at hand...a **superseding** indictment constitutes a dismissal of the prior indictment **(whether dismissal was made by defendant, the government or the court)** and the speedy trial clock should be restarted (not tolled)...A **third superseding** indictment was filed...which ***effectively* dismissed** the prior indictments and restarted the Speedy Trial Act clock. *West,* at 1412...] *U.S. v. Goodman*, 36 F.Supp.2d 947, 951-953 (11th Cir M.D. Ga. 1999)

"Subsequent" (*Re*-)Indictments May Not Be "Superseding" Indictments

[A **superseding** indictment is an indictment filed before the dismissal of the original...indictment. *U.S. v. Rojas-Contreras*, 474 US 231, 237, 239 (1985)...In a ***re*indictment** case the underlying indictment ***or* charges** are dismissed ***prior* to** the **filing** of the new indictment.] *U.S. v. Hoslett*, 998 F2d 648, 657 n. 11 (9th Cir 1993)

[The term "**superseding** indictment" refers to a second indictment issued in the *absence of* a dismissal of the first. The Act **nowhere refers to a *superseding***

indictment, and ***seems to assume*** that dismissal of the first indictment will precede issuance of the second. *See* 18 USC 3161(d)(1) and ... 3161(c)(2) ... **The question before the Court is whether** that {statutory} language may be interpreted to refer to the defendant's appearance on **the {final} indictment** upon which he **ultimately goes to trial**, or whether one must read that language to refer to the defendant's appearance on **the first** {Grand Jury} **indictment** ... When an indictment **is dismissed on motion of the *defendant***, and the defendant is thereafter **reindicted**, both the 30-day and 70-day periods ***run anew***. *See* 18 USC 3161(d)(1) ... The provisions demonstrate, however, **that the 30-day and 70-day periods were intended to operate in tandem**; where one runs anew, so should the other...it would make little sense to restart both the 30-day and 70-day periods ***whenever*** there is a **superseding** indictment. **Frequently, a *superseding* indictment is used to *drop* charges or ... a superseding indictment may *add* ... additional charges.**] *U.S. v. Rojas-Contreras*, 474 U.S. 231, 236-242 (1985)

***Sua Sponte* Dismissal of Indictment Always Resets Speedy Trial Act Clock**

[When an indictment ***is*** **dismissed** on motion of **the *defendant***, and the defendant is thereafter ***re*indicted**, both the 30-day and 70-day periods ***run anew***...This difference...protects against governmental circumvention of the Speedy trial guarantee.] *U.S. v. Rojas-Contreras*, 474 US 231, 239 (1985) Cf. *U.S. v. McKay*, 30 F3d 1418 (CA11 1994)

[We review...factual issues concerning Speedy Trial Act disputes for **clear error** by the district court. Questions concerning the Act are reviewed ***de novo***...We conclude that the ***sua sponte*** **dismissals** restarted...the speedy trial "clock."] *U.S. v. Feldman*, 788 F2d 544, 547-549 (9th Cir 1986)

[The {9th Circuit} *Feldman* court found it significant that § 3161(d)(1) required **"restarting the clock** where the indictment is dismissed upon motion of the defendant, **or *any* charge...*is* dismissed *or otherwise dropped*."** 788 F2d at 549...The circuit court reasoned that the provision was applicable to ***any*** **type of dismissal other than** those made on the government's motion...Consequently, the court rules that the lower court's ***sua sponte*** **dismissal** had the same effect as if the defendant's motioned for dismissal. The *Feldman* court concluded that ***sua sponte*** **dismissals *restarted*** rather than tolled the STA time period...It should be noted that the *Feldman* court analyzed the 70-day limitation period set forth in § 3161(c)(1). In *Rojas-Contreras*, 474 US 231 (1985), **two justices of the Supreme court, in a concurring opinion, stated** that **both the 30-day and 70-day provisions "were intended to operate in tandem"**...Thus, the district court properly reasoned the *Feldman* analysis is applicable to the 30-day provision in § 3161(b).] *U.S. v. Perez*, 845 F2d 100, 102 n.3 (CA5 1988)

[The 8th Circuit...quoted {the 9th Circuit in} *Feldman* with approval in *Page*, 854 F2d 293 (CA8 1988)...Noting *Feldman* appeared...to be **the *only* federal case to have addressed** the **issue** of ***sua sponte* dismissals**. The *Page* court held..."in either case -- a ***sua sponte*** order by the court or a withdrawal {dismissal} of the initial {indictment} charge at the defendant's request -- the outcome is the same. The time period under the {Speedy Trial} Act begins to **run anew**." *Page*...at 294. No more recent federal cases have been located that address the issue of ***sua sponte* dismissals**.] *U.S. v. Stangeland*, 2008 US Dist LEXIS 45481 (8th Cir)

[Judge...concluded...time period under...STA began to **run *anew*** with...**new indictment** since the prior dismissal was not on a government motion but a ***sua sponte* dismissal** by the court...Judge...noted...in *Feldman*, 788 F2d 544 (9th Cir 1986), the Ninth Circuit...held...under § 3161 (d)(1), the speedy trial clock ***restarts*** when a case is dismissed for ***any*** reason "except on ... government's ... motion ... including a ***sua sponte* dismissal**"... thus restarting the clock at 70 days on each ***re*indictment**.] *Stangeland*, 2008 US Dist LEXIS 81368 (8th Cir)

[Trial shall commence within 70 days ***from*** the **filing and making *public*** of the indictment...{When} a ***subsequent*** indictment is filed, charging the same conduct, the 30-day {/70-day} STA Clock ***restarts***.] *U.S. v. Barraza-Lopez*, 659 F3d 1216 (9th Cir 2011). Cf. *U.S. v. Rojas-Contreras*, 474 US 231, 239 (1985)

[§ 3161(d)(1) provides...when an indictment ***is* dismissed** on the ***defendant's*** motion, the ***subsequent***...indictment triggers a new {30/}70-day time period. *See Karsseboom*, 881 F2d 604, 606 (9th Cir 1989); *Harris*, 724 F2d 1452, 1454 (9th Cir 1984); *McCown*, 711 F2d 1441, 1446 (9th Cir 1983). The {30/}70-day clock ***also*** starts anew if the district court **dismissed** the first {Grand Jury} indictment ***sua sponte***. *Feldman*, 788 F2d 544, 548-549 (9th Cir 1986), cert. denied, 479 US 1067 (1987).] *U.S. v. Magana-Olvera*, 917 F2d 401, 404-5 (9th Cir 1990)

[Indictment was dismissed **on *defendant's* motion**, rather than government's, where defendant made motion...and...Court stressed it was granting defendant's motion, and thus **new indictment triggered new {30/} 70-day time period**.] *U.S. v. Magana-Olvera*, 917 F2d 401, 405 (9th Cir 1990)

[When an indictment is dismissed on motion of the defendant, and...defendant is thereafter *reindicted*...the 30-day trial preparation period and the 70-day speedy trial time period start over.] *U.S. v. Karsseboom*, 871 F2d 877 (9th Cir 1989)

[It seems obvious that such by the judge is a 'fundamental' and **not a mere minor error**. He should have either **dismissed** the indictment ***sua sponte*** or advised appellant of his right to move for such a dismissal, or appointed an attorney for him for that purpose. The court's failure to perform such a judicial

obligation is a plain violation of **the court's *judicial due* process** due to be exercised...It is apparent that the **layman appellant**, because he did not so move, was in 'ignorance' of his right to move to quash the indictment...**upon the trial judge rests the duty** of seeing that the trial is conducted with solicitude for the essential rights of the accused.] *Kelly*, 166 F2d 731 (9th Cir 1948)

[When an indictment ***is* dismissed**...***sua sponte*** by the court, the subsequent ... indictment triggers a ***new*** {30/} 70-day period...*Magana-Olvera*, 917 F2d 401, 404-5 (9th Cir 1990).] *U.S. v. Darlmon*, 1997 US Dist LEXIS 12153 (10th Cir)

[The 70-day time period began to run...on the date the {subsequent} indictment was **filed and made public**...Thomas acknowledges the {§ 3161(d)(1)} provision applies when an indictment is dismissed **by *defense* motion** {resetting the STA Clock}.] *U.S. v. Thomas*, 2011 US Dist LEXIS 67340

[The {STA} does ***not***...provide for ***superseding*** indictments...Instead, the Act speaks...to {subsequent} ***re*indictments** only. On that score, § 3161(d)(1) provides... when {one} secures a **dismissal** "both the 30-day trial preparation period and the 70-day speedy trial time period start over"...***We have also held*** ...when {one} ***is re*indicted** after a ***sua sponte* dismissal** by the court, the {30/} 70-day clock ***is* reset**. *Feldman*, 788 F2d 544, 547-9 (9th Cir 1986).] *Thomas*, 726 F3d 1086, 1090 (9th Cir 2013). Cf. *Thomas*, 2013 US App LEXIS 16413 (9th Cir)

[The {STA} statute does ***not*** specifically address ***sua sponte* dismissals** by the district court. **The 9th Circuit addressed this issue** in *Feldman*, 788 F2d at 547. In examining the...history of § 3161(d)(1), which requires the application of § 3161(b) time limits to ***subsequent* indictments** arising out of the same events, the court recognized that **Congress intended** the time limits to **run *anew*** from the date of the second...charge...**The circuit court rules that**, under § 3161(d)(1), the {70/} 30-day clock starts anew not only for dismissal of an indictment upon motion of the defendant **but also for** dismissal by the court ***sua sponte***. 788 F2d at 549.] *U.S. v. Perez*, 845 F2d 100 (5th Cir 1988)

[When...a speedy trial {Act} violation has occurred, the court is required to **dismiss** the indictment ***sua sponte***. *U.S v. Lowery*, 21 FSupp2d 648, 649 (ED Tex 1998). Dismissal is **automatic** when a defendant is not brought to trial within the 70-day limit...*Mancias*, 350 F3d 800, 810 (8th Cir 2003).] *U.S. v. Arias-Gonzales*, 2007 US Dist LEXIS 52714 (8th Cir)

[The Court **may dismiss an indictment**...if...unnecessary delay occurs in...**bringing** a... {STA-consistent} **trial**.] FRCP 48(b)(3)

Statutory Construction of the 30/70 Day Speedy Trial Act Clock

[§ 3161(b) applies to ***"any"*** indictment, **including** one that subsequently is found to be **defective *or* invalid**.] *U.S. v. Perez*, 845 F2d 100, 102 (CA5 1988)

[In the context of the Speedy Trial Act...the interpretation that is **consistent *within* the language of the statute** and avoids absurd results is to be preferred.] *U.S. v. Thomas*, 726 F3d 1086, 1091 (9th Cir 2013)

[It is a well-established principle of statutory construction that legislative enactments should ***not*** be construed to render their provisions mere surplusage.] *U.S. v. Barraza-Lopez*, 659 F3d 1216, 1220 (9th Cir 2011)

[Common sense, backed up by the canon **against rendering statutory language ineffective**, *Corley*, 556 US 303 (2009), supports this interpretation. When the government violates the STA...§§ 3162(a)(1) and (2) of the Act permits {indictment dismissal / vacatur}.] *U.S. v. Myers*, 666 F3d 402, 404 (CA6 2012)

Grand Jury Must Sign Off on Amendments of Substance & Not Form

[An indictment may ***not*** be amended except by ***resubmission*** to the Grand Jury, unless the charge is **merely a matter of form**. If a defendant is in *no* sense *misled*, put to burdens, or otherwise *prejudiced*...such an amendment ought to be...treated as an **amendment of *form* and not *substance***, and, therefore, allowable, even though unauthorized by the Grand Jury.] *Reese*, 611 Fed Appx 961, 968 (11th Cir 2015), quoting *Russell*, 369 US 749, 770 (1962)

[A **defective indictment** is a ***structural* flaw** not subject to harmless error review.] *U.S. v. Inzunza*, 638 F3d 1006, 1017 (9th Cir 2009)

Insufficient Indictments Violate Indictment of a Grand Jury Clause

An indictment is [**insufficient**], [fatally defective] and [facially deficient], when it [failed to allege essential {statutory} elements under] the [charging statute] and, as such, must be [dismissed post-trial] due to failure to [resubmit...evidence to a Grand Jury] to cure the defect. *U.S. v. Graham*, 2008 US Dist LEXIS 77713 (8th Cir); FRCrP 12(b)(3)(B); *Hilderbrand v. U.S.*, 261 F2d 354 (9th Cir 1958)

[{An indictment} is legally {**in**}**sufficient**...if it...{does not} **fairly inform** {one of all} charges {to} allow {one} to plead double jeopardy as a bar to future prosecution.] *U.S. v. Nieman*, 265 FSupp2d 1017 (CA8 2003). Cf. FRCrP (7)(c)(1)

[To be **sufficient** an Indictment must allege each material element of the offense; if...not, it **fails to charge** that offense.] *U.S. v. Berrios-Centeno*, 250 F3d 294 (CA5 2001)

[If the indictment does not contain every **essential element** of the offense, it is invalid...To be legally **sufficient**, an Indictment, must contain the elements of the offense charged {and} fairly inform the accused of the charge.] *U.S. v. Loayza*, 107 F3d 257 (CA4 1997)

Constructive Amendment of Grand Jury Indictment Requires Reversal

[The 5th Amendment {Grand Jury Clause} **guarantees**...defendants a right to be **tried *solely*** on allegations in an indictment returned by a Grand Jury. From this...arises the **doctrine** of **constructive amendment**, which provides that after an indictment has been returned its charges may **not be broadened** through amendment **except by** the Grand Jury itself...{which} occurs when the Court permits {accused} to be convicted upon a **factual** basis that effectively **modifies** an **essential** element of the offense charged or upon a **materially different theory** or set of facts than that which the defendant was charged.] *U.S. v. Chaker*, 820 F3d 204 (CA5 2016), LexisNexis Headnotes, quoting *Stirone v. U.S.*, 361 US 212, 215-16, 217 (1960)

[After an Indictment has been returned, its charges may **not** be **broadened** through **amendment** except by the Grand Jury...A federal court cannot permit {one} to be tried on charges that are ***not*** made in the Indictment...A{n accused's} right, under the 5th Amendment, to have the Grand Jury make the charge on its own judgment, is a ***substantial* right** which cannot be taken away with or without Court amendment of the indictment.] *Stirone*, 361 US 212 (1960)

[If a court permits a Jury to convict an accused on evidence of a crime ***not*** included in *the* Indictment, the {5th Amendment} Constitutional **right to a Grand Jury** is violated.] *U.S. v. Rosario-Diaz*, 202 F3d 54 (CA1 2000)

[*Constructive amendments* are **per se** violations of the 5th Amendment that **require reversal** even **without** a showing of prejudice.] *U.S. v. Bastian* 770 F3d 212 (CA2 2014)

[The...4th Circuit...held...constructive amendment...is a **structural error**, and ...2nd Circuit...that it is **per se prejudicial.**] *Brandao*, 539 F3d 44 (CA1 2008)

[**Constructive amendment** {to an Indictment} ***always* requires reversal** {as per se prejudicial}]. *U.S. v. Pisello*, 877 F2d 762, 765 (9th Cir 1989)

[Constructive amendment occurs when the **charging terms** of the Indictment are altered, either literally or in effect, by the prosecutor or a court after the Grand Jury has last passed on them...Constructive amendment **requires reversal.**] *McCracken*, 2014 US App LEXIS 21152 (9th Cir)

[An appellate court...reviews the record **de novo** to determine whether a constructive amendment has occurred...Constructive amendments are **per se prejudicial** because they infringe on the 5th Amend. Grand Jury guarantee. A{n accused} is therefore entitled to a **reversal** of his conviction.] *U.S. v. Lawrence*, 557 F. App'x 520 (6th Cir 2014)

[The **Grand Jury Clause** {5th Amend.} provides...{one} may only be tried on {their} Indictment, which may not be broadened through...**constructive amendment** {which} occurs when the evidence at trial supports a crime other than...in the Indictment.] *U.S. v. Gaines*, 8 F. App'x 635 (9th Cir 2001)

[**Constructive amendment** occurs when the {accused} is charged with one crime but, in effect, is tried for **another** crime. The...**Ninth Circuit** has found {constructive amendment} where (1) There is a **complex of facts** presented at trial distinctly different from those set forth in the charging instrument, or (2) The crime charged...was **substantially altered at trial**, so it was impossible to know whether the Grand Jury would have indicted for the crime actually proved.] *U.S. v. Mancuso*, 718 F3d 780 (9th Cir 2013)

[The **5th Amendment guarantees** that an accused be tried **only on** those offenses presented in {the Grand Jury} Indictment.] *U.S. v. Manning*, 142 F3d 336 (CA6 1998)

Docket [Entry] aka [Making {Filings} Public] vis-à-vis Docket [Filing]

[Although the docket sheet reflects a **filed** date of...the docket reflects an **entered** date of...{therefore} because...is the date judgment was **entered**...the notice of appeal was timely.] *Cadkin*, 2009 US App LEXIS 13830 (9th Cir)

[In determining timeliness, the proper procedure is to count days from **entry or docketing** date...***not*** from the date...**filed**.] *Charles v. Rice*, 1993 US App LEXIS 40694 (5th Cir)

[**Entry** Defined: A {filing} is **entered** ... when ... entered **in the...docket**.] FRAP 4(a)(7). Cf. FRCvP 79(a)(1)-(3).

[**Entry**. A judgment is **entered** when it is noted on the docket.] FRAP 36(a)

PACER means [Public Access to Court Electronic Records] *See* "ECF Rules"

INTRODUCTION

The Speedy Trial Act ("STA") Clock resets each time a "subsequent" indictment reiterates a prior indictment following *sua sponte* dismissal of that prior on defense motion, or after a charge is "dismissed or otherwise dropped." *See* 18 USC § 3161(d)(1) and (c)(1)-(2). Congress made no mention of "superseding" indictments in Section 3161. Impliedly, the word [subsequent] covered ***all*** follow-up indictments. Since the Act was ratified, however, courts have complicated things so much so that, as here, a trial Judge could and did docket an *unsigned*, Judge-created, indictment [*subsequent*] to a prior indictment, yet failed to acknowledge those acts reset the statutorily-mandated STA Clock, *and* mistook that [subsequent] indictment for a "modified" (Grand Jury) indictment while also confusing that indictment with the species of "superceding" indictment which they believe do not reset the STA Clock.

Consequently, this case presents the important and recurring question of whether this plain error can go on uncorrected, and be repeated each day, whenever indictments are amended *without* Grand Jury approval, even though required for *substantive* changes, as herein. And, when this occurs, § 3161(d)(1) [subsequent] indictments are entered on PACER ***without*** resetting the STA Clock, an act held to be so *per se* prejudicial as to require automatic vacatur as the only lawful cure.

The Circuit courts are sharply divided as to whether [superseding] indictments are *always* excluded from the [subsequent] indictments that *always* reset the Clock.

The Eleventh Circuit holds the Clock is ***always*** reset "***regardless* of how** prior indictments **are dismissed**." *See U.S. v. Goodman*, 36 F.Supp.2d 947, 951 (1999).

See "Constitutional Provisions" for larger cite from *Goodman*, at mid-page 3, *supra*.

The Tenth, Ninth, Eighth and Fifth Circuits, by contrast, hold [***sua sponte* dismissal**] of an indictment, or charges, followed by ***re***indictment, despite a similar indictment, ***always* resets** the Clock under § 3161(d)(1). *See Feldman*, 788 F2d 544, 547-549 (CA9 1986), cert. denied, 479 US 1067 (1987); *Magana-Olvera*, 917 F2d 401, 404-5 (CA9 1990); *Thomas*, 726 F3d 1086, 1090 (CA9 2013); *Thomas*, 2013 US App LEXIS 16413 (CA9); *Perez*, 845 F2d 100, 102 n.3 (CA5 1988); *Stangeland*, 2008 US Dist LEXIS 45481 (8th Cir); *Stangeland*, 2008 US Dist LEXIS 81368 (8th Cir); *Page*, 854 F2d 293, 294 (CA8 1988); *Darlmon*, 1997 US Dist LEXIS 12153 (10th Cir). *See* "*Sua Sponte* Dismissals" for holdings from each case, *supra*, at pp. 4-6.

Eight other Circuits, by contrast, hold [superseding] indictments (***generally* defined** as those *similar to* prior indictments) do ***not* reset** the Clock, regardless of how a prior indictment was dismissed, *if* dismissed at all, while ***dissimilar*** indictments ***do* reset** the Clock, regardless of how a prior indictment is dismissed, *if* dismissed at all. *See U.S. v. Marshall*, 935 F2d 1298, 1302 (D.C. Cir 1991); *U.S. v. Handa*, 892 F3d 95 (1st Cir 2018); *U.S. v. Gambino*, 59 F3d 353 (2nd Cir 1995); *U.S. v. Novak*, 715 F2d 810, 819 (3rd Cir 1983); *U.S. v. Shealey*, 641 F3d 627, 632 (4th Cir 2011); *U.S. v. Levon*, No. 01-80308 (6th Cir E.D. Mich. 2002); *U.S. v. Thomas*, 788 F2d 1250, 1258 (7th Cir 1986); *U.S. v. Young*, 528 F3d 1294, 1296 (11th Cir 2008).

This division of authority is particularly intolerable because Congress enacted the Speedy Trial Act for the purpose of introducing [a measure of uniformity] to federal practices regarding pretrial delay. *See* 120 Cong. Rec. 41, 781 (1974). Thus,

the below decision cannot stand because the Speedy Trial Act's text, structure, purpose and controlling precedent make it clear, it matters not if a [subsequent] indictment is "modified," "superceding" or otherwise. All that matters is it ***fulfill*** the criteria of § 3161(d)(1), or Congress's will, as codified in the statute, is moot.

As will be shown herein, the current chaotic approach of the lower courts [creates a big loophole in the statute], *Bloate v. U.S.*, 559 US 196, 213 (2010), undermining Congress's decision to enact strict rules for all. Thus, further review is warranted to resolve this stark and entrenched split on a commonly arising issue of critical importance to the proper administration of the federal justice system.

STATEMENT OF THE CASE

Circuit splits directly interrelated with this case, now ripe for review, as well as plain errors and structural defects of a constitutional magnitude will be shown.

Movant's case arises out of a Ninth Circuit denial of a FRCvP 60(b)(4) motion to vacate a Judgment due to a District Court's failure to reset (aka *restart* or *renew*) the 30/70 day Speedy Trial Act ("STA") Clock, after its Judge entered a Court-issued (Judge-made) 18 USC § 3161(d)(1) [subsequent] indictment, on a docket, post-trial, among other plain and structural errors violating the substantive, procedural due process rights, all flowing from a Grand Jury indictment under the Bill of Rights.

Nota bene: All filings and authorities noted herein yet ***not*** set out verbatim, but referenced by Appendix ("App.") and Exhibit ("Exh.") item, as found on-the-record (PACER), are *incorporated* by reference as if set forth *herein* at length. *See* Rule 12, Rules Governing § 2255 Proceedings; FRCvP 10(c), at [adoption by reference];

FRCvP 15(c)(1)(B), at [relation back of amendments]; and *U.S. v. Marulanda*, 226 FedAppx 709 (CA9 2007) as to the [relation back doctrine]. Also, because FRAP 32(a)(6) provides, [*italics* or **boldface** may be used for emphasis], *all* such emphasis herein, including underline, is that of Movant. Also, all text in brackets ("[ ]") indicates authority quoted verbatim, and, in subset brackets ("{ }"), is that of Movant added to enhance clarity. Also, mirroring LexisNexis, all cites herein using "CA" means "court of appeals," e.g., CA9 = 9th Circuit, CA11 = 11th Circuit. Also, "CR" means "Dkt. No." in CR 10-1032 (aka 4:10-cr-01032-CKJ, the underlying case), while "CV" means "Dkt. No." in CV 15-504 (aka 4:15-cv-00504-CKJ, the habeas seeking automatic vacatur of CR 10-1032). Also, some page numbers are noted in brackets ([ ]) because that is how they appear at the bottom of Movant's pre-PACER membership filings, which does not always match the blue-colored page numbers stamped atop each filing conformed into PACER. Finally, to enhance brevity, when citing cases the names of *both* parties may only appear in the Table of Authorities.

FACTS MATERIAL TO QUESTION PRESENTED

On 5/12/10, as required by 18 USC § 3161(b), a PAPER format ***two***-page Grand Jury indictment was [filed] on the docket for CR 10-1032, and, as required by FRCrP 6(c), *physically* [sign(ed)] by a Grand Juror, and, by FRCrP 7(c)(1), *physically* [signed by an attorney for the government] ("AUSA"). (Here, *physically* means, by hand, as opposed to electronically-signed direct-to-PACER filings.) *See* App. C for an originally PAPER-based Grand Jury indictment, now seen on PACER.

That filing was docket-entered as a bona fide indictment because it was labeled, in its Caption, "I N D I C T M E N T," noted the parties, as well as the claim, "THE GRAND JURY CHARGES," above two Counts, etc. *See* FRCrP 7(c)(1) and App. C.

As required, that Grand Jury indictment was **never** *electronically* signed by anyone, nor was allowed to be, before being entered on PACER. Cf. FRAP 25-5(e): [**Signature. Electronic** filings shall indicate each signatory by using an **"s/"** in addition to the typed name of counsel.] Cf. "U.S. District Court of Arizona's CM/ECF Policies Manual," May 2017 Edition, at § II, C.1, pg. 8, regarding "Electronic Filing & Service of Documents," requiring the use of **"s/"** for e-filings.

On 10/28/11, Movant's then FPD Standby / Advisory Counsel moved to dismiss that Grand Jury indictment, at CR 605, which Order CR 700 denied. Movant also made numerous motions to dismiss, alter or replace that Grand Jury indictment with a ***subsequent*** one. All were denied. *See* CR 156, 282, 283, 285, 305, 441, 503, 507. Of those motions, CR 441, at ln 5-6, actually moved for a new, ***replacement, reindictment***, with the charge [*intimidate*] redacted therefrom, "under its **own** docket entry number **effectively** making the original {Grand Jury indictment} Doc. 22 one **moot**." Unknown to Movant at the time, this was essentially a motion for a § 3161(d)(1) **[subsequent]** indictment, which was denied, until the last day of trial.

On 1/13/12, four days before the three-day trial, Order CR 700 denied Movant's ***eighth*** and final CR 679 motion to continue trial because neither Movant nor FPD Counsel were ready for trial due to numerous obstacles created by the Court itself.

This was despite the fact that FPD Counsel had been *ordered* to be trial-ready (at CR 252, pg 5, ln 10-13, 16-17, 24-26), as well as step-in and *represent* Movant if Movant was not yet ready, and they said they *would* be six (6) months prior to trial:

> [FPD COUNSEL: *Whatever* trial date the Court sets...if {his} *Faretta* rights are stripped, we'll be *ready* to go to trial on *that* day.] CR 875, pg 17, ln 5-8

On 1/17/12, the first day of trial, Movant's FPD Counsel moved the trial Judge to ***replace*** the Grand Jury indictment with a ***subsequent*** indictment with the charge [intimidate] redacted from both Counts, and give Jurors the ***subsequent*** indictment instead. The motion was taken under advisement. *See* CR 776, pg 78, ln 2-23.

Shortly before trial, that Judge ordered Movant, on-the-record, in open court, *not* to tell the Jury that Movant was *not* trial-ready, even listing half a dozen reasons Movant might give them, each one of which laid the blame on the Court itself, an order Movant followed. FPD Counsel also told that Judge *they too* were *not* trial-ready, on-the-record. Then, following FPD advice, neither Movant nor FPD Counsel participated in the trial, even as FPD Counsel privately told Movant, before trial, Movant's accuser was so "pathetic and mistaken," as well as the entire case, that the Jury may just as easily declare innocence as guilt after hearing only one side.

The result was a "trial" in which the alleged evidence was never *tried*, i.e., tested nor challenged in *any* way. Much more occurred on-the-record that nullified the Bill of Rights for the accused, but this brief is limited to the issues which may shock the conscience of this Court. To summarize, because most of the trial testimony was outright perjury, to reverse the verdict, Movant did the due diligence seen herein.

On 1/19/12, on the last day of trial, outside of the Jury's presence, the Judge granted Movant's (CR 441, *supra*, at 14) and FPD-made motion, by unveiling a new, Judge-made, PAPER format, ***one***-page ***subsequent*** indictment (*seen* at App. D), similar to the Grand Jury indictment except for [intimidate] redacted from both Counts, and ***no*** physical signature of any Grand Juror nor AUSA. Instead, the Judge got oral approval, on-the-record, from the trial AUSA for this ***subsequent*** indictment, and gave a **not**-*yet*-filed **PAPER copy** to Movant, in open court. *See* CR 781, pg 99-100, ln 3-6; pg 101, ln 18-25; pg 102, ln 18-22; and pg 103, ln 7-14.

On 1/19/12, the Judge told the Jury that ***subsequent*** indictment was the ***Grand Jury's*** Indictment, as its ***one***-page claimed ("THE GRAND JURY CHARGES:"), even though it was not because it lacked a Grand Juror's signature. The Judge also read that ***subsequent*** indictment to the Jury, verbatim, and ordered a PAPER copy given to each Juror for deliberations with a PAPER copy of the Jury Instructions. *See* CR 777, pg 9, ln 1-17; CR 781, pp. 162-163, ln 25-26. The Grand Jury's ***two***-page Indictment was, at that moment, **physically *replaced*** with that ***one***-page Court-issued, ***subsequent*** indictment. *See* App. C, as compared with App. D.

On 1/19/12, possibly even *after* the Jury had reached a verdict, that ***subsequent*** indictment was [filed], stamped [JAN 19 2012], as CR 715, before being ***deleted*** by that Judge four *years* later. *See* App. D as CR 715 [Page 1 of 23] **initially** appeared.

On 1/20/12, the day *after* trial, the Clerk [entered], aka [made public], that, ***subsequent*** indictment, as [Page 1 of 23] of the [Jury Instructions], as noted in the docket's "Docket Text" for CR 715. *See* App. D for how CR 715 **originally** appeared.

Thus, that *post*-trial filing then became the *controlling* indictment of *actual* conviction as the only one the Jury got, which they were told was ***the*** Grand Jury indictment, though it was not, but which they believed, because [juries are presumed to follow the instructions of the court.] *Richardson*, 481 US 200 (1987)

By these acts, 18 USC § 3161(d)(1) was triggered, and fulfilled, which provides:

> [If ***any*** indictment...***is*** **dismissed** upon motion of the defendant, **or** ***any*** **charge**...is dismissed ***or otherwise dropped***, and **thereafter** a...indictment is ***filed*** charging...the ***same*** offense ***or*** an offense based on the ***same*** conduct ***or*** arising from the ***same***...episode, the provisions of subsections...**(c)** of this section ***shall*** **be applicable** with respect to such ***subsequent***...indictment.] Also,
>
> 18 USC § 3161**(c)**(1)-(2), which provides: [The trial...***shall*** **commence** within ***seventy*** days ***from*** the ***filing*** date (**and making** ***public***) of ***the***...{controlling, final} indictment...Trial shall ***not*** **commence** less than ***thirty*** days.]

Here, the Grand Jury's ([any]) Indictment was [dismissed upon motion of the defendant], via an FPD Counsel defense-motion, by the Judge having ***replaced*** that indictment with a **[subsequent]** indictment, with the redacted charge, [intimidate], having been [dismissed or otherwise dropped], [and thereafter], that [subsequent] indictment [charging...the same offense ***or*** an offense based on the same conduct ***or*** arising from the same...episode], was [filed] on 1/19/12, with its [making public] date, i.e. once entered on PACER, having been on 1/20/12, the day *after* trial.

Thus, by triggering-fulfilling 18 USC § 3161(d)(1), that Judge ***reset*** the 30/70 day STA Clock **but they *did not* also** fulfill 18 USC § 3161(c) by postponing trial (to occur at least 30 days hence, but no more than 70 days), making the trial that did occur void for having violated the Speedy Trial Clause, as codified in the STA.

These events also violated the Indictment of a Grand Jury Clause because that Judge-issued [subsequent] indictment lacked a Grand Juror's signature to prove their consent ***before*** redacting the **[substantive]** charge [intimidate] therefrom.

Nota bene: Even an AUSA herein described the redacted charge [intimidate] as having been [***substantive***]. *See* CV 52, pg 7, ln 15-17. Indeed, the maxim [equity regards ***substance*** rather than form] is reflected in *Gregory v. Helvering*, 293 US 465 (1935), wherein this Court held, [*substance* rather than form] must prevail.

The fact that the Grand Jury indictment was a § 3161(b) [***any***...indictment] and § 3161(d)(1) [***any*** indictment] is key because [§ 3161(b) applies to ***"any"*** indictment, *including* one that subsequently is found to be *defective* or invalid.] *Perez*, 845 F2d 100, 102 (CA5 1988). App. C and D were [insufficient] indictments because they did not cite the ***aggravated*** form of the cited offense heard at trial. *See supra*, at 7-8.

Failure to get a Grand Juror's signature on that Judge-made [subsequent] indictment made it defective. [A defective indictment is a *structural flaw* not subject to harmless error review.] *U.S. v. Inzunza*, 638 F3d 1006, 1017 (CA9 2009)

Failure to hold a new trial after resetting the STA Clock by docketing a [subsequent] indictment was a [due process] violation for which there was no requirement to object during trial, or pre-trial, because such violations are [*per se* prejudicial], [structural], and [plain errors] of a constitutional magnitude requiring [automatic vacatur]. *See* "Constitutional Provisions," *supra*, at 2-3, for cites from *U.S. v. Gonzalez-Lopez*, 548 US 140 (2006), *Arizona v. Fulminante*, 499 US 279 (1991), *U.S. v. Olano*, 507 US 725 (1992), and *Neder v. U.S.*, 527 US 1, 7 (1999).

These plain errors also violated the Due Process Clause by having circumvented the substantive, procedural statutory rights guaranteed by the Speedy Trial Act provisions flowing from the 6th Amendment Speedy Trial Clause.

Because the 30/**70** day STA Clock was reset on 1/20/12, with no new trial held thereafter, the Court was required to dismiss the [subsequent] indictment **70**-days after 1/20/12, and, with it, the entire case. [The Court may **dismiss** an indictment ... if ... unnecessary delay occurs in ... *bringing* a ... {STA-consistent} **trial**.] FRCP 48(b)(3). And, due to the Double Jeopardy Clause, and 18 USC § 3282 statute of limitations, a newly reconvened same-charges trial has now been foreclosed upon.

It was a [*subsequent*] indictment because it was entered on PACER ***after*** the Grand Jury indictment. By [subsequent], Congress clearly meant "after," no more.

It was ***not*** a "Grand Jury" indictment, or "redacted" *Grand Jury* indictment because no Grand Juror signed it, so the trial AUSA having approved of it was simply not enough. *See* FRCrP 6(c) and 7(c)(1), and Movant's indictment jurisprudence, at CV 40, citing a great deal of precedent. It did *appear* to be a Grand Jury indictment by having had the words, "THE GRAND JURY CHARGES:" therein, but it did not have the **mandatory** Grand Juror's **physical** signature on it, even though "redacted for public disclosure." Even that trial Judge acknowledged, at CV 88, pg 2, ln 1-2, that their personally-drafted [subsequent] "indictment {was} ***not*** filed or returned by a Grand Jury." *See* App. C, as compared to App. D.

Per the Dept. of Justice ("D.O.J.") website, it was an [***amended*** indictment]. *See* www.justice.gov/jm/criminal-resource-manual-236-amendment-indictments

The problem is, and the following authority is from *that* **D.O.J.** webpage, it was ***not*** **amended *legally*** by that Judge because indictments cannot be amended in *substance* without a Grand Juror's signature. [An **amendment** to an indictment occurs when the charging terms ... are altered.] *Cancelliere*, 69 F3d 1116, 1121 (11th Cir 1995). Thus, once [altered] by the Judge or AUSA without a Grand Juror's signature, it is **no** longer **the** *Grand Jury's* indictment because the accused [could then be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him.] *Russell v. U.S.*, 369 US 749, 769 (1962). Thus, [the 5th Amendment **forbids** amendment of an indictment by the Court, whether actual or constructive.] *Wacker*, 72 F3d 1453, 1474 (10th Cir 1995). Unlike an *information*, Grand Jury [indictments are found upon the oaths of a {grand} jury, and ought only to be amended by themselves.] *Ex parte Bain*, 121 US 1, 6 (1887).

That trial Judge's only basis given, in CV 88, for denying *all* of Movant's § 2255 habeas claims regarding that § 3161(d)(1) [subsequent] indictment, seen at App. D, was that this Judge-made indictment was intended, by that Judge, to be a "modified" (§ 3161(b)) **Grand Jury** indictment. But, as explained above, it was not a Grand Jury indictment because it lacked a Grand Juror's signature to indicate consent before redacting the [*substantive*] charge [intimidate] therefrom, then docketing such a constitutionally lawful amended indictment. But it is now too late to get their approval. [That bell cannot be unrung.] *Digital Equipment*, 511 U.S. 863 (1994). *See* "Constitutional Provisions," *supra*, at 7, for holdings regarding the mandatory Grand Jury signature needed before [substantive] changes.

The Judge did not have to ***formally*** [dismiss] the Grand Jury's indictment, by issuing an explicit Order, because they ***effectively*** dismissed it by ***replacing*** it with the Judge's [subsequent] indictment. [We are concerned with the dismissal ***or effective*** **dismissal** of an indictment.] *U.S. v. Young*, 528 F3d 1294, 1297 (CA11 2008). [Effective dismissal] *did* occur because that Judge ordered PAPER copies of that [subsequent] indictment *distributed* to the Jury with one *entered* on PACER.

The mandate to **print out** a *PAPER* format indictment before entering the same on PACER was argued at CV 84 by citing the "Case Management / Electronic Case Filing ("ECF") Administrative Policies and Procedures Manual," May 2017 Edition, at § B, II, pg. 7, "Electronic Filing & Service of New Documents,' detailing the *constitutionally-consistent* method to redact indictments, as the Judge *intended* but failed to *do* when [dismissing or otherwise dropping] the charge [intimidate] from the Grand Jury indictment, which provides: [The U.S. Attorney's Office ***will*** submit the indictment, along with a ***redacted*** version of the indictment **in *PAPER* form** during **the Grand Jury *return***...Guidance as to effective **redaction** techniques is available on the U.S. District Court website under "Electronic Case Filing" --> "E-Filing Procedural Information."] Instead, the Judge gave their printed-redacted [subsequent] indictment to a trial Jury, then [entered] it post-trial, without first giving a copy to a Grand Jury **in *PAPER* form** for their ***physical*** signature.

Under FRAP 25-5(g), [Court-Issued Documents...are official and binding], describing perfectly that Judge-created, Jury-distributed, docket-entered filing. Under FRAP 30-1.4(b)(i), that Judge-created indictment was a [***final*** indictment].

The [subsequent] indictment was a bona fide "indictment" (though defective, because no Grand Juror had signed it), because it was drafted by a federal Judge, cited a case number, charged an offense, named parties, was approved of by a trial AUSA, and was on-the-record (PACER). *See* FRCrP 7(c)(1) and App. D, and Movant's possibly comprehensive restatement of indictment jurisprudence at CV 40.

Under FRAP 36(a), defining [**Entry**], [a judgment is *entered* when it is noted on the docket], as with all PACER filings. In plain terms, [filed] means, "when the Clerk of the Court has an item in their records." [Entered / Entry] means, "when the public can see unsealed filings on PACER," i.e. on-the-record.

The Judge was aware a year before Movant's trial that STA Clocks are ***reset*** by a ***re*indictment**. See *U.S. v. Thomas*, 2011 US Dist LEXIS 67340, where that Judge held [the 70-day time period began to run...on the date the {subsequent} indictment was ***filed*** and ***made public***...Thomas acknowledges the {§ 3161(d)(1)} provision applies when an indictment is dismissed **by *defense* motion** {resetting the STA Clock}.] [When...defendant secures {indictment} dismissal] or [is ***re***indicted after a ***sua sponte*** **dismissal** by the court, the {STA} Clock is reset]. Despite this foreknowledge, they still failed to automatically vacate this case on habeas appeal

Their above Order was vacated, reversed and remanded, as follows: [The {STA} does ***not*** ... provide for ***superseding*** indictments ... Instead, the Act speaks ... to {subsequent} ***re*indictments** only. On that score, § 3161(d)(1) provides that when the defendant secures a **dismissal** "both the 30-day trial preparation period and the 70-day speedy trial time period start over" ... ***We have also held*** that when the

defendant ***is reindicted*** after a ***sua sponte*** **dismissal** by the court, the {30/} 70-day Clock ***is*** **reset**. *Feldman*, 788 F2d 544, 547-9 (CA9 1986).] *Thomas*, 726 F3d 1086, 1090 (CA9 2013). Cf. 2013 US App LEXIS 16413 (9th Cir). *See* Constitutional Provisions, *supra*, at 4-6, for holdings in *Magana-Olvera*, 917 F2d 401, 404-5 (CA9 1990), and *Perez*, 845 F2d 100, 102, n.3 (CA5 1988), among many other Circuit courts *all* agreeing that **[*sua sponte* dismissal]** *resets* the Clock. **So, here too, Ninth Circuit precedent *agreed* with Movant *fully*, and yet, on habeas appeal, the Ninth Circuit did *not* automatically vacate the underlying case.**

The charge—[*intimidate*]—redacted by that Judge from both Counts of the Grand Jury indictment to draft the [subsequent] indictment was not [surplusage], and, instead, [*substantive*], because it went to the heart of the trial case-in-chief, proven by the AUSA's [***constructive amendment***] of that indictment during trial by claiming the *aggravated* form of the charged offense—[intent to *intimidate*]—itself, yet another violation of the Indictment of a Grand Jury Clause. In plain terms, the AUSA could **not** *lawfully* have the *Grand* Jury sign off on one indictment and then have the ***Trial*** Jury effectively receive a *new* Indictment by hearing a new charge presented at trial, *let alone one resembling the* ***very*** *charge redacted from the Grand Jury indictment to create the Trial Jury reindictment*, **intent to cause fear**.

This ***was*** done: First, the Grand Jury indictment charged the ***simpliciter*** form of the cited offense, then, the Judge's [subsequent] reindictment charged a ***watered down*** **variant** of that simpliciter form (by redacting "intimidate" therefrom), then, the trial AUSA argued the ***aggravated*** form of that offense before the trial Jury.

[The Supreme Court has emphasized that "serious bodily injury" is a classic, traditional element{s} of **aggravated** crimes. *Harris*, 536 US 545, 553 (2002).] *Martinez*, 268 FSupp2d 70, 73 (2003). Aggravated vs. simpliciter. Polar opposites. And yet, tellingly, outside the Jury's presence, that AUSA ***first*** said, "there's ***not*** going to be ***any*** evidence, you know, that he intended to kill her," meaning, Movant's accuser (at CR 776, pg 75, 1n 14-17), then, during trial, they argued the ***aggravated* form** of the cited offense, the same AUSA who had okayed a ***watered down*** version of the Grand Jury indictment with [intimidate] ***removed***. *See* App. D. You "can't have your cake and eat it too." They did, and have yet to be corrected.

This sort of "bait-and-switch" (and switch *again*) was [constructive amendment] to the Grand Jury Indictment, and, as such, a [structural error] *mandating* [automatic vacatur] for having violated the 5th Amendment Indictment of a Grand Jury Clause and 6th Amendment Notice Clause [to be {fully} informed of nature and cause of the {actual and entire} accusation], and yet the Ninth Circuit did ***not*** vacate this case in No. 19-15446 or No. 18-15988, despite numerous, detailed, meticulous cites in the habeas filings to the on-the-record transcripts ***proving*** this occurred. *See* CV 1, pg [3], [7], [11], [39]-[47]; CV 48, § V-VI at pg [6]-[18], pg [28]-[29], pg [32]; CV 55, pg [7] at § (D) to pg [10]; pg [46] to pg [48].) *See* Constitutional Provisions, *supra*, at 8-9, for [constructive amendment] holdings in *Stirone*, 361 US 212 (1960), *Mancuso*, 718 F3d 780 (CA9 2013), *Ward*, 747 F3d 1184 (CA9 2014), *McCracken*, 2014 US App LEXIS 21152 (9th Cir), *Pisello*, 877 F2d 762, 765 (CA9 1989), *Cimino*, 1994 US App LEXIS 20225 (9th Cir), *Molinaro*, 11 F3d 853, 861 (CA9

1993), *Gaines*, 8 F. App'x 635 (CA9 2001), *Reese*, 2 F3d 870 (CA9 1992), *Brandao*, 539 F3d 44 (CA1 2008), *Bastian*, 770 F3d 212 (CA2 2014), *Lawrence*, 557 Fed Appx 520 (CA6 2014), *Chaker*, 820 F3d 204 (CA5 2016). All the Circuits agree on this issue and yet neither that Judge nor the Ninth Circuit vacated this case on appeal.

On 1/7/16, when Movant's § 2255 habeas filings seeking automatic case vacatur of CR 10-1032 (*see* CV 1, 4, 10, 11, 14, 17, 31, 32, 40, 46, 48, 55, 61, 62, 64, 65, 84, 87) began memorializing dozens of [plain errors] and [structural defects] made by that Judge, that Judge **ordered *permanently* DELETED from PACER, from its *original* place as Page 1 of the Jury Instructions (CR 715), their *personally* drafted** § 3161(d)(1) [subsequent] indictment, because, they wrote, its existence was owed to having been a "***loose* page**" caused by a "***clerical* error**." (*See* CV 27, pg 3, fn. 2, pg 8; CV 42, pg 4, ln 10, to pg 5, ln 6.) In reconsider motions (CV 40, 46), Movant then *reminded* that Judge what had *actually* occurred four years earlier, by quoting the Judge's on-the-record words proving it was the *Judge*, not Clerks, who had created that [subsequent] indictment, ordered it shown to the Jury, then [made public] on PACER. ***Compare* App. D ("before") vs. App. E ("after").** *See* CV 46, Exhibit C, for eight (8) pages of transcripts, incorporated herein by this reference.

On 7/7/16, only then did that Judge order their **still-now-deleted** [subsequent] indictment **re-entered** on PACER, but *not* in its *original* place as CR 715, but as a mere Exhibit (CR 890-2, p. 24 of 24) attached to an Order admitting ***only*** to the error of deleting it. (*See* CV 50, pg 2, ln 2, aka CR 891, pg 2, ln 2-12.) Thus, when *only* this Judge's *failing memory* caused deletion of *their* Court-issued, controlling,

final indictment (that reset the STA Clock), rather than order vacatur of the underlying case, **the Judge blamed their *Clerks*** (for resetting the STA Clock), as if Clerks would take it upon themselves to create *and* docket the Jury's Indictment.

On 5/25/18, when denying vacatur with their § 2255-Habeas-Order-CV-88, tellingly, that Judge, documented obvious *confusion* and *misapprehension* about the lawful status of their § 3161(d)(1) [subsequent] indictment by *mischaracterizing* all of Movant's indictment-related claims by writing, "a ***superceding*** indictment was ***not*** issued in this case," and by denying, all-at-once, all of Movant's "claims related to a ***superceding*** indictment." *See* App. F, for CV 88, pg. 5, ln 2, and, footnote 2.

Nota bene: Movant ***never*** once argued a ***superceding*** indictment was issued in this case, and, instead, dozens of times ***only*** wrote that a § 3161(d)(1) [***subsequent***] indictment **was** issued. Indeed, Movant even expressly ***disavowed*** *any* claimed issue whatsoever with regards to any so-called "super*c*eding" or "super*s*eding" indictment (*see* CV 55, last ¶ of pg 18, to the top of pg 20) because research revealed the word-of-art [***superceding***] implicates a great deal of **convoluted** holdings amongst the Circuits, resulting in *chaos* about when the STA Clock should be reset.

The Judge's mischaracterization of the [subsequent] indictment as "superceding" is **critical** because then-controlling precedent defining the term [*superseding*] held, based on the unique circumstances of this case, the final indictment was ***not*** a [***superceding***] one, but rather a [**subsequent**] ***re*indictment**. [A **superseding** indictment is an indictment **filed *before*** the dismissal of the original...indictment. *U.S. v. Rojas-Contreras*, 474 US 231, 237 (1985)...In a ***re*indictment** case the

underlying **indictment *or* charges** are dismissed ***prior* to** the ***filing*** of the new indictment. Id. at 239.] *U.S. v. Hoslett*, 998 F2d 648, 657 n. 11 (9th Cir 1993). This was precedent from *their* supervising Circuit Court and *this* Supreme Court.

Mirroring those holdings, this is what occurred herein when the Judge declared, on-the-record, they held "the" [subsequent] indictment, then read and distributed it to the Jury, **effectively dismissing** the Grand Jury indictment **at-*that*-moment**, by replacing it, then, later that day, and the next, ***filed*** then [made public]-docketed that [subsequent] ***re***indictment, thus resetting the STA Clock. *See* § 3161(d)(1).

On 5/25/18, in said Order CV 88 denying habeas relief, that Judge also wrote, at pg 4, ln 19, to pg 8, ln 4, "procedural default" was a basis to disregard *all* claims related to *both* indictments, thus simultaneously offering no specifics whatsoever to substantively refute the claimed issues related to [constructive amendment] to the [subsequent] indictment, the constitutionally [insufficient] indictment, or the STA Clock having been reset by the § 3161(d)(1) [subsequent] indictment. Embedded, however, within the cases relied on to deny relief were the exception to the rule, which held that newly claimed issues [***may*** be raised ***in*** **habeas**...if {one} demonstrate{s}...actual prejudice.] *Braswell*, 501 F3d 1147, 1149 (CA9 2007), citing *Bousley*, 523 US 614, 622 (1998). One need only show [not merely that the **errors** at his trial created a *possibility* of prejudice, but that they worked to {one's} *actual* and substantial disadvantage, infecting {the} entire trial with ***error*** of ***constitutional*** **dimensions**.] *U.S. v. Frady*, 456 US 152, 170 (1982). Movant did that. *See* "Summary of Plain Structural Constitutional Errors," at pp. 30-31, *infra*.

Moreover, Movant did so *ad nauseam* while claiming *seven* (7) distinct issues related to the § 3161(d)(1) [subsequent] indictment, arguing exhaustively why they caused [actual prejudice] infecting the [entire trial with error of constitutional dimensions]. *See* CV 1, pg [3]-[4], [7], [11], [22]-[51]; CV 48, § IV, pg [3]-[20], pg [28], ln 20 to pg [33], ln 28; CV 55, pg [A1]-[4]; pg [7], § (D), to pg [10], ln 28; pg [11], § (G), to pg [13], ln 7; pg [16], ln 1, to pg [41]; pg [46], ln 1, to pg [54], ln 28; pg [62], ln 1-18; pg [79]-[83], incorporated by this reference as if set forth herein at length.

In the Order CV 88 denying habeas relief, the phrases [subsequent indictment], [insufficient indictment] and [constructive indictment] were all noticeably absent.

On 1/11/19, in Order CV 101 (denying Movant's FRCvP 60(b)(4) motion to reverse Order CV 88 denying habeas relief), the trial Judge demonstrated further *confusion* by writing, "It is ***not*** clear ***what*** Order {Movant} is referring to in asserting the Court reset ... the 30/70 Day STA Clock" (*see* App. B, pg 2, ln, 22-23), even as they *described* that Order within self-same Order (*see* App. B, pg 1, ln 24-27), to wit: "Due to the Court's failure to correct the Speedy Trial Act violation when it reset...the...STA Clock, without having convened a new trial, thereby failing to provide...Constitutional [due process] rights, pertaining to the 18 USC § 3161(d)(1) **hard-copy** [**subsequent** indictment]." Indeed, Movant had discussed that **Clock-Resetting-Order *dozens* of times** in the § 2255 filings (*see* CV 1, 4, 10, 11, 14, 17, 31, 32, 40, 46, 48, 55, 61, 62, 64, 65, 84, 87), so, why they wrote, "it is ***not*** clear what Order {Movant} is referring to," is itself not clear. Movant obviously writes clearly.

Given the Circuit splits as to which species of indictment resets the STA Clock, the Judge's apparent confusion may have been inevitable. [The Eleventh Circuit **made clear**...a {new} indictment ***restarts*** the clock ***regardless*** of how the prior indictment was dismissed...the **subsequent (replacement)** indictment, triggered a new {30/} seventy-day period.] *U.S. v. Goodman*, 36 F. Supp. 2d 947, 951 (1999).

Nota bene: Movant did *not* add "(replacement)," as seen just above, ***in*** parenthesis, in the quote from *Goodman*. That is precisely how the case reads, matching precisely what happened in Movant's case, because, here, the Grand Jury Indictment was ***replaced*** by the Judge-created [subsequent] indictment once that Judge *read* it to the trial Jury and *gave* each one of them a copy for deliberations.

Given the Circuit splits as to when the STA Clock is reset based on how the prior indictment is dismissed and or the definition of the word of art [superseding], *in the context of* 18 USC § 3161(d)(1), the Judge's possible confusion is not surprising.

Furthering Circuit splits, in LexisNexis, [superseding] is often spelled [supercceding], so different key word searches leads to conflicting precedent. Even the Judge did the same in CV 88, while denying vacatur, by reversing their spelling.

Nota bene: *Barraza-Lopez*, 659 F3d 1216 (9th Cir 2011), from this Judge's own Circuit, states [numerous other circuits that have addressed the issue] agree the STA Clock is ***reset*** under the same circumstances as occurred in Movant's case.

When Movant appealed to the Ninth Circuit, despite being fully briefed as to all discussed herein, and many times having [made a *substantial* showing of the denial of a ***constitutional*** right], *see* 28 USC § 2253(c)(2), they did **not** vacate CR 10-1032

in their single-page denial, nor give any *substantive* reason as to why, contravening their *own* precedent and triggering this certiorari brief. *See* App. A denying the (CR 937) FRCvP 60(b)(4) motion, citing to *Gonzalez v. Crosby*, 545 US 524, 534 (2005), to vacate Order CR 938 (aka CV 101), and, with it, the underlying case, CR 10-1032. *See* "Constitutional Provisions," *supra*, at 2-3, for multi-Circuit holdings mandating [automatic vacatur] due to [***sua sponte*** dismissals] having reset the STA Clock.

SUMMARY OF PLAIN ERRORS OF A CONSTITUTIONAL DIMENSION

The judicial holdings supporting the below summary of [plain errors] and [structural defects] herein are seen in the "Constitutional Provisions," *supra*, at 2-9.

Circuit splits as to when the STA Clock is reset, and whether the indictments that reset it should be called [superseding] or otherwise, formed the basis for this case in which a § 3161 [subsequent] indictment was *mischaracterized* by a Judge as [superceding], with the concomitant statutorily-reset STA Clock unlawfully denied.

Here, [*sua sponte* dismissal] of a Grand Jury indictment by a Judge having replaced that indictment with a Judge-made [subsequent] ***re***indictment, on the last day of trial, [made public], post-trial, ***reset*** the STA Clock, but without convening a new trial, violating the 5th Amendment statutory procedural [due process] rights created by the 6th Amendment Speedy Trial Clause, mandated by the Speedy Trial Act, at 18 USC § 3161(b), (c)(1)-(2), (d)(1), and violated the 5th Amendment Indictment of a Grand Jury Clause, and 6th Amendment Notice Clause.

Failure to obtain a Grand Jury signature on that [subsequent] indictment, before redacting the [*substantive*] charge, [intimidate], an [amendment of *substance*

and not form], violated the Indictment of a Grand Jury Clause, and 6th Amendment Notice Clause to [be informed of the nature and cause of the accusation].

Under-charging an offense, by a constitutionally [insufficient] indictment, by failing to cite the case-central charge aka *actual* case-in-chief, here, the *aggravated* form of the offense, as alleged at trial, violated the Notice Clause, Indictment of a Grand Jury Clause, Due Process Clause, FRCrP (7)(c)(1) and FRCrP 12(b)(3)(B).

Trying to over-prove the case at trial, by broadening the charge in the [subsequent] indictment was [constructive amendment] to the indictment, violating the Indictment of a Grand Jury Clause, Due Process Clause and Notice Clause.

The trial was made constitutionally-void by [making public], on PACER, that [subsequent] indictment, the day *after* the trial was already *over* rather than at least 30 days before it had commenced, as required by 18 USC § 3161(c)(2).

Failure to dismiss that [subsequent] indictment, for want of prosecution of the said indictment, by failure to hold a ***constitutionally-indicted*** trial within 70 days *from* the date *that* the [subsequent] indictment was [made public] on PACER, under § 3161(d)(1) and (c)(1)-(2), due to the same having reset the 30/70 day STA Clock, violated the Due Process Clause, and Speedy Trial Clause.

[Plain errors] and [structural defects] mandate the automatic vacatur thus far denied by the courts. Ordering vacatur now due to these constitutional, substantial, cumulative, statutory, procedural due process rights violations, fulfills this Court's mandate. Thus, the Circuit conflicts should be resolved, and precedent enforced, *in a light most favorable to* one's basic, fundamental, constitutional, Bill of Rights.

ARGUMENT AMPLFYING REASONS FOR GRANTING THE WRIT

This case squarely presents an important and recurring question of federal law: whether § 3161(d)(1) [subsequent] indictments must also be "superceding" to reset the STA Clock, and, if so, whether the word of art [super<u>s</u>eding / super<u>c</u>eding] should have a national definition to ensure consistency, and far less chaos, between Circuits in the administration of trial courts, given the sharp divisions on this issue.

(1) Until now, important federal questions have not been, but should be, settled by this Court in a way that resolves these Circuit splits, given precedent from both this Court and other Circuits, whose deep splits directly implicate the issues.

(2) The question presented is of recurring national public importance because ***<u>all</u>*** 18 USC § 3161(d)(1) [subsequent] indictments ***<u>reset</u>*** the 30/70 day STA Clock, but, incredibly, as seen herein, despite an overabundance of well settled, black letter law, not all lower courts follow the will and or mandate of Congress.

(3) There will always be new § 3161(d)(1) [subsequent] indictments entered on PACER, whether called "superceding" or not, and, thus, similarly situated cases.

(4) By quashing the Bill of Rights, the lower court decisions have *so far* departed from the accepted and usual course of judicial proceedings, by orders of magnitude, or sanctioned such a departure, again, by orders of magnitude, as to call for an exercise of this Court's supervisory power.

<u>This Court Has Acknowledged A Circuit Split Regarding The Lack of Any CONSISTENT Definition for "Superseding" or "Superceding" Indictments</u>

> [**Frequently**, a superseding indictment **is used to <u>DROP</u>** charges **or** ... a superseding indictment **may <u>ADD</u>** ... additional charges.] U.S. v. Rojas-*Contreras*, 474 U.S. 231, 236-242 (1985)

For a **lawyer's legal research analysis** of Movant's Question Presented, from www.CaseText.com, proving Circuit Splits affecting this case ***do*** exist, see App. G.

I. There Is A Circuit Split Over Whether "Superseding" Indictments Are Excluded Under 18 USC § 3161(d)(1). *See* "Introduction," *supra*, at 10-12.

A. Eight Circuits Hold Superseding Indictments Are Automatically Excluded From The Reset Speedy Trial Act Clock Despite § 3161(d)(1). *See* "Intro," *supra*, at 11.

B. Five Circuits Hold, Under § 3161(d)(1), [Subsequent] Indictments Are Not Automatically Excluded If The Prior Indictment Is [***Sua Sponte* Dismissed**]. *See* "Introduction," for details, *supra*, at 10-11, and, for holdings from multiple Circuits regarding [*sua sponte* dismissals], see "Constitutional Provisions," *supra*, at 4-6.

Because eight Circuits encompassing most of the nation's federal criminal cases are divided against five circuits, the Supreme Court's review is urgently warranted to prevent this chaos from going on uncorrected, running afoul of the Act's purpose.

II. The Decision Below Is Wrong

The trial Judge's reading of § 3161(d)(1) to exclude [superceding] indictments, however they define that word of art, runs counter to the obvious meaning of the word [subsequent], this Court's precedent on interpreting the statutory provisions at issue, and the mandate and will of Congress's when enacting the Speedy Trial Act, as well as the U.S. Constitution's Bill of Rights with its affected Clauses.

The Text & Structure of the Act Does Not Permit Automatic Exclusion Of [Superceding] Indictments, But Rather Inclusion of [Subsequent] Ones

Courts interpret [plain and unambiguous statutory language according to its terms.] *Hardt v. Life Ins.*, 560 US 242, 251 (2010). In determining plain meaning,

courts rely on the [fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.] *Food & Drug Admin. v. Tobacco Corp.*, 529 US 120, 133 (2000).

By its plain terms, § 3161(d)(1) applies only to **[subsequent]** indictments. The word "subsequent" is most naturally read to refer only to ***any*** indictment docketed ***after*** a prior indictment. There is no dispute that the filing seen at App. D was an "indictment." To this, even the trial Judge agreed by having four times called it a "modified" ***indictment***, i.e., a "redacted Grand Jury" indictment. *See* CV 88, p. 2, ln 6-15. The question is, was it really a ***Grand Jury's*** indictment, or, as explained above, and as the law provides, a "defective, untimely, Court-issued, § 3161(d)(1) [subsequent] indictment"? "Defective and untimely" for lacking a Grand Juror's signature, and having been docketed the day after trial was over. "Court-issued," because it was drafted by a trial Judge with an AUSA's approval. "§ 3161(d)(1) [subsequent]," because it was came *after* the Grand Jury indictment, and was the only indictment given to the trial Jury for their deliberations, then [made public] on PACER, and because it met all other criteria of § 3161(d)(1) by being a reiteration of a prior indictment, except for that one redacted *substantive* charge ([intimidate]).

Seen in that context, whether it was also a [superceding] indictment is moot, given that Congress said nothing on the matter, not anticipating the judicial chaos that would ensue once the Act commenced. Thus, the trial Judge's mistaken opinion, that § 3161(d)(1) only applies to [superceding] indictments is not confirmed by the statutory context because [superceding] indictments may be defined

differently from Circuit to Circuit, so much so that the [subsequent] indictment required by § 3161(d)(1) may or may not fit their definitions. Thus, Circuit splits on the matter undermine the plain meaning of the statute, with denial of due process being not only a potential but now all too obvious consequence.

III. This Case Presents A Recurring Issue Of National Importance

Whether § 3161(d)(1) requires the automatic exclusion of [superceding] indictments based solely on the unpredictable, unfounded opinion of a district court Judge is a recurring and important question. As the many cases involving [***sua sponte* dismissals**] cited above make clear, this issue arises frequently. Indeed, given the ubiquity of newly-docketed ***amended*** indictments, however termed, this issue has the potential to arise in virtually every federal prosecution. As such, the cases cited arguably greatly under-represent the number of affected cases.

A. This Issue Arises Frequently

The question presented here is all too familiar to federal courts, and to the accused. As seen above, federal courts of appeals, including jurisdictions responsible for the vast majority of federal prosecutions each year, have considered this question in recent years. The issue also arises constantly in federal district courts since sister circuit precedent has potentially rendered such exclusions routine. The issue's pervasiveness is unsurprising given an indictment's central role in the justice system, making it is no exaggeration to say the questions presented herein may arise in virtually every prosecution.

Moreover, the trial Judge seen herein is not the first to inadvertently become confused by the conflicting definitions of the key word of art, superceding, at issue:

> [I reluctantly concur ... {that} both in and out-of-circuit, **"superseding"** has been given a meaning in the context of a{n}...indictment that is **the direct opposite of its meaning in every other known context**. {footnote:} [1] This is, unfortunately, not the first occasion on which we have construed words in this manner. If "slight" may be equated with "substantial" and "another state" may include the "same state" ... then we should not be surprised that a superseding indictment does not supersede anything at all. I do not favor **depriving words of all meaning simply in order to reach a desired legal result**. Here, I see no reason, rational or otherwise, to treat the word "superseding" as meaning "not replacing," as we have done before and as we do again here. **An abundance of judicial creativity** has been devoted to tasks like interpreting "another" to mean "the same" ... "slight" to mean "substantial" ... and "superseding" to mean "not superseding" ... I propose **redirecting that creativity to better uses**, such as finding terms that actually mean what they appear to mean. We could start by using "second indictment" or "first additional indictment" to describe an indictment that follows the original indictment, but does not "supersede" it. Were we to do so, we might earn more public trust and respect than we are accorded now. Any additional amount, no matter how slight, i.e. substantial, would be most welcome ... {Footnotes:} [1] *See,* e.g., Random House Dictionary ... (1979) (defining "supersede" as "to replace . . . set aside . . . [or] supplant").] *U.S. v. Hickey*, 580 F3d 922 (9th Cir 2009)

The Court should grant review to further Congress's purpose that the Speedy Trial Act be uniformly followed throughout the nation and not be subject to further [judicial creativity] turning purely on the happenstance of where one is prosecuted.

Nota bene: Much of the chaos in STA jurisprudence appears to be caused by the phrase [required to be joined] in § 3161(h)(5) (or (6), depending on the STA version being cited), under which [excludable delay] only applies [if the indictment is dismissed upon motion of...***the <u>Government</u>***], **not <u>the</u>** ***<u>defense</u>***, as in § 3161(d)(1). *See*, e.g. *Roman*, 822 F2d 261, 263-5 (CA2 1987), at its 3rd LexisNexis Headnote. Based on this, § 3161(d)(1) is often reinterpreted so as to be fully neutered, i.e.

thereby undone and ignored, by claiming it can and should function like § 3161(h)(5), or (6), when it cannot, if the will and mandate of Congress is the guide.

B. The Statutorily Reset 30/70 Day Clock Must Be Strictly Enforced

The Speedy Trial Act operates in [categorical terms], *Zedner v. U.S.*, 547 US 489, 508 (2006), by [mandating dismissal of the indictment upon violation of precise time limits], *Taylor*, 487 US 326, 344 (1988). *See*, e.g., *U.S. v. Bryant*, 523 F.3d 349, 361 (D.C. Cir 2008), which held that when a case exceeds § 3161(c)'s 70-day deadline by even one day, the court is [obligated] to [remand the case to the District Court with instructions to dismiss the indictment]. Here, because the STA Clock ***was*** **reset**, a constitutionally-indicted (lawful) trial never took place within 70 days after the one that was held by the court, so automatic vacatur now and dismissal of the [subsequent] indictment at issue is mandated by the Act as a [dismissal sanction].

Thus, granting the writ in this case would allow this Court to reaffirm the important principle that there is no [de minimis] exception too trivial or minor to merit consideration of the Speedy Trial Act's explicit and mandatory time limits.

C. The Speedy Trial Act Serves Important Societal Objectives Beyond The Interests Of Individual Litigants

The Speedy Trial Act safeguards important policies of the justice system. Congress carefully balanced the need for fixed time limits with narrowly tailored, judicially supervised exceptions. By adding an *automatic* exclusion that Congress plainly never intended, the Act, as adopted below, completely distorts that balance.

The trial Judge's decision to automatically exclude a § 3161(d)(1) [subsequent] indictment from all consideration, under the belief that the same would also have to automatically be a [superceding] indictment undermines Congress's carefully formulated exceptions. Thus, reading § 3161(d)(1) to exclude all [superceding] indictments while including some [subsequent] ones, invariably leads to catchall risks [creating a big loophole in the statute.] *Bloate v. U.S.*, 559 US 196, 213 (2010).

IV. This Case Presents An Ideal Vehicle To Resolve A Deep Circuit Split

At its core, this brief presents a single question of federal law that may also be an issue of first impression under the unique circumstances of this case: Whether a [subsequent] indictment, i.e., one meeting the criteria of § 3161(d)(1) in all respects, need also be a [super<u>c</u>eding / super<u>s</u>eding] indictment, however that word of art is defined, for that [subsequent] indictment to reset the STA Clock, even though the statute sets forth no criteria to concern itself with matters of mere nomenclature.

This case presents a procedurally clean vehicle to resolve a broad and entrenched Circuit split on an issue that recurs frequently. As such, if Movant prevails on the question presented then the judgment below is invalid, with automatic vacatur of <u>CR 10-1032</u> and <u>CV 15-504</u> being a straightforward matter.

All the circuits have weighed in, taking opposing sides, and the issue is ripe.

V. The Underlying Case Was Plainly Erroneous, Upside Down, Backwards

In Movant's forty (40) gigabyte hard drive, holding decades of data, the AUSA found **<u>absolutely</u>** **<u>NO</u>** violence-directed statements or activities, despite specifically

looking for this, proven by a case agent disclosure showing they ordered a computer search for the key words "kill," "hurt," "injure." *See* CR 343, 355, 399, 426, 491.

Hence, the only-one-side-heard "trial" was based solely upon mere ***conjecture***:

> **Trial-AUSA** (speaking six days before "trial," in open court): **[Really, to sum up,** the majority of the government's case involves {Movant's accuser} and {their} **testimony**, {their} ***perspective*** ... **The *crux* of the case** really does come down to {their opinions}.] CR 774 , p. 29, ln 24, to p. 30, ln 1, 1n 25, to p. 31, ln. 1.

In an order denying one of Movant's numerous pretrial motions to dismiss the Grand Jury Indictment, the Magistrate summarized, by writing, "the Court ***must accept*** the ***truth*** of the indictment." The truth. This was the same indictment from which that Court later ***redacted*** the charge [***intimidate***] therefrom, that is to say, the very ***heart*** of it. The case-in-chief. *Gone*. That redaction *alone* proves the initial indictment was *itself* factually and legally *defective* (void) from day one.

A correction is compelled. The Court is so moved.

CONCLUSION & RELIEF REQUESTED

Granting this petition for a writ of certiorari, and or a brief on the merits, would fulfill this Court's mandate, *equal justice under law*, engraved above its palatial entrance, because, [aside from all else, 'due process' means fundamental fairness and substantial justice]. *See Vaughn v. State*, 456 S.W. 2d 879, 883 (1970)

Relief would include, under the unique circumstances of this case:

(1) Resolving the aforementioned Circuit splits regarding 18 U.S.C. § 3161(d)(1);

(2) Issuing an Order holding: (A) Under § 3161(d)(1), to reset the STA Clock, all that is required is a [subsequent] indictment fulfilling the criteria of § 3161(d)(1), not whether is it [superceding], or [superseding], however defined; (B) Making a

[subsequent] indictment public on PACER previously read and given to a trial Jury dismisses all prior indictments; (C) The [subsequent] indictment herein was a § 3161(d)(1) indictment, not a "modified Grand Jury indictment" for lack of a Grand Juror's signature; (D) That [subsequent] indictment was [defective] because it redacted the [substantive] charge "intimidate," [an amendment of *substance* and not form], without a Grand Juror's consenting signature; (E) Also [defective], because it was [insufficient] of the case-in-chief charged at trial, proven by the filings incorporated herein; and, (F) Unlawfully [constructively amended] at trial, by broadening the original charge from its simpliciter form to its aggravated form, proven by the filings incorporated herein by reference;

(3) Granting habeas in CV 15-504 by ordering the indictments dismissed with automatic vacatur of CR 10-1032, and reversal of order CR 842, i.e., ending SR and return of personal property. *See* CV 55, pg "[90]" at "§ VIII relief sought."

(4) Oral argument or reply or supplement will be ordered if clarification is sought.

Nota bene: To aide this Court a text-searchable PDF/A format copy of this brief with clickable links to the CR and CV filings was emailed under Subject title: "Cert-Brief Re: 9th Cir Notice of Appeal No. 19-15446" to efilingsupport@supremecourt.gov

Movant declares under penalty of perjury as true and correct all facts asserted herein, contending issues, rules, arguments and conclusions as of this day 8/18/19.

Respectfully submitted,

By: s/ *Moses Shepard* Moses Shepard

August 18, 2019