NO. _____

In The
Supreme Court of the United States

ANGELO PETER EFTHIMIATOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under § 3161(c)(1) of the Speedy Trial Act of 1974 (the "Act"), a federal criminal trial must generally "commence" within 70 days after the defendant is charged or makes an initial appearance. Courts have uniformly held that trial "commences" when jury selection begins. *See United States v. Fox*, 788 F.2d 905, 908 (2d Cir. 1986) (collecting cases). Federal appellate courts, however, have condemned so-called "start-and-stop" maneuvering in which district courts conduct jury selection within the time limits of the Act while postponing the presentation of evidence beyond the 70-day clock. *See United States v. Brown*, 819 F.3d 800, 810 (6th Cir. 2016) (collecting cases). The Second Circuit ruled—in conflict with decisions of the Sixth and Tenth Circuit Courts of Appeals—that the district court did not violate the Act by scheduling jury selection two days before the speedy trial clock was set to expire while scheduling presentation of evidence two months later to accommodate the district court's calendar. The Second Circuit affirmed the district court's start-and-stop plan by accepting the district court's post hoc justification that the delay was necessary to provide defense counsel preparation time even though the defense never requested a continuance and, in fact, the defendant vigorously asserted his right to a speedy trial.

The question presented is:

Whether the Speedy Trial Act permits district courts to conduct jury selection within the time limits of the speedy trial clock but delay presentation of evidence two months beyond the 70-day period to accommodate the district court's calendar.

THE PARTIES

The Petitioner in this case is Angelo Peter Efthimiatos. Petitioner was the defendant-appellant below. The Respondent is the United States of America. Respondent was the appellee below.

STATEMENT OF RELATED CASES

United States v. Angelo Efthimiatos, No. 2:18-cr-049-1, United States District Court for the District of Vermont. Judgment entered Apr. 12, 2019.

United States v. Angelo Efthimiatos, No. 19-1023, United States Courts of Appeals for the Second Circuit. Judgment entered Mar. 31, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angelo Peter Efthimiatos respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Summary Order of the Second Circuit App. 1a denying Petitioner's appeal of the district court's violations of the Speedy Trial Act.

JURISDICTION

The district court entered a final judgment on April 12, 2019, sentencing Petitioner to fifteen months of imprisonment followed by one year of supervised release. App. 5a–6a. Petitioner filed a timely appeal to the Second Circuit, which affirmed the judgment of the district court, on March 31, 2020. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(c)(1) of the Speedy Trial Act, provides, in relevant part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

The relevant provisions of the Act are located at 18 U.S.C. §§ 3161 and 3162 and are reprinted at App. 15a–18a.

INTRODUCTION

This case presents an important question about the practice of so-called "start-and-stop" maneuvering in which district courts seek to comply with the Speedy Trial Act by conducting jury selection within the time limits of the Act while intentionally postponing the presentation of evidence beyond the 70-day clock. Although many of the federal appellate courts have issued rulings regarding this practice, this Court has not. Here, Petitioner presented the Second Circuit with unchallenged evidence that the district court scheduled jury selection for October 3, 2018 in an effort to comply with the Act while intentionally postponing the presentation of evidence until at least November 26, 2018, as that was the "earliest" the court could commence trial given the court's busy schedule. JA214.[1] The Second Circuit held that the nine-week delay between jury draw and presentation of evidence was acceptable because it was shorter than delays the Second Circuit had previously found impermissible. App. 2a.

While not directly inconsistent with its own precedent, the Second Circuit's decision is in direct conflict with cases from the Sixth and Tenth Circuits. In *United States v. Crane*, 776 F.2d 600, 604–605 (6th Cir. 1985), the Sixth Circuit condemned a thirteen-day delay between jury selection and trial to accommodate the district court's schedule as a violation of the Speedy Trial Act. In *United States v. Andrews*, 790 F.2d 803, 805 (10th Cir. 1986), the Tenth Circuit held that a two and a half month delay between jury draw and presentation of evidence due to the district court's "heavy criminal docket, several legal holidays, and [the district court's judge]

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[1] JA refers to the Joint Appendix record from the United States Court of Appeals for the Second Circuit.

attendance at a judicial seminar, which he mistakenly believed was mandatory" violated the Speedy Trial Act. *Id.* at 808. The Tenth Circuit stated that "[n]either a congested court calendar nor the press of a judge's other business can excuse delay under the Act." *Id.*

Uniform application of the Speedy Trial Act is essential because the Act serves "great practical administrative importance in the daily working lives of busy trial judges." *United States v. Tinklenberg*, 563 U.S. 647, 657 (2011). This petition, therefore, asks the Court to address an important question of federal law about which the Circuit Courts of Appeals have reached differing results. The Court should reverse the Second Circuit's decision because it contravenes the rigorous timing structure of the Speedy Trial Act and directly conflicts with circuit court decisions condemning start-and-stop maneuvering employed to address congestion of the court's docket. District courts should not be permitted to do an end-run around the time constraints of the Speedy Trial Act to accommodate the district courts' schedules.

STATEMENT OF THE CASE

A. Proceedings Before The District Court.

On April 26, 2018, a grand jury indicted Petitioner on one count of flying without a valid pilot's license in violation of 49 U.S.C. § 46306(b)(7), after the district court ordered him detained pending trial. JA16-17, JA3. Petitioner was arraigned on May 4, 2018 and the district court set a pretrial motions deadline of July 11, 2018, finding the ends of justice were served by excluding the period from May 4 to July 11,

2018 from the speedy trial clock. JA3. At this stage, 7 days expired on the speedy trial clock between the Indictment and arraignment.[2]

After 15 more days expired under the Act for a total of 22, the speedy trial clock stopped on July 27, 2018, when Petitioner filed a motion for reconsideration of the court's detention order. JA4. The court denied the motion on July 31, 2018, and scheduled trial to begin on September 11, 2018. *Id.*

After 14 more days expired under the Act for a total of 36, the speedy trial clock stopped on August 15, 2018, when Petitioner filed an unopposed motion to continue the trial date. *Id.* Petitioner argued that beginning trial involving an unlicensed piloting of an aircraft on September 11 would be unduly prejudicial. JA29. Petitioner requested additional time to file pretrial motions and asked for the time "between now and any new trial date" be excluded from the Act. JA30. On August 17, 2018, the court granted Petitioner's motion in a text-only order and asked defense counsel to provide a proposed order. JA4. Defense counsel never submitted a proposed order and the district court did not issue findings supporting an ends-of justice exclusion. Accordingly, the speedy trial act clock began to run again on August 18, 2018. 18 U.S.C. § 3161(h)(7)(A) (requiring the district court to "se[t] forth, in the record of the case, either orally or in writing, its reasons" supporting its ends-of-justice continuance).

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[2] Petitioner first appeared before a judicial officer on April 10, 2018 after being arrested and charged by Complaint. JA2–3; *see* 18 U.S.C. § 3161(c)(1) (stating that trial "shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, *whichever date last occurs*" (emphasis added)).

After 3 more days expired under the Act for a total of 39, the speedy trial clock stopped on August 21, 2018, when Petitioner's assigned Assistant Federal Public Defender moved to withdraw. JA5. On September 4, 2018, the district court held a hearing and granted counsel's motion to withdraw. *Id.* The court noted that there were "31 days on the speedy trial clock, so [the Court] will be setting [trial] promptly." App. 54a. Petitioner's former counsel explained that although Petitioner had requested to move the trial date from September 11, and had initially sought a continuance to file pretrial motions, Petitioner now wished to assert his speedy trial rights and objected to tolling any time under the Act. App. 54a-55a ("I had filed motions to toll the speedy trial clock in conjunction with a request to move the trial date from September 11th. Since that time, Mr. Efthimiatos has told me he does not want the speedy trial clock tolled.").

In response, the district court granted Petitioner's motion to move trial from September 11 and ruled that it would not exclude "any further time on the clock." App. 55a. To make certain no further time was excluded under the Act, counsel asked the court whether the "clock would begin ticking again today," to which the court responded: "It would." *Id.*[3]

After the hearing, the court asked Petitioner's trial counsel whether he would accept representation of Petitioner. The court noted that there were "31 days left" on the speedy trial clock and that the court was contemplating conducting jury selection

[3] Importantly, even if the Court concludes the district court's August 17 docket entry stopped the clock until the September 4 hearing, the district court conducted jury selection with five remaining days on the speedy trial clock and, therefore, delayed the presentation of evidence well beyond the limits of the Act.

in early October. *See* JA216. Petitioner's trial counsel agreed to accept the appointment and noted he could be available for jury selection in October. App. 59a. In response, the court appointed counsel and scheduled jury draw to begin on October 3, 2018. JA214. The court informed the parties that "[a]s far as potential trial dates—we'd have to look at *November 26 as the trial start date*. That's the earliest we could fit this in given another *trial in October and the judge's schedule*." *Id.* (emphasis added). Defense counsel informed the court he was unavailable to begin trial on November 26 because of a previously scheduled trial but that he could be available the following week of December 5, 2018. *Id.* at 213–214. The court scheduled a two-day trial to begin on December 5, 2018. JA5.

As summarized below, assuming that the jury draw is not viewed as commencement of the trial for purposes of the Speedy Trial Act, the district court was well past the number of days on the speedy trial clock by the time trial started on December 5, 2018.

Event:	**Period:**	**Number of Days Counted Against Speedy Trial Clock (running total in parentheses):**	**Excludable Days:**
Day Following Indictment Up Through Arraignment[4]	April 27, 2018—May 3, 2018	7 (7 total)	0 days
Ends-of-Justice Continuance for Arraignment Through Initial Pretrial Motions Deadline	May 4, 2018—July 11, 2018	0 (7 total)	69 days
Day Following Initial Pretrial Motions Deadline Up to Petitioner's Motion to Reconsider Detention	July 12, 2018—July 26, 2018	15 days (22 total)	0 days
Petitioner's Motion to Reconsider Detention through Order denying said Motion	July 27, 2018—July 31, 2018	0 days (22 total)	5 days
Day following Order denying Motion To Reconsideration of Detention up to Petitioner's Unopposed Motion to Continue Trial Date	August 1, 2018—August 14, 2018	14 (36 total)	0 days

[4] Mr. Efthimiatos first appeared before a judicial officer on April 10, 2018 after being arrested and charged by Complaint.

Petitioner's Unopposed Motion to Continue Trial Date Pending and Text Order	August 15, 2018—August 17, 2018	0 (36 total)	3 days
Date Following Text Order Up To Date Petitioner's Counsel Filed Motion to Withdraw	August 18, 2018—August 20, 2018	3 days (39 total)[5]	0 days
Date Petitioner's Counsel Filed Motion to Withdraw Up To Date of Hearing on Motion to Withdraw	August 21, 2018—September 3, 2018	0 days (39 total)	13 days
Day Of Hearing Granting Motion To Withdraw And Restarting Speedy Trial Clock Through Jury Selection	September 4, 2018-October 3, 2018	30 days (69 total)	0 days
Day After Jury Selection Up To Day Stipulated Motion To File Transcript Under Seal	October 4, 2018—October 16, 2018	13 days (82 total)	0 days
Stipulated Motion to File Transcript Under Seal and Order Granting Same	October 17, 2018—October 17, 2018	0 days (82 total)	1 day

[5] Petitioner's counsel argued that the three additional days should be counted against the speedy trial clock from August 18, 2018 through August 20, 2018 until Petitioner's Counsel's Motion to Withdraw was filed on August 21, 2018 because the district court did not grant a proper ends-of-justice exclusion in August 17, 2018 text order. Even if the district court could effectively have cured this error with a Nunc Pro Tunc Order and excluded time from August 17 through September 3, 2018, this does little to change the fact that the 70 days expired in early October 2018 shortly after *voir dire*, as the district court was well aware, and as noted in footnote 3 *supra*.

Day Following Order Granting Stipulated Motion to File Under Seal Up to Day Motion To Reconsider of Order of Detention	October 18, 2018—November 14, 2018	28 days (110 days)	0 days
	Total Speedy Trial Clock Days	110 days[6]	

On November 21, 2018, Petitioner moved to dismiss the Indictment for violations of the Speedy Trial Act and filed motions *in limine* to exclude Petitioner's post-arrest statements. JA8; JA68; JA93. Petitioner argued that the October 3, 2018 jury selection did not constitute the commencement of trial because the court engaged in an impermissible start-and-stop plan by scheduling jury selection with the intention of postponing trial for two months to address the court's calendar. JA7.[7]

On November 29, 2018, the court denied Petitioner's motion to dismiss. The court reasoned that jury draw took place within the allotted 70-day period and found the delay between jury selection and the presentation of evidence permissible. App. 43a–44a. The court noted that prior to the withdrawal of Petitioner's first attorney, defense counsel sought, and the court granted, a second exclusion of time from the

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[6] Although the Government's calculation of the speedy trial clock days differs slightly from Mr. Efthimiatos' calculation, there is no dispute that by the trial date of December 5, 2018 (or even by the earliest date that the court was available for trial, November 26, 2018) the speedy trial clock would have passed the permitted 70 days if it is determined that trial did not commence with *voir dire* on October 3, 2018. The district court's belated Nunc Pro Tunc Order of December 3, 2018 purporting to retroactively exclude the period August 17 through October 3, 2018 is both inconsistent with its comments about the clock at the September 4, 2018 hearing and ineffective as a matter of law. *United States v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985) (ends-of-justice continuances may only be granted prospectively).

[7] Petitioner agreed before the district court and the Second Circuit that he would not challenge the delay between November 26, 2018, and December 5, 2018, because the delay was caused by defense counsel's schedule. JA7, n.2; Appellant's Br. at 16, n.3.

Speedy Trial Act to allow for the filing of pretrial motions. App. 44a. Significantly, the court did not address its September 4 unequivocal ruling that the speedy trial clock would begin to run that day, despite defense counsel bringing the ruling to the court's attention. App. 28a, 30a. Even though defense counsel never requested additional preparation time, the court summarily concluded that counsel's assertion that he was ready to proceed with trial in October was "without merit." App. 46a. The district court refused to address the fact that regardless of defense counsel's need to prepare—a request never made by the defense—the court's calendar prohibited the presentation of evidence until November 26. *See* App. 47a–50a. Furthermore, the district court improperly focused on the defense request that jury draw or trial not begin on September 11, 2018, as that date would cause the defendant undue prejudice. A defendant can assert a claim of prejudice, which the district court has the discretion to grant or deny, without waiving his rights under the Speedy Trial Act, particularly when the district court itself affirmed there would be no exclusion of time beyond the September 4, 2018 hearing.

On December 3, 2018, the district court entered a Nunc Pro Tunc Order retroactively excluding the period from August 17 to October 3, 2018 from the Speedy Trial Act. App. 12a–14a. The court concluded when defense counsel failed to provide a proposed order in conjunction with Petitioner's August 17 motion to continue, the court should have entered in its own ends-of-justice order. App. 13a. The court found that its error could be rectified in a retroactive order. *Id.* Inexplicably, however, this Nunc Pro Tunc Order refused to address the defendant's assertion of his rights under

the Speedy Trial Act on September 4 and the court's unambiguous ruling acknowledging said assertion and restarting the running of the speedy trial clock. App. 12a-13a. Incongruously, the court then relied on the defense's November filing of motions *in limine* to find that the ends of justice were served by excluding the period from August 17 to October 3 from the speedy trial clock. *Id.* Specifically, the district court concluded, without a request from the defense, and in fact over the defense's assertion of the defendant's Speedy Trial Act rights, that the August 17 to October 3 continuance was necessary to provide defense counsel "reasonable time . . . for adequate preparation." *Id.*

On December 6, 2018, Petitioner was convicted by a federal jury of one count of flying without a valid pilot's license. JA11. On April 2, 2019, the court denied Petitioner's motions for acquittal and a new trial. JA13. Final judgment was entered on April 12, 2019, and Petitioner timely filed his notice of appeal on April 17, 2019. App. 5a.

B. The Second Circuit's Decision.

On appeal, Petitioner argued that the district court erred in denying his motion to dismiss the indictment with prejudice for violations of the Speedy Trial Act, citing established case law condemning start-and-stop plans employed to accommodate the court's calendar. Appellant's Br. at 10–11. Petitioner further urged the court to dismiss the indictment with prejudice because the issue of whether dismissal should be with or without prejudice arose for the first time on appeal. *Id.* at 20.

The government argued that Petitioner's appeal should be denied because Petitioner did not object to the district court's scheduling and that his motion was untimely because he did not file his motion to dismiss until after jury selection. Appellee Br. at 20–21. Both arguments fail as a matter of law. Defendants have "no obligation to take affirmative steps to insure that they [are] tried in a timely manner." *United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985). Moreover, the motion to dismiss would have been premature if Petitioner filed it before the violation occurred. *See United States v. Sherer*, 770 F.3d 407, 411 (6th Cir. 2014) (noting the proper course for challenging a Speedy Trial Act violation is to raise the challenge "on day seventy-one (or later)").

The government further argued that Petitioner received a speedy trial because the district court's Nunc Pro Tunc Order was effective and, therefore, only eight unexcluded days ran on the speedy trial clock between jury selection and trial. *Id.* at 22–24. The defendant contended that the Nunc Pro Tunc Order was impermissible as a retroactive ends-of-justice continuance.

The Second Circuit held oral argument on March 23, 2020. At oral argument, the defendant stated that it was the duty of the courts and the government, not the defendant, to police the speedy trial clock. The defendant further cited case law that a motion to dismiss the indictment on Speedy Trial Act grounds is premature until the speedy trial clock runs. App. 65a. The defendant also pointed out that the district court had accepted the defense's motion to withdraw its request to toll the speedy trial clock on September 4, 2018 and had unequivocally told the defendant that the

speedy trial clock would start running again immediately. App. 63a. The defendant complained that the delay between jury selection and presentation of evidence, at least until November 26, was the result of the court's stated unavailability until November 26. The defense asserted that the court's busy calendar was not a sufficient basis for the delay. The defense reiterated that the two-month delay was neither requested by the defense or necessary for preparation of the defense, given that the trial was not complicated and only a one and half day trial. App. 64a. The defense further argued that the Nunc Pro Tunc Order was an impermissible post hoc rationalization. App. 63a, 65a-66a.

On March 31, 2020, the Second Circuit summarily denied Petitioner's appeal. App. 2a. The Second Circuit concluded that "the delay between October 3, 2018 and November 26, 2018 is not nearly as lengthy as the delays [the court] ha[s] found impermissible previously." *Id.* (citing *United States v. Stayton*, 791 F.2d 17 (2d Cir. 1986) (twenty-three months) and *United States v. Fox*, 788 F.2d 905 (2d Cir. 1986) (five and a half months)). *Id.* The Second Circuit further accepted the district court's post-hoc rationalizations that the defense needed more time to prepare notwithstanding that the defense made no such request, and the district court had agreed that the speedy trial clock would resume running on September 4, 2018. JA33. The Second Circuit ruling allows district courts to engage in start-and-stop maneuvering to address calendaring conflicts while impermissibly utilizing post hoc rationalizations to justify impermissible delays between jury selection and presentation of evidence.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to address two important questions of federal law.

First, the Court should reverse the Second Circuit's decision that a nine-week delay between jury draw and presentation of evidence due to the district court's congested calendar is not an impermissible start-and-stop plan in contravention of the Speedy Trial Act when the Sixth and Tenth Circuits have decided that similar or shorter delays for such reasons would contravene the Speedy Trial Act. To protect the interests of the public and the defendant in a speedy trial, the Act contains strict time limits tempered by measured exceptions designed to accommodate the complexities of trial. Nothing in the Act excuses start-and-stop planning to address congested dockets.

Second, this Court should reverse the Second Circuit's decision because it improperly permitted the district court to end-run the Speedy Trial Act by accepting a post hoc rationalization for the district court's failure to afford the defendant a trial within the 70-day time limit prescribed by the Act. Condoning such post hoc rationalizations contravenes this Court's holding in *Zedner v. United States*, 547 U.S. 489, 506 (2006), that "the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance." District courts should not be permitted to use post hoc rationalizations to correct impermissible start-and-stop maneuvering.

I. This Petition Presents The Ideal Vehicle To Address The Lack Of Uniformity Among The Circuit Courts For Regulating Start-And-Stop Maneuvering.

The Court should grant the petition to address the direct conflict between the Second, Sixth and Tenth Circuits, as well as the general lack of uniformity in how federal appellate courts have policed start-and-stop maneuvering. This Court has long recognized the fundamental importance of an accused's right to a speedy trial. The speedy trial right "has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in the Magna Carta (1215). . . ." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). "Reflecting the concern that a presumptively innocent person should not languish under an unresolved charge, the Speedy Trial Clause guarantees 'the *accused*' 'the right to a speedy ... *trial*.'" *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (citing U.S. Const., Amdt. 6) (emphasis added). "Congress enacted the Speedy Trial Act because of its concern that this Court's previous interpretations of the Sixth Amendment right to a speedy trial had drained the constitutional right of any 'real meaning.'" *United States v. Taylor*, 487 U.S. 326, 352 (1988). The Speedy Trial Act "gave effect to a Federal defendant's right to speedy trial under the Sixth Amendment and acknowledged the danger to society represented by accused persons on bail for prolonged periods of time." *United States v. Rojas-Contreras*, 474 U.S. 231, 238–239 (1985) (citing H.R. Rep. No. 96-390, p. 3 (1979), U.S. Code Cong. & Admin. News 1979, pp. 805, 807).

Although the federal circuit courts agree that district courts cannot "evade the spirit of the Act by conducting *voir dire* within the statutory time limits and then ordering a prolonged recess with [the] intent to pay mere 'lip service' to the Act's requirements,'" *Brown*, 819 F.3d at 810 (citations omitted), the circuit courts do not regulate the practice uniformly. There exist disparities among the federal circuit courts on what justifications for delay and how much delay between jury selection and presentation of evidence are acceptable under the Act. This petition provides the Court an ideal vehicle to address these inconsistent standards and, in particular, to address the Second Circuit's ruling in this case, which is in direct conflict with rulings from the Sixth and Tenth Circuits.

A. The Speedy Trial Act Mandates That Defendants Must Be Brought To Trial Within 70 Days, Absent Some Exclusion.

Under § 3161 of the Speedy Trial Act, a federal criminal trial must generally begin within 70 days after the defendant is charged or makes an initial appearance. 18 U.S.C. § 3161(c)(1). "[T]he Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate v. United States*, 559 U.S. 196, 211 (2010). "The Act controls the conduct of the parties and the court itself during criminal pretrial proceedings. Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself." *Stayton*, 791 F.2d at 20 (quoting *United States v. Pringle*, 751 F.2d 419, 429 (1st Cir. 1984)).

"To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Zedner*, 547 U.S. at 497. For example, the Act excludes "delay resulting from

trial with respect to other charges against the defendant," 18 U.S.C. § 3161(h)(1)(B), "delay resulting from any interlocutory appeal," § 3161(h)(1)(C), and "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," § 3161(h)(1)(D). The Act further permits district courts to exclude any period of delay if the court finds that the "ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A). Importantly, an ends-of-justice continuance cannot be granted to address "general congestion of the court's calendar . . . ." 18 U.S.C. § 3161(h)(7)(C). If the defendant is not brought to trial within the 70-day limit, and the Act does not exclude the delays, the district court must dismiss the case, with or without prejudice, on the defendant's motion. *Id.* § 3162(a)(2).

Although the Act does not define the term "commence," the circuit courts have held that trial commences when jury selection begins. *See United States v. Rodriguez*, 63 F.3d 1159, 1164 (1st Cir. 1995); *United States v. Fox*, 788 F.2d 905, 908 (2d Cir. 1986); *Gov't of Virgin Islands v. Duberry*, 923 F.2d 317, 320 (3d Cir. 1991); *Brown*, 819 F.3d at 810. The Act is generally "not violated if the jury is selected within the 70–day period but a short recess places [the jury's] swearing outside the statutory period." *Duberry*, 923 F.2d at 320. Federal appellate courts have held that district courts cannot "evade the spirit of the Act by conducting *voir dire* within the statutory time limits and then ordering a prolonged recess with [the] intent to pay mere lip service to the Act's requirements." *Brown*, 819 F.3d at 810 (citations omitted)

(collecting cases). How the appellate courts apply this principle varies, although they agree that *voir dire* cannot serve as "commencement" of the trial under when there is a finding of unjustifiable delay. *See*, *e.g.*, *Brown*, 819 F.3d at 815; *Stayton*, 791 F.2d at 20–21.

B. The Circuit Courts of Appeals Use Different Approaches In Evaluating Speedy Trial Act Violations Resulting In Inconsistent Outcomes.

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuit Courts of Appeals have addressed start-and-stop plans under the Speedy Trial Act, but the circuit courts have applied differing standards in reviewing alleged violations of the Act.

The First Circuit has held that the delay between jury selection and presentation of evidence is impermissible under the Act if jury selection was a mere "pretext" for tolling the speedy trial clock. *See United States v. Zayas*, 876 F.2d 1057, 1058 (1st Cir. 1989) (holding that defendant's Speedy Trial Act claim boiled down to the factual issue of whether the September 15 jury selection "was a pretext" for tolling the speedy trial clock). The Third Circuit has similarly concluded that a violation occurs if there is evidence the district court "intended to evade the spirit of the Act." *Duberry*, 923 F.2d at 321 (noting there was no evidence "the district court intended to evade the spirit of the Act"). In *Duberry*, the Third Circuit held that the district court did not violate the Act because the delay was attributable to judicial vacancies in the Virgin Islands. *See id.* Similarly, the Eleventh Circuit has held that both the letter and the spirit of the Act must be complied with and it will look at whether there

"was an intent to merely pay the Act lip service." *United States v. Gonzalez*, 671 F.2d 441, 444 (11th Cir. 1982). In *Gonzalez*, the Eleventh Circuit ruled that an eleven-day delay between jury selection and presentation of evidence was permissible. *Id.*

The Fifth Circuit has suggested that a post-jury selection delay is permissible so long as the day is "reasonable," regardless of the justification or reason for the delay. *See United States v. Howell*, 719 F.2d 1258, 1262 (5th Cir. 1983). In *Howell*, the court conducted jury selection on January 24 but delayed trial until January 31 to allow a civil case to be tried first. *Id.* at 1261. On this record, the Fifth Circuit perceived no violation of either "the spirit or the letter of the Act" because the delay was not "an unreasonable length of time." *Id.* at 1262.

The Second and Tenth Circuits examine the reasonableness of the delay against the purpose of the Act, "which is premised on strict time limits tempered by certain exceptions designed to accommodate the vagaries of the trial process." *Stayton*, 791 F.2d at 20. In other words, the Act is not violated if the reasons for the delay between jury selection and the presentation of evidence are consistent with the Act. *Fox*, 788 F.2d at 909 (noting that nothing in the Act justified the 5½ months between jury selection and presentation of evidence); *Andrews*, 790 F.2d at 808. However, the Second and Tenth Circuits do not seem to agree on what reasons are consistent with the Act. The Tenth Circuit has found start-and-stop planning permissible when the delay is caused by the need to excuse and replace jurors. *See United States v. Martinez*, 749 F.2d 601, 604 (10th Cir. 1984), *abrogated on alternative grounds by Mathews v. United States*, 485 U.S. 58 (1988), but usually

impermissible to address a congested court docket; *see Andrews*, 790 F.2d at 808 ("[N]either a congested court calendar nor the press of a judge's other business can excuse delay under the Act.").

The Sixth Circuit's analysis lies somewhere between these standards. The Sixth Circuit conducts a two-step inquiry. First, the court examines "whether the record supports a finding that the district court's start-and-stop plan constituted an improper attempt to evade the spirit of the Speedy Trial Act." *Brown*, 819 F.3d at 815. Second, even if the first question is answered in the affirmative and the district court relies on 18 U.S.C. § 3161(h)(7)(A)'s ends-of-justice provision to justify the delay, the court must then "consider whether the district court's findings were sufficient to justify an ends of justice continuance under the Act, and whether the findings underlying the court's ends of justice continuance were the true basis for its decision to continue the trial." *Id.* (citations omitted).

For example, in *Brown*, the trial was scheduled to commence on September 8. *Id.* at 804. The government moved to continue trial because one of its witnesses was unavailable. *Id.* At a September 3 status conference, the court proposed scheduling trial on September 15, but discovered that would conflict with the schedules of the parties and the court. *See id.* at 805. The court orally granted the government's motion to continue and scheduled trial to begin on September 22. *Id.* at 805. The next day, the defendant opposed the government's motion to continue, arguing the continuance would violate his speedy trial rights by ratifying the government's lack of due diligence in obtaining the availability of an essential witness. *Id.* At a

September 4 status conference, the court reversed course and denied the government's motion for a continuance and decided to conduct jury selection on September 8 and postpone presentation of evidence until September 22. *Id.* at 806. At the final pretrial conference, the defendant objected to the court's proposed start-and-stop plan. *Id.* at 807. The court overruled the defendant's objection and subsequently excluded the days that expired beyond the speedy trial clock between jury selection and presentation of evidence to address the unavailability of counsel. *Id.* at 808.

The Sixth Circuit concluded that the district court's start-and-stop scheduling paid mere lip service to the Act. The Sixth Circuit reasoned:

> the record indicates that the district court sought to continue trial to a date beyond the 70-day limit *from the outset* . . . , and only subsequently determined that it would commence trial prior to the expiration of the 70–day deadline (by conducting *voir dire* on September 8 and then taking a two-week recess until September 22) after calculating the 70–day deadline.

Id. at 817.

The Sixth Circuit also held that the district court intended to pay mere lip service to the Act by granting the government's original continuance to accommodate the government's witness and then reversing course once it discovered the witness' availability was not justification for continuing trial. *Id.* The Sixth Circuit further held that the district court's start-and-stop plan was not saved by granting a seven-day continuance to accommodate counsel's purported unavailability. The court held that the purported continuance was not based on counsel's unavailability but rather to address the unavailability of the government's witness. *Id.* at 821. Because the

government's witness could not be considered "absent" under the Act, the continuance was inoperable and, therefore, the district court's start-and-stop plan violated the Act. *See id.* at 819, 822.

The upshot of these decisions is a lack of consistency in how circuit courts police start-and-stop maneuvering under the Speedy Trial Act. As described *infra,* the Second and Tenth Circuits, although adopting similar standards to some extent, have reached conflicting results about whether the court's schedule justifies a delay. The Sixth Circuit is also at odds with the Second Circuit by proscribing delay that is attributable to court scheduling. This Court should decide to what extent, if at all, start-and-stop maneuvering should be allowed to accommodate the court's calendar and the judge's availability, and if it is allowed for such a purpose, what period of delay is permissible so as not to evade the letter and the spirit of the Act.

C. The Second Circuit's Decision Is At Odds With Decisions From The Sixth And Tenth Circuits.

The Second Circuit's decision here, though brief, is a radical departure from the structure of the Speedy Trial Act as well as other circuit court decisions prohibiting start-and-stop maneuvering to address the court's busy calendar. Petitioner presented the Second Circuit with unchallenged evidence that the district court scheduled jury selection for October 3, 2018 in an attempt to "technically" comply with the Act but proposed postponing trial until November 26, 2018, as that was the "earliest" the court could commence trial given the court's busy schedule. JA214. The Second Circuit held that the delay was acceptable because the nine-week delay was shorter than delays the Second Circuit has previously found impermissible.

App. 2a. The Second Circuit further held that the delay was justified because it adopted the district court's post hoc rationalization that the defense required additional preparation time. In so doing, the Second Circuit ruled that (a) a nine-week delay to address the district court's calendar is not impermissible start-and-stop maneuvering under the Speedy Trial Act, and (b) district courts may examine the record after a violation has occurred to rationalize failing to bring a defendant to trial within the 70-day clock in contravention of this Court's directive in *Zedner v. United States*, 547 U.S. 489, 497 (2006).

The Tenth Circuit has refused to excuse a similar delay due to the district's court's calendar. In *Andrews*, the district court conducted jury selection on November 7, 1983, but the trial was postponed until January 23, 1984. 790 F.2d at 805. The district court denied the defendant's motion to dismiss under the Speedy Trial Act, finding that trial commenced within the meaning of the Act on jury selection. *Id.* at 807. The district court noted that the delay "was occasioned by a heavy criminal docket, several legal holidays, and his attendance at a judicial seminar, which he mistakenly believed was mandatory." *Id.* at 808. The Tenth Circuit reversed, holding "[n]either a congested court calendar nor the press of a judge's other business can excuse delay under the Act." *Id.* The court noted that the "Act specifically provides that a continuance may not be granted by the court 'because of general congestion of the court's calendar.'" *Id.* (quoting 18 U.S.C. § 3161(h)(7)(C)).

Similarly, in *United States v. Crane*, at the June 20 pretrial conference, defense counsel alerted the court that the court's proposed trial schedule would place trial

beyond the Act's 70-day limit. 776 F.2d 600, 602 (6th Cir. 1985). The court noted the judge was "leaving the country on June 21 and, upon his return, would be presiding over another trial until July 3." *Id.* The court, therefore, set a trial date for July 5. *Id.* Later that day, the court discovered that the 70-day period would not expire until June 22 and arranged for a magistrate judge to begin jury selection on June 21 but postpone trial until the court was available to proceed on July 5. *Id.* The district court agreed with defense counsel that the court's scheduling was an impermissible attempt to avoid the Act, but that the delay was nevertheless permissible under the Act's ends-of-justice provision. *Id.* at 603. The Sixth Circuit reversed. Although the district court gave numerous reasons for excluding the time between June 20 to July 5, the Sixth Circuit held that "judge did not commence the trial before the seventy-day period expired because he was caught unaware and was going to be out of the country and occupied with another case until after the period expired." *Id.* at 606. The Sixth Circuit further held that "the judge's absence is not a proper reason for an ends of justice continuance." *Id.* at 605.

The decisions of the Sixth and Tenth Circuits are consistent with the Speedy Trial Act. To accomplish flexibility, the Act contains a detailed list of exclusions to address the complexities of trial scheduling, including ends-of-justice continuances. *See* 18 U.S.C. § 3161(h). Even though ends-of-justice continuances are "the most open-ended type of exclusion recognized under the Act," *Zedner*, 547 U.S. at 508, the Act specifically proscribes excluding delay caused by "general congestion of the court's calendar," 18 U.S.C. § 3161(h)(7)(C). Consistent with the Act, district courts cannot

use start-and-stop maneuvering to justify delay that otherwise would be impermissible under the Act.

In this case, the Second Circuit, in direct conflict with *Andrews* and *Crane*, ignored unchallenged evidence that the district court engaged in start-and-stop scheduling expressly to accommodate the district court's calendar. When Petitioner was assigned new counsel on September 4, the district court noted that there were 31 days left on the speedy trial clock and, therefore, trial would be scheduled "promptly." App. 54a. On September 4, Petitioner clearly asserted his speedy trial rights. The district court allowed the Petitioner to withdraw his former counsel's request for a continuance and to restart the Speedy Trial clock effective immediately. App. 55a. (In response to former defense counsel's question, "In other words, the clock would begin ticking again today?", the district court replied, "It would."). The court scheduled jury selection to begin on October 3, 2018 and notified the parties that "[a]s far as potential trial dates—we'd have to look at *November 26 as the trial start date*. That's the earliest we could fit this in given another *trial in October and the judge's schedule*." JA214 (emphasis added). To accommodate a conflict in defense counsel's schedule, the court scheduled a two-day trial to begin on December 5, 2018. JA5.

At that point, the Speedy Trial Act was violated. The district court scheduled trial to begin on the 68th day of the clock to technically comply with the Act but postponed the presentation of evidence for over two months to address the district

court's congested docket.[8] The district court improperly attempted to salvage this violation by pointing to defense counsel's purported need for preparation time. However, as set forth *infra*, courts cannot examine the record after a violation has occurred to find permitted justifications for failing to bring a defendant to trial within the 70-day clock.

D. This Court Should Not Permit Jury Selection To Serve As Commencement Of The Case Under The Speedy Trial Act If The Delay Would Not Otherwise Be Excludable Under The Act.

Start-and-stop maneuvering is not an outlier, anomaly, or one-off incidental violation of the Speedy Trial Act; start-and-stop planning is a pervasive behavior across the country. Moreover, uniform application of the Speedy Trial Act is critical because the Act serves "great practical administrative importance in the daily working lives of busy trial judges." *Tinklenberg*, 563 U.S. at 657. The Court should therefore grant this petition to resolve the conflict and lack of uniformity among the circuit courts regarding when start-and-stop maneuvering violates the Speedy Trial Act.

Consistent with the decisions of the Sixth Circuit and the Tenth Circuit, the Court should hold that district courts cannot rely on jury selection as the commencement of trial if the delay between jury selection and presentation of evidence would not otherwise be excludable under the Act. In other words, even a

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[8] Contrary to the government's argument below, the district court's Nunc Pro Tunc Order is inconsistent with the court's ruling on September 4, 2018, that the clock would begin to run again that day. JA33. The order is further invalid because the Act does not permit district courts to grant ends-of-justice continuances retroactively. *See Tunnessen*, 763 F.2d at 77; *see also Zedner*, 547 U.S. at 506 (holding that "the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance").

brief delay between jury selection and presentation of evidence is impermissible under the Act if the delay is based on prohibited considerations. Furthermore, a district court's prohibited start-and-stop planning cannot be excused by retroactively examining the record to find acceptable justifications for the delay.

This approach is consistent with the text and structure of the Speedy Trial Act. Section 3161(h) of the Act contains a structured list of periods of delay that are automatically excluded from the Speedy Trial clock, including delays caused by determining the mental competency of the defendant, pretrial motions, the court's consideration of a plea agreement, or the unavailability of the defendant or essential witnesses. *See* 18 U.S.C. § 3161(h). District courts can also exclude any delay on its "own motion or at the request of the defendant or his counsel or at the request of the attorney for the government" if the ends of justice served by the continuance outweigh the interests of the public and the defendant in a speedy trial. *Id.* § 3161(h)(7)(A). The Act defines five factors that warrant ends-of-justice continuances, including case complexity, continuity of defense or government counsel, or providing the defendant and the government "reasonable time necessary for effective preparation, taking into account the exercise of due diligence." *Id.* § 3161(h)(7)(B)(iv). Congress further concluded that the court's calendar and the government's "lack of diligent preparation or failure to obtain available witnesses" cannot justify an ends-of-justice continuance. *Id.* § 3161(h)(7)(C). The Act counteracts "substantive openendedness with procedural strictness," *Zedner*, 547 U.S. at 509, by requiring that the district court "set forth, in the record of the case," the reasons the ends of justice served by the continuance

"outweigh the best interests of the public and the defendant in a speedy trial," 18 U.S.C. § 3161(h)(7)(A).

Start-and-stop planning cannot stand as an exception to the Act's "detailed scheme under which certain specified periods of delay are not counted." *Zedner*, 547 U.S. at 492. If the court cannot exclude delay between jury selection and presentation of evidence within the parameters defined by Congress, the district court cannot rely on jury selection as the commencement of trial to avoid violating the Speedy Trial Act. However, if the post-jury selection delay is consistent with the time excluded by the Act, jury selection marks the commencement of trial. *See United States v. Richmond*, 735 F.2d 208 (6th Cir. 1984) (holding that the district court did not pay mere lip service to the Act by continuing trial two weeks to give the defense additional preparation time); 18 U.S.C. § 3161(h)(7)(B)(iv) (delay excludable to provide "reasonable time necessary for effective preparation, taking into account the exercise of due diligence"). Moreover, district courts cannot do an end-run around the Act's "procedural strictness" by scouring the record after a violation has occurred and a motion to dismiss the indictment is filed to find acceptable reasons to exclude periods of delay. *Zedner*, 547 U.S. at 509.

In this case, the district court plainly denied Petitioner a speedy trial. Fully cognizant that 31 days remained on the speedy trial clock, the district court scheduled jury selection to begin two days before the clock expired and postponed the presentation of evidence for two months to address the court's calendar. App. 54a; JA213–214. Once Petitioner identified the violation, the district court reexamined

the record to find an appropriate justification for the court's impermissible start-and-stop maneuvering.

II. Under *Zedner v. United States*, District Courts Cannot Cure Speedy Trial Act Violations By Relying On Post Hoc Justifications For Delay.

The district court denied Petitioner's motion to dismiss the indictment and issued a Nunc Pro Tunc Order concluding that the delay between jury selection and presentation of evidence was proper because the defense counsel was not prepared to go to trial on October 3. App. 13a-14a. The Second Circuit adopted the district court's reasoning, holding that defense counsel required additional time to prepare as "evidenced by the fact that [Petitioner's] new counsel wanted to move the trial date from September and also asked the government to move jury selection from October to December in order to have more time to prepare." App. 2a. The Second Circuit further reasoned that Petitioner's pretrial motions demonstrated that "counsel would not have been prepared for trial shortly after jury selection." App. 3a. Problematically, however, the Second Circuit's acceptance of the district court's post hoc rationalizations is contrary to established precedent and inconsistent with the record.

The Act requires that when a district court grants an ends-of-justice continuance, it must "se[t] forth, in the record of the case, either orally or in writing, its reasons" for finding that the ends-of-justice are served and they outweigh the interests of the defendant and the public in a speedy trial. 18 U.S.C. § 3161(h)(7)(A). Although the Act is "ambiguous on precisely when those findings must be 'se[t] forth, in the record of the case,'" the Court has held that "the Act is clear that the findings

must be made, if only in the judge's mind, before granting the continuance." *Zedner*, 547 U.S. at 506–507. Consistent with this reasoning, circuit courts have held that retroactive ends-of-justice orders are inoperable. *See*, *e.g.*, *Stayton*, 791 F.2d at 21 ("Ends of justice continuances cannot be used in hindsight to mop up such excessive delay."); *Brown*, 819 F.3d at 817 ("The Act does not countenance district courts inventing new, after-the-fact reasons for continuing trial."); *United States v. Suarez-Perez*, 484 F.3d 537, 542 (8th Cir. 2007) ("The Speedy Trial Act does not provide for retroactive continuances."). This is because "Congress wanted to [e]nsure that a district judge would give careful consideration when balancing the need for delay against 'the interest of the defendant and of society in achieving [a] speedy trial.'" *Richmond*, 735 F.2d at 215 (citation omitted).

Start-and-stop maneuvering is no exception to the Act's requirement that district courts consider the reasons for delay before granting continuances. To hold otherwise, would disincentivize district courts from remaining cognizant of the speedy trial clock throughout the case and carefully balancing the need for delay against the interests of the defendant and the public in a speedy trial. A contrary holding would also create a loophole in the Speedy Trial Act that permits district courts to engage in stop-and-stop maneuvering to pay mere lip service to the Act so long as courts mop up excessive delay with the benefit of hindsight.

In this case, the district court used the benefit of hindsight to mop up the excessive delay caused by the district court's own improper start-and-stop maneuvering. On September 4, the district court stated that the speedy trial clock

would commence running that day, as the defendant insisted. With this in the mind, the district court scheduled jury selection for October 3 and proposed commencing the presentation of evidence on November 26 because that was the earliest date the court could conduct trial "given another *trial in October and the judge's schedule*." JA214 (emphasis added). To avoid a finding of impermissible delay between October 3 and November 26 permissible, the district court issued a Nunc Pro Tunc Order declaring that defense counsel could not have been ready for trial on October 3 and an ends-of-justice exclusion was necessary. However, that consideration could not have been in the judge's mind at the time and, in fact, is belied by the judge's own statement on September 4 that she would start the speedy trial clock on that date.

Furthermore, the district court relied on several events that occurred ***after*** the district court's start-and-stop planning, including the defense counsel's conversations with the government, about which the district court did not know at the time, and Petitioner's motions *in limine*. Even if the defense counsel's conversations with the government about possibly continuing the trial had been known by the district court earlier, they are not relevant, as the defendant ultimately declined to seek a continuance on this basis. In his discussions with the government, defense counsel stated that any continuance was conditioned on Petitioner's consent, and said consent was not given. JA218 ("If my client consents, I would like to defer the draw until December 5 . . . ."). These considerations could not have been in the district court's mind when the trial schedule was set. Therefore, the district court's reasoning is precisely the type of retroactive justification that the Act prohibits.

The district court's findings also cannot be squared with the record. There is no support in the record for the district court's conclusion that defense counsel was incapable of being trial ready on October 3. Indeed, the record is devoid of any evidence that the defense requested a continuance to prepare for trial. This is because defense counsel was committed to honoring Petitioner's wish to assert his speedy trial rights as expressed by the Petitioner at the September 4 hearing.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 29, 2020

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19-1023
United States v. Efthimiatos

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 31st day of March, two thousand twenty.

Present: DENNIS JACOBS,
ROSEMARY S. POOLER,
Circuit Judges.
BRENDA K. SANNES,[1]
Judge.

UNITED STATES OF AMERICA,

Appellee,

v. 19-1023

ANGELO PETER EFTHIMIATOS,

Defendant-Appellant.

Appearing for Appellant: Heather Ross, Sheehey Furlong & Behm (Craig S. Nolan, *on the brief*), Burlington, VT.

Appearing for Appellee: Eugenia A.P. Cowles, Assistant United States Attorney (Gregory L. Waples, Assistant United States Attorney, *on the brief*), *for*

[1] Judge Brenda K. Sannes, United States District Court for the Northern District of New York, sitting by designation.

Christina E. Nolan, United States Attorney for the District of Vermont, Burlington, VT.

Appeal from the United States District Court for the District of Vermont (Reiss, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant Angelo Peter Efthimiatos appeals from the April 12, 2019 judgment of conviction in the United States District Court for the District of Vermont (Reiss, *J.*) for piloting without a license in violation of 49 U.S.C. § 46306(b)(7). Efthimiatos appeals the district court's denial of his motion to dismiss for violation of the Speedy Trial Act; denial of his motion to suppress; and jury instructions defining "willfully." We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Efthimiatos first challenges the district court's denial of his motion to dismiss the indictment for violation of the Speedy Trial Act. The Speedy Trial Act requires that trials commence within seventy days of filing an indictment or information. 18 U.S.C. § 3161. "A trial court has broad discretion over the trial timetable and the exercise of that discretion will not be overturned unless it is an arbitrary action that substantially impairs the defense." *United States v. Fox*, 788 F.2d 905, 908 (2d Cir. 1986) (internal quotation marks and citation omitted).

Efthimiatos claims that, although jury selection timely took place on October 3, 2018, the district court's later scheduling of the presentation of evidence, which the court attempted to schedule for November 26, 2018 but ultimately scheduled for December 5, 2018 due to defense counsel's schedule,[2] was an attempt to impermissibly evade the spirit of the Speedy Trial Act. *See id*. at 909. We disagree.

"Normally, the Act is not violated when the jury is selected within the 70-day period but a short recess places the swearing of the jury outside the statutory period. But if a court impairs a defendant's ability to make a defense by arbitrarily and substantially delaying the trial, it abuses its discretion." *Id*. at 908-09 (citations omitted).

Here, the record does not suggest that the district court's bifurcated scheduling was meant to evade the spirit of the Act. The delay between October 3, 2018 and November 26, 2018 is not nearly as lengthy as the delays we have found impermissible previously. *See Stayton*, 791 F.2d at 20 (noting that a twenty-three-month delay "blatantly offends the purpose and spirit of the act"); *Fox*, 788 F.2d at 909 (concluding that an unjustified five-month delay between trial and jury selection was a violation). Nor was the delay unjustified. While the district court was ready to proceed with trial on September 11, 2018, Efthimiatos moved to continue the trial. Efthimiatos also sought new defense counsel, who needed time to prepare, as evidenced by the facts that Efthimiatmos's new counsel wanted to move the trial date from September and also asked the government to move jury selection from October to December in order to have more time to prepare. From November 15 onwards, Efthimiatos filed a number of pretrial motions,

[2] Efthimiatos concedes that the delay past November 26, 2018 was due to his own circumstances, and therefore, he challenges only the delay from October 3, 2018 to November 26, 2018.

further reinforcing that his counsel would not have been prepared for trial shortly after jury selection.

Efthimiatos next challenges the district court's denial of his motion to suppress post-arrest statements that he made to the agents at the airport. We disagree.

We review de novo a district court's determination as to whether a suspect was in custody for the purposes of *Miranda*. *United States v. Santillan*, 902 F.3d 49, 60 (2d Cir. 2018) (internal quotation marks and citation omitted). "We use a two-step, objective test, that asks whether: (1) a reasonable person in the defendant's position would have understood that he or she was free to leave; and (2) there was a restraint of freedom of movement akin to that associated with a formal arrest. For the second step, relevant factors are whether the suspect is told that he or she is free to leave, the location and atmosphere of the interrogation, the language and tone used by the law enforcement officers, whether the subject is searched or frisked, and the length of the interrogation." *Id*. (citation omitted).

Efthimiatos was not in custody at the time the relevant statements were made at the airport. A reasonable person in Efthimiatos's position would have felt free to leave, and the questioning did not bear the major hallmarks of formal arrest. At no time during the questioning did the agents tell him he was under arrest or otherwise not free to leave. They were dressed in civilian clothing, did not display their weapons, and maintained a conversational tone throughout. Efthimiatos was not physically restrained or touched at all. He moved freely to and from the vehicle in which some of the questioning occurred, and he was able to leave the car to retrieve his bags. All of these facts suggest that the interrogation was not custodial. That he was frisked and sat inside the car is insufficient to find that he was in custody. *Santillan*, 902 F.3d at 61.

Nor did Efthimiatos unambiguously invoke his right to counsel after arrest when being transported by Special Agent Hope. "If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *United States v. Plugh*, 648 F.3d 118, 123 (2d Cir. 2011) (internal quotation marks and citation omitted).

As the district court found, Efthimiatos's statement that "I, I am willing to answer questions. But I do want an, an Attorney, also," was equivocal. Special App'x at 11. When Hope asked Efthimiatos "would you prefer to have an Attorney with you before we" have a back-and-forth conversation, Efthimiatos responded, "We can have a back-and-forth conversation." Special App'x at 12. Efthimiatos thus clarified that he was willing to talk. As such, suppression of the statements made during the interrogation was not warranted. *Plugh*, 648 F.3d at 123.

Efthimiatos's final challenge is to the jury instructions, which define willful conduct as done "with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law." Special App'x at 34. Efthimiatos argues that conduct is only willful in the context of 49 U.S.C. § 46306(b)(7) if

there is subjective knowledge that the conduct is criminal, and not merely unlawful. We disagree.

While the Supreme Court has held that subjective knowledge of criminal violations is necessary for willful conduct "in two other contexts," which are the tax and currency structuring contexts, because they "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent misconduct," *Bryan v. United States*, 524 U.S. 184, 194 (1998), this is not such a case. The statutory prohibition at issue here is neither highly technical nor likely to mislead innocent individuals.

We have considered the remainder of Efthimiatos's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Vermont

UNITED STATES OF AMERICA
v.
ANGELO PETER EFTHIMIATOS

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:18-cr-049-1

USM Number: 13900-030

Craig Nolan, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
49:46306(b)(7)	Serving as an Airman without an Airman's Certificate	4/10/2018	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/11/2019
Date of Imposition of Judgment

Signature of Judge

Christina Reiss, U.S. District Judge
Name and Title of Judge

4/12/2019
Date

JUDGMENT ENTERED ON DOCKET
DATE: 4-12-2019

DEFENDANT: ANGELO PETER EFTHIMIATOS
CASE NUMBER: 2:18-cr-049-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

15 months, concurrent to the sentence imposed in the Southern District of Iowa, Docket. 3:13-cr-00015, with credit for time served.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be incarcerated at Fort Devens, camp facility, to facilitate contact with his family and minor child and to facilitate reentry back into his community.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANGELO PETER EFTHIMIATOS
CASE NUMBER: 2:18-cr-049-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

1 year

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ANGELO PETER EFTHIMIATOS
CASE NUMBER: 2:18-cr-049-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines, based on your criminal record, personal history or characteristics, that you pose a risk to another person (including an organization), the probation officer, with the prior approval of the Court, may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ANGELO PETER EFTHIMIATOS
CASE NUMBER: 2:18-cr-049-1

ADDITIONAL SUPERVISED RELEASE TERMS

You must comply with the standard conditions of supervision set forth in Part G of the presentence report. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. Section 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: ANGELO PETER EFTHIMIATOS
CASE NUMBER: 2:18-cr-049-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must ma e restitution (including community restitution) to the following payees in the amount listed below.

If the defendant ma es a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ANGELO PETER EFTHIMIATOS
CASE NUMBER: 2:18-cr-049-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 2:18-cr-49**
	)	
ANGELO PETER EFTHIMIATOS	)	

NUNC PRO TUNC ORDER PROVIDING GROUNDS FOR GRANTING DEFENDANT'S UNOPPOSED MOTION TO EXCLUDE TIME UNDER THE SPEEDY TRIAL ACT AND FOR LEAVE TO EXTEND TIME FOR PRETRIAL MOTIONS
(Doc. 21)

The court issues this Order *sua sponte* to provide the grounds for its Speedy Trial Act exclusion granted on August 17, 2018.

This matter was set for a jury trial on September 11-14, 2018. On August 15, 2018, Defendant filed an unopposed motion to continue the trial date. In seeking a continuance of the trial date, Defendant also asked for a new pretrial motions deadline which had expired on July 11, 2018. He further asked for leave to file pretrial motions, but did not seek a specific timeframe within which to do so. Defendant's counsel stated in writing that he had consulted with his client and that Defendant agreed to have the time between August 15, 2018, the date of his motion, and the new trial date excluded from computation under the Speedy Trial Act. *See* Doc. 21 at 3 (stating "Mr. Efthimiatos agrees time should be excluded under the Speedy Trial Act" and that Defendant "moves the Court for an order that [the] time between now and any new trial date be excluded from computation under the Speedy Trial Act. Such exclusion is warranted because the ends of justice outweigh the best interest of the public and the defendant in a speedy trial. Such time also would give counsel for the defendant the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.") (citations and emphasis omitted).

Each of Defendant's requests was granted in a text Order dated August 17, 2018. The court should have, but did not, require Defendant to comply with its Local Rules and submit a separate proposed Order. *See* Local Rule 16(g)(2) (requiring counsel to "submit a proposed order stating the time to be excluded and the basis for the exclusion."). In the absence of a proposed Order, the court should have drafted its own Order explaining its reasons for granting Defendant's unopposed requests. Its failure to do so was inadvertent. To rectify this error, the court now sets forth those reasons, *nunc pro tunc*.

Pursuant to 18 U.S.C. § 3161(h)(7)(A), the court finds that the ends of justice are best served by granting an extension of time and outweigh the interest of Defendant and the public in a speedy trial. Defendant's request to continue the trial so that he could file pretrial motions was a reasonable one, albeit untimely. On September 4, 2018, he asked for and obtained new counsel who chose to pursue pretrial motions as a trial strategy and to seek suppression of certain statements he made before and after his arrest. Because the court inadvertently did not set a new deadline for Defendant's pretrial motions, Defendant had until October 3, 2018, the commencement of his re-scheduled trial, to do so. *See* Fed. R. Crim. P. 12(b)(3) (listing "motions that must be made before trial[,]" including "a violation of the constitutional right to a speedy trial" and "suppression of evidence") (emphasis and capitalization omitted). Defendant did not file his suppression motion by this deadline, but instead filed it on November 21, 2018 after his trial had commenced and after a preliminary charge conference had taken place. The government submitted a prompt response on November 28, 2018 and the court held an expedited evidentiary hearing on Defendant's suppression motion on November 29, 2018. The court excused Defendant's untimely filing. Defendant's motion to suppress is currently under advisement.

It is FURTHER ORDERED that the period of delay resulting from the extension of time shall be excluded in computing the time in which the trial in this case must commence pursuant to the Speedy Trial Act and this District's Plan for Prompt Disposition of Criminal Cases. Denial of an extension of time would deny Defendant, exercising due diligence, reasonable time necessary for adequate preparation. The time

to be excluded as directed above commenced on August 17, 2018 and continued through commencement of trial on October 3, 2018.

This Order shall be temporarily sealed so that it is unavailable to the public during the pendency of Defendant's trial. The court finds that the public's interest in an unsealed Order is substantially outweighed by the need to preserve the presumption of innocence.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 3rd day of December, 2018.

Christina Reiss, District Judge
United States District Court

(1) the term ''judicial officer'' means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term ''offense'' means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2088; amended Pub. L. 98–473, title II, §§ 203(c), 223(h), Oct. 12, 1984, 98 Stat. 1985, 2029; Pub. L. 99–646, § 55(i), Nov. 10, 1986, 100 Stat. 3610; Pub. L. 103–322, title IV, § 40501, Sept. 13, 1994, 108 Stat. 1945; Pub. L. 104–294, title VI, § 607(i), Oct. 11, 1996, 110 Stat. 3512; Pub. L. 105–314, title VI, § 601, Oct. 30, 1998, 112 Stat. 2982; Pub. L. 114–22, title I, § 112, May 29, 2015, 129 Stat. 240.)

AMENDMENTS

2015—Subsec. (a)(4)(C). Pub. L. 114–22 inserted ''77,'' after ''chapter''.

1998—Subsec. (a)(4)(C). Pub. L. 105–314 added subpar. (C) and struck out former subpar. (C) which read as follows: ''any felony under chapter 109A or chapter 110; and''.

1996—Subsec. (a)(5). Pub. L. 104–294 added par. (5).

1994—Subsec. (a)(4)(C). Pub. L. 103–322 added subpar. (C).

1986—Subsec. (a). Pub. L. 99–646 substituted ''the term'' for ''The term'' in pars. (1) to (4) and struck out ''and'' after ''Congress;'' in par. (2).

1984—Subsec. (a). Pub. L. 98–473, § 203(c)(1), substituted ''3141'' for ''3146'' in provision preceding par. (1).

Subsec. (a)(1). Pub. L. 98–473, § 203(c)(2), substituted ''to detain or release'' for ''to bail or otherwise release'' and struck out ''and'' after ''District of Columbia;''.

Subsec. (a)(3), (4). Pub. L. 98–473, § 203(c)(3), (4), added pars. (3) and (4).

Subsec. (b)(1). Pub. L. 98–473, § 203(c)(5), substituted ''to detain or release'' for ''to bail or otherwise release''.

Subsec. (b)(2). Pub. L. 98–473, § 223(h), substituted ''Class B or C misdemeanor or an infraction'' for ''petty offense as defined in section 1(3) of this title''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–646 effective 30 days after Nov. 10, 1986, see section 55(j) of Pub. L. 99–646, set out as a note under section 3141 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 223(h) of Pub. L. 98–473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98–473, set out as an Effective Date note under section 3551 of this title.

CHAPTER 208—SPEEDY TRIAL

Sec.

3161. Time limits and exclusions.
3162. Sanctions.
3163. Effective dates.
3164. Persons detained or designated as being of high risk.
3165. District plans—generally.
3166. District plans—contents.
3167. Reports to Congress.
3168. Planning process.
3169. Federal Judicial Center.
3170. Speedy trial data.
3171. Planning appropriations.
3172. Definitions.
3173. Sixth amendment rights.
3174. Judicial emergency and implementation.

AMENDMENTS

1979—Pub. L. 96–43, § 11, Aug. 2, 1979, 93 Stat. 332, substituted ''Persons detained or designated as being of high risk'' for ''Interim limits'' in item 3164 and inserted ''and implementation'' in item 3174.

1975—Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2076, added chapter 208 and items 3161 to 3174.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(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.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty 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—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(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;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own

motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

(Added Pub. L. 93–619, title I, §101, Jan. 3, 1975, 88 Stat. 2076; amended Pub. L. 96–43, §§2–5, Aug. 2, 1979, 93 Stat. 327, 328; Pub. L. 98–473, title II, §1219, Oct. 12, 1984, 98 Stat. 2167; Pub. L. 100–690, title VI, §6476, Nov. 18, 1988, 102 Stat. 4380; Pub. L. 101–650, title III, §321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 110–406, §13, Oct. 13, 2008, 122 Stat. 4294.)

AMENDMENTS

2008—Subsec. (h)(1)(B) to (J). Pub. L. 110–406, §13(1), redesignated subpars. (D) to (J) as (B) to (H), respectively, and struck out former subpars. (B) and (C) which read as follows:

''(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

''(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;''.

Subsec. (h)(5) to (9). Pub. L. 110–406, §13(2), (3), redesignated pars. (6) to (9) as (5) to (8), respectively, and struck out former par. (5) which read as follows: ''Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.''

1988—Subsec. (k). Pub. L. 100–690 added subsec. (k).

1984—Subsec. (h)(8)(C). Pub. L. 98–473, §1219(1), substituted ''subparagraph (A) of this paragraph'' for ''paragraph (8)(A) of this subsection''.

Subsec. (h)(9). Pub. L. 98–473, §1219(2), added par. (9).

1979—Subsec. (c)(1). Pub. L. 96–43, §2, merged the ten day indictment-to-arraignment and the sixty day arraignment-to-trial limits into a single seventy day indictment-to-trial period.

Subsec. (c)(2). Pub. L. 96–43, §2, added par. (2).

Subsec. (d). Pub. L. 96–43, §3(a), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 96–43, §3(b), substituted ''seventy days'' for ''sixty days'' in three places and inserted provisions excluding the periods of delay enumerated in subsec. (h) of this section in computing the time limitations specified in this section and applying the sanctions of section 3162 of this title to this subsection.

Subsec. (h)(1). Pub. L. 96–43, §4, added to the listing of excludable delays, delays resulting from the deferral of prosecution under section 2902 of title 28, delays caused by consideration by the court of proposed plea agreements, and delays resulting from the transportation of a defendant from another district or for the purpose of examination or hospitalization, and expanded provisions relating to exclusions of periods of delay resulting from hearings on pretrial motions, examinations and hearings relating to the mental or physical condition of defendant, or the removal of a defendant from another district under the Federal Rules of Criminal Procedure.

Subsec. (h)(8)(B)(ii). Pub. L. 96–43, §5(a), expanded provisions authorizing the granting of continuances based on the complexity or unusual nature of a case to include delays in preparation of all phases of a case, including pretrial motion preparation.

Subsec. (h)(8)(B)(iii). Pub. L. 96–43, §5(b), inserted provision authorizing a continuance where the delay in filing the indictment is caused by the arrest taking place at such time that the return and filing of the indictment can not reasonably be expected within the period specified in section 3161(b) of this title.

Subsec. (h)(8)(B)(iv). Pub. L. 96–43, §5(c), added cl. (iv).

CHANGE OF NAME

Words ''magistrate judge'' substituted for ''magistrate'' in subsec. (c)(1) pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–473 effective 30 days after Oct. 12, 1984, see section 1220 of Pub. L. 98–473, set out as an Effective Date note under section 3505 of this title.

SHORT TITLE OF 1979 AMENDMENT

Pub. L. 96–43, §1, Aug. 2, 1979, 93 Stat. 327, provided: ''That this Act [amending this section and sections 3163 to 3168, 3170 and 3174 of this title] may be cited as the 'Speedy Trial Act Amendments Act of 1979'.''

SHORT TITLE

Pub. L. 93–619, §1, Jan. 3, 1975, 88 Stat. 2076, provided: ''That this Act [enacting this chapter and sections 3153 to 3156 of this title, and amending section 3152 of this title, and section 604 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Speedy Trial Act of 1974'.''

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice be-

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
VS	)	CASE NO: 2:18-cr-136-1 2:18-cr-49-1
ANGELO PETER EFTHIMIATOS	)	
	)	MOTION HEARING

BEFORE: HONORABLE CHRISTINA REISS
DISTRICT COURT JUDGE

APPEARANCES: EUGENIA A. COWLES, ESQUIRE
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DATE: November 29, 2018

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(The Court opened at 2:00 p.m.)

THE CLERK: Your Honor, the matter before the Court is criminal case number 18-cr-49-1 and 18-cr-136-1, United States of America versus Angelo Peter Efthimiatos. Representing the government are Assistant United States Attorneys Eugenia Cowles and Nicole Cate. The defendant is present today with his attorney Craig Nolan. And we are here for a hearing on the motions in limine doc 49, 53, 54 and 55. And the continuation of the initial appearance hearing on Rule 32.1 in docket 18cr136-1.

THE COURT: Good afternoon. I have read everything that you've filed. And I'm going to take up the motion to dismiss for speedy trial violation first. And that is document 53.

And I'm going to start, you can waive oral argument if you want and rely on your papers, but I was going to start with Mr. Nolan as to why you did not include the whole e-mail chain with your motion, including the request to set the dates in December and any response you have to the government's recitation of facts that occurred between the two of you.

I didn't take those to be settlement negotiations. They looked to me like scheduling negotiations. So I'm going to start with you and you can also address the merits of your motion.

MR. NOLAN: Sure. So I included the e-mail I thought was most pertinent. In the motion itself I was very clear that I had asked -- I had said I was not available the week of the 26th because I was supposed to be, I was scheduled for trial. That trial did not go in the northern district, but I was scheduled the 26th through the 30th, though uncertain how long that case would have taken. But that was the schedule.

And, as I said right in the motion, that nine day delay to the 5th was because of my schedule, but that that was immaterial because the delay to the 26th, which was the earliest date the Court could do it itself, was a violation of the act.

THE COURT: So let me ask you about when the deputy clerk proposed November 26th, when I guess I would say when the deputy clerk said, here's the dates we're available, you said that was perfect for you.

MR. NOLAN: So which e-mail are we looking at?

THE COURT: So I'm looking at the e-mail that you did attach, which doesn't have the request for the December dates, but she says, this is the schedule. And you say, that's perfect for me.

MR. NOLAN: I want to get the e-mail in front of me.

THE COURT: It's the e-mail from you to the deputy

clerk September 4, 2018.

MR. NOLAN: Which time? At what time? Which one are we looking at?

THE COURT: 12:02 September 4, 2018. It's part of your Exhibit B.. So she gives you the proposed trial dates and you say, perfect for me.

MR. NOLAN: 12:02. Sure. Because at that point in time the Court had been very clear the earliest the Court could do it, because of an October trial, and because of the judge's schedule, that's what was voiced to me, was November 26. I made clear I couldn't do it the week of the 26th because I was set to be in the northern district. Didn't know whether that might go over a week or not. So I had said the 5th was what I was suggesting in terms of in the window that the Court had given us. That was the earliest I felt that I could do it at any time starting November 26th or later.

And so when the deputy clerk came back to me and said 5, 6, 7, that was the earliest it could be done, that was perfect for the window that the Court set.

THE COURT: What, if anything, do you want to say about the negotiations with Miss Cowles to put off the trial?

MR. NOLAN: So, we had extensive discussions about whether we might put off jury selection or not. And they're

correctly categorized or characterized by the government. In fact, some of those communications were with the Court as well because I was keeping Kathy Carter in the loop because, after all, she was responsible for whether jurors were actually going to have to walk in the door on October 3rd. And we were getting very, very close.

We went back and forth. We considered it. My client considered it. Finally, as the government indicates, it said that it would agree to that. And we elected not to.

THE COURT: But do you agree that you elected not to when Miss Cowles told you there might be a superceding indictment involving other dates?

MR. NOLAN: Certainly she had given me that information. I can't tell you that that was the entirety of the reason. I mean, we were, at that point, faced with a difficult choice, weren't we? The government threatened at that point, was telling us, hey, if you want to exercise your rights to challenge unconstitutional acts of the government, just know the penalty you pay for that is that we're going to supercede and add charges.

THE COURT: Is that how she phrased it?

MR. NOLAN: I'm, I am happy to use her characterization of that.

THE COURT: Okay.

MR. NOLAN: But, certainly, the interpretation is,

if you want to extend that motions deadline, you know, which would require in this Court a Speedy Trial Act exclusion, you should know that we're going to supercede. And we'll go with her characterization of it. I mean, I certainly, I may or may not have notes of that, but her characterization is clearly consistent with my recollection. And, certainly, she didn't say to me, if your client wants to exercise his constitutional rights then --

THE COURT: So point to me where this is coming from? Because I hear you saying to her, I want to push back the trial for September, I've got stuff I need to do, i might want to, I need the time to prepare for a defense, would you consent to that, would you consent to an exclusion from the act for that purpose? She says to you, yes. You tell her, I'm going to be filing motions in a couple days. She says, I think that the Court will be happy with that.

Where is the threat that if you exercise your rights to a speedy trial she's going to supercede the indictment against your client?

MR. NOLAN: No. I don't think that's it. I think what, I think -- let's get to her -- let's start with her characterization of that phone conversation, which I don't dispute one bit.

And I want to find that in her papers. That's page four of the government's memo, which is document 57.

She says, during that 14 minute conversation the government agreed, again agreed not to oppose a motion to continue to allow the defense time to prepare and advised defense counsel that if the case continued the government would likely supercede the pending indictment to add additional charges related to Efthimiatos' flying without a valid airman certificate on additional days.

So she's not saying to me if you exercise, if your client exercises his right to a speedy trial we're going to penalize him. What she is saying, as what we are interpreting her statement is, if he exercises his right to ask this Court for an extension of the motions deadline in order to bring pre-trial motions of a suppression nature, which, of course, would have required, the Court wouldn't of granted it, the government wouldn't have agreed to it without a Speedy Trial Act exclusion. But if we sought the extra time for that purpose then the government would supercede because it wouldn't have to pick a jury. And so it wouldn't have to pick a jury on October 3rd, it would pick a jury on, let's say, December 4th or 5th. And so it would likely, I don't want to deviate from what she said, it would likely supercede to add charges.

THE COURT: So didn't the government consent to Mr. Barth's request for an extension of the pre-trial deadline? So he files a motion to continue the September

trial and he says, we also need additional time to file pre-trial motions. And Miss Cowles consents to that.

MR. NOLAN: I don't think this is about whether the government consents or not to a motion that the defendant was considering bringing or brought. This is simply about the clock started and stopped at different points in time.

THE COURT: Okay.

MR. NOLAN: Our count, our clock count is obviously slightly different than the government's. However, it is not materially different in the sense that we're way past day 70 at this point. And so the issue before the Court is whether in this case the normal rule applies that selecting the jury is the commencement of a trial under the Speedy Trial Act.

THE COURT: I looked at your cases. And I didn't see any case in which the Court had actually set the case for trial, sent out jury summons, was ready to go, no stop and start, defendant asked to continue the trial, filed pre-trial motions, asked for new counsel. I just didn't see those facts.

So he was given a speedy trial with no stop and start and he asked that it not go forward. He didn't ask to voir dire the jurors about 911. He didn't ask to postpone it a day. He asked for that and he was granted that.

So do any of the cases that you cite have somebody whose actually been afforded a speedy trial and asked that it be continued?

MR. NOLAN: So, I guess I don't understand the Court's question. Because as I see the procedural history this Court granted a motion to withdraw on September 4th. And at that time my client said to the Court, through Mr. Barth, and I've excerpted that, he doesn't want the clock tolled. He wants his speedy trial. You say to him, I'm going to give you your speedy trial.

THE COURT: But I'm saying, I've got a different point. And I want you to address it. I didn't see in any of those cases that the Court had set the case for trial, had juror summons, government ready, no asking for delay, defendant asked to put it off and, thereafter, the Court reschedules as quickly as it can. There's a stop and start. The defense counsel doesn't object to it. In fact, asks to put off the dates. I just didn't see that fact pattern. Am I missing something?

MR. NOLAN: I guess I'm missing where how that's analogous here. Is it, are you saying that -- what are the dates we're talking about? The only jury draw I know about is the one that was scheduled on October 3rd.

THE COURT: You certainly knew it was set for jury draw in September.

MR. NOLAN: It was September, for September 11th.

THE COURT: The summons went out. The case was ready for trial. It would have been within the Speedy Trial Act. And the defendant is the only party who said, no, I don't want to go forward on that date, I want a new attorney, I want to file pre-trial motions.

So I didn't see in the impermissible stop and start cases anything akin to that fact pattern. Do any of them have it where the Court actually afforded a speedy trial date and the defendant declined it?

MR. NOLAN: I guess we see the facts in this case very differently. So I didn't look for cases with that kind of pattern. There's no Speedy Trial Act exclusion as of the 4th or as of the 11th.

THE COURT: Well, there is in that Mr. Barth asked to continue the trial and agreed on behalf of Mr. Efthimiatos that he would exclude the time between his motion and the new trial date. That's in writing. The Court granted it on that basis.

MR. NOLAN: There is no Speedy Trial Act exclusion on September 4th or September 11th. There's just -- and the Court can't do one retroactively. The law is clear on that. But there is no -- in the interest of justice there's no new motions deadline that I see set. I just, I don't see that anywhere.

I do know that at one point my client complained about having to pick a jury for unauthorized flying of a plane on the date of September 11th for obvious reasons. I don't see anywhere in the record that there was a Speedy Trial Act exclusion.

THE COURT: So you saw Mr. Barth's motion though, and you saw the representations made in that, including the consent to the exclusion and that the Court granted it?

MR. NOLAN: I saw that. And that that occurred, I don't have the date in front of me.

THE COURT: I think it's August 17th.

MR. NOLAN: August 17th. And so the Court grants that motion, no speedy, no Speedy Trial Act exclusion. So the magic words were never written drown or said.

Then you're in court next on September 4th. This defendant is very, very clear with the Court. And the Court acknowledges.

THE COURT: Does he also want a specialized attorney in that, and that would have obviously taken a substantial amount of additional time?

MR. NOLAN: Your Honor, he can want all sorts of things. And he only gets what the Court gives him. And I won't comment on whether he was -- should have gotten one or shouldn't have gotten one. But he got stuck with me.

And, in any case, he can want a lot of things. He

can ask for a lot of things. But the reality is that on the 4th this Court recognized he didn't want a Speedy Trial Act exclusion. His counsel made clear. And then you made clear to him, hey, we're going to get this done.

THE COURT: But I think your argument is the jury draw was set within the Speedy Trial Act. Your argument is focused on the impermissible start and stop. And I'm kind of, I guess we are talking past each other. I'm hammering on you consented to that and actually asked that the dates be pushed back further. And it would be one thing if the Court had never set the case for trial. But it had set the case for trial and it was ready to go.

MR. NOLAN: It was ready to go. It certainly wasn't ready to go on September 11th because, as it turned out, Mr. Barth was taken off the case. So --

THE COURT: At the defendant's request.

MR. NOLAN: At the defendant's request. I understand.

THE COURT: And you didn't come on and say, which, of course, would be unreasonable, I'm here on September 4th, let's go forth on September 11th.

MR. NOLAN: No. I was, I was told from the get go that we were looking originally at October 2nd, which I had a conflict. I can do October 1st, 3rd, 4th, whatever. And so that was what happened. And we -- and we did it on that

day.

The law is clear that the defendant has no affirmative obligation to police the Speedy Trial Act. That obligation is on the Court and, to some extent, on the government. And when the Court says to the defendant, the earliest we can do a trial is X, the defendant doesn't have an obligation to say, woe, that would be a Speedy Trial Act, a Speedy Trial Act violation.

THE COURT: Well, it's only a speedy trial violation if the jury draw is not determined to be within the act.

MR. NOLAN: Right. It's not granted and that's, that's --

THE COURT: That's why I was trying to get to impermissible stop and start cases. I looked at your cases. I didn't see anything that approximated our facts where there was a speedy trial afforded, defendant asked for it to be continued, and defendant's counsel asked to push off the dates even further. I just didn't see that.

So that's why I keep getting back to that in terms of, you can have a recess between the jury draw and the presentation of evidence. It was consented to in this case. There was no objection raised. In fact, you told the deputy clerk it was perfect for you. And I just didn't see any case that lined up with ours that said, no, in the facts and

circumstances of this case it would be impermissible.

MR. NOLAN: So, the jury draw was set for October 3rd. That was certainly within the 70 day clock no matter whose counting it among the three entities.

The Court said, can't do earlier than November 26th. And that was the Court.

THE COURT: And you said, I want to do it after December 5th.

MR. NOLAN: And what I've said in my motion is that, that we acknowledge it was my schedule that moved it from November 26th to December 5th. And that our position is those nine days are immaterial. Just like if I had, if you had said, Craig, can you do a pick and go on October 3rd, and if I had said to you, I don't know what my schedule was at that point, but I had said to you, well, I can't do a pick and go, but, because I have another trial, but I can pick on the 3rd and come back nine days later and start that trial. I think the case law would say that's not a Speedy Trial Act violation. But those aren't the facts here.

And the facts -- the law doesn't require us to say, Judge, your, the Court's schedule of not being able to do this earlier than November 26th violates the Speedy Trial Act. We have no obligation to do that. And, in fact, we can't even complain about it until we get to day 71 through

a motion, day 71 or later. You can't file a motion early and say, oh, if we go forward on your proposed date that's a violation of the act. And I cite a case from outside the Second Circuit on that.

THE COURT: Do you think, on behalf of the defendant, you consented to the dates? Consented to the dates?

MR. NOLAN: No.

THE COURT: Okay.

MR. NOLAN: No, I don't. I, I believe that we are responsible for a delay from November 26th to December 5th. Those nine days are on us, on the defense, because I was scheduled to be in trial. But from October, whenever you find that the 70 day, 70 days was hit, sometime in early October to November 26th, we did not agree to that.

THE COURT: What about the government's argument that you waived this argument by not raising it at the jury draw and effectively waiting to the last minute to raise it?

MR. NOLAN: So the case law is very clear. The entire motion, of course, asks the question, under the act was the jury selection the commencement of trial in this case. And so you do have to file that motion before the case commences. But what the Court here has to decide is, is this trial, is it commencing, did it commence on October 3rd or is it commencing on December 5th. Or you can

even say on November 26th, since we're responsible for the delay.

And it's -- the law is very clear that we can't move to dismiss based on a Speedy Trial Act violation, that's that case I cited, before we hit 70 days. We just can't file that motion.

THE COURT: Anything else that you want to say about the motion before I turn to the government?

MR. NOLAN: Yes. I want to -- so the government cites -- we talked about the waiver issue and that Shearer out of the Sixth Circuit in 2014. You know, two month delay is not a short recess. The government cites White. I would invite the Court to actually read White. Unlike here, the defendant in White never moved to dismiss on Speedy Trial Act grounds. He only raised it on appeal. This is one paragraph in a summary order by the Court.

Unlike here, that defendant joined in a request to adjourn jury selection to a date beyond the 70 day period. Unlike, you know, and here, defendant declared to the Court on December 4th he did not want the clock tolled any further. And the Court acknowledged that and took actions in that direction.

The Court specifically scheduled the jury draw on October 3rd. So it fell within the clock as then calculated by the Court. And the defendant didn't join in a request or

assent in any way to the start and stop. The start was on October 3rd. Then there was a stop. And I think for purposes of the motion I think it would be fair to say the restart was November 26th because we're responsible for that later delay. So the government, the government's take on White is completely wrong.

And I'll just point you to Burt, which is a Second Circuit case. And it's, you know, a defendant has no obligation to take affirmative steps to ensure that he will be tried in the time length manner. It is the Court and the government that bear the affirmative obligation of ensuring the speedy prosecution of criminal charges.

I think it's a clear-cut violation. I think that the biggest decision this Court has to make is whether the dismissal is with or without prejudice. I've laid out a discussion on why I think it should be with.

THE COURT: Well, one of your points is it's really unfair to Mr. Efthimiatos because he wants to go to the Southern District of Iowa and attend to the supervised release violation. And that just seemed a little disingenuous in light of the fact that when the Court offered to have him transferred there he submitted to detention on his conditions. He's done nothing to expedite his return to the Southern District of Iowa.

And so that just kind of baffled me that he's been

prejudiced because he wants to be there and litigating his supervised release violation.

MR. NOLAN: He does want to be there. He's been held here for, at this point, nearly the high end of his advisory guideline sentence. He does want to get that over and done with. It would be unfair, should it be without prejudice, because the government, the moment you say dismissed without prejudice, Agent Hope can walk right there and place my client under arrest and spend tonight drawing up a complaint and submitting it to Magistrate Judge Conroy in the morning to have him charged on the same charge and then he would be held again. I think it would be great injustice if he were given a dismissal without prejudice. In the end it would simply reward the government. And it would be a complete penalty for Mr. --

THE COURT: What did the government do wrong in this case? You blamed it on the Court. I actually think that it's on you and your client. But what did the government do wrong? Because they didn't ask for any delays. And, in fact, it was Miss Cowles who said, can we have the trial sooner. You didn't jump in and say, yeah, let's do it sooner. You asked for it to be after December 5th.

MR. NOLAN: So, once again, the Court told us --

THE COURT: Never mind that. You just started

saying that the government shouldn't be rewarded. And maybe the Court should have made findings about when it granted Mr. Barth's exclusion. So that that's quite possible. But what did Miss Cowles and the government do that shouldn't be rewarded?

MR. NOLAN: The government is required to also police the Speedy Trial Act.

THE COURT: So what did the government do that jeopardized a speedy trial?

MR. NOLAN: It didn't say to the Court, when the Court said the earliest possible date was November 26th, it didn't say to the Court, that's a speedy trial violation.

THE COURT: But what if their legal analysis showed it was not?

MR. NOLAN: I suspect there was no legal analysis by the government at that point in time. I mean, I've been practicing criminal law federally now for about 12 years on both sides. And I will say that the Speedy Trial Act doesn't really enter into the mind of many people very often, other than the technical compliance, oh, we have to -- we have to get there. I'm not saying that this Court is any different than the Courts across the nation. But the reality is we have a name from Courts for this kind of situation. Start and stop. Why? Because we give lip service to the Speedy Trial Act by setting jury draws within

that. And sometimes we go right to trial, which is appropriate and the defense getting his speedy trial rights. And sometimes it's a week, and that's not a big deal. And sometimes we have start and stop and it goes one month, two months, two and a half months, 24 months. And so that is the reality.

I think the reality is that, yes, we're looking at it and we're thinking about it. We're saying the magic words when we're supposed to generally, but we're not actually thinking about the spirit of the Speedy Trial Act.

Had the Court done a proper exclusion in connection with Mr. Barth's motion I submit to you we would still be beyond at this point.

THE COURT: Okay. Anything further before I turn to the government?

MR. NOLAN: No, Your Honor.

THE COURT: I think your client wants to consult with you.

(Defendant conferring with Attorney Nolan off the record.)

MR. NOLAN: So I guess I would just add, based on some input from my client, that, and I think the Court is aware of this to some degree, that there was conflict between Mr. Barth and Angelo over the issue of delay and Mr. Barth wanting delays and Angelo not wanting delays.

Granted, he didn't want to pick a jury on September 11th. And I think there was some discussion about that. And there's a good reason, but --

THE COURT: So, as you know, I heard the reasons why they couldn't get along. And I had an opportunity to hear from both of them. And Mr. Efthimiatos did most of the talking about what he needed, what he wanted. And I don't recall him arguing about Mr. Barth delaying the case. He might have said that he wanted to go forward and he didn't like the way he was representing him, didn't want, didn't agree that it should be delayed. But I don't remember that being the focus of it.

MR. NOLAN: I could tell you it's apparent from my discussions from the get go that that was part of it. I mean, Angelo didn't like the fact that there was a Speedy Trial Act exclusion for a period of time to prepare motions And Mr. Barth didn't prepare those motions.

There's no reason that the motions that have been submitted as motions in limine couldn't have been brought by Mr. Barth during that time period. That didn't require any investigation.

THE COURT: So we're going to get to that in a minute. But those, as filed by you, do you agree that they are untimely? Because you didn't file pre-trial motions to suppress either?

MR. NOLAN: Would you like me to address that now?

THE COURT: No. I'm just wondering about your criticizing Mr. Barth for not filing those motions. And we're going to get to a motion, if the Court denies this motion, that says you were untimely.

MR. NOLAN: So Angelo didn't like the fact that his counsel was given, I think 90 days, whatever, I think it was 90, to file pre-trial motions and he didn't file, and Mr. Barth didn't file the pre-trial motions that I have filed. I came into the case. There was -- the scheduling order with a motions deadline was long past. It had expired in July. It had not been extended.

THE COURT: Could you have asked for it to be extended?

MR. NOLAN: Of course I could have asked for it to be extended. And, in fact, that was the crux of the discussions with the government that we referenced earlier. And the, you know, more significant discussions with my client about what did he want to do. What did he want to do with regard to making a motion to extend the motions deadline.

And so, you know, he made a decision to not seek an extension of that motion deadline. I know we'll deal with that slightly later this afternoon, but the point is we were talking about Mr. Barth and my client not authorizing

or liking the delays. After all, this Court requires attorneys whenever they want to file a motion to continue a deadline and seek a Speedy Trial Act exclusion to go to their client, consult their client and then affirmatively represent to the Court that the client knows and agrees.

THE COURT: Which is what Mr. Barth did in writing.

MR. NOLAN: I understand that. That's what the writing says. And I'm not here to argue whether that is accurate or inaccurate. I simply point out that we're talking in the context of what Angelo wanted to do. And he has been consistent with me that we engage in some discussions and some thinking and some reflection about what not seeking an extension of the motions deadline would mean, which we'll discuss later.

But just as he was clear on September 4th in this courtroom he wanted a speedy trial and he wanted to go forward. And that's where we are today.

THE COURT: All right. Let's hear from the government.

MS. COWLES: Thank you, Your Honor. I have little to add. And we'll predominately rely on the papers we filed. I would note that even according to Mr. Nolan's calculation if we didn't consider the start of the jury pick as the start of the trial, which I think the Court should,

the 70 day window would have run as of October 5th. So I'm still not sure to the answer as why he was unable to raise this speedy trial problem until this point in time.

It's the government's position, and I think it's in line with case law, that the Court appropriately set the jury draw, that that was the start of trial, that the jury selection time fell within the Speedy Trial Act. And we believe both parties were aware of it, agreed to it. And there's certainly no indication, as the defense filing certainly suggests, that this was only for the convenience of the Court.

I think with that in mind, the cases the defense cites are not relevant and that the Court has appropriately adhered to the requirements in this case.

THE COURT: The jury draw in this case was set within the speedy trial clock. Nonetheless, the defendant argues that the Court engaged in an impermissible start and stop and did so to give lip service to the Speedy Trial Act.

There might be an argument to that effect if there were not a factual background in this case that belied any suggestion that that's what occurred.

The Speedy Trial Act required this case to be set for trial commensurate with its deadlines. The Court complied with those deadlines, set the case for a jury trial on September 11th through 14th, 2018, sent out jury summons

and was ready to try the case. Two events, both solely attributable to the defendant, caused that trial date to be continued.

On August 15, 2018 the defendant filed a motion to continue the trial date because he did not want the trial to involve 911. He did not ask that the trial be postponed a day. He did not ask to voir dire the jurors with regard to the 911 concern.

In seeking a continuance of the trial date the defendant asked for a new pre-trial motions deadline and leave to file pre-trial motions. That was granted. The Court, by an oversight, did not set a firm deadline, but had the defendant filed a motion that certainly wouldn't have said it was untimely because it granted that request.

The defendant further affirmatively, and in writing through counsel, consented to an exclusion from the speedy trial clock from the date of the motion until the date of the new trial. The Court granted that, again through an oversight, didn't enter a special finding about the interest of justice, but understood that the motion was unopposed. And it was clear that that request was granted.

Thereafter, the defendant asked his attorney to withdraw. And he advised the Court that he did not have confidence in his attorney's representation and that he wanted him, wanted to represent himself.

The Court promptly held a hearing on that motion in advance of the September trial. If two motion had not go forward or be denied we could conceivably of had the trial as scheduled.

As the Court noted, the defendant asked for a specialized attorney. The Court discussed that with the defendant and determined that maybe an expert witness, but a specialized attorney was not required and appointed an attorney from the CJA Panel with experience in criminal law.

The Court confirmed that the defendant did not want to represent himself and that he understood that his new counsel would need time to prepare for trial.

That very day, on September 4, 2018, the Court assigned defendant new counsel. In doing so the Court ensured that the newly appointed attorney would be able to represent defendant if his case was quickly set for retrial.

The defendant's counsel did not request the Court to permit trial to proceed on the September 11th to 14 dates, nor would it have been reasonably to do so because that would have been only seven days to prepare for trial.

The Court set the jury draw on October 3, 2018, which was within the speedy trial clock even with the continuation of the prior trial.

The government cites e-mails with defendant's counsel that indicate that defendant's counsel wanted to

continue that date until December, had consulted with his client and anticipated filing a motion to continue for that purpose. Defendant's counsel requested the government consent to that delay. In a September 15, 2018 e-mail defendant's counsel said, as you know we're scheduled for jury draw on October 3rd and trial on December 5th through 7oth. If my client consents I would like to defer the draw until December 5th, or a date much closer to December 5th, so that my client and I have sufficient time to investigate potential motions, consider the government's offer and prepare our defense.

Jen Ruddy, the deputy clerk, tells me that she believes the Court would be agreeable. Would you stipulate to a motion to continue the draw to December 5th retaining the trail dates, set a motions deadline of December 5th and exclude time under the speedy trial clock? Defendant then stated that he had consulted with his client and anticipated consulting with him again and anticipated filing a motion to continue within days.

Against this backdrop defendant's counsel's representation that he was ready for the presentation of evidence in October is without merit. Because the Court had a case, United States versus Sheltra scheduled for trial in October, it offered a date for the presentation of evidence on November 26, 2018.

In his September 4, 2018 e-mail to the deputy clerk, defendant's counsel represented that this was perfect for him. When the government asked for the date to be sooner defendant, through counsel, did not join in that request. To the contrary, he asked that the Court not set the case in December -- in November because he had another trial scheduled for November 26th through the 30th. He affirmatively asked the Court to look for dates starting with December 5, 2018.

The e-mail chain defendant attaches to his motion to dismiss omits this request. Defendant's counsel should have attached the whole e-mail string.

The Court set the presentation of evidence on the first date defendant's counsel indicated he was available. At no time prior to filing his motion did the defendant object to the scheduled trial dates or asserted a speedy trial violation despite numerous opportunities to do so, including at the jury draw, at the Court's charge conference. To the contrary, counsel assured the Court that the dates were satisfactory.

The defendant appears to have relied on the start and stop procedure to forestal a superseding indictment. Once he was advised of the possibility of a superseding indictment defendant's counsel called the prosecutor at home to let her know that he would not be filing a motion to

continue and wanted to go forward with the scheduled trial dates.

Although the Court has an obligation to provide the defendant and the public with a speedy trial, here it did so. Defendants start and stop cases are simply inapplicable to the present facts. Those cases do not involve a defendant who is provided a speedy trial, who asks that it be continued, who agreed to an exclusion from the speedy trial clock from August 15, 2018 to the date of his new trial, who asked for new counsel, who asked for an expanded opportunity to file pre-trial motions, which was granted, and whose counsel affirmatively asked to delay the presentation of evidence. Those undisputed facts distinguish the present case from the cases cited by the defendant.

There are approximately 63 days between the jury draw and the presentation of evidence. That time period would have been shorter but for defendant's counsel's request to put off the trial. During that approximately 63 day period, defendant has had numerous court proceedings. He has not been idly waiting the Court's convenience or the clearing of its schedule. The Court has cleared its schedule several times and heard defendant's various motions on short notice with an expedited briefing schedule or without even awaiting the government's written response.

This is not a case where the Court's schedule has interfered with the defendant's right to the Court's attention.

As for prejudice, defendant has a supervised release violation pending in the Southern District of Iowa and he is subject to that district's arrest warrant. He has made no request to expedite the Southern District of Iowa proceedings. He has made no request to be transferred to that jurisdiction. Indeed, he recently submitted to detention in this case to avoid that result. It is thus ironic that he claims that he has been thwarted and prejudiced because he has not been able to address the Southern District of Iowa's supervised release violation, which involves many of the same facts involved in this case.

Finally, because of the Southern District of Iowa's arrest warrant it is unlikely that the defendant would be awaiting trial in the community. Instead, if defendant was not detained in the District of Vermont the government has advised the prosecutors in the Southern District of Iowa would seek his detention there.

In the facts and the circumstances of this case the Court finds that the trial commenced on October 3rd, within the Speedy Trial Act. That the Court acted consistent with the Speedy Trial Act with due regard to defendant's and the government's and the public's constitutional right to a speedy trial.

The defendant, either through himself or through counsel, either consented to any delay or affirmatively caused it. That the Court did not pay only lip service to the Speedy Trial Act. It did not try to game the system. And it did not seek to defeat the purpose of the act. The Court, therefore, denies defendant's motion to dismiss based on a speedy trial violation.

I'm going to take up the next motion. And we'll take up the motions in limine, but there are a number of motions that the defendant has asserted that the, that the government does not oppose, at least in its case in chief.

So I'm going to start with you Mr. Nolan for the arguments you have as to the exclusion of certain evidence, including the defendant's prior conviction, his status on supervised release, the grounds for the revocation of his airman's certificate, and then other issues which the government does not agree with, which is the status of the DEA agents, the additional flights that the defendant allegedly took. So let's start with you.

MR. NOLAN: Sure. I mean, I think we're agreed on the vast majority, at least with the government's case in chief. And I think this Court will be called upon, depending on how trial plays out, to revisit some of those issues. I don't know that there's a need for oral argument on things that we agree on. If the Court has specific

C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for the United States District Court, for the District of Vermont, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

MS. CATE: 

Anne Marie Henry, RPR
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	*	
	*	
V	*	
	*	
ANGELO PETER EFTHIMIATOS	*	CRIMINAL FILE NO. 18-49

MOTION TO WITHDRAW AS ATTORNEY
Tuesday, September 4, 2018
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA REISS
District Judge

APPEARANCES:

EUGENIA A.P. COWLES, ESQ., Assistant United States Attorney, Federal Building, Burlington, Vermont; Attorney for the United States

STEVEN L. BARTH, ESQ., Assistant Federal Public Defender, Office of the Federal Public Defender, District of Vermont, 126 College Street, Suite 410, Burlington, Vermont; Attorney for the Defendant

ANNE NICHOLS PIERCE
Registered Professional Reporter
United States District Court
Post Office Box 5633
Burlington, Vermont 05402
(802) 860-2227

TUESDAY, SEPTEMBER 4, 2018

(The following was held in open court at 10:08 a.m.)

COURTROOM DEPUTY: Your Honor, the matter before the Court is criminal case number 18-CR-49-1, United States of America versus Angelo Peter Efthimiatos. Representing the government is Assistant United States Attorney Geni Cowles. The defendant is present today with Attorney Steven Barth.

And we are here for a hearing on the motion to withdraw as attorney.

THE COURT: Good morning.

MR. BARTH: Good morning, your Honor.

THE DEFENDANT: Good morning.

THE COURT: So we have kind of two parts to this, and I was thinking I would take up the first part without the prosecutor in the courtroom, and that's whether or not Mr. Barth should be -- withdraw as counsel. If Mr. Efthimiatos decides that he wants to represent himself, I am going to have you in the courtroom because that's a very important decision -- they're all important decisions, but it doesn't have to do with trial strategy. It has to do with honoring his constitutional right but also making sure he understands what's going on.

So any problem with having it done in that two-part

fashion?

MR. BARTH: No, your Honor.

MS. COWLES: No, your Honor.

THE COURT: And you are okay with that?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. Thank you, Miss Cowles.

(Attorney Cowles exited the courtroom.)

A PORTION OF THIS TRANSCRIPT IS SEALED

BY ORDER OF THE COURT

(Attorney Cowles entered the courtroom.)

THE COURT: Miss Cowles, I am going to grant Mr. Efthimiatos new counsel, and we are going to get this going as quickly as possible in light of the potential penalties in this case. I don't want him incarcerated pretrial any longer than necessary, and so you should anticipate that as well.

We have, I believe, 31 days on the speedy trial clock, so we will be setting it promptly. Some of the dates that I was looking at is a jury draw of October 2nd, and we'll consult more, but I have got to get new counsel on board first.

All right. Anything else at this time?

MR. BARTH: Your Honor, I had filed motions to toll the speedy trial clock in conjunction with a request to move the trial date from September 11th.

Since that time, Mr. Efthimiatos has told me he does not want the speedy trial clock tolled, and I just asked him now to confirm that, and he confirmed it. So I thought it important that the Court know that.

THE COURT: So what I will do is I will grant your motion to move it from September 11th, because it's not going to happen now. That will take that off the speedy trial clock. I am going to grant your motion to withdraw as of today. New counsel will come on board.

So, Mr. Efthimiatos, any time a motion is filed, it tolls the clock. So if you ask for new counsel or your new counsel says, "I need more time to get up to speed" or "I want to file pretrial motions," every time that happens, the clock is tolled. That's just automatic. There's no getting away from it. But by granting these motions today, at least it won't be any further time on the clock.

Does that work for everyone?

MR. BARTH: Correct. In other words, the clock would begin ticking again today.

THE COURT: It would.

MR. BARTH: Very well. Thank you, your Honor.

THE COURT: And no surprises. Your new counsel is going to want time. They won't be doing their job if they don't ask for it, so you should

anticipate that. Okay?

THE DEFENDANT: Okay. Can I have these two letters handed over to you?

THE COURT: You -- right now, you are technically without an attorney. You want to tell me what the documents are entitled so we have it on the record?

THE DEFENDANT: I do not have titles on these documents here. They're just two -- some letters that I wrote you.

THE COURT: Okay. I'm going to ask that you hold off on it and talk to your new attorney about it, because you're technically in this limbo state, and I don't want you to do anything that would prejudice your rights.

At some point you and I, if we -- if you are convicted, we are going to be talking a lot. So don't worry, just like I did today, I am going to let you tell me anything that you want to tell me.

So our next event will be reappointing counsel, and then we are going to go for a jury draw date promptly, so be prepared.

All right. Anything further?

MR. BARTH: No, your Honor.

MS. COWLES: No, your Honor.

THE COURT: Thank you.

THE DEFENDANT: Thank you.

(Court was in recess at 10:43 a.m.)

*** ** ***

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

October 11, 2018
Date

Anne Nichols Pierce

From: Jennifer_Ruddy@vtd.uscourts.gov
To: Cowles, Eugenia (USAVT)
Cc: Craig S. Nolan; Donna M. Sims
Subject: RE: New Criminal Case?
Date: Tuesday, September 04, 2018 1:35:31 PM

Hi Geni,

Thanks. I will let the judge know the proposed trial dates and about the request for alternates. I'll get back to you both if she thinks we should change anything about our plan. I'll docket the Jury Draw notice once Craig is officially on the docket (which should be this afternoon).

Jen

U.S. DISTRICT COURT- DISTRICT OF VERMONT
Jennifer Ruddy
Courtroom Deputy
Chief Judge Christina Reiss
Tel: (802) 951-8127
http://www.vtd.uscourts.gov

From: "Cowles, Eugenia (USAVT)" <Eugenia.Cowles@usdoj.gov>
To: "Craig S. Nolan" <cnolan@sheeheyvt.com>, "'Jennifer_Ruddy@vtd.uscourts.gov'" <Jennifer_Ruddy@vtd.uscourts.gov>
Cc: "Donna M. Sims" <dsims@sheeheyvt.com>
Date: 09/04/2018 12:52 PM
Subject: RE: New Criminal Case?

Those dates look fine for me. I have reentry court with Judge Conroy the morning of 10/3, but can arrange for coverage if the judge needs us before 11.

Can we ask for some extra alternates for the jury given the delay between jury selection (10/3) and trial 12/5?

Geni

From: Craig S. Nolan <cnolan@sheeheyvt.com>
Sent: Tuesday, September 4, 2018 12:02 PM
To: 'Jennifer_Ruddy@vtd.uscourts.gov' <Jennifer_Ruddy@vtd.uscourts.gov>
Cc: Donna M. Sims <dsims@sheeheyvt.com>; Cowles, Eugenia (USAVT) <ECowles@usa.doj.gov>
Subject: RE: New Criminal Case?

Perfect for me.

Craig S. Nolan
SHEEHEY FURLONG & BEHM P.C.
30 Main Street, 6th Floor
PO Box 66

(802) 345-6775 (mobile)
cnolan@sheeheyvt.com
www.sheeheyvt.com

From: Jennifer_Ruddy@vtd.uscourts.gov <Jennifer_Ruddy@vtd.uscourts.gov>
Sent: Tuesday, September 04, 2018 11:56 AM
To: Craig S. Nolan <cnolan@sheeheyvt.com>; Eugenia (Genie) Cowles <Eugenia.Cowles@usdoj.gov>
Cc: Donna M. Sims <dsims@sheeheyvt.com>
Subject: RE: New Criminal Case?

Hi Craig,

Thanks so much. The judge is fine if we hold a draw on Wednesday, October 3. Geni, does that work for you? As far as potential trial dates--we'd have to look at November 26 as the trial start date. That's the earliest we could fit this in given another trial in October and the judge's schedule.

Jen

U.S. DISTRICT COURT- DISTRICT OF VERMONT
Jennifer Ruddy
Courtroom Deputy
Chief Judge Christina Reiss
Tel: (802) 951-8127
http://www.vtd.uscourts.gov

From: "Craig S. Nolan" <cnolan@sheeheyvt.com>
To: "'Jennifer_Ruddy@vtd.uscourts.gov'" <Jennifer_Ruddy@vtd.uscourts.gov>
Cc: "Donna M. Sims" <dsims@sheeheyvt.com>
Date: 09/04/2018 11:46 AM
Subject: RE: New Criminal Case?

Jen, I would be pleased to represent Mr. Efthimiatos. We have no conflicts. As you and I discussed, I am not available for a jury draw on October 2, but can be available October 1 (until my 2:30 pm sentencing before WKS), October 3 and October 4.

Craig S. Nolan
SHEEHEY FURLONG & BEHM P.C.
30 Main Street, 6th Floor
PO Box 66
Burlington, VT 05402-0066
(802) 864-9891 (voice)

From: Jennifer_Ruddy@vtd.uscourts.gov <Jennifer_Ruddy@vtd.uscourts.gov>
Sent: Tuesday, September 04, 2018 11:21 AM
To: Craig S. Nolan <cnolan@sheeheyvt.com>
Subject: New Criminal Case?

Hi Craig,

Wondering if you're able to take over a criminal case? Docket is: 18-cr-049. US v. Angelo Peter Efthimiatos. Pending count is as follows:

49:46306(b)(7).F REGISTRATION VIOLATIONS NON-AIR TRANSPORTATION AIRCRAFT- knowingly piloted an aircraft without an airman's certificate (1)

He's got 31 days left on speedy trial. At this point, it appears that he wants to head to trial. We had a prior Jury Draw date in this case of 9/11. Jury Draw/Trial were continued (you can see why 9/11 would not have been a good date to hold Jury Draw in this case given his pending charge). Steven Barth then filed his motion to wd as counsel. That motion was granted today.

Jen

U.S. DISTRICT COURT- DISTRICT OF VERMONT
Jennifer Ruddy
Courtroom Deputy
Chief Judge Christina Reiss
Tel: (802) 951-8127
http://www.vtd.uscourts.gov

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	Case No. 19-1023
v.	)	
	)	March 23, 2020
ANGELO PETER EFTHIMIATOS, Defendant-Appellant.	)	

Telephonic Oral Argument

Before The Honorable Rosemary S. Pooler, Circuit Judge
The Honorable Dennis Jacobs, Circuit Judge and
The Honorable Brenda K. Sannes, District Judge

APPEARANCES:

AUSA Eugenia A.P. Cowles, Attorney for the Government
Heather E. Ross, Esq., Attorney for Defendant-Appellant

Janice D. Badeau
AAERT Certified Electronic Transcriber (CET**D-665)
17 Beacon Street
Barre Vermont 05641
janicedbadeau@yahoo.com
(802)476-6281

March 23, 2020

(Recording commenced)

JUDGE POOLER: The first case on the calendar is *United States v. Efthimiatos*. I will hear counsel for appearances.

MS. ROSS: Heather Ross representing Angelo Efthimiatos.

MS. COWLES: Good morning, Your Honor. This is Eugenia Cowles from the District of Vermont for appellee, the United States.

JUDGE POOLER: Thank you. We'll hear from appellant.

MS. ROSS: Thank you, Your Honor. May it please the Court, I am representing Mr. Efthimiatos in this matter and the essence of the matter before the Court this morning to which I'm going to devote my time is the violation of the Speedy Trial Act in this case. We have other arguments submitted in our brief. If the Court has questions about those remaining arguments, I would be happy to answer those, but will devote most of my time to the Speedy Trial Act violation.

In this case, because the Speedy Trial Act was violated, the case should be dismissed with prejudice.

In this case, the jury draw should not be considered the commencement of the case, because there

was an impermissible start and stop plan enacted by the district court. In this particular case, the district court recognized on September 4th that there were thirty-one days left on the speedy trial clock. The district court enacted a plan to set a jury draw on October 3rd in order to be within the time frame of the speedy trial clock and, at the same time, the court advised the parties that the earliest the presentation of evidence could commence, due to the court's schedule, was fifty-four days after that jury draw and fifty-two days after the speedy trial clock otherwise expired. This delay between the jury draw and the presentation of evidence is an impermissible start and stop plan.

JUDGE POOLER: Counsel, didn't the defendant get new counsel in this period?

MS. ROSS: The defendant requested and was granted new counsel on September 4th. At that hearing on September 4th, the -- when the Court granted the defendant's motion for new counsel, the defendant, nonetheless, made clear to the Court that, despite his request, he was not agreeing to toll time on the speedy trial clock. The Court acknowledged that the defendant was not agreeing to that and agreed not to exclude time. The defense counsel clarified, in other words, the clock would begin ticking again today, meaning September 4th.

The court responded it would. At no point in time, did the defendant's new counsel request an exclusion of time under the Speedy Trial Act for preparation or other purposes.

JUDGE POOLER: But didn't the new counsel make some motions during that period?

MS. ROSS: So the new counsel did file a motion in limine on November 21st; however, by that point in time, the speedy trial clock had long expired. So the motion at that point in time does nothing to toll the clock, because it is already exhausted at that point.

This was a one-day, maybe one-and-a-half-day trial, so it was, by no means, a lengthy or complicated trial and, as stated, defense counsel -- neither defense counsel nor defendant at any time requested an exclusion from the speedy trial clock. And, in fact, the court, on September 4th, ordered that there would be no such exclusion from that point forward. The --

JUDGE POOLER: Counsel, you're familiar with *United States v. Patton*, a Second Circuit case?

MS. ROSS: Your Honor, I am not sure off the top of my head if I am familiar with *Unites States v. Patton*.

JUDGE POOLER: Well, it stands for the principle that he has to make his motion before the trial

begins.

MS. ROSS: Yes, Your Honor, so I am certainly familiar with that concept that the defendant is to make his motion before the trial begins. In this case, the defense was constrained by the -- by the other principle that the defendant is not to make its motion to dismiss the indictment for Speedy Trial Act purposes until the speedy trial clock has expired. So here, at the time of the jury draw, it had not expired. The clock expired between the time of the jury draw and the presentation of evidence; thus, the motion in this case was timely made, given the constraint that it must be filed after the clock has expired.

Now, in this particular case, the court set forth a plan, an intention, knowing what the speedy trial clock was, to have this period of delay. And the reasoning for the period of delay between the jury draw and the presentation of evidence was the court's own schedule. That is not a sufficient reason.

In addition, after the defendant made his motion to dismiss the indictment for the speedy trial act violation on November 21st, the court attempted to justify the violation with a nunc pro tunc order excluding time between September 4th and October 3rd from the speedy trial clock. However, that retroactive

attempt to justify the violation should not be allowed in accordance with this Court's law that prohibits an ends of justice retrospective application for precisely these reasons. What controls should be the court's September 4th order which said that the court would not be excluding time from that point forward.

The issue of the violation then becomes whether the Court, once there is a violation, should dismiss the case with or without prejudice. And we submit that the statutory factors enable this Court to determine that the dismissal should be with prejudice in the first instance. For example, most importantly, in looking at the seriousness of the offense, here, we're talking about an airman flying without a license. There's no evidence that he was engaged in smuggling contraband as part of this offense. There is no evidence that the reason he didn't have a license had anything to do with his ability to fly safely. This offense, clearly, seems to be at the less serious end on the spectrum of offenses; not a crime of violence.

JUDGE POOLER: Although it was a violation of his supervised released from Iowa, wasn't it?

MS. ROSS: It was, yes, Your Honor, a violation of his supervised release from Iowa. Again, however, in contrast to the kinds of offenses which this Court has

found to be serious, it is really at the low end of the spectrum. This Court, understandably, has been concerned about firearms offenses, drug trafficking offenses, things where, as this Court said in *Bert*, it was a life-threatening offense; use of firearms.

JUDGE POOLER: Counsel, I think your time has expired. Have you reserved any time for rebuttal?

MS. ROSS: I have, Your Honor. I've reserved two minutes, thank you.

JUDGE POOLER: Okay, so we'll turn to the Government. Thank you.

MS. COWLES: Thank you, Your Honor. Again, this is Eugenia Cowles from the District of Vermont appearing for the United States.

May it please the Court, Your Honor, I'll begin also with the speedy trial issue. In this case, Defendant Efthimiatos received a speedy trial. No matter how the clock is calculated and whether or not the Court's continuance, which was granted in August of that year, is given credit. Jury selection on October 3rd happened before the expiration of the speedy trial period. As this Court has recognized, that is the beginning of the trial and it fell within the Speedy Trial Act.

Now, the defense challenges this case, claiming

that the delay between jury selection and the start of evidence created an impermissible stop and start plan that, itself, results in a violation. But Your Honor, that doesn't -- or, Your Honors, that does not look at the actual time frames and the structuring of this case. The actual time frame between the expiration of the true period, if we were to exclude the jury draw day, was only eight days. That's well within the time frame for a stop and start that this Court has approved before.

JUDGE SANNES: Counsel, I have a question about your calculation of the Speedy Trial Act. In your brief, you originally say there was thirty-four days left on the clock on September 4th. And then later, you say there was thirty-four days left on the clock on October 3rd. Isn't the first statement correct, so that your calculation of the -- the discrepancy between your calculation and the defense's calculation is a result of that mistake?

MS. COWLES: Well, Your Honor, I think that the issue is whether anything changed at that September 4th hearing. It's the Government's position, and I think it's supported by the docket entries in this case, that a continuance of the Speedy Trial Act was issued in August. Before that September hearing, defense had moved to continue the trial date from September 11th for the

reasons of having additional time to prepare, and the court granted that motion. Now, there was no formal order entered. The court requested an order that was not submitted by defense counsel, presumably, because of the change in counsel at that time. But at the time the parties appeared on September 4th, that continuance from the August grant of the motion to the day of the jury draw was already in place. So I think the correct position would be that the same number of days existed on the speedy trial clock at the time of the September 4th hearing as remained at the time of the jury draw. That's where we're getting that thirty-four number from.

JUDGE SANNES: I see.

MS. COWLES: However --

JUDGE SANNES: And so that is -- that is assuming the nunc pro tunc order is effective also?

MS. COWLES: It does, Your Honor, but the Government would also suggest that the validity of that August 17th order does not turn only on the nunc pro tunc explanation. I believe the case law says that it's important that findings are made by the court before the time of a motion to dismiss. And in this -- I apologize, Your Honor. Go ahead.

JUDGE JACOBS: Suppose it did turn upon whether a nunc pro tunc order is effective, then what?

MS. COWLES: Well, we would certainly say that the nunc pro tunc order should be considered effective because, in this case, it is truly a memorialization of the reasoning of the court rather than, as the defense describes it, a retrospective grant or explanation.

JUDGE JACOBS: What does it mean -- I'm sorry, but what did it mean when it looks like, on September 4, the court said the clock would begin -- the -- the -- I'm sorry, the defendant's lawyer said the clock would begin ticking again today and the court seemed to agree on that.

MS. COWLES: That's correct, Your Honor. And I think there's some confusion there and it's important to look at the context. First, what we have is the court agreeing to a statement from the defense. It's not the court's words that the clock begins ticking; the defense proposes that and the judge says yes. In light of the fact that a continuance had already been granted, I think the most logical way to understand it is that the court is agreeing no additional time would come off the clock because of the order she made that day to replace counsel. So the existing exclusion remains in place, any other time does not come off the clock and the clock would start running. I think that is borne out both by the later explanation in the nunc pro tunc order, but

also, if we look at how the court interacted with the defense on November 29th during that hearing, the court specifically asked the defense if it understands that, when the original attorney filed a motion to continue, that it was granted. And, at that time, Mr. Efthimiatos' trial counsel agreed; yes, he understood that there had been a motion that was granted and explains his challenge is simply that the order was not sufficiently fulsome.

So I think if we look at what happened on September 4th in the context of how the parties discussed it thereafter, while the wording is, obviously, less than ideal, I think it appears that what the court meant to communicate to the defense is that there would be no further continuances. Not that somehow, by making a comment in court, she was undoing the previously granted continuance.

JUDGE SANNES: I have one other question about the calculation of the Speedy Trial Act. Both counsel assume that the Speedy Trial Act calculation starts with the date of the indictment, but the statute says the later of the indictment or "the date the defendant has appeared before a judicial officer of the court in which such charge is pending." Here, there was an arraignment on May 4th and the defendant signed a waiver of arraignment. I believe there's case law, not in this

circuit, but outside this circuit, treating a waiver of arraignment as tantamount to a first appearance. Is it the Government's position that the Speedy Trial Act time starts from the indictment when a defendant doesn't personally appear for the arraignment by virtue of a waiver of arraignment?

MS. COWLES: No, Your Honor. I think we would agree that the arraignment could be the period considered. In this case, although there was a change in the provision of the statute between the complaint and the indictment, because there had been a complaint prior to this indictment on which the defendant had appeared, that is why the Government started with the indictment date as the start of the speedy trial clock. But --

JUDGE SANNES: And I'm not following that. What are you -- why -- what statutory provision are you relying on to track the complaint, as opposed to the indictment?

MS. COWLES: I believe we're looking at the Speedy Trial Act provision saying it runs from the first appearance on the charge or the indictment. Since the defendant had appeared on what was, essentially, the same charge, a different subsection, but, essentially, the same charge, we started from the date of indictment. Your Honor could be correct that that's actually an error

in the defense's favor in this case and the clock should have started with the arraignment time.

JUDGE SANNES: And what are we to make of the defendant's argument that the real reason for the delay here was court congestion with the emails from the courtroom deputy saying that the earliest the court could try this case would be November 26th?

MS. COWLES: Well, I think there are two factors at play, Your Honor. I think there's no question that the court did have another trial scheduled and that's part of why the court was looking at the December time frame. But I think the record also shows the court had great concern, initially expressed during the September 4th hearing, about the amount of time necessary for a defense attorney to be ready for trial. While I agree that the case law would suggest, if the continuance were only for the benefit of the court calendar, that would not be sufficient. But I think, here, the underlying reason supporting -- supporting the time frame allowed in this case was preparation of the defense. And that's really borne out, as I think Judge Jacobs alluded to in his question, by how the time was used between voir dire and the start of evidence. The defense files motions for release from custody. There were -- there was, ultimately, what was, in fact, a suppression motion

that even defense counsel admitted could have been filed, with no investigation, much earlier in the case, that was filed during that time period.

So many of the things we would think would normally be part of pre-trial preparation actually took place during this window that the court had allowed, essentially, in a compromise, by allowing the trial to start, keeping the defendant satisfied that things were moving promptly, while still giving counsel time to prepare and file necessary motions.

And Your Honors, I apologize, but I believe I am close to the end of my time, unless there are further questions.

JUDGE JACOBS: None from me.

JUDGE POOLER: Thank you very much. We'll turn to counsel for appellant who has two minutes reserved. Counsel? Counsel?

MS. ROSS: My apologies, Your Honors. I realize that I started talking and was still on mute.

So the record does reflect at J.A. 33 that, in fact, on September 4th, defense counsel went out of his way to clarify that the clock would, in fact, begin ticking that day, because the court's initial response was unclear as to what she intended. Therefore, defense counsel asked, in other words, the clock would begin

ticking again today. The court responded it would.

So the record is clear that, on September 4th, the court amended her order, if one, in fact, existed prior to that, to exclude time, which there's nothing on the record suggesting it. But if one had existed, she amended that effective September 4th and clearly stated the time would begin ticking again that day.

Furthermore, though the defense counsel -- new defense counsel, of course, vigorously defended the defendant right up until the time of presentation of the evidence, he, at no time, requested time to -- an exclusion under the Speedy Trial Act for that defense and it is not fair to ascribe that to him.

JUDGE SANNES: And counsel, prior to the jury draw on October 3rd, if the defense knew that the court had -- the defense did know that the court had set trial to start sixty-three days later, if the defense believed that, absent Speedy Trial Act findings, this violated the Speedy Trial Act, why didn't the defense alert the court to this issue?

MS. ROSS: Your Honor, I think the Second Circuit case law is clear that it is not the job of the defendant to alert the court to this issue. It is not the job of the defendant to police this issue. It is the job of the court to police this issue and the prosecutors

to police this issue. It is not the defendant's responsibility and they have no affirmative obligation to do so.

JUDGE SANNES: And what are we to make of the emails in the record that when the courtroom deputy suggests the date, November 26th, defense counsel says, perfect for me?

MS. ROSS: Defense counsel explains that in the record and it's really self-explanatory. Perfect for me, meaning that it suited his availability from that perspective. But the defense counsel's availability does not end or resolve the inquiry for an ends of justice exclusion of time.

JUDGE JACOBS: How long would you figure it could be reasonable to toll the clock for the ends of justice with the appointment of new counsel before a criminal trial?

MS. ROSS: Your Honor, for --

JUDGE JACOBS: Zero -- because I think you're arguing for zero extension, which is, you know, it's quite a job to get ready in no time for a criminal trial.

MS. ROSS: Your Honor, what we're arguing for is that this Court has made clear that, in prior precedent, in *Fox*, for example, that a six-day, a seven-day, an eleven-day, perhaps even a twenty-eight-day time

frame between jury draw and the presentation of evidence would not be an impermissible start and stop plan. Any of those periods of time would have been sufficient for defense counsel to prepare for what is really a day-, day-and-a-half-long trial on just not a particularly complicated matter. In fact, defense counsel made absolutely no objection to proceeding to jury draw in early October.

JUDGE JACOBS: Thank you.

MS. ROSS: I do believe that my time is up, so unless the Court has further questions, I will conclude with our request that a motion to dismiss the indictment be granted with prejudice.

JUDGE POOLER: Thank you, counsel. Thank you both. We will reserve decision.

(Recording concluded)

CERTIFICATE

I, Janice D. Badeau, do hereby certify that the foregoing is a true and accurate transcription, to the best of my ability, from an electronic sound recording in the above-entitled matter.

June 25, 2020

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Janice D. Badeau DATE

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