NO. 19-8898

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: December 9, 2020

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This case involves a challenge to the district court's start-and-stop maneuvering to comply with the Speedy Trial Act (the "Act"). The government concedes that when the district court set its bifurcated schedule, it was aware that limited time remained on the speedy trial clock, knew that the court's calendar would not allow presentation of evidence until more than two months after the clock expired, and elected to achieve compliance with the Act by implementing a start-and-stop plan. Opp. 6. Nonetheless, the government attempts to recharacterize this case as a factual dispute by parroting the district court's post-hoc rationalization for excluding time. Opp. 12. This attempt should be rejected, as it runs afoul of the undisputed facts, the Speedy Trial Act, and *Zedner v. United States*, 547 U.S. 489 (2006).

What is relevant is what was known to the district court at the time it engaged in start-and-stop maneuvering to manage its own calendaring issues, not what was known or assumed by the district court at some later time, when, in response to a challenge under the Act, it decided the defense must have needed more time to prepare its case, despite the absence of such a request from the defense.

Tellingly, the government gives short shrift to the circuit courts' inconsistent policing of start-and-stop planning. Opp. 15–18. Although the federal circuit courts generally 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," *United States v.*

Brown, 819 F.3d 800, 810 (6th Cir. 2016) (citations omitted), the circuit courts do not regulate the practice uniformly. There are disparities in their approach to determining whether the spirit of the Act has been evaded, what constitutes an acceptable justification for delay, and how much delay between jury selection and presentation of evidence is acceptable under the Act. *See* Pet. 18–22.

Uniform application of the Speedy Trial Act is essential because the Act (1) serves "great practical administrative importance in the daily working lives of busy trial judges," *United States v. Tinklenberg*, 563 U.S. 647, 657 (2011), and (2) "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 (1985) (citations omitted).

The Court should reject the government's position and grant the petition for three reasons.

First, the decision of the Second Circuit, in determining whether the district court's bifurcated scheduling was meant to evade the spirit of the Act, conflicts with the Sixth and Tenth Circuits' rulings that delays to accommodate the district court's calendar violate the plain language of the Act. Given that the Act specifically prohibits court congestion as a basis for tolling the speedy trial clock, district courts should not be allowed to end-run the Act by using a start-and-stop plan to manage the court's calendar.

Second, the Second Circuit effectively held that district courts may examine the record after a violation has occurred to find justification—in this case, counsel's alleged need to prepare for trial—for failing to bring a defendant to trial within the 70-day clock. This is precisely the type of post-hoc rationalization that is forbidden by *Zedner* and other circuit courts in determining compliance with the Act.

Finally, the government's attempt to assert that Petitioner is judicially estopped from bringing a Speedy Trial Act challenge should be rejected because it was not raised by the government below. Moreover, the government falls far short of showing that the elements of judicial estoppel have been met. This argument is simply another attempt to put the burden on Petitioner for policing the Speedy Trial Act, contrary to well-established law. Defendants have no obligation to take affirmative steps to insure they are tried in a timely manner. "It is the court and the government that bear the affirmative obligation of insuring the speedy prosecution of criminal charges." *United States v. Bert*, 814 F.3d 70, 82 (2d Cir. 2016).

I. The Petition Presents A Legal Question That Demands This Court's Review Given The Lack of Uniformity Among The Circuit Courts.

Contrary to the government's claim, the issue before the Court is a legal one. The relevant facts are undisputed, and the Court need look no further than the government's brief to identify the Speedy Trial Act violation that is at the heart of the petition. The Court must decide if and to what extent the Speedy Trial Act allows district courts to commence trial within the parameters of the Act but delay the presentation of evidence beyond the Act's 70-day clock due to the court's own calendaring issues.

On September 4, 2018, the district court held a hearing and granted counsel's motion to withdraw. Opp. 6-7. At that time, 39 days had expired on the speedy trial clock.[1] Petitioner's former counsel raised with the district court that Petitioner was not willing to agree to a Speedy Trial Act exclusion of time and wished to assert his rights to a speedy trial. As Petitioner's former counsel explained, 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. Opp. 6.

In response, the district court granted Petitioner's motion to move the trial from September 11 and ruled that it would not exclude any further time on the clock. *Id.*; App. 55a (specifically acknowledging the "clock would begin ticking again today"). The court noted that there were 31 days on the speedy trial clock and, therefore, the court would schedule trial "promptly." *Id.*; App. 54a.

At the September 4 hearing, the district court advised Petitioner that his new attorney was "going to want time" to prepare for trial and would not "be doing [his]

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[1] After 36 days had expired on the speedy trial clock, the clock stopped on August 15, 2018 when Petitioner filed an unopposed motion to continue the trial date. Opp. 4. Petitioner argued that beginning trial involving an unlicensed piloting of an aircraft on September 11 would be unduly prejudicial. *Id.* at 4–5. Petitioner requested additional time to file pretrial motions and asked for the time between August 15 and any new trial date be excluded from the Act. *Id.* at 5. The district court granted the motion to continue the trial on August 17, 2018 but did not issue an ends-of-justice exclusion from the Speedy Trial Act. 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. *Id.* at 6. Below the government and the Petitioner disagreed whether the time between August 17 and August 21, 2018 should be excluded from the clock. Given that the district court stated on September 4, 2018 that it calculated only 31 days left on the speedy trial clock, the district court appears to have agreed with the Petitioner at that point in time. However, this issue is not material because assuming *arguendo* that such time was properly excluded, the outcome would be no different: the presentation of evidence took place well outside the 70-day time limit under either calculation.

job if" he did not "ask for it." Opp. 6; App. 55a. However, as the government's brief acknowledges, defense counsel never moved for a continuance, let alone a continuance to facilitate additional preparation time. *See* Opp. 7–11.

Later on September 4, the district court set jury selection to begin on October 3 but delayed the presentation of evidence until November 26 "given another trial in October and the judge's schedule." *Id.* at 7 (citing App. 59a). In response to the court's inquiry, new defense counsel stated that he could be available October 1, 3 or 4 for jury draw. *Id.* (citing JA 214). Having noted that there were only 31 days left on the speedy trial clock, the court responded to the parties confirming October 3 for jury draw and stating 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.* 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. Opp. 7. The court scheduled a two-day trial to begin on December 5, 2018, and defense counsel stated that date worked "perfect" for him, plainly meaning he had no existing conflicts on that date. *Id.*

At that point, the Speedy Trial Act was violated.[2] On September 4, the district court assured Petitioner that the speedy trial clock would start running as Petitioner requested, and simultaneously decided that to comply with the Act it would hold jury

[2] Notwithstanding that the Act was violated on September 4, Petitioner had to wait until the violation occurred in order to file his motion to dismiss. *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)").

draw on October 3 but delay the presentation of evidence until November 26 due to the court's calendar. It is irrelevant that on September 15 defense counsel had informal discussions with the government about continuing the trial date, which the district court only learned about much later. Indeed, after such discussions, defense counsel made the decision *not* to seek a continuance. It is also irrelevant that defense counsel filed pretrial motions in November 2018. At the time the bifurcated schedule was set by the district court, the reason for setting trial to begin on the 68th day of the speedy trial clock and postponing the presentation of evidence for over two months was to "technically" comply with the Act while accommodating the district court's calendar.

After Petitioner moved to dismiss the indictment in November 2018 for Speedy Trial Act violations, the district court scoured the record in an attempt to salvage its error and summarily concluded that the delay was permissible because defense counsel needed time to prepare. The Second Circuit affirmed, finding that the court's proposed delay from October 3 to November 26 was not impermissibly lengthy and accepting the district court's effort to mop up excessive delay with the benefit of hindsight. The Second Circuit's decision is contrary to the structure of the Speedy Trial Act, *Zedner v. United States*, and decisions of the Sixth and Tenth Circuits forbidding start-and-stop planning to accommodate the district court's calendar.

Section 3161(h) of the Act contains a list of reasons for 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). However, the Act specifically proscribes excluding delay caused by "general congestion of the court's calendar," 18 U.S.C. § 3161(h)(7)(C).

In this case, when the district court scheduled the presentation of evidence to begin nine weeks after jury selection, the court lacked a statutory basis to delay trial. *See* 18 U.S.C. § 3161(h)(7)(C); *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986) (holding start-and-stop planning impermissible to address the "congested court calendar" and "the press of a judge's other business"); *United States v. Crane*, 776 F.2d 600, 605 (6th Cir. 1985) (holding the district court's ends-of-justice continuance to correct start-and-stop planning inoperable because "the judge's absence is not a proper reason for an ends of justice continuance").

II. The District Court's Actions Evade The Spirit Of The Act.

The district court could not remedy the error by finding permissible reasons for delay after the violation occurred. *See* Pet. 30 (collecting cases). The government does not dispute that the district court relied on several events that occurred *after* the district court's start-and-stop planning to justify the delay, including defense counsel's informal discussions with the government on September 15 and the motion to suppress filed on November 21, 2018. *See* Opp. at 10–11; App. 45a–49a. However, these considerations could not have been in the district court's mind when the trial

schedule was set. *Zedner*, 547 U.S. at 506–507 ("the Act is clear that the findings must be made, if only in the judge's mind, *before granting the continuance*") (emphasis added).

In its Opposition, the government fails to address the undisputed fact that on September 4, the district court allowed Petitioner to withdraw his request for the ends-of-justice exclusion made on August 15 and assured him that the speedy trial clock would start running again that day. When faced with a challenge under the Act, the district court reversed course and entered a belated ends-of-justice exclusion. As the Sixth Circuit explained in *United States v. Richmond*,

> If the judge gives no indication that a continuance was granted upon a balancing of the factors specified by the Speedy Trial Act until asked to dismiss the indictment for violation of the Act, the danger is great that every continuance will be converted retroactively into a continuance creating excludable time, which is clearly not the intent of the Act.

735 F.2d 208, 216 (6th Cir. 1984). Here the district court's retroactive ends-of-justice exclusion plainly evaded the intent of the Act.

Finally, contrary to the government's argument, the district court's *Nunc Pro Tunc* Order is within the scope of the question presented. Opp. 19–20. Petitioner challenged the *Nunc Pro Tunc* Order before the Second Circuit. *See* Cir. Ct. Doc. No. 20 at 15; Cir. Ct. Doc. No. 44 at 4–6. Moreover, the Court does not need to examine the validity of the *Nunc Pro Tunc* Order to answer the question presented because the *Nunc Pro Tunc* Order relies on the same after the fact justifications for delay as the district court's decision denying Petitioner's motion to dismiss. *Compare* App. 13a–14a (excluding time between August 17, 2018 and October 3, 2018, citing

Petitioner's November 2018 motions practice), *with* App. 45a–49a (relying on defense counsel's September 15 discussion with the government and Petitioner's motions *in limine* to justify pretrial delay).

III. Petitioner Has Not Taken Inconsistent Positions; To The Contrary, He Consistently Asserted His Speedy Trial Rights.

The government argues for the first time that Petitioner is estopped from challenging the district court's start-and-stop maneuvering because defense counsel informed the district court on September 4 that the court's proposed schedule was "perfect" for him. Opp. 22; App. 59a. The Court should reject this argument for two reasons.

First, this argument was never raised below and should not be considered by this Court now. *Byrd v. United States*, __ U.S. __, 138 S. Ct. 1518, 1527 (2018) (this Court generally will not consider arguments in the first instance that were not raised below).

Second, Petitioner did not take a position before the district court that is clearly inconsistent with the position he now takes seeking dismissal of the indictment. In *Zedner*, the defendant requested an ends-of-justice continuance at a November 8 status conference. 547 U.S. at 493. In response, the district court suggested that the defendant waive application of the Act "for all time" and produced a preprinted form for the defendant to sign. *Id.* at 494. At a January 31 status conference, defense counsel asked for another continuance so that he had time to gather additional evidence. *Id.* at 495. The district court continued trial until May 2 but made no mention of the Act, nor did the court make any findings supporting the 91-day

exclusion between January 31 and May 2. *Id.* On appeal, the government argued the defendant was estopped from pursuing a Speedy Trial Act violation because of the defense counsel's request at the January 31 status conference. *Id.* at 503. This Court held that estoppel did not apply because the position the defendant took at the January 31 status conference "was not 'clearly inconsistent' with the position" he took seeking dismissal. *Id.* at 505.

Like *Zedner*, Petitioner is not taking a position "clearly inconsistent" with defense counsel's September 4 statement. On September 4, defense counsel did not attempt to convince the district court that an ends-of-justice continuance was appropriate to facilitate preparation time. To the contrary, such a request would not have made sense given Petitioner's assertion that very day that he did not want further time excluded. *See* App. 58a–60a. The only discussion about the speedy trial clock was the district court's acknowledgment that only 31 days remained on the clock. There was no discussion between counsel and the district court about the Act's requirements, nor did the district court make any findings under the Act supporting the delay. *Id.* Instead, defense counsel, who had been assigned to the case that day, simply acknowledged that he did not have a scheduling conflict on December 5, 2018, as he did on November 26, 2018. *Id.* This is a far cry from taking a position on the status of the Speedy Trial Act that is clearly inconsistent with the arguments supporting dismissal.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 9, 2020