No. _____

In the
Supreme Court of the United States

_____

DANIEL CARPENTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

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PETITION FOR WRIT OF CERTIORARI

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October 2, 2020

QUESTIONS PRESENTED

In *Moore v. Arizona*, 414 U.S. 25 (1973), this Court vacated the conviction of an accused murderer, and determined *per curiam* that: "Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Moore* at 27, *citing United States v. Marion*, 404 U.S. 307, 320-21 (1971) and *Barker v. Wingo*, 407 U.S. 514, 537 (1972) (WHITE, J. concurring).

Four years later in 1977 in *United States v. Lovasco*, 431 U.S. 782 (1977), this Court considered the prosecution's "long delay" of "more than 18 months" to indict the defendant for the reason of "furthering the investigation" did not "offend the standards of fair play and decency" so as to violate the standards of due process. *Id.* at 793-96. In her concurring opinion in *Betterman v. Montana*, 136 S.Ct. 1609 (2016), Justice Sotomayor suggested that the test for a Due Process delay in sentencing should be the now familiar Speedy Trial standard of *Barker v. Wingo*. This is the unique case where this Court can finally set the uniform standard for pre-indictment Due Process delay, Speedy Trial Act delay, Sixth Amendment Speedy Trial delay, and Due Process delay in sentencing.

The questions presented are:

Whether the Government's prosecution of the Petitioner in this case violated his Sixth Amendment right to a Speedy Trial and/or his Fifth Amendment right to Due Process because of the inordinate pre-indictment delay, the prejudicial post-indictment delay, and the extraordinary post-verdict delay in sentencing?

If a Judge merely thinks about the Speedy Trial Act factors in his own mind, but does not set forth his findings in the record, does that satisfy this Court's standard under *Zedner v. United States*, 547 U.S. 489 (2006) and *United States v. Bloate*, 559 U.S. 196 (2010)?

Did the Petitioner become the "accused" for the purposes of the Speedy Trial Clause as described in *Marion*, when a magistrate judge issued a search warrant allegedly based on "probable cause" on April 19, 2010 and May 25, 2011?

PARTIES TO THE PROCEEDING

Daniel Carpenter is the Petitioner and was the defendant-appellant below. The United States of America is the Respondent here, and was the appellee below.

RELATED CASES

United States v. Carpenter, No. 13-cr-00226 (RNC), US District Court for the District of Connecticut. Judgment entered December 20, 2018.

United States v. Carpenter, No. 19-00070, United States Court of Appeals for the Second Circuit. Judgment entered May 7, 2020.

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INTRODUCTION

Petitioner Daniel Carpenter is just the latest victim of the Second Circuit's bizarre and unconstitutional "Right to Control" Theory of fraud. In this case, Petitioner was accused in an expanded superseding indictment issued in May of 2014 for allegedly lying on life insurance applications, all of which were submitted to the carriers by their respective agents and brokers from 2006 to 2008. The evidence is indisputable that Petitioner did not fill out the life insurance applications, nor did he sign or send them in. The agents of the carriers met with the insureds and filled out the applications, and none of the carriers complained of any lies on the applications nor did they rescind any of the policies.

The only connection Petitioner had to the allegedly fraudulent policies was that his company financed the premium payments to the carriers in the amount of $100 million. The Government's theory of the case was not that the insurance carriers were deprived of any money or property, but rather were allegedly deprived of "information" and, in the Second Circuit, that type of nondisclosure is prosecuted as a crime under the "Right to Control" Theory of fraud. *See, e.g., United States v. Binday,* 804 F.3d 558 (2d Cir. 2015). While this Court has ruled that fraud by nondisclosure is "outside the bounds of the fraud statutes," and in any type of fraud, the fraudster's gain should be the mirror image of the victim's loss (see *Skilling v. United States*, 561 U.S. 358, 400, 410 (2010)). But, that is not the most egregious violation of the Constitution in this case.

Mr. Carpenter had nothing to do with the alleged fraudulent applications and the carriers received all the premiums they bargained for. Furthermore, the business turned out to be very profitable for the carriers, even after paying some large death claims. But, there is no allegation, much less proof that Mr. Carpenter lied to anyone about anything at any time, unlike the "Bridgegate" case of *Kelly v. United States,* 140 S.Ct. 1565, 1571, 1574 (2020), *United States v. Takhalov,* 827 F.3d 1307, 1316-17 (11th Cir. 2016), *United States v. Weimert*, 819 F.3d 351, 353

(7th Cir. 2016), or even the famous case of *United States v. Countrywide Home Loans, Inc.*, 822 F.3d 650 (2d Cir. 2016) which found that, despite lying on mortgage applications, the infamous bank did not commit Mail or Wire Fraud. Suffice it to say that if there was no Mail or Wire Fraud in *Skilling* or *Countrywide*, there was no Mail or Wire Fraud in Mr. Carpenter's case. Whereas Mr. Carpenter could certainly cite this Court's decision in *Marinello v. United States*, 138 S.Ct. 1101 (2018) that he should not have been prosecuted at all, because there was no "bright line" that he knowingly crossed, the purpose of this appeal is to respectfully propose that Mr. Carpenter's conviction should be vacated for clear violations of the Speedy Trial Act, the Speedy Trial Clause of the Sixth Amendment, and the Due Process Clause of the Fifth Amendment. As this Court declared in *Dillingham v. United States*, 423 U.S. 64 (1975):

> "An interval of 22 months elapsed between petitioner's arrest and indictment, and a further period of 12 months between his indictment and trial, upon charges of automobile theft in violation of 18 U.S.C. §§371, 2312, and 2313. The District Court for the Northern District of Georgia denied petitioner's motions made immediately after arraignment and posttrial to dismiss the indictment on the ground that petitioner had been denied a speedy trial in violation of the Sixth Amendment. The Court of Appeals for the Fifth Circuit affirmed, holding that under *United States v. Marion*, 404 U.S. 307 (1971), the 22-month "pre-indictment delay . . . is not to be counted for the purposes of a Sixth Amendment motion absent a showing of actual prejudice." 502 F.2d 1233, 1235 (1974). This reading of Marion was incorrect. Marion presented the question whether in assessing a denial of speedy trial claim, there was to be counted a delay between the end of the criminal scheme charged and the indictment of a suspect not arrested or otherwise charged previous to the indictment. The Court held: "On its face, the protection of the (Sixth) Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time." *Marion* at 313. In contrast, the Government constituted petitioner an "accused" when it arrested him and thereby commenced its prosecution of him. Marion made this clear, *id*., at 320-21, where the Court stated…To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *see also Smith v. Hooey*, 393 U.S. 374, 377-78 (1969). So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints

> imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. *See also Barker v. Wingo*, 407 U.S. 514, 519-20, 532-33 (1972)." *Dillingham* at 64-65.

It is indisputable that the applications at issue in this case were submitted to the carriers between March 2006 and December 2008. It is also indisputable that Petitioner's office was raided by the IRS in April 2010 and by the DOL in May 2011. In neither case were the Search Warrant Affidavits attached to the Search Warrant as required by this Court in *Groh v. Ramirez*, 540 U.S. 551 (2004). Petitioner is challenging the execution of those searches in different courts, but for the purposes of this Writ (and the Constitution), Mr. Carpenter was the "accused" and "under investigation" for the purpose of the familiar balancing test under *Barker* found in such cases as *United States v. Loud Hawk*, 474 U.S. 302 (1986) and *Lovasco*.

As in *Dillingham*, he became the "accused" after the first unlawful raid on his office building in April 2010, making this almost triple the amount of time that this Court considered a "long delay" in *Lovasco*. If that did not start the pre-indictment clock for the purpose of being the "accused" as found in *United States v. Marion*, 404 U.S. 307 (1971), then the raid of May 2011 certainly did, and the corresponding superseding indictment from that raid came in May of 2014 – a full 36 months later; once again double the "long delay" in *Lovasco*. Additionally, there were three times the amount of federal officers in the raid on Petitioner's building without a valid Search Warrant than took out Osama bin Laden earlier that month. But, for the purposes of this Petition, Mr. Carpenter wishes to focus on the extraordinary delays in this case based on the balancing test of *Barker* for both Speedy Trial delay and Due Process delay as Justice Sotomayor suggested in *Betterman v. Montana*, 136 S.Ct. 1609 (2016), after he had become the "accused" in either April of 2010 or May of 2011.

As if it was not bad enough, Mr. Carpenter was indicted for the first time in December 2013

for allegedly lying on insurance applications that he had no involvement with, a full five years after the last application in the Indictment and seven years after the first and most significant application involving the payment of a large death claim by one of the carriers. As the Second Circuit stated in *United States v. Black*, 918 F.3d 243 (2d Cir. 2019):

> The right to a speedy trial has been deemed "fundamental" to our system of justice since its inception. *Klopfer* at 223-26 ("The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."). Pursuant to the Sixth Amendment, the court and the government owe an "affirmative obligation" to criminal defendants and to the public to bring matters to trial promptly. *United States v. New Buffalo Amusement Corp*., 600 F.2d 368, 377 (2d Cir. 1979). *Black* at 245.

Even though this Court ruled in *Doggett v. United States*, 505 U.S. 647 (1992) that delays of more than a year are "presumptively prejudicial" for Speedy Trial purposes, Mr. Carpenter can point to the type of actual prejudice that courts are instructed to look for in *Lovasco* when the Government delays its prosecution. For instance, Mr. Carpenter's co-defendant, Wayne Bursey, died in 2015 before Mr. Carpenter's trial in February 2016 after he became the "accused," and one of Mr. Carpenter's alleged co-conspirators, business associate, and counsel, Jack Robinson, died in 2017 before Mr. Carpenter's sentencing in December 2018, where Mr. Carpenter was sentenced to 30 months imprisonment based on the illusory crime of nondisclosure on certain life insurance applications that were submitted to the carriers in 2007 and 2008. Based on the District Court's sentence, Mr. Carpenter reported to prison on March 22, 2019, a full 13 years after the submission of the application on the life of a wealthy hedge fund manager, Sash Spencer, in March 2006 whose death in 2008 was the subject of the Money Laundering Counts in the Superseding Indictment of May 2014 and the Verdict of June 2016. Suffice it to say, if the carrier had thought someone had lied on that application, they never would have paid the $30 million death claim in 2009.

Even worse, the Second Circuit acknowledged in its Summary Affirmance that the trial judge did not put on the record the reasons for excluding time from the Speedy Trial Clock limit of

70 days as required by 18 U.S.C. §3161(h)(7)(A) and this Court in *Zedner* and *Bloate* because they thought the trial judge had gone over the reasons in his mind:

> While the required ends-of-justice findings must be made before a continuance is granted, the time is properly excluded even where the district court does not ″utter the magic words ′ends-of-justice′ at the time of ordering the continuance.″ *United States v. Breen*, 243 F.3d 591, 597 (2d Cir. 2001). Where it is apparent from the record that the district court has weighed the competing interests, ″the purposes of the statute are satisfied by a subsequent articulation.″ *Id.* at 596; *see also Zedner v. United States*, 547 U.S. 489, 506-07 (2006) (stating required ends-of-justice findings ″must be made, if only in the judge′s mind, before granting the continuance″). See Appendix A, Summary Affirmance pp. 3-4.

As for Mr. Carpenter, he has suffered all of the fears that this Court pointed out in *Marion* and *Moore v. Arizona*, 414 U.S. 25 (1973), and has become the "posterchild" for "public obloquy" as this Court listed as one of the dangers of Speedy Trial and Due Process delay, as has occurred in this case. Mr. Carpenter's primary purpose for bringing this Petition is to restore his good name and to make sure that it never happens again, where an honest businessman is indicted for a non-crime that he did not commit, and has the Government purposefully delay his indictment, trial, and sentencing for no good reason. This is the perfect case for this Court to firmly establish the rules and standards for when a pre-indictment and post-trial delay violates the Due Process Clause, as well as the Speedy Trial Clause and the Speedy Trial Act, and what does this Court mean by setting forth the reasons for the exclusion of time on the record.

OPINIONS BELOW

The Second Circuit's opinion is reported at 801 Fed.Appx. 1 and is reprinted in Appendix A.

The District Court Order denying Mr. Carpenter's Motion to Dismiss on Speedy Trial grounds dated March 22, 2016, and is reprinted in Appendix C.

JURISDICTION

The Second Circuit issued its opinion on January 13, 2020 and denied a timely petition for rehearing *en banc* on May 7, 2020. On March 19, 2020, this Court issued an order extending the time to file any yet-to-be filed petition for certiorari by 150 days, making the deadline for this petition October 5, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 18 U.S.C. §3161 and 18 U.S.C. §3162, and are reproduced at Appendices E and F.

STATEMENT OF THE CASE

A. Factual Background

1. Mr. Carpenter and Mr. Bursey Make Their Initial Appearances Before a Magistrate Judge and a Schedule of Unrealistic Control Dates Is Set

Mr. Carpenter and Mr. Bursey made their initial appearances before a magistrate judge on January 17, 2014. (Dkt. No. 16.) After arraigning the defendants, the magistrate judge relied on the default provisions of the local rules to set unrealistic control dates that the magistrate judge and the parties knew Judge Chatigny would promptly modify. Relying on the local rules' two-week default deadline for the Government to produce discovery, the magistrate judge ordered that defense motions would be due one week after the discovery deadline (*i.e.*, three weeks after the arraignment), and scheduled trial to begin approximately seven weeks after arraignment, on March 11, 2014. Neither at the arraignment nor in the written scheduling order memorializing these dates did the magistrate judge exclude time for speedy trial purposes. No automatic exclusion applied.

2. The District Court Vacates the Original Schedule

With the Speedy Trial clock running, the Government made no efforts to comply with the default discovery deadline under the local rules, presumably reflecting the parties' shared assumption that all of the dates set by the magistrate judge were merely control dates that Judge Chatigny would adjust at the first conference before him. Nonetheless, in light of the February 7, 2014 motions deadline as it then stood, and not having received *any* discovery from the Government, Mr. Carpenter was forced to file a perfunctory two-page motion with the District Court on January 30, 2014, formally requesting "an enlargement of time to file any motion he deems appropriate to a time consistent with not only receiving <u>all</u> the discovery, but only after a reasonable time period to allow the defendant to review all the documents and prepare any appropriate pre-trial motions[.]" (emphasis in original).) Although Mr. Carpenter did not recite the

Government's consent to his requests, it was self-evident that he had it and that the parties viewed vacating the existing scheduling order as a formality, since the Government had made no effort to comply with the existing schedule—by January 30, 2014, the Government had produced "no documents" in discovery.

On February 4, 2014, Mr. Bursey filed a substantially identical continuance motion, this time making clear that the Government did not object. Three days later, on February 7, 2014, Judge Chatigny implicitly granted the motions by setting an initial pretrial conference for March 3, 2014—nearly a month out— thus making clear that all of the originally set deadlines (including the Government's discovery deadline) were continued and that trial was not, in fact, going to begin on March 11, 2014. (Dkt. No. 42.) As discussed below, at least some number of days before the March 3, 2014 conference were automatically excluded from the Speedy Trial clock based on the defendants' continuance motions, but the clock otherwise continued to run.

3. The District Court Holds the Initial Conference and, Thereafter, Issues an Order Setting a Schedule and Excluding Time Based on the Ends-of-Justice

On March 3, 2014, more than *six weeks* after the initial appearance, the District Court finally held an *initial* pretrial conference and ordered the parties to confer about an appropriate schedule. The District Court did not exclude time under the Speedy Trial Act.

Two days later, on March 5, 2014, the Government submitted a jointly proposed schedule and requested that Speedy Trial time be excluded. (Dkt. No. 45.) On March 6, 2014, the District Court signed an order formally granting the pending scheduling motions, setting trial for March 10, 2015, and excluding time based on the ends-of-justice "from March 11, 2014*"* (the original trial date, per the magistrate judge's original schedule) "until March 10, 2015" In other words, although the District Court signed the order on March 6, 2014, it did not purport to exclude any time for Speedy Trial Act purposes prior to March 11, 2014.

4. The District Court Adjourns Trial for Another Six Months Without Excluding Time or Finding that the Ends-of-Justice Were Served

On December 3, 2014—the day before a scheduled conference concerning various pending motions—Mr. Carpenter moved to continue the trial date from March 2015 to September 2015, citing the Government's discovery delays. The next day, at a December 4, 2014 conference, the District Court heard argument on the various previously pending motions and took them all under advisement. (Dkt. No. 119 (minute entry providing that all motions "tak[en] under advisement").) As to Mr. Carpenter's motion to adjourn the trial date, the Government consented, but explained that it did so on the understanding that Mr. Carpenter would not object to the Government's plan to take various Rule 15 depositions of purportedly elderly witnesses "sometime in the spring" of 2015. Accordingly, the District Court orally granted the motion, saying: "I'll grant that motion to extend the trial date and I'll assume that the new date will be in the fall, perhaps in October. I do that on the understanding that if Rule 15 depositions are to be done, they'll be done without objection and on the understanding that there will be no further requests [to adjourn the trial] unless something truly unforeseeable should crop up." The District Court did not purport to exclude any additional Speedy Trial time, which to that point had only been excluded through March 10, 2015.

On December 15, 2014, Mr. Carpenter filed a Speedy Trial waiver, stating that he had no objection to the trial's postponement through October 2015. But the District Court took no action to make the necessary ends-of-justice finding or to exclude time. Thus, as discussed below, upon the expiration of the prior exclusion of time on March 10, 2015, the Speedy Trial clock began running again on March 11, 2015. After 57 more days (which, in total, exceeded the Speedy Trial Act's 70-day requirement), the Speedy Trial clock automatically stopped on May 7, 2015, when Mr. Carpenter moved for a bill of particulars and thereafter filed various additional motions in August and September 2015 (Dkt. Nos. 124, 133-34, 137, 140).

5. Over Mr. Carpenter's Objection, the District Court Adjourns Trial for Another Four Months and Denies Mr. Carpenter's Speedy Trial Act Motion

The Government did not seek to take its Rule 15 depositions in the spring of 2015, as promised. Indeed, the Government did not even move the District Court for *permission* to take any Rule 15 depositions until *July 21, 2015*. (Dkt. No. 131.) Mr. Carpenter promptly filed a response to the motion on July 31, 2015. (Dkt. No. 133.) The District Court, however, did not hold any proceeding on the motion until September 22, 2015, when it held a telephonic conference and orally granted the Government's motion. (Dkt. Nos. 141, 143).

On October 4, 2015, the Government moved to adjourn trial again, this time to mid-February 2016, principally so that it could take the Rule 15 depositions. As an additional ground, the Government also asserted that it could not be ready for trial because its witnesses needed significant advance warning in order to prepare to attend trial—even though the October 2015 trial date had been set *10 months in advance*. (("[T]here are a number of elderly potential witnesses who, even if they can travel to Connecticut, will need ample time to plan those trips. Similarly, given the volume of potential witnesses, many of whom reside outside of Connecticut, the Government will need time once a trial date is set to serve subpoenas on witnesses and to arrange for their travel.").) Finally, in connection with its adjournment request, the Government asked the District Court to exclude Speedy Trial Act time based on the ends-of-justice, both *retroactively* and prospectively: retroactively to March 10, 2015, when the District Court's last exclusion expired; and prospectively to the Government's proposed new trial date in February 2016.

On October 9, 2015—a mere five days after the Government's motion, and before Mr. Carpenter had responded—the District Court signed the Government's proposed order, granting the Government's request and adjourning trial until February 9, 2016, citing the need to take Rule 15 depositions and the need to provide the Government's witnesses with sufficient notice so that

they could arrange to attend the trial. The District Court also purported to make the ends- of-justice findings to exclude Speedy Trial time *retroactively* to March 10, 2015, and prospectively to the new trial date. Moreover, the delay between October 2015 and the trial date of February 16, 2016 was exactly the amount of time that the Second Circuit found to be a violation of the Speedy Trial Act in *United States v. Ramirez*, 788 F.3d 732 (7th Cir. 2015).

The District Court's order was docketed on October 13, 2015. The next day, October 14, 2015, Mr. Carpenter moved the District Court to reconsider its continuance of the trial date, citing the Speedy Trial Act and his interest in a speedy trial. Mr. Carpenter acknowledged that he had waived portions of the nearly two-year period since indictment, but disputed the Government's claimed justifications for further delay. In particular, he noted that "[t]he Government ha[d] taken no affirmative action in nearly ten months of … 2015[] to depose their witnesses under Rule of Criminal Procedure 15," and had only begun seeking to do so "in the eleventh hour." As to the advance notice supposedly required by the Government's witnesses, Mr. Carpenter objected that "the Government … had many months, and years, to advise its prospective witnesses as to the status of this prosecution and prepare them for the rigors and timing of travel for trial." The Government opposed Mr. Carpenter's reconsideration motion nearly three weeks later. The District Court ignored the motion until after trial, when it denied it as moot.

On February 12, 2016, shortly before trial, Mr. Carpenter invoked the Speedy Trial Act again, moving to dismiss the Indictment on the ground that his statutory rights had been violated. (Dkt. No. 170.)[1] Four days later, on the first day of trial, the District Court orally denied the motion. (Tr. 52.) Thereafter, on March 22, 2016—shortly after the conclusion of trial—the District Court issued a written decision explaining its denial. Detailing the various periods of delay, the District

[1] Mr. Carpenter also moved to dismiss based on the Speedy Trial clause of the Sixth Amendment.

Court found that almost all were covered by an exclusion, concluding that "only twelve days of non-excluded time elapsed prior to the start of the trial— specifically, the time between January 18 and 30, 2014"—*i.e.*, the time between the arraignment and Mr. Carpenter's motion to adjourn the original motion deadline set by the magistrate judge.

B. Procedural Background

On December 12, 2013, Mr. Carpenter and co-defendant Wayne Bursey were charged by indictment with mail and wire fraud (Counts 1-32) and conspiracy to commit mail and wire fraud (Count 33).[2] A Superseding Indictment (the "Indictment") charged Mr. Carpenter with substantially identical counts (Counts 1- 33), and—based solely on the Spencer death benefit—added money laundering and illegal monetary transaction charges (Counts 34-57). A 19-day bench trial began on February 16, 2016. (Dkt. No. 175.) On June 6, 2016, the District Court issued a written verdict convicting Mr. Carpenter on all counts.

On December 3, 2018, the District Court held the sentencing proceeding, literally five years after Mr. Carpenter was indicted. At the conclusion of the proceeding, the District Court found that the Guidelines Range for Mr. Carpenter was 292 to 365 months based on a total Offense Level of 39, driven substantially by a 22-level enhancement for fictional losses in this case that no insurance carrier experienced. Every one of the insurance carriers reported substantial profits from the insurance policies. Nonetheless, the District Court sentenced Mr. Carpenter to 30 months' imprisonment and 36 months of Supervised Release, and Restitution of over $12 million on the fictional losses. The Restitution aspect of the sentence is subject to a separate appeal that the Government has put on hold pending the outcome of this Petition.

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[2] Mr. Bursey died before trial and the charges against him were dismissed. (Dkt. No. 126.)

REASONS FOR GRANTING CERTIORARI

This Court first recognized that challenges to preindictment delay are governed by the Due Process Clause in *United States v. Marion*, 404 U.S. 307, 325 (1971). Five years later, in *United States v. Lovasco*, 431 U.S. 782 (1977), the Court rejected a due process challenge to the 18-month investigative delay and, in closing, observed that the prosecution's reasons for delay need only be considered where "defendants have established that they were prejudiced." *Id.* at 796-97. For that reason, the Court explained, the time since *Marion* had not provided lower courts "a sustained opportunity to consider the constitutional significance of various reasons for delay." *Id*. Now, four additional decades later, the arguments on both sides of the split have been copiously aired. Indeed, every federal Court of Appeals and all but two state high courts have considered the standard that applies to preindictment delay.

Balancing courts correctly recognize that when a defendant has shown that the prosecution's excessive delay in pursuing charges has caused "actual prejudice" to his ability to defend himself, he has been denied due process of law unless the prosecution's reasons for delay are sufficient to justify that prejudice. In contrast, viewing the prejudice and the reasons for delay in isolation, and limiting the universe of justifications to those which evince some "improper motive," conflicts with this Court's precedent and basic principles underlying the constitutional guarantee of due process. "[U]nlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, it "is flexible and calls for such procedural protections as the particular situation demands." *Id.* This is no less true when it comes to the protection that the Due Process Clause affords against arbitrary and prejudicial preindictment delay. In locating challenges to preindictment delay under the Due Process Clause, this Court explained that the "sound administration of justice" requires "a delicate judgment based on the circumstances of each case."

Marion at 325. And upon evaluating such a claim in *Lovasco*, this Court explained that the task for lower courts was to apply "the settled principles of due process" to the "particular circumstances of individual cases." *Lovasco* at 797. The Court has thus never "establish[ed] a blackletter test for determining unconstitutional preindictment delay" which would detach the inquiries of prejudice and justification, and then restrict due process to some particular showing of improper motive. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). Rather, it has "made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitate[s] a case-by-case inquiry based on the circumstances of each case." *Id.*

Courts that have adopted the improper-motive requirement have pointed to language in this Court's opinions noting that an improper motive would generally be sufficient to show a due process violation. In *Marion*, for instance, the Court noted the Solicitor General's concession that the Due Process Clause would require dismissal of charges if "*delay was an intentional device to gain tactical advantage over the accused." Marion* at 324. And in *Lovasco*, the Court again noted this concession and contrasted such improper motive as "fundamentally unlike" the 18 months of investigative delay under consideration. *Id.* at 795. Subsequent cases that summarize *Lovasco* in dicta have similarly incorporated the government's concession. *See, e.g., United States v. Gouveia*, 467 U.S. 180, 192 (1984) (noting that "the Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him").

But by acknowledging that an improper motive to prejudice the defendant at trial will generally suffice, the Court did not purport to hold that only such a motive could violate the defendant's right to a fair trial. Rather, the Court "provided an illustration of one egregious situation that such a standard would likely proscribe" - that is, it "was establishing the due process ceiling to the problem." In fact, upon noting the government's concession, the Court went out of

its way to say that it "need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *Marion* at 324-25. And the Court later instructed lower courts "to consider the constitutional significance of various reasons for delay" given "the particular circumstances of individual cases." *Lovasco* at 797. To the extent that this Court's subsequent characterizations under *Lovasco* and *Marion* provide guidance, they too have "merely restat[ed] in dicta the established outer contour of unconstitutional preindictment delay." *Howell* at 894 (finding "no guidance in the Court's later characterizations of its holding in *Lovasco* and *Marion*").

In *United States v. Vispi*, 545 F.2d 328 (2d Cir. 1976), the delay from the information to trial was only 22 months, whereas the delay in this case for Petitioner was over three years. Vispi was sentenced 6 months after his bench trial and received no jail time and a small fine for his violation, while Petitioner was sentenced a full 21 months after his trial to 30 months imprisonment and 36 months supervised release, with $12 million in restitution. The Second Circuit had no problem vacating Vispi's conviction for his small violation of the Speedy Trial Act, yet summarily affirmed the district court's decision in Mr. Carpenter's case. The decision in this case directly contradicts the Second Circuit's recent decision in *United States v. Black*, 918 F.3d 243 (2d Cir. 2019), where it quoted *Vispi* and stated:

> The right to a speedy trial has been deemed "fundamental" to our system of justice since its inception. *Klopfer* at 223-26 (1967) ("The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."). Pursuant to the Sixth Amendment, the court and the government owe an "affirmative obligation" to criminal defendants and to the public to bring matters to trial promptly. *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979). This burden weighs particularly heavily on the government, which "owe[s] the additional duty of monitoring the case and pressing the court for a reasonably prompt trial. We therefore hold that the relevant interval for Defendants-Appellees' Sixth Amendment speedy trial claim is from the *first* indictment or arrest to trial. In so doing, we, like six of our sister circuits, do not apply the dissent's suggested *Blockburger* approach to calculate the relevant delay for a speedy trial violation where a superseding indictment is filed. *See United States v. Handa*, 892 F.3d 95, 106-07 (1st Cir. 2018) (measuring duration

> of delay from the first indictment where charges in the superseding indictment arose from the same occurrence and the government reasonably could have brought all charges at once) (collecting cases). *Black* at 254, 260, *quoting Vispi* at 334.

Therefore, as this Court set out in *Lovasco*, pre-indictment delay is unconstitutional when it violates traditional Due Process principles, including the "fundamental conceptions of justice which lie at the base of our civil and political institutions," and "the community's sense of fair play and decency." *Id.* at 790. There is no question that "impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage." *Marion* at 331 (Douglas, J., concurring, joined by Brennan and Marshall, JJ.). For example, where the prosecution delays indicting the defendant for several years, as it did in this case, and over the course of those years it slowly destroys central interviews and evidence, as happened in this case, it makes no difference to the defendant's right to a fair trial whether the prosecution acted with an improper motive in mind or not. In this case, the trial judge did not put any reasons whatsoever for the exclusion of time anywhere on the record of the case or the docket as required by 18 U.S.C. §3161(h)(7)(A) and by this Court's decisions in both *Zedner* and *Bloate*.

I. Mr. Carpenter's Speedy Trial Act Rights Were Violated

Mr. Carpenter's conviction must be vacated and the Indictment dismissed because more than 70 unexcluded days elapsed between Mr. Carpenter's arraignment and the start of trial, in violation of Mr. Carpenter's rights under the Speedy Trial Act.

Mr. Carpenter and Mr. Bursey initially appeared and were arraigned on January 17, 2014. Trial did not start until more than two years later, on February 16, 2016. The intervening period was characterized by numerous delays. Some of these delays were properly excluded under the Speedy Trial Act, but others were not. For example, at least 57 days ran off the clock in 2015 during a period when the District Court made no ends-of-justice findings to exclude time and no automatic statutory exclusion applied. Although the District Court later attempted to make a

retroactive finding that the delay had served the ends-of-justice, this Court's decisions make clear that a district court's attempt to make a retroactive ends-of-justice continuance is invalid and ineffectual.

When combined with even the most charitable analysis of the automatic exclusions applicable to previous periods, a bare minimum of 73 unexcluded days had already run off the clock between arraignment and October 2015, when the Government moved for a *four-month* adjournment of trial. Mr. Carpenter objected to the adjournment on Speedy Trial Act grounds, and then later moved to dismiss the Indictment on the ground that the Speedy Trial Act had been violated. The District Court granted the Government's request to adjourn the trial date to February 2016 and denied Mr. Carpenter's motion to dismiss. That denial was error. The Speedy Trial Act compels that Mr. Carpenter's conviction be vacated and the Indictment dismissed.

A. Applicable Law

The Speedy Trial Act "requires that a criminal trial must commence within 70 days of the latest of a defendant's indictment, information, or appearance, barring periods of excludable delay." *Henderson v. United States*, 476 U.S. 321, 326 (1986); *see generally* 18 U.S.C. §§3161-62. If that deadline is not met, the Act provides that the indictment "*shall* be dismissed on motion of the defendant." 18 U.S.C. §3162(a)(2) (emphasis added). Dismissal can be either with or without prejudice. *Id*.

1. Prospective Ends-of-Justice Exclusions

Time can be excluded from the 70-day clock for a variety of enumerated reasons. *See* 18 U.S.C. §3161(h). The broadest of those reason—an ends-of-justice exclusion—permits exclusion for "[a]ny period of delay resulting from a continuance granted" by the court "on the basis of [its] findings that the ends-of- justice served by [the continuance] outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. §3161(h)(7)(A). But no such period is

excludable "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." *Id.*

Moreover, "the decision to grant an ends-of-justice continuance [must] be prospective, not retroactive." *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985). This Court has confirmed that time may not be excluded based on the ends-of-justice unless the district court indicates *at the time it grants the continuance* that it is doing so upon a balancing of the factors specified by [§3161(h)(7)(B)].… A prospective statement that time will be excluded based on the ends-of-justice serves to assure the reviewing court that the required balancing was done at the outset. *Id.* at 78 (emphasis added); *accord United States v. Shellef*, 718 F.3d 94, 104 (2d Cir. 2013) ("[T]he statutory text and legislative history of §3161(h)(7) plainly express[] Congress's intent for [ends-of-justice continuances] to be only prospective."); *United States v. Gambino*, 59 F.3d 353, 358 (2d Cir. 1995) ("an order of excludable delay has no retroactive effect").

2. Automatic Exclusions for Prompt Disposition of Motions

The Speedy Trial Act also automatically excludes at least some of the time it takes the district court to decide a pretrial motion. *See* 18 U.S.C. §3161(h)(1)(D), (H). The amount of time excluded depends in part on whether the motion requires a hearing. *See Henderson* at 329. If the motion requires a hearing, the Act excludes "the entire period between the filing of the motion and the conclusion of the hearing," plus up to 30 additional days while the motion is "under advisement." *Id.* at 329. By contrast, when "motions that require no hearing" are filed, time is excluded only until the "prompt disposition" of the motion, which cannot exceed the 30-day "under advisement" period. *Henderson* at 329 (citing S. Rep. No. 96-212, at 34 ("[I]f motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days.")). "After that thirty-day period expires, the Speedy Trial clock

begins to tick, regardless of when the trial court ultimately rules on the motion." *United States v. Johnson*, 29 F.3d 940, 942 (5th Cir. 1994); *see also United States v. Bert*, 814 F.3d 70, 78 (2d Cir. 2016); *United States v. Jones*, 601 F.3d 1247, 1255 (11th Cir. 2010).

B. Mr. Carpenter's Conviction Must Be Vacated and the Indictment Dismissed for Violations of the Speedy Trial Act

More than 750 days elapsed between Mr. Carpenter's arraignment on January 17, 2014, and the start of trial on February 16, 2016. At least 73 of those days—and arguably far more—were unexcluded, violating Mr. Carpenter's right to be brought to trial within 70 days of his arraignment. Accordingly, Mr. Carpenter's conviction must be vacated and his Indictment dismissed.

As the foregoing shows, Mr. Carpenter was not brought to trial within the 70-day period required by the Speedy Trial Act. Twelve unexcluded days ran off the clock in January 2014, at least four (and as many as thirty-one) unexcluded days ran off the clock in February and March 2014, and fifty-seven unexcluded days ran off the clock from March through May 2015. In total, at least 73 (and arguably many more) unexcluded days passed between arraignment and trial. As a result, the Indictment was required to be dismissed. As this Court has explained, "The relevant provisions of the Act are unequivocal," and "[t]he sanction for a violation of the Act is dismissal." *Zedner*, 547 U.S. at 507, 509. If "the trial does not begin on time, the indictment or information must be dismissed." *Id*. at 508.

The remedy is no different on appeal. Where a defendant's pretrial motion to dismiss was incorrectly denied and an untimely trial was allowed to occur, the required remedy for any such violation is to vacate the conviction and remand with instructions that the district court dismiss the indictment (with or without prejudice). *See, e.g.*, *United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir. 1990) (affirming dismissal of defendant's indictment with prejudice because of 90 unexcluded days); *United States v. Dezeler*, 81 F.3d 86, 88 (8th Cir. 1996) (vacating defendant's

conviction because of 71 unexcluded days); *Jones*, 601 F.3d at 1254 (vacating defendant's conviction because of 75 unexcluded days); *United States v. Huete- Sandoval*, 668 F.3d 1, 6 (1st Cir. 2011) (vacating defendant's conviction because of 86 unexcluded days). Accordingly the judgment of conviction in this case should be vacated and the case remanded with instructions to dismiss the Indictment.

1. Twelve Days of Unexcluded Time Elapsed From January 18, 2014, Through January 29, 2014

Mr. Carpenter was arraigned on January 17, 2014. There is no dispute that the Speedy Trial Clock started the next day and continued without any exclusion until January 30, 2014, when Mr. Carpenter filed a motion seeking a continuance of the schedule set at his arraignment. Accordingly, 12 days ran off the Speedy Trial clock from January 18, 2014, through January 29, 2014.

2. At Least Four and as Many as Thirty-One Days of Unexcluded Time Elapsed Between January 30, 2014, and March 11, 2014

Mr. Carpenter filed a perfunctory two-page continuance motion on January 30, 2014, seeking to extend the February 7, 2014 motions deadline. There was no conceivable way the originally scheduled deadline could not be extended, given the nature of the case and the fact that the Government had not produced *any* discovery with only one day left under the local rules' default discovery deadline. Thus, unsurprisingly, the motion was implicitly granted on February 7, 2014, when the District Court responded to it by scheduling an initial conference for March 3, 2014—for inexplicable reasons, nearly a month out—making clear that all of the originally set deadlines (including the Government's discovery deadline) were continued and trial was not, in fact, going to begin on March 11, 2014. (Dkt. No. 42.) Neither the Government nor the defendants doubted that the requested extension had been granted (if the Government did have any doubt, then it was willfully flouting its discovery obligations), and that all that remained was to decide what the new schedule would be. Accordingly, the Speedy Trial clock arguably began running the

next day, on February 8, 2014, and did not stop until March 11, 2014, the first date on which the District Court began excluding time based on the ends-of-justice. Under this analysis, 31 days ran off the Speedy Trial clock from February 8 through and including March 10.

Importantly, the foregoing analysis has the benefit of comporting with reality. There is no reason why the Government and District Court should have let nearly *five* unproductive weeks elapse between the time when Mr. Carpenter pointed out on behalf of all parties on January 30 that there was effectively no schedule in place (only a default schedule that the parties and the District Court were collectively ignoring) and when the District Court *finally* held an initial scheduling conference on March 3, more than a month later. Nothing justifies the exclusion of that time. Even if Mr. Carpenter's January 30, 2014 continuance motion was not deemed granted on February 7, it was a prototypically simple and routine motion that could justify an automatic exclusion for *no more* than 30 days. As noted, the motion was for no more than an adjustment of the default, unrealistic schedule set by the magistrate judge and the routine imposition of an appropriate one by the District Judge; not a motion that requires a hearing. *See United States v. Barnes*, 159 F.3d 4, 12 (1st Cir. 1998) ("Because a motion requesting only the scheduling of a status conference requires no 'hearing'—marked by oral argument, factual findings, or legal rulings—but involves merely the simple administrative act of setting a date, it must be resolved within 30 days of the date the Court has received all it expects to properly consider the request."); *Jones*, 601 F.3d at 1256 (holding that district court was entitled to only thirty excludable days from government's response to resolve defendant's motion for in camera hearing because motion did not require a hearing). Thus, for Speedy Trial purposes, Mr. Carpenter's January 30, 2014 motion could result in an automatic exclusion only for 30 days, through March 1, 2014. "After that thirty-day period expires, the Speedy Trial clock begins to tick, regardless of when the trial court ultimately rules on the motion." *Johnson* at 942. Accordingly, under this analysis, nine days ran off the Speedy

Trial clock from March 2 through and including March 10, at which point—starting on March 11— the District Court began excluding time based on the ends-of-justice.

Finally, under even the *most* favorable analysis to the Government, *at least* four days unquestionably ran off the Speedy Trial clock. Even if the automatic exclusion resulting from Mr. Carpenter's January 30 scheduling motion were permitted to exceed 30 days (and it should not be, since it was a simple and routine motion), the motion was fully resolved on March 6, 2014, when the District Court executed an order granting the motion, adjourning the trial date, and dictating that an ends-of- justice exclusion of time would begin on March 11, 2014 and continue through the trial date on March 10, 2015. Between March 6 and March 11—*i.e.*, for the four days of March 7, 8, 9, and 10—there was no motion pending and no ends- of-justice exclusion. Accordingly, even if both of the prior analyses are rejected, there were at a *bare minimum* four unexcluded days.

3. Fifty-Seven Days of Unexcluded Time Elapsed From March 11, 2015 Through May 6, 2015

On December 4, 2014, the District Court granted Mr. Carpenter's motion to continue the trial date from March 2015 to September 2015. But the District Court neither excluded time, nor made any ends-of-justice findings that would have justified an exclusion. Accordingly, any ends-of-justice exclusion ended on March 10, 2015, the date through which the District Court had *previously* excluded time in its initial scheduling order. Moreover, although there were several pending motions as of March 10, 2015, those motions had all been taken under advisement at the December 4, 2014 conference—meaning that by March 10, 2015, they had already been under advisement for far more than 30 days—and so no automatic exclusion applied. (Dkt. No. 119.) *See Henderson*, 476 U.S. at 329. Thus, with no ends-of-justice exclusion and no automatic exclusion, the Speedy Trial clock began running again on March 11, 2015. It did not stop until Mr. Carpenter filed a motion for a bill of particulars—creating an automatic exclusion— on May 7, 2015. From

March 11 through May 6, inclusive of those end-dates, 57 unexcluded days elapsed.

As the District Court later observed in its denial of Mr. Carpenter's Speedy Trial motion, Mr. Carpenter did file a "waiver of his speedy trial rights" on December 15, 2014, which purported to waive the requirements of the Speedy Trial Act from that date "until October 31, 2015"; a range that included the 57 days in question. Specifically, Mr. Carpenter's December 15, 2014 waiver said, "In accordance with the Federal Rules, I, Daniel E. Mr. Carpenter, hereby waive my rights to a Speedy Trial under, 18 U.S.C. § 3161, *et seq.* I have no objection to this trial being postponed through October 31, 2015." But as this Court has expressly held, a defendant's prospective waiver, on its own, has no legal effect and does not serve to exclude time under the Speedy Trial Act. *See Zedner v. United States*, 547 U.S. 489, 503 (2006).

In *Zedner*, as here, the defendant's own motion for a continuance was granted after the defendant knowingly and voluntarily executed a form captioned "'Waiver of Speedy Trial Rights.'" *Id*. at 494. The district court accepted the waiver and, on that basis, granted the defendant his requested continuance, but—as here—"made no mention of the [Speedy Trial] Act and did not make any findings to support exclusion of [time]." *Id*. at 495. Subsequently, the defendant moved to dismiss the indictment on the ground that, notwithstanding the waiver, the lack of any ends-of-justice findings meant that time had not been excluded and that the Speedy Trial clock had run and expired. *Id*. at 496. The district court denied the motion on the ground that the defendant had waived his Speedy Trial Act rights, and this Court affirmed that decision, explaining that it "'[d]oubt[ed] that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request.'" *Id*. at 497 (quoting *United States v. Zedner*, 401 F.3d 36, 45 (2d Cir. 2005)).

But this Court rejected that reasoning and reversed, holding that "a defendant may not prospectively waive the application of the Act." *Id*. at 500. This Court explained that neither the

text nor the purposes of the Act allowed for an exclusion based purely on a defendant's waiver, without on-the-record findings by the district court to justify an ends-of-justice exclusion. As to the statutory text, the Supreme Court explained that "§3161(h) has no provision excluding periods of delay during which a defendant waives the application of the Act, and it is apparent from the terms of the Act that this omission was a considered one." *Id*. Similarly, this Court held that "[t]he purposes of the Act also cut against exclusion on the grounds of mere consent or waiver," because the Act was not "designed solely to protect a defendant's right to a speedy trial," but, rather, "was designed with the public interest firmly in mind," and that public interest would not be served by a rule that allowed defendants simply to "opt out." *Id*. at 500-01. Accordingly, because an ends-of-justice exclusion requires "on-the-record findings" by the district court, and because the record contained only the defendant's waiver and no such findings, this Court concluded that the relevant period was "not excluded from the speedy trial clock" and that the "unequivocal" provisions of the Act *required* the dismissal of the indictment. *Id*. at 507.

Zedner controls here. The District Court made no contemporaneous, on-the- record findings that the 57 days from March 11, 2015 through May 6, 2015 should be excluded under the ends-of-justice exception. Neither the fact that Mr. Carpenter requested the continuance nor the fact that he purported to waive the application of the Speedy Trial Act to those days sufficed to exclude the time from the Speedy Trial clock. The clock ran during that period.

The Government and the District Court seem to have implicitly recognized this failure in October 2015 when the Government asked the District Court to exclude that unexcluded period of time retroactively, and the District Court purported to do so. Specifically, in connection with requesting and seeking to justify a four-month trial adjournment over Mr. Carpenter's objection, the Government moved not just for the adjournment but also for a Speedy Trial exclusion, and supplied the District Court with a proposed order that purported to reach back and exclude "[t]he

period of time from and including March 10, 2015" (then seven months in the past) "through and including the new trial date" On October 9, 2015, the District Court executed the proposed order, purporting to exclude seven months retroactively—including the 57 days at issue here—and four months prospectively.

But the attempt to exclude time retroactively was plainly invalid. The Second Circuit has repeatedly held that "the decision to grant an ends-of-justice continuance [must] be prospective, not retroactive." *Tunnessen* at 77-78 ("[T]ime may not be excluded based on the ends-of-justice unless the district court indicates *at the time it grants the continuance* that it is doing so") (emphasis added); *Shellef* at 104 ("[T]he statutory text and legislative history of §3161(h)(7) plainly express[] Congress's intent for [ends-of-justice continuances] to be only prospective."); *Gambino* at 358 ("an order of excludable delay has no retroactive effect"). Thus, notwithstanding the Government and District Court's attempt to alter the situation retroactively, no ends-of-justice exclusion was in effect during the 57 unexcluded days that ran off the Speedy Trial clock from March 11, 2015 through May 6, 2015.

It bears noting, moreover, that the Government and District Court's attempt to retroactively exclude 57 unexcluded days was directly in service of forcing still *another* four-month adjournment on Mr. Carpenter over his objection. In the *same order* that purported to exclude seven months of prior delay, the District Court simultaneously granted the Government four months of *additional* delay for patently insubstantial reasons.

When the District Court had previously adjourned the trial in December 2014—moving it from March 2015 to October 2015—the Government had informed the District Court that it would use the delay to take any necessary Rule 15 depositions "sometime in the spring" of 2015. On that basis, the District Court adjourned the trial date six months, to October 2015, making clear that it was granting the adjournment in order to allow for the Government's Rule 15 depositions and "on

the understanding that there will be no further requests [to adjourn the trial] unless something truly unforeseeable should crop up." Yet when the Government thereafter waited until *July 21, 2015* to move even for *permission* to take any depositions (Dkt. No. 131), and the District Court similarly delayed ruling on that motion until *September 22, 2015* (Dkt. Nos. 141, 143 (describing events)), the District Court nonetheless rejected Mr. Carpenter's request to keep the October trial date and, instead, granted the Government's request to adjourn Mr. Carpenter's trial for *another* four months—from October 2015 to February 2016—on the ground that "Fed. R. Crim. P. 15 depositions, authorized by the Court, will not take place until at least November 2015, and potentially after that time" The Government's lack of diligence in pursuing its depositions (and the District Court's lack of attention to authorizing them) did not justify a four-month trial adjournment or the ends-of- justice exclusion that the District Court made to enable it.

Similarly flimsy, the District Court also justified the four-month adjournment by accepting the Government's claim that "many potential witnesses, several of whom are elderly, will require significant advance notice to serve subpoenas and arrange travel to Connecticut for trial." But the existing trial date had been set ten months in advance—certainly sufficient advance notice to permit the Government to serve subpoenas and arrange travel for its witnesses without justifying an additional four-month delay. Again, this rationale did not justify a four- month adjournment or the ends-of-justice finding that the District Court made to enable it.

In short, the unjustified rejection of the Defendant's objection to the final four- month trial adjournment illustrates that the Speedy Trial clock in this case elapsed not from mere benign inattention, but from an affirmative disregard for Mr. Carpenter's Speedy Trial rights and the Government's obligation to put its case in order for a timely trial. The Government did not simply fail to mind the Speedy Trial clock, it failed to pay sufficient mind to the rights that underlie it.

II. The Decision Below Conflicts with this Court's decisions in *Zedner, Bloate,* and *Tinklenberg,* and most of the other Circuits' Clear Precedents

"[T]o trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from `presumptively prejudicial' delay...." *Doggett v. United States*, 505 U.S. 647, 651-52 (1992). The longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty. Courts must balance the four factors to determine whether a delay violated the Sixth Amendment. (1) the "[l]ength of the delay"; (2) "the reason for the delay"; (3) "the defendant's assertion of his right"; and (4) "prejudice to the defendant." *Barker*, 407 U.S. at 530. A delay of one year or more crosses the threshold and triggers analysis of the remaining *Barker* factors, but no one factor is determinative; rather, they are related factors which must be considered together with such other circumstances as may be relevant.

In Mr. Carpenter's case, the delay has clearly violated the Sixth Amendment and caused excessive presumptive prejudice. First, the "length of delay" in this case has been longer than three years, so the first factor favors Mr. Carpenter. Second, the "reason for the delay" has been the government dragging its feet pre-Indictment, and then taking almost two full years to produce documents to counsel for Mr. Carpenter, with new documents being submitted to this day. Therefore, the second factor favors Mr. Carpenter. Third, Mr. Carpenter has laid out the various speedy trial violations that have occurred in this case since it began, so the third factor obviously favors Mr. Carpenter. Fourth, and most importantly, not only has this now five-year nightmare resulted in the worst forms of prejudice against Mr. Carpenter in lost business opportunities and his physical freedom, but also by separate litigations being poisoned against him due to a presumption of guilt and "negative inferences." His family has also suffered through this ordeal not only by numerous lost business opportunities and banks severing ties with them, but simply

through the personal pain of watching their loved one suffer while incarcerated and through relentless litigation by the government. *United States v. Ferreira*, 665 F.2d 701 (6th Cir. 2011), *Dixon v. White*, 210 Fed. Appx. 498 (6th Cir. 2007), *United States v. Erenas-Luna*, 560 F.3d 772 (8th Cir. 2009), *United States v. Ingram*, 446 F.3d 1332 (11th Cir. 2006), and the policy behind speedy trial rights support a conclusion that both the negligence that the government committed and the significant length of the delay warrant dismissal of the indictment with prejudice.

The Speedy Trial violations in this case are also not a close call as there was no reason for the delay from March 2014 to March 2015, nor was there any balancing tests done in the interests of justice. *See United States v. Zedner*, 547 U.S. 489, 507 (2006). The same is true in the delay from March 2015 to October 2015. There were no reasons placed on the docket as required by §3161(h)(7)(A) and this Court's decision in *Bloate v. United States*, 559 U.S. 196 (2010). But, the 120 days from October 2015 to February 2016 were a clear-cut violation of the Speedy Trial Act. *See, e.g., United States v. Ramirez*, 788 F.3d 732 (7th Cir. 2015), where a notorious cocaine dealer had his conviction vacated by the Seventh Circuit for a delay of only 90 days, and *United States v. Giambrone*, 920 F.2d 176, 180 (2d Cir. 1990) (court may dismiss with prejudice in light of prosecution's "demonstrably lackadaisical attitude"). *See, also, United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (1979) (delay of 54 months); *United States v. Bert*, 814 F.3d 70 (2d Cir. 2016) (delay of only 11 months on Motion to Suppress, whereas delay on Mr. Carpenter's motion to suppress was 16 months); *United States v. Montecalvo*, 861 F. Supp. 2d 110, 120 (E.D.N.Y. 2012) (delay of 23 months); *United States v. Dezeler*, 81 F.3d 86 (8th Cir. 1996) (delay of only one day); *United States v. Huete-Sandoval*, 668 F.3d 1 (1st Cir. 2011) (delay of only 16 days), and *Bloate* and *United States v. Tinklenberg*, 131 S.Ct. 2007 (2011) (delays of only 9 days).

If the district court "fails to make the requisite finding regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed." *Ramirez* at 738, *citing Zedner* at 508. As this Court recognized in *Zedner*, the built-in flexibility of the ends of justice continuance has the potential to "get out of hand," so "procedural strictness" is necessary to counteract that danger. *Ramirez* at 740. That procedural strictness requires on-the-record findings that sufficiently identify the factors that were considered in making an ends of justice continuance. *See United States v. Crawford*, 982 F.2d 199, 204 (6th Cir. 1993). A judge may not "grant an 'ends of justice' continuance *nunc pro tunc*, providing after the fact justification for unauthorized delays." *United States v. Janik*, 723 F.2d 537, 545 (7th Cir. 1983). In Mr. Carpenter's case, there is no mention of any "ends of justice" reasoning in the exclusion of dozens of days that should have been counted against the STA Clock; not to mention the **three years** between the raid of May 2011 and the issuance of the Superseding Indictment in May 2014.

Mr. Carpenter would also like to emphasize the Third Circuit opinion in *United States v. Velazquez*, 749 F.3d 161 (3d Cir. 2014), written by Judge Lipez of First Circuit fame, where he reviews the six year delay in bringing Mr. Velazquez - who was a truly notorious drug dealer and dangerous criminal - to trial. Mr. Velazquez was either evading justice (the government's view) or was just a transient individual (Third Circuit's view) when he was arrested in California and shipped back to Philadelphia on an old arrest warrant. Mr. Velazquez pled guilty while preserving his Speedy Trial claim and was sentenced to 87 months. In vacating his conviction and sentence for violations of the Speedy Trial Clause, Judge Lipez discusses the second of the *Barker* factors: who exactly is responsible for the delay, which is the "flag that all litigants seek to capture," *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). Unlike the transient defendant in *Valezquez*, Mr. Carpenter has lived at the same address for 25 years and has actively been fighting the Government

for 20 years, all from the same address. There is no excuse whatsoever for the Government's extensive delays in prosecuting Mr. Carpenter in this case.

III. The Due Process Delays in this Case Were Extraordinary and the Prejudice to Mr. Carpenter was Palpable

"[T]he Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings." *See United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009), *citing Doggett* at 666. In *Ray*, in trying to craft a remedy for the Due Process violation for the delay in Ms. Ray's case, the Second Circuit eliminated the need for her to serve any of her custodial sentences or time in a Halfway House and stated the following:

> "The appropriate remedy for a proven due process violation often depends on the stage at which the violation is found and the relief sought. After a due process violation has occurred, courts endeavor to fashion relief that counteracts the prejudice caused by the violation. The Sixth Circuit has stated that suspension of the remainder of the sentence is the appropriate remedy for a due process violation…. The violation of Ray's due process right has prejudiced her insofar as a delayed custodial sentence threatens to undermine her successful rehabilitation. To remedy that harm, the appropriate relief is to release her from any requirement that she submit to a custodial sentence. Accordingly, we conclude that the appropriate remedy in this case is the vacatur of Ray's sentence insofar as it imposes a six-month term of residence in a halfway house." *Ray* at 202-03.

In this case, Mr. Carpenter respectfully requests that the indictment be dismissed based on the numerous Due Process violations in this case, all of which surpass the Second Circuit's description of "hardship" in *Ray*. Mr. Carpenter respectfully suggests that the Court would be well within its discretion to dismiss his indictment as the District Court did in *United States v. Benatta*, 2003 WL 22202371 (W.D.N.Y. 2003), to cure the many Due Process violations in his case. Similarly, this is the rare case where both sections §3161(j) and §3164 come into play. Section 3164 was violated because the Government required Mr. Carpenter to be imprisoned at the Wyatt Detention Center throughout his trial rather than be at a local Halfway House in Hartford or receive a furlough under CFR §570.33. The Government had also knowingly postponed Mr. Carpenter's trial from the original date of October 2015 to a new date in February 2016, just so it could travel

across the country and interview witnesses that had never even heard of Mr. Carpenter, much less participated with him in a scheme to defraud the insurance carriers. This was clearly a violation of §3164 of the Speedy Trial Act, but §3164's only remedy is the release of the defendant, therefore Mr. Carpenter asks only for the recognition of the several Due Process violations in this case and for the vacating of his conviction and the dismissal of his indictment.

However, the Speedy Trial Act and Due Process Delay bullets that the government could never possibly dodge is §3161(j)(1), (2), and (3), which provide as follows:

> (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 –
>
> (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. *See Benatta* at *12-13.

In Mr. Carpenter's case, however, no one from the Government contacted the Warden or advised Mr. Carpenter of his Speedy Trial rights under §3161(j). The Government knew that he was sentenced by the Judge in Boston in February of 2014, and his post-trial motions were denied in May of 2014 when the Government hit him with a Superseding Indictment with a whole new series of Money Laundering charges, one month before the Government knew that Mr. Carpenter would be reporting to prison. So, while the Government knew they were going to re-indict Mr. Carpenter in May 2014 just before he reported to USP Canaan in June 2014, they did absolutely nothing as required under §3161(j). Then, without notifying Mr. Carpenter or his attorneys, they had Mr. Carpenter yanked out of his bunk after lights-out on December 28, 2015 and he was

transferred to the same MDC Brooklyn that resulted in the defendant in *Benatta* having his indictment dismissed for only a violation of four months, where Mr. Carpenter's §3161(j) violation was over 18 months, and Mr. Carpenter was held in Maximum Security at both MDC Brooklyn and at Wyatt for 180 days, including six months leading up to and during his Trial, whereas the total for the defendant in *Benatta* was only 134 days.

The reason that the dismissal of the indictment in *Benatta* is so important to Mr. Carpenter's case is that the defendant in *Benatta* was suspected by the FBI of being one of the 9-11 terrorists caught at the Canadian Border, and was held at MDC Brooklyn from the time of his indictment (December 12, 2001) to his release to the Immigration Court at the Batavia Federal Detention Facility on April 30, 2002; a delay of only four and a half months. Mr. Carpenter respectfully suggests that this Court would be well within its discretion to dismiss his indictment as the district court did in *Benatta* pursuant to Rule 48(b) of the Fed.R.Crim.P. which provides that:

> The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:
> (1) presenting a charge to a grand jury;
> (2) filing an information against a defendant; or
> (3) bringing a defendant to trial

Rule 48(b) not only allows a court to dismiss an indictment on constitutional grounds, but also where the delay may not be of the constitutional magnitude of this case – a court can still dismiss an indictment pursuant to Rule 48(b) for any Due Process delay violation. *See Pollard v. United States*, 352 U.S. 354, 361 n. 7 (1957) (noting that Rule 48(b) provides for enforcement of the Sixth Amendment's speedy-trial right). It also restates the court's inherent power to dismiss an indictment for lack of prosecution where the delay is not of a constitutional magnitude, *see* Fed.R.Crim.P. 48(b) advisory committee note pointing out that the rule restates the "inherent power of the court to dismiss a case for want of prosecution." *Pollard* at 361. This is important because now Mr. Carpenter's case is exactly like the famous drug dealer Eddi Ramirez, who had

his indictment dismissed in the Seventh Circuit for a delay from October to January that was not covered by the Speedy Trial Act. *See United States v. Ramirez*, 788 F.3d 732 (7th Cir. 2015). Once again, the delay in Mr. Carpenter's case is many times longer than the delay in *Ramirez*, and yet the *Ramirez* indictment was dismissed with prejudice.

Similarly, in *United States v. Bert*, 814 F.3d 70 (2d Cir. 2016), the defendant did a motion to suppress which was eventually denied, but the delay by the court in that case is actually shorter than the delay on the motion for suppress in Mr. Carpenter's case, which is several months longer and Mr. Carpenter has a better argument because the search warrants were facially defective. Significantly, the delay in Mr. Carpenter's case was substantially longer than in *Bert*, but the Second Circuit decided to remand the case with instructions to dismiss Bert's indictment with prejudice. The district court dismissed the indictment without prejudice, and the government re-indicted the defendant. Not only did Mr. Carpenter have a better case than the defendant in *Bert*, the Speedy Trial Act violation was far greater just on the time difference alone, so Mr. Carpenter respectfully submits the argument that the Second Circuit made in *Bert* and that they completely ignored in analyzing Mr. Carpenter's case. That is why this Court must make clear that the standard articulated in *Zedner* and *Bloate* is that any exclusions under the Speedy Trial Act must be put on the docket, and not remain simply in the judge's mind as the Second Circuit erroneously stated in Mr. Carpenter's summary affirmance:

> While the required ends-of-justice findings must be made before a continuance is granted, the time is properly excluded even where the district court does not ″utter the magic words ′ends-of-justice′ at the time of ordering the continuance.″ *United States v. Breen*, 243 F.3d 591, 597 (2d Cir. 2001). Where it is apparent from the record that the district court has weighed the competing interests, ″the purposes of the statute are satisfied by a subsequent articulation.″ *Id*. at 596; *see also Zedner v. United States*, 547 U.S. 489, 506-07 (2006) (stating required ends-of-justice findings *″must be made, if only in the judge's mind*, before granting the continuance″). *See* Appendix A pp. 3-4 (emphasis added).

This is perhaps the most important reason that this Court needs to grant Certiorari to clear up just how much time is too long under *Lovasco* and exactly what must be put on the docket of the case before there is an exclusion. Clearly, every other circuit disagrees with the conclusion of the Second Circuit in this case that it is sufficient for the judge to have gone over the balancing of features required by the Speedy Trial Act in his mind without putting the explanation of what actually constituted the interests of justice in a particular case. The district court clearly violated the rules of *Zedner, Bloate*, and §3161(h)(7)(A), and the Government clearly violated §3161(j). Therefore, Mr. Carpenter's conviction should be vacated and his indictment should be dismissed with prejudice as happened to the defendants in *Benatta, Bert, Ramirez,* and *Valezquez.*

CONCLUSION

For the forgoing reasons, this Court should grant this Petition.

Respectfully submitted,

Jonathan J. Einhorn, Esq.
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Attorney & Counselor at Law
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New Haven, CT. 06510
tel: 203-777-3777
einhornlawoffice@gmail.com

Counsel for Petitioner

APPENDIX

APPENDIX A

Summary Affirmation of the Second Circuit dated January 13, 2020

19-70-cr
United States v. Daniel Carpenter

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 13th day of January, two thousand twenty.

PRESENT: BARRINGTON D. PARKER,
DENNY CHIN,
Circuit Judges.
DENISE COTE,
District Judge.[*]

----------x

UNITED STATES OF AMERICA,
Appellee,

v. 19-70-cr

WAYNE BURSEY,
Defendant,

DANIEL CARPENTER,
Defendant-Appellant.

----------x

[*] Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

FOR APPELLEE:	DAVID E. NOVICK, Assistant United States Attorney (Neeraj Patel *and* Sandra S. Glover, Assistant United States Attorneys, *on the brief*), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, Connecticut.
FOR DEFENDANT-APPELLANT	MICHAEL A. LEVY (Qais Ghafary, *on the brief*), Sidley Austin LLP, New York, New York.

Appeal from the United States District Court for the District of Connecticut (Chatigny, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendant-appellant Daniel Carpenter appeals from the December 20, 2018 judgment of the district court convicting him, following a bench trial, of fifty-seven counts related to his participation in a stranger-originated life insurance ("STOLI") scheme, in which he fraudulently induced insurance providers to issue and maintain life insurance policies on elderly strangers. Specifically, Carpenter was convicted of wire fraud, mail fraud, conspiracy to commit mail and wire fraud, illegal monetary transactions, money laundering, and conspiracy to commit money laundering. The district court sentenced Carpenter principally to thirty months' imprisonment. Carpenter argues that the district court committed reversible error by (1) denying his motion to dismiss the indictment for violations of the Speedy Trial Act; (2) denying his motions to suppress evidence seized pursuant to warrants; (3) erroneously calculating

the loss amount; (4) holding that certain of the mail and wire fraud counts were timely; and (5) erroneously treating certain death benefits as proceeds of fraud. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

I. *Speedy Trial Act*

"We review the district court's findings of fact as they pertain to a speedy trial challenge for clear error and its legal conclusions *de novo*." *United States v. Lynch*, 726 F.3d 346, 351 (2d Cir. 2013) (internal quotation marks omitted). The Speedy Trial Act requires that a trial begin within seventy days of indictment or initial appearance, whichever is later. 18 U.S.C. § 3161(c)(1). Time may be excluded, however, for various reasons, including the filing of pretrial motions and continuances in the interest of justice. *See* 18 U.S.C. § 3161(h)(1)(D), (7)(A).

With respect to exclusions of time for interest-of-justice continuances, the court must articulate either orally or in writing its reasons for finding that the ends of justice are served by the continuance. *See* 18 U.S.C. § 3161(h)(7)(A). While the required ends-of-justice findings must be made before a continuance is granted, the time is properly excluded even where the district court does not "utter the magic words 'ends-of-justice' at the time of ordering the continuance." *United States v. Breen*, 243 F.3d 591, 597 (2d Cir. 2001). Where it is apparent from the record that the district court has weighed the competing interests, "the purposes of the statute are satisfied by a subsequent articulation." *Id.* at 596; *see also Zedner v. United States*, 547 U.S. 489, 506-07

(2006) (stating required ends-of-justice findings "must be made, if only in the judge's mind, before granting the continuance").

The district court issued a written decision on March 22, 2016 denying Carpenter's speedy trial motion. We agree that there was no speedy trial violation largely for the reasons given by the district court. We note that during the relevant period, from January 17, 2014, when Carpenter made his first appearance, until the start of trial on February 16, 2016, Carpenter made several motions that resulted in the exclusion of time. On January 30, 2014, Carpenter moved for an enlargement of his time to file motions and to reschedule his trial from March 11, 2014 to an unspecified time thereafter. After a hearing on the motion, the district court granted the motion, making the necessary ends-of-justice finding and adjourning the trial to March 10, 2015. On December 3, 2014, Carpenter moved for an enlargement of time for the commencement of trial from March 10, 2015 to "sometime after September 10, 2015." App'x at 408. Carpenter represented that the time was necessary for counsel to review the voluminous discovery and prepare a proper defense. The motion was discussed at length at a hearing on December 4, 2014. The court granted the motion, extending the trial date until "the fall, perhaps in October." App'x at 510. While the district court did not make explicit ends-of-justice findings, clearly the court and counsel thoroughly discussed the relevant factors, and it is apparent that, in granting the motion, the district court weighed these factors in its mind. Moreover, in its October 13, 2015 order, the district court made explicit its ends-of-justice finding for the exclusion of time from

March 10, 2015 forward. Accordingly, the time was properly excluded and Carpenter's rights to a speedy trial were not violated.

II. *The Search Warrants*

Carpenter argues that the district court erroneously denied his motion to suppress evidence seized on the basis of facially defective search warrants. We disagree. On appeal from a denial of a suppression motion "we review a district court's findings of fact for clear error, and its resolution of questions of law and mixed questions of law and fact *de novo*." *United States v. Bohannon*, 824 F.3d 242, 247-48 (2d Cir. 2016).

A warrant must satisfy three criteria to be sufficiently particular under the Fourth Amendment: (1) it must "identify the specific offense for which the police have established probable cause"; (2) it must "describe the place to be searched"; and (3) it must "specify the items to be seized by their relation to the designated crimes." *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017). "[T]he alleged crimes must appear in either (1) the warrant itself, or (2) in a supporting document if the warrant uses appropriate words of incorporation and if the supporting document accompanies the warrant." *In re 650 Fifth Ave. and Related Props.*, 830 F.3d 66, 100 (2d Cir. 2016). "A failure to describe the items to be seized with as much particularity as the circumstances reasonably allow offends the Fourth Amendment." *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992). Even where a warrant is facially invalid, the search can be upheld under the good faith exception to the warrant requirement. "[T]he exclusion of

evidence is inappropriate when the government acts in objectively reasonable reliance on a search warrant, even when the warrant is subsequently invalidated." *United States v. Ganias*, 824 F.3d 199, 221 (2d Cir. 2016).

As a threshold matter, the district court found that Carpenter had a reasonable expectation of privacy in the areas searched and the items seized under the two warrants. *See* App'x at 542. Assuming Carpenter did have standing to challenge the warrants, his challenge still fails. Even if the warrants were facially invalid, the agents' reliance on them was reasonable. "[A] defective warrant issued based on an affidavit providing detailed factual allegations" will "almost invariably demonstrate reasonable reliance." *United States v. Clark*, 638 F.3d 89, 103 (2d Cir. 2011); *see also United States v. Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990) (holding that "[w]hen the magistrate signed the warrant . . . with the affidavit apparently attached although not specifically incorporated, the agent reasonably could have concluded that the scope of the warrant was limited to materials supporting the allegations contained in the affidavit") (cited in *George*, 975 F.2d at 76). Both warrants were based on detailed affidavits that clearly described the crimes in question, the places to be searched, and the items to be seized. *See Clark*, 638 F.3d at 102. Accordingly, the evidence seized as a

result of the warrants was admissible under the good faith exception, and we conclude that the district court did not err when it denied Carpenter's motion to suppress.

III. *Loss Calculation*

Carpenter argues that the district court miscalculated the Sentencing Guidelines range because it applied a sentencing enhancement based on an erroneous estimate of loss. Specifically, Carpenter contends that the Guidelines range of 292 to 365 months was driven largely by a 22-level enhancement resulting from a faulty loss calculation of $53.3 million, when the proper loss calculation would have resulted in a Guidelines range of 27 to 33 months. We are not persuaded.

"We review legal interpretations of the Sentencing Guidelines construing the term 'loss' *de novo*. Factual findings supporting the district court's offense level calculation are reviewed under a clearly erroneous standard." *United States v. Jacobs*, 117 F.3d 82, 95 (2d Cir. 1997) (citation omitted). A district court's factual findings as to loss amount is reviewed for clear error. *See United States v. Binday*, 804 F.3d 558, 595 (2d Cir. 2015). Here, the district court applied the loss amount methodology we approved in *Binday*, *id.* at 596. Accordingly, we find no clear error in the application of the sentencing enhancement derived from the resulting loss calculation.

IV. *Statute of Limitations*

Carpenter argues that the district court erred when it convicted him of 28 counts of mail and wire fraud that he contends were barred by the statute of limitations. Specifically, Carpenter argues that the relevant mailings or wires involved premium

payments on policies issued outside the applicable limitations period and that premium payments made within the limitations period do not qualify as acts in furtherance of the charged fraud. We disagree.

"After a bench trial, we will set aside a district court's findings of fact only if they are clearly erroneous." *United States v. Coppola*, 85 F.3d 1015, 1019 (2d Cir. 1996). Conclusions of law and mixed questions of fact and law are reviewed *de novo*. *Id.* The relevant mailing or wire "need not be an essential element of the scheme. It is sufficient for [it] to be incident to an essential part of the scheme." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (internal citations and quotation marks omitted). "Where the frauds are not isolated or unrelated swindles, postfraud mailing of invoices, checks, or receipts may further the scheme . . . by helping to keep the scheme in operation by preserving a needed business relationship between a fraud victim and a defendant." *United States v. Slevin*, 106 F.3d 1086, 1089-90 (2d Cir. 1996).

Here, though the fraud was initiated when a STOLI policy was purchased, the scheme did not reach fruition until the STOLI policies were resold at the end of the two-year contestability period and Carpenter's companies received commissions. Keeping the policies in force -- which required making premium payments -- was thus necessary to complete the fraud. Accordingly, we conclude that the challenged mail and wire fraud counts fell within the statute of limitations.

V. *Money Laundering and Illegal Monetary Transaction Convictions*

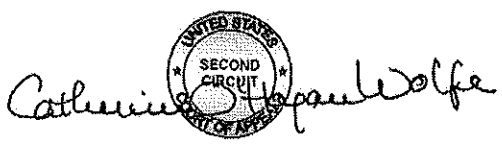
Carpenter argues that his convictions for money laundering and illegal monetary transactions based on the death of Sash Spencer must be reversed because the death benefits were not themselves proceeds of fraud. Specifically, Carpenter argues that because the information regarding Spencer's age and health was accurate, proceeds from the benefit were not fraudulently obtained. We disagree.

As Carpenter did not make this argument below, we review for plain error. *See United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995). A factfinder may infer that an insurer seeking to avoid issuing STOLI policies asks questions about an applicant's economic status and reason for purchasing the policy "not out of idle curiosity, but because they are material to the insurer's underwriting decision." *Binday*, 804 F.3d at 576. Here, questions intended to ferret out STOLI policies were not answered truthfully, resulting in the issuance of policies that would not have otherwise issued. Accordingly, we hold that the district court did not plainly err when it convicted Carpenter of money laundering and illegal monetary transactions.

* * *

We have considered Carpenter's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

Judgment and Commitment Order of the District Court dated December 20, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES

V.

DANIEL CARPENTER

JUDGMENT

CASE NO. 3:13-cr-00226-RNC
USM: 90792-038

Government's Counsel:
David Novick, Assistant U.S. Attorney
Neeraj Patel, Assistant U.S. Attorney

Defendant's Counsel:
Richard R. Brown
Cody Nolan Guarnieri
James M. Cole
Michael A. Levy
Qais Ghafary
Jonathan J. Einhorn

The defendant was found guilty on each count in the Superseding Indictment. Accordingly, the defendant is adjudicated guilty of the following offenses:

Title & Section	Nature of Offense	Offense Concluded	Count
18 U.S.C. §§ 1343 and 2	Wire Fraud	June 2014	1-4, 7-18, 20, 23, 26, 29-32
18 U.S.C. § 1341 and 2	Mail Fraud	June 2014	5, 6, 19, 21-22, 24-25, 27-28
18 U.S.C. § 1349	Conspiracy to Commit Mail and Wire Fraud	June 2014	33
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	June 2014	34
18 U.S.C. § 1957 and 2	Illegal Monetary Transactions	June 2014	35-47
18 U.S.C. § 1956(a)(1)(A)(i) and 2	Money Laundering: Promotion of Specified Unlawful Activity	June 2014	48-57

The following sentence is imposed pursuant to the Sentencing Reform Act of 1984. A non-Guidelines sentence is imposed. The defendant's criminal conduct as the organizer and leader of the STOLI scheme established by the evidence at trial calls for a significant sentence of imprisonment in order to reflect the seriousness of the defendant's offenses, impose just punishment, provide adequate deterrence to criminal conduct of this nature, and promote respect for law. However, a substantial variance is necessary to avoid overpunishing the defendant. As applied here, U.S.S.G. § 2B1.1 overstates the seriousness of the offense. The loss amount of $54 million, which results in a 22-level increase in the offense level, equates fraudulently induced STOLI transactions with theft, although the two differ in ways that are relevant to sentencing. In addition, applicable adjustments for offense conduct involving sophisticated means and causing loss to a financial institution of more than $1 million, together with an enhancement for aggravating role, result in a further 8-level increase. Though each of these is sufficiently distinct to avoid double-counting, they substantially overlap. In addition, the guideline calculation does not take account of the defendant's bipolar disorder, which is significantly mitigating (and best treated in the community), or his record of charitable and employment-related contributions. The possibility that the indictment in this case caused an increase in the defendant's prior federal sentence, and prevented him from being released to a halfway house or home confinement, as he contends, does not justify a further reduction in his sentence of imprisonment beyond the substantial variance that is being granted for the reasons stated above.

IMPRISONMENT

The defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 30 months on Counts 1 through 57, to run concurrently, for a total effective sentence of 30 months. The defendant will self-surrender directly to the facility designated by the Bureau of Prisons no later than 12:00 p.m. on March 4, 2019. In the event the defendant does not receive a designation from the Bureau of Prisons prior to that date, the defendant will self-surrender directly to a Bureau of Prisons facility as directed by the United States Marshal.

RECOMMENDATIONS TO THE BUREAU OF PRISONS

The Court recommends that the defendant be designated to serve his term of incarceration at FMC Devens or FCI Otisville in that order of preference.

SUPERVISED RELEASE

The defendant will be on supervised release for a term of three years on all counts, to be served concurrently, subject to the mandatory and standard conditions of supervised release set forth below, as well as the following special conditions:

1. The defendant will pay restitution in an amount to be determined by the Court within 90 days. If he is unable to pay the full balance in a lump sum, any remaining balance will be paid at a rate of not less than $1,000 per month. The monthly payment schedule may be adjusted based on the defendant's ability to pay as determined by the Probation Office and approved by the Court.

2. The defendant will provide the Probation Office with access to any requested financial information and authorize third parties to release financial information to the Probation Office. The Probation Office may share financial information with the U.S. Attorney's Office.

3. The defendant will participate in a program of mental health evaluation, counseling and treatment recommended by the Probation Office and approved by the Court. The defendant will pay all or part of

the costs of this treatment based on his ability to pay as recommended by the Probation Office and approved by the Court.

4. The following occupational restrictions are reasonably necessary to ensure that the defendant does not engage in unlawful conduct similar to that for which he has now been twice convicted: (a) the defendant will not engage in any for-profit business, directly or indirectly, without the prior approval of the Probation Office; (b) the defendant's involvement in the activities of any not-for-profit entity will exclude activities relating to the finances of the entity unless he receives prior approval from the Probation Office; and (c) the defendant will not act in a fiduciary capacity without the prior approval of the Probation Office.

RESTITUTION

The defendant will pay restitution in an amount to be determined by the Court.

MONETARY PENALTIES

The defendant will pay a special assessment of $100 on each count of conviction for a total of $5,700.

The defendant will notify the United States Attorney for this District within 30 days of any change of name, residence or mailing address until the restitution and special assessments imposed by this judgment are paid.

DATE: 12/3/2018
Date of Imposition of Sentence

/s/

Robert N. Chatigny, United States District Judge
Date: 12/20/2018

CONDITIONS OF SUPERVISED RELEASE

In addition to the Standard Conditions listed below, the following indicated (■) Mandatory Conditions are imposed:

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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

(5) ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

(6) ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

(7) ■ 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)*

STANDARD CONDITIONS

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) You must follow the instructions of the probation officer related to the conditions of supervision.

Upon a finding of a violation of supervised release, I understand that the court may (1) revoke supervision and impose a term of imprisonment, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

CERTIFIED AS A TRUE COPY ON THIS DATE: _____

By: _____
Deputy Clerk

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
Brian Taylor
Acting United States Marshal

By _____
Deputy Marshal

APPENDIX C

Order denying Motion to Dismiss on Speedy Trial grounds dated March 22, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES	:	
	:	
v.	:	Case No. 3:13-CR-226(RNC)
	:	
DANIEL CARPENTER	:	

MEMORANDUM

Prior to the start of the trial in this case, the defendant moved to dismiss the superceding indictment on the ground that his right to a speedy trial had been violated. On February 16, 2016, the Court denied the motion in a bench ruling stating that there had been no violation. The defendant requested that the Court provide a written statement of the reasons for the ruling. This memorandum responds to that request.

I. Speedy Trial Act

Under the Speedy Trial Act, the trial of a defendant must begin within seventy days of the filing of the indictment, or within seventy days of the date the defendant first appears before a judicial officer, whichever is later. 18 U.S.C. § 3161(c)(1). A defendant first "appears" when he is arraigned and enters a plea of not guilty. See United States v. Hammad, 902 F.2d 1062, 1064 (2d Cir. 1990); United States v. Segura, No. 3:99CR85 (EBB), 2001 WL 286851, at *2 (D. Conn. Mar. 21, 2001).

The Act provides that certain "periods of delay shall be excluded . . . in computing the time within which the trial . . . must commence." 18 U.S.C. § 3161(h). For instance, "[a]ny period of delay resulting from other proceedings concerning the

defendant" is excluded, including "delay resulting from any pretrial motion." 18 U.S.C. § 3161(h)(1)(D). Under the Act, "filing a pre-trial motion tolls the speedy trial clock until the earlier of either (1) a ruling on the motion, or (2) 30 days after the final filing or hearing necessary to decide the motion." United States v. Zerbe, 596 F. Supp. 2d 267, 270 (D. Conn. 2009). In addition, any period of delay caused by a continuance granted by the court may be excluded when "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). In determining whether to grant an "ends of justice" continuance, the judge must consider several factors, including "[w]hether the failure to grant such a continuance . . . would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation." 18 U.S.C. § 3161(h)(7)(B)(iv).

In this case, the seventy day period began to run on January 18, 2014, the day after the defendant was arraigned. On January 30, 2014, the defendant moved for a continuance. On March 3, 2014, a conference was held to discuss an appropriate schedule. After the parties conferred, the Government submitted a proposal calling for a trial in March 2015. The Court then granted the defendant's motion for a continuance and set the trial date for March 11, 2015. In doing so, the Court found that the ends of

justice outweighed the best interest of the public and the defendant in a speedy trial and excluded the time between March 10, 2014 and March 11, 2015. The defendant filed a waiver of his speedy trial rights effective until the new trial date.

The superceding indictment was returned on May 15, 2014. Over the next several months, the defendant filed a number of pretrial motions, including multiple motions to dismiss the indictment and two motions to suppress. These motions were fully briefed as of December 1, 2014.

On December 3, 2014, the defendant again moved for a continuance. The Court granted the motion and continued the trial date until October 2015 after finding that the ends of justice were best served by the continuance. The defendant filed a second waiver of his speedy trial rights effective until October 31, 2015.

At a conference on September 22, 2015, the parties discussed whether an October trial date was feasible. Because the Government still needed to conduct several out-of-state depositions, counsel suggested that the trial be postponed until February 2016. On October 4, 2015, the Government formally moved for a continuance. On October 13, 2015, the Court granted the motion, made the necessary "ends of justice" finding, and excluded the time between March 10, 2015 and February 9, 2016. The trial date was subsequently continued until February 16,

2016, and the trial began that day.

As the foregoing summary shows, only twelve days of non-excluded time elapsed prior to the start of the trial -- specifically, the time between January 18 and 30, 2014. Accordingly, there has been no violation of the Speedy Trial Act.

II. Sixth Amendment

The defendant also claims that his Sixth Amendment right to a speedy trial has been violated. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."). This right attaches when an accused "is indicted, arrested, or otherwise officially accused," United States v. MacDonald, 456 U.S. 1, 6 (1982), and is intended to "prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Marion, 404 U.S. 307, 320 (1971) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)) (internal quotation mark omitted).

To determine whether a defendant's constitutional right to a speedy trial right has been violated, four factors must be considered: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972). "These factors 'must be considered together with such other

circumstances as may be relevant' and 'have no talismanic qualities.'" United States v. Cain, 671 F.3d 271, 296 (2d Cir. 2012) (quoting id. at 533). Review of the four Barker factors shows that defendant's right to a speedy trial has not been violated.

The first factor -- the length of the delay -- "is in effect a threshold question." Id. A defendant "cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness." Id. (quoting Doggett v. United States, 505 U.S. 647, 652 (1992)) (internal quotation mark omitted). As a general matter, a delay approaching one year may be considered "presumptively prejudicial," Doggett, 505 U.S. at 652 n. 1, in that such a delay would be sufficient to justify inquiry into the remaining Barker factors.

The pretrial phase of this case lasted approximately twenty-six months. On its face, this period of delay might seem to weigh strongly in favor of the defendant. But delays of this length have occurred in complex cases with no Sixth Amendment violation. Cain, 671 F.3d at 296 (delay of less than 22 months was "largely neutral" and "particularly understandable given the presence of multiple defendants, the large number of allegations and the complexity of the . . . case); United States v. Alvarez, 541 F. App'x 80, 84 (2d Cir. 2013) ("[G]iven the nature of th[e]

conspiracy prosecution, with multiple defendants, allegations spanning multiple years and states, and voluminous discovery, including thousands of intercepted phone calls (many in Spanish), the [29-month] delay here weighs only modestly in [the defendant's] favor."). So too here. The 57-count superceding indictment charges mail and wire fraud, money laundering, illegal monetary transactions and conspiracy stemming from an elaborate scheme to defraud a number of different insurance companies. Discovery has encompassed approximately one million documents as well as pretrial depositions of elderly witnesses located across the country. In this unusual context, a delay of twenty-six months does not weigh strongly in favor of the defendant.

Turning to the next factor -- the reason for the delay -- the Supreme Court has instructed that "different weights should be assigned to different reasons." Barker, 407 U.S. at 531. "A deliberate attempt to delay the trial" weighs heavily in defendant's favor, while "a valid reason . . . should serve to justify appropriate delay." Id. In between these two extremes, a "neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered." Id.

Here, "the delay in bringing the case to trial resulted primarily from the practical difficulties occasioned by the complexities of the case and not from congestion of the calendar

or bad faith or neglect on the part of the government." Cain, 671 F.3d at 297. The parties agree that this case is complex. The indictment charges a scheme to defraud involving numerous persons and entities. The discovery provided by the Government includes approximately one million documents. Defendant relied on these aspects of the case when seeking two lengthy continuances that extended the trial date from March 2014 to October 2015. The remaining delay, even if attributable to the Government, is the result of "practical difficulties," such as arranging out-of-state depositions of elderly witnesses. Given the nature, scope, and complexity of the charges, the voluminous discovery, and the practical difficulties presented by the case, the second factor does not weigh in favor of the defendant.

The next factor to consider is the defendant's assertion of his right to a speedy trial. "In practice, a defendant's demand for or failure to demand a speedy trial tends not to influence the analysis strongly except at the extremes." United States v. Ghailani, 751 F. Supp. 2d 515, 529 (S.D.N.Y. 2010), aff'd, 733 F.3d 29 (2d Cir. 2013). "[C]ourts have tended to discount a defendant's belated demand for a speedy trial if convinced that it was opportunistic," while "early and frequent demands by a defendant for a speedy trial have proved significant if they have been ignored by the prosecution." Id.

Here, the defendant first broached the issue of his speedy

trial rights in a motion for reconsideration of this Court's order extending the trial date from October 2015 to February 9, 2016. Prior to that time he requested or joined in requests for lengthy continuances and filed speedy trial waivers. The motion for reconsideration -- which did not seek to dismiss the superceding indictment -- was filed on October 14, 2015, approximately twenty-two months after the defendant was indicted. In view of this history, the defendant's belated attempt to invoke his right to a speedy trial through his motion for reconsideration is properly discounted. See United States v. Vasquez, 918 F.2d 329, 338 (2d Cir. 1990) ("[B]oth defendants waited roughly [twenty-two] months before advancing their speedy trial claims, and this hardly renders plausible their contention that an expeditious resolution of their cases was a matter of pressing constitutional importance for them."); United States v. Stevens, No. 04-CR-222S, 2009 WL 2381897, at *8 (W.D.N.Y. Aug. 3, 2009) (holding that this third factor weighed against the defendant "because she first raised the issue of her speedy trial rights . . . approximately three and one-half years after Indictment").

Finally, on the issue of prejudice, the Court considers the interests the speedy trial right protects -- "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that

the defense will be impaired." Barker, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. For this reason, the Second Circuit "generally require[s] a showing of some significant trial-related disadvantage in order to establish a speedy-trial violation." Cain, 671 F.3d at 297.

In his motion to dismiss, the defendant focuses primarily on the first and second interests. He argues that this prosecution has caused him to lose business opportunities and physical freedom, and that his family has suffered "the personal pain of watching their loved one suffer while incarcerated." Mot. to Dismiss (ECF No. 170) at 8. However, these hardships are not attributable to this case. They are due to the defendant's service of a sentence of imprisonment imposed by the District of Massachusetts in another fraud case.

The defendant does not argue that his ability to present a defense has been impaired. In fact, he sought and obtained lengthy continuances in order to adequately prepare. That the delay has also benefitted the Government is of no moment. See United States v. Abad, 514 F.3d 271, 275 (2d Cir. 2008) ("[P]rejudice is concerned with impediments to the ability of the defense to make its own case (e.g., if defense witnesses are made unavailable due to the government's delay); the opportunity for

the prosecution to prepare for trial does not, on its own, amount to prejudice to the defense.").

III. Conclusion

For the reasons stated, the defendant's right to a speedy trial has not been violated and, accordingly, his motion to dismiss has been denied.

Signed this 21st day of March 2016.

/s/ RNC
Robert N. Chatigny
United States District Judge

APPENDIX D

Summary Order of the Second Circuit denying en banc dated May 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 7th day of May, two thousand twenty.

United States of America,

Appellee,

v.

Wayne Bursey,

Defendant,

Daniel Carpenter,

Defendant - Appellant.

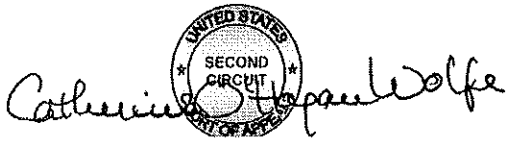
ORDER

Docket No: 19-70

Appellant, Daniel Carpenter, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX E

18 U.S.C. §3161

(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.

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-

APPENDIX F

18 U.S.C. §3162

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

Section 1 of Pub. L. 96–43 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

Section 1 of Pub. L. 93–619 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 before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

(Added Pub. L. 93–619, title I, §101, Jan. 3, 1975, 88 Stat. 2079.)

§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effec-