No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MANUEL DE JESÚS GORDILLO-ESCANDÓN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

(CA4 No. 18-4306)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

1. Did the district court err when it failed to dismiss the indictment under the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161–3174, when the trial did not begin within the 70 days required under the STA?

2. Did the district court err when it failed to dismiss the indictment under the Interstate Agreement on Detainers Act ("IADA"). P.L. 91-538 (Dec. 9, 1970), amended by Anti-Drug Abuse Act of 1988, P.L. 100-690, Title, VII, § 7059, 102 Stat. 4403 (Nov. 18, 1988), *available at* 18 U.S.C. Appx. 2, even though the trial did not commence within the 120 days required under the IADA?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

PRIOR PROCEEDINGS

U.S. District Court for the District of South Carolina:

United States v. Gordillo-Escandón, No. 6:17-cr-002 (jmt. entered May 9, 2018).

U.S. Court of Appeals for the Fourth Circuit:

United States v. Gordillo-Escandón, No. 17-4481 (jmt. entered Dec. 13, 2017).

United States v. Gordillo-Escandón, No. 18-4306 (jmt. entered Oct. 19, 2020).

This Court:

Gordillo-Escandón v. United States, No. 17-7177 (cert. denied Jun. 24, 2019).

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TABLE OF AUTHORITIES

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Statutes

Manuel de Jesús Gordillo-Escandón respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication. It is reprinted in the Appendix. [App. 3].

The district court did not prepare a reported opinion. Its pertinent rulings are reprinted in the Appendix. [App. 19-54].

JURISDICTION

The district court had jurisdiction over the federal criminal charge. 18 U.S.C. § 3231.

This Court has jurisdiction to review the judgment of the Fourth Circuit. 28 U.S.C. § 1254(1). Judgment was entered on October 19, 2020, and a timely petition for rehearing was denied on November 10, 2020.

STATUTORY PROVISIONS INVOLVED

The Interstate Agreement on Detainers ("IADA"), 18 U.S.C. Appx. 2, § 2, art. IV(a) provides:

> The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated[.]

IADA, 18 U.S.C. App. 2, § 2, art. IV(c) provides:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

IADA, 18 U.S.C. App. 2, § 2, art. VI(a) provides:

> In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

* * *

18 U.S.C. § 3161(c)(1), which is part of the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161–3174, provides:

> 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.

18 U.S.C. § 3161(h) provides:

> 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.

STATEMENT OF THE CASE[1]

A. The Federal Indictment

In March 2017, a federal grand jury indicted Mr. Gordillo-Escandón on drug and gun charges arising from a joint federal-state investigation. One count charged conspiracy to possess with intent to distribute 50g or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Another count charged possession with intent to distribute a mixture or substance containing 50g or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). And a final count charged possession of a handgun in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A).

He was arraigned on the unsealed indictment on March 30, 2017. The district court set jury selection for June 22, 2017—*i.e.*, 84 days after arraignment. [App. 45].

B. The Government's "Motion" for Reciprocal Discovery

On May 15, 2017, the Government filed a motion for reciprocal discovery. The Government claimed exemption from an obligation to the meet-and-confer requirements of the district court's local rules on the grounds that "consultation with counsel for the defendants would serve no useful purpose."

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[1] This Petition alleges that the trial did not take place within the 70-day STA, 18 U.S.C. § 3161(c); and/or 120-day IADA trial deadlines, IADA art. IV(c). To assist the Court in its consideration of this Petition, a timeline of relevant dates appears at the conclusion of this Petition.

C. The First Pretrial Conference and Continuance

On May 23, 2017, the district court held a pretrial conference. Mr. Gordillo-Escandón (and his co-defendants, whose charges were subsequently resolved by pleas), asked the district court to continue the case to the court's August term. The parties did not discuss the motion for reciprocal discovery.

The district court orally granted the continuance, saying: "We'll go ahead and continue the entire matter to the next term. Thank you all." [App. 41-42]. Thereafter, it set the case for its August term of court, with jury selection to be held August 17, 2017. [App. 46].

D. The Related State Conviction and Sentence

On June 12, 2017 Mr. Gordillo-Escandón pleaded guilty in state court to a charge of trafficking between 10g-28g of methamphetamine and unlawful carrying of a weapon, growing out of the same episode for which he had been federally indicted. He received a three-year sentence on the former charge and a one-year concurrent sentence on the latter.

E. The First Motion to Dismiss

On June 25, 2017—three days after the original date for jury selection—Mr. Gordillo-Escandón filed a motion to dismiss the indictment. He raised several grounds. He moved to dismiss the indictment on Double Jeopardy grounds. Alternatively, he also moved to dismiss under the Speedy Trial Act ("STA"), 18

U.S.C. §§ 3161–3174, on the ground that the continuance from June 22 to August 17 did not cure the problem of having failed to schedule jury selection within seventy days of arraignment in the first instance.[2]

F. The Denial of the Motion to Dismiss and Continuance to the October Term

In the hearing on the motion, held July 25, 2017, with Mr. Gordillo-Escandón in personal attendance, the Government conceded that the start date for the excludable period was unclear from the district court's continuance order. Nonetheless, it urged the district court to take the broadest view: that excludable time started at the May 23 pretrial conference, rather than from the June 22 jury-selection date.

The district court denied the motion from the bench. With respect to the STA, the district court rules:

> [T]here has been no violation of the Speedy Trial Act in this matter. The Defendant's counsel joined in a continuance request on May 23rd, 2017, prior to the expiration of the speedy trial clock, which that request was granted for the ends of justice and more specifically for the effective preparation of counsel; therefore, the period of delay resulting from the continuance is excludable under 18, United States Code, Section 3161(h)

[App. 20].

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[2] Mr. Gordillo-Escandón did and does not dispute that it was appropriate to exclude for STA purposes the time between June 22 (the original date for jury selection) and August 17 (the date for jury selection in the August term), per his own motion to continue. He does, however, dispute whether the excludable period began at the time of the pretrial conference or whether the excludable period began at the date originally set for jury selection.

Due to a continuance granted to a co-Defendant, the district court continued Mr. Gordillo-Escandón's case until the October term. The minute order granting the continuance as to Mr. Gordillo-Escandón defined the "[t]ime excluded [as] from 8/19/17 until 10/26/17". [App. 47].

The next day, July 26, 2017, Mr. Gordillo-Escandón filed a written demand for a speedy trial under "U.S. Const. VI and all potentially applicable statutes, including the Speedy Trial Act and the Interstate Agreement on Detainers." He also objected to any future co-Defendant requests for continuance and, to the extent necessary to preserve his trial rights, moved for a severance.

G. The First Appeal

On July 26, 2017, Mr. Gordillo-Escandón also filed a notice of interlocutory appeal of the denial of his Double Jeopardy motion. During the appeal, the remaining co-Defendants entered guilty pleas.

The Fourth Circuit affirmed the district court. The mandate issued December 15, 2017. It was docketed with the district court on December 19, 2017.

H. The Renewed Demand for a Speedy Trial

The day the mandate issued, Mr. Gordillo-Escandón's counsel emailed the district judge's deputy clerk to advise of the mandate. He said that "[g]iven the unusual procedural posture, [he] didn't want the case to get lost." [App. 56].

The same day that the mandate was docketed with the district court, Mr. Gordillo-Escandón filed a notice with the district court withdrawing "any 'formal' motion…in his previous Speedy Trial Demand [*i.e.* a motion to sever] …. He [did], however, continue to assert his rights under U.S. Const. VI and all potentially applicable statutes, including the Speedy Trial Act and the Interstate Agreement on Detainers, to a speedy trial…."

On January 2, 2018, the district court issued a scheduling notice. *See* [App. 51]. Jury selection would begin on February 8, 2018.

I. The Renewed Motion to Dismiss

On January 12, 2018, Mr. Gordillo-Escandón filed a renewed motion to dismiss. Again, he alleged a violation of the STA. He also, however, alleged a violation of the 120-day-to-trial deadline set forth in the Interstate Agreement on Detainers Act ("IADA"). P.L. 91-538 (Dec. 9, 1970), amended by Anti-Drug Abuse Act of 1988, P.L. 100-690, Title, VII, § 7059, 102 Stat. 4403 (Nov. 18, 1988), *available at* 18 U.S.C. Appx. 2. The IADA was at issue because the Government had lodged a detainer with the South Carolina Department of Corrections on June 14, 2017, and Mr. Gordillo-Escandón thereafter reappeared in federal court pursuant to that detainer on July 25, 2017.

J. The Denial of the Motion and Continuance to the February Term

On January 19, 2018, the district court held a hearing on the renewed motion to dismiss. The court denied the motion from the bench.

With respect to the STA, the district court did not acknowledge that its prior written order that had only excluded time "until 10/26/17," [App. 47]. Nonetheless, it denied the STA motion because "the Court's previously granted continuance persisted through the first available pretrial conference since the defendant took his interlocutory appeal. And all delay through and including January 16, 2018, is excludable under Title 18 United States Code Section 3161(H)(7)(a)." [App. 23-24].

With respect to the IADA, the district court held that a dismissal was not appropriate because Mr. Gordillo-Escandón had not served a formal demand for final disposition and, alternatively, because delay excludable under the STA is automatically excludable under the IADA. [App. 15-16].

The Government then moved for an ends-of-justice continuance until the *existing* jury selection date of February 8, 2018, because the Defendant was trying to work out a potential plea with the Government and because the Government was "still in the process of gathering its materials for trial." [App. 26]. Mr. Gordillo-Escandón objected under the STA and the IADA. [*Id.*]. The district court granted the continuance, stating: "The Court finds that by granting this continuance the ends of justice outweigh the best interests of the public and the defendant in a speedy trial." [JA 185]. The district court did not explicitly find "good cause" under the IADA for the continuance. [App. 27].

K. The Denial of the Motion for Reconsideration

On January 30, 2018, the case was assigned to a senior judge. He later advised that the original judge "had a lot of obligations and conflicts going on."

On February 5, 2018, Mr. Gordillo-Escandón renewed his previous motions to dismiss. The successor judge reaffirmed the rulings. [App. 20].

L. The Jury Trial

The jury was selected on February 8, 2018, and the trial began in earnest on February 14, 2018. Mr. Gordillo-Escandón was convicted on all counts. He received the statutory minimum sentence of incarceration: 60 months concurrent on the drug counts followed by a consecutive 60 months on the gun count.

M. The Fourth Circuit's Affirmance

The Fourth Circuit found no STA violation. The opinion did not explicitly address all the non-excludable periods that Mr. Gordillo-Escandón had raised. It did, however, find that the district court was within its discretion to have granted the continuance (on January 19, 2018) to the February term of court. It determined that the district court's explanation of its reasons for granting the continuance "to put it gently, was not ideal. The STA does not require elaborate findings that occupy interminable pages of transcript, but those findings should generally be more than what the district court set forth here—a mere incantation of the words of the statute." [App. 8-9]. Yet the Fourth Circuit excused the failure to provide an adequate on-the-record reasoning on the grounds that they were sufficiently apparent from the context. [App. 9].

The Fourth Circuit did, however, explicitly addressed another STA argument: the effect of the Government's motion for reciprocal discovery. It held that the filing was a "motion" for STA purposes, despite its pro forma nature. [App. 9-10]. Although the motion was never formally ruled upon, the Fourth Circuit rejected the Government's claim that the motion tolled the STA clock all the way to trial. Instead, the Fourth Circuit allotted six days as excludable time, with no explanation why some smaller period was rejected. [*Id.*].

As for the IADA, the Fourth Circuit relied upon its prior precedent that ends-of-justice continuance under the STA and time excluded under the STA for defense motions is automatically excludable under the IADA. [App. 10]. With no STA violation, no IADA violation occurred, either.

REASONS FOR GRANTING THE PETITION

A. This Petition Will Allow the Court to Resolve Circuit Splits Concerning the Speedy Trial Act.

Under the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161–3174, a criminal trial in federal court must begin "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." 18 U.S.C. § 3161(c)(1). That 70-day period is, however, subject to several exclusions. Among other things, the STA excludes delay from interlocutory appeals, motions, and continuances granted in the ends of justice. *See* 18 U.S.C. § 3161(h)(1)(C) & (D) & (H) & (h)(7). The

lower courts are divided as to the application of those exclusions. This Petition is a good vehicle to resolve those splits on important questions of federal law.

1. The Circuit Courts Are Divided About When an Interlocutory Appeal Ends for STA Purposes.

The STA excludes from the 70-day trial clock "delay resulting from any interlocutory appeal." 18 U.S.C. § 3161(h)(1)(C). The circuits are divided over when the STA clock resumes after an interlocutory appeal: once the appellate mandate issues or once the district court dockets the mandate.

In some circuits, it is "the date on which the mandate is issued which determines when the district court reacquires jurisdiction for further proceedings." *United States v. Rush*, 738 F.2d 497, 509 (1st Cir. 1984). For those courts, it is the issuance, not the docketing of the mandate below, that deprives the court of appeals of further jurisdiction over an appeal. *See United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981) ("Until the mandate is issued, a case is not closed. The parties may petition the court for a rehearing. The court may decide to rehear the case *en banc*." (citations omitted)). Consequently, the First Circuit holds that the STA "clock begins to run again for speedy trial purposes…[on] the date on which the appellate court issues its mandate." *Id.* (citations omitted). The Second, Third, and Ninth Circuits agree. *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) (explicitly joining *Rush*); *United States v. Felton*, 811 F.2d 190, 198 (3d Cir. 1987) (*en banc*); *United States v.*

Crooks, 826 F.2d 4, 5 (9th Cir. 1987) ("[T]he period of excludable delay in petitioners' cases ended with the issuance of our mandate on February 10, 1984, and not with its receipt by the district court on February 14, 1984….").

By contrast, other circuits hold that jurisdiction only vests in the district court upon the district court's docketing of the appellate mandate. Thus, the STA clock resumes upon the docketing of appellate mandate with the district court clerk. *United States v. Arrellano-Garcia*, 471 F.3d 897, 900 (8th Cir. 2006) ("[T]he district court is without jurisdiction to act until the mandate is received… [T]he excludable 'delay' under the Speedy Trial Act…must extend up to the date in which the mandate is received by the district court." (footnote and citation omitted)). *See also United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987) ("[T]he Speedy Trial Act clock commenced not when the court of appeal's mandate was issued on March 13, but when the district court received the mandate on May 19.").

2. The Circuit Courts Are Divided About Whether Motions for Reciprocal Discovery Count as "Motions" for Speedy Trial Act Purposes.

The STA also excludes from the speedy-trial clock "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." 18 U.S.C. § 3161(h)(1)(D). Under the STA, a motion can only be under advisement for a reasonable time and, in any event, for no more than thirty days. 18 U.S.C. § 3161(h)(1)(H) (excluding "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"). "[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." *Henderson v. United States*, 476 U.S. 321, 329-30 (1986) (quotation omitted).

Under the Federal Rules of Criminal Procedure, a defendant may elect into the discovery regime. Doing so triggers mandatory pretrial disclosure of specified requested items from the Government. Fed. R. Crim. Pro. 16(a)(1) (requiring the Government to disclose various items "[u]pon a defendant's request"). A defendant's election into the discovery regime comes with a concurrent right from the Government to request reciprocal discovery. Fed. R. Crim. Pro. 16(b)(1) (requiring a defendant who has requested and received specified items to disclose specified items "upon request" from the Government").

The circuits are divided about whether "motions" for reciprocal discovery exclude any STA time and, if so, how much.

For the Sixth Circuit, a filing on the docket that is merely a request for reciprocal discovery—with no actual dispute resulting in a judicial hearing or ruling—does not count as a "motion" for STA purposes and thus excludes no time from the STA trial clock at all. *See United States v. Mentz*, 840 F.2d 315, 329 (6th Cir. 1988) ("Because the district court never held a hearing or ruled on the motion [for reciprocal discovery], and there is no other indication that the

motion was 'actually under advisement,' the motion did not trigger the statutory exclusions for delay occasioned by the filing of a pretrial motion." (statutory citations and footnote omitted)).[3]

Other Circuits, however, do deem a motion for reciprocal discovery a "motion" for STA purposes. But they are divided about how to measure the period of excludable time that such motions generate. In the Fifth Circuit, where no response to or hearing on the *pro forma* motion is filed, the motion is deemed under advisement on the date that it is filed, with up to 30 days of "under advisement" time excludable under the STA. *See United States v. Forester*, 836 F.2d 856, 859 (5th Cir. 1988) (excluding ten days from the STA clock beginning from the filing of "self-executing" motion for reciprocal discovery until the date that the district court entered its "superfluous" ruling as a period under which the motion was under advisement). Relatedly, the Fifth Circuit holds that where the discovery motion results in a response brief but no hearing or ruling, the filing of the motion tolls the STA trial clock, but the filing of the response brief constitutes the "prompt disposition" of that motion, thus restarting the trial clock. *United States v. Franklin*, 148 F.3d 451, 455 (5th Cir. 1998) (citing *United States v. Ortega-Mena*, 949 F.2d 156, 159 (5th Cir. 1991) ("Absent any

[3] When the discovery motion is not a *pro forma* one, but rather part of a live dispute, the Sixth Circuit holds that such motions create excludable time to the same extent as other motions. *See, e.g.*, *United States v. Chalkias*, 971 F.2d 1206, 1210 (6th Cir. 1992) (holding that discovery motion that generated response brief and a judicial ruling tolled the STA clock).

indication that the court actually took *the Brady* motion under advisement following the Government's response, we will attribute only the government's response time to the motion's 'prompt disposition.'" (alterations omitted)).

The Ninth Circuit rejects the Sixth Circuit's view that a *pro forma* discovery motion results in no excludable time in favor of a "variant" of the Fifth Circuit's approach:

> A discovery motion will be deemed under advisement as of the date of the last hearing or filing of supporting papers, whichever is later, absent evidence that the motion was actually taken under advisement later than that (as, for example, where the court suspends consideration of the motion for a definite period so as to allow the parties to discuss settlement). Under this rule, a *pro forma* discovery motion 'continued' merely 'in case' future discovery disputes arise is under advisement, because the motion is not set for a hearing nor is the court awaiting any ascertainable materials. Put another way, unless consideration of the motion is continued until a date certain or the happening of an event certain, the motion is deemed under advisement.

United States v. Sutter, 340 F.3d 1022 1031-32 (9th Cir. 2003).

For its part, the Tenth Circuit agrees that a *pro forma* discovery motion that is never subjected to a hearing or ruling "cannot exclude time [under the STA]" indefinitely. *United States v. Williams*, 511 F.3d 1044, 1054 (10th Cir. 2007). But because in that case, the STA clock was violated regardless as to the approach taken, the Tenth Circuit was not required to determine the correct rule. *Id.* (noting that while the Sixth Circuit's approach to *pro forma* discovery motions "would not result in the exclusion of even one day" whereas the

Ninth Circuit's approach would exclude up to 30 days, either approach would still result in a STA violation given the 300-day delay in the case).

3. The Circuit Courts Are Divided About How to Evaluate Continuances.

The STA also allows the district court to grant continuances upon the district judge's "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." 18 U.S.C. § 3161(h)(7)(A). To "counteract substantive open-endedness" of continuances under that provision, Congress demands "procedural strictness." *Zedner v. United States*, 547 U.S. 489, 509 (2006). Specifically, Congress requires as a condition of an exclusion of time for an ends-of-justice continuance that the district judge "set[] 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." 18 U.S.C. § 3161(h)(7)(A). The failure to satisfy those procedural strictures is not subject to review for harmless error; "if a judge fails to make the requisite findings 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." *Zedner*, 547 U.S. at 508.

"The Circuits are split over the question whether open-ended continuances are permissible under the Speedy Trial Act," *United States v. Jones*, 56 F.3d

581, 586 n.10 (5th Cir. 1995), or whether a continuance can only be granted until a date certain.

The Ninth Circuit falls into the latter camp. Given the need to expressly weigh the public's interest in a speedy trial with the proposed considerations of the ends-of-justice, the Ninth Circuit requires that any "'ends of justice' continuance be specifically limited in time and that there be findings supported by the record to justify each 'ends of justice' continuance." *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) (quotation omitted) (finding STA violated where the district court granted a continuance due to case complexity but "never indicated when if ever, the continuance would terminate").

The Sixth Circuit agrees. *See United States v. Crawford*, 982 F.2d 199, 205 (6th Cir. 1993) (holding that ends-of-justice exclusion not applicable, among other reasons, because "[t]he court did not specify or approximate the length of the continuance" (footnote omitted)).

Other circuits, however, permit open-ended continuances, although disfavoring them. *United States v. Spring*, 80 F.3d 1450, 1458 (10th Cir. 1996) ("We agree with the First, Third, and Fifth Circuits that, while it is preferable to set a specific ending date for a continuance, there will be rare cases where that is not possible, and an open-ended continuance for a reasonable time period is permissible." (collecting cases)).

Furthermore, the Circuits are divided about what constitutes a district court's compliance with the requirement to "set forth…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." 18 U.S.C. § 3161(h)(7)(A). As part of that analysis, the STA enumerates "factors, among others, which a judge shall consider in determining whether to grant a continuance…" for the ends of justice. *Id.*

In contrast to the statutory requirement that the "district court" set forth the reasons for its finding, some courts deem reasons proffered in a granted motion as reasons of the district court itself. Thus, a mere incantation of the statutory language can suffice. *See, e.g.*, *United States v. Toombs*, 574 F.3d 1262, 1269 (10th Cir. 2009) ("In setting forth its findings, however, the district court need not articulate facts which are obvious and set forth in the motion for the continuance itself." (quotation omitted)); *United States v. Jean*, 25 F.3d 588, 594-95 (7th Cir. 1994) ("[W]hen facts have been presented to the court and the court has acted on them, it is not necessary to articulate those same facts in a continuance order." (quotation omitted)); *United States v. Mitchell*, 723 F.2d 1040, 1044 (1st Cir. 1983) ("Where the motion sets forth the basic facts, and they are obvious, it is not necessary for the court to articulate them. By tracking the language of the statute, the judge here demonstrated that he was aware of what requirements had to be met before a continuance could be granted." (citation omitted)).

Other circuits require express reasons to justify a continuance, not only to "insure[] careful consideration of the relevant factors by the trial court" but

also to "provide the appellate court with an adequate record on which to review the district court's decision." *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985). The Second Circuit falls into this camp, *see id.*, as does the Ninth Circuit, *see United States v. McCarns*, 900 F.3d 1141, 1145 (9th Cir. 2018) ("A district court's discussion of the statutory factors is adequate to support a continuance that serves the ends of justice when it is clear that the district court considered the factors in § 3161(h)(7)(B) and determined that the continuance was merited based on the applicable factor or factors." (quotation and alteration omitted)).

The D.C. Circuit subscribes to the same view but for a different reason. It interprets this Court's decision in *Zedner* to require "the judge … to make 'express findings' about *why* the ends of justice were served by a continuance." *United States v. Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008) (emphasis added).

4. This Petition Is a Good Vehicle to Resolve those Circuit Splits.

This Petition presents the Court with a good vehicle to resolve those splits about the STA.

First, if the Court of Appeals below erred in its treatment of the STA, that error would be dispositive of the appeal. Failures to respect the 70-day time-to-trial clock result in mandatory dismissal of the indictment, with or without prejudice in the district court's discretion. 18 U.S.C. § 3162(a). Given that that the first 44 days in this case are indisputably not excludable (*see* timeline), erroneous exclusion of 27 or more days would entitle Mr. Gordillo-Escandón to

relief. As set forth in the timeline to this Petition, he respectfully submits that 81 additional days passed without a trial, resulting in a STA violation.

Second, no error-preservation issues exist. The STA issue was timely raised and ruled upon in the district court and in the Court of Appeals.

Third, the Fourth Circuit is likely wrong in its analysis. For example, with respect to the 16-day ends-of-justice continuance granted on January 20, 2018, the Court of Appeals should have done more than criticize the district judge's failure to set forth any explicit reasoning as being worse than "not ideal." [App. 8]. Rather than allow implicit reasoning, the Court of Appeals should have taken Congress at its word that "[n]o such period of delay" can be properly excludable under 18 U.S.C. § 3161(h)(7)(A), "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. (emphasis added)*. As this Court has already held, Congress intentionally required "procedural strictness" *Zedner*, 547 U.S. at 509, for ends-of-justice continuances. The Court of Appeals' ruling, however, undermines that strictness.[4]

[4] Given the 44 undisputedly countable days between arraignment the motion for reciprocal discovery, these 16 additional days would bring the STA trial clock to 60 days.

Likewise, the Fourth Circuit is likely also wrong when it implicitly held excludable the 22 days between the district court's December 20, 2017 docketing of the appellate mandate and Mr. Gordillo-Escandón's January 12, 2018 motion to dismiss.[5] The existing continuance, by the district court's own order, only excluded the time "from 8/19/17 until [the] 10/26/17" term of court. [App. 47]. The Fourth Circuit appears to have implicitly agreed with the district court's post-hoc reasoning that—despite the plain text of its order—the continuance was meant to run until the "first available" trial term, [App. 24], which turned out to be February 2018 jury term. Whether or not such an open-ended continuance could ever exist in some other context, such a continuance would have been impermissible here on these facts. District court terms-of-court are legally meaningless. 28 U.S.C. § 138 ("The district court shall not hold formal terms."). And the STA specifically precludes continuances "because of general congestion of the court's calendar…." 18 U.S.C. § 3161(h)(7)(C). The district court could and should have set the case immediately for trial upon the docketing of the mandate—consistent with counsel's email to the district judge's chambers that tried to avoid the case "get[ting] lost" given the prior interlocutory appeal. That the district judge was not herself already planning to hold court between the mandate and the next formal term is no basis to exclude that time.

[5] Adding 22 days to the 60 days set forth in Note 4, above, results in 82 days, thus establishing a STA violation, whether or not the Court ultimately agrees with the Petitioner about the proper resolution of other circuit splits.

B. This Petition Will Allow the Court to Resolve Circuit Splits Concerning the Interstate Agreement on Detainers Act.

"Forty-eight States, the Federal Government, and the District of Columbia… have entered into the Interstate Agreement on Detainers ['IADA']…, an interstate compact. The Council of State Governments drafted the language of the [IADA] in 1956. The United States joined in 1970." *Alabama v. Bozeman*, 533 U.S. 146, 148-49 (2001). Because the IADA is an interstate compact, it is a "federal law subject to federal construction," *New York v. Hill*, 528 U.S. 110, 111 (2000) (citations omitted), regardless as to the forum for trial.

The IADA's drafters wanted to "encourage the expeditious and orderly disposition" of new charges by one signatory against a prisoner in the custody of a different signatory. IADA, § 2, Art. I.

To that end, among other things, the IADA requires that trial "be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State" unless "for good cause shown in open court…, the court having jurisdiction of the matter… grant[s] any necessary or reasonable continuance." IADA, § 2, Art. IV(c).[6] That trial clock is, however, subject to one express tolling provision: "[T]he running of said time periods shall be tolled

[6] The IADA also allows prisoners who have not been transported from their home jurisdictions to demand that they be tried within 180 days. IADA, § 2, art. III(a). Both the 120-day and 180-day clocks "shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." IADA, § 2, art. VI(a). Case law interpreting the tolling period applicable to the 180-day clock is, therefore, equally applicable to case law governing tolling of the 120-day clock.

whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." IADA, § 2, Art. VI(a).

"Problematically, the phrase 'unable to stand trial' is not defined [in the IADA]." *State v. Batungbacal*, 913 P.2d 49, 55 (Haw. 1996). As a result, the lower courts have divided on their interpretation of that tolling provision. Some courts limit the tolling provision to physical and mental inability to stand trial. Other courts apply the tolling provision whenever the defendant requests pre-trial judicial rulings, as by filing motions and appeals. This Petition is a good vehicle to resolve that split of authority on an important federal question.

1. Some Courts Limit the IADA's "Unable to Stand Trial" Provision to Physical and Mental Inability to Stand Trial.

A longstanding split exists as to when a prisoner is "Unable to Stand Trial" within the meaning of the IADA, thereby pausing the time-to-trial clock.

At least two federal courts of appeal hold that the IADA's use of "unable to stand trial" is limited to physical and mental inability to stand trial. The Fifth Circuit is one such court. In *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), it explained that when Congress passed the IADA in 1970, the phrase "unable to stand trial" had been "consistently and only used by federal courts to refer to a party's physical or mental ability to stand trial…" *Id.* at 1340-41 (footnotes collecting federal cases omitted). The Fifth Circuit was unwilling "to expand that phrase to encompass legal inability due to the filing of motions or requests." *Id.* (footnote omitted). Similarly, the Sixth Circuit held that the filing

of a habeas petition with respect to the prisoner's underlying conviction did not toll the deadlines for the prosecution in the second forum because it does not implicate the defendant being "physically or mentally disabled." *Stroble v. Anderson*, 587 F.2d 830, 838 (6th Cir. 1978).

Some state courts agree. The New Mexico Court of Appeals has held that the drafters of the IADA intentionally chose 120 days for the trial deadline to encompass pretrial proceedings in the normal case and wanted any extra time to be subject to the continuance procedure in the IADA:

> It is unsettling to note that in the cases cited by the State and those we have independently perused wherein defendants were held to have caused a tolling of the limitation period because their motions 'delayed' trial, none indicated that the prosecution had availed itself of the simple statutory expedient of requesting continuance 'for good cause shown.' Thus[,] the prosecutors' lack of diligence and noncompliance were excused, and the defendants' resort to the entitlements allowed them were held to operate against their protections in a punitive manner. Those decisions do not appear to be in keeping with the 'solemn agreement' that the Agreement on Detainers 'shall be liberally construed so as to effectuate its purposes' of encouraging expeditious and orderly dispositions of untried charges.
>
> We prefer, therefore, to adopt the view that the time limitations of the Agreement were intended to permit sufficient time and opportunity for disposition of all pre-trial proceedings and commencement of trial before the time expired. The Agreement specifies that time is tolled only when the prisoner is 'unable to stand trial' as determined by the court; in all other circumstances, it provides the mechanism for reasonably or necessarily extending the time limits by a request for continuance 'for good cause shown.'

State v. Shaw, 651 P.2d 115, 120 (N.M. Ct. App. 1982) (citations omitted). *See also State ex rel. Hammett v. McKenzie*, 596 S.W.2d 53, 58 (Mo. Ct. App. 1980) (holding that a request for a public defender did not toll the IADA's trial clock).

For its part, Florida does not toll the IADA clock under the "unable to stand trial" provision if adjudication of the defendant's pretrial motions does not impact the trial date. *See Vining v. State*, 637 So. 2d 921, 925 (Fla. 1994) (per curium) ("The State contends that Vining's pretrial motions tolled the time limits under the IAD….[W]e do not agree with the State…. Even though Vining filed a number of motions, the original trial date was never changed. Thus, no delay can be attributed to Vining's motion practice.").

2. Other Courts Interpret "Unable to Stand Trial" to Include More than Physical and Mental Inability to Stand Trial.

By contrast, other federal circuit courts interpret the IADA's use of "unable to stand trial" to not only compass physical and mental inability to stand trial but also "those periods of delay caused by the defendant's own actions," such as the filing of pretrial motions. *United States v. Ellerbe*, 372 F.3d 462, 468 (D.C. Cir. 2004) (collecting cases from and joining the First, Second, Seventh, and Ninth Circuits). *Accord United States v. Peterson*, 945 F.3d 144, 154 (4th Cir. 2019). Those circuits do so to harmonize the 70-day STA clock with the 120-IADA clock. *See, e.g.*, *Peterson*, 945 F.3d at 154 ("To bring…the IADA into conformity with the STA, the clear majority of our sister circuits have read [the

IADA's 'unable to stand trial'] tolling section to include those periods of delays caused by the defendants' own actions.").

Even though the STA does not apply in state courts, many state courts reach the same result, holding that pretrial motions and interlocutory appeals—that is, periods of "legal[] or administrative[]" inability—also automatically toll the IADA's clock without the need to resort to the continuance procedure set out in the statute. *State v. Pair*, 5 A.3d 1090, 1100 (Md. 2010) (quotation and citation omitted). *Accord, e.g.*, *Cobb v. State*, 260 S.E.2d 60, 64 (Ga. 1979) ("The court was authorized to find that the 120-day time limit… was tolled by the delay occasioned by the appellant's numerous pretrial motions…."); *Batungbacal*, 913 P.2d at 56 (explaining that "such an interpretation of the IAD allocates responsibility for delay where it belongs—on the party filing the motion."); *Diaz v. State*, 50 P.3d 166, 167 (Nev. 2002) (4-1 decision noting that "[t]he United States circuit courts of appeals are divided as to whether the IAD period is tolled during the time required to resolve matters raised by the defendant" but joining those that so hold (footnote omitted)); *State v. Bernson*, 807 P.2d 309, 310-11 (Or. Ct. App. 1991) ("We hold that time expended in defense pretrial motions, including time necessary to resolve them on appeal, is time that the prisoner is 'unable to stand trial' and tolls the 120-day period."); *Commonwealth v. Montione*, 720 A.2d 738, 741 (Penn. 1998) (noting the "conflicting" authorities and joining the authorities holding that

pretrial motions by the defendant toll the time-to-trial clock); [7] *Jones v. State*, 813 P.2d 629, 648 (Wyo. 1991) (4-1 decision adopting rule that motions automatically toll the IADA's time-to-trial clock).

3. This Petition Is a Good Vehicle to Resolve the Split.

This Court should use this Petition to resolve the longstanding split about the proper interpretation of the IADA, for several reasons.

First, if the Court of Appeals below erred in its treatment of the IADA, that error would be dispositive of the appeal. Failure to abide by the 120-day time-to-trial clock requires a mandatory dismissal, with or without prejudice in the district court's discretion. IADA, § 9. The trial clock below began on July 25, 2017, (*see* timeline), making the 120th day November 22, 2017. Trial did not, however, begin until February 2018, well past the deadline unless one or more events tolled the deadline.

Second, the IADA issue was timely raised and ruled upon in the district court and in the Court of Appeals.

Third, the Court of Appeals below is likely wrong in its view that STA-excludable time is also automatically excludable under the IADA. In contrast to the judgment below, which foreswears that possibility, *see* [App. 11], this Court

[7] At one time, the lower courts in Pennsylvania had selected the opposite view. *See, e.g.*, *Commonwealth v. Kripplebauer*, 469 A.2d 639, 641 (Pa. Super. Ct. 1983) ("[W]e find that appellee's exercising his right to file pre-trial motions does not amount to a request for a continuance and does not affect his ability to stand trial.")

has already determined that it is possible for the IADA and the STA to have different trial deadlines. *See United States v. Mauro*, 436 U.S. 340, 356 n.24 (1975) (explaining that where the IADA and STA have different trial deadlines, the "more stringent limitation" applies). Indeed, the wholesale importation of the STA clock into the IADA time-to-trial clock is problematic because the two statutes use different language. Courts usually assume that Congress is intentional in its choice of language, with differences in language evincing a different legislative intent. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. (quotation omitted)). Further, given that the STA does not even apply to the states, while the IADA does, it is, as this Court has recognized elsewhere, "inapt" to make comparisons between the two statutes. *See Hill*, 528 U.S. at 117 n.2 (noting that several features of the IADA "make respondent's analogy to the Federal Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq*., inapt.").

Fourth, the judgment below is not only also likely wrong, but its premise is also one that hurts defendants overall. Requests for continuances ought to be interpreted separately from ordinary pretrial litigation, so as to avoid chilling zealous defense representation. *Diaz*, 50 P.3d at 169 (Rose, J., dissenting) ("I would certainly not want a defendant to feel restricted in litigating his case

simply because he is fearful that it will effectuate a tolling of his demand to be brought to trial [under the IADA]."). This Court should so state.

CONCLUSION

For the forgoing reasons, this Court should grant the petition and reverse the Fourth Circuit's opinion and judgment below.

Dated: January 20, 2021

Respectfully submitted,

MANUEL DE JESÚS
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TIMELINE OF KEY DATES

Date	Description	Interval	Notes
3/30/17	Arraignment on unsealed indictment	n/a	
3/31 – 5/14/17	n/a	44 days	• All parties agree that this period counts toward 70-day STA clock.
5/15/17	Gov't motion for reciprocal discovery	1 day	• Petitioner contends not an excludable event under STA or at most, one excludable day exists. • If correct, 1 day would count toward STA clock.
5/16 – 5/22/17	n/a	6 days	• Petitioner contends that no time is excludable under STA • CA4 held 6 days excludable under STA.
5/23/17	Oral motion to continue made and ruled upon at pretrial conference	1 day	• Petitioner agrees this item is excluded under the STA as motion time.
5/24 – 6/21/17	Period between pretrial conference and original date set for jury selection	28 days	• Petitioner contends that this period is not excludable under the STA because it predates the original date for jury selection

Date	Description	Inter-val	Notes
6/22 – 6/24/17	Period between original date for jury selection and filing of motion to dismiss	2 days	• Petitioner agrees that this period is excludable under the ends-of-justice continuance granted at the pretrial conference.
6/25 – 7/24/17	Period between filing of motion to dismiss and hearing	29 days	• Petitioner agrees that this period is excludable under the ends-of-justice continuance granted at the pretrial conference and as motion time.
7/25/17	Hearing on and denial of motion to dismiss	1 day	• Petitioner agrees that this period is excludable under the ends-of-justice continuance granted at the pretrial conference and as motion time. • The district court continues the case "from 8/19/17 until 10/26/17." [App. 47] • The 120-day IADA clock begins as Petitioner's first appearance following the Government's lodging of detainer (on 6/14) with the South Carolina Department of Corrections
7/26 – 12/14/17	Notice of appeal is filed, and the appeal remains under consideration	141 days	• Petitioner agrees that this period is excludable under the STA as appeal time. • Petitioner does not agree that this period tolls the IADA clock (rights he asserted in his 7/26/17 demand for speedy trial).

Date	Description	Interval	Notes
12/15/17	CA4 mandate issues	1 day	• Petitioner agrees that this period is excludable under the STA as appeal time. • Petitioner does not agree that this period tolls the IADA clock. • Petitioner files renewed demand for speedy trial that withdraws any pending motions and specifically invokes IADA rights. • Petitioner emails district court's scheduling clerk to advise of the mandate and because he "didn't want the case to get lost."
12/16 – 12/19/17	Period between CA4 mandate issuance and district court docketing of mandate	3 days	• Petitioner does not agree that this period is excludable under STA as appeal time. • Petitioner does not agree that this period tolls the IADA clock.
12/20/17 – 1/11/18	Period between mandate docketing and filing of motion to dismiss	22 days	• Petitioner does not agree that this period is excludable under STA. • Petitioner does not agree that this period tolls the IADA clock. • On 1/2/18, the district court issues notice for a 2/8/18 trial date.

Date	Description	Inter-val	Notes
1/12 – 1/18/18	Period between filing of motion to dismiss and hearing on motion to dismiss	6 days	• Petitioner does not agree that this period is excludable under STA as motion time. • Petitioner does not agree that this period tolls the IADA clock.
1/19/18	Hearing on motion to continue	1 day	• Petitioner agrees that this period is excludable under STA as motion time. • Petitioner does not agree that this period tolls the IADA clock.
1/20 – 2/4/18	District court grants, over objection, an ends-of-justice continuance under the STA to the existing jury selection date of February 8, 2018	16 days	• The CA4 determined that the district court's explanation of the ends of justice "to put it gently, was not ideal." [App. 8] • Petitioner does not agree that this period is excludable under the STA. • Petitioner does not agree that this period tolls the IADA clock.
2/5/18 – 2/12/18	Period between filing of motion to reconsider and hearing and ruling on the motion	7 days	• Petitioner agrees that this period is excludable under STA as motion time. • Petitioner does not agree that this period tolls the IADA clock. • Jury was selected on 2/8/18