No. 20-7207

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)

Reply in Support of
Petition for *Writ of Certiorari*

Howard W. Anderson III
LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
(864) 643-5790 (P)
(864)332-9798 (F)
howard@hwalawfirm.com
CJA Counsel

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Manuel de Jesús Gordillo-Escandón respectfully submits this Reply in support of his Petition for *Writ of Certiorari*. Contrary to the Government's claims, this Court should grant the Petition on both Question 1 and Question 2.

A. This Court Should Grant the Petition on Question 1 Concerning the Speedy Trial Act.

Question 1 is case dispositive, making this Petition a good vehicle to resolve the legal issue. No preservation issues exist concerning Mr. Gordillo-Escandón's objection that he was not tried within the 70-countable days required under the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161-74. Furthermore, under the Government's view, "at most 70 days had elapsed" before jury selection, [Opp. at 17],[1] thus rendering *any* additional excludable time established in this Court violative of the limit, which would entitle Mr. Gordillo-Escandón to a dismissal.

---

[1] Insofar as the Government suggests in a footnote that the prior petition for certiorari that was filed after the mandate triggers excludable time under the STA, the Government may not present that claim here. Where the respondent raises a new argument not advanced below, the best course is to preclude the respondent from raising it now, especially given the Government's zeal in claiming defendants' forfeiture of arguments. *See Steagald v. United States*, 451 U.S. 204, 208 (1981) (precluding Government from advancing a new theory to save a warrantless search). At worst, the Court could resolve the STA issues that were actually litigated below, which have divided the lower courts, and remand for the Fourth Circuit to consider whether to allow the belated argument and, if so, whether the argument is correct. *See Ford Motor Co. v. United States,* 571 U.S. 28, 30 (2013) (remanding for reconsideration). Mr. Gordillo-Escadón submits, however, that the belated argument is incorrect. When Congress excluded "delay from any interlocutory appeal," 18 U.S.C. § 3161(h)(1)(C), Congress did not intend to include petitions for certiorari. Otherwise it would have said so, especially given that appeals are as of right whereas *writs of certiorari* are discretionary.

As for the Government's boilerplate request for reciprocal discovery, the Government simply asserts that that filing was a "motion" that stopped the STA clock for at least six days. [Opp. at 14]. Because, however, reciprocal discovery is automatic, it should not qualify as a motion, as Mr. Gordillo-Escandón argued previously. Further, even if it were a motion, the Government—like the Court of Appeals below—offers no test for deciding that six days are appropriate to exclude as under-advisement time, as opposed to five, four, or one. *See generally Henderson v. United States*, 476 U.S. 321, 329 (1986) ("[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.").

If the Government thinks that a motion for reciprocal discovery that never results in a hearing or formal disposition stops the speedy trial clock indefinitely, that suggestion would conflict with other decisions post-*United States v. Tinklenburg*, 563 U.S. 647 (2011). *See, e.g.*, *United States v. Hicks*, 779 F.3d 1163, 1172 (10th Cir. 2015) ("[A] 'pro forma' or 'administrative' motion—such as the government's motion here—does not require a hearing and therefore tolls the speedy trial clock only for thirty days from the date it is taken under advisement by the court."); *United States v. Rashid*, 593 F. App'x 132, 135 n.12 (3d Cir. 2014) ("On August 26, Rashid's counsel filed a motion for enlargement of time to file pretrial motions. Because the District Court never disposed of that motion, it did not toll the speedy trial clock because there is no indication that the motion was 'under advisement.'" (citation omitted)).

With respect to the January 19, 2018, ends-of-justice continuance order, the Government claims that the district court could implicitly decide why that continuance (over objection) was appropriate. [Opp. at 26]. But the Government does not dispute that the plain text of the STA requires explicit reasoning from the district court: No time is excludable under an ends-of-justice continuance "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." 18 U.S.C. § 3161(h)(7)(A). And the Government does not dispute that this Court has already decided that Congress intentionally chose to impose "procedural strictness" on ends-of-justice continuances. *Zedner v. United States*, 547 U.S. 489, 509 (2006).

B. This Court Should Grant the Petition on Question 2 Concerning the Interstate Agreement on Detainers Act.

Question 2 is case dispositive, making this Petition a good vehicle to resolve the legal issue, too. The Government does not dispute that Mr. Gordillo-Escandón properly preserved an objection that he had not been tried within the 120-day period after his first federal court appearance pursuant to a detainer, as required under Article IV(c) of 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. Nor does the Government appear to dispute that, if the Court agrees with Mr. Gordillo-Escandón (and the minority view among the federal

courts of appeals) that STA tolling analysis does not apply, then Mr. Gordillo-Escandón would be entitled to a dismissal. *See* [Opp. at 29 (agreeing that "no more than 239 [calendar] days passed between June 14, 2007 and the start of voir dire on February 8, 2018.")].

While the Government does note that, during the pendency of the Double Jeopardy appeal, the district court issued a stay pending appeal, [Opp. at 24], that stay from the district court is irrelevant to the IADA analysis. Only "the court having jurisdiction of the matter may grant any necessary or reasonable continuance." IADA, § IV(c). During the pendency of the appeal, jurisdiction to order a trial was vested exclusively in the Court of Appeals. *See, e.g.*, *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." (citations omitted)). The Government did not ask for, and the Court of Appeals did not grant, a continuance of the IADA trial clock during the pendency of the first appeal; and there is no claim that

Mr. Gordillo-Escandón was ever physically or mentally unable to stand trial, so as to fall within the plain text of the tolling provision of IADA Art IV(c).[2]

As to the merits of whether STA tolling analysis should be grafted onto the IADA, the Government does not dispute that the IADA drafters chose the phrase "unable to stand trial" after it had been "consistently and only used by federal courts to refer to a party's physical or mental ability to stand trial throughout the fifteen years prior to Congress' enacting the IADA in 1970." *Birdwell v. Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993). Nor does the Government contend that anything in the plain text commands the additional automatic tolling that the Government seeks—i.e., tolling the clock whenever a defendant files anything on the docket. Nor does the Government have an explanation about how the Congress that joined the IADA in 1970 (which various states had already adopted as early as 1956) could have anticipated the complex tolling provisions that the Congress in 1974 decided to place in the STA. Further, the Government has no answer for how the federal STA could control time-to-trial clocks in the state courts that have enacted the IADA but are not subject to the STA. Indeed, the state courts cannot even decide whether their

[2] Even if, contrary to the IADA text, the district court could have granted a countable continuance while the interlocutory appeal was pending, the Sixth Circuit has rejected "a per se rule that all defense requests for a continuance automatically waive procedural and substantive Article IV(c) rights." *United States v. Crozier*, 259 F.3d 503, 516 (6th Cir. 2001). Nothing in his motion was intended as a waiver of his IADA rights. Indeed, the order itself was not entered in "in open court" upon a finding of "good cause" as would have been required in any event to satisfy the plain text of IADA Art. IV(c)

own speedy trial rules do or do not apply to IADA analysis. *Compare State v. Rieger,* 708 N.W.2d 630, 639 (Neb. 2006) (holding that "the Court of Appeals erred in applying Nebraska's… speedy trial rule…to determine whether Rieger was timely brought to trial [under the IADA]" and finding it unnecessary to decide the effect of a pending motion on the IADA trial clock), *with Vining v. State*, 637 So. 2d 921, 925 (Fla. 1994) (*per curium*) ("[W]e will not grant greater dignity to the IAD's speedy trial time limit than to Florida's speedy trial rule….").

Finally, the Government is wrong to suggest that construing the proper interpretation of IADA Art. IV(c) ought not to merit this Court's time. The courts that have adopted the minority, narrow view show no sign of backtracking in the decades in which their view has conflicted with state and federal courts that have expansively construed the tolling provision. Given the large number of courts that have already addressed the issue, further development in the lower courts is not likely to be of any help to this Court when it ultimately decides the split of authority.

CONCLUSION

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

Dated: May 25, 2021

Respectfully submitted,

MANUEL DE JESÚS
GORDILLO-ESCANDÓN

_____

Howard W. Anderson III
CJA Counsel for Petitioner

LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
(864) 643-5790 (P)
(864)332-9798 (F)
howard@hwalawfirm.com
CJA Counsel