NO. 21-6960

IN THE
SUPREME COURT OF THE UNITED STATES

Jonathan C. Roush,

Petitioner,

vs.

United States of America,

Respondent,

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

EMERGENCY PETITION FOR A WIT OF CERTIORARI

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I. QUESTIONS PRESENTED

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, provides that the trial of a person being detained solely because they are awaiting trial shall commence not later than 90 days following the beginning of such continuous detention. § 3164(a)(1)&(b). The remedy available to such person for violation of the 90 day limit is release from custody pending trial. § 3164(c). In calculating the 90 day period, the periods of delay in § 3161(h) are excluded.

The case before this Honorable Court presents four questions which divide the courts of appeals:

1. Whether, in light of this Court's ruling in *Zedner v. United States*, 547 U.S. 489, 126 S. Ct. 1976, 164 L. Ed. 2D 749 (2006) and *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982), may a Court of Appeals, subsequent to a defendant filing a timely notice of appeal challenging a district court's oral and written denial of defendant's motion for release pursuant to 18 U.S.C. 3164(c), consider an additional order entered after the notice of appeal by the district court offering speedy trial findings, analysis, and calculations not made prior to the oral and written denial appealed from?

2. Whether, in absence of an oral or written order entered into the docket of a criminal case at the outset of a specific period of time, may the period of time in question subsequently be excluded pursuant to 18 U.S.C. 3161(h)(7) by an order operating retroactively?

   The Courts of Appeals for the 2nd, 3rd, 4th, 7th, 8th, 10th, and 11th have answered in the negative. The 6th Circuit, in the instant case, has decided to allow a retroactive exclusion. The 9th Circuit has thus far avoided deciding the issue. District Courts in the 1st and 5th Circuits have expressed agreement but the Courts of Appeals have not expressly ruled on the issue.

3. Whether, blanket, district-wide findings made by a single district judge, without case-specific considerations or findings addressing the needs of individual cases, may operate to toll the speedy trial clock in every criminal case within a district?

4. Whether a district court may order an open-ended continuance, containing no definitive end date, under 18 U.S.C. 3161(h)(7)(A)?

   The 2nd and 9th Circuits has answered in the negative. The 1st, 3rd, 5th, 6th, and 10th Circuits have answered in the affirmative.

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IV. Petition for Writ of Certiorari

Jonathan C. Roush, a federal detainee at Northeast Ohio Correctional Center in Youngstown, Ohio, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

V. Opinions Below

The decision by the United States Court of Appeals for the Sixth Circuit denying Mr. Roush's interlocutory appeal is reported as *United States v. Roush*, 2021 U.S. App. LEXIS 36082 (6th Cir. 2021) and is attached as Appendix A. Mr. Roush filed a petition for panel rehearing on December 20, 2021, and subsequently withdrew the petition.

The District Court for the Northern District of Ohio denied Mr. Roush's Emergency Motion for Immediate Release orally during a Status Conference on September 1, 2021 and confirmed the denial by Marginal Entry Order on September 8, 2021. The transcript of the September 1, 2021 Status Conference and the Marginal Entry Order is attached at Appendix B & C. N.D. Ohio Case No.: 5:20-CR-00621

VI. Jurisdiction

Mr. Roush's interlocutory appeal to the Sixth Circuit was denied on December 7, 2021. Mr. Roush invokes this Court's jurisdiction under 28 U.S.C. § 1254, having been timely filed this petition for a writ of certiorari within ninety days of the Sixth Circuit's judgment.

VII. Constitutional Provisions Involved

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII. Statement Of The Case

A. Procedural Posture

The Speedy Trial Act claims raised by Mr. Roush are procedural in nature which necessitate the recital of the procedural posture of the case at length.

1. October 9, 2020 to May 18, 2021

Mr. Roush was indicted on October 9, 2020. He was transferred into U.S. Marshals custody from Lorain Correctional Institution in Grafton, Ohio on October 26, 2020[1]. Mr. Roush's initial appearance was conducted on October 30, 2020 and a detention hearing scheduled for November 6, 2020. He was ordered detained at the November 6 hearing.[2]

Following the detention hearing, the docket fell silent until a Non-Document Ends-of-Justice Continuance was entered on January 11, 2021 by order of Senior U.S. District Judge Christopher A. Boyko (herein referred to as "Judge Boyko"). This continuance cited 18 U.S.C. § 3161(h)(7)(A) and Amended General Order 2020-08-4[3]. It should be noted that prior to this date, no pretrial or trial dates had been discussed or set in the case.

The next entry into the docket was another Non-Document Ends-of-Justice Continuance on February 19, 2021 ordered by Judge Boyko. This continuance cited 18 U.S.C. § 3161(h)(7)(A) and Amended General Order 2020-08-5[4]. No entries appear on the

1 Mr. Roush was serving a 9 month incarceration for a state of Ohio parole violation with a release date of November 8, 2020.

2 Petitioner notes that at neither the initial appearance, nor at the detention hearing, was there any discussion of continuance. Also, no trial date was discussed nor set at either hearing.

3 Amended General Order 2020-08-4 ordered that trials would be allowed to commence on February 16, 2021.

4 Amended General Order 2020-08-5 ordered that trials would be allowed to commence on April

docket from this date through May 17, 2021.

a. Criminal Trial Order – May 18, 2021

On May 18, 2021, a Criminal Trial Order was entered onto the docket of the case. The trial order set forth the requirements of the court regarding pretrial preparation. The trial order set the case for trial on November 1, 2021. The order contains no reference to 18 U.S.C. § 3161(h)(7), nor does it contain any findings relating to exclusion under the same.

It is important to note that the trial order uses a template which is used in every criminal case assigned to Judge Boyko. See *United States v. Hurley*, N.D. Ohio Case No.: 1:18-CR-00408, R. 9, Trial Order.

2. May 19, 2021 to August 9, 2021

On June 23, 2021, Mr. Roush filed two pro se motions. The first, a Motion to Proceed Without Counsel (R. 13, Motion), and the second, an Emergency Motion for Immediate Release pursuant to 18 U.S.C. § 3164(c) (R. 14, Motion). In his motion for release, Mr. Roush argued that he had been held in excess of 90 non-excludable days of continuous pre-trial detention and was entitled to release pending trial.

On August 4, 2021, a hearing was held before Judge Boyko and Mr. Roush's Motion to Proceed Without Counsel was granted. Immediately after granting the motion, and without mention or ruling on the motion for release, Judge Boyko ordered that the case be transferred to another judge. It is important to note that Judge Boyko did not make any speedy trial findings, nor comment on periods of excludable delay.

The case was subsequently transferred to U.S. District Judge John R. Adams

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5, 2021.

(herein referred to as Judge Adams). On August 9, 2021, a Status Conference was noticed (R. 20, Notice) for September 1, 2021.

3. Status Conference – September 1, 2021

On September 1, 2021, a Status Conference was held. During the conference, Judge Adams discussed the trial date, jury selection, and confirmed Mr. Roush's choice to proceed pro se. At the conclusion of the court's agenda, Judge Adams asked if the government had any issues to address. The government notified the court that Mr. Roush's motion for release was still pending. When addressed by the court, petitioner requested that the court rule on the motion. The following exchange ensued (R. 37, Transcript, PageID#: 203, 17-21):

> THE COURT: You've had a detention hearing, I take it?
>
> THE DEFENDANT: Yes, I did, Your Honor.
>
> THE COURT: All right. So you don't get two bites of the apple. The motion is denied.

Judge Adams briefly explained that after a detention hearing and order, the court was not required to consider another motion for bond. He further stated "We don't need to write on it. It's clear." (R. 37, Transcript, PageID#: 204, 1-2).

As it was clear that Judge Adams believed Mr. Roush was requesting release under the Bail Reform Act, rather than section 3164 of the Speedy Trial Act, Mr. Roush raised the issue with the court (R. 37, Transcript, PageID#: 205, 10-23). Upon being informed that there was an alleged speedy trial violation, Judge Adams responded that, "The chief judge has issued two or three general orders that would make your motion not

well-taken as it relates to speedy trial. So candidly, I'm not overly concerned about it at all..." (Transcript, PageID#: 206, 1-4). The court repeated this sentiment, stating, "So as I've indicated, I'm not overly concerned about it because of the Court's general orders. You'll remain detained. Thank you very much. That will be the Court's order." (Transcript, PageID#: 206, 10-13).

4. Marginal Entry Order – September 8, 2021

On September 8, 2021, a Marginal Entry Order (R. 22, Order)[5] was entered into the docket. The order was a copy of the defendant's original motion for release with a small notation superimposed stating that the motion was denied, "for reasons set forth on the record during the status conference held on 9/1/21."

5. Notice of Appeal – September 14, 2021

On September 14, 2021, Mr. Roush filed a timely Notice of Appeal (R. 27, Notice) of the order denying his motion for release.

6. Post-Appeal Order – September 17, 2021

On September 17, 2021, an order was entered into petitioners criminal docket. (R. 32, Order, PageID#: 185-190). The order was purported to be, "necessary to detail those periods excludable from the calculation of Roush's pretrial custody time to properly explain the Court's denial of Roush's Motion for release." (PageID#: 185). In the order, the district court claimed the Sept. 1 Status Conference was noticed for the purpose of speaking to the defendant and government regarding the motion for release. Within the order, the district court makes findings and outlines the general orders issued by the chief judge of the district in response to the Covid-19 Pandemic. The district court then

5 Included as Appendix C.

clearly orders a retroactive ends-of-justice continuance stating (PageID#: 189):

> "The Court specifically finds that the ends of justice served by ordering the continuances outweigh the interest of the public and any defendant's right to a speedy trial pursuant to 18 U.S.C. Section 3161(h)(7)(A). As a result, for Roush, the time frame between the December 7, 2020 general order and the current date are excluded as the national emergency caused by the COVID pandemic eliminated any possibility of bringing him forward to jury trial."

The district court continued, adding that Mr. Roush had requested a 90 day continuance to prepare for trial. (PageID#: 189) It is important to note that this continuance was requested on September 10, 2021, nine days after the district court's oral denial and two days after the written order confirming said denial. The district court, in a footnote, also stated that the time period from Roush entering federal custody (Oct. 26, 2020) to December 7, 2020 should also be excluded "based on the national emergency as well." (PageID#: 190, Footnote #3).

B. Interlocutory Appeal

1. Motion to Exclude – September , 2021

a. Mr. Roush's Argument

On appeal to the Sixth Circuit, Mr. Roush filed a motion to exclude the district court's September 17, 2021 Post-Appeal Order from the record and/or consideration in the appeal. Mr. Roush argued that the post-appeal order was not in compliance with this Court's ruling in Zedner as it set forth supplemental findings, calculations, and analysis not relied upon during the September 1, 2021 status conference. Mr. Roush further argued that as the district court delivered it's order denying his motion orally during the status conference and subsequently in its written order on September 8, 2021, it was

foreclosed from filing its post-appeal order and the Court of Appeals was likewise foreclosed from considering it.

b. Government's Argument

The government, in response to Mr. Roush's motion to exclude, argued that the post-appeal order was entered under the "in aid of the appeal" exception. The government further argued that, in filing the order, the district court was in fact complying with this Court's Zedner ruling, making a tally of the unexcluded and excluded days in support of its earlier oral ruling. The government reasoned that the district court was merely memorializing its oral ruling.

2. Argument on Appeal

a. Argument of Appellant

On appeal to the sixth circuit, Mr. Roush renewed his argument that he has been held detained in excess of 90 non-excludable days in violation of 18 U.S.C. § 3164. Specifically he argued that the first ends-of-justice continuance incorporating the district's general orders was entered by Judge Boyko on January 11, 2021. Roush further argued that the second ends-of-justice continuance entered on February 19, 2021 was effective to exclude time until April 5, 2021. In response to the government's assertion that the May 18, 2021 Criminal Trial Order was a continuance excluding time until the November 1, 2021 trial date, Mr. Roush showed that the trial date was set for that date due to the congestion of the court's calendar, as evidenced by an email[6] sent by the deputy clerk who entered the criminal trial order. Further, the criminal trial order was not justified as a continuance by any on the record findings as required by the Speedy Trial

6 Included as Appendix D

Act.

Mr. Roush reasoned that if he were to concede to the government's calculations that 79 unexcluded days had accrued as of May 17, 2021, the addition of the 36 days from May 18 to June 22, 2021 totals 115 days, a clear violation of the 90 day limit imposed by § 3164. Mr. Roush offered the following analysis:

Time Period	Countable Days	Event(s)	Total Speedy Trial Act Days
11/8/20 – 1/10/21	64	Roush remains in federal custody, solely because he is awaiting trial, after his state sentence terminates	64
1/11/21 – 5/2/21	0	1/11/21 and 2/19/21 non-document ends-of-justice continuances based on suspension of jury trials	64
5/3/21 – 5/17/21	15	Jury trials resume	79
5/18/21 – 6/22/21	36	No continuance granted by trial judge, no pending motions or tolling events	115

b. Argument of Government

In its brief, the government argued that the defendant had been detained a total of 79 non-excludable days and not entitled to release under § 3164. In support of its argument, the government agreed with Mr. Roush that the first continuance to exclude time in the case was the January 11, 2021 ends-of-justice continuance ordered by Judge Boyko. It also argued that the February 19, 2021 continuance ordered pursuant to Amended General Order 2020-08-5 was open-ended, and relied on the subsequent general orders which postponed trials until May 3, 2021. The government reasoned that the defendant's clock resumed on that date. The government also argued that the May 18, 2021 Criminal Trial Order was in fact a continuance based upon the general order

allowing trials to resume on May 3. It reasons that the trial order was effective to exclude time from the date of the order until the November 1 trial date.

The government offered the following analysis:

Time Period	Countable Days	Event(s)	Total Speedy Trial Act Days
11/8/20 – 1/10/21	64	Roush remains in federal custody, solely because he is awaiting trial, after his state sentence terminates	64
1/11/21 – 5/2/21	0	1/11/21 and 2/19/21 non-document ends-of-justice continuances based on suspension of jury trials	64
5/3/21 – 5/17/21	15	Jury trials resume	79

3. Judgment Affirmed

On December 7, 2021, the Court of Appeals for the Sixth Circuit affirmed the denial by the district court of the defendant's motion for release. In its Dec. 7 opinion, the Court of Appeals reasoned that, although "brief" the district court did not abuse its discretion. Further, it opined that the district court's passing reference was sufficient to apply the districts general orders to Mr. Roush's case and that the general orders were "expressly issued as ends-of-justice continuances". The Court of Appeals expressly included the district court's post-appeal September 17, 2021 order in its considerations, which implies its approval of the retroactive continuance contained therein.

IX. REASONS FOR GRANTING THE WRIT

A. To prevent erroneous circumvention of this Court's rulings in Griggs and Zedner, this Court should clarify whether a district court may enter a post-appeal order to place findings and calculations on the record of a case to explain an earlier oral ruling denying a defendant's § 3164 motion for release.

In Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982), this Court ruled that, "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." Id. at 58. In Zedner v. United States, 547 U.S. 489 (2006), this Court described the procedural requirements provided by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. Specifically, this Court addressed the requirements of § 3161(h)(8)[7], and known as the "ends-of-justice" provision. In Zedner, the defendant moved for dismissal of the indictment for violation of the 70 day limit for the commencement of trial set by 3161(c)(1). Mr. Zedner moved for dismissal pursuant to the sanction provided by 3162(a)(2). When calculating the 70 day limit, certain periods of time are excluded. These exclusions are listed under 3161(h). The ends-of-justice exclusion, 3161(h)(7) requires that when a judge orders a continuance pursuant to that section, its reasons must set forth in the record of the case. This Court ruled that the district courts findings must be set forth in the record "at the very least"..."by the time a district court rules on a defendant's motion to dismiss under 3162(a)(2)." Id. at 507.

This Court also adopted a set of procedures which a district court must follow to effectively rule on the defendant's motion. "In ruling on a defendant's motion to dismiss,

7 Now renumbered as § 3161(h)(7)

the court must tally the unexcluded days. This, in turn, requires identifying the excluded days." Zedner 547 U.S. at 507.

The Court of Appeals erroneous decision to consider the district court's September 17, 2021 post-appeal order circumvents the rules and requirements outlined in Griggs and Zedner. It is clear from the transcript of the Sept. 1, 2021 Status Conference that the district court expressly denied the defendant's motion at that time. The Court of Appeals agrees. (See Appendix A, Page 3). The district Court memorialized the denial, and reasons for the decision on Sept. 8, 2021 in its Marginal Entry Order.

It stands to reason that the procedure for ruling on a motion for release under 3164 would be essentially the same as a motion for dismissal under 3162(a)(2). 3164(b) incorporates the same 3161(h) exclusions from calculating the 90 day limit set for pretrial detention. The only difference is that the 90 day limit begins on the first day of continuous detention rather than the date of indictment or initial appearance. See 3164(b) and 3161(c)(1).

Upon review of the Sept. 1, 2021 transcripts (Appendix B), it is certain that Judge Adams was unaware of the grounds of the defendant's motion. Indeed, the judge assumed Mr. Roush was requesting reconsideration of the order of detention. After being informed of the true grounds for the requested relief, Judge Adams spoke for substantially less than a minute, expressing a generalized belief that two or three general orders issued by the chief judge would make his speedy trial argument not well-taken. He then stated, twice, that he was not "overly concerned" and again denied Mr. Roush's motion. Judge Adams did not read the motion, nor did he review the docket to tally the unexcluded days

or identify the periods subject to exclusion. Indeed, there simply was not time between learning the grounds of the motion and issuance of the denial to do so.

In its Sept. 17, 2021 post-appeal order, the district court, for the first time, offers the required calculations. The district court offered findings and analysis obviously not relied upon for its oral and written ruling. Surprisingly, the district court even claims as a reason for denial a continuance requested by the defendant on Sept. 10, 2021. Petitioner is flabbergasted as to how the request, made nine days after the ruling, could have been part of the reasoning of the Sept. 1 decision. It is clear that the district court only became "overly concerned" with defendant's motion after the defendant timely appealed on Sept. 14 and filed his opening brief on Sept. 16. According to this Court in Griggs and Zedner, Sept. 17 was too late.

Mr. Roush filed a motion with the Court of Appeals seeking to exclude the Sept. 17 order from consideration in the appeal. The government opposed the motion, reasoning the order was made "in aid of the appeal", citing United States v. Harvey, 996 F.3d 310 (6th Cir. 2021) and United States v. Sims, 708 F.3d 832 (6th Cir. 2013). The government further reasoned that the district courts order was necessary to comply with the requirements in Zedner. Mr. Roush responded in rebuttal that while courts have allowed actions "in aid of the appeal" the Sept. 17 order does not fit the definition which, "includes issuance of an opinion that memorializes an oral ruling." This is because the order contains "supplemental findings" that "altered the case on appeal" which have been found to be impermissible. See Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007, 1013 (6th Cir. 2003). Mr. Roush further identified that the district court included

an impermissible retroactive ends-of-justice continuance from December 7, 2020 to the date of the order.

The Court of Appeals denied Mr. Roush's motion as "moot" and included the post-appeal order in considering the appeal. This decision not only circumvents this Court's ruling in Zedner and Griggs, but also creates a circuit split with the majority of the circuits prohibiting the issuance of retroactive continuances. The district court was barred from placing additional findings on the record once it ordered the denial of MR. Roush's motion on Sept. 1. Clearly, Sept. 17 was too late, and the findings cannot be made on remand. Therefore the Sept. 17 order was inappropriate and invalid. Upon exclusion of the Sept. 17 post-appeal order, the denial by the district court on Sept. 1, 2021 becomes woefully inadequate and in error. This Court should Grant certiorari to prevent this erroneous circumvention and non-conformity with accepted procedure.

B. To prevent an unnecessary circuit split, this Court should confirm the majority's prohibition of retroactive, *nunc pro tunc*, ends-of-justice continuances.

The majority of the circuits expressly prohibit the use of retroactive ends-of-justice continuances:

> "We reaffirm, however, than an ends of justice continuance pursuant to section 3161(h)(8)(A) cannot be entered *nunc pro tunc*, and hold that in its order, the district court must, at a minimum, state that it is entering an "ends of justice" continuance or a continuance pursuant to 3161(h)(8)(A). The order continuing the case must be entered ***before*** the days to be excluded."
> United States v. Brenna, 878 F,2d 117, 122 (3rd Cir. 1989)

The same has rule has been followed in United States v. Tunnessen, 763 F.2d 74, 78 (2nd Cir. 1985); United States v. Carey, 746 F.2d 228, 230 (4th Cir. 1984); United

States v. Janik, 723 F.2d 537, 544-45 (7th Cir. 1983); United States v. Suarez-Perez, 484 F. 3d 537, 542 (8th Cir. 2007); United States v. Williams, 511 F.3d 1044, 1055 (10th Cir. 2007); United States v. Elkins, 795 F.2d 919, 924 (11th Cir. 1986). In each of these decisions, the courts of appeals reasoned that the Speedy Trial Act section 3161(h)(7) only provides for prospective exclusions, not retroactive. In Tunnessen, the court of appeals explained that "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. Moreover, it puts defense counsel on notice that the speedy trial clock has been stopped." We again look to this Court's opinion in Zedner. This Court pointed out that Congress placed upon the defense the task of spotting speedy trial violations. Zedner at 503. In absence of an order entered in the docket, this task proves to be impossible. "Continuances under that section must be specifically limited in time and supported by clear, specific findings, **so that the excludability of any period of time is readily ascertainable from the docket.**" United States v. Hardeman, 249 F.3d 826, 828 (9th Cir. 2000)(emphasis added).

Section § 3161(h)(7)(A) explicitly requires that the findings justifying an ends-of-justice continuance must be set in the record of the case. It stands to reason that the order granting the continuance would also be required to be entered in the record of the case as well. It is important to note that the Act specifies "in the record of the case". One must ask, what constitutes the "record" of a particular case? Black's Law Dictionary[8] defines 'court record of proceedings' as,

"A written memorial of all the acts and proceedings in an action or suit, in a

8 Black's Law Dictionary, Abridged 6th Ed., Copyright © 1991 by West Publishing Co.

> court of record. The official and authentic history of the cause, consisting in entries of each successive step in the proceedings, chronicling the various acts of the parties and of the court, couched in the formal language established by usage, terminating with the judgment rendered in the cause, and intended to remain as a perpetual and unimpeachable memorial of the proceedings and judgment. Such record in civil cases consists primarily of the "civil docket" (Fed.R.Civil P. 79); and in criminal cases of the "criminal docket" (Fed.R.Crim.P. 55). *See also* Docket." and 'Docket' as, "A book containing an entry in brief of all the important acts done in court in the conduct of each case, from its inception to its conclusion."

The logical conclusion is that "record of the case" would denote entries made on the docket of a particular case. This would comport with the requirement set forth by the majority and would make possible the task of spotting violations.

The Court of Appeals, it its erroneous decision to allow the district court to order a retroactive continuance as a part of its September 17, 2021 post-appeal order, splits with the circuit decisions which prescribe that an order be entered before the days to be excluded.

A review of the record of the instant case reveals that no order continuing the case was entered on the docket on or before December 7, 2020. The first mention of Amended General Order 2020-08-4 was on January 11, 2021 by Judge Boyko. It is important to note that prior to the January 11, 2021 continuance, there was in fact no trial date set in the case, nor had there been any discussion of whether a trial would be necessary. The government agreed with Mr. Roush in its brief that the speedy trial clock did not freeze until the January 11, 2021 order was entered in the case. The Sept. 17, 2021 order, which explicitly ordered an ends-of-justice exclusion from December 7, 2020 to the date of the order, is clearly an order operating retroactively to exclude time.

It is always possible to look back in time and discover a reason which may have

justified an exclusion. Requiring a continuance to be entered at the time it is granted protects defendant's from the obvious danger that a court will simply rationalize an unwitting violation of the act[9]. To hold otherwise would not only render the requirement of prospective application meaningless, but would also turn a defendant's task of spotting violations of the Act into an exercise in futility. To prevent a needless circuit split, this Court should grant certiorari and confirm the soundness of the majority's prohibition of retroactive exclusions.

C. To prevent the erroneous deprivation of a defendant's Sixth Amendment right to a speedy trial, as implemented by the Speedy Trial Act, this Court clarify whether a single district judge may make blanket, district-wide findings and whether these findings operate automatically to toll the speedy trial clock for every criminal case in the district.

This Court has, on numerous occasions, undertaken to examine and interpret the Speedy Trial Act. In Zedner[10], this Court thoroughly analyzed the "ends-of-justice" exclusion provided in 18 U.S.C. § 3161(h)(7)[11]. This Court determined, "This provision gives the district court discretion-within limits and subject to specific procedures-to accommodate **limited delays for case-specific needs.**" Zedner at 499. This comports with earlier rulings such as in United States v. Gambino, 59 F.3d 353, 358 (2d Cir. 1995)(ruling that an exclusion under the ends of justice provision be reasonably related to the actual needs of the case); United States v. LoFranco, 818 F.2d 276, 277 (2d Cir. 1987)(same).

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9 United States v. Tunnessen, 763 F.2d 74, 77 (2nd Cir. 1985) quoting United States v. Frey, 735 F.2d 350, 353 (9th Cir. 1984)

10 Zedner v. United States, 547 U.S. 489 (2006)

11 Renumbered from 3163(h)(8).

This Court also stated, "In the first place, the Act requires **express findings**, and in the second place, it does not permit those findings to be made on remand as the Government proposes." Zedner at 506. Blacks Law Dictionary[12] defines "express" as:

> "Express – Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with implied."

Accordingly, it stands to reason that for an exclusion to be valid under 3161(h)(7), the continuance must be supported by express, case-specific findings related to the actual needs of the case. With this in mind, we now focus on the topic at hand.

Norther District of Ohio General Orders[13]

In the Northern District of Ohio, the Chief Judge of the district issued a series of general orders in response to the COVID-19 pandemic with the first being issued in March of 2020. As Mr. Roush was indicted on October 9, 2020, we will focus on those issued during the instant case.

Amended General Order 2020-08-3 was issued on October 5, 2020. In regards to criminal cases in the district, the general order stated the following on page 4:

> "To accommodate trials and the effect of public health recommendations on the trials, the time period of the continuances implemented by the General Order will be excluded under Speedy Trial Act, as the Court specifically finds that the ends of justice served by ordering the continuances outweigh the interest of the public and any defendant's right to a speedy trial pursuant to 18 U.S.C. Section 3161 (h)(7)(A)."[14]

12 All references to Black's Law Dictionary are from - Black's Law Dictionary, Abridged 6th Ed., Copyright © 1991 by West Publishing Co.

13 Amended General Orders 2020-08-3, -4, -5, -6, & -7 are included in this petition as APPENXICES E – J

14 This exact statement is repeated on Page 4 of Amended General Order(s) 2020-08-4, -5, -6, and -7

The general order further stated that jury trials could be convened, but set forth conditions, such as the number of trials held at a time in each courthouse and limited trials to 5 days. The general order further stated:

> "If a participant does not consent, it must be for a COVID related reason and included in the Court's "speedy trial" order pursuant to 18 U.S.C. Section 3161 (h)(7)(A). If a participant has a non-COVID related reason, an appropriate motion for continuance must be filed with the Court."

Amended General Order 2020-08-4, which was issued on December 7, 2020, and was substantially the same as its predecessor. 2020-08-4 substituted the following paragraph for the one immediately above:

> No jury trial will be commenced until on or after February 16, 2021. Any trial dates currently scheduled through February 15, 2021 are vacated.

Amended General Orders 2020-08-5, -6, and -7 collectively extended the date on which trials could commence until May 3, 2021. The language of the general orders do not support the theory that they are themselves ends-of-justice continuances. The requirement that a court must enter a ""speedy trial" order pursuant to 18 U.S.C. Section 3161 (h)(7)(A)" is a dead giveaway. Further, requiring parties with a non-COVID related reason to file a motion for continuance also supports the assertion that the general order wasn't itself a continuance. Chief Judge Patricia Gaughan herself has proceeded to order ends of justice continuances in cases assigned to her during the suspension of jury trials caused by her own general orders. This is yet another indicator that her general orders require implementation by individual judges in the cases assigned to them.

It is important to note that, upon issuance, the general orders for the Northern

Dist. Of Ohio were not entered into the docket of individual cases, nor were they entered into the district's general business docket, miscellaneous docket, etc. The general orders were posted on the Clerk's website under the General Orders section with a link posted on the sites homepage.

General Orders

> "General Orders – Orders or rules of court, promulgated for the guidance of practitioners and the regulation of procedure in general, or in some general branch of its jurisdiction; as opposed to a rule or an order made in an individual case. General orders have generally been replaced by rules of court." Blacks Law Dictionary

The response by district courts throughout the nation have varied greatly as to the application of general orders issued by their chief judges. Indeed, the response varies even withing the districts themselves. Judge Boyko, in the instant case, and in the individual cases assigned to him, ordered continuances incorporating the general orders as a finding[15]. Indeed, this procedure has been widely used in the Districts of Utah, Colorado, M.D. Alabama, Minnesota, Nebraska, S.D. West Virginia, C.D. Illinois, Massachusetts, E.D. Tennessee, Kansas, E.D. Michigan, W.D. Pennsylvania, E.D. Missouri, E.D. California, W.D. New York, W.D. Oklahoma, and Montana[16]. Also worthy of note, multiple chief judges have ordered continuances in individual cases assigned to them citing their own general orders[17].

Multiple courts have made it clear that the general orders do not exclude time in

15 See United States v. Hurley, N.D. Ohio Case Number 1:18CR408, Non-Document entries on 5/1/20, 9/25/20, 10/22/20, 12/31/20, 2/19/21

16 See Appendix K

17 United States v. Peck, 2020 U.S. Dist. LEXIS 125488 (D. Utah 2020); United States v. Glass/Little, 2020 U.S. Dist. LEXIS 55364 (M.D. Alabama 2020)

and of themselves. These courts have reasoned that the general orders provide a fact or finding which may justify an exclusion, but there must be an individualized determination in each case:

> "To be clear, the Court agrees with Defendant that the General Orders are insufficient by themselves to exclude time in particular cases. See Zedner, 547 U.S. at 506-07. The importance of General Order 20-27 is that it provided a new, relevant fact-that grand jury proceedings would remain suspended past the indictment deadline of June 19. As has been the case three times in this matter, this fact was sufficient to make a finding that another ends-of-justice continuation is warranted." United States v. Santacruz-Cortes, 2020 U.S. Dist. LEXIS 120498, 4 (D. Arizona 2020)

> "Even if those Orders did not themselves operate to exclude time, they clearly inform this Court's own ends-of-justice exclusions by offering critical underlying facts - namely, that public-health conditions have necessitated the suspension of trials in this judicial district, notwithstanding every effort to hold them...In other words, this Court's own findings - as expressed in the record of this case and the present Opinion, though necessarily informed by the Chief Judge's Standing Orders - support the pandemic-related continuances and exclusions it ordered on March 16 and August 17, 2020, pursuant to 18 U.S.C. § 3161(h)(7)(A)." United States v. Taylor, 2020 U.S. Dist. LEXIS 232741, 19 (D. D.C. 2020)

The general order's provided a relevant fact which may justify an exclusion in an individual case. The suspension of jury trials due to the health risks posed by COVID-19 is a definite barrier to cases set for trial. However, a restriction on jury trials would support an exclusion only on cases which were being set for trial during the time period set forth in the general order.

The CARES Act

Congress passed the CARES Act on March 27, 2020. As a part of the Act, Congress expanded the use of videoconferencing[18]. In section 15002, Congress allowed federal courts to hold hearings for nearly every stage of a criminal case, up to and including

18 See Appendix L – CARES Act § 15002, March 27, 2020

felony plea hearings and sentencing. The only proceedings excluded are jury selection and trial. This would mean that, for a criminal case not proceeding to trial, every stage of the case may proceed by way of video or teleconference. This allowed many cases to proceed normally through the pandemic.

Application to Instant Case

Mr. Roush was indicted on October 9, 2020 and arraigned on October 30. A detention hearing was held on November 6, 2020. It is important to note that as of the date of the detention hearing, no trial date had been discussed with the parties or set by the court. Also, there was no discussion of speedy trial exclusion, an no continuance was ordered. The docket of the case is silent until January 11, 2021, when Judge Boyko entered a non-document ends of justice continuance order. This order was "pursuant to Amended General Order 2020-08-4", which suspended jury trials until February 16. As of the date of the order, there had still been no discussion of setting the case for trial. Amended General Order 2020-08-4 was issued by the chief judge on December 7, 2020. It is apparent from the language of the general order that the restrictions were specifically geared towards cases which had been set for trial. The clear language of the order indicated that any trial dates set before February 15 should be vacated, but did not state when the trials would be reset for, just that trials would be able to resume on the 16th.

Lack of Express Findings

As covered above, this Court held that the Act requires express findings. It is important to note that as of the district court's denial on September 1, 2021, no findings were placed on the record of the case regarding the time period beginning December 7,

2020. During the status conference, the district court made "passing reference" to the district's general orders, simply stating the chief judge had issued "two or three general orders" which would make Mr. Roush's speedy trial argument "not well-taken". Such passing reference does not satisfy the Act's requirements. In Zedner, this Court held:

> "Here, the District Court set forth no such findings at the January 31 status conference, and § 3161(h)(8)(A) is not satisfied by the District Court's passing reference to the case's complexity in its ruling on petitioner's motion to dismiss." 547 U.S. at 507.

In the instant case, the district court did not make any case-specific findings which would satisfy the Act. The district court did not take a moment to analyze the periods of excluded and unexcluded time in the case, nor did the district court make any express findings as to the possible effect of the suspension of trials. The district court did not even attempt to explain whether there had been any need at all for a continuance of Mr. Roush's case some nine months prior when the case had been assigned to another judge. It is clear that the "brief, indistinct statement by the district court was completely inadequate.

Actual Needs of the Case

Exclusions under the ends-of-justice provision must be reasonably related to the actual needs of the case. This, in turn, would require the supporting findings to explain why the case had need of the continuance. This leads to trouble for the general orders and blanket, district-wide findings. It is indisputable that the general orders prohibition on conducting jury trials create a condition which may warrant the continuance of an individual case, but, what of those cases not set for jury trial?

It is common knowledge that the majority of criminal cases never proceed to trial.

Criminal cases typically end with either a pretrial dismissal or plea of guilty[19]. In many cases, much of the speedy trial clock is excluded due to the filing of pretrial motions, and other automatic exclusions. The question now before this Court is, do the blanket findings apply to these cases?

Petitioner sets forth an example to illustrate this assertion. Say a case is set for a change of plea hearing on December 15, 2020. As of December 6, 2020, the speedy trial clock has accrued 20 unexcluded days. On December 7, 2020 the chief judge issues a general order, postponing trials until February 16, 2021 and orders all trials scheduled in the interim to be vacated. What effect does this order have on the example case? None. There is simply no need for a continuance of the example case.

A review of the record of the case supports the conclusion that the case had simply fallen through the cracks. If one determines that Mr. Roush's speedy trial clock began on November 8, 2020 (as asserted by the government), by December 7, 2020, only 30 days of the 70 day limit had elapsed. The clock was in no danger of running out and there was no need to continue the case at that time. Indeed, there's no evidence of any communication between the Court and the parties. Only once the speedy trial clock became in danger of being violated did the district court take action, ordering the January 11, 2021 continuance while invoking the general order. Presented is a clear case of inattention by the district court.

Mr. Roush was indicted 4 days after Amended General Order 2020-08-3 was

19 United States v. Ruiz, 536 U.S. 622, 632, 122 S. Ct. 2450, 2457, 153 L.Ed.2d 586, 597 (2002) (government relies "upon plea bargaining in a vast number-90% or more" of federal cases); U.S. Dept. of Justice, Sourcebook of Criminal Justice Statistics 448 (1996) (92% of federal convictions are guilty pleas)

issued. This general order not only allowed trials but expanded the number of trials which could be held simultaneously in the district. The district court showed no interest or attention to the case from the beginning. 18 U.S.C. 3161(a) requires:

> "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."

No trial date was set upon Mr. Roush's Oct. 30, 2020 initial appearance, nor was a trial date set following his next appearance at the Nov. 6, 2020 detention hearing. On December 7, 2020, as no trial date appeared on the court's calendar, there was still no action from the district court. There was simply no trial date needing continued! It is clear why the district court did not take action until Jan. 11, 2021. The speedy trial clock was in danger of running over, and the court had not taken any action until that point. On January 11, the district court merely copied and pasted an exact copy of a continuance order used throughout Judge Boyko's case load. It can also be argued that use of a boilerplate continuance shows that the district court did not evaluate the actual needs of the case and failed to perform the necessary balancing test required by the Act. However, that argument is unnecessary. As the general order did not support an exclusion in petitioner's case, the earliest stoppage of Mr. Roush's clock is January 11, 2021. This, coupled with the unexcluded time in May and June 2021, provide well over the 90 day limit set forth in § 3164, requiring Mr. Roush's release pending trial.

Court of Appeals Committed Error

In affirming the district court's motion for release is clearly in error. The record

does not support the assertion that the district's general orders were issued as a continuance resulting in excluded time in Mr. Roush's case. Such an assertion gives license for district's to circumvent this Court's ruling in Zedner which mandates exclusions only for case-specific needs. There is no rationalization available to support the district-wide exclusion of time in every criminal case. It is fact that the vast majority of cases do not require a trial date, let alone an exclusion of time to accommodate one. To hold that a single judge, in a single order, may exclude time in every criminal case in a district, without making individualized findings based upon the actual needs of the case, is to invalidate the protections afforded by the Speedy Trial Act. One must also ask the question, in districts where resources are being effectively utilized during our current state of affairs, why have chief judges not utilized the remedy available in 18 U.S.C. § 3174? It is irrefutable that the pandemic has caused an unwieldy backlog of criminal and civil cases in every district. What situation could possibly be a better fit for the definition of Judicial Emergency?

D. To end a long-standing circuit split, this Court should clarify whether the use of open-ended, indefinite ends-of-justice continuances are consistent with the Speedy Trial Act and this Court's decision in Zedner.

> "This delicate balance could be seriously distorted if a district court were able to make a single, open-ended "ends of justice" determination early in a case, which would "exempt the entire case from the requirements of the Speedy Trial Act altogether." quoting Jordan, 915 F.2d at 565-66."
> --United States v. Clymer, 25 F.3d 824, 829 (9th Cir. 1994)

This Court determined in Zedner, "This provision[20] gives the district court discretion-within limits and subject to specific procedures-to accommodate **limited delays**

20 § 3161(h)(8) (Now renumbered at § 3161(h)(7))

for case-specific needs." 547 U.S. at 499. There has been a long standing split between the circuits on whether this provision allows for the use of open-ended or indefinite periods of exclusion.

The 2nd and 9th circuits have long held that ends-of-justice exclusions must be limited in length. In United States v. Gambino, 59 F.3d 353, 358 (2nd Cir. 1995), the Court of Appeals held:

> "The length of an exclusion...must be not only limited in time, but also reasonably related to the actual needs of the case. See United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1198 (2d Cir.) ("indefinite delay" not tolerated), cert. denied, 493 U.S. 933 (1989); United States v. LoFranco, 818 F.2d 276, 277 (2d Cir. 1987) (per curiam); accord United States v. Clymer, 25 F.3d 824, 828 (9th Cir. 1994) (continuance under § 3161(h)(8)(A) may not be open-ended)."

This was in agreement with the holdings of the 9th Circuit in United States v. Clymer, 25 F.3d 824, 828 (9th Cir. 1994):

> "In Jordan[21], we made clear that a district court may grant an "ends of justice" continuance only if it satisfies two requirements: (1) the continuance is "specifically limited in time"; and (2) it is "justified [on the record] with reference to the facts as of the time the delay is ordered." 915 F.2d at 565-66; accord United States v. Pollock, 726 F.2d 1456, 1461 (9th Cir. 1984)"

Other circuits, however, have held that open-ended continuances are allowed. See United States v. Sabino, 274 F.3d 1053, 1064-65 (6th Cir. 2001) ("[W]e will follow the rule of the First, Third, Fifth, and Tenth Circuits and hold that open-ended ends-of-justice continuances for reasonable time periods are permissible in cases where it is **not possible** to . . . set specific ending dates.")(amended and superceded on other grounds by 307 F.3d 446 (en banc)); United States v. Rush, 738 F.2d 497 (1st Cir. 1984); United States v. Lattany, 982 F.2d 866, 868 (3rd Cir. 1992); United States v. Jones, 56 F.3d 581, 586 (5th

21 United States v. Jordan, 915 F.2d 563, 565 (9th Cir. 1990)

Cir. 1995) (district court may grant open-ended continuances in situations where "it is **impossible**, or at least quite difficult, for the parties or the court to gauge the length of an otherwise justified continuance."); United States v. Spring, 80 F.3d 1450, 1458 (10th Cir. 1996) (agreeing with the First, Third, and Fifth Circuits that open-ended continuances for a reasonable time period are warranted in some cases).

It seems as though these circuits have adopted an "impossibility" standard when evaluating whether an open-ended exclusion is warranted. The circuits allowing these open-ended continuances have also adopted a reasonableness standard when evaluating whether an open-ended continuance is valid. This standard, however, seems to only be able to be decided in hindsight. This factor reveals an inherent danger to the grant of such a continuance.

Irreparable Harm

The danger is that an open-ended continuance of indefinite length may result in irreparable harm. As the propriety of these continuances can only be judged in hindsight, upon a findings that an open-ended continuance was allowed to operate for an unreasonable length of time, there is no possibility to reverse any prejudice. While the defendant may be able to benefit by moving for dismissal or release from custody, the defendant must face the possibility that the dismissal may well very be without prejudice, subjecting the defendant to possible re-indictment. Even if the defendant secures pretrial release, there is no possibility of retrieval of the time spent in pretrial detention.

Application to the Instant Case

On February 19, 2021, Judge Boyko entered a non-document ends-of-justice continuance. This continuance was made "pursuant to Amended General Order 2020-08-5". On appeal, Mr. Roush argued that this continuance was effective to exclude time until April 5, 2021. He reasoned that as the continuance was based upon 2020-08-5, and the general order allowed trials to begin on April 5, his clock would resume on that date.

The government argued that the continuance was, in fact, open-ended, contingent on the suspension of jury trials within the district. The government reasoned that the continuance was automatically extended upon 2020-08-5 being superseded by 2020-08-6 & 2020-08-7, which continued the suspension until May 3, 2021. The government argued that Mr. Roush's clock resumed on May 3. Among the government's reasons is that in the continuance order, the court stated that new dates would be set in the future. As the court did not set a trial date following the April 5 date, the government implies that Judge Boyko meant for the continuance to automatically extend following following the issuance of subsequent general orders.

This issue provides this Court with a textbook situation for which to clarify: 1) the definition of an open-ended continuance; 2) is the issuance and use of open-ended continuances consistent with the goals and requirements of the Speedy Trial Act. As established above, there is a clear circuit split as to the appropriateness of such a continuance.

There is at least one court which feels that this type of exclusion is foreclosed by this Court's holdings in Zedner. The district court in United States v. Graham, 2008 U.S.

Dist. LEXIS 122113 (S.D. Ohio 2008) had this to say concerning open-ended continuances:

> "Finally, although decided on different facts, it seems obvious from the Zedner decision that granting an open-ended continuance is not appropriate under the Speedy Trial Act. In Zedner, the Court held that a defendant may not prospectively waive his Speedy Trial rights for "all time." 547 U.S. at 503. An open-ended continuance is similar to an "all time" waiver in that it leaves the trial court and the parties to their own devices as to when and whether the case is to be brought to trial. Moreover, the ends of justice are never be served by delaying a trial indefinitely." Id. at LEXIS 13.

The Speedy Trial Act protects not only the rights of the accused, but those of society as well. It is important to determine whether the use of open-ended, indefinite continuances under the ends-of-justice provision do indeed work within the goals Congress sought to accomplish. Such a long standing split between the circuits warrants a closer look by this Court.

E. May 18, 2021 Criminal Trial Order doe not result in excludable time.

The Criminal Trial Order entered on May 18, 2021 did not contain any order of continuance or mention an exclusion under 18 U.S.C. 3161(h)(7)(A). Nor is there any indication in the record that Judge Boyko made contemporaneous findings required by statute and precedent. A simple reading of the transcripts from the September 1, 2021 hearing shows that no findings were placed on the record to justify exclusion of the time period between the Trial Order and the November 1, 2021 trial date. The trial order was not discussed, nor mentioned prior to or at the time of the denial. Furthermore, Judge Adams could not have made the required contemporaneous findings as he was not assigned to the case until August 4, 2021.

F. Confluence of the Results Necessitate Writ of Certiorari

The results of the arguments above lead to reversal. The decision by the Court of Appeals to include the post-appeal Sept. 17 order was clearly in error. The retroactive continuance contained therein is plainly impermissible. By allowing the district court's order to stand, the Court of Appeals allowed a substantial deviation from procedure and applicable precedent.

Once the decision to exclude the September 17, 2021 post-appeal order and the impermissible retroactive continuance contained therein is confirmed, there remains no valid explanation for the denial of petitioners' motion for release. None of the time periods agreed to by the parties are subject to exclusion. As agreed to by the government, at the very least, 79 unexcluded days had passed by May 17, 2021. Therefore, if one were to accept the bare minimum number of unexcluded days as of May 17, 2021 to be 79, the addition of May 18, 2021 to June 22, 2021 would result in a total of 115 unexcluded days.

Upon the district courts oral denial and written confirmation, no continuance had been entered into the record which would exclude sufficient time to warrant denial. Furthermore, no findings exist in the record prior to, or at the time of the denial which would justify exclusion pertaining to the May 18, 2021 to June 22, 2021 time period. With the exclusion of the *nunc pro tunc* findings and retroactive order contained in the Sept. 17 order, petitioner accrued more than 90 unexcluded days and therefore is entitled to release pursuant to 18 U.S.C. § 3164(c).

G. To Prevent Irreparable Harm to Petitioner this Court Should Grant Certiorari

"Deprivation of physical liberty by detention constitutes irreparable harm." Arevalo v. Hennessy, 882 F.3d 763, 767 (9th Cir. 2018)

When a defendant has established he is being held in detention in violation of 3164 of the Speedy Trial Act, and subsequently is denied release by the district court and court of appeals, his final resort is to request review by the Supreme Court of the United States.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Roman Catholic Diocese v. Cuomo, 592 US ___, 141 S Ct ___, 208 L Ed 2d 206 (2020)(quoting Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)) Surely the deprivation of an individuals' right to liberty and due process under the Fifth and Fourteenth Amendments would equate to the same or greater degree of irreparable injury. Each day an individual spends detained pending trial results in degradation of personal relationships, loss of income and pursuit of employment, anxiety, restriction of enjoyment of freedom of choice, and the pursuit of happiness.

Furthermore, when statute provides a remedy for prolonged pretrial detention, denial of that remedy on erroneous grounds amounts to a deprivation of the defendant's right to due process. When a defendant has alleged a violation of the 90 day limit imposed by 18 U.S.C. § 3164, and the motion setting forth the allegation is denied without consideration of the merits, and without the necessary analysis and calculation, due process demands additional remedy. Denial of proper remedy would undeniably

result in irreparable harm.

Mr. Roush first alleged violation of § 3164 on June 23, 2021. The district court, without considering the merits of the motion, indeed, without even reading the motion, denied it. Even upon learning the true grounds for the motion, the district court declined to perform the requisite analysis or calculations imperative to effectively rule on the motion. The district court opined that it was not "overly concerned" with the issue. It is apparent that the district court only became "overly concerned" upon the defendant's filing of a notice of appeal. The district court then belatedly attempted to remedy its error by ordering retroactive exclusion of sufficient time to justify it's earlier denial.

On appeal to the Sixth Circuit, this erroneous procedure was expressly approved by the Court of Appeals. Due to the denial of Mr. Roush's motion for release, as of December 7, 2021, he has now been detained in violation of 18 U.S.C. § 3164 for over 408 days. This is four and a half times the 90 day limit.

Speaking in opposition to an amendment that would have reduced the 90-day limit of section 3164(b) to 60 days, Senator Thurmond told the Senate that "the 90 days is the worst case limit," 130 Cong. Rec. S941 (daily ed. Feb. 3, 1984), Senator Laxalt called the 90-day limit the "upper bound," id. at S943, and Senator Grassley relied on the 90-day limit to assure his colleagues that "no defendant will be detained indefinitely while the processes of justice grind to a halt," id. at S945.

Mr. Roush has thus been experiencing irreparable harm for the over 160 days he has remained in detention after requesting release. This harm has been caused by the erroneous procedure, perpetrated by the district court and upheld by the court of appeals.

This warrants intervention by the United States Supreme Court in it's supervisory capacity and is necessary to protect the rights of liberty and due process.

X.CONCLUSION

For the foregoing reasons, Mr. Roush respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DATED this 6th day of JANUARY, 2022.

Respectfully Submitted,

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