NO. _____

In The
Supreme Court of the United States

SIVA K. DURBESULA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) WHETHER THE SIXTH AMENDMENT REQUIRES A JURY RATHER THAN A JUDGE TO DETERMINE FACTS WHICH ARE USED TO APPLY ENHANCED PUNSIHMENTS INCLUDING THE PERIOD OF SUPERVISED RELEASE AND THE AMOUNT OF A SPECIAL ASSESSMENT?

2) WHETHER THE PETITIONER'S SPEEDY TRIAL ACT RIGHTS WERE VIOLATED?

LIST OF PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of this case on the cover page.

STATEMENT OF RELATED CASES

There are none.

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IN THE
SUPREME COURT OF THE UNITED STATES

SIVA K. DURBESULA, Petitioner,	)	
v.	)	No. _____
UNITED STATES OF AMERICA, Respondent.	)	

PETITION FOR
WRIT OF CERTIORARI

NOW COMES SIVA K. DURBESULA., Petitioner herein, and requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision filed on March 15, 2022 affirming the petitioner's conviction and sentence. 1a.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit filed an unpublished opinion on March 15, 2022 affirming the petitioner's conviction and sentence. 1a. *United States v. Durbesula*, 2022 U.S. App Lexis 6705, 2022 WL 794975 (4th Cir. 2022).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court Rules for Certiorari to review the unpublished opinion of the Fourth Circuit Court of Appeals issued on March 15, 2022.

CONSTITUTIONAL AUTHORITY INVOLVED

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.

STATEMENT OF THE CASE

On or about January 28, 2020, the United States obtained a single-count Bill of Indictment in the District of South Carolina charging the petitioner Siva Durbesula with violations of 18 U.S.C. 2244(b) and 49 U.S.C. § 46506 (JA at 11-13). The petitioner was alleged to have unlawfully touched the breast of another person while being a passenger on Spirit Airlines flight NK843 from Chicago to Myrtle Beach, South Carolina (JA at 11-13).

The petitioner was subsequently arrested in his home in New Jersey on January 31, 2020 and ultimately transported to the District of South Carolina (JA at 9).

In March of 2020, the COVID-19 pandemic beset the United States and in the interest of public safety, the District of South Carolina issued orders which had the effect of continuing the case through August of 2020 (JA at 38-42). On August 19, 2020, the petitioner's counsel filed a motion for change of venue. A hearing was conducted in the District of South Carolina and the motion was allowed (JA at 16).

The petitioner's case was transferred to the Western District of North Carolina (JA at 16). The petitioner was physically transported to the Western District and arrived on September 17, 2020 (JA at 3). He appeared at an initial hearing in the Western District on September 21, 2020, was appointed counsel and his case was set for trial during the November 2, 2020 trial term (JA at 3).

On October 6, 2020, the United States obtained a Second Superseding Indictment by a Grand Jury sitting in the Western District of North Carolina on the exact same charges that were contained in the original indictment (JA at 17-18).

On November 4, 2020, the petitioner filed a Motion to Dismiss for Violation of the Defendant's Speedy Trial Act rights (JA at 19-29). The Government filed a response in opposition to the motion (JA at 30-42). The petitioner filed a reply (JA at 43-8). The trial court denied the motion by written order (JA at 49-61).

The case was called for trial on or about November 9, 2020 (JA at 62). The testimony at trial tended show the following:

Tricia Davis testified that on or about June 23, 2019 that she was working as a flight attendant for Spirit Airlines (JA at 112). She was assigned to work on that date to flight NK 843 (JA at 112). She described for the jury the layout of the seating in the airplane and how the three seats on each side of the center aisle were labeled (JA at 113). She identified the ticket issued to the petitioner and indicated that he was assigned to seat 31-D (JA at 113).

Ms. Davis described how she became aware of a disturbance at some point in the flight and that she went to the back of the plane (JA at 113). She observed a

woman in the lavatories who was distraught and crying (JA at 118). She testified that she called the captain to inform him of the situation and that the captain advised that he would call to have a law enforcement officer meet them at the gate (JA at 119).

Ms. Davis described how she found a seat near the front of the plane and moved the petitioner to that seat (JA at 120-1). She told the jury how at a later point she spoke with the petitioner who requested to be able to speak with the woman as it was "[p]robably a misunderstanding." (JA at 122).

Ms. Davis explained that upon arrival she spoke with law enforcement officers and was requested to retrieve the petitioner (JA at 123). After the petitioner was off the plane, she went back and assisted the woman with gathering her belongings and exiting the plane (JA at 123)

Eleazer Tapia testified that she was a passenger on Spirit Airlines flight NK 843 (JA at 127). She identified the petitioner as the person who sexually assaulted her on the flight (JA at 127). She told the jury how the petitioner was seated in the seat next to her, immediately on her left (JA at 128). She testified how she had fallen asleep after the plane took off (JA at 129). She was awakened by movement on her left side and felt something touching her arm (JA at 130). She opened her eyes and saw the petitioner on her left with his arms crossed, facing the aisle (JA at 130).

Ms. Tapia testified that she then "played I was sleeping." (JA at 130). She felt someone grabbing her arm between her arm and her armpit and pulling her

towards her left (JA at 131). She testified that she felt something rubbing her breast (JA at 131). She testified that she reached over and grabbed the petitioner's hand and that he said "sorry, sorry" (JA at 132). She testified that she then stood up and started yelling at the petitioner (JA at 132). The flight attendants then came and took her back to the lavatory area and took the petitioner away (JA at 133). Once the plane landed, she met law enforcement officers at the gate and spoke with them (JA at 133).

Kaitlynn Cantrell testified that she was a passenger on Spirit Airlines flight NK 843 and that she was traveling as an unaccompanied minor (JA at 137-8). She was seated in a window seat with a "college-aged" female seated to her left and a slender man with dark hair, darker skin and dark eyes seat on the aisle (JA at 139-40).

Ms. Cantrell stated that she initially saw the man moving in his seat and the woman "shuffling over" (JA at 141). She testified that she saw his arm move toward her and he was trying to grab around her arm (JA at 141). The woman shifted in her seat and was "telling him to stop" (JA at 141). She further stated that it looked like he was trying to grab "toward her breasts" (JA at 141).

Ms. Cantrell testified that the woman was upset and crying after the incident (JA at 142). She testified over defense objection that the woman told her that the man was "trying to touch her breasts" (JA at 143).

Samantha Ojedo-Robbins testified that on March 21, 2019 she was living in the Bronx, New York and worked in the Bushwick area of Brooklyn, New York (JA

at 147-8). She told the jury how she took the subway into Manhattan that morning and then changed trains and took another train into Brooklyn (JA at 149).

Ms. Ojedo-Robbins stated that while she was on the "L" train to Brooklyn, it was a "very empty train" (JA at 149). She was seated in a "two-seater" and at some point, a person came and sat down next to her (JA at 150). Because there were so many empty seats she found it "odd or suspicious" that the person would sit next to her (JA at 151). Because of this, she took out her cell phone and placed it in her lap (JA at 151).

Ms. Ojedo-Robbins described the person who sat down next to her and said she "believe[d] its that gentleman over there that I saw" (JA at 152). She testified that as the man sat next to her, he began "inching his way closer to me" (JA at 153). She turned towards her left away from the man (JA at 153). She noticed his arm coming through between her right arm and her breast (JA at 153). She felt the man fondling her breast, with his hand coming up under her right arm (JA at 153).

Ms. Ojedo-Robbins testified that she immediately jumped up and got the attention of other people on the train (JA at 154). She began recording the man with her cell phone (JA at 154). She identified a short video that she took of the man and a still photograph that was taken from the video (JA at 154-158).

The man got off the train at the Morgan Avenue stop (JA at 157). When Ms. Ojedo-Robbins continued on the train to her destination (JA at 158). She went to her job and called 911 to report the incident (JA at 158). She also called her uncle who is a detective in Queens, New York (JA at 158). She told the police what

happened to her on the train and provided them with the cell phone video (JA at 159). She testified that she later went to the police station and identified a person that appeared to be the one in the video (JA at 160). She testified that the petitioner was charged with that offense (JA at 161).

FBI Special Agent Grant Lowe testified that he was tasked with investigating the incident that occurred on June 23, 2019 on Spirit Air flight NK843 (JA at 162). He told the jury that he interviewed the petitioner with regard to the incident and that the petitioner told him that "he had fallen asleep and that he was awoken by a female sitting next to him yelling at him" (JA at 163). SA Lowe further asked the petitioner about the incident on the train in New York (JA at 163). The petitioner also stated he had fallen asleep and that he was awakened by a woman yelling at him" (JA at 163).

The petitioner's Rule 29 Motion was denied by the Court (JA at 167).

The jury returned a verdict of guilty (JA at 204).

The parties appeared at a sentencing hearing on or about June 17, 2021 (JA at 209). The petitioner objected to the imposition of a term of Supervised Release in excess of the amount authorized for a violation of a Class C felony (JA at 214, 274-6). The petitioner objected to the imposition of a Special Assessment in excess of the amount authorized for a violation of Class C felony (JA at 215, 276-7). The Court imposed a variance sentence up to the statutory maximum of 24 months in the Bureau of Prisons, 10 years of Supervised Release and a Special Assessment of $5,000 (JA at 265-9).

The petitioner filed a written Notice of Appeal on June 22, 2021 (JA at 272-3). The Fourth Circuit affirmed the petitioner's conviction and sentence by unpublished opinion filed on March 15, 2022.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE TRIAL COURT VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHTS BY ENGAGING IN IMPERMISSIBLE JUDICIAL FACT-FINDING TO IMPOSE AGGRAVATED PENALTIES BEYOND WHAT WAS AUTHORIZED FOR THE OFFENSE OF CONVICTION

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed 2d. 435 (2000) this Court announced a watershed rule that the Sixth Amendment required that all facts except for the fact of prior conviction which are used to enhance a sentence beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Id*. at 490.

This Court has consistently reinforced the *Apprendi* rule. Notably, in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed 2d 314 (2013) the Court reversed an earlier decision and determined that the Sixth Amendment requirements also applied to facts which increased the statutory minimum penalty.

A. THE TRIAL COURT UTILIZED JUDICIAL FACT-FINDING TO IMPERMISSIBLY INCREASE THE TERM OF SUPERVISED RELEASE

The *Apprendi* rule has been extended to apply to punishments that are imposed beyond simple imprisonment. In *United States v. Haymond*,___ U.S. ___, 139 S. Ct. 2369, 204 L. Ed 2d 897 (2019), a plurality of the Court held that the mandatory minimum term of imprisonment that is set out in 18 U.S.C. § 3583(k) for

violations of supervised release violates the 5th and 6th amendment. The Court applied its *Apprendi* jurisprudence and determined that:

> "judicial factfinding triggered a new punishment in the form of a prison term of at least five years to life. So just like the facts the judge found at the defendant's sentencing hearing in *Alleyne,* the facts the judge found here increased 'the legally prescribed range of allowable sentences…" 139 S. Ct. 2378.

Importantly, the decision in *Haymond* reaffirmed the decision in *Johnson v. United States*, 529 U.S. 694, 120 S. Ct 1795, 146 L. Ed 2d 727 (2000). In *Johnson*, the Court concluded that a term of supervised release is a part of the original "final sentence" of the defendant. *Id*. at 706.

The Government and the trial court herein distinguish *Haymond* because it was applied at a supervised release hearing and because it applied to a mandatory prison sentence (JA at 208). However, despite these seeming distinctions, the trial court in *Haymond* and the trial court herein are engaging in the same prohibited actions: using judicial fact-finding to increase the minimum applicable penalty from that which was allowed by the facts found by the jury.

The trial court's responsibility for fashioning a sentence at the supervised release stage and at the original conviction are functionally equivalent. The range of applicable punishments are set by the applicable statutes and the trial court has discretion to sentence within that applicable range. As the *Johnson* case makes plain the "final sentence" includes both any initial term of imprisonment and any period of supervised release. *Id.* at 706.

Similarly, the Fourth Circuit acknowledged in *United States v. Ketter*, 908 F. 3d 61 (4th Cir. 2018) that terms of incarceration and supervised released are "components of one unified sentence." *Id.* at 65. Thus, the term of supervised release is part of the sentence.

In both *Haymond* and in this case, however, the trial courts utilized judicial fact-finding to increase the range of the applicable punishments. In *Haymond*, it was the term of imprisonment for the supervised release violation. In the instant case, it was the actual term of supervised release. As a practical matter, the procedural distinctions are distinctions without a difference. It is the practice of judicial fact-finding that is prohibited by the Sixth Amendment; it matters not whether it occurs at the initial sentencing hearing or at a later supervised release violation hearing.

The petitioner herein was convicted by a jury of a class E felony. 18 U.S.C. § 3583(b)(3) sets the term of supervised release to a period of no more than one year for a violation of a class E felony. Accordingly, the maximum supervised release penalty prescribed by the statute based upon the facts submitted to and found by the jury in this case is no more than one year.

Despite this limitation on the period of supervised release for Class E felony convictions, the trial court imposed a term of 10 years (JA at 253). The trial court determined that the provisions of 18 U.S.C. § 3583(k) applied because the offense was one of the type of offenses enumerated in that statute and that the new applicable term of supervised release based upon this judicial fact-finding was 5

years to life (JA at 288). In applying the statute to increase the term of supervised release, the trial court and not the jury determined that the offense is one of the type enumerated in §3583(k).

This factual determination does not fall into the narrow category of facts regarding prior convictions that are excepted from the *Apprendi* line of cases. This type of factual determination is precisely the type of fact that is required to be determined by a jury. Because there was no jury determination that the conviction herein was the type of case enumerated in § 3583(k), the trial court violated the Sixth Amendment by imposing a term of supervised release in excess of one year.

B. THE TRIAL COURT ENGAGED IN IMPERMISSIBLE JUDICIAL FACT-FINDING TO APPLY AN EHNANCED SPECIAL ASSESSMENT

The *Apprendi* rule has also been applied to facts which increased the minimum punishment, including facts necessary to support additional punishments such as fines.

This Court determined in *Southern Union Co v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed 2d 318 (2012), that the Sixth Amendment also applied to the imposition of a fine. *Id*. at 356. The Court then applied the *Apprendi* jurisprudence to the fine imposed and held that "juries must determine facts that set a fine's maximum amount." *Id*. at 356.

18 U.S.C. § 3013(a)(2)(A) sets the amount of the special assessment that may be generally imposed for felony convictions at one hundred dollars ($100). The trial court herein imposed a special assessment pursuant to 18 U.S.C. § 3014. However,

in order to impose this enhanced special assessment, it was necessary for additional facts to be determined.

The additional facts necessary to trigger the enhanced special assessment provision of § 3014 were required to be submitted to a jury and determined beyond a reasonable doubt. *Southern Union*, 567 U.S. at 356. In this case those facts were not submitted to the jury. The jury was simply asked to determine the general question of whether the Government had proven guilt beyond a reasonable doubt (JA at 204).

The trial court could only impose an enhanced special assessment if it engaged in judicial fact-finding. The trial court would be required to determine that the offense of conviction herein is one of the types of cases that is enumerated in § 3014. Of course, the rule is well established that the determination of "any fact other than prior conviction" may not be done by judicial fact-finding and must be done by the jury. *Apprendi,* 530 U.S. at 490. Because the consequence of the judicial fact-finding here was to increase the minimum amount of the special assessment, this was a violation of the defendant's Sixth Amendment rights.

II. THE PETITIONER'S STATUTORY RIGHT TO A SPEEDY TRIAL WAS VIOLATED

18 U.S.C. § 3161(c)(1) requires that a defendant be brought to trial "within seventy days from the filing date (and making public) of the …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."

The statutory scheme set forth in 18 U.S.C. § 3161 allows for time to be excluded from the 70-day Speedy Trial act period. Therefore, it is necessary to first determine when the "clock" began to run and which periods of time are excludable in order to determine whether the non-excludable time exceeded the 70-day threshold.

A. THE INITIAL ARRAIGNMENT WAS THE "TRIGGERING EVENT" FOR APPLICATION OF THE SPEEDY TRIAL ACT

When, as in this case, the indictment precedes arrest, "the first appearance before a judicial officer of the court in which the indictment has been filed is the triggering event." *United States v. Garcia*, 995 F 2d 556, 559 (5th Cir. 1993).

The petitioner herein first appeared in the Florence Division of the District of South Carolina on March 3, 2020. This is the "triggering event" for purposes of the Speedy Trial Act. The fact that the case was transferred to the Western District of North Carolina for trial on the same offense does not implicate the Speedy Trial clock. As noted in *United States v. Lattany*, 982 F. 2d 866 (3rd Cir. 1993), the Speedy Trial act is offense specific and only when a subsequent indictment charges a new offense does a "new, independent speedy trial period" begin. 982 F. 2d at 873 n.7.

The trial court's Order in this case noted that there is a paucity of authority on the question as to the effect of a transfer from one district to another on the Speedy Trial Act "clock" (JA at 56). The trial court determined that the Speedy Trial Act period began to run at the defendant's "first appearance" in the Western District of North Carolina (JA at 56).

While this interpretation of the applicable statutes embodies a certain attractive logic, it ignores the other provisions of the statute. The position adopted by the trial court is substantially undermined by the act's exclusion of time for the transfer of a defendant between districts. *See* 18 U.S.C. § 3161(h)(1)(F). If the trial court's position were correct, there would be no need to exclude the time for transfer, because the Speedy Trial Act clock would simply be tolled until the defendant made an appearance in the receiving jurisdiction. The trial court's interpretation herein runs afoul of this Court's admonishment that the federal courts should not interpret statutes in such a way as to render certain language superfluous. *TRW Inc v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 1441, 151 L. Ed 2d 339 (2001).

The trial court bolstered its position by noting some logistical problems that might be occasioned upon the receiving district. In particular, the trial court was concerned because the case was brought to trial at the next available trial term and without any continuances having been sought or granted in the Western District of North Carolina.

While the concerns raised by the trial court do appear to raise legitimate points, the trial court was not without recourse. The act provides the trial court with a solution: the court could have allowed the motion to dismiss without prejudice and allow the Government to refile the charges.

B. THE MARCH 26, 2020 CONTINUANCE ORDER DID NOT "RELATE BACK" TO THE ISSUANCE OF THE STANDING ORDER

The March 26, 2020 continuance order indicates that it is "per" the standing order issued by Chief Judge Hartwell on March 16, 2020 (JA at 38-9). Both the Government and the trial court herein characterize the continuance order as "incorporating by reference" the standing order (JA at 34,50). Both the Government and the trial court assume without citing to specific authority that the date of issuance of the standing order, and not the date of the issuance of the continuance order, tolls the Speedy Trial Act clock.

The language utilized in the continuance order, "per" does not specifically incorporate the standing order by reference. "Per" in this context can be understood as "according to" or "on account of" the standing order. While the use of "per" does reference the standing order, and specifically the factual justification for an "ends of justice" continuance, the continuance order itself does not specifically *incorporate* the standing order.

Moreover, the standing order itself lacks a specific reference to a continuance period, which is a feature that the federal courts have recognized as necessary. *See United States v. Jordan,* 915 F. 2d 563 (9th Cir. 1990). While the *Jordan* rule has not been universally adopted by all circuits, even in those circuits where open-ended continuances have been permitted, those continuance orders generally contained some type of triggering event which acts to restart the Speedy Trial Act period. *See United States v. Lattany*, 982 F.2d at 880. (due to extenuating circumstances, an

open-ended continuance was allowed until defense counsel notified the court she was ready for trial).

By contrast, the standing order herein contains neither a continuance for a specific period of time nor some triggering event which would restart the Speedy Trial Act clock. As such, the standing order by itself is insufficient to toll the Speedy Trial clock. The continuance order, however, does provide for a continuance for a specific period of time. It is only the continuance order, issued on March 26, 2020 which fully comports with the Speedy Trial Act and which tolls the Speedy Trial Act clock. The trial court's conclusion to the contrary is error.

C. THE TIME FROM THE ISSUANCE OF THE TRANSFER ORDER TO THE ISSUANCE OF THE TRANSPORTATION ORDER IS EXCLUDABLE

The transfer Order was entered on August 26, 2020 and the case was docketed in the Western District of North Carolina on that day. The docketing of the case in the Western District of North Carolina divested the District of South Carolina of jurisdiction and established jurisdiction in the Western District of North Carolina. *In Re Southwestern Mobile Homes, Inc.* 317 F. 2d 65 (5th Cir. 1963).

As consequence, any order issued by the District of South Carolina ceased legal effect and no order had yet been issued by the court in the Western District of North Carolina. As of August 27, 2020, there was no non-excludable event which tolled the Speedy Trial clock and it again began to run. The clock continued to run until the entry of the transportation order on September 2, 2020.

D. THE GOVERNMENT PRESENTED NO EVIDENCE TO REBUT THE PRESUMPTION THAT A DELAY OF MORE THAN TEN DAYS WAS UNREASONABLE

On September 2, 2020, the Hon. Carlton Metcalf issued a transportation order directing the petitioner to be transported to the Western District of North Carolina. Pursuant to 18 U.S.C. § 3161(h)(1)(F), the transportation order again tolled the Speedy Trial Act clock. The statute includes a presumption that 10 days for transportation of a defendant is a reasonable time and specifically states that any period in excess of ten-days is presumptively unreasonable and presumptively non-excludable. *United States v. Williams*, 917 F. 3d 195, 203 (3rd Cir. 2019).

In the instant case, the Government merely asserted some generalized and speculative concerns about the effect of the COVID-19 pandemic on the transport of prisoners. While it is possible that the pandemic may have necessitated additional time, without a specific factual showing both the Government and the trial court can do no more than speculate as to the reasons for the additional delay.

In the face of a presumption of unreasonableness, speculation on the part of the Government as to the reasons for the delay cannot act to rebut the presumption. Stated another way: "[s]peculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio R.R.*, 340 U.S. 573, 578, 71 S. Ct. 428, 95 L. Ed 547 (1951). While it is certainly possible that extenuating circumstances necessitated an additional delay, the trial court cannot simply relieve the Government of its burden of producing some evidence to overcome the presumption.

This Court has expressed the view that the time constraints related to transportation should be strictly construed against the Government. In *United States v. Tinklenberg*, 563 U.S. 647, 131 S. Ct. 2007, 179 L. Ed 2d 1080 (2011), the Supreme Court held that this 10-day period should include weekend days and holidays. *Id* at 661. Accordingly, the provisions of the transportation provision should be strictly construed against the Government.

E. THE FILING OF A MOTION *IN LIMINE* DID NOT TOLL THE SPEEDY TRIAL ACT CLOCK

The trial court also accepted the Government's position herein that the defendant's filing of a Motion *In Limine* regarding the admission of evidence under F.R.E. 413/404(b) on October 30, 2020 tolled the Speedy Trial Act clock. The trial court concluded that the Motion *In Limine* falls within the "any pre-trial motion" language contained in 18 U.S.C. § 3161(h)(1)(D).

The trial court's broad interpretation of this language was rejected by the Court in *Bloate v. United States*, 559 U.S. 196, 130 S. Ct. 1345, 176 L. Ed 2d 54 (2010). The defendant in *Bloate* filed a motion to extend the time for filing pre-trial motions. When he later filed a motion to dismiss on Speedy Trial act grounds, the trial court denied his motion by concluded that the time during which his motion to extend the time for filing pre-trial motions tolled the statute. *Id*. at 201.

This Court determined that the 28 days from the filing of the motion to the date when a hearing was held wherein the defendant waived the right to file pre-trial motions were not excludable. *Id*. at 215. The Court further concluded that not all delays related to pre-trial motions are automatically excluded. *Id*. at 205. The

automatically excluded delays only include delays that "result from" the filing of a motion. *Id.* at 205. In other words, it is not the filing of the motion that creates the automatic exclusion, but the resulting delay related to a "hearing" or "disposition" that is necessitated by the nature of the motion. *Id*. at 206.

In reality, the Motion *In Limine* herein was really in response to the Government's Notice Of Intent to Offer 413 evidence (JA at 4). The Motion *in Limine* was responsive to that request and noted for the trial court and the Government that during the trial, the court would be required to determine whether the Government could put on certain evidence. The motion did not specifically call for, nor did it necessarily warrant either a pre-trial hearing or a pre-trial determination. The defendant acknowledges that other circuits prior to *Bloate* have adopted a different rule. For example, in *United States v. Sposito*, 106 F. 3d 1042, 1044 (1st Cir. 1997), the court held that a Motion *in Limine* filed by the Government to prohibit the defendant from presenting an alibi defense did toll the Speedy Trial act clock.

But the framework set out by the *Bloate* Court provides for a different analysis. This analysis focuses on the delay related to resolution of the motion and does not rely upon the label of the motion. The fundamental principal underlying the *Bloate* decision is that time is excluded when the nature of the motion requires the trial court to expend time prior to the trial to either conduct a hearing or otherwise dispose of the motion.

A Motion *in Limine* addressing an evidentiary issue at trial that does not call for a pretrial "hearing" or "disposition" prior to the trial and must necessarily fall outside the purview of excluded time. Indeed, the defendant could simply have waited until the evidence was proffered at trial and objected at that point. As a matter of courtesy, the defendant herein filed the motion in advance of trial in the interest of providing both the Court and prosecution with adequate time to fully prepare to address the issue during the trial.

Accordingly, the filing of the Motion *in Limine* on October 30, 2020 did not toll the Speedy Trial act clock.

CONCLUSION

The Court should grant the petition herein and reverse the petitioner's conviction and sentence consistent with the arguments presented.

Respectfully submitted this the 3rd day of June, 2022.

SIVA K. DURBESULA by counsel
Andrew B. Banzhoff
Counsel of Record
DEVEREUX & BANZHOFF, PLLC
22 South Pack Square, Suite 1100
Asheville, North Carolina 28801
(828) 285-9455

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4323

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SIVA K. DURBESULA,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:20-cr-00090-MR-WCM-1)

Submitted: January 31, 2022 Decided: March 15, 2022

Before WILKINSON, HARRIS, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Andrew B. Banzhoff, DEVEREUX BANZHOFF, PLLC, Asheville, North Carolina, for Appellant. William T. Stetzer, Acting United States Attorney, Don Gast, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Siva Durbesula appeals his jury conviction and 24-month sentence for abusive sexual contact without permission, in violation of 18 U.S.C. § 2244(b); 49 U.S.C. § 46506(1). On appeal, Durbesula argues that: (1) the district court violated his speedy trial right under the Speedy Trial Act ("STA"), 18 U.S.C. § 3161; (2) the court imposed a substantively unreasonable sentence; and (3) the court engaged in impermissible judicial fact-finding to enhance both his term of supervised release and his special assessment. For the following reasons, we affirm.

We review de novo a district court's interpretation of the STA and review the district court's related factual findings for clear error. *United States v. Bush*, 404 F.3d 263, 272 (4th Cir. 2005). The STA requires that a defendant's trial begin within 70 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). The STA provides for the exclusion of certain delays when computing the time within which a defendant's trial must commence. *Id.* § 3161(h).

Among other exceptions inapplicable here, the STA excludes delays 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," *id.* § 3161(h)(1)(D); "any proceeding relating to the transfer of a case," *id.* § 3161(h)(1)(E); and the "transportation of any defendant from another district," *id.* § 3161(h)(1)(F). Additionally, the STA excludes delays resulting from the granting of a continuance "if the judge granted [a] 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." *Id.* § 3161(h)(7)(A). If a defendant's trial does not begin within 70 days as required by § 3161(c)(1), taking into consideration all excludable delays, the district court must dismiss the indictment upon the defendant's motion. *Id.* § 3162(a)(2); *United States v. Henry*, 538 F.3d 300, 304 (4th Cir. 2008). Having reviewed the record, even if we assume that the speedy trial clock began to run when Durbesula first appeared in the District of South Carolina – not when he later appeared in the Western District of North Carolina, after a transfer of venue – we discern no error in the district court's finding that there was no violation of the STA.

We "review[] all sentences – whether inside, just outside, or significantly outside the [Sentencing] Guidelines range – under a deferential abuse-of-discretion standard." *United States v. Torres-Reyes*, 952 F.3d 147, 151 (4th Cir. 2020) (cleaned up).

> First, we "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range."

United States v. Fowler, 948 F.3d 663, 668 (4th Cir. 2020) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

"If the sentence 'is procedurally sound, [we] then consider the substantive reasonableness of the sentence.'" *United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019) (quoting *Gall*, 552 U.S. at 51). "When considering the substantive reasonableness of a prison term, we examine[] the totality of the circumstances to see whether the

sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)." *United States v. Arbaugh*, 951 F.3d 167, 176 (4th Cir. 2020) (internal quotation marks omitted). Therefore, a sentence must be "sufficient, but not greater than necessary," to satisfy the goals of sentencing. 18 U.S.C. § 3553(a). "Where, as here, the sentence is outside the advisory Guidelines range, we must consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *United States v. Nance*, 957 F.3d 204, 215 (4th Cir. 2020) (internal quotation marks omitted). "That said, district courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors, and the fact that a variance sentence deviates, even significantly, from the Guidelines range does not alone render it presumptively unreasonable." *Id.* (internal quotation marks omitted). "Instead, we must 'give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

Having reviewed the record, we conclude that Durbesula's sentence is both procedurally and substantively reasonable. The district court properly calculated Durbesula's Guidelines range, afforded the parties an opportunity to argue for an appropriate sentence, and provided a detailed explanation of the chosen sentence in terms of the § 3553(a) factors and the parties' arguments. As the district court explained, Durbesula's Guidelines range did not adequately represent the seriousness of his conduct or criminal history or the likelihood that he would commit other crimes. Based on its consideration of the § 3553(a) factors and arguments of the parties, the court reasonably

found that a sentence of 24 months was sufficient but not greater than necessary to accomplish the goals of sentencing.

Additionally, we conclude that the district court did not engage in impermissible judicial fact-finding in imposing Durbesula's term of supervised release and special assessment, as the court correctly applied the sentencing provisions found in 18 U.S.C. § 3583(k) and 18 U.S.C. §§ 3013(a)(2)(A), 3014(a)(2) that are applicable to Durbesula's offense of conviction. We therefore affirm the district court's judgment.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: March 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4323
(1:20-cr-00090-MR-WCM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SIVA K. DURBESULA

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Defendant: Siva K Durbesula
Case Number: DNCW120CR000090-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWENTY-FOUR (24) MONTHS**. THE TERM OF IMPRISONMENT IMPOSED BY THIS JUDGMENT SHALL BE CONSECUTIVE TO ANY UNDISCHARGED TERM OF IMPRISONMENT IMPOSED BY ANY STATE OR FEDERAL COURT, WHETHER PREVIOUSLY OR HEREAFTER IMPOSED.

■ The Court makes the following recommendations to the Bureau of Prisons:

1. In accordance with established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. § 1101 et seq, the defendant, upon release from imprisonment, is to be surrendered to a duly-authorized immigration official for deportation.
2. Participation in sex offender treatment programs, if eligible.
3. Participation in the Federal Inmate Financial Responsibility Program.

■ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

- ☐ As notified by the United States Marshal.
- ☐ At _ on _.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ As notified by the United States Marshal.
- ☐ Before 2 p.m. on _.
- ☐ As notified by the Probation Office.

FILED
CHARLOTTE, NC

SEP 17 2021

US DISTRICT COURT
WESTERN DISTRICT OF NC

RETURN

I have executed this Judgment as follows:

Defendant delivered on 8-02-21 to Cole Civil at Mc Leo, with a certified copy of this Judgment.

Sgt. J. Vm

United States Marshal

By: _____
Deputy Marshal

AO 245B (WDNC Rev. 01/2020) Judgment in a Criminal Case

PLEASE EXECUTE AND RETURN TO USMS IN ENVELOPE ATTACHED.

UNITED STATES DISTRICT COURT

Western District of North Carolina

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
V.	
SIVA K DURBESULA	Case Number: DNCW120CR000090-001
	USM Number: 73328 050
	Andrew Brady Banzhoff, Defendant's Attorney

THE DEFENDANT:

- ☐ Pleaded guilty to count(s).
- ☐ Pleaded nolo contendere to count(s) which was accepted by the court.
- ■ Was found guilty on count 1ss after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18 U.S.C. § 2244(b) and 49 U.S.C. § 46506(a)	Abusive Sexual Contact without Permission	6/23/2019	1ss

The Defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

- ☐ The defendant has been found not guilty on count(s).
- ☐ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 6/17/2021

Martin Reidinger
Chief United States District Judge

Date: June 21, 2021

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT W. DIST. OF N.C. 2021 SEP 15 PM 4:04