22-5316 ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Antwan Criswell — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antwan Criswell, Reg. #76758-061
(Your Name)

FCI Greenville, P.O. Box 5000
(Address)

Greenville, Illinois 62246
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) Since the presumption of prejudice exists in a Speedy Trial Violation under 18 U.S.C. §3262, and the Sanction is Dismissal with Prejudice for said violation, and in light of the existing violation filed, that the Court delayed relief of for over thirteen months, then claimed no prejudice does not suffice, under 18 U.S.C. §3161(h)(7)(C), 'due to court congestion.'

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 21-cv-4236; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at 1:21-cv-00135-MRB; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES CITED

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STATUTES AND RULES

OTHER

STATEMENT OF THE CASE

Petitioner filed, once the Court had exceeded 100 days of no action, for a Speedy Trial Violation. The Court ignored the Motion for an additional 13 months, while the Government claims it attempted to obtain a plea agreement from Petitioner, whom had refused negotiations of what should have been dismissed within thirty days of his filing. Court then erred in its determination, which never considered its own additional delay in relief as grounds for prejudice, when plenty of case laws support dismissal with prejudice after eight months of delay, and clearly in the case of a one-year delay. Court then ignored attempts to reconsider this error, placing the matter under a new Indictment and case number, reindicting Petitioner. It then delayed more, until it forced Petitioner to accept a plea bargain. The Court erred in its determination that its own delay had no impact on the argument of dismissal with prejudice or without prejudice, since its own delay was three times the amount at the time of violation Motion filing. The Government cannot cover its wrong by the claim of 'active pursuit of a plea bargain' to an offense overdue dismissal.

Petitioner should have received his dismissal with prejudice based upon the Government delay in Prosecution, which includes the Court's additional 13 month delay in resolution of the Motion. 18 U.S.C. §3161 does not permit the delay of over a year in the response to a Motion they spent no time considering during the 13 months they ignored the detention of this Petitioner pending his 'Speedy Trial'.

REASONS FOR GRANTING THE PETITION

Petitioner should have received Dismissal with Prejudice for his original case, rather than without prejudice, as did **Moss**, 21 F.3d 426 (6th Cir. 2000), where **Moss** was a similar case, involving a single defendant and drugs, was not complex, and **Moss** was first, on bail, then kept for ten months delay, attributed to the Government, and given, after Appeal, Dismissal with Prejudice. **Moss** received a dismissal on the first case, without prejudice, as did our Petitioner herein, and was reindicted, as was our Petitioner. However, where we vary from **Moss** is on two key points, both of which should have been borne against the Government, and were ignored. Our Petitioner was never out on bail, but incarcerated the entire time. Our Petitioner was delayed thirteen months, not ten, and had an additional four months prior to the thirteen where he was dealyed prior to his filing the Speedy Trial Act violation Motion, thus our Petitioner spent a total of nearly seventeen months on delay to **Moss'** ten months. Therefor, our Petitioner was even more entitled to relief than **Moss** obtained, and was denied, merely for reason that the Court never considered its own thirteen month delay in resolution of the Speedy Trial violation Motion as against the Government. It had ignored that entire delay that it caused itself to prejudice this petitioner. For, if no other reason that equity, this Petitioner deserves the equal treatment that **Moss** received.

BRIEF IN SUPPORT

1) Did the Court commit error in not following local precedent and Supreme Court holdings, when making the finding of no prejudice to retrial in Petitioner's Speedy Trial violation ?

PETITIONER AVERS THIS IS TRUE.

In Petitioner's case, the Motion for Speedy Trial was made, then the Court delayed the hearing on the matter for an additional 13 months. Even though the matter, which, under 18 U.S.C. §3162 has one relief, with two options, the end result is that the matter will be dismissed. The decision left is to render that dismissal with or without prejudice to Retrial. The Government, at the hearing, more than a year late, claimed that it had actively been pursuing a plea deal with the Petitioner, whom remained unresponsive to any such offers. The Government ignored, and the Court allowed, these 'negotiations' about a matter due to be dismissed, thus Government had no right to even propose any plea agreements on the issue. The Court, in its delay, caused the finding of prejudice it should have rendered in that case. Instead, it permitted a reindictment, when it did not release the Petitioner upon its dismissal without prejudice, then it ignored any and all motions to correct the first matter, proceeding with the second new case as if nothing wrong had occurred on the part of the Government, which also included the Court's own actions.

Johnson, 19-1610 (S.Ct. 2021); "When a district court grants an ends-of-justice continuance, "it must 'se[t] forth, in the record of the case, either orally or in writing, its reasons' for finding that the ends of justice are served and they outweigh other interests." ID at 506. (aliteration in original)(quoting 18 U.S.C. §3161(h)(7)(A)). The court must make the findings, "if only in the judge's mind, before granting the continuance." Id. However, the district court need only put those findings 'on the record by the time a district court rules on a defendant's motion to dismiss under §3162(a)(2)." Id at 507; see also: United States v. Adejumo, 772 F.3d 513, 522 (8th Cir. 2014)("[W]e have previously held that the district court is not required to make a contemporaneous record of its ends-of-justice findings.)."

In Petitioner's case, §3161(h)(1)(h); "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding is actually under advisement by the court." See: Taylor, 487 US 326, 353, note 4 (S.Ct. 1988); Felix, 850 Fed Appx. 374, 381 (6th Cir. 2021); Tinklenberg, 563 US 647, 657 (S.Ct. 2011), should have applied as a maximum date for the district court to have heard on the Speedy Trial Violation Motion. Under 18 U.S.C. §3161(h)(1)(d); "delay resulting from any pretrail motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Prompt, is defined as a time period, somewhere between 7 and 14 days in other filing matters, and should be applied herein. The Speedy Trial

calculation, in our simple matter with no co-defendants to consider, thus not complex, should have been completed within 14 days maximum, but the statute allows for, **if it remained under consideration daily...which it did not**, 30 days to complete the hearing.

The court allowed continued delays in actually 'considering or hearing on,' for an additional 13 months. The court record was attempting to have the Government aid it in the required, 'findings that the ends of justice are served and they outweigh other interests.' by applying an excuse from 18 U.S.C. §3161(h)(1)(g). "Delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government." The problem is that this speaks of an agreement that has been completed and is before the court for its consideration, and not a proposed 'work in progress' that the Government claimed it was working on such a plea agreement during the period **after the filing of the Speedy Trial violation.** Before the filing to dismiss the case, the Government had never entertained, had never approached the Petitioner, and had no intentions on or before the date of the filing to think of offering any plea negotiation. They only claimed to do so to cover the thirteen month non-actions by the court after the filing date. Even then the Government had no plea negotiations 'ongoing' with this Petitioner, whom was waiting for his dismissal by law that was pending for no reasons of delay during that 13 months. Therefore, the district court never justified the delay, before or after the Motion to dismiss was placed before them, as to any 'ends-of-justice' requirement for the delay. Prejudice is therefore plain in this matter of the Petitioner.

Continuing in **Johnson**; "the Act sets forth factors the court must consider in deciding whether to grant an ends-of-justice continuance. See 18 U.S.C. §3161(h)(7)(B). But "No continuance [under 18 U.S.C. §3161(h)(7)(A)] shall be granted because of **general congestion of the court's calendar**, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." ID. §3161(h)(7)(C)(emphasis added). "The prohibition recognizes that the entire structure of the Speedy Trial Act is intended to eliminate delays caused by crowded dockets." **United States v. Nance**, 666 F.2d 353, 356 (9th Cir. 1982). An "'end-of-justice' continuance cannot be granted simply to serve the court's own scheduling needs, as opposed to the needs of the parties." **United States v. Gallardo**, 773 F.2d 1496, 1503 (9th Cir. 1985)."

Since it is illegal to consider the Government's excuse of 'pursuit of a plea bargain,' as grounds to justify the Court's negligence in a 13 month delay in the hearing on a Speedy Trial Act violation, which according to the 18 U.S.C. §3161 rules should have been determined 'not in excess of thirty days' to consider that Motion, the only possible reason for delay is on the part of the Court, since the Government never declared on Court record that is was actively seeking a plea bargain, as it was

not seeking one prior to the filing of the violation. In addition, the Government has no right to actively pursue a plea bargain in a dismissal matter that, by statute, was due to be resolved within 30 days of filing. Therefore, the delay is entirely on the part of the Court itself, and it cannot justify that delay by 'congestion of the court calendar.' There was no ends-of-justice determination on the record for the cause of the 13 month delay in the violation hearing. This is automatically then regarded as prejudicial to the Petitioner, and the fault of the Government, which includes the court.

United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003)("[A] delay approaching a year may meet the threshold for presumptively prejudicial delay requiring application of the **Barker** factors.") In Petitioner's matter the court caused an additional delay, that in and of itself was enough to cause prejudice determination, **and this does not take into consideration the delay the Speedy Trial already exceeded PRIOR to the Court's additional 13 month delay**. In **Zedner v. United States**, 547 US 489, 498-99 (S.Ct. 2006), this court resolved the issue by the simple fact that when a continuance exceeded 90 days, the court could not condone that, as there were only 70 days in which to consider delay(s). So, using this decision, the minute the district court exceeded 90 days following the violation Motion filing, the court should have, and the Appeal Court failed to correct this point, dismissed with prejudice Petitioner's case #17-cr-00054.

United States v. Ramirez, 788 F.3d 732 (page 2015 U.S. App. LEXIS 7)(7th Cir. 2015); "relevant to this case, §3161(h)(7) of the STA 'permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes **on the record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's intereststs in a speedy trial**." (quoting **Zedner**). "if the district court fails to make the requisite finding regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, as if as a result the trial does not begin on time, the indictment or information must bedismissed." There is no justification for a 13 month delay in the hearing of an already-violated Speedy Trial Motion. "Closely related to the length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. **A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government**." However, the Government attempted to resolve the court's delay error by claiming ongoing plea negotiations, but those negotiations were illegal, thus ignored by the Petitioner. There were no 'active plea negotiations' on a case due to have been dismissed a year prior to the Government's claim. The entire weight therefore, is upon the Government for the additional delay in resolution of this matter, and Government only sought to save its own error by hope of a plea bargain it had no right to.

Doggett, 505 US 647, 652, note 1 (1992); (delay approaching one year is presumptively prejudicial).

US v. White, 443 F.3d 582 (7th Cir. 2006); "The length of time from accusation to trial is a triggering mechanism: without a delay that is presumptively prejudicial, we need not examine the other factors. **Barker v. Wingo**,407 US514, 530 (S.Ct. 1972). The constitutional right attches only after Indictment, or some other form of official accusation. **US v. Souffront**, 338 F.3d 809, 835 (7th Cir. 2003(citing **Doggett**, 505 US @662). As a general matter, courts have found delays approaching one year to be presumptively prejudicial. **US v. Ward**, 211 F.3d 356, 361 (7th Cir. 2000)(citing **Doggett**, 505 US @651). The length of delay necessary to trigger a more thorough analysis, however, 'is necessarily dependent upon the peculiar circumstances of the case.' **Barker**, 407 US 2530-31. In this case, officers arrested White on April 14th, 2004, and the trial commenced on January 18, 2005. The length of delay, approximately nine months, is within the range that we have found long enough to warrant a more searching analysis. See: e.g., **US ex rel Fitzgerald v. Jordan**, 747 F.2d 1120, 1127 (7th Cir. 1984)(finding that a pretrial delayof approximately eight months was presumptively prejudicial); cf. **Hogan v. McBride**, 74 F.3d 144, 145 (7thCir. 1996)(finding that a pretrial delay of approximately eight months in a robbery case did not constitute presumptive prejudice). Deciding that a delay ispresumptively prejudicial requires us next to 'consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.' **Doggett**, 505 US @652. Because the delay in this case is barely long enough to constiute presumptive prejudice, its length beyond that point was not excessive."

In Petitioner's case, the delay was four months upon the filing of the Speedy Trial Motion, being over 100 days delay, then the court delayed the ruling on that Motion for and **additional 13 months.** Since the delay was due in no part to the defendant, all such delay is against the Government, whose claim of 'ongoing plea negotiations,' is nonsense, since a dismissal was due under §3162, with or without prejudice, but due Petitioner here, so that there was no legal matter to plea to for that 13 months. had Court obeyed §3161, the Motion should have been completed for hearing within 30 days, thus the dismissal would have been final for a year, while Government tried to obtain its illegal plea deal. All delay, whether Court to allow this behavior, or due directly to the Government, weighs entirely against the Government.

US v. O'Connor, 656 F.3d 630 (7th Cir. 2011); "[W]hether the delay before trial was uncommonly long, whether the Government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserts his right to a Speedy Trial, and whether he suffered prejudice as the delay's result. "**Doggett**, 505 US 647,

651 (1992)."

US v. Bass, 460 F.3d 830, 836 (6th Cir. 2006); "The second **Barker** factor -- the reasons for the delay -- favors a finding that there was no constitutional violation. the purpsoe of the inquiry is to determine 'whether the government or the criminal defendant is more to blame for [the] delay.' **Stegall**, 427 F.3d @1026 (citing **Doggett**, 505 US 647, 651 (S.Ct. 1992)).

Some reasons weigh more heavily than others. For instance, governemnt delays motivated by bad faith, harrassment, or attempts to seek a tactical advantage weigh heavily against the government, while 'more neutral' reasons such as negligence or overcrowded dockets weigh against the government less heavily. **Stegall**, 427 F.3d @1026. Delays due to the complexity of the case and the number of defendants support a finding that no Sixth Amendment violation occurred. See: **US v. Casas**, 425 F.3d 23, 33 (1st Cir. 2005)."

In Petitioner's case, The Government claimed, 13 months after the Speedy Trial violation Motion itself, which was field after 100 plus days of delay, that it was "negotiating a plea bargain," with Petitioner. However, this is false, since the petitioner had no intention of 'negotiating' a plea for a dismissed case, overdue by 13 months for relief. Negotiations infer the listening and trading of points in an agreed manner towsrds resolution. Thus the Government, in bad faith, because they had no right to atetmpt to obtain a plea bargain from a dismissed matter, did seek a tactical advantage, the Petitioner objecting to his delay in jail this entire time, by further delaying the relief already due this Petitioner -- his dismissal under 18 U.S.C. §3162. Therefore, district erred in not holding that the delay was both in bad faith and an attempt to obtain the tactical advantage of a plea to that dismissed case. Court simply ignored the additional delay, then did not release the Petitioner upon dismissal, but held him until the Government could reindict this Petitioner. By the time his Attorney had filed the complaint against the Court's lack of prejudice holding, the Government had reindicted Petitioner, thereby ignoring the error of the first case, #17-cr-0054. The Motion of complaint was answered as if it was being applied to the second case, and denied. The additional delay of the new indictment then eventually caused this Petitioner, waiting some twenty-nine months of total delay.

Under **Doggett**, 505 US 647, 651-52 (S.Ct. 1992); "This later enquiry is significant to the speedy trial analysis because...the presumption that pretrial delay has rpejudiced the accused intensifies over time." In Petitioner's case, there was already a violation, then an additional thirteen month delay, which the court treated as non-existing, answering that original 4 month delay in its response, and holding it non-prejudicial. They ignored the additional 13 months, which should have

added to the presumption of prejudice against this Petitioner. Under **US v. White**, 920 F.3d 1109, 1110 (6th Cir. 2019); This applies:

> "Following our circuit's precedent, we previously held in this case that preindictment plea negotiations are 'period[s] of delay resulting from other proceedings concerning the defendant' that are automatically excludable under 10 U.S.C. §3161(h)(1) of the Speedy Trial Act. **US v. White**, 679 Fed. Appx. 426, 431 (6th Cir. 2017)(citing **US v. Dunbar**, 357, F.3d 582, 593 (6th Cir. 2004), vacated and remanded on other grounds, 543 US 1099 (S.Ct. 2005); **US v. Bowers**, 834 F.2d 607, 609-10 (6th Cir. 1987) (per curium)). Defendant challenged this precedent for the first time in his petition for a writ of certiorari as inconsistent with the Supreme Court's intervening decision in **Bloate v. US**, 559 US 196 (S.Ct. 2010). Petitioner for Writ of Certiorari at 22-23. **White v. US**, 138 S.Ct. 641 (2018)(No. 17-270). The government then changed horses midstream, conceding-also for the first time before the Suprem Court-that our circuit precedent was incorrect and inconsistent with **Bloate**, and that the roughly two-week continuance to engage in preindictment plea negotiations here did not qualify for automatic exclusion under §3161(h)(1)."

Petitioner argues that the thirteen-month delay, in which government attempts to exclude for reasons of bad faith and tactical advantage, seeking a plea to a charge overdue dismissal, and delaying four times the already-violated Speedy Trial Act time limitation to obtain thta plea, to which it held no right to even pursue. This entire time, ignored by district, must be held against the government, in bad faith, and must then result in a finding of prejudice for the Petitioner on that dismissal of his 17-cr-0054 case, which would have prevented the reindictment for case 19-cr-0015. In **Zedner**, it was pointed out that this is also a public interest in a Speedy Trial, not merely the defendant's. And, like in **Zedner**, the minute that delay exceeded 70 days, which is the sum total of the allowable delay to bring a defendant to trial, Petitioner's case should, as **Zedner** did, be held as **dismissed with prejudice**.

Stayton, 791 F.2d 17 (2nd Cir. 1986);

B. *Dismissal With or Without Prejudice*{**1986 U.S. App. LEXIS 13**} .

Having concluded that Stayton was not brought to trial within the time limits of section 3161(c)(1), we next must determine "whether to dismiss the case with or without prejudice". 18 U.S.C. § 3162(a)(2). Because the district court denied Stayton's motion to dismiss, it naturally did not address whether a dismissal should be with or without prejudice. Nevertheless, we need not remand this question to the district court since "a remand for a hearing should not be routinely ordered in a case where the issue of whether dismissal should be with or without prejudice arises for the first time on appeal, the trial court having denied the motion to dismiss." *Tunnessen*, 763 F.2d at 79. Our conclusion is that the dismissal should be with prejudice to the reprosecution of Stayton.

We have previously rejected the notion that the act contains a presumption in favor of dismissal with prejudice, holding that the decision lies within the discretion of the court, *see United States v. Caparella*, 716 F.2d 976, 979-80 (2d Cir. 1983), guided by four factors: (1) the seriousness of the offense; (2) the facts and circumstances which led to{**1986 U.S. App. LEXIS 14**} the dismissal; (3) the impact of a reprosecution on the administration of the Speedy Trial Act; and (4) the impact of a reprosecution on the administration of justice, 18 U.S.C. § 3162(a)(2).

As to the first factor, the crime here -- trafficking in 200 kilograms of a controlled substance -- is a serious one, *see United States v. Simmons*, 786 F.2d 479, 485 (2d Cir. 1986); to be weighed against it is the seriousness of the delay, *see United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984), because, "where the crime charged is serious, the sanction of dismissal with prejudice should ordinarily be imposed only for serious delay", *Simmons*, 786 F.2d at 485.

The dominating consideration here on the seriousness of the delay is the sheer length of the period involved. As noted earlier, there is no suggestion that any significant portion of the twenty-three months under consideration would be excludable under the act. Unlike many recent cases, the district court was not barraged with pretrial motions by multiple defendants; rather, only a limited number of such motions were made. Moreover, the court ignored**{1986 U.S. App. LEXIS 15}** the persistent prodding of the government to decide the outstanding motions and proceed to trial.

Stayton alleges that he was prejudiced over the twenty-three months following voir dire by the loss of a critical witness, an unindicted coconspirator -- an allegation the government strongly disputes. Stayton also claims that six of the jurors had to be replaced because of the long delay, and this, he argues, upset the composition of the jury he originally had selected.

Although prejudice to the defendant is a proper consideration in deciding whether to **{791 F.2d 22}** dismiss with or without prejudice, *see Simmons*, 786 F.2d at 486; *Caparella*, 716 F.2d at 980, we need not decide whether, and if so, how seriously, these changes prejudiced Stayton. In the context of this case, the enormity of the delay is sufficient alone to tip this second factor in favor of dismissal of the indictment with prejudice.

The third and fourth factors blend together in these circumstances, since neither the Speedy Trial Act nor the administration of justice in general would be advanced by excusing the type of administrative neglect that occurred here. As we noted in *Caparella***{1986 U.S. App. LEXIS 16}** , "as a deterrent to other would-be offenders, [the dismissal of this prosecution] seems relatively insignificant. Of greater significance to the administration of justice is the salutary effect of this Court's reaffirmance of Congress' basic purpose in enacting the Speedy Trial Act." 716 F.2d at 981.

CONCLUSION

The judgment appealed from is reversed, the conviction vacated, and the case remanded to the district court with instructions to dismiss the indictment with prejudice for failure to commence the trial within the period required by the Speedy Trial Act.

In Petitioner's case, the delay amounted to about sixteen-seventeen months total, since the Origianl Motion, filed after the fourth month of delay, was then delayed resolution by the Court for an additional thirteen months. These case are therefore compatable in nature and relief granted should be identical.

US v. Moss, 217 F.3d 426, 429 (6th Cir. 2000);

One year later, on January 29, 1997, **Moss** brought a motion to dismiss the indictment**{2000 U.S. App. LEXIS 6}** with prejudice for violation of the **Speedy** Trial Act. On February 25, 1997, **Moss** filed a motion to set a hearing date on the motion to dismiss. The Government filed a response to the motion on March 4, 1997, conceding that the **Speedy** Trial Act had been violated as more than 70 non-excludable days had accumulated, but the Government insisted that the dismissal should be without prejudice. On April 2, 1997, the district court agreed with the Government and dismissed the indictment without prejudice.

On April 30, 1997, **Moss** was reindicted on the same single count of possession with intent to distribute 79.5 grams of cocaine in violation of 18 U.S.C. § 841(a)(1). **Moss** made an initial appearance, counsel was appointed, and **Moss** was released on bond on June 2, 1997. On July 28, 1997, **Moss** filed a motion to dismiss the second indictment with prejudice for violation of the **Speedy** Trial Act, a motion to dismiss the second indictment for violation of the Sixth Amendment right to a **speedy** trial, and a motion to suppress evidence for lack of probable cause and violation of the "knock and announce" rule. The motions were referred to a magistrate judge who issued**{2000 U.S. App. LEXIS 7}** a report and recommendation denying all three motions. The district court, after overruling **Moss**' objections, adopted the recommendation of the magistrate judge.

The case was tried to a jury that found **Moss** guilty. At sentencing, the district judge imposed a two level enhancement to {217 F.3d 430} **Moss**' base level offense for obstruction of justice because the court believed that **Moss** presented evidence at trial which contradicted evidence he presented pretrial. **Moss** was sentenced to 262 months imprisonment and 5 years supervised release. The judgment was entered on July 20, 1998, and **Moss** filed this timely appeal.

On appeal, **Moss** challenges the district court's determination that although the **Speedy** Trial Act had been violated, the dismissal of the first indictment should be without prejudice. 1 Likewise, **Moss** claims that the district court should have dismissed his second indictment with prejudice for violating the **Speedy** Trial Act and the **Speedy** Trial Clause of the Sixth Amendment. **Moss** also appeals the district court's denial of his motion to suppress, claiming that the affidavit provided in support of the search warrant did not establish probable cause, and the two level sentence{2000 U.S. App. LEXIS 8} enhancement imposed for obstruction of justice. Because we conclude that the district court should have dismissed the original indictment with prejudice, we do not determine the remaining issues on appeal.

Petitioner is arguing the same facts as occurred in the **Moss** case, with one additional problem, where **Moss** was delayed ten months by a Motion to Suppress determination, which court did not take into consideration in his Speedy Trial Motion time calculation, Petitioner's case is a thirteen month delay caused by the Court in the Speddy Trial Act violation determination itself, causing Petitioner further time suffered and more prejudice. **Moss** was granted prejudice on less issues that Petitioner.

Continuing in Moss:

{2000 U.S. App. LEXIS 9}II. ANALYSIS

Moss argues that the district court abused its discretion by determining that the dismissal of his original indictment should be without prejudice because the court did not carefully consider all of the factors set forth in **Speedy** Trial Act, 18 U.S.C. § 3162(a)(2). **Moss** claims that the dismissal should have been with prejudice because the **Speedy** Trial Act violation was caused by the district court's own neglect, the delay was lengthy, and the defendant suffered because of his two years of incarceration.

The **Speedy** Trial Act enumerates three factors that trial courts must consider when deciding whether to dismiss an action with or without prejudice: 1) the seriousness of the offense; 2) the facts and circumstances that led to the dismissal; and 3) the impact of reprosecution on the administration of the **Speedy** Trial Act and on the administration of justice. 18 U.S.C. § 3162(a). In **United States v. Pierce**, 17 F.3d 146 (6th Cir. 1994), this circuit opined, "Because Congress has set forth specific factors to be considered, a district court that does not set forth written findings with regard{2000 U.S. App. LEXIS 10} to these factors has abused its discretion and will be reversed." 17 F.3d at 148 (**citing United States v. Taylor**, 487 U.S. 326, 336, 101 L. Ed. 2d 297, 108 S. Ct. 2413 (1989)). If those findings are set forth, however, the appellate court applies a "modified abuse of discretion standard." **United States v. Kottmyer**, 961 F.2d 569, 572 (6th Cir. 1992). Under this modified standard, the district court's factual findings will be reversed only if the findings {217 F.3d 431} are clearly erroneous. **Taylor**, 487 U.S. at 336. Because the judgment is only arrived at by considering and applying statutory criteria, which constitutes applying the law to the facts, the reviewing court is required to undertake a more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute. **Id.** at 337. Nevertheless, if the reviewing court finds that the district court properly considered the statutory factors, the district court's "judgment of how opposing considerations balance should not lightly be disturbed." **Id.**

In deciding to dismiss the original indictment without prejudice, {2000 U.S. App. LEXIS 11} the district court in this case set forth a written order. The order provided that the charges against **Moss**, possession of 79.5 grams of cocaine base with intent to distribute, was "rightfully characterized as a serious offense." **Moss** does not dispute that cocaine possession is a serious offense. This circuit has categorically labeled drug offenses as serious. **See Kottmyer**, 961 F.2d at 572. Accordingly, the district court's consideration of the first statutory factor favors a dismissal without prejudice.

With respect to the facts and circumstances that led to the dismissal of the original indictment, the district court implied that **Moss** alone caused the delay. Instead of recognizing its own role in not issuing a ruling on **Moss**' motion to suppress-which had been taken under advisement for approximately 10 months-the court simply quoted from the unpublished opinion, **United States v. Pierce**, 17 F.3d 146, 1992 WL 71367, *3 (W.D. Mich.) **aff'd** (6th Cir. 1994): "Defendants who passively wait for the **speedy** trial clock to run have [a lesser right] to dismissal with prejudice than do defendants who unsuccessfully demand prompt{2000 U.S. App. LEXIS 12} attention." Unlike the district court in **Pierce** which weighed its role in causing delay against the role of the defendant in causing delay, the district court in this case failed to acknowledge that the reason for ten months of the delay was that the motion to suppress was under advisement. Nor did the Court acknowledge that under the **Speedy** Trial Act, 18 U.S.C. § 3161(h)(1)(J), only thirty days are excludable from the **speedy** trial clock for a motion taken under advisement. Evidently, the court was aware that the motion was still under advisement, as the trial was adjourned a number of times for that reason. The court also failed to mention that the Government also had not alerted the court to the **speedy** trial clock.

Pierce is also distinguishable from this case because the **Pierce** court was waiting to receive information from the defendant, while in this case **Moss** was waiting to receive a substantive opinion from the court. No evidence suggests that **Moss** caused any delay from the time the motion was taken under advisement until the time he filed the motion to dismiss for violation of the **Speedy** Trial Act. Although **Moss** could have informed{2000 U.S. App. LEXIS 13} the court of the delay, a defendant has no duty to bring himself to trial and has no duty to bring any delay to the court's attention. **Kottmyer**, 961 F.2d at 572. **Cf. Barker v. Wingo**, 407 U.S. 514, 527, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972) (analyzing the Sixth Amendment right to a **speedy** trial). Without a proper evaluation of the roles each party and the court played in causing the delay, the district court could not adequately consider this statutory factor.

As to the last statutory factor, the district court found that reprosecution would not hinder the administration of the **Speedy** Trial Act, nor the administration of justice because **Moss** had not shown that the delay would prejudice him at trial. The court failed to address that the ten month delay in rendering its opinion on the motion to suppress was approaching the point of being presumptively prejudicial. **Cf. United States v. Mundt**, 29 F.3d 233, 235 (6th Cir. 1994) (analyzing the Sixth Amendment right to a **speedy** trial (citing **Doggett v. United States**, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 112 S. Ct. 2686 (1992))). The district court{2000 U.S. App. LEXIS 14} also neglected {217 F.3d 432} to address any non-trial prejudice suffered by **Moss**. In **Taylor**, the Supreme Court, quoting **Barker**, held:

> The longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty:
>
> "Inordinate delay between public charge and trial, . . . wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'"

Taylor, 487 U.S. at 340 (quoting **Barker**, 407 U.S. at 537). In this case, the district court failed to consider the impact on **Moss**' liberty. **Moss** had been incarcerated for two years, including the time he was awaiting the decision of the court on the motion to suppress, yet the court failed to mention his incarceration and its impact on his life circumstances.

Nor did the district court adequately address the impact reprosecution would{**2000 U.S. App. LEXIS 15**} have on the administration of the **Speedy** Trial Act. The purpose of the **Speedy** Trial Act is not only to protect a defendant's constitutional right to a **speedy** trial, but also to serve the public interest in bringing prompt criminal proceedings. **United States v. Saltzman**, 984 F.2d 1087, 1090 (10th Cir. 1993) (citing **United States v. Noone**, 913 F.2d 20, 28 (1st Cir. 1990)). Whenever the "government--for whatever reasons--falls short of meeting the Act's requirements, the administration of justice is adversely affected." **United States v. Ramirez**, 973 F.2d 36, 39 (1st Cir. 1992) (quoting **United States v. Hastings**, 847 F.2d 920, 926 (1st Cir. 1988) (finding that the legislative history of the **Speedy** Trial Act demonstrates its importance in advancing both the public and private interests in fair and expeditious trial of criminal cases)). While not all violations of the **Speedy** Trial Act warrant a dismissal with prejudice, the purposes of the Act would be thwarted if courts do not adjust their day-to-day procedures to comply with its requirements. **See United States v. Clymer**, 25 F.3d 824, 832 (9th Cir. 1994).{**2000 U.S. App. LEXIS 16**}

On the record as a whole, we find the district court's decision to dismiss the original indictment without prejudice clearly erroneous. Although the district court in this case issued a written opinion, it did not adequately address two of the three statutory factors set forth in the **Speedy** Trial Act. The decision of the district court is reversed and remanded for an order dismissing the action with prejudice.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment of the district court.

STANDARD OF REVIEW

Just as is Petitioner's case, **Moss** was a drug-related offense, **Moss** was neither a multiple Count nor multiple defendant case, as was also Petitioner's. Unlike the Petitioner's case, **Moss** had his timely Speedy Trial Act Motion heard within the prescribed 30 days, having filed on January 29th, 1997, and heard on February 25th, 1997. district court also, as in Petitioner's case, dismissed without prejudice. The Government in **Moss** then reindicted for the same offense in April, 1997. **Moss**, the same as Petitioner, could not Appeal the dismissal without prejudice until after sentencing.

> "**Moss** argues that the district court abused its discretion by determining that the dismissal of his original indictment should be without prejudice because the court did not carefully consider all of the factors set forth in the Speedy Trial Act, 18 U.S.C. §3162(a)(2). **Moss** claims that the dismissal should have been with prejudice because the Speedy Trial Act violation was caused by the district court's own neglect, the delay was lengthy, and the defendant suffered because of his two years of incarceration."

> "Instead of recognizing its own role in not issuing a ruling on **Moss'** motion to suppress -- which had 'been taken under advisement for approximately 10 months -- the court simply quoted from the published opinion, **US v. Pierce**, 17 F.3d 146 (W.D. Mich.) aff'd (6th Cir. 1994)"

In Petitioner's case, the court failed to 'recognize its own role in not issuing a ruling, for more than **Moss'** 10 months, taking 13 months to do so, and not on a motion to suppress, but the Speedy Trial Act violation itself. This delay by its own doing,

even more directly insulting that in **Moss'** case, since we are discussing that the Court failed to bring to Trial the Petitioner in our matter, was called on it by Motion under Speedy Trial, then violated the Act further in refusing to rule upon the delay already caused by adding an addition thirteen months to that violation, then holding it was non-prejudicial to do so. **Moss** complained, and received relief for his two years of incarceration, although **Moss** spent some time released out on Bond, while our petitioner remained in jail more than **Moss'** two years, received no Bond, had a thirteen month delay, wherein **Moos** had but ten months, and yet **Moss** obtained relief wherein Petitioner did not. If district abused its discretion in **Moss'** case, it more than abused it in Petitioner's case, thus Petitioner, by this standard, deserves equal treatment as **Moss** received, dismissal with prejudice on his first Indictment, thus removing the second Indictment as barred.

CONCLUSION

Petitioner has shown, through parallel cases, that he has met the standard of proof of an abuse of discretion in his dismissal without prejudice, which should be now corrected to dismissed with prejudice, thus barring the secondary reindictment he received. Petitioner suffered longer, and more of the weight of the delay must fall upon the government and the Court itself than was considered. If not, this would allow, as was done in Petitioner's case, since the rule permits no Appeal of the first dismissal until after sentencing, the reindictment and further delay, in bad faith of the government, and the tactical advantage of retaining Petitioner in jail forcing a plea bargain just to end the process and allow the Appeal. An Interlocutory Appeal should have been permitted, such that the district court could not allow the Governmennt to reindict, pending the Appeal of the first Indictment's dismissal. To not find prejudice would permit Government to just hold parties that will not plea out until the time becomes so oppressive that they fold and give in, as Petitioner did. Relief in the form of Dismissal with prejudice in case #17-cr-0054, barring reprosecution by case #19-cr-0015, should be granted.

I, Antwan Criswell hereby certify under penalty of perjury pursuant to Title 28 U.S.C. §1746 the aforesaid true and correct.

7/27/2022
Dated :

Antwan Criswell
Signature