NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AARON KEITH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner waived any speedy-trial objection to the period of delay after his motion to dismiss for violation of the Speedy Trial Act was filed because he did not also file an additional motion to dismiss on the eve of trial, even though his dismissal motion challenged the lengthy trial continuance the district court had ordered and the resulting trial date set, and the district court addressed that time period when denying it.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner Aaron Keith respectfully petitions this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The court of appeals affirmed petitioner's convictions in a published opinion, *United States v. Keith*, 61 F.4th 839 (10th Cir. 2023). (Appendix A.)

JURISDICTION

The court of appeals issued its opinion affirming petitioner's convictions on March 7, 2023. (Appendix A.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Speedy Trial Act are codified at 18 U.S.C. § 3161 (Appendix D) and 18 U.S.C. § 3162 (Appendix E).

STATEMENT OF THE CASE

1. Proceedings in the district court

On December 12, 2018, petitioner was named in two counts of a 93-page Superseding Indictment that charged 97 substantive counts against 55 individuals. (Suppl. R. 515-607.) Petitioner was charged in a conspiracy to possess with intent to distribute methamphetamine (Count 1) and one substantive count of possession with intent to distribute methamphetamine (Count 65). (Supp. R. 515-31, 566.)

By written order dated January 28, 2020, after several trial continuances not addressed in petitioner's motion to dismiss, the district court set a new trial date of August 11, 2020. (Suppl. R. 688-90.) A footnote in this order stating that with the

exception only of codefendant Chairez, all remaining defendants were then incarcerated by the Oklahoma Department of Corrections and serving (state) sentences (Suppl. R. 689, n.2) is mistaken. As the district court later recognized, petitioner had discharged his state sentence on January 13, 2020, and was thereafter being detained solely on the pending federal charges. (Vol. 1 at 505.)

On February 19, 2020, following a detention hearing, petitioner was ordered detained pending trial in the federal case. (Suppl. R. 193 (Docs. 1663-64).)

Several months later, on June 4, 2020, the government filed a Second Superseding Indictment against petitioner and several remaining codefendants. (Vol. 1 at 216-42.)

Five weeks after the filing of the Second Superseding Indictment, the government moved for an additional continuance of trial due to the COVID-19 pandemic. At that time, there were only three defendants still heading towards trial: codefendant Postelle, codefendant Gunn, and petitioner. (Vol. 1 at 244-55.)

On July 21, 2020, the district court granted the government's motion and set jury selection and trial to begin on November 3, 2020. (Vol. 1 at 366-70.)

On November 4, 2020, the district court held jury selection for the joint trial of codefendant Gunn and petitioner. (Vol. 1 at 13 (Doc. 2220); Vol. 1 at 437-38, 450.) Jurors were selected but not sworn. (Vol. 1 at 427-38, 450.) The district court excused the selected jurors and ordered them to return on November 10, 2020, to be sworn and for the commencement of trial. (Vol. 1 at 450.)[1]

[1] The Court originally scheduled trial to begin immediately after jury selection on November 4, 2020, but then delayed the start of trial to November 9, 2020, due to several Deputy U.S. Marshals having

On November 6, 2020, however, one of the selected jurors notified court personnel that they had tested positive for COVID-19. (Vol. 1 at 450.) Court personnel notified the selected jurors that the start of trial would be postponed until at least November 30, 2020. (Vol. 1 at 450.)

On November 16, 2020, the government moved the district court to excuse the jurors who had been selected and to restart jury selection on December 1, 2020. (Vol. 1 at 437-46.) Petitioner filed an objection to this motion. (Vol. 1 at 447-48.)

On November 23, 2020, the district court granted the government's motion, excused the jurors who had been selected but not sworn, and continued the start of trial to January 12, 2021. (Vol. 1 at 449-53.) The court noted that after it had set trial to begin December 1, 2020, the U.S. District Court for the District Court of Oklahoma had issued another General Order postponing trials scheduled for December 2020 due to the ongoing COVID-19 pandemic. (Vol. 1 at 450-51.) The court further noted that petitioner and codefendant Gunn had objected to the government's motion and were asking the court to "proceed with the current jury." (Vol. 1 at 452.)

The district court ruled that "the potential for prejudice and the other risks associated with proceeding with the current jury compel the need to excuse the current jury." (Vol. 1 at 452.) The court noted that "no actions of the Court or its personnel were at play resulting in the jury's need to quarantine" but expressed concern "that the particular circumstances of this case have undermined the existing

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been exposed to COVID-19 and the number of in-custody witnesses in this case. Then, because a juror and an alternate indicated scheduling conflicts on November 9, 2020, the court moved the start date for trial to November 10, 2020. (Vol. 1 at 450 n.1.)

jury's confidence in those safety protocols." (Vol. 1 at 452.) The selected jurors were never questioned about this matter.

The court further found that "there is no guarantee that the existing jury will be able to serve on a trial that will not commence until January 14, 2020 trial [*sic*]." (Vol. 1 at 452.)[2] Again, the court did not question the selected jurors about this. Likewise, the court noted that an alternate juror who was pregnant with a high-risk pregnancy would be "much further along" in that pregnancy by the start of the January 2021 trial. (Vol. 1 at 452 n. 3.) But the court did not question her about whether the risk of the pregnancy was expected to increase, decrease, or remain the same as the pregnancy progressed. Nor did the court question her about whether there would be any other difference in her ability to serve as a juror during one time period versus the other.

Having continued the start of trial with the selected jurors from November 10, 2020, to at least November 30, 2020 (i.e., one day before December 2020), the court then made a finding that "the continuance of the trial to January 2021 is now mandated by G.O. 20-26." (Vol. 1 at 452-53.) The order did not address whether there was an earlier trial date in November 2020 when trial with the selected jurors could begin (following the necessary quarantine period arising from the fact that one juror had tested positive), or whether trial could begin on November 30, 2020. Instead, the district court applied another ends-of-justice exclusion of time from the Speedy Trial Act. (Vol. 1 at 453.)

[2] In addition to the extraneous word "trial" here, it is apparent the court mistakenly wrote 2020 instead of 2021.

Then on January 6, 2021, the district court sua sponte continued the trial in this case for another four months, to May 11, 2021. (Vol. 1 at 454-56 (Appendix B).) The court noted that no jury trials had been conducted in December 2020 and that no jury trials would be conducted through at least February 2021. (Vol. 1 at 454 (citing *In re: Suspension of Jury Trials and First Grand Jury Session in February 2021* (G.O. 21-1)).) "As a result," the court found, "a further continuance of this trial is necessary." (Vol. 1 at 454.)

Regarding the length of the additional trial continuance that it was ordering, the district court made the following findings:

> The Court is uncertain when jury trials will commence again in this judicial district and it is highly likely that when they do, they will, once again, be conducted on a limited basis for at least a period of time. This case is complex and has been declared such. Moreover, the case involves many logistical challenges associated with witnesses who must travel and witnesses who are incarcerated. These logistical challenges are greatly exacerbated by the pandemic. Not only must the Court be concerned with travel restrictions and/or impediments posed by the pandemic, but also quarantine requirements for incarcerated individuals and the safety of lawyers, Court staff, the United States Marshal Service, and jurors. The Court's internal resources are also impacted by this case due to these logistical issues, the anticipated length of the trial, and enhanced security measures that must be implemented due to the nature of the case. As such, it is likely that conducting this trial will prevent other trials from simultaneously proceeding.

(Vol. 1 at 455.) Based on these reasons, the court found that a continuance of the trial to its May 2021 trial docket was warranted. (Vol. 1 at 455.) The court acknowledged it was certainly possible the case could be brought to trial sooner, but instead set it for May 2021 so it would be "a more realistic and 'firm' date for this trial." (Vol. 1 at

455 (explaining that "[s]etting the trial at that time will facilitate witness travel and will ease or possibly avoid the other logistical concerns noted.").) Thus, the court again excluded time under the ends-of-justice provision and set the trial to begin on May 11, 2021. (Vol. 1 at 455-56.)

On January 21, 2021, petitioner and codefendant Gunn filed a "Joint Motion to Dismiss Based Upon Violation of Defendants' Speedy Trial Rights" asserting, inter alia, a violation of the Speedy Trial Act. (Vol. 1 at 457-63 (Appendix F).) The Joint Motion to Dismiss explained that "[b]ut for the pending criminal charges in this matter, [petitioner]would be a free man. However, as of the day of the filing of this motion, [petitioner] has remained in the custody of the U.S. Marshall [*sic*] for 2 years, 1 month, and 2 days as he awaits the trial on this matter to begin." (Vol. 1 at 457.) The Joint Motion to Dismiss asserted that "Based upon the Court's January 6, 2021 Order, trial in this matter will not begin until May 11, 2021, at the earliest." (Vol. 1 at 457.) The Joint Motion to Dismiss calculated that by then, "over 2 years, 4 months, and 29 days will have passed between the filing of the Superseding Indictment and the beginning of trial." (Vol. 1 at 457-58.)

The government opposed the Joint Motion to Dismiss. (Vol. 1 at 469-92.)

On March 1, 2021, the district court denied the Joint Motion to Dismiss in a lengthy order. (Vol. 1 at 493-507 (Appendix C).) The district court specifically ruled that "the May 2021 trial docket is a proper and realistic date upon which to conduct this trial." (Vol. 1 at 501 (Appendix C).) The court acknowledged the case could

potentially be tried in April 2021, but characterized the additional monthlong delay—to the May 2021 trial setting—as "not undue." (Vol. 1 at 501 (Appendix C).)

On May 11, 2021, a jury was empaneled and sworn. (Vol. 1 at 510.) From December 19, 2018, the date petitioner first appeared before a judicial officer on this case to be arraigned on the Superseding Indictment, to May 11, 2021, it had taken 874 days to bring petitioner to trial.

Petitioner was convicted on both counts. (Vol. 1 at 932-35; Vol. 3 at 1046-48.)

The district court had jurisdiction over petitioner's criminal case under 18 U.S.C. § 3231.

2. Proceedings in the court of appeals

The court of appeals declined to review petitioner's Speedy Trial Act (STA) claim as it related to the 110-day period of time from when his motion to dismiss was filed—January 21, 2021—and when trial began—May 11, 2021. *Keith*, 61 F.4th at 846-49 (Appendix A). Relying on its decision in *United States v. Nevarez*, 55 F.4th 1261 (10th Cir. 2022), the court of appeals held that in order to preserve an STA objection to such period of delay, petitioner was required to file an additional motion to dismiss after that period had passed, i.e., on the eve of trial—which he did not do. *Id.* at 847-49. As a result of holding that petitioner had waived any objection to this 110-day period of time, the court of appeals did not address petitioner's arguments as to the full 119-day period of the final trial continuance. Instead, it held that the final period of trial delay at issue in petitioner's appeal was only 9 days: the amount of time between the penultimate trial date (January 12, 2021) and the date on which petitioner and his codefendant filed their Joint Motion to Dismiss (January 21, 2021).

Id. at 849. And the court of appeals deemed it unnecessary to address whether the 9-day delay was justified, given its other speedy-trial calculations. *Id.* at 852 ("Even if [petitioner] convinced us that the district court's fourth and fifth continuances (respectively spanning 50 and 9 days) were unexcludable time under the STA, those two periods would add up to only 59 days, not 71. So we need go no further and thus do not discuss the propriety of the fourth and fifth continuances.").

Consequently, the court of appeals never addressed the merits of petitioner's arguments as to the final trial continuance of 119 days—which was itself 49 days longer than the statutory speedy-trial period of 70 days within which a defendant is supposed to be brought to trial. These arguments were threefold, and meritorious:

> The court's own order granting this continuance expressly acknowledged that the case could be tried sooner than May 11, 2021. (Vol. 1 at 455 (nonetheless setting the trial for May 2021 so it would be "a more realistic and 'firm' date."). This was both an abuse of discretion and, on de novo review, reversible error. The Speedy Trial Act entitles federal criminal defendants to a speedy trial date, not what a district court judge thinks will be a "realistic" or "firm" one. It will always be true that setting a continued trial date out longer will provide more time for perceived impediments to trial to be resolved and thereby reduce the probability of future requests for trial continuances. If such were an allowable basis for an ends-of-justice exclusion, then there would be no outside limit to the continuances that could be granted, and such continuances would wholly undermine the purposes of the Speedy Trial Act, as occurred here.

(Amended Opening Brief at 35-36.)

> Moreover, in granting the continuance to May 11, 2021, the district court expressly relied on the congestion of its own docket as a basis for excluding time under the ends-of-justice provision. (Vol. 1 at 455 ("[I]t is likely that

> conducting this trial will prevent other trials from simultaneously proceeding."). But this circumstance is a statutorily prohibited basis for granting an ends-of-justice continuance. 18 U.S.C. § 3161(h)(7)(C). Congress wisely realized that such a basis, if allowed, would be the exception that swallowed the speedy-trial rule.

(*Id.* at 36; *see also id.* at 36 (citing Tenth Circuit authorities supporting the claim that this final trial continuance constituted an abuse of discretion due to inadequate record findings supporting an ends-of-justice exclusion).)

The court of appeals did not even review these arguments on plain-error review under the doctrine of forfeiture. By deeming the claim waived, the court of appeals held the claim as to the final, lengthy trial continuance not subject to appellate review at all.

REASONS FOR GRANTING THE WRIT

1. **This Court should grant review to address this important matter regarding when a waiver of the statutory right to a speedy trial occurs, an issue that has not been but should be decided by this Court and that now negatively impacts many hundreds of federal criminal cases tried within the Tenth Circuit such that an exercise of this Court's supervisory power is warranted.**

Congress provided for the remedy of dismissal in the STA. 18 U.S.C. § 3162(a)(2) ("If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant."). Congress further mandated that "[f]ailure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section." *Id.* But Congress *did not* dictate that a defendant must file a motion to dismiss for a statutory speedy-trial violation before all periods of trial delay that are the subject of the claim have passed. The only

requirement as to the timing of an STA motion to dismiss is that it be filed before the beginning of trial (for cases where, as here, the defendant was convicted at trial). *Id.*

Research has not revealed any other circuit that applies the draconian and nonsensical waiver rule adopted by the court of appeals in this case. The court of appeals denied petitioner his statutory speedy-trial claim as to the full 119 days of delay in bringing him to trial resulting from the final trial continuance, even though his motion to dismiss squarely addressed that period of delay, as did the district court's ruling denying the motion to dismiss.

Specifically, the period of delay petitioner challenges on appeal—the district court's Order dated January 6, 2021 sua sponte continuing trial to the final trial date of May 11, 2021—was included in petitioner's Joint Motion to Dismiss under the STA. (Vol. 1 at 457 ("Based upon the Court's January 6, 2021 Order, trial in this matter will not begin until May 11, 2021, at the earliest."); Vol. 1 at 460 ("On January 6, 2021, the Court entered an Order continuing the trial until May 11, 2021 and finding that the period of delay resulting from the continuance of Defendants' trial will be excluded under the Speedy Trial Act."); Vol. 1 at 461 ("At this point, the earliest this case will be set for trial is May 11, 2021.") (Appendix F).)

Additionally, the record shows without a doubt that the district court fully understood petitioner was moving to dismiss the charges based in part on the several months of delay preceding the May 11, 2021 trial day that had not yet occurred. The district court's Order denying the Joint Motion to Dismiss quoted at length from its earlier findings for the ends-of-justice continuance to the final trial date of May 11,

2021. (Vol. 1 at 497-98 (Appendix C).) And the district court expressly referenced the May 11, 2021 trial date in its ruling denying petitioner's claim that the charges should be dismissed due to a violation of the STA:

> As the Court set forth in its most recent continuance Order, given the nature of this case and the unique complexities attendant thereto, the May 2021 trial docket is a proper and realistic date upon which to conduct this trial. At the current juncture, the earliest date any trial might proceed in this judicial district is April 2021. Therefore, the additional thirty days of delay to the May 2021 trial docket, is not undue.

(Vol. 1 at 501 (Appendix C).)

To be sure, the Ninth Circuit has held that "[a]s a general rule, a motion to dismiss for violation of the Speedy Trial Act does not, in the absence of a further motion, preserve an objection to subsequent periods of delay that occur following the denial of the motion." *United States v. Hall*, 181 F.3d 1057, 1061 (9th Cir. 1999) (citing *United States v. Wirsing*, 867 F.2d 1227, 1230 (9th Cir. 1989), and *United States v. Berberian*, 851 F.2d 236, 239-40 (9th Cir. 1988)). But none of those three cases involve a situation such as that presented here, where the district court ordered a lengthy trial continuance, the accused filed a motion to dismiss under the STA based on that trial continuance and the new trial date several months in the future, and it is evident that the district court understood that that period of time was being challenged and denied the motion to dismiss on the merits.

Moreover, even *Hall* recognized that an ongoing objection effected by the filing of the motion to dismiss should last at least as long as that motion remains pending. *Hall*, 181 F.3d at 1061 ("[W]e find it reasonable to deem the motion continuing until

it is denied, thus preserving an objection to the delay up until that time. In this case, the district court never ruled on Hall's September 29 motion to dismiss. Thus, the motion remained live when trial commenced on October 6, preserving for appeal Hall's Speedy Trial Act challenge to the entire pretrial delay."). If the court of appeals had applied the rule of *Hall* here, that would have add several weeks of delay and required adjudication of petitioner's claim.

The harsh waiver analysis applied to petitioner by the court of appeals here stands in stark contrast to the analysis applied in the First Circuit, which focuses, more appropriately, on whether the period of time in question was identified in the motion to dismiss. *See, e.g., United States v. Valdivia*, 680 F.3d 33, 41-42 (1st Cir. 2012) ("Nowhere in the motion did Valdivia identify the periods of time that he now purports to challenge as non-excludable; accordingly, there is a strong basis for finding the argument waived."). Here, as discussed, petitioner squarely identified in his motion to dismiss the period of delay arising from the months-long final trial continuance that he also challenges on appeal.

This Court has recognized that "§ 3162(a)(2) assigns the role of spotting violations of the [STA] to defendants-for the obvious reason that they have the greatest incentive to perform this task." *Zedner v. United States*, 547 U.S. 489, 502-03 (2006). Petitioner spotted a violation of the STA when the district court sua sponte continued the trial date for several months to the final trial date of May 11, 2021. He appropriately moved to dismiss based in part on that period of delay. The district court recognized that and addressed his claim on the merits. Petitioner's claim is

therefore preserved for appellate review. The holding of the court of appeals to the contrary is erronesous, and should be reversed.

For all these reasons, certiorari review is appropriate because this case presents an important matter of federal criminal law that has not been, but should be, settled by this Court. *See* R. 10(c).

This Court should also exercise its certiorari review in this case because the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* R. 10(a).

2. **This Court should grant review because the waiver rule applied by the court of appeals does not further the goals of waiver doctrine and will either (i) incentivize criminal defendants to delay filing speedy-trial dismissal motions until it is too late for any STA violations to be remedied; or (ii) result in needless, duplicative litigation just before the outset of federal criminal trials.**

In federal criminal law, the doctrine of waiver is grounded in the concept of fair notice to trial judges. It is meant to incentivize litigants to raise claimed violations of the law in the first instance before the district court so that such courts will have a reasonable opportunity to remedy the violations in the first instance, long before any appeal may become necessary.

These goals are not furthered by the unique waiver rule applied by the court of appeals in petitioner's case. As discussed, petitioner's motion to dismiss addressed the period of delay that the court of appeals deemed waived. (Vol. 1 at 457-61 (Appendix F).) And the district court's ruling denying the motion to dismiss also fully addressed that period of time. (Vol. 1 at 497-501 (Appendix C).)

Moreover, if allowed to stand, the published court of appeals decision in this case will skew incentives for criminal defendants in ways that will have effects that

are contrary to the fair and efficient administration of justice. To avoid a waiver problem, any criminal defendant being prosecuted within the Tenth Circuit is now incentivized to wait to file their motion to dismiss under the STA until the eve of trial. Such last-minute timing fully comports with the statutory requirement to file the motion to dismiss before trial, and under the court of appeals decision below, it ensures that no waiver will be found. But of course when STA motions are filed at the last minute before trial begins, then ipso facto, they are not being filed in time for the district courts to actually provide a meaningful remedy by, for example, advancing the trial date to bring the defendant to trial earlier, within the strictures of the Act. It makes much more sense for courts to incenitivize defendants to file motions on a timeframe similar to what petitioner did below: promptly after a continuance is granted and in time for the district court to reconsider the continuance and avoid most or all of the challenged delay.

Alternatively, some defendants may file repeated motions that are duplicative in substance. There is nothing to be gained and, given the general congestion of our federal courts, much to be lost by such an incentive structure. For example, if petitioner had renewed his motion to dismiss on the even of trial, there was nothing new for him to say than was already said in the initial motion to dismiss. Nor was there anything new for the district court to decide that had not already been ruled upon. Redundant and unnecessary litigation on the eve of federal criminal trials is in the interest of no party nor the courts. It is contrary to the sound administration of justice.

CONCLUSION

For all these reasons, petitioner asks this Court to grant certiorari and, following full merits review of this case, hold that his motion to dismiss adequately preserved his speedy-trial objection to the entire final trial continuance. Petitioner further asks this Court to ultimately vacate his convictions due to violations of the Speedy Trial Act and order that the charges against him be dismissed, or in the alternative, to remand for the court of appeals to adjudicate in the first instance the merits of his STA claim as to the entire final trial continuance.

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Respectfully submitted,

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