No. 22-7761

IN THE SUPREME COURT OF THE UNITED STATES

AARON KEITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a criminal defendant adequately preserves a claim under the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq., by filing a prospective motion to dismiss before the relevant delay has occurred.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Okla.):

United States v. Velasquez, No. 18-cr-260 (Nov. 16, 2021)

United States Court of Appeals (10th Cir.):

United States v. Keith, No. 21-6158 (Mar. 7, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 61 F.4th 839. The orders of the district court (Pet. App. B1-B3, C1-C15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2023. The petition for a writ of certiorari was filed on June 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiring to distribute controlled substances, in violation of 21 U.S.C. 841(b)(1)(A) and 21 U.S.C. 846, and possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Judgment 1. He was sentenced to 480 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A14.

1. While serving a state sentence in Oklahoma, petitioner became a high-ranking member of a prison gang. Pet. App. A2; Presentence Investigation Report (PSR) ¶ 19. From prison, petitioner "coordinated large drug transactions outside of prison." Pet. App. A2. The Probation Office ultimately determined that petitioner was responsible for 57,995 kilograms of converted drug weight. PSR ¶ 31.

A federal grand jury in the Western District of Oklahoma indicted 55 gang members and affiliates, including petitioner, on various drug-related charges. Pet. App. A2. The grand jury charged petitioner with conspiring to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 21 U.S.C. 846, and possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. A2.

The district court granted five continuances of petitioner's trial -- the first because of the complexity of the case, the second because two co-defendants had retained new attorneys, and the remaining three because of the COVID-19 pandemic. See Pet. App. A3-A5; see also id. at A5 (setting out full chronology). The fifth continuance was granted on January 6, 2021, when the court continued petitioner's trial -- which had been scheduled to begin on January 12 -- to May 11. See id. at B1-B3. The court cited a general order issued by its chief judge suspending jury trials in the district. See id. at B1. The court also observed that the "complex[ity]" of the case had created significant "logistical challenges," which had been "greatly exacerbated by the pandemic." Id. at B2.

On January 21, 2021, petitioner moved to dismiss the indictment, arguing (among other things) that the government had violated the Speedy Trial Act of 1974 (Speedy Trial Act), 18 U.S.C. 3161 et seq. Pet. App. A4. Petitioner's argument rested in part on a period of delay that had not yet occurred -- namely, the delay from the date of filing through May 11, 2021, under the fifth continuance. Ibid. The district court denied the motion. Id. at C1-C15. The court observed that, although the Speedy Trial Act requires that a defendant be tried within 70 days, that 70-day period is subject to various exclusions of time, including a delay caused by a continuance that serves "the ends of justice." Id. at C7 (quoting 18 U.S.C. 3161(h)(7)). And the court explained that,

in granting the continuance at issue here, it had already determined that the continuance served the ends of justice in light of "the myriad concerns -- logistical, safety and otherwise -- caused by the pandemic." Id. at C8.

Following a jury trial, which began on May 11, 2021, petitioner was convicted on both counts. Pet. App. A4. The district court sentenced him to 480 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A14.

In addressing petitioner's challenge to the denial of his motion to dismiss on Speedy Trial Act grounds, the court of appeals determined that petitioner had "waived his challenge to part of the fifth continuance." Pet. App. A7 (emphasis omitted). The court noted that under its previous decision in United States v. Nevarez, 55 F.4th 1261 (10th Cir. 2022), cert. denied, 143 S. Ct. 1790 (2023), "[w]hen a defendant moves to dismiss an indictment based on [a Speedy Trial Act] violation that has yet to occur, that motion cannot succeed and the right to challenge any subsequent delay is waived unless the defendant brings a new motion to dismiss." Pet. App. A7 (citation and internal quotation marks omitted). And here, the court found that petitioner had preserved a challenge only to the period of delay that predated his motion. Id. at A8. The court explained that "[t]o avoid waiving a challenge to the 110 days' delay that postdated his motion, [petitioner] needed to file another motion to dismiss -- 'a course

he never took.'" Ibid. (brackets and citation omitted). The court then determined that the periods of delay that petitioner had properly challenged did not establish a violation of the Speedy Trial Act. Id. at A9-A10.

ARGUMENT

Petitioner contends (Pet. 9-15) that a criminal defendant can preserve a claim under the Speedy Trial Act by filing a prospective motion to dismiss before the relevant delay has occurred. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This case also is a poor vehicle for reviewing the question presented because petitioner's underlying Speedy Trial Act challenge is meritless. This Court has recently denied a petition for a writ of certiorari in the prior circuit decision on which the decision below relied. See Nevarez v. United States, 143 S. Ct. 1790 (2023) (No. 22-7100). The same course is appropriate in this case.

1. The Speedy Trial Act generally requires a federal criminal trial to begin within 70 days after the defendant is charged or makes an initial appearance. 18 U.S.C. 3161(c)(1). But the statute contains "a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." Zedner v. United States, 547 U.S. 489, 497 (2006). Among other things, the statute excludes "[a]ny period of delay resulting from a continuance * * * if the judge granted such

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." 18 U.S.C. 3161(h)(7)(A). The statute further provides that "[i]f a defendant is not brought to trial within the time limit," the district court must dismiss the indictment "on motion of the defendant." 18 U.S.C. 3162(a)(2). "Failure of the defendant to move for dismissal prior to trial," however, "shall constitute a waiver of the right to dismissal." Ibid.

The court of appeals correctly determined that a criminal defendant does not preserve a Speedy Trial Act claim by filing a prospective motion to dismiss challenging a delay that has not yet occurred. Cf. Zedner, 547 U.S. at 502 (holding that, although a criminal defendant may retrospectively waive a Speedy Trial Act objection to a past delay, he may not prospectively waive an objection to a delay that has not yet occurred). The specific remedial language of the statute provides that "[i]f a defendant is not brought to trial within the time limit * * * the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). That text suggests that a defendant may move for dismissal -- and that a court may dismiss the case -- only after "the time limit" has expired and only once it is clear that the "defendant [has] not [been] brought to trial within" that time. Ibid. The text does not contemplate

anticipatory motions or anticipatory dismissals based on delays that have not yet occurred.

That makes sense. An anticipatory motion to dismiss would be self-defeating: The filing of "[a]ny pretrial motion," including a Speedy Trial Act motion, itself stops the 70-day clock until the disposition of the motion. See 18 U.S.C. 3161(h)(1)(D); United States v. Tinklenberg, 563 U.S. 647, 652-659 (2011); United States v. Sherer, 770 F.3d 407, 411 (6th Cir. 2014), cert. denied, 574 U.S. 1097 (2015). In addition, the Speedy Trial Act sets forth multiple grounds for excluding time from the 70-day time limit. See 18 U.S.C. 3161(h). The parties and the court cannot be certain in advance that a future period of delay will fall outside all those exclusions. For example, part or all a time period that falls within an ends-of-justice continuance might wind up also falling within the exclusion for "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," 18 U.S.C. 3161(h)(1)(G), or the exclusion for "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," 18 U.S.C. 3161(h)(4).

Petitioner errs in suggesting (Pet. 14) that the court of appeals' interpretation of the Speedy Trial Act will undermine "the sound administration of justice" by encouraging criminal defendants to delay Speedy Trial Act motions "until the eve of

trial." Under the decision below, a criminal defendant need not wait until "the eve of trial," ibid.; rather, the defendant need only wait until "the time limit" for the trial has expired, 18 U.S.C. 3162(a)(2). See Sherer, 770 F.3d at 411 ("The proper course was to [move to dismiss] on day seventy-one."). If anything, it is petitioner's reading that undermines the sound administration of justice, for it encourages defendants to file (and courts to resolve) anticipatory motions about violations that have not yet occurred, might not actually occur (if a reason arises to hold the trial sooner than anticipated), or might wind up having been justified on alternative grounds that have not yet arisen.

2. The decision below does not conflict with the decision of any other court of appeals. Every other court of appeals that has considered the issue has agreed with the court below that "[p]remature motions will not suffice" to preserve Speedy Trial Act claims and that "[a]n actual violation of the [statute] must exist at the time the motion is made." Pet. App. A7 (emphasis omitted); see United States v. Connor, 926 F.2d 81, 84 (1st Cir. 1991) ("[A] motion for dismissal is effective only for periods of time which antedate the filing of the motion."); Sherer, 770 F.3d at 411 ("As our sister circuits have held and as we agree, 'a motion for dismissal under the Speedy Trial Act is effective only for periods of time which antedate its filing.'") (6th Cir.) (brackets and citation omitted); United States v. Wirsing, 867 F.2d 1227, 1230 (9th Cir. 1989) ("In ruling on a motion to dismiss

an indictment for failure to comply with the Speedy Trial Act, a court need only consider alleged delay which occurs prior to and including the date on which the motion is made. The right to challenge any subsequent delay is waived absent the bringing of a new motion to dismiss.").

Petitioner attempts to distinguish (Pet. 11) his case from those cases on the ground that the district court here "ordered a lengthy trial continuance" and the defendant "filed a motion to dismiss * * * based on that trial continuance and the new trial date several months in the future." But nothing in the statutory text or the reasoning of the other courts' decisions suggests that those factors would affect the legal analysis. Petitioner's argument would in any event show, at most, that this case presents a novel situation that other courts of appeals have not yet confronted. But that is a reason to deny certiorari, not to grant it.

Contrary to petitioner's suggestion (Pet. 12), the approach of the decision below does not "contrast" with "the analysis applied in the First Circuit." As explained above, the First Circuit agrees with the court below that "a motion for dismissal [under the Speedy Trial Act] is effective only for periods of time which antedate the filing of the motion." Connor, 926 F.2d at 84. In the decision that petitioner cites (Pet. 12), the First Circuit explained that a criminal defendant can also forfeit a Speedy Trial Act claim in other ways (e.g., through a complete "failure to move

for dismissal" or through a "failure to identify specific arguments" supporting the motion). United States v. Valdivia, 680 F.3d 33, 41, cert. denied, 568 U.S. 994 (2012). That decision did not disturb the First Circuit's separate recognition that "a defendant waives the contention that a particular period was not excludable * * * when the period post-dates the filing of his motion to dismiss." United States v. Gates, 709 F.3d 58, 68 (describing Connor), cert. denied, 571 U.S. 908 (2013).

3. Moreover, this case would be a poor vehicle for resolving the question presented. The statute excludes, from its 70-day clock, "[a]ny period of delay resulting from a continuance * * * if the judge granted such 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." 18 U.S.C. 3161(h)(7)(A). And the district court expressly found that "the ends of justice served by ordering the continuance [at issue here] outweigh the best interests of the public and [petitioner] to a speedy trial." Pet. App. B2.

Contrary to petitioner's suggestion, the district court did not grant the continuance simply to "reduce the probability of future requests for trial continuances" or to avoid "the congestion of its own docket." Pet. 8 (citations omitted). Rather, the court emphasized that "[t]his case is complex," that "the case involves many logistical challenges associated with witnesses who must travel and witnesses who are incarcerated," and that "enhanced

security measures * * * must be implemented due to the nature of the case." Pet. App. B2. The court added that "[t]hese logistical challenges [we]re greatly exacerbated by the pandemic"; indeed, the court had "attempted to proceed with a trial of this matter in November 2020, but after empaneling the jury, one of the jurors notified the [c]ourt of having tested positive for COVID-19." Id. at B1-B2. "Given all of the logistical issues involved," the court found that "a continuance to the May 2021 trial docket [wa]s warranted." Id. at B2.

The district court did not abuse its discretion by granting that continuance. Zedner, 547 U.S. at 508 (explaining that the provision authorizing ends-of-justice continuances is relatively "open-ended" and "give[s] district judges a measure of flexibility"). This Court should not grant review to determine whether petitioner preserved a claim that would in any event fail on the merits. See The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."); Supervisors v. Stanley, 105 U.S. 305, 311 (1881) (explaining that this Court does not "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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