No. 23-5116 ORIGINAL

In The

Supreme Court of the United States

Jeremy Adams,

Petitioner,

v.

The United States of America,

Respondent.

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

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Questions For Review
Speedy Trial Act Operation

(I). Is the Sixth Circuit's new rule, in opposition to 7 other Courts of Appeals -- that the protections of Speedy Trial Act 18 USC § 3161(h)(1)(H)'s 30 day 'under advisement' period can be bypassed when no hearing was ever held for an infinitely pending bond motion -- thereby denying pretrial release under § 3164(c), correct?

(II). Where a *pro forma* continuance under 18 USC § 3161(h)(7)(A) for 'pretrial motion preparation' was raised *sua sponte* at arraignment, can that time be excluded when there are no contemporaneous case-specific facts to support that the preparation would be anything other than routine?

(III). Does the "reasonably necessary" delay exclusion of § 3161(h)(7) continuances have a different meaning and application under § 3164 because of the different context in which it arises, because the harm caused by postponing a trial is not comparable to the harm caused by continued oppressive pretrial detention?

Party Presentation Principle

(IV). If the government forfeited a Speedy Trial Act exclusion argument (that an infinitely pending bond motion excludes all time), is that argument on appeal: (1) waived because it was an affirmative defense?; (2) waived because the district court did not provide fair notice when it raised the argument *sua sponte*?; (3) forfeited but can prevail on plain error review?; or (4) not waived or forfeited and as if the government had raised it itself?

(V). Is the government excepted from the party presentation principle? Can a Court of Appeals affirm on any argument supported by the record, even if the government didn't raise the argument in either instance -- that withdrawing a pending bond motion deprived the district court from holding a hearing?

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Statement of Jurisdiction

The authority to review the judgment of the Sixth Circuit Court of Appeals affirming the denial of pretrial release via the Speedy Trial Act § 3164(c) is 28 USC § 1254. The order is final in accordance with the collateral order doctrine and 28 USC § 1291. *Stack v. Boyle*, 342 U.S. 1, 4, 7 (1951). The disposition for the Court of Appeals was filed on 3/16/2023 and the mandate issued on 5/8/2023. Request for Rehearing was denied on 4/28/2023. The gravity of the questions is of such importance and the need for uniform rules on the Speedy Trial Act statutes at issue need plenary review partly because of Circuit splits.

Constitutional Provisions & Statutes

U.S. Constitution Amendment V

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

U.S. 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 defence.

U.S. Constitution Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Speedy Trial Act 18 USC §3161. Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-

(D) delay 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;

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, 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. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph 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.

Speedy Trial Act 18 USC §3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving-

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to ensure that he shall appear at trial as required.

Statement of the Case

The petitioner, Jeremy Adams, has been detained continuously for more than 2 years on a single count indictment with only one defendant. Petitioner avers that the only reason that the case continues is because the government has been dilatory with discovery that would exonerate him, impeach the search warrant affidavit and provide evidence of illegal searches. Petitioner was arrested on 5/18/2021 and remains in oppressive pretrial detention. Adams has since filed a motion for release under the Speedy Trial Act, 18 USC § 3164(c), which requires a non-discretionary release after 90 days have passed since arrest. (Doc. 44: Mot. Immediate Release, PageID# 680). This truncated procedural history will be limited to only those events that contribute to the § 3164 release but other due process and speedy trial issues exist.

Adams was indicted 50 days after arrest on 7/7/2021.[1] The charge was under 18 USC § 2251(a), Exploitation of a Minor, for an alleged filming of sexual activity between Adams and his then 17-year-old girlfriend six years ago.[2] This was ancillary to lawful, consensual, romantic sexual activity and the couple continued to date for two years. At the initial detention hearing in front of a magistrate on 6/17/2021, the government advanced uncharged conduct which was false and the later discovery impeached that conduct. On this basis, the magistrate ordered detention.

As of the arraignment on 7/13/2021, the government agrees there are 44 excludable days.[3] (Doc. 46: Govt. Resp. Speedy Trial Release, PageID# 694-695). The day of the arraignment, the magistrate, on his own initiative, entered a *pro forma* ends of justice continuance for "pretrial motion preparation" and to "fully enjoy his right to counsel." Adams' retained counsel acquiesced to the continuance. (Doc. 64: Arraignment Trans., PageID# 828-829). This continuance lasted 58 days and only a minor amount of discovery

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[1] There were enough countable days (the government acquiesced to) before the indictment to qualify for dismissal under § 3162(a)(1) but Adams filed for release under § 3164(c) only, intending to win his case on its merits.

[2] The alleged offense was affirmatively protected by First Amendment expression after *New York v. Ferber*, 458 U.S. 747 (1982), until the upper age for the offense was raised in order to ease prosecution of offenses with younger adolescent subjects; creating incongruent law between age of majority for sexual activity and age of majority for expression of the same. (See Doc.66: Mot. to Dismiss 1st Amend., PageID# 842-849).

[3] There are actually 45 excludable days to this point. The government is following FRCrP Rule 45(a)(1)(A) but fails to follow Rule 45(a)(1)(C), shorting a day from the count but considering the huge number of days involved, this is non-dispositive.

with limited value was delivered, so pretrial motion preparation wasn't even possible during the continuance.[4] This is the first tolled period that Adams challenges. (Doc. 44: Mot. Immediate Release 3164, PageID# 684; *United States v. Adams* (hereafter *Adams I*), Sixth Circuit Appeal, Case # 22-3879, Doc. 13: Def. Br. at 10-12.)

In October 2021, Adams filed first a Motion for Pretrial Release, (Doc. 15, PageID# 54), and then a Motion to Suppress, (Doc. 18, PageID# 82). After delays, the responses and replies were all submitted by 1/28/2022. The district court, without holding a hearing, denied the suppression motion 116 days later.[5] (Doc. SCt 34: Order, PageID# 568). The 86 days that go beyond the STA § 3161(h)(1)(H) 30 days under advisement period are the second tolled time that Adams challenges. (Doc. 44: Imm.Rel. 3164, PageID# 684-85; *Adams I*, Doc. 13: Def.Br. at 15-20).

At that time on 5/24/2022, the district court made a minute order couched in "ends of justice" language to extend time but didn't give any reason for the continuance. Later in the order denying STA release, the district court explained that this time was for the benefit of Adams and his counsel to strategize. (Doc. 55, PageID# 794-795). The 15 days for that continuance is the final time period challenged by Adams, bringing the total non-excludable days to 204 since arrest. On 6/8/2022 at the pretrial conference the district judge told retained counsel that he knew he had a motion to rule on. There was no mention of needing more information or plans to set a bond hearing.

In August 2022 Adams filed the STA immediate release motion, (Doc. 44, PageID# 686), and it was docketed on 9/6/2022 at the *Faretta* hearing. At that time, the bond motion had been pending for 11 months and the district court had still not scheduled or held a hearing, so Adams withdrew the bond motion in light of the STA non-discretionary release. The district court approved the withdrawal thereby disposing of the motion. (Doc. 69: *Faretta* Trans., PageID# 923-924).

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[4] The discovery that did arrive prior to the September 2021 pretrial conference was minor and that had little value to the case. The suppressed discovery that impeached the search warrant affidavit and the prosecution wasn't delivered until much later (and was obscured) and the discovery that provided evidence of follow-on illegal searches wasn't delivered until March 2023 (and even then, was attempted to be suppressed through a frivolous and draconian protective order). These are the basis of the *Brady* violations pending in the district court.

[5] The district court, on its own initiative without fair notice, in response to a warrantless search raised inevitable discovery on a highly speculative probable cause that the detective *could* have obtained a warrant.

The government responded in opposition to the STA release, admitting the 44 days before the arraignment but opposing the 86 days under advisement time and asked the court to make a *nunc pro tunc* continuance order retroactive to cover the more than 7 months the suppression motion was pending. The government didn't respond to the ends of justice continuances but claimed that if the 86 days wasn't excluded that it would be a "miscarriage of
justice" because of the "voluminous" discovery and complexity. (Doc. 46: Govt. Opp. STA Release, PageID# 699). In a surreply the government repeated the complexity to support the ends of justice continuances, (Doc. 53: Govt. Surreply, PageID# 775), but they presented none of those concerns to the magistrate at the time of the continuance. (Doc. 64: Arraign. Trans., PageID# 928). Adams moved to strike the surreply. (Doc. 56, PageID# 797).

The district court denied the STA release but did not enter the retroactive continuance requested by the government. *United States v. Adams*, 2022 U.S. Dist. Lexis 185907 (N.D. Ohio 2022). The district court claimed the arraignment continuance was valid because of the complexity, later requesting a continuance and that it was "unreasonable" to expect discovery just after arraignment. (*Id.*, at *12-13). Then the district court raised a *sua sponte* argument, without fair notice, that the 2021 bond motion that was never ruled upon tolled the entire 11 months because it was "likely" that it would have needed more information, or a hearing, or both. (*Id.* at *9-10). Although the court never asked for more information nor set or held a hearing.

In October 2022 Adams timely filed an interlocutory appeal, (Doc. 58, PageID# 804), claiming (1) a violation of the party presentation principle, (*Adams I*, Doc. 13: Def. Br. at 21-25), (2) that *Henderson v. United States'* additional information rule to extend the start of (h)(1)(H)'s "under advisement" time does not apply to motions that never had a hearing, (*Id.* at 19-21), (3) challenged that the two (h)(7)(A)'s "ends of justice" continuances cannot be excluded without some factual basis for their need, (*Id.*, at 8-12), and (4) that even if the infinite pending bond motion argument wasn't waived on appeal because of being an affirmative defense -- that at least it was forfeited and could only prevail on plain error review -- which it would fail because there is no binding case law the allows (h)(1)(H) to be

bypassed without having a hearing and other circuits have on point case law opposing that argument. (*Adams I*, Doc. 23: Def. Reply, at 14).

In March 2023, the 6th Circuit affirmed the denial of release, *United States v. Adams*, 2023 U.S App. Lexis 6400 (6th Cir 2023), and decided that: (1) by saying it was enough that Adams later filed pretrial motions that ends of justice continuances do not need any contemporary factual basis, *Id.* at *3-4; (2) that it was reasonable for the district court to keep a bond motion pending for 7 months until after a suppression motion (and the 4 months beyond), *Id.* at *7; (3) that because Adams withdrew the motion, that it means a hearing would no longer be necessary and because a hearing was "likely necessary" and thus all the time is excluded because they *could* have had a hearing;[6] and (4) that because the appellate court failed to even mention whether the government had waived or forfeited the argument and treated the argument as if the district court and the government were an inseparable team -- the court implied that the party presentation principle is not binding. In April 2023 rehearing was denied. *United States v. Adams*, 2023 U.S. App. Lexis 10542 (6th Cir 2023).

In the ultimate irony, 17 days after this decision, the 6th Circuit put out an opinion that defendants could only prevail on plain error review for arguments they didn't raise below under the STA.

> "We have rarely had occasion to address what happens when a defendant brings a motion to dismiss under the STA, but does not raise below the precise argument presented on appeal. Based on our unpublished case law, it appears that we apply plain error review to such a claim."

United States v. Partin, 2023 U.S. App. Lexis 10665 (6th Cir May 1, 2023). So, the 6th Circuit is directing that the government gets a different standard than defendants. If the government does not raise an argument, that is okay -- the courts can cover for them; if a defendant does not raise a precise argument -- too bad.

Adams now petitions the Court for immediate release under the Speedy Trial Act, §

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[6] "Adams ultimately withdrew his motion for pretrial release before the district court held a hearing." *Id.* at *7. Because Adams' motion was based in large part on COVID-19 "additional factual information, up to and including a hearing was likely necessarily before resolving the motion . . . when Adams withdrew the motion there was no more need for a hearing." *Id.*

3164, because there have been more than 90 days of non-excludable time over the past two years of continuous detention because (h)(1)(H) cannot be bypassed without a hearing and the supposed to be "rarely used" (h)(7)(A) continuances require contemporary case-specific facts on the record in order to satisfy the requirement that the ends of justice were properly balanced.

Summary of Argument

The petitioner has been in oppressive pretrial detention for more than two years on a single count charge with one defendant. The government has been responsible for most of the delay. Within the two years there have been two Speedy Trial Act (STA) concepts which are being applied such that the STA has become a dead letter. One is a completely new rule that infinitely pending bond motions bypass STA protections. After filing a Motion for Immediate Release under 18 USC § 3164(c), the petitioner encountered party presentation deviations where the district court and appellate courts have made arguments on their own initiative to benefit the government, without fair notice to the petitioner. After the petitioner appealed, the Sixth Circuit treated the forfeited argument as if the government had properly presented it below, effectively treating the government and the court as a team against the petitioner. The lack of fairness destroys the adversarial system, creates courts of inquisition that lack neutrality, and strikes at the very heart of the legitimacy of the judicial process.

The two primary STA issues are (1) that an infinitely pending bond motion was excluded even though no hearing was ever scheduled or held and (2) that court initiated *pro forma* § 3161(h)(7)(A) "ends of justice" continuances automatically at every delay no matter the reason and without any contemporary case-specific facts on the record to support the delays. The third STA issue is whether reasonably "necessary" delay means the same thing under § 3164 as under § 3161 because of different contexts and harms.

The district court had taken 116 days to rule on a suppression motion where no hearing was held. The STA directs that 30 days of that time is excluded by § 3161(h)(1)(H)'s under advisement tolling, but the 86 days are counted against the speedy trial clocks. A bond motion, filed before the suppression motion, had been ripe for the same amount of time but the district court did not hold a hearing. After 11 months the motion was disposed of when the petitioner withdrew the motion in light of the speedy

trial release provision and the court granted the withdrawal. That 86 days still counted against the clock since there was never a hearing and no prompt disposition, meaning that (h)(1)(H) had also gone into effect for the bond motion. The district court, however, claimed it was "likely" that they may have needed more information, or a hearing, or both so they excluded all the time since they hadn't received all the papers they expected. This even though the district court had specifically told the petitioner's counsel that he knew he had a bond motion to rule on but gave no indication that a hearing would be held or that any other information was expected. On appeal the 6th Circuit made a different argument, on their own accord without fair notice, ruling *in essence* that since the district court *could* have held a hearing, but the petitioner withdrew the still pending bond motion, that that action had robbed the district court of holding a hearing.

Using the negligence of the district court in ignoring the bond motion to bypass the speedy trial right is the incredible injustice. The Bail Reform Act (BRA) was only found constitutional because of the safeguards. Using the failure to employ one of the safeguards, a prompt hearing with prompt appellate review available, 18 USC § 3145(b) & (c), in order to undercut another of the safeguards, the stringent adherence to the STA, is beyond the pale and makes pretrial detention of the petitioner unconstitutional as applied. Thus because (1) this action violates both the letter and spirit of the STA, (2) swallows the speedy trial right, (3) seems to be in conflict with this Court's interpretation in *Henderson v. United States*, (4) the precedent could affect every pretrial detainee, and (5) 7 Courts of Appeals have ruled against the infinite pending motion tolling time, this Court should grant the writ of certiorari and solve the circuit split.

The second STA issue is the rote *pro forma* § 3161(h)(7)(A) "ends of justice" continuance, that the Senate said should be "rarely used," is now used routinely, usually without a reason, but especially at arraignments for "pretrial motion preparation" in order to circumvent the STA's 70- and 90-days speedy trial clocks and this Court's ruling in *Bloate v. United States*, 559 U.S. 196 (2010). The instant decision by the 6th Circuit does not require any contemporary case-specific facts on the record to support that pretrial motion preparation would be anything but routine and that it would be "necessary" for this continuance. This decision and others by the 6th Circuit have allowed the continuances to be excluded so long as the STA language is used, even though there might

be no reason or the reason isn't supported by the record at the time the continuance is made. Ten other Courts of Appeals are split with the 6th Circuit.

Because the infinitely pending motions bypassing the protections of (h)(1)(H) and the "pro forma" (h)(7)(A) continuances combined nullify the STA, which was enacted to give teeth to the Sixth Amendment's speedy trial right, the issue is of such importance and could affect every trial in the 6th Circuit, therefore this Court should grant the writ of certiorari in order to solve the circuit split.

The third STA issue is whether a delay's reasonableness from § 3161(h)(7)(A)'s continuances have different meaning and application under § 3164 since the harm of postponing a trial is not the same as the "abhorrent" harm of oppressive pretrial detention.

The party presentation principle is what defines our adversarial system of justice. When federal courts abandon their neutrality to help litigate for the government, the legitimacy of the entire system is questioned. In this case, the district court has now twice, on its own initiative without fair notice, raised arguments that the government had a burden to raise yet forfeited. These forfeited arguments do not conform to the four recognized general categories of exceptions: (1) an interest of the judiciary that goes beyond the parties, (2) plain errors, (3) federal state comity issues, or (4) in defense of the substantive, procedural or constitutional rights of a defendant, especially when *pro se*. Not having fair notice prohibited the petitioner from making legal arguments or presenting new evidence to counter the newly raised argument. Federal courts have clung to the "supple, not ironclad" term of art in *United States v. Sineneng-Smith* to often disregard the party presentation principle in its entirety.

Because the government forfeited the affirmative defenses, then according to *Wood v. Milyard*, they should not be able to be raised on appeal at all. However, if they aren't waived and only forfeited, they should be able to be raised but only on plain error review. The 6th Circuit's decision to neither recognize waived or forfeited arguments, treats the government and the courts as a team in an inquisitorial match against defendants. The district court had raised the infinite pending bond motion tolling the speedy clock on its own initiative. The government forfeited this affirmative defense which they had a burden to prove. On appeal, this argument should have either been waived because it was

an affirmative defense, waived because no fair notice was given, or at least forfeited and limited to plain error review. Since there are no statutes or binding case law that allows a motion *without* a hearing to bypass (h)(1)(H)'s 30-day limits, and several Courts of Appeals have case law opposing tolling time for such infinite pending motions, then plain error review should have failed and the petitioner should have been released pending trial.

The appellate court, raised on its own initiative, that because the petitioner had withdrawn the motion, there was no longer a need for a hearing so all the time was excluded because, in essence, the district court *could* have had a hearing and since it was "likely" that the district court would have wanted more information and a hearing, then that qualifies as "requires a hearing." *Adams*, 2023 U.S. App. Lexis 6400, at *7. The government never made this argument. They instead argued that time "was excluded because it lacked all the information it reasonably expected to decide the motion" which was needed to render it "under advisement by the court." *Adams I*, Doc. 21: Govt. Br., at 42. This is a new rule that is not found in *Henderson v. United States* nor in the statute. The STA § 3161(h)(1)(D) and (h)(1)(H), as interpreted by this Court in *Henderson*, work together to allow time to be excluded in three situations: (1) all time between filing of a motion and its hearing and 30 days after, (2) all the time between the filing of the motion and the briefings and 30 days after, and (3) all the time between filing and the hearing and when more information is expected after that hearing and 30 days after. When there is no hearing, then that *Henderson* additional information rule does not apply. One would hope especially not when more information is only deemed to be requested after a STA motion for release has been filed.

This new rule by the 6th Circuit creates another situation: all the time between filing and disposition no matter if a hearing or not, even if not promptly determined within the 30 days after all briefs are filed. A Court of Appeals creating a new rule that subverts the speedy trial right is exactly the sort of case this Court should take, such that they can clarify and make consistent the rule and statute. This Court is also the best place to determine when the party presentation principle should be deviated from and when it should be followed. Thus, the petitioner respectfully requests the writ be approved.

Argument: The Reasons for Granting the Writ

The questions at issue fall into two categories with grave consequences: (1) the Sixth Amendment speedy trial right has, in practice, nearly disappeared largely because of these two questions and (2) the abandonment of the party presentation principle strikes at the very heart of the legitimacy of the judicial system. These questions are of such importance that plenary review is needed, both because of the need for uniform rules on the two questions about operation of the Speedy Trial Act (STA) and two questions about the operation of the party presentation principle, as well as "partly because of different conclusions by Courts of Appeals,"[7] and to protect the fairness of the adversarial system and protect the "right to be heard."[8]

The Decision Conflicts with 7 Courts of Appeals as to Allowing An Infinitely Pending Bond Motion To Toll The Speedy Trial Clock

A criminal defendant's right to a speedy trial is "one of the most basic rights preserved by our Constitution." *Kopfler v. North Carolina*, 386 U.S. 213, 226 (1967). When the Bail Reform Act (BRA) was instituted that allowed more defendants to be detained prior to trial, it was only found to be constitutional (over a scathing dissent) because of the safeguards built into the BRA to ensure that (1) only the most serious crimes would qualify, (2) that appellate review would be available promptly, (3) the duration was limited by the stringent time limits of the Speedy Trial Act (STA), and (4) the conditions of confinement reflected its regulatory purpose. *United States v. Salerno*, 481 U.S. 738, 746, 752 (1987). Sadly, none of the safeguards have been employed or are true in the instant case, but this petition is dealing specifically with the second and third safeguards.[9] In essence, the district court was negligent on conforming to the second safeguard because they never ruled on the bond motion filed by the petitioner, 18 USC § 3145(b), thus also denying prompt appellate review, § 3145(c). When the petitioner filed the request for immediate release under the STA, § 3164, since 204 non-excludable days had already passed, the district court used the failure in not ruling upon the bond motion to deny the

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[7] *Shapiro v. United States*, 235 U.S. 412 (1914).

[8] *Burns v. United States*, 501 U.S. 129, 136 (1991).

[9] The petitioner notes that he is not alone in that tragedy, and many, if not all, pretrial detainees are denied one or more of the safeguards. See Hopwood. *THE NOT SO SPEEDY TRIAL ACT*, 89 Wash. L. Rev. 709 (Oct 2014).

speedy trial release. Literally, because one of the safeguards was ignored, another of the safeguards was unable to be enacted? Nothing could be more unfair or nefarious in denying release than that manifestly unjust maneuver.

The infinite pending § 3145(b) bond motion, according to the district court, tolled all the time in that 11 months because it was "likely" that the court would "need more information, or a hearing, or both," but no information was ever requested and a hearing was never set.[10] On appeal, the 6th Circuit Court of Appeals affirmed, essentially, that because the petitioner had withdrawn the § 3145(b) bond motion, in light of the non-discretionary § 3164(c) immediate release, the district court was denied the chance to hold a hearing. In other words, because the district court *could* have held a hearing, all the time was tolled according to § 3161(h)(1)(D) and the protections of § 3161(h)(1)(H) do not apply. However, this concept does not actually exist within the STA and it completely swallows (h)(1)(H)'s protections, not to mention the very purpose of the STA.

Several other Courts of Appeals have addressed the issue in opposition to how the 6th Circuit ruled.

> "It goes without saying, however, that a district court may not simply ignore a motion . . . and thereby render excludable all periods of delay."

United States v. Williams, 557 F.3d 943, 953 (8th Cir 2009) citing *United States v. Hall*, 181 F.3d 1057, 1061 n.1 (9th Cir 1999). The 8th Circuit is wrong about one thing, apparently it *does* have to actually be said, to the chagrin of all. The 1st Circuit is on point:

> "The STA makes no provision for what the district court did here: not decide the motion for 124 days and then retroactively seek to explain the lack of prompt disposition by saying it needed additional filings[.]"

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[10] Besides the fact that the district court did not hold a hearing for the much more complicated suppression motion in which they *sua sponte*, without fair notice, raised inevitable discovery, the court later said on having a bond motion hearing when requested by Adams in 2023: "Sir, let me just say, it is not clear under the law that you are entitled to a subsequent hearing on a challenge for *de novo* review to the District Judge. In other words, it's not clear that you get a do-over with regard to the hearing. What's clear is that you get -- you can request review . . . but it's not clear that you get to supplement the record or get a new hearing. In fact, the law doesn't seem to support that at all . . ." (Doc. 85: Pretrial Conf. Trans., PageID# 1163). So, the STA release was denied because the district court "likely" would have had a hearing for the 2021 bond motion that was infinitely pending, but now the district court is saying Adams likely cannot have a hearing for the 2023 bond motion. Standards change depending on who benefits.

United States v. Scott, 270 F.3d 30, 56 (1st Cir 2001). See also *United States v. Williams*, 511 F.3d 1044, 1053 (10th Cir 2007) ("An indefinite continuance of a motion for which no hearing is scheduled is tantamount to an indefinite advisement period."); *United States v. Stephens*, 489 F.3d 647, 657 n.14 (5th Cir 2007) (no tolling of STA clock where district court "never noticed the severance motion for a hearing or otherwise indicated a hearing was required"); *United States v. Johnson*, 29 F.3d 940, 943-945 (5th Cir 1994) (for motions without a hearing or never ruled upon, "we hold, as a matter of law, that a motion should be considered under advisement for Speedy Trial Act purposes on the day the last paper concerning the motion is filed with the court."); *United States v. Sutter*, 340 F.3d 1022, 1031 (9th Cir 2003) ("[R]ecognizing a motion as pending indefinitely although no hearing is even scheduled is in tension with *Henderson*."); *United States v. Gambino*, 59 F.3d 353, 359 (2nd Cir 1995) (Indefinitely pending motion, "in effect [has been] tabled," and cannot toll STA under (h)(1)([H]), "obviously were we to so hold, perpetual postponements would become routine in every case where a defendant seeks an evidentiary hearing."); *United States v. Jones*, 601 F.3d 1247, 1256 n.2 (11th Cir 2010) ("Here . . . the district court gave no indication that it needed additional information from the parties, that any evidence was missing, or that a hearing would facilitate resolution of [the motion]," holding that such time does not toll the STA clock.)

It appears that only the 6th Circuit and the 4th Circuit hold contrary positions to the majority. Although the 4th is not exactly on point in *United States v. Riley*, 991 F.2d 120, 122-124 (4th Cir 1993) (all time excluded when a suppression motion was tabled until trial) but *cf. United States v. Bush*, 404 F.3d 263, 272-274 (4th Cir 2005) (defendant requested hearing, hearing was offered but refused, then (h)(1)(D) tolls time until offering was affirmatively declined and after (h)(1)(H) applies).

Besides the extraordinarily unfair tolling of time for ignoring the safeguard of the prompt bond determination specifically, the Court of Appeals for the Sixth Circuit is in opposition to the majority of the appellate courts as to allowing the protection of (h)(1)(H)'s 30 day under advisement time to be bypassed when there is never a hearing held for any

pretrial motion.[11] This grave injustice represents an issue that deserves to be heard by this Court as it could affect most cases where pretrial motions might be filed.

The Decision conflicts with 10 Courts of Appeals as to allowing "Ends of Justice" Continuances without contemporary Case Specific Facts

The second Speedy Trial Act avoidance issue is perhaps even more grave than the last. Despite that Congress expected the (h)(7)(A) "ends of justice" continuances to be "rarely used,"[12] the actual practice is that almost *every* routine hearing, ruling, and conference is accompanied by an "ends of justice" *pro forma* continuance that usually is only accompanied by canned reasons repeated every time, or in the instant case, usually no reason at all. The two challenged (h)(7)(A) continuances by the petitioner are first, one made by the magistrate *sua sponte* for "pretrial motion preparation" and second, for no reason listed but when answering the STA release motion, the reason provided was for the benefit of the defendant and his counsel to strategize.[13] Basically, these *pro forma* continuances are entered
automatically like some kind of speedy trial avoidance robot, and then once challenged they are attempted to be justified. There cannot fairly or honestly be justification for these "rare" continuances if the reasons aren't put on the record at the same time as the continuance is granted but certainly the reason, even if provided later, must be fairly supported by the continuance's contemporary record.[14]

The problem with both of these continuances is that balancing of factors requires contemporary cases specific facts to support the balancing required by the STA. If there are no facts on the record, written or oral, to support the findings, then what exactly is a court balancing when making the findings? The "rarely used" (h)(7)(A) continuances are instead made at every turn, usually without a party asking for one and usually without

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[11] In 2008 the STA was amended and although none of the pertinent parts changed, they did change their designation. Paragraph (h)(8) became (h)(7), subparagraph (h)(1)(F) became (h)(1)(D), and subparagraph (h)(1)(J) became (h)(1)(H).

[12] S. Rep. No. 1021, 93d Cong., 2d Sess. 41 (1974)

[13] The second challenged continuance was for 15 days but was also excluded by the district court because it was during the 11 months the bond motion above was pending. Unless the 86 days for (h)(1)(H) while the suppression and bond motion were pending are non-excludable, then this time would be excluded by (h)(1)(D) rather than (h)(7)(A). Otherwise, it is countable.

[14] Petitioner regularly objects to "ends of justice" continuances and is regularly overruled. The district court enters the continuances on the petitioner's behalf even when the petitioner denies wanting them.

any case-specific facts to support the findings. This misuse of the "ends of justice" (h)(7)(A) continuances effectively makes the Constitutional right to a speedy trial, a dead letter.[15] STA violations have become increasingly more difficult to get, even for long periods of time, and courts claim that without a STA violation, the Sixth Amendment will not be violated.[16] In the instant case, the district court has made all but one of the continuances on its own initiative, two of them over the objection of the petitioner. In one instance, at a hearing on 3/16/2023, it was actually a court employee who "moved" for the (h)(7)(A) continuance with a whisper to the district judge.[17] Not once has the government represented the public's interests in a speedy trial, nor even questioned why such continuances were needed.

This Court in *Bloate v. United States*, 559 U.S. 196 (2010), held that pretrial motion preparation could not be automatically excluded. But the Court mentioned that such time could be tolled with an (h)(7)(A) continuance. The district court, affirmed by the 6th Circuit, has taken the Supreme Court to mean that all that is required then to toll all the time of a trial starting from arraignment is to enter a rote (h)(7)(A) continuance at every turn, without ever any actual balancing whatsoever. This decision instead respects form over substance. So long as the "ends of justice" language is used, then the instant ruling allows the time to be excluded, even if it wasn't "necessary." 18 USC 3161(h)(7). This isn't the first time that the 6th Circuit has held as much. In *United States v. White*, 920 F.3d 1109, 1117 (6th Cir 2019), the 6th Circuit followed *United States v. Andrews*, 695 F.3d 390, 396 (6th Cir 2012) ("We have previously affirmed a district court's ends-of-justice

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[15] This could probably be easily quantified by comparing the average time of trials for cases now as compared to 30 years ago. The "worst case scenario" of 90 days maximum until trial peddled by the sponsors of the BRA in the Senate for people in pretrial detention is rarely, if ever, achieved. The petitioner would provide statistics but because he himself is in oppressive pretrial detention and cannot even get books delivered, let alone research done, it is not available at this time.

[16] Despite the adoption by this Court that pretrial motions are automatically excluded between filing and hearing even when the delay is not reasonable, since that ruling, *Henderson*, 476 U.S. at 326-327, the unreasonable time can be excluded under the STA but should count against the Sixth Amendment speedy trial right. Alas, that is not true in practice. The 6th Circuit reasons, the "resolution of [a defendant's] Speedy Trial Act claim eliminates the necessity of reaching the constitutional claim because it will be an unusual case in which the time limits of the [STA] have been met but the Sixth Amendment right to speedy trial has violated." *Chambers v. United States*, 2021 U.S. App. Lexis 21101 at *6 n.4 (6th Cir 2021) (citations omitted). Resultantly, unreasonable delays won't qualify as a Sixth Amendment violation and the STA actually undercuts the constitutional right.

[17] Adams objected to that continuance requested by the courtroom deputy and was overruled. (Doc. 85: PTC Hrg., PageID# 1173-1175).

continuance when it simply held that 'the ends of justice served outweigh the best interest of the public and the defendant in a speedy trial.'") No contemporary case-specific facts, or even a reason, is required.

The result is that the speedy trial right has little to do with actual time elapsed or even any reason for a delay, but rather the "right" is determined only on if the proper *pro forma* rote recitation of the STA has been entered into the record. It doesn't even have to be entered at the time of the continuance, but can be entered after the defendant asserts his speedy trial right and asks for dismissal or release, resulting in that 100% of time can be excluded retroactively after a STA motion is filed. Allowing this completely undermines the detailed and comprehensive statue designed by Congress to *protect* speedy trial rights. In practice this just allows the speedy trial right to be ignored without a second thought.

The lack of contemporary case-specific facts, particularly for pretrial motion preparation, has been opposed in the following Courts of Appeals: *United States v. Heurte-Sandoval*, 668 F.3d 1, 2-5 (1st Cir 2011) (The trial judge "couched his order in the language of § 3161(h)(7)" but it "omitted the necessary case-specific analysis" and pretrial motion preparation "may only be excluded pursuant to the ends-of-justice provision, provided that the trial court makes the appropriate case-specific finding"); *United States v. Oberoi*, 379 Fed. Appx. 87 (2nd Cir 2010) (order) (unpub'd) ("Time spent preparing motions . . . may be excluded only if a court makes case-specific findings under 18 USC § 3161(h)(7)."); *United States v. Reese*, 917 F.3d 177, 181-184 (3rd Cir 2019) (A district court must provide "the factual basis for an ends of justice continuance," without that factual basis "on the record when the continuance is ordered" the delay cannot be excluded even if defendant did not object.); *United States v. Henry*, 538 F.3d 300, 302-306 (4th Cir 2008) (the record failed to support the contemporaneous need of trial preparation, the reason the trial court put on the record to justify the § 3161(h)([7])(A) continuance, so time was not excluded); *United States v. Blackwell*, 12 F.3d 44, 48 (5th Cir 1994) ("absence of contemporaneous, articulated on-the-record findings" requires time to not be excluded when trial court reset trial date through minute order); *United States v. O'Connor*, 656 F.3d 630, 638 (7th Cir 2011) ("[D]elay resulting from the preparation of pretrial motions may be excluded under the ends-of-justice provision, but continuances granted for this

purpose must be supported by case-specific findings"); *United States v. Suarez-Perez*, 484 F.3d 537, 540-542 (8th Cir 2007) (district court entered *nunc pro tunc* order under (h)(7)(A) ends of justice language citing the need for defense preparation, but the time could not be excluded, because *inter alia*, the record did not show that the defense requested additional time until later and "no factual basis exists" to support the need); *United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir 1984) ("ends of justice continuances are not meant to be a general exclusion for every delay no matter what the source, but were to be based upon specific underlying factual circumstance"); *United States v. Doran*, 882 F.2d 1511, 1515 (10th Cir 1989) (The "rarely used" (h)([7])(A) continuance must state "the reasons why it believes granting the continuance strikes the proper balance between the ends of justice" and the interests of society and defendant. "Failure to address issues on the record creates unnecessary risk of granting continuances for the wrong purposes, and encourages overuse of this narrow exception."); *United States v. Williams*, 197 F.3d 1091, 1093-95 (11th Cir 1999) (20 days continued to prepare pretrial motions immediately after arraignment not excludable, because, among other reasons, "this case was hardly extraordinary" and the delay was "not specifically tailored to the needs of the case.")

The 6th Circuit stands alone in allowing (h)(7)(A) continuances to be entered without a contemporary case-specific factual basis on the record. If this ruling is allowed to stand then the speedy trial right will exist no more.

> "The Senate Judiciary Committee expressly rejected as 'unreasonable' the suggestion that 'all time consumed by motions practice, from preparation through their disposition, should be excluded,' finding instead that 'in routine cases, preparation time should not be excluded[.]"

Henderson, 476 U.S. at 337 (White, J. dissenting). There is no reason why arraignment continuances should exist in routine cases. This is especially true when the delay doesn't just affect the delay of the trial, but while the defendant is rotting in soul-destroying, oppressive pretrial detention, especially when innocent.

What might be reasonable delay in terms of dismissal "might become unreasonable when a defendant, incarcerated for more than ninety days without a chance to make bail." *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir 1986). The district court in this case has entered a rote ends of justice continuance seven times on its own accord (one of those by the court deputy). The government has asked for extensions or long response

times another six times. Without some standards for the Speedy Trial Act, the right simply doesn't exist in practice.

The legislative history of the 1979 amendment incorporating § 3161(h)'s excludable delays into § 3164 makes clear the Congressional concern with excessive involuntary prolongation of pretrial detention.

> "The Committee points out that this recommendation for making provisions of § 3161(h) specifically applicable to detention and high risk defendants is being offered in a bill which expands those provisions for exclusions and continuances. It is the intention of the committee that courts apply provisions of § 3161(h) to those cases in such a manner as to extend only the bare minimum necessary detention of persons in custody . . ."

H.R. Rep. No. 390, U.S. Code and Admin. News, 96th Congress, 2nd Session p 805, 816.

The Decision disregarding the Party Presentation Principle, absconding from the adversarial system and putting the government and the district court on the same team against a defendant strikes at the very legitimacy of the judiciary.

The party presentation principle is black letter law and it is imperative that federal courts maintain their neutrality in all but exceptional circumstances. However, ever since this Court used "supple, not ironclad" term of art, in *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020), some federal courts have considered that inquisitorial courts are now authorized. In the instant case, the district court twice abandoned its neutrality to litigate on behalf of the government: (1) in raising an affirmative defense of inevitable discovery when the government made an opposing argument in a suppression motion, and (2) by raising that an infinitely pending bond motion tolls the speedy trial clock, both without fair notice.

While this Court has ruled against party presentation principle violations multiple times, there really hasn't been a clear and cogent guide to when the exceptions apply. The petitioner has identified four general categories in which exceptions have fallen under: (1) institutional issues of the judiciary that go beyond the parties,[18] (2) plain

[18] For example, creation of new federal common law rule, *Kamen v. Kemper Fin. Serv. Inc.*, 500 U.S. 90, 99 (1991), facial invalidation of statues when not requested by parties, *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020), or invalidation of statutes based on truncated law because of incorrect stipulation of parties, *U.S. Nat'l Bank of Oregon v. Ind. Ins. Ag. of Am., Inc.*, 508 U.S. 437 (1993).

errors,[19] (3) federal state comity issues,[20] and (4) to defend the substantive, procedural or constitutional rights of a defendant, especially when *pro se*. While obviously the nature of the exceptions of such a wide-reaching rule cannot be conditioned into a neat *per se* rule, but some guidance is necessary before, over time due to the nature of prosecutorial and court power creep, our adversarial system no longer exists.

In the instant case, an affirmative defense, the government had a burden of proving and getting time excluded, was raised *sua sponte* by the district court without fair notice. The Sixth Circuit affirmed with nary a word about the forfeited (or waived) argument and the standard of review set forth for forfeited (or waived) arguments, even though it is clear that the district court was acting on its own initiative in their published order. The ruling thus is setting precedent that equated a district court raising an argument, without fair notice, that the government forfeited, as if the government and the federal courts are on the same team in opposition to defendants. (See 22-3879, Doc. 13: Def. Br., at 22-26).

The 6th Circuit has both affirmed the district court acting as its own board of legal inquiry, but also the appellate court itself. In *United States v. Robertson*, 260 F.3d 500, 503 (6th Cir 2001), through a chain of citations akin to the child's game of telephone, the 6th Circuit transformed the proper idea that an appellate court can affirm on any argument properly presented in the lower court into the improper idea that they could affirm a "district court's decision that the Speedy Trial Act was not violated . . . though on grounds different from those presented by the government to the district court and on which the district court relied."[21] Therefore, criminal defendants have to defeat all the arguments presented by the government but then also imagine all the arguments a district court and an appellate court might raise, all without fair notice. The government

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[19] Fed. R. Crim. P. Rule 52(b); a simple math error in *Day v. McDonough*, 547 U.S. 198, 202 (2006).

[20] Such as avoiding a *per se* waiver of statute of limitations in state *habeas corpus* cases. *Wood v. Milyard*, 566 U.S. 463, 470 (2012), *Day v. McDonough*.

[21] Compare *Robertson* with *United States v. Allen*, 106 F.3d 695, 700 n.4 (6th Cir 1997) (stating that "we may affirm on any grounds supported by the record, even though on different grounds relied upon the by the district court."); *Robertson*, 260 F.3d at 503; with chain of citations back to *Davis v. United States*, 589 F.2d 446, 448 n.3 (9th Cir 1979) ("Even if we disagree with the district judge's reasons, we may nevertheless affirm his disposition on any ground squarely presented on the record."); with the source, being *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), where the district court denied the use of an affidavit from the government but on appeal the appellate court did not allow use of it as an alternative affirmation since the government didn't cross appeal, the Court remanded the case directing the appellate court to consider the affidavit since it was properly presented below. Jaffke still requires the government to present the argument in the district court, thus showing how the 6th Circuit's later incantation is incorrect.

argued that fair notice is not required and the appellate court did not contradict them. "The right to be heard has little reality or worth unless one is informed" that a decision is contemplated. *Burns v. United States*, 501 U.S. 129, 136 (1991). "No one is in a position to guess when or on what grounds a district court might depart." *Id.* at 137.

In *Taylor v. United States*, 2022 U.S. App. Lexis 28539 (6th Cir 2022), the petitioner's Fed. Rules. Civ. Proc. Rule 60(b) motion was denied *sua sponte* by the district court for not making the 28-day limitations of FRCP Rule 59(e). Relying on *Sineneng-Smith*'s "supple, not ironclad" term of art and that *Wood v. Milyard*, allowed "affirmative defenses" can be raised on a district court's "own initiative when the government has not strategically withheld the . . . defense or chosen to relinquish it[.]" *Taylor*, at *5. However, this is not the extraordinary circumstances of the math error in *Day v. McDonough*, 547 U.S. 198, 201 (2006), which was placed in a federal state comity framework that that neither *Taylor* or the instant case involves. As long as the government doesn't flat out say they are abandoning an argument, the 6th Circuit doesn't care that they forfeited said argument. "[O]ur courts extend no charity to defendants who fail to raise an issue, so why should courts sua sponte raise an issue that the government flatly did not raise[?]" United States v. Waters, 64 F.4th 199, 206 (4th Cir 2023) (Wynn, J. concurring).

The question of whether an affirmative defense is waived, Wood v. Milyard, 566 U.S. 463, 460 (2012) ("An affirmative defense, once forfeited, is excluded from the case and, as a rule, cannot be asserted on appeal."), or even just forfeited and can only be raised on appeal under plain error review, and whether criminal defendants are not entitled to fair notice as the government claims, are gravely important questions that have wide consequences and thus this Court should approve plenary review.

Conclusion

The speedy trial right and the adversarial system are at risk; therefore, the petitioner respectfully request that certiorari be approved.

Respectfully submitted,

/s/ 

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