

NO. \_\_\_\_\_

In The

# Supreme Court of the United States

TOMMIE DOWARD WEATHERS, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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## PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

This case concerns the meaning of the word “fault” in 18 U.S.C. § 3164(c), which says that if a defendant is not brought to trial within 90 days following his detention, and the delay is not the “*fault* of the accused or his counsel...,” the defendant must be released from confinement.

Petitioner, Tommie Doward Weathers (“Weathers”), was held in pretrial confinement for 144 nonexcludable Speedy Trial Act (“STA”) days. Nevertheless, the district court, affirmed by summary order of the Fourth Circuit Court of Appeals, denied Weathers’ motion for release under § 6134(c), concluding Weathers was “partially” at fault for some undetermined number of the 144 nonexcludable STA days.

The issue presented is the meaning of “fault” in STA § 6134(c), and the proper test for ascribing “fault” to a confined defendant or their attorney in a motion for the defendant’s release under STA § 6134(c).

## **PARTIES AND RELATED PROCEEDINGS**

Weathers is the sole defendant in *United States v. Tommie Doward Weathers, Jr.*, criminal action number 2:22-cr-00192-DCN, pending in the District Court for the District of South Carolina. Weathers was the Appellant in the interlocutory appeal of the district court's denial of his motion for release under § 3164(c) to the United States Court of Appeals for the Fourth Circuit, (appeal number 23-4074).

The United States is the Plaintiff in the pending district court criminal case and was the Appellee in the interlocutory appeal to the Fourth Circuit.

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## **OPINIONS BELOW**

The district court's denial of Weather's motion for release is attached at Petition Appendix pg. A3. The Fourth Circuit's affirmance of the district court's denial of Weathers' motion is attached at Petition Appendix pg. A1, and the Fourth Circuit's denial of Weather's Supplemental Petition for Rehearing is attached at Petition Appendix pg. A14.

## **JURISDICTION**

This Petition is filed within ninety (90) days of the May 23, 2023, Fourth Circuit denial of Weathers' Petition for Rehearing. This Court has jurisdiction under 28 U.S.C. § 1254.

## **STATUTORY PROVISION INVOLVED**

Title 18, United States Code, section 3164 provides,

(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 insure that he shall appear at trial as required.

### **PROCEDURAL HISTORY**

The district court denied Weathers' motion for release by order entered January 31, 2023. Weathers filed an interlocutory appeal of that order on January 31, 2023.

On March 13, 2023, the Fourth Circuit denied the government's motion to dismiss Weathers' appeal, and by summary order affirmed the district court's denial of Weathers' release motion.

On March 28, 2023, Weathers filed a Petition for Rehearing or Rehearing en banc, which the Fourth Court denied as untimely. Weathers immediately filed a Motion to Reconsider the dismissal of his Petition for Rehearing, sought leave to file his Petition for Rehearing out of time, asked for leave to file a Supplemental Petition for Rehearing, and asked for appointment of substitute appellate counsel. On March 29, 2023, the Fourth Circuit granted Weathers' leave to file his rehearing petition out of time and on April 5, 2023, the court granted Weathers' leave to file a Supplemental Petition for Rehearing and agreed to appoint substitute appellate counsel.

On May 23, 2023, the Fourth Circuit denied Weathers' Petition for Rehearing.

## **STATEMENT OF THE CASE**

### **A. STA § 3164; from interim provision to permanent statute.**

When first enacted in 1976, the STA provided a three year “phasing – in” period during which the time allowed to pass between arrest and indictment and indictment and trial gradually decreased until permanent time limits were reached on July 1, 1979.

The 1976 version of STA § 3164 provided that until the permanent STA time limits were reached, a 90-day confinement-to-trial “interim time limit” applied to “detained persons who are being held in detention solely because they are awaiting trial.” The “interim” STA § 3164(c) provided that failure to begin trial within the 90-day period, “through no fault of the accused or his counsel....” would result in the mandatory release of the defendant from custody. This “interim” time limitation was inserted in the STA “to assure priority” for cases involving defendants who required detention pending trial. *United States v. Worthy*, 699 F.3d 661 (1<sup>st</sup> Cir. 2012).

The 1976 STA did not say whether the time exclusions under § 3161(h), applicable to the arrest-to-indictment and indictment-to-trial time periods, were also to be excluded from the § 3164 90-day “interim” confinement-to-trial time period. This resulted in a circuit split. *Compare United States v. Corley*, 548 F.2d 1043 (D.C. Cir. 1976) (the § 3161(h) time period exclusions were applicable) and *United States v. Tirasso*, 532 F.2d 1289 (9<sup>th</sup> Cir. 1976), and *United States v. Krohn*,

560 F.2d 294 (7<sup>th</sup> Cir. 1977) (the § 3161(b) time period exclusions were not applicable.)

In 1979, Congress sided with *Corley*'s view and amended § 3164. Congress renamed this section from its original "Interim limits" title to "Persons detained or designated as being high risk," and amended STA § 3164(b) to say that the "periods of delay enumerated in § 3161(h) are excluded in computing the time limitations specified in..." § 3164(c). However, STA § 3164(c)'s "through no fault of the accused or his counsel" provision remained unchanged and has remained so to this day.

Accordingly, from 1979 onward, the 90-day confinement-to-trial deadline in the original "interim" STA §§ 3164(b) and (c) requires a detained defendant be brought to trial within 90 nonexcludable STA days or the accused must be released, if failing to begin trial within this 90-day period was not the "fault" of the accused or his lawyer. As a result, and as the First Circuit observed in *Worthy*, "§ 3164, intended originally as a temporary phase-in measure, [has] never meshed perfectly with § 3161, which is evident from the original lack of explicit exclusions in § 3164...", *id.* at 664, the rub being the addition of the explicit § 3161(h) exclusions to the already existing "fault" language of § 3164(c) with no guidance as to how to distinguish between the two.

**B. Weathers' 144 Nonexcludable STA days.**

On March 21, 2022, Weathers made his initial appearance before United States Magistrate Judge Molly H. Cherry under a March 8, 2022, single defendant federal indictment charging him with being a felon in possession of a firearm, (18

U.S.C. § 922(g)(1)), possession with intent to distribute a quantity of fentanyl, (21 U.S.C. § 841(b)(1)(C)) and the use, carrying and possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)(A)(i)). These offenses are alleged to have occurred on October 24, 2021, and, based on a motion to suppress filed by Weathers, result from a single traffic stop on the day alleged in the indictment. (ECF 43).

At Weathers' initial appearance, the government moved for detention, and Weathers waived his detention hearing without prejudice. On October 24, 2022, Weathers filed a pro se motion for pretrial release under STA § 3164(c). Weathers' counsel filed a supplement to the pro se release motion on November 21, 2022, the government responded on November 29, 2022, and Weathers replied to the government's response on December 5, 2022.

On December 20, 2022, the district court heard Weathers' motion for release, asked for supplemental briefing, and on January 31, 2023, entered an order denying Weathers' motion.

Since his March 21, 2022, initial appearance, Weathers has been held continuously in pretrial confinement. The district court concluded, with the concurrence of Weathers and the government, that from his initial appearance, through his suppression motion filing and the entry of an "ends-of-justice" continuance order, Weathers accumulated 144 nonexcludable STA days based on the following timeline:

Date	Event
March 21, 2022	Weathers makes his initial appearance before Magistrate Judge Cherry. ECF No. 13.
<b>57</b> non-excludable days elapse	
May 17, 2022	<ul style="list-style-type: none"> <li>• Weathers files a motion to appoint new counsel, ECF No. 28, and the clock stops, 18 U.S.C. § 3161(h)(1)(D).</li> <li>• Weathers' motion is under advisement for <b>three</b> excludable days. 18 U.S.C. § 3161(h)(1)(H).</li> </ul>
May 20, 2022	The court grants Weathers' motion to appoint counsel, and the clock resumes
<b>32</b> non-excludable days elapse (total: <b>89</b> days)	
June 21, 2022	<ul style="list-style-type: none"> <li>• Weathers files a motion for an order permitting him to use a laptop to review discovery at his detention center, ECF No. 33, and the clock stops, 18 U.S.C. § 3161(h)(1)(D).</li> </ul>
	<ul style="list-style-type: none"> <li>• Weathers' motion is under advisement for one excludable day. 18 U.S.C. § 3161(h)(1)(H).</li> </ul>
June 22, 2022	The court grants Weathers' motion to review discovery, and the clock resumes
<b>6</b> non-excludable days elapse (total: <b>95</b> days)	
June 28, 2022	<ul style="list-style-type: none"> <li>• Weathers files a second motion to appoint new counsel, ECF No. 35, and the clock stops, 18 U.S.C. § 3161(h)(1)(D).</li> <li>• Weathers' motion is under advisement for <b>7</b> excludable days. 18 U.S.C. § 3161(h)(1)(H).</li> </ul>
July 5, 2022	The court grants Weathers' second motion to appoint counsel, and the clock resumes
<b>49</b> non-excludable days elapse (total: <b>144</b> days)	

August 23, 2022	<ul style="list-style-type: none"> <li>• Weathers files a motion to suppress, ECF No. 43, and the clock stops.</li> <li>• Additionally, the court grants an ends-of-justice continuance, ECF No. 42, and the order remains in effect, 18 U.S.C. § 3161(h)(7)(A).</li> </ul>
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The district court ruled that even though Weathers had been held in pretrial detention for more than 90 nonexcludable STA days, he was not entitled to release under § 3164(c) as he was “partially ‘at fault’” for an unspecified portion of the 144 nonexcludable STA day delay because Weathers asked for the appointment of substitute counsel.<sup>1</sup>

In so concluding, the district court observed there was “scant caselaw concerning when a failure to commence trial is through the fault of the accused or his counsel....,” and there is a “... a dearth of recent cases that have defined the term ‘fault,’” as used in § 3164(c).

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<sup>1</sup> The district court attempted to find in the alternative, that Weathers was at “fault” under § 3164(c), for 32 days from May 20, 2022, the date the STA clock began to run again following the district court’s ruling on Weathers’ motion to appoint new counsel, until the STA clock stopped on June 21, 2022, when Weathers filed a motion regarding discovery review. First, and again, the district court cannot connect this 32-day period with Weathers’ request for a new trial, and any portion of the 144 nonexcludable day delay in bringing Weathers to trial, because no trial date had been set or continuance motion filed. Second, if there was a concern by the district court regarding adequate time for Weathers’ new counsel to prepare for trial (even though there could not have been because no trial date was set), an “ends of justice” continuance order under § 3161(h)(7)(B)(iv) (“reasonable time necessary for effective preparation....”), could easily have been entered. The district court further attempts an alternative finding by pointing to Weathers’ second motion to appoint new counsel filed June 28, 2022, and granted July 5, 2022. However, this second motion was filed 95 nonexcludable STA days following Weathers confinement and, therefore, cannot salvage the district court’s erroneous ruling.

Citing a 1977 District Court for the District of Maryland case, the district court said “fault” in the § 3164(c) sense “refers to a causal nexus between the delay in commencing trial and the actions of the defendants and their counsel...”

Referring to the “practicalities of the trial-preparation process...” the district court concluded that “[the trial] process was invariably delayed” by Weathers’ new counsel motion. The district court failed, however, to connect the action of Weathers in moving for new appointed counsel, with any part of the 144 nonexcludable STA day delay.

## **ARGUMENT**

### **A. The Court should grant this petition.**

Litigation involving the § 3164 90-day confinement-to-trial mandate, and particularly its subsection (c) requirement that if trial of a detained defendant is not begun within 90 nonexcludable STA days, the defendant must be released, is rare. There is, therefore, little case law on what § 3164(c) “fault” is, or how to calculate its effect on § 3164(c) 90-day confinement-to-trial deadline. However, the rarity of this issue in federal criminal litigation does not mean the rights granted under the STA § 3164(c) are insignificant.

The district court applied a definition of “fault” appearing in a 1977 district court case from the District of Maryland which said that “fault’ in the context of § 3164(c), ... refers to a causal nexus between the delay in beginning trial and the actions of the defendants and their counsel.” However, the district failed to determine the number of days, if any, the motion for the appointment of new

counsel for Weathers contributed to the delay in bringing Weathers to trial. Citing the District of Maryland case, the district court said, "... there is no need to calculate which days are attributable to Weathers and which are not; it only matters that the court cannot say that the delay ... was through no fault of Weathers."

The district court did not connect Weathers' request to appoint new counsel with any portion of the 144-day nonexcludable STA day delay. There was no connection because no trial date had been set or even discussed, and all Weathers' motions or other excludable events or actions under the STA were taken into account in calculating the 144 nonexcludable STA day delay. The district court ruling relied on the purely speculative notion that Weathers' newly appointed counsel could not be ready for trial on an equally speculative (because it was never set) trial date.

Since 1979, the time exclusions under STA § 3161(h) have applied to the 90-day STA § 3164(c) clock. However, the STA provides no guidance on how courts are to determine the effect a finding of fault on the part of a confined accused, or his lawyer, should have on the § 3164(c) 90-day STA confinement-to-trial deadline.

The Maryland District Court's "causal nexus" test makes sense and comports with the plain meaning, structure, and purpose of the STA to provide specific time limits for events in federal criminal cases, while excluding from the calculation of the "STA Clock" days which fall under listed categories of events, as well as providing a catch-all "ends of justice" exclusion.

However, to compound the STA’s silence on the effect of “fault” by an accused or counsel under the 90-day confinement-to-trial deadline, there is a nearly equal silence from the federal courts on this issue, and the error of the district court, affirmed by the Fourth Circuit, illustrates this lack of guidance, and shows the need for this Court to take up and decide this question.

B. The cases, or lack thereof, addressing the issue presented.

In its ruling, the district court relied on *United States v. Howard*, 440 F.Supp. 1106, 1109 (D. Md. 1977), *aff’d* 590 F.2d 564 (4<sup>th</sup> Cir. 1979), which held that “fault” under § 3164(c) “refers to a causal nexus between the delay in commencing trial and the actions of the defendants and their counsel.” The *Howard* district court had before it Howard’s motion to dismiss the indictment, or for his release from custody pending trial. The district court, apparently formulating the “causal nexus” test without citation of authority, found “fault” by Howard’s counsel who, because of his schedule, asked for a trial to date after November 10. The district court’s only available trial date after November 10, was November 14, which was after the 90-day confinement-to-trial deadline. Accordingly, the district court found a causal nexus between the request of Howard’s counsel for a trial date after November 10, where the only trial date available to accommodate that request fell on a date after the end of the 90-day confinement-to-trial deadline, and denied Howard’s release motion.

In affirming the *Howard* district court, the Fourth Circuit did not explicitly mention the “fault” test used by the district court, saying only that Howard’s own

attorney requested a trial date 91 days after Howard was first incarcerated, thus “faulting” Howard’s attorney for “partially” causing the delay. Howard did not take an interlocutory appeal from the district court’s denial of his release motion (Howard first appealed to the Fourth Circuit following his conviction), so the Fourth Circuit further concluded that Howard could point to no prejudice from the district court’s denial of his release motion. *United States v. Howard*, 590 F.2d 564, 568 (4<sup>th</sup> Cir. 1979). Finally, given its conclusions regarding Howard’s attorney’s request for a trial date beyond the 90-day deadline and the lack of prejudice, the Fourth Circuit said it did not have to decide whether Howard’s 10-day hospitalization following his arrest was excludable time under § 3161(h), there being then the circuit split as to whether the excludable time periods provided by § 3161(h) applied to the “interim provisions” of § 3164(c).<sup>2</sup>

The only other case mentioning the *Howard* district court’s § 3164(c) fault test is *United States v. Cafaro*, 1988 U.S. Dist. LEXIS 14032 (S.D.N.Y. Dec. 14, 1988), where the district court, citing *Howard*, concluded that without Cafaro’s cooperation agreement with the government, negotiated at his insistence (and which Cafaro ultimately renounced), Cafaro and his co-defendants would have gone to trial on April 6, 1987, a trial commencement date which apparently would not have violated the § 3164(c), 90 day nonexcludable STA days deadline. *Id.* at \* 45.

While *Howard’s* “fault” test appears to comport with Congress’ intent in using the word “fault” in § 3164(c), Weathers respectfully submits it nevertheless lacks a

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<sup>2</sup> Both the district court and the Fourth Circuit *Howard* opinions were entered before the enactment of the 1979 STA amendments.

crucial step required to carry out that intent to protect the crucial and over-arching right of a confined accused under § 3164(c) to be brought to trial within 90 days of his detention or be released pending trial because there is no requirement that a district court connect the supposed “fault” of the accused or his client with the number of days delay resulting from that “fault.” This lack of connection between fault and days resulting from that fault also makes review of district court § 3164(c) “fault” decisions difficult if not impossible. Weathers submits, therefore, that the *Howard* causal connection test must include a determination that the act or acts of the accused or his counsel are connected to a specific number of days delay in bringing the accused to trial.

The *Howard* and *Cafaro* courts could at least point to a specific connection between an act or acts of the defendant or his counsel, and the trial delay. Here, however, the district court’s conclusion, affirmed by the Fourth Circuit, that Weathers’ motion to appoint substitute counsel was “fault” under 3164(c), is dangerously untethered to any “causal,” factual connection or nexus to the delay beyond the 90-day deadline. In contrast to the acts of the defendants and their counsel in *Howard* and *Carfarro*, Weathers’ motion to appoint new counsel cannot be connected to any delay in bringing Weathers to trial because the district court set no trial date, and held no status or pretrial conferences, or like proceedings, to discuss trial dates or trial schedules. Neither Weathers nor his counsel sought a continuance, asked about trial dates, suggested trial dates whether beyond the 90-day deadline or not, or did anything to push trial past the 90 nonexcludable STA

day deadline. Neither Weathers nor his counsel should be “faulted” under § 3164(c) for the district court’s failure to manage its docket.

The district court said the trial preparation “process was invariably delayed....” upon the filing of Weathers’ motion for new counsel. But there can be no connection between Weathers’ motion for new counsel and a trial delay when no trial date was ever set. Whether Weathers’ new counsel could have been ready to try this single defendant, three count indictment based on the events of a single day in October 2021,<sup>3</sup> is purely speculative.

No other court, either district or circuit, has applied the *Howard* causal nexus test. Courts have, however, occasionally ruled on § 3164(c) release motions, finding “fault” with either the moving defendant or his counsel, but on each occasion pointing to a specific period that either the defendant or his counsel’s actions or inactions caused the delay past the nonexcludable 90-day STA deadline.

In *United States v. Martinez*, 538 F.2d 921 (1<sup>st</sup> Cir. 1976), Mr. Justice Clark, sitting by designation, held there to be no violation of the 90-day confinement-to-trial deadline in the then new and interim § 3164(c). The defendants’ filed nine motions beyond the motion filing deadline and then filed a tenth motion on the 91<sup>st</sup> day following the confinement of the defendants and while the first eight motions were being heard. The First Circuit concluded the late filed motions caused the delay, and thus the “fault” of the defendants or their counsel.

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<sup>3</sup> Weathers’ suppression motion (ECF 43) seeks to suppress any evidence seized during the traffic stop on October 24, 2021, the date the three offenses alleged in the indictment allegedly occurred.

In *United States v. Gates*, 935 F.2d 187 (11<sup>th</sup> Cir. 1991), 95 nonexcludable STA days passed between Gates' arrest and the day before his attorney moved for a continuance. However, although this event did not appear in the docket entries, before the end of the 90 nonexcludable STA day deadline, Gates' attorney suffered a serious head injury, and informed the court and the government that he would ask for a continuance. The Eleventh Circuit observed that defense counsel was not "blameworthy" for his own injury, but that the injury "tolled the running of the ninety-day period by [the] affirmative representations [of defense counsel to the government and the court], made [regarding the filing of a continuance motion]...." before the running of the § 3164 deadline. *Id.*

In *United States v. Morin*, 308 F.Supp. 2d 835, 845 n. 6 (M.D. Tenn. 2003), the court found that the delay between the time of Morin's arraignment and his moving to dismiss was the defendant's "fault" under § 3164(c), because this delay was due to Morin's "conflicted or non-conflicted counsel."

In *United States v. Lev Aslan Dermen*, 2019 U.S. App. LEXIS 17714 (10<sup>th</sup> Cir. June 13, 2019), the court found four periods of time to be excluded under the 90-day nonexcludable confinement to trial deadline – (1) August 24, 2018 to December 5, 2018, because the case was found to be complex and Dermen did not object to the trial date continuances granted during that period, (2) the time between December 5, 2018 and February 11, 2019, because the defendant "conced[ed] (sic) to the exclusion of time until December 5, 2018," waiving his right to a trial within 70 days of that date, (3) between February 11, 2019 and May 13 2019, because the

district court continued the February trial date to accommodate a co-defendant's attorney's trial schedule; and (4) the time between May 13, 2019 and July 29, 2019, because the district court continued the May trial date to give counsel for two new codefendants adequate time to prepare for trial and to accommodate Dermen's own counsel's trial schedule. *Id.* at \* 17 – 18.

In *United States v. Tomkins*, No. 07-cr-227, 2011 U.S. Dist. LEXIS 117857 \* 30 (N. D. Ill. Oct. 12, 2011), the district court conflated § 3164(c) fault with excludable time under § 3161(h). In doing so, the district court cited *United States v. Lemon*, 550 F.2d 467 (9<sup>th</sup> Cir. 1977) for the proposition that a defendant's continuance motion is fault under § 3164(c), which may have been a correct statement of the law in 1977, before the § 3161(h)-time exclusions were made explicitly applicable to § 3164(c) in 1979.

The courts in *Martinez*, *Gates*, *Morin*, *Dermen* and *Tomkins*, while not referring specifically to the *Howard* causal nexus test, each pointed to an act or inaction by the defendant or his attorney which resulted in a delay of a specific, articulable period of time.

This analysis comports with the structure of the STA and specifically with the excludable time periods set out in § 3161(h). The STA requires courts to “count time” under § 3161(h), i.e, be able to articulate the periods of time excluded under the 70-day indictment-to-trial clock. While the “no fault” language of § 3164(c) “does not limit the available § 3161(h) time exclusions,” *Dermen* at \*17, citing *United States v. Theron*, 782 F.2d 1510, 1515 – 16 (10<sup>th</sup> Cir. 1986), the § 3164(c)

“fault” analysis should be undertaken in like manner with courts required to make specific factual and articulable findings of the time attributable to the “fault” of a defendant or his counsel in delaying trial beyond the 90-day nonexcludable confinement-to-trial deadline.

The district court in this instance, citing the district court in *Howard*, said there was “no need to calculate which days are attributable to” the “fault” the district court found in Weathers’ motion for a new attorney. Weathers respectfully submits this is a misreading of *Howard* and the few other § 3164(c) “fault” cases, some of which are cited above, and shows the need for this Court to take this issue up and provide the lower courts with the guidance necessary to apply the § 3164(c)’s, confinement-to-trial 90-day nonexcludable STA day deadline uniformly over the federal criminal justice system.

### **CONCLUSION**

For the reasons set forth for about, Weathers respectfully requests the Court grant this Petition.

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