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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

DAVID ALLEN
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner has previously been granted leave to proceed *in forma pauperis* in the U.S. District Court and U.S. Court of Appeals for the Sixth Circuit.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding. The appointment was made under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

Respectfully submitted,



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Dated: **April 29, 2024**

QUESTIONS PRESENTED

I.

Whether the broad rule adopted by the Sixth Circuit, that the Commerce Clause gives congress the power to regulate all conduct incidentally using a cell phone, is contrary to its original meaning, was adopted without reconciling the Supreme Court's most relevant precedent, and is contrary to the substantial effects test?

- a. Whether the original meaning of the Commerce Clause encompasses regulation of local violent crime?
- b. Whether the rule of the Sixth Circuit decisions in *Weathers* and *Windham* were adopted without consideration of recent Supreme Court decisions?

II.

Whether the Sixth Circuit erred in concluding that Mr. Allen did not aggressively pursue his right to a speedy trial under both the Speedy Trial Act the Sixth Amendment, and that he was not prejudiced by the nearly four-year delay in scheduling his trial?

- a. Whether Mr. Allen's Sixth Amendment right to a speedy trial was violated by the nearly four-year delay in scheduling his trial?
- b. Whether Mr. Allen's statutory right to a speedy trial under 18 U.S.C. § 3161(c)(1), the Speedy Trial Act, was violated by the nearly four-year delay in scheduling his trial?

LIST OF PARTIES

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

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Petitioner **DAVID ALLEN**, respectfully petitions that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's opinion affirming the judgment of the U. S. District Court, is published at *United States v. David Allen*, 86 F.4th 295 (6th Cir, 2023). Rehearing *en banc* was denied on February 15, 2024, 2024 WL 1043516 (6th Cir. 2024). These decisions and other relevant orders of the district court are reproduced in the Appendix to this petition.

JURISDICTION OF THE SUPREME COURT

The U.S. Sixth Circuit Court of Appeals issued its published opinion on November 9, 2023. (App. A, 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article 1, § 8, clause 3

The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”

U.S. Constitution, Am VI:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]”

Section 1958 of Title 18 of the United States Code

18 U.S.C. § 1958(a) Conspiracy to Use and Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire;

“Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$250,000, or both.”

Section 3161(c) (1 of Title 18 of the United States Code

18 U.S.C. § 3161(c)(1), the Speedy Trial Act

“In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs...”

STATEMENT OF THE CASE

On December 23, 2016, Dwight Williams contacted Michael Davis and offered to hire him to kill Deangelo Pippen. Davis accepted and enlisted Christopher Davis to assist him and David Allen to be their driver. The Davis's rented a GMC Terrain vehicle in Detroit, Michigan, to use for the trip across the state to Norton Shores, Michigan, to commit the murder of Pippen. On December 29, 2016, Mr. Allen drove the Davis's, to Pippen's residence and waited for him to exit.

As they waited, Michael Davis communicated with Williams, by cell phone. Pippen eventually exited his residence, drove away, and was followed by the three in the Terrain until they arrived at a stoplight. Allen pulled the Terrain alongside Pippen's vehicle, at time which both Davis's fired multiple gunshots into Pippin's vehicle, killing him. The trio then returned to Detroit. Williams paid Michael Davis, who in-turn paid a share to Christopher Davis and David Allen.

On February 7, 2018, Mr. Allen, Dwight Williams, Christopher Davis and Michael Davis were charged in a sealed four-count indictment, filed in the United States District Court, Eastern District of Michigan, with Conspiracy to Use and Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire, in violation of 18 U.S.C. §§ 1958(a) and two firearms counts, of Use and Carry of a Firearm During and in Relation to a Crime of Violence resulting in Death, in violation of 18 U.S.C. §§ 924(c), 924(j), and 2. The conspiracy was alleged to have occurred from in or about November 2016 through in or about December 2016.

Mr. Allen joined in a pretrial motion to dismiss that alleged a lack of federal jurisdiction for the wholly intrastate conduct charged in those counts contending that, 18 U.S.C. § 1958 was unconstitutional as applied, that was denied by the district court, as was his motion to dismiss the indictment for a Speedy Trial Act (18 U.S.C. §§ 3161–3174) (STA) violation.

On January 14, 2022, a Third Superseding Information was filed charging Michael Davis and David Allen with Count 1: Conspiracy to Use Interstate Commerce Facilities in the Commission of Murder-for-Hire Resulting in Personal Injury, in violation of 18 U.S.C. § 1958(a); and Count 2: Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire Resulting in Personal Injury, contrary to 18 U.S.C. §§ 1958(a) and 2. Mr. Allen pled guilty to both counts, pursuant to a written Rule 11 Plea Agreement that was linked with plea agreement of codefendant Michael Davis. The plea agreements were conditioned on the defendant's right to appeal pretrial motions to dismiss under the Sixth Amendment Right to a Speedy Trial and the Speedy Trial Act, and Michael Davis's Motion to Dismiss Counts One and Three.

The district court accepted both Mr. Allen's and Michael Davis's guilty pleas at a joint change of plea hearing. On July 26, 2022, Mr. Allen was sentenced to concurrent terms of 240-months in custody on each count to be followed by three concurrent years of supervised release. He filed a timely notice of appeal and the Sixth Circuit affirmed his convictions in a published decision on November 9, 2023, *United States v. Allen*, 86 F.4th 295 (6th Cir. 2023) (Attachment "A").

In rejecting his claim that government could not constitutionally apply the federal murder-for-hire statute to the purely intrastate conduct under the Commerce Clause, the Sixth Circuit concluded that “Our binding precedent requires us to reject this claim,” citing *United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir 2022) and *United States v. Weathers*, 169 F.3d 336, 341-42 (6th Cir 1999). *Allen*, 86 F.4th at 298. The Sixth Circuit affirmed the district court’s determination that intrastate cell phone calls required out-of-state switches for connection that “involved the use of the channels of interstate commerce,” citing *Windham. Id.*, at 301. The Court further noted that “we have ‘repeatedly’ held that telephones (including cell phones) qualify as ‘instrumentalities of interstate commerce’ that Congress may regulate under the Court’s second category even when a party does not use the phone in any interstate activities.” *Id.* The Court ultimately concluded that Congress could reach solely intrastate acts of violence under its power to regulate instrumentalities of interstate commerce. *Id.* at 302.

Judge Murphy in a concurring opinion joined by Judge Bush, explained that while the panel was bound by circuit precedent, he remains “particularly unconvinced by our broad rule allowing Congress to regulate any activity using a phone.” *Allen*, 86 F.4th at 308. Judge Murphy, stated that the Sixth Circuit’s broad rule is out of step with the original meaning of the Commerce Clause and the “concrete limits” on interstate commerce jurisdiction imposed by recent Supreme Court decisions. *Id.*, at 309. He further opined that this Court’s broad rule undercuts both the Court’s limits on its substantial-effects test but the right of Michigan citizens to reject the death

penalty authorized by the federal murder-for-hire statute, as they did in their Constitution. *Id.*, at 313-14.

Mr. Allen's Petition for Rehearing *en banc* was denied on February 15, 2024, 2024 WL 1043516 (6th Cir. 2024). (App. B, 10a.).

REASONS FOR GRANTING THE PETITION

Review should be granted because the statute under which Mr. Allen was charged, 18 U.S.C. §§ 1958(a), as applied, exceeded the power of Congress under the Commerce Clause as set forth in this Court's established precedent, *United States v. Morrison*, 529 U.S. 598, 616 (2000), to reach wholly intrastate, noneconomic violent crime. The indictment alleged that the defendant's "...used and caused another to use a facility of interstate and foreign commerce, to wit: telephone(s), with intent that the murder of D. P. be committed in violation of the laws of the State of Michigan and the United States, as consideration for the receipt of, and as a consideration for a promise and agreement to pay, things of pecuniary value, to wit: United States currency, which offense resulted in the personal injury of D.P., in violation of Title 18, United States Code, Sections 1958(a) and 2."

The Sixth Circuit in affirming Mr. Allen's convictions simply relied on circuit precedent. Those cases, *United States v. Weathers*, 169 F3d 336, 341-42 (6th Cir 1999), and *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022), were decisions that misinterpreted and extended the scope and limitations of Congressional power defined in *United States v. Morrison*, 529 U.S. 598, 617 (2000). Mr. Allen maintains

that the Sixth Circuit's reliance on the flawed reasoning in the *Weathers* and *Windham* cases was reversible error.

I. The broad rule adopted by the Sixth Circuit, that the Commerce Clause gives congress the power to regulate all conduct incidentally using a cell phone, is contrary to its original meaning, was adopted without reconciling this Court's most relevant precedent, and is contrary to the substantial effects test.

The rule of *Weathers* and *Windham* extends interstate commerce jurisdiction to intrastate use of a cell phone as an instrumentality of commerce. It was adopted without accounting for the original meaning of the Commerce Clause and this Court's most recent precedent limiting its application. It was also adopted without recognizing the ubiquitous reality of cell phones, that there is now almost no human activity that takes place without a cell phone. *Riley v. California*, 573 U.S. 373 (2014) (“ . . . modern cell phones [] are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”). In our present day, defining a cell phone as an instrumentality of commerce in order to create federal jurisdiction over a local crime, provides no limit to federal jurisdiction. The rule undercuts recent this Court's Commerce Clause decisions limiting federal jurisdiction under the substantial effects test. Here, the federal government has conceded “that Congress could not punish the defendant's crime based on its “effect” on interstate commerce.” *Allen*, 86 F.4th at 308. (Murphy, J., concurring).

Realistically, the Sixth Circuit's rule provides no limit on federal jurisdiction for prosecution of local violent crime. Nevertheless, relying on *Weathers* and *Windham*, the Court concluded that “Congress could prohibit [the defendants'] cell

phone use under its power to regulate ‘an instrumentality of interstate commerce.’” *Allen*, 86 F.4th at 302.

This broad rule, as applied in this case to the prosecution of a local murder, is plainly contrary to recent decisions explaining that our federalist system of government is one with historically limited responsibility in the states for local prosecution of violent crime. See, e.g., *Morrison*, 529 U.S. at 617. (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”). As demonstrated by application of the rule in this case, this Court should grant certiorari because this rule “convert[s] congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *United States v. Lopez*, 514 U.S. 549, 567 (1995).

a. The original meaning of the Commerce Clause does not encompass regulation of local violent crime.

Starting with first principles, “[t]he Constitution creates a Federal Government of enumerated powers. Art. I, § 8.” *Lopez*, 514 U.S. at 552. It mandates a division of authority to regulate between national and state governments in order “to ensure protection of our fundamental liberties.” *Lopez*, 514 U.S. at 552; *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *The Federalist* No 51, at 323 (James Madison) (Clinton Rossiter ed, 1961).

The Commerce Clause delegates power to Congress to regulate commercial intercourse between the states, but it reserves control of exclusively internal commerce to the States. *Gibbons v. Ogden*, 9 Wheat 1, 189-190 (1824); *Lopez*, 514 U.S.

at 553. “At the time of the founding, the Commerce Clause’s key word (commerce) “meant ‘trade’ or economic ‘intercourse[.]” *United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022).” *Allen*, 86 F.4th at 308. Local violent crime of the kind charged in this case is not commercial activity within this meaning by any definition. *Morrison*, 529 U.S. at 617.

Although case law has not provided “precise formulations” to distinguish federal from state jurisdiction in every case, *Lopez*, 514 U.S. at 567, this Court has “*always* [] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.” *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

There is no clearer example of where this division lies than in the “general right to punish murder,” long and consistently understood to be reposed in the States. *Cohens v. Virginia*, 19 U.S. 264, 426 (1821); *United States v. Bass*, 404 U.S. 336, 350 (1971) (rejecting a broad construction of the Commerce Clause that would render traditionally local criminal conduct a matter of federal enforcement); *Morrison*, 529 U.S. at 618 (“Indeed, we can think of no better example of the police power which the founders denied the National Government and reposed in the states than the suppression of violent crime and vindication of its victims.”).

The concurring opinion by Sixth Circuit Judge Murphy, agrees. For example, it explains, using legal reasoning, *NY State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct 2111, 2132 (2022), that because Congress lacked authority under the Commerce Clause to “reach all activities done in part by intrastate delivery of a letter outside of

the postal system,” it would not now possess power under the Commerce Clause to *automatically* regulate all conduct with phones. *Allen*, 86 F.4th at 311 (emphasis in original).

b. The rule in *Weathers* and *Windham* were adopted without consideration of the most recent decisions of this Court.

This Court’s most recent cases have recognized the constraint on authority of Congress to regulate interstate commerce under its substantial effects test. *Lopez*, 514 U.S. at 553. Even before *Lopez*, the Court warned that “the scope of the interstate power ‘must be considered’ in light of our dual system of government.” *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937).

In *Lopez*, where a federal statute regulated possession of a firearm in a school zone, the Court held the statute exceeded Commerce Clause authority because, “Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561. In *Morrison*, the Court held the civil remedy provisions of the Violence Against Women Act, 42 U.S.C. § 13981, which provide remedies for victims of gender- based violence, exceed Commerce Clause authority to regulate intrastate violence (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”) *Morrison*, 529 U.S. at 613.

In *Jones v. United States*, 529 U.S. 848 (2000). this Court applied the *Lopez* framework in holding that the federal arson statute, 18 U.S.C. § 844(i), is unconstitutional as applied in a prosecution of a defendant for throwing a Molotov cocktail into an owner-occupied residence. The *Jones*, Court examined the arson

statute through the lens of federalism to determine whether the “dwelling place, in the words of §844(i), [was] . . . being used in an activity affecting . . . commerce.” *Id.* at 858. (“Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the “traditionally local criminal conduct” in which petitioner Jones engaged “a matter for federal enforcement.” *United States v. Bass*, 404 U.S. 336, 350 (1971)”) *Id.*

In *Bond v. United States*, 572 U.S. 844 (2014) the Court relied again on federalism as the principle for measuring limits of jurisdiction for a federal criminal statute, 18 U.S.C. § 229(a), prohibiting offensive use of chemicals as adopted pursuant to a treaty banning use of chemical weapons.

The defendant in *Bond*, a microbiologist, was charged with violating the statute by attempting to assault a woman with whom her husband was having a romantic relationship, by spreading toxic chemicals where they would be touched by the other woman and would cause her physical injury, conduct described as within the scope of state law. Bond challenged the application of the statute in her indictment to her conduct, lost her challenge in the district court and entered a conditional plea. *Bond*, 572 U.S. at 853. Although the statute alleged to have been violated was adjunct to a treaty and not to the Commerce Clause, the Court invoked the same principles articulated in *Lopez*, *Jones* and *Morrison* to conclude that it does not apply to conduct that is most essentially within the traditional power of the states to prosecute: “[b]ecause our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding

on that responsibility, unless Congress has clearly indicated that the law should have such reach.” 572 U.S. at 848.

Several principles supported the Court’s conclusion in *Bond* that the Implementation Act does not extend enumerated powers to offenses that would “dramatically intrude[d] upon traditional state criminal jurisdiction.” *Bond*, 572 U.S. at 857, citing *Bass*, 404 U.S. at 350. Those include “the relationship between the Federal Government and the States under our constitution.” and, the clear statement rule, the “well-established principle that ‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ the ‘usual constitutional balance of federal and state powers.’” *Bond*, 572 U.S. at 857-58 (“The Government’s reading of section 229 would “alter sensitive federal state relationship,’ convert an astonishing amount of ‘traditionally local criminal conduct’ into ‘a matter of federal enforcement,’ and ‘involve a substantial extension of federal police resources.’”). *Id.* at 863, citing *Bass*, 404 U.S. at 349- 350.

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Court held that the Commerce Clause regulates commercial activity, not inactivity. It ruled that Congress exceeded its authority under the Commerce Clause when enacting the mandate in the Patient Protection and Affordable Care Act, 26 U.S.C. §5000A, by penalizing individuals who refuse to buy health insurance. 567 U.S. at 530 (opinion of Roberts, C.J.).

Neither *Weathers* nor *Windham* considered whether the Commerce Clause’s original meaning or this Court’s existing precedent support a broad rule extending

federal criminal jurisdiction to local violent crime. *Allen*, 86 F.4th at 312, Murphy, J. concurring. (“I might be less skeptical of our caselaw if it had addressed my concerns about whether the Constitution’s original meaning or the Supreme Court’s existing precedent supported our broad rule. But our caselaw lacks this reasoning.”). The Court in *Weathers* did not address any constitutional question concerning the scope of Commerce Clause authority. It only held that evidence regarding “the technical aspects of the operation of Weather’s cellular telephone” was sufficient to sustain the defendant’s conviction for violating 18 U.S.C. § 1958(a). *Weathers*, 169 F.3d at 342. Prior cases cited in *Weathers*, *Acquionics Acceptance Corp v. Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974) and *United States v. Graham*, 856 F.2d 756 (6th Cir. 1988), similarly only considered evidence sufficiency, not any constitutional question.

In *Windham*, the Sixth Circuit simply adopted the rule in *Weathers* to conclude that intrastate use of a cell phone and car were instrumentalities of interstate commerce. *Windham*, 53 F.4th at 1013. The *Windham* court, following the lead of the Seventh Circuit in *United States v. Protho*, 41 F.4th 812 (7th Cir. 2022), looked to *Weathers*, where the court analyzed the murder-for-hire statute, 18 U.S.C. § 1958(a), and held that statutes that refer to instrumentalities *of* interstate commerce apply to intrastate activities. Since the kidnapping statute at issue, 18 U.S.C. § 1201(a)(1), referred to instrumentalities “*of* interstate or foreign commerce,” the *Windham* court concluded that cars and cell phones “even when used intrastate, constitute instrumentalities of interstate commerce,” citing *United States v. McHenry*, 97 F.3d 125, 126–27 (6th Cir. 1996), a case that “upheld a federal carjacking statute as a

legitimate exercise of Congress' power to regulate interstate commerce." *Windham*, 53 F.4th at 1012-1013.

Such a broad reading of the statute would make "virtually every [murder] in the country a federal offense." *Bond*, 572 U.S. at 859, citing *Bass*, 404 U.S. at 349. Holding that using a cell phone establishes federal jurisdiction under 18 U.S.C. § 1958(a) is not a "narrow" reading of statute as required by *Bond*, 572 U.S. at 859.

The Sixth Circuit's decision in *Windham*, should be rejected because it would "alter sensitive federal-state relationships,' 'convert an astonishing amount of 'traditional local criminal conduct' into 'a matter of federal enforcement,' and 'involve a substantial extension of federal police powers.'" *Bond*, 572 U.S. at 863. It should be reversed as unconstitutional as applied in light of principles of federalism and as an improper extension of federal authority to prosecute serious local crime, based only on the incidental intrastate use of cell phones or vehicles.

II. The Sixth Circuit erred in concluding that Mr. Allen did not aggressively pursue his right to a speedy trial under both the Speedy Trial Act the Sixth Amendment, and that he was not prejudiced by the nearly four-year delay in scheduling his trial.

The Sixth Circuit rejected Mr. Allen's separate claims of violations of his speedy trial rights under both the Sixth Amendment and the Speedy Trial Act that were also denied by the district court. *Allen*, 86 F.4th at 305, 307. In so doing the Sixth Circuit erroneously concluded that Mr. Allen did not consistently and aggressively assert his right to a speedy trial.

a. Mr. Allen’s Sixth Amendment right to a speedy trial was violated by the nearly four-year delay in scheduling his trial.

The Sixth Amendment provides that “the accused shall enjoy the right to a speedy and public trial.” U.S. Const. Amend. VI. This Clause is “an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.” *United States v. Marion*, 404 U.S. 307, 320 (1971) (internal quotation marks and citations omitted).

The Sixth Amendment right to a speedy trial is “fundamental.” *Barker v. Wingo*, 407 U.S. 514, 515 (1972). There is no fixed rule to measure how long a wait is too long. In *Barker*, this Court articulated a four-factor balancing test for measuring a violation, including: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Id.* at 530. Not any one factor alone has “talismanic qualities.” *Id.* at 533. “[C]ourts must still engage in a difficult and sensitive balancing process.” *Id.* Measured by these factors, it is clear that the district court’s denial of Mr. Allen’s motion to dismiss was error requiring reversal.

In assessing the criteria set forth in *Barker*, the Sixth Circuit concluded that Mr. Allen “agreed to most of the four-year delay” and “objected to the delay in a “belated nature” by waiting until over a year after the indictment” then “flipfopped,” by agreeing to a few months delay requested by his counsel, then objecting to another delay requested by codefendant Davis and an indefinite pandemic-related continuance from May through October of 2020. The Court then assumed that Mr. Allen concurred with his counsel and consented to further monthly status reports

from November 2020 until he filed his motion to dismiss the indictment in September of 2021. *Allen*, 86 F.4th at 306. This simply was not the case. Mr. Allen was not a party to the joint monthly reports to the district court and had no opportunity to voice an objection to the continued delays that were routinely entered by the district court.

Indeed, Mr. Allen, from early 2019 forward even when the death penalty was still a possibility, consistently voiced his desire to proceed to trial to his counsel. The district court acknowledged Mr. Allen's vociferous objections to the continuances and on several occasions noted his disagreement with his counsel and his desire to proceed to trial immediately (ECF No. 207, Pg.ID 725, 728.; ECF No. 263, Pg.ID 1139). The fact that on September 22, 2021, Mr. Allen had to file a *pro se* motion to dismiss the indictment reasserting his speedy-trial rights -- that his counsel later revised and refiled on his behalf, indicates that not only did he disagree with all of the numerous continuances, but also that he did not consent to them. See, ECF No. 286, Pg.ID 1476-90; ECF No. 288, Pg.ID 1492-1518). The Sixth Circuit's conclusion to the contrary was error that should cause this Court to grant Mr. Allen's petition for writ of certiorari.

The Sixth Circuit also concluded that Allen, "cannot rely on any presumption of prejudice to [his] defense because [he] requested many of the delays themselves and because the government had a valid pandemic-related reason for the other continuances. So, [he] must prove actual prejudice." The Court decided that Mr. Allen failed to identify any "specific harm to their defense that the delay caused." *Allen*, 86 F.4th at 306.

In assessing this matter, the Sixth Circuit acknowledged that “Allen suffered some prejudice from this lengthy delay because they remained in jail throughout this time. *See Barker*, 407 U.S. at 532. But *Barker* does not treat physical incarceration as the “most serious” type of prejudice.” *Allen*, 86 F.4th at 307. The Court failed to recognize the clear holding of *Doggett v. United States*, 505 U.S. 647, 655-56 (1992) where this Court stated:

“*Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony “can rarely be shown.” 407 U.S., at 532, 92 S.Ct., at 2193. And though time can tilt the case against either side, see *id.*, at 521, 92 S.Ct., at 2187; *Loud Hawk*, *supra*, 474 U.S., at 315, 106 S.Ct., at 656, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, see *Loud Hawk*, *supra*, at 315, 106 S.Ct., at 656, it is part of the mix of relevant facts, and its importance increases with the length of delay.”

The fact that his counsel requested several continuances to further investigate the charges, and review discovery, the overwhelming volume of which did not even mention Mr. Allen, underscores the fact that he likely was unable to locate witnesses, or was confronted with their fading memories, and/or the loss or destruction of evidence, all of which would implicate the ability of his counsel to effectively represent him because of the four-year delay. Moreover, in this matter two codefendants who were initially considered likely to provide exculpatory testimony for the defense “flipped” to the prosecution after favorable plea-bargains with cooperation provisions were presented during the lengthy delay. Mr. Allen should not be required to

articulate facts beyond these circumstances and occurrences that clearly impaired his defense had his trial commenced in a timely manner. *Doggett*, 505 U.S. at 655-56.

b. Mr. Allen’s statutory right to a speedy trial under 18 U.S.C. § 3161(c)(1), the Speedy Trial Act was violated by the nearly four-year delay in scheduling his trial.

The Speedy Trial Act (STA) requires that in any case in which the defendant has not entered a guilty plea, trial must commence within 70 days of the filing of the indictment or the date of defendant’s arraignment, whichever occurs later. 18 U.S.C. § 3161(c)(1); *United States v. Tinklenberg*, 563 U.S. 647 2010 (2011). The STA also lists delays that must be excluded from the 70-day period. 18 U.S.C. § 3161(h). Where the defendant is not brought to trial within the 70-day limit, and the STA does not exclude the delays, the district court must dismiss the case, with or without prejudice, on the defendant’s motion. 18 U.S.C. § 3162(a)(2); *United States v. Myers*, 666 F.3d 402, 404 (6th Cir. 2012).

On October 20, 2020, after considering defendants Stipulation and Proposed Order to Continue the Pleas Cut-off and Trial and Find Excludable Delay, the Court ordered, in part:

“...that the time from October 1, 2020, to the trial date to be later determined by the Court shall constitute excludable delay under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7), because the Court finds that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial. The Court notes the objection of defendant David Allen but, for the reasons stated in the stipulation, nonetheless finds excludable delay.”

ECF No. 263, Pg.ID 1139

On August 5, 2021, the court entered counsel’s joint stipulation and proposed order excluding delay under the STA and scheduled the trial for February 1, 2022.

The Court determined that the ends of justice would be served by granting the adjournment “from August 2, 2021, through February 1, 2022, is excluded in computing the time in which trial must commence.” (ECF No. 277, Pg.ID 1223-24).

Though the court cited other provisions in the Speedy Trial Act to warrant a continuance in the trial date, the essence of the “ends of justice” exclusion was primarily based on the systemic breakdown in the court system resulting from the Pandemic. These kinds of institutional problems and delays are properly charged to the State. See, e.g., *Vermont v. Brillon*, 556 U.S. 81, 94 (2009).

Moreover, “the ‘ends of justice’ exclusion . . . may not be invoked in such a way as to circumvent the time limitations set forth in the Act.” *United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) (explaining that those factors include “[w]hether 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”); 18 U.S.C. § 3161(h)(7)(B)(i).

While there is no question that the public health concerns due to the Pandemic were serious, conducting a jury trial under these circumstances was clearly possible. There had been a number of jury trials conducted in the Eastern District of Michigan, Southern Division beginning in September 2021 without any serious problems.

When a defendant is not brought to trial within the 70-day time limit (excepting all properly excludable periods of delay) “the information or indictment shall be dismissed on motion of the defendant.” 18 U.S.C. § 3162(a)(2); *Zedner v.*

United States, 547 U.S. 489, 499 (2006). Consequently, the district court decision denying Allen's motion to dismiss the indictment was clearly erroneous.

Because Mr. Allen repeatedly asserted his right to a speedy trial and the four-year delay impaired his defense, this Court should grant certiorari and reverse the Sixth Circuit decision affirming his convictions and sentences.

CONCLUSION

For the foregoing reasons, Petitioner, David Allen, requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,



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Dated: **April 29, 2024**

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

DAVID ALLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Submitted by:

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INDEX TO APPENDICES

APPENDIX A

The published opinion of the U.S. Sixth Circuit Court of Appeals, in *United States v. Allen*, 86 F.4th 295 (6th Cir, 2023) affirming the district court, entered on November 9, 2023.

APPENDIX B

The U.S. Sixth Circuit Court of Appeals order denying *en banc* rehearing, entered on February 15, 2024, 2024 WL 1043516 (6th Cir. 2024).

APPENDIX C

The order of the district court denying defendant's motion to dismiss for Speedy Trial Act and Sixth Amendment Violations, entered on December 16, 2021.

APPENDIX D

The order of the district court denying co-defendant Davis's motion to dismiss Counts 1 & 3, in which Mr. Allen joined, alleging that statute charged in those Counts, 18 U.S.C. § 1958, is unconstitutional as applied to the defendants, entered on June 19, 2020.

APPENDIX A

86 F.4th 295

United States Court of Appeals, Sixth Circuit.

UNITED STATES of

America, Plaintiff-Appellee,

v.

David ALLEN (22-1698); Michael

Davis (22-1717), Defendants-Appellants.

Nos. 22-1698/1717

|

Decided and Filed: November 9, 2023

Synopsis

Background: Following denial of their motions to dismiss, 2020 WL 3402023, 2021 WL 5989060, and 2021 WL 5989060, defendants pled guilty in the United States District Court for the Eastern District of Michigan, Paul D. Borman, J., to using facility of interstate commerce in murder-for-hire scheme, and they appealed.

Holdings: The Court of Appeals held that:

[1] defendants' use of their cellphones to commit murder-for-hire satisfied federal murder-for-hire statute's interstate commerce jurisdictional requirement;

[2] 27-month delay as result of defense counsel's continuances to convince government not to seek death penalty and to prepare for trial were attributable to defendants;

[3] COVID-19 pandemic was valid reason for 13-month delay;

[4] six-month delay to permit defense counsel to undertake trial preparations that COVID-19 pandemic had prevented favored government;

[5] timely-assertion factor of speedy trial test did not favor defendants;

[6] defendants failed to establish prejudice as result of four-year delay in bringing them to trial; and

[7] district court did not abuse its discretion in granting five-month ends-of-justice continuance under Speedy Trial Act.

Affirmed.

Murphy, Circuit Judge, concurred and filed opinion in which Bush, Circuit Judge, joined.

West Headnotes (17)

[1] Criminal Law 🔑 Review De Novo

Court of Appeals reviews constitutional questions de novo.

[2] Commerce 🔑 Federal Offenses and Prosecutions

Homicide 🔑 Murder for hire; contract killing

Defendants' use of their cellphones to commit murder-for-hire scheme satisfied federal murder-for-hire statute's interstate commerce jurisdictional requirement, even though phones were used to engage only in intrastate activity, where their calls required use of out-of-state switches. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 1958(a).

[3] Criminal Law 🔑 In general; balancing test

To resolve Sixth Amendment speedy trial claim, court must engage in difficult and sensitive balancing of the four *Barker* factors along with any other relevant circumstance. U.S. Const. Amend. 6.

1 Case that cites this headnote

[4] Criminal Law 🔑 Review De Novo Criminal Law 🔑 Speedy trial

When analyzing Sixth Amendment speedy trial claim, Court of Appeals reviews district court's legal rulings de novo and its findings of fact for clear error. U.S. Const. Amend. 6.

[5] Criminal Law 🔑 Length of Delay

Customary delays during any litigation—such as five-month delay—automatically pass muster under Sixth Amendment. [U.S. Const. Amend. 6](#).

[6] Criminal Law 🔑 Length of Delay

Delay longer than one year presumptively meets threshold requirement for Sixth Amendment speedy trial claim. [U.S. Const. Amend. 6](#).

[7] Criminal Law 🔑 Delay Attributable to Prosecution

Criminal Law 🔑 Deliberate governmental conduct

When analyzing Sixth Amendment speedy trial claim, reason-for-delay factor weighs strongly against government if government engineers delay in bad faith to hamper defense or obtain tactical advantage, but less so if it causes delay for invalid reason but without any bad intent. [U.S. Const. Amend. 6](#).

1 Case that cites this headnote

[8] Criminal Law 🔑 Necessities of trial procedure; docket congestion

Criminal Law 🔑 Delay caused by accused

When analyzing Sixth Amendment speedy trial claim, reason-for-delay factor weighs in government's favor if it identifies legitimate reason for delay—such as state's prosecution of defendant for same conduct, defense counsel's decision to litigate pretrial motions or ask for continuances, or defendant's decision to seek new counsel—or if defendant causes it. [U.S. Const. Amend. 6](#).

1 Case that cites this headnote

[9] Criminal Law 🔑 Delay caused by accused

In evaluating defendants' Sixth Amendment speedy trial claim in murder-for-hire prosecution, 27-month delay as result of defense counsel's continuances to convince government

not to seek death penalty and to prepare for trial were attributable to defendants, even though defendants did not consent to delays. [U.S. Const. Amend. 6](#).

[10] Criminal Law 🔑 Cause for delay, "good cause", and excuse or justification in general

COVID-19 pandemic was valid reason for 13-month delay in defendants' murder-for-hire prosecution, for purposes of evaluating their Sixth Amendment speedy trial claim, where government and defendants' lawyers jointly agreed to pandemic-related continuances. [U.S. Const. Amend. 6](#).

[11] Criminal Law 🔑 Delay caused by accused

Six-month delay in defendants' murder-for-hire prosecution to permit defense counsel to undertake trial preparations that COVID-19 pandemic had prevented favored government in evaluating defendants' Sixth Amendment speedy trial claim. [U.S. Const. Amend. 6](#).

[12] Criminal Law 🔑 Demand for trial

When considering whether defendant has adequately raised speedy-trial objection, courts consider both how early defendant has asserted this right and how often defendant has done so. [U.S. Const. Amend. 6](#).

1 Case that cites this headnote

[13] Criminal Law 🔑 Demand for trial

Timely-assertion factor of test used to evaluate Sixth Amendment right to speedy trial did not favor defendants in murder-for-hire prosecution, where one defendant agreed to all but five months of four-year delay, and other defendant objected to only one year of four-year delay. [U.S. Const. Amend. 6](#).

[14] Criminal Law 🔑 Prejudice or absence of prejudice

If defendant caused delay or government has valid excuse for it, defendants must show actual defense-related prejudice or their Sixth Amendment speedy trial claims will generally fail. [U.S. Const. Amend. 6](#).

[15] Criminal Law 🔑 **Prejudice or absence of prejudice**

Defendants failed to establish prejudice required to establish violation of their Sixth Amendment speedy trial rights as result of four-year delay in bringing them to trial; defendants requested many delays themselves, government had valid pandemic-related reason for other continuances, and defendants failed to identify any specific harm to their defense that delay caused. [U.S. Const. Amend. 6](#).

1 Case that cites this headnote

[16] Criminal Law 🔑 **Time of trial; continuance**

Because district courts have broad discretion to grant ends-of-justice continuances under Speedy Trial Act, Court of Appeals reviews district court's decision under deferential abuse-of-discretion standard. [18 U.S.C.A. § 3161\(h\)\(7\) \(A\)](#).

[17] Criminal Law 🔑 **Extension of time**

District court did not abuse its discretion in granting five-month ends-of-justice continuance under Speedy Trial Act in defendant's murder-for-hire prosecution, despite defendant's contention that it was possible to hold trial earlier despite COVID-19 pandemic, where defense counsel requested extension, purportedly with defendant's consent, because counsel needed more time to prepare. [18 U.S.C.A. § 3161\(h\)\(7\) \(A\)](#).

***297** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:18-cr-20085—Paul D. Borman, District Judge.

Attorneys and Law Firms

ON BRIEF: [Martin J. Beres](#), Clinton Township, Michigan, for Appellant in 22-1698. [Harold Gurewitz](#), GUREWITZ & RABEN, PLC, Detroit, Michigan, for Appellant in 22-1717. [William J. Vaillencourt, Jr.](#), UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

Before: [STRANCH](#), [BUSH](#), and [MURPHY](#), Circuit Judges.

The court delivered a PER CURIAM opinion. [MURPHY](#), J. (pp. 308-14), delivered a separate concurring opinion, in which [BUSH](#), J., joined.

OPINION

PER CURIAM.

Michael Davis and David Allen pleaded guilty to using a facility of interstate commerce (their cellphones) in a murder-for-hire scheme, in violation of [18 U.S.C. § 1958\(a\)](#). But they reserved the right to raise two constitutional issues on appeal, one involving the Commerce Clause and the other involving the Sixth Amendment right to a speedy trial.

Davis and Allen first argue that the government could not constitutionally apply the federal murder-for-hire statute to their conduct. Although the statute rests on Congress's power to regulate interstate commerce, Davis and Allen never left Michigan or even made calls outside the State when committing the murder. At most, some of their intrastate calls required the telephone company to use out-of-state switches. This interstate connection, ***298** they say, does not suffice to give Congress the power to regulate their crime. Our binding precedent requires us to reject this claim. The Supreme Court has held that Congress may regulate the “instrumentalities of interstate commerce” even when used only within a State, and we have long treated an ordinary telephone as one such “instrumentality” within Congress's control. See [United States v. Windham](#), 53 F.4th 1006, 1013 (6th Cir. 2022); [United States v. Weathers](#), 169 F.3d 336, 341–42 (6th Cir. 1999).

So Davis and Allen turn to their speedy-trial claims. Before they pleaded guilty, the district court had postponed their trial for nearly four years. Davis and Allen allege that this lengthy delay violated the Sixth Amendment right to a speedy trial, and Allen also claims that it violated the Speedy Trial Act. But

the delay arose in part from their own repeated requests for more time and in part from the COVID-19 pandemic. Because the district court found that both reasons justified the delay, it saw no speedy-trial problem. We agree and affirm.

I

In their plea agreements, Davis and Allen admitted to the following details of their murder-for-hire scheme. Dwight Williams wanted to kill Deangelo Pippen. In late December 2016, Williams asked Davis to commit the murder in exchange for money. Davis agreed. He then convinced two acquaintances—Allen and Christopher Davis—to help carry out the murder in return for a cut of the promised payment. (We will refer to Christopher Davis by his full name to distinguish him from the appellant.)

The murder plans had taken shape by December 23. That day, Williams paid the downpayment for the murder. Davis also rented a GMC Terrain to implement the plan. Pippen had been staying in a Muskegon apartment in western Michigan. Since Davis and the others lived in Detroit, they needed to travel across the State to commit the murder.

Davis, Allen, and Christopher Davis drove the GMC Terrain to Muskegon on December 28. But they could not find Pippen. So they stayed overnight at a hotel in Grand Rapids. The next day, they waited several hours outside Pippen's apartment. When Pippen left in his Chrysler, Allen drove the GMC Terrain in pursuit with the two Davises riding along as passengers. Allen eventually pulled next to Pippen's stopped car at a red light in nearby Norton Shores. The two Davises fired multiple shots into Pippen's car, killing him. The hitmen then returned to Detroit. Williams paid Davis, who split the proceeds with the others.

None of the accomplices traveled outside Michigan to plan or execute the murder. But they did use their cellphones to facilitate it. Williams called Davis over the phone to solicit the murder, and Davis used his phone to convince Christopher Davis to help carry it out. When the men traveled to Muskegon on December 28, they also used their phones to stay in touch with Williams, who remained back in Detroit. They called Williams both shortly before and shortly after the murder. Although these calls all occurred within Michigan, they “were routed through out-of-state switches” for their completion. Davis Plea Agreement, R.322, PageID 1745; Allen Plea Agreement, R.325, PageID 1769.

On February 7, 2018, a federal grand jury indicted all four men. The government charged them with, among other things, conspiring to use and actually using facilities of interstate commerce to commit a murder for hire, in violation of [*299 18 U.S.C. § 1958\(a\)](#). The parties took some four years to resolve the charges against Davis and Allen, the two appellants. Substantial delays occurred while Davis's and Allen's lawyers sought to convince the government not to seek the death penalty, while these lawyers sought to prepare for trial, and while the COVID-19 pandemic limited the court's ability to conduct criminal proceedings.

During this time, Davis and Allen litigated the two issues that matter now. They first sought to dismiss the murder-for-hire counts on the ground that the Commerce Clause did not give Congress the power to punish their intrastate murder. The district court disagreed. *See United States v. Davis*, 2020 WL 3402023, at *2 (E.D. Mich. June 19, 2020). It reasoned that the defendants' cellphones were “instrumentalities of interstate commerce” and that Congress could regulate “those instrumentalities” even when used to engage only in intrastate activity. *Id.*

Davis and Allen next moved to dismiss the indictment on speedy-trial grounds. Allen invoked both the Sixth Amendment's Speedy Trial Clause and Congress's Speedy Trial Act, whereas Davis asserted only a constitutional claim. The district court also rejected these speedy-trial challenges. *See United States v. Allen*, 2021 WL 5994725, at *1–3 (E.D. Mich. Dec. 16, 2021); *United States v. Davis*, 2021 WL 5989060, at *1–3 (E.D. Mich. Dec. 16, 2021).

After these rulings, Davis and Allen conditionally pleaded guilty to the murder-for-hire counts. In return, the government dropped all other charges. It also agreed that the “appropriate” sentence for Davis was 30 years' imprisonment and that the “appropriate” sentence for Allen was 20 years' imprisonment. Davis Plea Agreement, R.322, PageID 1749; Allen Plea Agreement, R.325, PageID 1773. The district court followed these sentencing recommendations.

In their plea agreements, Davis and Allen reserved the right to appeal two issues: Did the Commerce Clause give Congress the authority to punish their murder for hire even though it took place within Michigan? And did the nearly four-year delay violate their constitutional or statutory rights to a speedy trial? Davis and Allen now raise both issues. We will address them in turn.

II. Commerce Clause Challenge

[1] Davis and Allen first argue that the Commerce Clause prohibited the federal government from applying the murder-for-hire statute to their intrastate conduct. We review this constitutional question de novo. See *United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022). And we must reject their argument because it conflicts with binding circuit precedent.

Congress may exercise only those powers that the Constitution grants it, including the power “[t]o regulate Commerce ... among the several States[.]” U.S. Const. art. I, § 8, cl. 3. The Supreme Court’s modern precedent has identified “three broad categories of activity” that Congress may regulate using its power under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); see *United States v. Morrison*, 529 U.S. 598, 608–09, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

First, the Supreme Court has held that the Commerce Clause gives Congress the power to regulate the “use of the channels” through which “interstate commerce” occurs. *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624. Because interstate “commerce” means economic “exchange” between States, it includes the transportation of the *300 goods that parties seek to sell. *Rife*, 33 F.4th at 842 (citation omitted). So Chief Justice Marshall recognized long ago that the Commerce Clause allowed Congress to impose “navigation” regulations in bodies of water used to ship goods interstate. See *Gibbons v. Ogden*, 22 U.S. 1, 196–97, 9 Wheat. 1, 6 L.Ed. 23 (1824). The Court has also long held that Congress has the general power to prohibit the interstate shipment of certain goods—such as lottery tickets, see *Champion v. Ames*, 188 U.S. 321, 344, 352–54, 23 S.Ct. 321, 47 L.Ed. 492 (1903), or products made by employees who do not receive a minimum wage, see *United States v. Darby*, 312 U.S. 100, 109–10, 113–17, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

Second, the Supreme Court has held that Congress may regulate the “instrumentalities of interstate commerce” even when a party uses these “instrumentalities” only for intrastate activities. *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624. So Congress may require railroads to place safety devices on their cars, including cars that might operate exclusively within one State, because of the cars’ intermingled nature. See *S. Ry. Co. v. United States*, 222 U.S. 20, 26–27, 32 S.Ct. 2, 56 L.Ed. 72 (1911). Congress may also oversee the railroads’

intrastate shipping rates to prevent railroads from subsidizing those intrastate trips by charging higher prices for interstate shipments. See *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 353–54, 34 S.Ct. 833, 58 L.Ed. 1341 (1914). And Congress may establish rules governing interstate highways, including rules governing the disclosure of studies of those highways. See *Pierce County v. Guillen*, 537 U.S. 129, 135–36, 146–47, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003).

Third, the Supreme Court has held that Congress may regulate those intrastate activities that substantially affect interstate commerce. See *Lopez*, 514 U.S. at 559, 115 S.Ct. 1624. The Court thus held that Congress may prohibit a person from growing a small amount of marijuana for personal use in order to extinguish the interstate marijuana market. See *Gonzales v. Raich*, 545 U.S. 1, 15–22, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). And it held that Congress may prohibit a farmer from growing wheat for use on his farm in order to prop up interstate wheat prices. See *Wickard v. Filburn*, 317 U.S. 111, 128–29, 63 S.Ct. 82, 87 L.Ed. 122 (1942). But the Court has refused to extend this third category indefinitely. So it concluded that Congress could not enact a civil remedy for violence against women or a criminal ban on the possession of guns near schools because these noneconomic activities had a tenuous connection to interstate commerce. See *Morrison*, 529 U.S. at 607–19, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 559–68, 115 S.Ct. 1624.

How does this three-part legal taxonomy apply to the murder-for-hire crime that Davis and Allen committed? As relevant here, the murder-for-hire statute punishes anyone who “uses ... any facility of interstate or foreign commerce, with intent that a murder be committed ... as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value.” 18 U.S.C. § 1958(a). The statute goes on to define a “facility of interstate or foreign commerce” to include “means of transportation and communication.” *Id.* § 1958(b)(2).

The government applied this statute to Davis and Allen even though they did not leave Michigan to commit the murder. It relied on the undisputed fact that Davis and Allen “use[d]” their cellphones to coordinate the murder. 18 U.S.C. § 1958(a); Davis Plea Agreement, R.322, PageID 1744–45; Allen Plea Agreement, R.325, PageID *301 1768–69. Many courts (including our own) have held that a phone is a “facility of interstate or foreign commerce” within the meaning of the murder-for-hire statute or similar laws. 18 U.S.C. § 1958(a);

see *Weathers*, 169 F.3d at 341; see also *United States v. Taplet*, 776 F.3d 875, 882 (D.C. Cir. 2015); *United States v. Evans*, 476 F.3d 1176, 1180–81 (11th Cir. 2007). And while Davis's and Allen's calls all involved parties within Michigan, many of the calls required the use of “out-of-state switches” for their connection. Davis Plea Agreement, R.322, PageID 1745; Allen Agreement, R.325, PageID 1769. We thus must decide whether the Commerce Clause allowed Congress to prohibit intrastate phone calls as part of a murder-for-hire plot—at least when the calls used interstate switches.

Relying on *Lopez* and *Morrison*, Davis and Allen argue that the Supreme Court's recent curtailment of its third (“substantial effects”) category renders the murder-for-hire statute unconstitutional as applied to their intrastate conduct. This argument lacks merit because the government disclaims any reliance on the third category that *Lopez* and *Morrison* addressed. Under our precedent, their conduct instead fell within the Supreme Court's first and second categories of activity that Congress may regulate.

To begin with, we have held that a defendant uses “the channels of interstate commerce”—the channels subject to congressional regulation under the first category—when the defendant makes *intrastate* phone calls that require the use of *interstate* switches for their connection. *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624; see *Weathers*, 169 F.3d at 342. In *Weathers*, Jeffrey Eugene Weathers made and received phone calls to arrange a murder, so the government charged him with violating an earlier version of the murder-for-hire statute. 169 F.3d at 338. At the time, this statute more narrowly covered the use of a facility *in* interstate commerce rather than (as now) the use of a facility *of* interstate commerce. See *id.* at 340. We reasoned that telephones (including cellphones) qualify as “instrumentalities *of* interstate commerce” even when a defendant does not use them to make interstate calls. *Id.* at 341. But we held that this now-outdated statute's use of the preposition “in” meant that Congress chose to cover “interstate activities only.” *Id.* (citation omitted). That said, we affirmed Weathers's conviction because his “*intra* state” calls required “*inter* state activities” to connect the parties and so involved the use of the channels of interstate commerce. *Id.* at 342.

Aside from *Weathers*, we have “repeatedly” held that telephones (including cellphones) qualify as “instrumentalities of interstate commerce” that Congress may regulate under the Court's second category even when a party does not use the phone in any interstate activities.

Windham, 53 F.4th at 1013; see *United States v. Dais*, 559 F. App'x 438, 445 (6th Cir. 2014). Most recently, we reached this conclusion to reject a Commerce Clause challenge to the federal kidnapping statute, which punishes a person who “uses ... any means, facility, or instrumentality of interstate or foreign commerce” to commit a kidnapping. *Windham*, 53 F.4th at 1010 (quoting 18 U.S.C. § 1201(a)(1)). The government had charged Seth Windham with using a cellphone to kidnap the victim, but no evidence suggested that he had made interstate calls or engaged in interstate activity. *Id.* at 1009, 1011. We held that this fact did not matter: Because phones are “instrumentalities of interstate commerce,” Congress may even regulate their “intrastate” use. *Id.* at 1013.

Apart from our own precedent, many other circuit courts have likewise said that ***302** the Commerce Clause gives Congress the power to prohibit the use of instrumentalities of interstate commerce (such as cars or phones) in a murder-for-hire scheme. See *United States v. Francisco*, 642 F. App'x 40, 44–45 (2d Cir. 2016) (summary order) (relying on *United States v. Perez*, 414 F.3d 302, 304–05 (2d Cir. 2005) (per curiam)); *United States v. Runyon*, 707 F.3d 475, 488–89 (4th Cir. 2013); *United States v. Marek*, 238 F.3d 310, 317–20 (5th Cir. 2001) (en banc); *United States v. Mandel*, 647 F.3d 710, 716–17, 720–22 (7th Cir. 2011); see also *United States v. Gilbert*, 181 F.3d 152, 157–59 (1st Cir. 1999); *United States v. Giordano*, 442 F.3d 30, 41 (2d Cir. 2006) (Sotomayor, J.); *United States v. Morgan*, 748 F.3d 1024, 1031–32 (10th Cir. 2014).

[2] This caselaw dooms Davis's and Allen's arguments in this case. As in *Weathers*, there is no dispute that their telephone calls required the use of out-of-state switches. So Congress could reach their conduct under its power to regulate “the use of the channels of interstate commerce[.]” *Weathers*, 169 F.3d at 342. And as in *Windham*, there is no dispute that Davis and Allen at least used cellphones to commit the murder-for-hire scheme. So Congress could prohibit their cellphone use under its power to regulate “an instrumentality of interstate commerce” even when the conduct takes place “entirely intrastate[.]” *Windham*, 53 F.4th at 1012.

III. Speedy Trial Challenge

Davis and Allen next argue that the four-year delay in their case violated their Sixth Amendment speedy-trial rights, and Allen adds that this delay also violated the Speedy Trial Act.

A. Procedural History

The merits of Davis's and Allen's speedy-trial claims must begin with a summary of the delays in their case. Under the Sixth Amendment, the speedy-trial clock begins to run from the earlier of a defendant's arrest or indictment. *See United States v. Young*, 657 F.3d 408, 414 (6th Cir. 2011). Under the Speedy Trial Act, the government has 70 days to commence trial from the later of a defendant's initial appearance or indictment. *See* 18 U.S.C. § 3161(c)(1). Here, the grand jury issued its indictment (which occurred before any arrests) on February 7, 2018. Allen made his initial appearance on February 8, and Davis made his initial appearance on March 9. Yet the district court delayed the trial for about four years, setting a final trial date of February 1, 2022, before Davis and Allen chose to plead guilty. This lengthy delay arose for four general reasons.

Reason One: Because Davis and Allen killed their victim, the murder-for-hire offense made them eligible for the death penalty. *See id.* § 1958(a). The government and the defendants jointly requested an extension of time so that defense counsel could develop a mitigation case against the death penalty and the government could fully consider whether to seek that penalty. Order, R.59, PageID 130–31. The court thus granted an initial extension until October 2018 and a second one until April 2019. *Id.*, PageID 135; Order, R.118, PageID 342; *see* 18 U.S.C. § 3161(h)(7)(A).

When the April 2019 deadline approached, defense counsel alerted the court that they were still completing their mitigation cases. Tr., R.156, PageID 454–55. At this hearing, however, Davis stated that he would prefer to proceed to trial even if the death penalty remained on the table. *Id.*, PageID 461–62, 464. Allen also opined, “I’ve been here 15 months, incarcerated 15 months and I’m ready to go to trial.” *Id.*, PageID 466. The government and defense counsel countered that, while ***303** the defendants had a “voice” in this process, the “ultimate decision” about a continuance rested with the court. *Id.*, PageID 471–76. Given the death-penalty risk, the court agreed with counsel that the ends of justice outweighed the defendants’ preferences. *Id.*, PageID 479. It extended the trial date to after September 2019. *Id.*, PageID 482. That August, the government opted against the death penalty.

Reason Two: From the outset, the parties recognized that the case would require extensive discovery and a complex

trial. Order, R.59, PageID 131–32. Near the time that the government declined to seek the death penalty, it had already disclosed nearly 200,000 pages of discovery to the defense. Tr., R.367, PageID 2370–71. With their clients’ agreement, therefore, defense counsel switched to seeking more time to prepare for the trial. *Id.* at PageID 2374–75. The court extended the trial date from September 2019 until May 2020. Order, R.181, PageID 619.

During this time, a conflict emerged between Davis and his counsel. The court thus appointed him new counsel. Tr., R.368, PageID 2386. His new counsel requested a delay through July 2020 to get up to speed on the case. *Id.* Although Allen refused to consent to this delay for Davis, the court nevertheless granted the extension. Order, R.207, PageID 725 n.2, 729.

Reason Three: This extension (which the court granted in March 2020) landed the trial date in the middle of the COVID-19 pandemic. Within a week of the court's order, the federal and state governments declared states of emergency. Order, R.247, PageID 1060–61. The District Court for the Eastern District of Michigan indefinitely postponed all trials. *Id.*, PageID 1061. Because the court could not hold a trial in July 2020 and because defense counsel could not interview witnesses, the parties obtained another continuance until October 2020. *Id.* at 1062–63, 1068. When that month came with no end to the pandemic in sight, the court granted an indefinite continuance over the objection of Allen (but not his lawyer). Order, R.263, PageID 1139.

Reason Four: With the availability of the COVID-19 vaccine and the rescission of Michigan's emergency orders restricting activities, the district court began to schedule trials in the second half of 2021. Order, R.277, PageID 1219. But defense counsel needed more time to prepare given the limited ability to do so during the pandemic. *Id.*, PageID 1219–21. In August 2021, the court issued a final continuance to February 1, 2022. *Id.*, PageID 1221, 1224.

A month after the court issued this last extension, Allen moved to dismiss the indictment under the Sixth Amendment and the Speedy Trial Act. Davis also later challenged the delay under the Sixth Amendment but conceded that the delay had not violated the Speedy Trial Act.

The district court rejected both motions. *Allen*, 2021 WL 5994725, at *1–3; *Davis*, 2021 WL 5989060, at *1–3. As for the constitutional claim, it held that defense counsel had

caused much of the delay, the defendants had not vigorously asserted their speedy-trial rights, and the delay had not prejudiced them. *See Allen*, 2021 WL 5994725, at *2–3; *Davis*, 2021 WL 5989060, at *1–3. As for the statutory claim, it held that defense counsel had agreed that the ends of justice warranted the delay. *Allen*, 2021 WL 5994725, at *1.

B. Sixth Amendment

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]” U.S. Const. amend. VI. This speedy-trial right exists to protect presumptively innocent defendants from languishing in *304 jail while the government doddles to prosecute them. *See Betterman v. Montana*, 578 U.S. 437, 442–43, 136 S.Ct. 1609, 194 L.Ed.2d 723 (2016). The word “speedy” might suggest that a trial must occur without *any* delay no matter the reason, but the Supreme Court has never interpreted the clause in a literal fashion. *See Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). It has reasoned that it cannot identify “with precision” what amount of delay will violate this “vague” speedy-trial right. *Barker v. Wingo*, 407 U.S. 514, 521, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

[3] [4] Rather than set a fixed time period, *Barker* selected a “balancing test” that decides each speedy-trial claim on an “ad hoc basis.” *Id.* at 530, 92 S.Ct. 2182. It identified four questions for courts to ask when confronted with such a claim: How long was the delay? What was the reason for it? Did the defendant timely assert this speedy-trial right? And what prejudice, if any, has the defendant suffered? *See id.* To resolve the claim, a court must “engage in a difficult and sensitive balancing” of these four factors along with any other “relevant” circumstance. *Id.* at 533, 92 S.Ct. 2182. We have engaged in this balancing many times since *Barker*, as the following sampling of cases shows. *See, e.g., Brown v. Romanowski*, 845 F.3d 703, 712–19 (6th Cir. 2017); *United States v. Sutton*, 862 F.3d 547, 558–62 (6th Cir. 2017); *Young*, 657 F.3d at 414–20; *United States v. Brown*, 498 F.3d 523, 530–32 (6th Cir. 2007); *United States v. Jackson*, 473 F.3d 660, 664–68 (6th Cir. 2007); *United States v. Schreane*, 331 F.3d 548, 553–59 (6th Cir. 2003); *United States v. Howard*, 218 F.3d 556, 563–65 (6th Cir. 2000); *Redd v. Sowders*, 809 F.2d 1266, 1269–72 (6th Cir. 1987); *Cain v. Smith*, 686 F.2d 374, 380–85 (6th Cir. 1982). When analyzing these factors, we review a district court’s legal rulings de novo and its findings of fact for clear error. *Romanowski*, 845 F.3d at 712.

[5] [6] *Length of the Delay*. To begin with, the Supreme Court has held that a delay must be sufficiently “long” to trigger any other factor. *See United States v. Loud Hawk*, 474 U.S. 302, 314, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986); *Romanowski*, 845 F.3d at 713–14. In other words, the “customary” delays during any litigation—such as a five-month delay—automatically pass muster under the Sixth Amendment. *Doggett*, 505 U.S. at 652, 112 S.Ct. 2686; *see Romanowski*, 845 F.3d at 713. But a delay longer than a year presumptively meets this “threshold” requirement. *Jackson*, 473 F.3d at 665; *see also Brown*, 498 F.3d at 530. And the four-year holdup in this case looks more like the “extraordinary” delay that the Court confronted in *Barker* than the “customary” one that it hypothesized in *Doggett*. Compare *Barker*, 407 U.S. at 531, 92 S.Ct. 2182, with *Doggett*, 505 U.S. at 652, 112 S.Ct. 2686. The government thus concedes that this delay requires us to invoke the remaining factors. Appellee’s Br. 42–43.

[7] [8] *Reason for the Delay*. The Supreme Court has cataloged the possible reasons for a delay into three general buckets tied to the party at fault. *See Romanowski*, 845 F.3d at 714. In bucket one, this reason-for-delay factor weighs strongly against the government if the government engineers a delay in bad faith “to hamper the defense” or obtain a tactical advantage. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182. In bucket two, this factor still weighs against the government (but less so) if it causes the delay for an invalid reason but without any bad intent. Examples of this second type of delay include the executive branch’s “negligence” in tracking down a defendant or the judicial branch’s “overcrowded” dockets. *Doggett*, 505 U.S. at 652, 112 S.Ct. 2686; *305 *Barker*, 407 U.S. at 531, 92 S.Ct. 2182. In bucket three, this factor weighs in favor of the government if it identifies a legitimate reason for the delay or if the defendant causes it. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182. Examples of this third type of delay include the federal government’s decision to wait for the state government to prosecute the defendant for the same conduct, *see Schreane*, 331 F.3d at 554–55, defense counsel’s decision to litigate pretrial motions or ask for continuances, *see Young*, 657 F.3d at 415–16, or the defendant’s decision to seek new counsel, *see Brown*, 498 F.3d at 531.

[9] Under this framework, the reasons for the delay in this case undercut Davis’s and Allen’s speedy-trial claims. From April 2018 to July 2020, defense counsel asked for continuances either to convince the government not to seek the death penalty or to prepare for the trial. Because these

lawyers—the agents of Davis and Allen—requested the delays, this part of the delay favors the government. See *Vermont v. Brillon*, 556 U.S. 81, 90–91, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009); *Young*, 657 F.3d at 415–16.

[10] Next, from July 2020 to August 2021, the district court delayed the trial because of the COVID-19 pandemic. We and other courts have treated this type of delay as a valid reason that also weighs against the defendants (or at least as a neutral reason that favors neither party). See *United States v. Jones*, 2023 WL 1861317, at *8 (6th Cir. Feb. 9, 2023); see also *United States v. Snyder*, 71 F.4th 555, 578 (7th Cir. 2023); *United States v. Rodriguez-Mendez*, 2023 WL 3378005, at *3 (3d Cir. May 11, 2023); *United States v. Vladimirov*, 2023 WL 2535263, at *5 (4th Cir. Mar. 16, 2023) (per curiam); *United States v. Keith*, 61 F.4th 839, 852–53 (10th Cir. 2023). That conclusion is especially fitting in this case because both the government and Davis's and Allen's lawyers jointly agreed to these pandemic-related continuances.

[11] Lastly, from August 2021 to February 2022, defense counsel requested a final delay so that they could undertake the trial preparations that the pandemic had prevented. This delay likewise undermines Davis's and Allen's claims. See *Brillon*, 556 U.S. at 90–91, 129 S.Ct. 1283. All told, this factor favors the government because the delays stem either from the defendants' conduct or from the pandemic.

In response, Davis and Allen argue that the government's negligence caused the COVID-19 delays because it did not prepare adequate means to hold a trial, and they analogize the pandemic to overcrowded dockets. This claim has legal and factual problems. Legally, we have already rejected their logic. See *Jones*, 2023 WL 1861317, at *8. Factually, they do not challenge the district court's findings about the pandemic's unexpected effects on the criminal-justice system. See *Allen*, 2021 WL 5994725, at *2. To the contrary, they admit that “real concerns” justified this part of the delay. Allen Appellant's Br. 41; Davis Appellant's Br. 37.

[12] [13] *Assertion of Rights*. When considering whether a defendant has adequately raised a speedy-trial objection, courts consider both how early a defendant has asserted this right and how often the defendant has done so. See *Barker*, 407 U.S. at 531–32, 534–35, 92 S.Ct. 2182; *Sutton*, 862 F.3d at 561. Davis and Allen do not fare well under these benchmarks.

Start with Davis. Over a year after his indictment, he objected once to his own counsel's request for a five-month delay (from April to September 2019) in order to convince the government not to seek the death penalty. Cf. *United States v. Flowers*, 476 F. App'x 55, 63 (6th Cir. 2012). *306 But Davis repeatedly consented to every other delay until he moved to dismiss the indictment years down the road. In many respects, then, Davis looks just like the defendant in *Barker*, who also did not object to repeated continuances until moving to dismiss the indictment much later. See 407 U.S. at 516–17, 534–35, 92 S.Ct. 2182. In sum, Davis consented to all but several months of the four-year delay.

Turn to Allen. While he raised his speedy-trial rights with a little more vigor, he also agreed to most of the four-year delay. Like Davis, he objected to the delay in a “belated nature” by waiting until over a year after the indictment when his counsel sought the same five-month delay to convince the government not to seek the death penalty. *Flowers*, 476 F. App'x at 63. But Allen then flipfopped, agreeing to the next delay so that his counsel could prepare for trial. He then switched again, objecting to Davis's request for a few more months so that his new counsel could get up to speed (from May to July 2020) and to the indefinite pandemic-related continuance (granted in October 2020). But the latter objection did not last long. In monthly status reports starting in November 2020, his counsel regularly stated that he consented to continued pandemic-related delays. And Allen did not object again until he moved to dismiss the indictment in September 2021. This stop-and-go conduct casts doubt on the “sincerity” of Allen's request for a speedy trial. *Sutton*, 862 F.3d at 561. At the least, it shows that Allen objected to all of one year of the four-year delay.

[14] *Prejudice*. The Supreme Court has explained that prejudice from a pretrial delay can take various forms. See *Doggett*, 505 U.S. at 654, 112 S.Ct. 2686. Some defendants must remain in jail and thereby suffer the continued pretrial deprivation of liberty. See *id.* Even those defendants who can post bail must suffer the continued disruption of their lives that arises when the government publicly accuses them of a crime. See *id.* And “most” problematically, according to the Court, a pretrial delay can undermine the defendant's trial defenses—say, if an alibi witness's memory starts to fade. See *id.* (quoting *Barker*, 407 U.S. at 532, 92 S.Ct. 2182). For this defense-related harm, courts will sometimes *presume* prejudice if the government has strategically or negligently caused the delay. *Romanowski*, 845 F.3d at 717. If, by contrast, a defendant caused the delay or the government has a valid excuse for it, defendants must show *actual* defense-

related prejudice or their speedy-trial claims “will generally fail.” *United States v. Mundt*, 29 F.3d 233, 236 (6th Cir. 1994); see *United States v. Williams*, 753 F.3d 626, 634 (6th Cir. 2014); *Howard*, 218 F.3d at 564.

[15] This framework dooms Davis and Allen. They cannot rely on any presumption of prejudice to their defense because they requested many of the delays themselves and because the government had a valid pandemic-related reason for the other continuances. So they must prove actual prejudice. But they identify no “specific” harm to their defense that the delay caused. *Howard*, 218 F.3d at 564. They instead paradoxically argue that the district court’s decision to set the trial for February 2022 prejudiced them because it required that they conduct the trial using physical restrictions like masking and social distancing. To avoid these restrictions, however, the district court would have needed to delay the trial even longer. Whether or not these restrictions matter under other constitutional provisions, cf. *United States v. Smith*, 2021 WL 5567267, at *3 (6th Cir. Nov. 29, 2021), they do not show speedy-trial prejudice.

*307 To be sure, Davis and Allen suffered some prejudice from this lengthy delay because they remained in jail throughout this time. See *Barker*, 407 U.S. at 532, 92 S.Ct. 2182. But *Barker* does not treat physical incarceration as the “most serious” type of prejudice. *Id.* In any event, Davis objected to only months of this incarceration and Allen objected to only a year of it. These periods come close to matching the 10 months that the defendant in *Barker* spent in jail before he was released on bond. *Id.* at 534, 92 S.Ct. 2182. Yet *Barker* held that this prejudice did not suffice when balanced against the other factors. *Id.* at 534–35, 92 S.Ct. 2182. This case requires the same result. Although, as in *Barker*, the delay was extraordinary, Davis and Allen agreed to most of it, did not vigorously assert their rights, and did not suffer any defense-related prejudice. So, as in *Barker*, their speedy-trial claims fail.

C. Speedy Trial Act

[16] This conclusion leaves Allen’s claim that the delay violated the Speedy Trial Act. See 18 U.S.C. §§ 3161–3174. This Act allows a district court to extend the 70-day period in which it must try a defendant if the court finds “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). When engaging in this “ends

of justice” inquiry, the district court must consider several “factors,” including whether the failure to grant a delay would make the trial “impossible” or cause a “miscarriage of justice,” and whether the case is “so unusual or so complex” that the parties cannot prepare within the allotted 70 days. *Id.* § 3161(h)(7)(B)(i)–(ii). Because district courts have broad discretion to grant ends-of-justice continuances, we review a court’s decision under the deferential abuse-of-discretion standard. See *Williams*, 753 F.3d at 635.

The district court here found that the ends of justice required each delay that it granted. For the initial delays to July 2020, it reasoned both that a “miscarriage of justice” would occur if it did not give defense counsel enough time to argue against the death penalty and that the case was “so complex” that counsel needed more time to prepare for trial. Order, R.59, PageID 135; Order, R.152, PageID 435. For the pandemic-related delays to August 2021, the court reasoned that trial would be “impossible” without a continuance or at least that the failure to grant the continuance would cause a “miscarriage of justice.” Order, R.247, PageID 1067; Order, R.263, PageID 1138–39. For the final delay from August 2021 to February 2022, the court reasoned that the ends of justice warranted a continuance to allow Allen’s counsel to engage in the trial preparation that the pandemic had foreclosed. Order, R.277, PageID 1224.

[17] On appeal, Allen challenges only the final continuance. Despite the pandemic, he claims that it was “possible” to hold a trial by September 2021 (rather than February 2022) because the court had conducted other trials at this point. Allen Appellant’s Br. 43. Allen ignores the reason for this last extension. The court did not grant it because of the pandemic but because his counsel needed more time to prepare. See 18 U.S.C. § 3161(h)(7)(B)(ii). Indeed, Allen’s own attorney asked for the extension purportedly with the “consent” of Allen himself. *Allen*, 2021 WL 5994725, at *1. The court did not abuse its discretion by granting the very continuance that Allen sought.

We affirm.

*308 CONCURRENCE

MURPHY, Circuit Judge, concurring.

Michael Davis and David Allen got paid to commit a horrendous crime that ended a human life. So seemingly

all could agree with Congress's "policy judgment[]" to punish their contract murder. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (opinion of Roberts, C.J.) (*NFIB*); 18 U.S.C. § 1958(a). But courts must neutrally enforce the Constitution's text regardless of a law's merits. And that text does not give Congress a "general right to punish murder," *Cohens v. Virginia*, 19 U.S. 264, 426, 6 Wheat. 264, 5 L.Ed. 257 (1821); it instead gives Congress a specific right "[t]o regulate Commerce ... among the several States," U.S. Const. art. I, § 8, cl. 3. Yet Davis and Allen committed the murder entirely within Michigan. So it is not obvious why any power over interstate commerce covers their conduct. After all, the State of Michigan (not the federal government) has traditionally held the "sovereign" prerogative to punish violent crimes within its borders. *United States v. Lopez*, 514 U.S. 549, 564, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

To be sure, the Supreme Court once seemed to interpret the Commerce Clause as allowing Congress to regulate *any* intrastate activity that substantially affected interstate commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 123–29, 63 S.Ct. 82, 87 L.Ed. 122 (1942). More recently, however, the Court has limited this "substantial effects" test and reaffirmed that Congress lacks a general power to regulate all human activity. See *Lopez*, 514 U.S. at 561–68, 115 S.Ct. 1624. The federal government thus conceded that Congress could not punish Davis and Allen's crime based on its "effect" on interstate commerce.

The government instead justified its prosecution of Davis and Allen on the ground that they made phone calls within Michigan to commit the murder. As support for this theory, the government primarily relied on our precedent holding that the Commerce Clause allows Congress to regulate *any* local activity that uses a phone (even if only to make an intrastate call) because phones are "instrumentalities" of interstate commerce. *United States v. Weathers*, 169 F.3d 336, 341–42 (6th Cir. 1999). Alternatively, the government argued that the Commerce Clause allowed Congress to prohibit Davis and Allen's murder because some of their intrastate calls flowed through the "channels of interstate commerce" in that the calls used out-of-state switches for their connection. *Id.* at 342. While our binding precedent requires us to agree with the government, I am skeptical of both grounds. I write to explain why I remain particularly unconvinced by our broad rule allowing Congress to regulate any activity using a phone. If correct, this holding would all but undo the Supreme Court's recent limits on its substantial-effects test.

I

At the time of the founding, the Commerce Clause's key word (commerce) "meant 'trade' or economic 'intercourse[.]'" *United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022) (citing 1 Samuel Johnson, *A Dictionary of the English Language* 422 (6th ed. 1785)). Yet economic exchanges have always required more than a handshake or a contract. They have also required the physical transfer of goods from seller to buyer. "All America" at the time of the founding thus "understood" the word "commerce" to cover not just an interstate exchange but also the primary transportation method in which the parties implemented that exchange: "navigation." *Gibbons v. Ogden*, 22 U.S. 1, 190, 9 Wheat. 1, 6 L.Ed. 23 (1824). As a result, the *309 Commerce Clause originally allowed Congress to regulate both "trade" and the "transportation" of the traded products. *Rife*, 33 F.4th at 842.

Today, by comparison, the Supreme Court broadly reads the Commerce Clause to give Congress authority over many things that nobody would describe as interstate trade or the shipment of the traded goods. See *NFIB*, 567 U.S. at 549, 132 S.Ct. 2566 (opinion of Roberts, C.J.). Since *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971), the Court has cataloged this broad commerce authority into "three" general "categories[.]" *Id.* at 150, 91 S.Ct. 1357. First, Congress may regulate "the channels of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). Second, it may regulate the "instrumentalities of interstate commerce" and the "persons or things in" that commerce. *Id.* at 16–17, 125 S.Ct. 2195. Third, it may regulate activities that "substantially affect interstate commerce." *Id.* at 17, 125 S.Ct. 2195.

The third ("substantial effects") category has primarily driven the Supreme Court's expansion of the Commerce Clause. *Rife*, 33 F.4th at 843. The Court developed this substantial-effects test in the 1930s to uphold federal laws designed to combat the Great Depression. *Id.* at 844. The test allows Congress to regulate local activities (such as growing wheat on a private farm for personal use) if the activities "have a substantial effect on interstate commerce" when considered in the aggregate. *Raich*, 545 U.S. at 17, 125 S.Ct. 2195; *Wickard*, 317 U.S. at 128–29, 63 S.Ct. 82.

By 1990, many had opined that this test spelled the "death of our federal system." David P. Currie, *The Constitution in*

the Supreme Court: *The Second Century, 1888–1986*, at 236 (1990); see Robert H. Bork, *The Tempting of America* 56–57 (1990). The Constitution “delegated” “few and defined” regulatory “powers” to the federal government and left the remaining “numerous and indefinite” powers to the States. *The Federalist* No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961). But if Congress could regulate *anything* that substantially affected national commerce, the federal government would seem to have obtained the unlimited “police power” reserved to the States. *NFIB*, 567 U.S. at 536, 132 S.Ct. 2566 (opinion of Roberts, C.J.).

Yet these predictions proved wrong. In three cases, the Supreme Court has since placed concrete limits on its substantial-effects test. See *id.* at 548–58, 132 S.Ct. 2566; *United States v. Morrison*, 529 U.S. 598, 608–09, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *Lopez*, 514 U.S. at 558–59, 115 S.Ct. 1624. In *Lopez*, the Court held that Congress may not make it a crime to possess a gun in a school. 514 U.S. at 559–67, 115 S.Ct. 1624. In the process, it rejected the theory that gun crimes negatively affect learning, which, in turn, negatively affects interstate commerce. *Id.* at 563–64, 115 S.Ct. 1624. This theory would permit Congress to regulate all crimes or other noneconomic activities that have an impact on the national GDP. *Id.* at 564, 115 S.Ct. 1624. The Court refused to extend its “substantial effects” test to “noncommercial” activity in this way. *Id.* at 566–67, 115 S.Ct. 1624.

The Court reaffirmed *Lopez* in *Morrison*, which considered a law that allowed victims who suffer gender-motivated violence to sue their abusers. 529 U.S. at 605–06, 120 S.Ct. 1740. The Court clarified that all of its substantial-effects cases addressed “some sort of economic endeavor.” *Id.* at 611, 120 S.Ct. 1740. Yet domestic violence was “not, in any sense of the phrase, economic activity.” *Id.* at 613, 120 S.Ct. 1740. Instead, the States hold the *310 power to regulate “intrastate violence” if the culprit does not direct that violence “at the instrumentalities, channels, or goods involved in interstate commerce[.]” *Id.* at 618, 120 S.Ct. 1740.

Most recently in *NFIB*, the Court held that its substantial-effects test applies only to economic activity—not inactivity. That case considered the mandate requiring individuals to buy health insurance in the Patient Protection and Affordable Care Act. 567 U.S. at 530, 132 S.Ct. 2566 (opinion of Roberts, C.J.). The controlling opinion held that Congress could not enact this mandate under the Commerce Clause. *Id.* at 548–61, 132 S.Ct. 2566. It reasoned that Congress had never used

its commerce authority to “compel” economic exchanges and that this type of affirmative power, if allowed, would “fundamentally” expand the limited scope of Congress’s regulatory reach. *Id.* at 549, 555, 132 S.Ct. 2566.

II

Given *Lopez*, *Morrison*, and *NFIB*, the government in this case “concede[d] that the activity regulated [by the murder-for-hire statute] does not have a substantial effect on interstate commerce.” Resp., R.231, PageID 957. It nevertheless argued that Congress could punish Davis and Allen’s murder because they made phone calls in Michigan to commit it. According to the government, phones are “instrumentalities of interstate commerce” under the Supreme Court’s second category of activities that Congress may regulate. *Raich*, 545 U.S. at 16–17, 125 S.Ct. 2195. This position is understandable. We have “repeatedly” treated phones as such instrumentalities—even when callers make local calls. *United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir. 2022); *United States v. Watson*, 852 F. App’x 164, 168 (6th Cir. 2021); *United States v. Dais*, 559 F. App’x 438, 445 (6th Cir. 2014); *Weathers*, 169 F.3d at 341–42. Under this logic, Congress may regulate *any* activity (whether the completion of a crime or the operation of a school) that uses a phone.

I am skeptical of this expansive rule. Judges Batchelder and Becker have already expressed many of my reservations in a related context. They critiqued an equally broad rule that treated cars as instrumentalities of interstate commerce (even when driven intrastate) and thus that gave Congress the right to regulate all local activities completed with cars. See *United States v. McHenry*, 97 F.3d 125, 132–34 (6th Cir. 1996) (Batchelder, J., dissenting); *United States v. Bishop*, 66 F.3d 569, 597–600 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part). Their concerns with this rule for cars apply just as much to phones. I will highlight three of the concerns here: this broad rule appears contrary to the Commerce Clause’s original meaning, the Supreme Court’s caselaw does not seem to justify the rule, and our precedent adopted it with little reasoning.

Start with first principles: Would the Commerce Clause as originally understood have allowed Congress to regulate any local activity (such as Davis and Allen’s crime) if a person made a local call to carry it out? Of course, phones (like cars) did not exist at the founding. But we often “must apply the legal rules” that flow from a “fixed constitutional” provision

“to new technologies in an evolving world.” *United States v. Miller*, 982 F.3d 412, 417 (6th Cir. 2020). The Supreme Court has told us how to do so. We should identify the legal principles that governed similar conduct and engage in “analogical reasoning” by asking whether these principles apply in the same way to the new phenomenon. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, — U.S. —, 142 S. Ct. 2111, 2132, 213 L.Ed.2d 387 (2022). For example, *311 the Fourth Amendment rules applicable to government searches of traditional mail may well extend to email. *See Miller*, 982 F.3d at 432–33. And the First Amendment rules applicable to government restrictions of street-corner speech may well extend to social-media speech. *See Packingham v. North Carolina*, 582 U.S. 98, 105–08, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017).

This guidance directs us to the right questions here. Even if phones (and cars) did not exist at the founding, other means of communication (and transportation) did. Think of letters (and horses or carriages). *See Miller*, 982 F.3d at 417; *Bishop*, 66 F.3d at 598 n.18 (Becker, J., concurring in part and dissenting in part); cf. *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9, 24 L.Ed. 708 (1877). And the government cites nothing to suggest that Congress had a power to regulate all activities completed through the intrastate delivery of a letter—just as it cites nothing to suggest that Congress could regulate, say, a local horse theft. *See Bishop*, 66 F.3d at 598 n.18 (Becker, J., concurring in part and dissenting in part). Indeed, if the Commerce Clause gave Congress this power over all activities done with letters, why would the Founders have felt the need separately to permit Congress “[t]o establish Post Offices and post Roads”? U.S. Const. art. I, § 8, cl. 7.

At most, some sources held that Congress could punish *any* use of its proprietary postal system for unauthorized purposes (under this postal power). *See Ex Parte Jackson*, 96 U.S. 727, 732–33, 24 L.Ed. 877 (1877). And others might be read to suggest that Congress could regulate the transport of *interstate* letters by non-postal means (under the commerce power). *See Champion v. Ames*, 188 U.S. 321, 346–64, 23 S.Ct. 321, 47 L.Ed. 492 (1903). Yet these sources fall short of justifying the broader rule that Congress may reach all activities done in part by the intrastate delivery of a letter outside the postal system. Cf. *Jackson*, 96 U.S. at 735. And if Congress historically lacked the power to regulate all activities involving letters, why should it now possess the power to regulate all activities involving phones?

Admittedly, the Supreme Court has taken us a long way from the Commerce Clause's original meaning. But I am aware of no Supreme Court decision that has extended it as far as we have. In *Lopez*, the Court described the second category of activities that Congress may regulate (the category relevant here) in this way: “Congress is empowered to regulate and protect the instrumentalities of interstate commerce ... even though the threat may come only from intrastate activities.” 514 U.S. at 558, 115 S.Ct. 1624. So, for example, the Commerce Clause gives Congress the power to require railroad companies to use safety equipment on train cars traveling “on any railroad which is a highway of interstate commerce.” *S. Ry. Co. v. United States*, 222 U.S. 20, 26, 32 S.Ct. 2, 56 L.Ed. 72 (1911). And because train cars traveling only intrastate on these railroads pose “dangers” to this interstate traffic, Congress may require these cars to use that safety equipment too. *Id.* at 26–27, 32 S.Ct. 2. Likewise, the Commerce Clause gives Congress the power to set the prices that railroad companies charge for interstate trips. *See Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 350–55, 34 S.Ct. 833, 58 L.Ed. 1341 (1914). And because those companies might try to subsidize intrastate trips by raising their interstate prices, Congress may require the companies to treat the two types of trips equally. *See id.* In short, Congress “may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to *312 the injury of interstate commerce.” *Id.* at 353, 34 S.Ct. 833.

It is not clear to me that these decisions justify our rule that Congress *automatically* may regulate all activities done with phones. I instead read the decisions to hold, consistent with the Necessary and Proper Clause, that Congress may regulate local conduct when “necessary or appropriate” to govern an interstate transportation system. *Id.* at 355, 34 S.Ct. 833; *see U.S. Const.*, art. I, § 8, cl. 18. That is, Congress may regulate intrastate activities if “necessary to make a regulation of interstate commerce effective[.]” *Raich*, 545 U.S. at 35, 125 S.Ct. 2195 (Scalia, J., concurring in the judgment). Here, then, perhaps Congress could protect an interstate-communications network by preventing local activities (whether phone calls or other behavior) that harm the network. *See Pensacola Tel.*, 96 U.S. at 9–11. But the government has not argued that Davis and Allen's murder (or calls) harmed an interstate network. Cf. *United States v. Reed*, 489 F.2d 917, 920 (6th Cir. 1974). It instead argued that the mere making of a local call allowed Congress to ban a local murder—without any nexus between

that local ban and a broader scheme regulating interstate commerce.

If anything, the government's broad reading would eviscerate the Supreme Court's more recent limits on its substantial-effects test. How many activities these days do not use phones (or cars)? Consider two examples. The Court's precedent makes clear that the Commerce Clause does not give Congress the power to punish the possession of a gun in a school. *See Lopez*, 514 U.S. at 559–68, 115 S.Ct. 1624. But can it punish the possession of a gun in a school if the student possesses a phone? Or can it set the “curriculum” of all schools that use phones in their operations? *Id.* at 565, 115 S.Ct. 1624. Likewise, the Commerce Clause does not give Congress the authority to punish gender-motivated violence in a State. *See Morrison*, 529 U.S. at 613–18, 120 S.Ct. 1740. But can it punish that intrastate violence by any abuser who owns a phone or at least uses the phone to call the victim once?

I might be less skeptical of our caselaw if it had addressed my concerns about whether the Constitution's original meaning or the Supreme Court's existing precedent supported our broad rule. But our caselaw lacks this reasoning. Most of our opinions date the rule back to our 1999 decision in *Weathers*. *See, e.g., Windham*, 53 F.4th at 1013. Yet *Weathers* has just a few paragraphs on this issue. 169 F.3d at 341–42. We called it “well established” that phones are “instrumentalities of interstate commerce,” and we suggested that Congress may regulate conduct that uses phones even for “intrastate” calls. *Id.* As support, we cited two of our cases and two out-of-circuit cases. *See id.* (citing *United States v. Graham*, 856 F.2d 756 (6th Cir. 1988); *Aquionics Acceptance Corp. v. Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974); *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997)).

But our prior cases did not establish (or even suggest) our broad rule. *Graham* considered only whether certain interstate phone calls satisfied a federal statute's elements, not any constitutional question. *See* 856 F.2d at 760–61. *Aquionics Acceptance* also asked only a statutory question: Did Congress's use of the phrase “instrumentality of interstate commerce” in the Securities and Exchange Act of 1934 cover securities fraud undertaken through intrastate phone calls? 503 F.2d at 1226–28 (quoting 15 U.S.C. § 78j(b) (1970)). We read the Act to reach this fraudulent conduct and explained that this broader reading posed no constitutional problem. *313 *Id.* at 1228. Why? Our constitutional analysis did *not* rest on the idea that the Commerce Clause gives

Congress plenary power over all activities using phones. *Id.* Rather, we relied on the Supreme Court's substantial-effects test, reasoning that Congress may regulate even intrastate securities sales that have an “appreciable effect on interstate commerce.” *Id.* But again, the government here disavowed any reliance on this substantial-effects test in its prosecution of Davis and Allen.

The out-of-circuit precedent also did not justify our rule. Like *Aquionics Acceptance*, the Seventh Circuit in *Shaffner* invoked the substantial-effects test. 626 F.2d at 37. Although it opined that a debt collector's phone was “an instrumentality of interstate commerce,” it added that Congress could regulate the collector's “intrastate” business as long as it “directly affect[ed] interstate commerce.” *Id.* The Ninth Circuit in *Clayton*, by comparison, concerned a federal law that banned the possession of “cloned” cellphones and cloning equipment. 108 F.3d at 1116–17. The court held that the prosecution did not need to show any effect on interstate commerce to prove a violation of this law because “[t]elephones are instrumentalities of interstate commerce.” *Id.* at 1117 (citing *Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir. 1984)). But this statute regulated communications equipment *itself*, so one could justify this rule on the Supreme Court's necessary-and-proper logic from cases like *Shreveport*: a defendant might use the cloned phone “to the injury of interstate commerce.” 234 U.S. at 353, 34 S.Ct. 833. Indeed, *Clayton* relied on its earlier decision in *Pavlak*, which in turn rested on *Weiss v. United States*, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298 (1939). *Pavlak*, 727 F.2d at 1427. *Weiss* suggested in dicta that the Federal Communications Act of 1934 could constitutionally bar the wiretapping even of intrastate phone calls because “Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions[.]” 308 U.S. at 327 & n.7, 60 S.Ct. 269 (citing *Shreveport*, 234 U.S. at 351–52, 34 S.Ct. 833). But again, the government has not tied its prosecution here to any broader scheme regulating interstate communications.

In short, our main decision holding that the Commerce Clause gives Congress the power to regulate all activities completed through a local phone call did not discuss the clause's original meaning. It also did not seek to reconcile its rule with the Supreme Court's most relevant precedent. It instead relied solely on circuit cases. And it may well have overread those cases.

* * *

The Founders established a federalist system to protect the liberty of the local communities in each State to choose the policies that would govern their local conduct. *See Bond v. United States*, 564 U.S. 211, 220–22, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). This case demonstrates the point. The Michigan legislature and Congress both surely agree that Davis and Allen's murder has no place in our society. But what about the punishment? Many citizens have moral concerns with the death penalty. Michigan, for example, forbids this penalty in its constitution. *Mich. Const. art. IV, § 46*. But the federal murder-for-hire statute authorized a federal court to impose the death penalty for Davis and Allen's Michigan

crime. *18 U.S.C. § 1958(a)*. And Davis and Allen spent years trying to convince federal prosecutors not to pursue that punishment. In the end, then, our broad view allowing Congress to regulate any activity done with a phone undercuts not just the Supreme Court's limits on its substantial-effects *314 test but also the Michigan citizenry's right to govern themselves.

All Citations

86 F.4th 295

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APPENDIX B

2024 WL 1043516

Only the Westlaw citation is currently available.

United States Court of Appeals, Sixth Circuit.

UNITED STATES of

America, Plaintiff-Appellee,

v.

David ALLEN (22-1698); Michael
Davis (22-1717), Defendants-Appellants.

Nos. 22-1698/1717

I

FILED February 15, 2024

Attorneys and Law Firms

[William J. Vaillencourt, Jr.](#), Office of the U.S. Attorney,
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[Martin J. Beres](#), Law Office, Clinton Township, MI, for
Defendant-Appellant David Allen in No. 22-1698.

Footnotes

* Judge Davis recused herself from participation in this ruling.

[Harold Z. Gurewitz](#), Gurewitz & Raben, Detroit, MI, for
Defendant-Appellant in Michael Davis in No. 22-1717.

BEFORE: [STRANCH](#), [BUSH](#), and [MURPHY](#), Circuit
Judges.

ORDER

1 The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petition then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

All Citations

Not Reported in Fed. Rptr., 2024 WL 1043516

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 18-cr-20085
District Judge Paul D. Borman

DAVID ALLEN-D-4,

Defendant. /

**ORDER DENYING DEFENDANT ALLEN'S MOTION TO DISMISS
BASED UPON SIXTH AMENDMENT SPEEDY TRIAL VIOLATIONS
AND SPEEDY TRIAL ACT VIOLATIONS**

BACKGROUND

On November 15, 2021, Defendant David Allen filed a Motion to Dismiss alleging violations of the Sixth Amendment right to a speedy and public trial, and the Speedy Trial Act, 18 U.S.C. § 3161, et seq. (ECF No. 288, PageID.1492.) That Motion was subsequently joined in by Co-Defendant Michael Davis. (ECF No. 298, December 10, 2021.)

Allen contends that the extensive delay in proceeding to trial prejudiced his right to a speedy trial, and that the "systemic breakdown in the criminal justice system largely due to the [COVID-19] pandemic must be charged to the government." (ECF No. 288, at PageID.1495.) Defendant Allen relies on the district court decision in *United States v. Henning*, 513 F.Supp.3d 1193 (C.D. CA, 2021), where a Central District of California District Judge dismissed the

indictment with prejudice, holding that his Chief Judge, in indefinitely suspending jury trials due to the COVID-19 emergency, acted to improperly suspend the constitutional right of that defendant to a public and speedy trial. (ECF No. 288, at PageID.1508, 1509-1511.) The *Henning* opinion noted that the trial at issue, involving just one defendant, was a retrial, and that the "retrial was not complex. To the contrary, it is quite simple and straightforward." *Henning*, at 1208. The instant case is a complex murder-for-hire case that initially involved four Defendants facing possible death penalty verdicts, and multiple complex defense motions.

Henning, which appears to be an outlier, is on appeal by the Government to the United States Court of Appeals for the Ninth Circuit.

DISCUSSION

Speedy Trial Act, 18 U.S.C. § 3161, et seq.

On August 5, 2021, this Court entered a Stipulation and Order Excluding Delay in Computing Time Under the Speedy Trial Act, in which all the parties agreed "that the time in which trial must commence under the Speedy Trial Act should be extended from August 2, 2021 to February 1, 2022, such that th[at] period of time...is excluded in computing the time in which trial must commence." (ECF No. 277, at PageID.1221.):

Such delay is excludable as the ends of justice served by granting the adjournment outweigh the best interest of

the public and the defendant in a speedy trial as it is the public's and the defendant's best interest to allow counsel for defendants reasonable time for effective preparation, taking into consideration counsel's exercise of due diligence. 18 U.S.C. § 3161(h)(7)(A) & (B); *see also*, *United States v. Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004); *United States v. Bowers*, 834 F.2d 607, 609-10 (6th Cir. 1987) (*per curiam*).

That Stipulation and Order, a continuation of previous Orders, was signed by counsel for all four then-Defendants. (*Id.* at PageID.1222.) This Court had previously found that, pursuant to 18 U.S.C. § 3161(h)(7)(B)(ii), this case was both unusual and complex, due to the nature of the prosecution, and that it is unreasonable to expect adequate preparation for pretrial proceedings and the trial itself within the time limits established by this section. § 3161(h)(7)(i) and (ii). Specifically, this Stipulation and Order was signed with consent, by Jeffrey Edison, counsel to D-4 David Allen, and Harold Gurewitz, counsel to D-2 Michael Davis.

The Sixth Amendment right to a speedy and public trial

Defendants' claim relating to a violation of the constitutional right to a speedy trial is based upon the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial." This constitutional right is discussed in the seminal Supreme Court decision in *Barker v. Wingo*, 92 S. Ct. 2182 (1972). This Court finds that proceedings in this case do not violate that

constitutional right, for the reasons that follow. The four *Barker* factors that the trial judge must consider are:

(1) Length of the delay.

The length in this case, pretrial, was extensive due to the charging indictment which permitted the Government to seek the death penalty for all four Defendants. In this case, the Defendants' initial focus was on development of mitigation material to provide the Department of Justice with compelling evidence to not seek the death penalty. The mitigation phase of a prosecution permitting the Federal Government to seek the death penalty requires the Court to appoint learned defense counsel to assist local counsel in Michigan in developing and presenting evidence to convince the DOJ to decline to seek the death penalty. Because Michigan law does not permit the imposition of the death penalty, the Court was required to appoint four out-of-state attorneys, learned in death penalty prosecutions, to assist local counsel in this critical "mitigation" stage. To reiterate, at this stage, all counsel concentrated on developing mitigation evidence to convince the Government to not seek the death penalty based upon, *inter alia*, the backgrounds and experiences of the Defendants from the time of their birth, to the present--critical mitigating facts to be forwarded to the Justice Department, which has the final decision on whether to seek the death penalty.

Throughout this process, from the initiation of this prosecution, the Defendants stipulated to the initial delays, and then, to all of the subsequent delays as waivers under the Speedy Trial Act, caused by the litigation and the COVID-19 pandemic which severely impacted the court system, creating lengthy closure of the courts and limiting reopening of the courts to the public in non-jury trial proceedings, up to the latest reopening to provide limited criminal jury trial proceedings involving no more than two defendants. (This case started with four Defendants, and very recently, in the last two weeks, has it been reduced to a two Defendant trial.) The COVID-19 pandemic also restricted/prevented counsel from consulting with their incarcerated clients, often in institutions with quarantines and lockdowns.

(2) Reason for the delay.

The Court notes that there has been a significant amount of excludable delay caused by Defendants' filing of pretrial motions, evidentiary hearings, and the resulting Court opinions, all of which are excludable delay per, 18 U.S.C. § 3161(h)(1)(D). None of this delay is attributable to the Government.

Time and again, the stipulations for extending time under the Speedy Trial Act have set forth difficulties under the COVID-19 pandemic involving the viability of counsel to meet with their incarcerated clients, including COVID-19 restrictions resulting in prison and court and state-imposed shutdowns/quarantines,

and their impact on the general public--and in particular, prosecutors, defense counsel, and witnesses in preparing the cases for hearings and trial, and with regard to securing jurors for trial.

The initial and continuing closure of the Federal Courthouse based on court orders due to COVID-19 concerns has had a significant impact on the progress of this case.

(3) Defendant's assertion of his right.

Defendants through their counsel did not vigorously assert their right to speedy trial in the face of the COVID-19 pandemic. Although Defendant Allen did not agree to the stipulations for adjournments, his counsel did agree, and the Court's finding of justification for this delay under 18 U.S.C. § 3167(h) (7)(A) and (B), clearly supports the necessary delay stipulated to by all defense counsel and ordered by the Court, finding that failure to grant such a continuance would result in a miscarriage of justice (3161(h)(7)(B)(i)), and that it would have been unreasonable to expect adequate preparation for pretrial proceedings and the trial itself within the time limits established by 18 U.S.C. § 3161(h). All of these reasons, over the years, culminated in the Stipulation and Order Excluding Delay in Computing Time Under the Speedy Trial Act entered August 5, 2021 extending to February 1, 2022, the trial date. (ECF No. 277.)

(4) Prejudice to Defendant.

There is no prejudice to Defendants from the delay other than a generalized assertion that excessive delay compromises the reliability of the trial. The Court does not find support for this generalized assertion in this case.

The Court finds that this delay was neither caused by bad faith nor negligence by the Government, and that the Government did not cause or facilitate the COVID-19 pandemic.

The Court further finds the Court's orders during the COVID-19 pandemic proper. The Court has been operating under its Administrative Order No. 20-AO-39, which explicitly excludes delay under 18 U.S.C. § 3161(h)(7)(A) from July 2020, until further Order of the Court. The opinion attaches the Court's November, 2021 Criminal Jury Trial Readiness form that permitted the reopening, limited to two-defendant criminal jury trials. (Attachment.)

Accordingly, the Court DENIES Defendants' Motion to Dismiss based upon claimed violations of the Sixth Amendment right to a speedy and public trial, and the Speedy Trial Act.

SO ORDERED.

DATED: December 16, 2021



PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 18-cr-20085
District Judge Paul D. Borman

MICHAEL DAVIS,

Defendant. /

**ORDER DENYING DEFENDANT MICHAEL DAVIS'S (D-2) MOTION TO
DISMISS COUNTS ONE AND THREE (ECF #218)**

On April 20, 2020, Defendant Michael Davis filed a Motion to Dismiss Counts One and Three of the indictment on the ground that the statute charged in those Counts, 18 U.S.C. § 1958, is unconstitutional as applied to Davis (ECF #218). On May 11, 2020, the Government filed a Response in Opposition (ECF #231). On May 22, 2020, Defendant Davis filed a Reply (ECF #234).

Defendants Dwight Williams D-1, Michael Davis D-2, Christopher Davis D-3, and David Allen D-4, residents of the Eastern District of Michigan, were charged in an indictment on February 7, 2018 with four counts relating to the December 29, 2016 murder of Deangelo Pippen in the Western District of Michigan. Count One charged Defendants with violating Title 18 U.S.C. §§ 1958(a), and 2, for using and causing another to use a "facility of interstate...commerce, to wit: telephone(s) and motor vehicle(s), with intent that a

murder of D.P. be committed in violation of the laws of the State of Michigan or the United States, as consideration for the receipt of, and as consideration for a promise and agreement to pay, things of pecuniary value, to wit: United States currency, which offense resulted in the death of D.P." (ECF #1, Page ID. 2).

The indictment alleged in Count Three that all four Defendants engaged in a "Conspiracy to Use Interstate Commerce Facilities in the Commission of Murder-for-Hire, 18 U.S.C. § 1958(a)." (*Id.*, Page ID. 3).

Counts Two and Four of the indictment, not at issue in this Motion, each charge a violation of 18 U.S.C. §§ 924(c), 924(j), and 2, for "Use and Carry of a Firearm During and in Relation to a Crime of Violence Resulting in Death."

The parties agree that venue is in the Eastern District of Michigan and elsewhere, and that all relevant conduct took place within the State of Michigan (Page ID. 778).

Defendant contends that:

The indictment charges state-law murder offenses as federal capital crimes based upon an attenuated link between the mere use of a telephone or motor vehicle and interstate commerce. It bases federal jurisdiction on the alleged wholly intrastate...murder-for-hire scheme. No connection to or effect upon interstate commerce is alleged...[F]ederal jurisdiction is limited to cases involving allegations of conduct having-at the very least-some sort of interstate character. To the extent that the purely intrastate conduct in this case is alleged to fall within the ambit of § 1958, that statute is

unconstitutional as applied and Counts One and Three...should be dismissed.

(ECF #218, Page ID. 777).

While Defendant contends that *United States v. Lopez*, 514 U.S. 549, 566 (1995) held that the Constitution withholds from Congress a plenary police power, that does not control the instant case: the statute, 18 U.S.C. § 1958, as applied, supports the charges contained in Counts I and III.

The "Government Response in Opposition to Defendants' Motion to Dismiss Counts One and Three [R. 218]" contends that interstate activity occurred because "all of the phone calls between the Defendants were routed through call switch centers located in several states including Texas, Illinois, Pennsylvania and New York." (ECF #231, Page ID. 948).

The Government contends that the "murder-for-hire statute, 18 U.S.C. § 1958(a) penalizes anyone who uses or causes another to use any facility of interstate commerce, with intent that a murder be committed as a consideration for the receipt of anything of pecuniary value." The Government points to a critical 2004 amendment to § 1958 that replaced "in interstate commerce with the current statutory requirement of a facility of interstate commerce." The Government notes that 18 U.S.C. § 1958(b)(2) defines "facility of interstate commerce to include means of transportation and communication." (Page ID. 949). That Defendant

Michael Davis contends that in 2004 Congress "quietly" amended § 1958 by substituting "of" in place of "in", that does not undermine the legitimacy of the amendment and its critical impact in this case.

The Government contends that (1) cell phones and vehicles are facilities of interstate commerce, *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1999), and (2) that Congress has the authority to regulate instrumentalities of interstate commerce such as cell phones and vehicles, even if the use of those instrumentalities in a particular case involves only intrastate activity. *Weathers* at 341. Finally, the use of telephone switch centers located outside Michigan undercuts any Defendant claim that their use of cell phones was purely intrastate activity.

Noone contests the fact that the Defendants repeatedly used cell phones to communicate with Co-Defendant Dwight Williams who hired them to commit the murder of Deangelo Pippen, which they accomplished on December 29, 2016. Noone contests that the Defendants used a rental vehicle, which is also a facility of interstate commerce, to conspire to murder, and to murder Pippen, driving from the Detroit area to the Western District of Michigan. The use of a vehicle, in addition to a cell phone, was essential to the conspiracy to murder, and to the murder. *See United States v. Cobb*, 144 F.3d 319, 321 (4th Cir. 1998). Cars are instrumentalities of interstate commerce, regardless of whether they have an

intrastate destination. Here the use of the vehicle to travel to the Western District of Michigan, and then to kill Pippen, facilitated the murder-for-hire scheme, satisfying the jurisdictional basis for charges contained in Counts I and III. § 1958(a).

Defendant's brief in support of this Motion concludes:

Because the Indictment fails to allege anything more than the intrastate conduct having no apparent connection to or effect upon interstate commerce, the "facility of interstate commerce" clause of § 1958(a) is unconstitutional-as applied and Counts I and III should be dismissed.

The Court disagrees. The Court finds that Title 18 U.S.C. § 1958(a) is properly applied to the facts in this case.

In amending 18 U.S.C. § 1958 in 2004, Congress exercised its power to regulate the use of the channels of interstate commerce, and its power to regulate the instrumentalities of interstate commerce, both of which are supported by the Supreme Court decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995): ("Even though the threat may come only from intrastate activities").

As the Government correctly noted, unlike the statute in *Lopez*, 18 U.S.C. § 1958 requires that the murder-for-hire involve either the use of channels of interstate commerce (travel in interstate commerce) or the use of instrumentalities of interstate commerce (any facility of interstate commerce). Here, the use of cell

phones and a rental vehicle satisfy the jurisdictional element. (ECF #231, Page ID. 960).

Accordingly, the Court concludes that 18 U.S.C. § 1958 is not unconstitutional as applied in this case, and denies Defendant's Motion to Dismiss Counts One and Three.

SO ORDERED.

DATED: June 19, 2020

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE