DOCKET NO. 18 -

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

ELIANA SARMIENTO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JAMES R. DEVITA

Counsel of Record
LAW OFFICES OF JAMES R. DEVITA, PLLC
81 Main Street, Suite 504
White Plains, New York 10601
Tel. No. (914) 328-5000

Attorney for Petitioner
ELIANA SARMIENTO

QUESTION PRESENTED

The Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174, requires the government to bring a criminal defendant who pleads not guilty to trial within 70 days from the filing of an indictment or the defendant's first appearance before a judicial officer of the court in which the charge is pending, whichever is later. 18 U.S.C. § 3161(c)(1). Certain specifically identified time periods are excluded from the calculation of the 70 day period. 18 U.S.C. § 3161(h). If the 70 day time limit, taking into account any exclusions under § 3161(h), is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be "with or without prejudice," depending on a variety of factors identified in § 3161(a)(2).

This case presents two question which have divided the courts of appeals which have considered them. Although the first question was seemingly resolved by this Court in *Zedner v. United States,* 547 U.S. 489 (2006), two different courts of appeals have reached diametrically opposed answers:

1. Whether a district court's denial of a motion to dismiss an indictment for a violation of the Speedy Trial Act's 70 day time limit for bringing a defendant to trial is subject to harmless-error analysis, despite the statute's mandatory language stating that, in the event of a violation, "the indictment shall be dismissed."

2. Even assuming a district court's denial of a motion to dismiss an indictment for a Speedy Trial Act violation is subject to harmless-error analysis, whether a harmless error finding can be based on the district court's hypothetical determination that if it had granted the motion to dismiss, it would have dismissed the indictment without prejudice.

TABLE OF CONTENTS

CONTENTS OF APPENDIX

Pages

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes / Rules

Page

Page

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Eliana Sarmiento respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming her conviction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated July 3, 2018, affirming the district court's judgment, is reported as *United States v. Sarmiento*, 739 Fed. Appx. 704 (2d Cir. 2018) (Summary Order). A copy of the opinion is included in the Appendix submitted herewith. (A. 1a-6a).[1] The Second Circuit entered a judgment on that date affirming the judgment of the district court. (A. 6a). The Second Circuit's decision was made final with the denial of panel rehearing and rehearing *en banc* on August 23, 2018. (A. 16a).

The opinion of the district court is reported unofficially as *United States v. Santana*, 2015 WL 8078928 (S.D.N.Y 2015). A copy of the district court's opinion is included in the Appendix. (A. 7a-15a).

[1] References to "A. _" are to the attached Appendix.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of New York had original jurisdiction of this case in the first instance pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Second Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291, issued a Summary Order and Judgment affirming the judgment of the district court on July 3, 2018. (A. 1a-6a). The Second Circuit denied a petition for rehearing or rehearing *en banc* on August 23, 2018. (A. 16a). The Supreme Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case principally involves provisions of the Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174 (West 2018), specifically §§ 3161 and 3162. The Court of Appeals also cited Rule 52 (a), Federal Rules of Criminal Procedure. The text of those statutes and of Rule 52 (a) is reproduced in the Appendix at A. 17a-24a.

STATEMENT OF THE CASE

Introduction

Section 3161(c) of the Speedy Trial Act requires that a defendant be brought to trial within 70 days of indictment or his or her first court appearance on the

charge, whichever is later, subject to certain exclusions of time set out it § 3161(h). The issues presented in this petition are: (1) whether a district court's decision denying a motion to dismiss an indictment pursuant to 18 U.S.C § 3162 (a)(2) for failure to bring the defendant to trial within the 70 days is subject to "harmless error" analysis on appeal; and (2) if so, whether the appellate court can base a "harmless error" finding on the district court's hypothetical determination that even if it had granted the motion to dismiss, it would have dismissed without prejudice.

In this case, the Second Circuit Court of Appeals held that denial of a Speedy Trial Act motion to dismiss is subject to "harmless error" analysis, despite this Court's decision in *Zedner v. United States*, 547 U.S. 489 (2006). A. 4a-5a. The Second Circuit held that *Zedner's* rejection of the "harmless error" rule was limited to violations of § 3161(h)(7), the provision of the Speedy Trial Act dealing with "interests of justice" continuances. *Id.*

The Second Circuit's decision conflicts with a decision of the United States Court of Appeals for the Seventh Circuit, which considered the same issue in a case remanded to it by this Court immediately after *Zedner* and which held that *Zedner*'s holding applied also to "automatic" exclusions under § 3161(h)(1) of the Speedy Trial Act. *United States v. Smith,* 190 Fed. Appx. 504 (7th Cir. 2006) (A. 25a). The Second Circuit's decision in this case also conflicts with a decision of

the Eleventh Circuit Court of Appeals, which reversed the denial of a dismissal motion based on the very same type of Speedy Trial Act violation presented here, and did not apply the "harmless error" rule to the Speedy Trial Act violation, despite applying it to other constitutional and non-constitutional errors raised by the appellant in that case. *United States v. Jones*, 601 F.3d 1247, 1254-57, 1264 (11th Cir. 2010).

Furthermore, no other Court of Appeals besides the Second Circuit appears to have applied the "harmless error" rule to any denial of a motion to dismiss under any provision of the Speedy Trial Act since this Court's decision in *Zedner*. *But see United States v. Lewis,* 397 Fed. Appx. 226 (7th Cir. 2010) (*dictum*). The Second Circuit did not cite a single case from any other court in support of its interpretation of *Zedner* limiting this Court's rejection of "harmless error" analysis to violations of the prescribed procedures for "interests of justice" continuances under 18 U.S.C. § 1361(h)(7). Moreover, the Second Circuit's holding is inconsistent with two other decision of this Court, decided after *Zedner*, interpreting the Speedy Trial Act. *United States v. Tinkleberg,* 563 U.S. 647 (2011) and *Bloate v. United States*, 559 U.S. 196 (2010).

Finally, the Second Circuit held that any error in denying Petitioner's Speedy Trial Act motion was harmless because the District Court stated, in *dictum,* that it would have dismissed the indictment without prejudice, and the Second

Circuit saw "no reason to doubt that the government would have indicted [Petitioner] again." A. 5a. That holding conflicts with decisions of the Fourth, Sixth and Seventh Circuits. *United States v. Carey,* 746 F.2d 228, 230 (4th Cir. 1984); *United States v. Crane*, 776 F.2d 600, 606 (6th Cir. 1985); *United States v. Janik*, 723 F.2d 537, 546-47 (7th Cir. 1983).

Proceedings in the District Court

It is undisputed that Petitioner was not brought to trial within 70 days of either the filing of the indictment or her first appearance in response to the original indictment. It is equally undisputed that the District Court took 219 days after the submission of the final brief related to Petitioner's pretrial motion for a bill of particulars to decide the motion, without holding a hearing on it or any other pretrial motions. A. 8a-9a. Thus, the motion was not decided within 30 days of that final submission, which is the extent of the automatic exclusion under § 3161(h)(1)(D) and (H) for decision of a pretrial motion. *United States v. Henderson,* 476 U.S. 321, 329 (1986). The 70 day Speedy Trial Act time therefore expired long before the motion was decided.

Nevertheless, the District Court denied Petitioner's subsequent motion to dismiss the indictment for violation of the Speedy Trial Act, finding an automatic exclusion under 18 U.S.C. §§ 3161 (h)(1)(D) and (h)(6), based on the thirteen

month "pendency" of a *pro se* motion filed by an individual named Julio Lara Trinidad ("Trinidad"). The District Court characterized Trinidad as a "co-defendant" of Petitioner for purposes of § 3161(6), despite the fact that he had never been named in the same indictment as Petitioner pursuant to Rule 8 (b) of the Federal Rules of Criminal Procedure, and no motion to join their separate indictments pursuant to Rule 13 was even made by the government, much less granted by the District Court. A. 7a-8a, 11a.

A. The Initial Scheduling and Motion Practice

The case below was initiated on March 1, 2013 with the filing of an indictment against five defendants, not including Petitioner Eliana Sarmiento, charging conspiracy to steal government funds, theft of government funds, identity theft conspiracy and aggravated identity theft in violation of 18 U.S.C. §§ 371, 641 and 2, 1028(f) and 1028(a)(1), (c)(1) and 2. A. 7a. Petitioner was not indicted until December 2013, when a superseding indictment was filed naming her and six other defendants. Trinidad was not named a defendant in that indictment. Petitioner was arraigned on the indictment on December 5, 2013. AA. 30.[2] The magistrate judge before whom Petitioner was arraigned excluded time from the Speedy Trial Act until January 8, 2014. *Id.* On January 8, 2014, the District Court

[2] References to "AA __" are to the Appellant's Appendix submitted to the Court of Appeals.

set a trial date of February 23, 2015 and excluded time under the Speedy Trial Act through that date pursuant to § 3161(h)(7), in the "interests of justice." AA 36.

On April 8, 2014, the government filed an indictment in which Trinidad was the only defendant (the "Trinidad Indictment"). AA 38, 119-126. At the government's direction, the Trinidad Indictment was assigned the same index number as the indictments previously filed against, among others, Petitioner, resulting in assignment of the Trinidad Indictment to the same District Judge. A 11a. On July 8, 2014, a superseding indictment was filed naming Petitioner and seven co-defendants. A. 7a; AA 40, 127-42. Trinidad was *not* included as a co-defendant in that superseding indictment, nor any subsequent superseding indictment.

On August 26, 2014, Trinidad filed a *pro se* motion to dismiss the indictment on double jeopardy grounds, and for permission to proceed *pro se*. A. 8a. Prior to Petitioner's subsequent Speedy Trial Act motion, neither the District Court nor the government appears to have regarded Trinidad's *pro se* motion as an actual, pending motion. At a November 24, 2014 pretrial conference, at which the District Court assigned standby counsel to assist Trinidad, and which was attended only by Trinidad, his newly assigned standby counsel and the government, the District Court advised Trinidad that he and his new standby counsel should confer, and counsel could "let me [the District Court] know what motion I should go

forward to decide." *United States v. Julio Alexander Lara Trinidad,* 13 Cr. 147 (KMW) (S.D.N.Y), November 24, 2104 Transcript of Proceedings (Docket No. 231)[3] (11/24/14 Tr.") at 12, lines 17-18. Similarly, the government asked the District Court to set a specific time within which "any motion or reapplication from Mr. Trinidad [would] be filed." 11/24/14 Tr. at 12, lines 22-25. No new motion or "reapplication" was ever filed, and the government never responded to Trinidad's *pro se* motion.

Beginning on November 26, 2014, defendants began filing pretrial motions according to a schedule established by the District Court, as amended. A. 8a. On February 6, 2015, Petitioner filed a motion for a bill of particulars. *Id.* She was the last defendant to file any pretrial motions. On February 20, 2015, the District Court adjourned the trial *sine die* without making any further "interests of justice" exclusion. A. 9a. On February 23, 2015, the government filed its brief in opposition to Petitioner's motion for bill of particulars. A. 8a. That was the last filing relating to any of defendants' pretrial motions.

Without holding a hearing on any of the pretrial motions of the various defendants named in the various different indictments, on October 1, 2015 the District Court issued an Opinion and Order denying all of them except Trinidad's

---

[3] References to "Docket No. __" are to numbered filings on the District Court's docket, *United States v. Santana, et al,* 13 Cr. 147 (KMW).

pro se motion. A. 9a. The Opinion and Order made no mention of Trinidad's *pro se* motion. Docket No. 312.

B. Petitioner's Speedy Trial Act Motion

Shortly after the District Court denied the pretrial motions, Sarmiento and two other defendants moved to dismiss the indictment for violation of the Speedy Trial Act. Petitioner filed her motion on October 27, 2015, arguing that the automatic exclusion for the making and deciding of pretrial motions pursuant to 18 U.S.C. § 3261(h)(1)(D) and (H) expired on March 26, 2015, which was thirty days after the final submission on Petitioner's motion for bill of particulars, *see Henderson, supra,* 476 U.S. at 329, and that her Speedy Trial Act clock therefore expired no later than June 4, 2015. A. 10a. Since the District Court did not grant another "interests of justice" continuance until *after* the October 1, 2015 decision denying Petitioner's motion for a bill of particulars, that decision came 118 days after the Speedy Trial Act time for Petitioner to be brought to trial had already expired. [4]

---

[4] At the government's request, the District Court granted an "interests of justice" continuance on October 19, 2015, without prejudice to Petitioner's argument that the Speedy Trial Act time had already expired. AA. 61. Including those additional eighteen days between the District Court's decision on Petitioner's pretrial motion and the new "interests of justice" exclusion brings to 136 the total number of days beyond the 70 within which Petitioner's trial was required to start.

The government opposed Petitioner's motion, contending for the first time that Trinidad's *pro se* motion had indefinitely tolled the running of the Speedy Trial Act time. According to the government, Trinidad was a "codefendant" with whom Petitioner was "joined for trial" for purposes of § 3161(h)(6), despite the fact that he was not joined in the same indictment pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure, and no motion had been made or granted to join Petitioner's and Trinidad's "separate cases" for trial pursuant to Rule 13. Under the government's theory, is was sufficient that the government *intended* at some unidentified point in the future to file a "trial" indictment joining all the defendants who decided to go to trial in a single indictment. Thus, according to the government, Trinidad's *pro se* motion had resulted in an indefinite automatic exclusion under § 3161(h)(1)(D) and (6) for all of the defendants from the date it was filed on August 24, 2014. *See* A11a. The government also contended that the thirty day limit for deciding a fully submitted motion contained in § 3161(h)(1)(H) was never triggered because the District Court never took the defendants' pretrial motions "under advisement." *See* A. 12a.

Even after Petitioner filed her Speedy Trial Act motion, but before the District Court decided it, the court again indicated that it did not consider Trinidad's *pro se* motion and actual, pending motion. At a November 9, 2015 pretrial conference – the same conference at which the Speedy Trial Act motions

were argued – the District Court advised Trinidad's attorney that "I [the District Court] have not viewed it [the *pro se* motion] as fully briefed, not even a formal motion, until you have a chance to review it and revise it." *United States v. Flor Soto, et al.,* 13 Cr. 147 (KMW) (S.D.N.Y), November 9, 2105 Transcript of Proceedings (Docket No. 347) at 11, lines 19-21.

Nevertheless, on December 4, 2015, the District Court denied Petitioner's motion to dismiss the indictment on the ground that Trinidad's *pro se* motion had stopped the running of the Speedy Trial Act from the time it was filed through the date of the court's decision. A. 7a-15a.[5] The District Court ordered Trinidad's counsel to inform the court by letter "whether she intends to *supplement* Trinidad's motion," A. 15a (emphasis added) – a curious choice of words since less than a month earlier the District Court had described it as "not even a formal motion." Finally, the District Court stated that even if it had granted Petitioner's Speedy Trial Act motioin, it would have dismissed the indictment without prejudice. A. 13a-15a.

---

[5] The District Court appears also to have accepted the government's argument that because the court "contemplated" the possibility of a hearing for pretrial motions when it adjourned the trial date *sine die* without granting an "interests of justice" continuance under 18 U.S.C. § 3161(h)(7)(A), the defendants' pretrial motions were never "under advisement" for purposes of § 3161(h)(1)(H), even though no hearing was held. A. 12a. Neither the government nor the District Court explained how the court could have decided the defendants' pretrial motions 219 days later without ever taking them "under advisement." The Court of Appeals did not address this argument.

C. Subsequent Proceedings in the District Court

On January 12, 2016, Trinidad's attorney filed a letter informing the District Court that her client wished to withdraw his *pro se* motion, and on January 14, 2016 the District Court marked it "withdrawn." AA. 208-210. Trinidad pled guilty on March 21, 2016. AA. 67.

On August 5, 2016, shortly before trial was scheduled to commence, the government filed a superseding indictment – the eighteenth indictment filed under the same docket number – naming Petitioner only. A. 2a, Docket No. 428. Trial commenced on September 12, 2016 and concluded on September 23, 2016, when the jury convicted Petitioner of all charges. AA. 78-81. On July 5. 2017, she was sentenced to a total of four years imprisonment. AA. 213.

The Second Circuit's Opinion

The Second Circuit avoided the question of whether Trinidad was Petitioner's "codefendant" for purposes of § 3161(h)(6), deciding that "any error committed by the District Court was harmless." A. 3a.[6] The court held that any error was harmless because the District Court stated that even if Petitioner's rights under the Speedy Trial Act had been violated, it would have dismissed the

---

[6] The Court of Appeals, however, did "observe . . . that literal compliance with Rules 8(b) and 13 will usually avoid troublesome issues that might jeopardize convictions in the future," conceding that those Rules had not been complied with and that the issue was "troublesome." *Id.* n. 1.,

indictment without prejudice. A. 4a. The Court of Appeals held that under its prior decision in *United States v. Gambino,* 59 F.3d 353, 363 (2d Cir. 1995), a violation of the Speedy Act is harmless if the government successfully reindicts the defendant on the same charge. *Id.* The Court of Appeals rejected Petitioner's argument that *Gambino*, which had been decided by the Second Circuit more than ten years prior to this Court's decision in *Zedner*, had been overruled by *Zedner*. A. 4a-5a. According to the Second Circuit, the holding of *Zedner* that the "harmless error" rule does not apply to violations of the Speedy Trial Act was limited to violations of the procedures for "ends of justice" continuances pursuant to § 3161(h)(7). A. 5a.

REASONS FOR GRANTING THE WRIT

This case represents an opportunity for this Court to resolve two important questions concerning the proper interpretation and application of the Speedy Trial Act on which courts of appeals have reached conflicting conclusions: 1) whether "harmless error" analysis applies to a violation of the Act at all; and 2) if it does, whether a "harmless error" finding can be based on the hypothetical determination of the district court which denied the motion that, had it granted the motion, it would have dismissed the indictment without prejudice.

POINT I

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH AND ELEVENTH CIRCUITS ON THE APPLICABILITY OF HARMLESS ERROR TO SPEEDY TRIAL ACT VIOLATIONS

A. The Conflict with the Seventh Circuit

In *United States v. Smith,* 190 Fed. Appx 504 (7th Cir. 2006),[7] the Seventh Circuit faced the identical issue the Second Circuit faced in this case. There, the defendant alleged his Speedy Trial Act rights were violated because the district court failed to decide his pretrial motion within the thirty days permitted by § 3161(h)(1)(H) after the motion was "actually under advisement by the court." *Id.*[8] The Seventh Circuit decision came after an earlier decision in the case, applying harmless error, was vacated by this Court and remanded for further consideration in light of *Zedner. Smith v. United States,* 547 U.S. 1190 (2006). On remand, the Seventh Circuit held as follows:

> Although *Zedner* was concerned with an "ends of justice" extension of the time for trial, granted under § 3161(h)([7]), and Smith's case concerns the

---

[7] A copy of the Seventh Circuit's opinion, which was not published in the Federal Reporter, is included in the Appendix to this Petition. A. 25a.

[8] At the time *Smith* was decided, the 30 day "under advisement" provision was codified as § 3161(h)(1)(J). It was recodified and designated § 3161(h)(1)(H) by the Judicial Administration and Technical Amendments Act of 2008, 122 Stat. 4294 (Oct. 13, 2008). Similarly, what had been § 3161(h)(8) became § 3161(h)(7). *See Bloate, supra,* 559 U.S. at 199 n. 2.

> question whether a motion was "actually under advisement by the court," for purposes of § 3161(h)(1)([H]), we see no principled difference between the two for purposes of harmless error review. The language of the Speedy Trial Act is just as mandatory for one subsection of § 3161(h) as it is for the others, and there is nothing in the Act that suggests that the command of § 3161(c) setting forth the time in which trial "shall" begin depends on which exception is invoked.

190 Fed. Appx at 504, A. 25a.

The history of the *Smith* case is significant. This Court's decision in *Zedner* reversed a decision of the Second Circuit applying harmless error to a Speedy Trial Act violation. *United States v. Zedner*, 401 F.3d 36, 47 (2d Cir. 2005), *rev'd,* 547 U.S. 489 (2006). The Seventh Circuit's initial decision in *Smith* specifically relied on the Second Circuit's decision in *Zedner* as authority for applying the "harmless error" rule to the Speedy Trial Act violation in *Smith*. *United States v. Smith*, 415 F.3d 682, 686 (7th Cir. 2005), *vacated,* 547 U.S. 1190 (2006), *rev'd* 190 Fed. Appx. 504 (2006). Therefore, its opinion remand interpreting of the scope of this Court's *Zedner* decision was immediate and is entitled to particular weight.

The Second Circuit's opinion in *Zedner* holding that "harmless error" analysis applied to violations of the Speedy Trial Act is relevant for another reason. In reaching that conclusion, the Second Circuit relied primarily on its prior decision in *Gambino*. 401 F.3d at 46-48. That is the same discredited precedent the Second Circuit relied on in this case. A. 4a-5a. The Second Circuit's reliance on *Gambino,* was as misplaced in this case as it was in *Zedner*. As previously pointed out,

Gambino was decided more than ten years before this Court's decision in *Zedner*. Moreover, the Speedy Trial Act violation in *Gambino* resulted from, among other things, the district court's failure to make timely findings for an "interests of justice" exclusion under what was then §3161(h)(8)(A) (now §3161(h)(7)(A)). 59 F.3d at 357-58. Thus, even under the Second Circuit's narrow reading of *Zedner,* it still overruled *Gambino*. Just as the Second Circuit's misplaced reliance on *Gambino* led to reversal in *Zedner*, so too should it here.

Furthermore, a careful analysis of this Court's decision in *Zedner* demonstrates that the Seventh Circuit's interpretation of it in *Smith* was correct, and the Second Circuit's interpretation in this case was erroneous. In *Zedner,* this Court unanimously reversed the conviction of a defendant whose Speedy Trial Act rights had been violated and who was subsequently convicted after trial. At an early pretrial conference in the case, the defendant signed a preprinted form provided by the district court purporting to waive his Speedy Trial Act Rights "for all time." 547 U.S. at 493-94. Thereafter, the district court granted many adjournments of the trial without following the procedure required by § 3161(h)(7). This Court observed that: "This case requires us to consider the application of the doctrines of waiver, judicial estoppel, and harmless error to a violation of the Speedy Trial Act of 1974, (Speedy Trial Act or Act), 18 U.S.C. §§ 3161-3174." 547 U.S. at 492.

The Court held that "harmless error" analysis did not apply to the violation of Zedner's Speedy Trial Act rights in that case for the following reasons, which apply in this case as well:

> The relevant provisions of the Act are unequivocal. If a defendant pleads not guilty, the trial "*shall* commence" within 70 days "from the filing date (and making public) of the information or indictment" or from the defendant's initial appearance, whichever is later. § 3161(c)(1) (emphasis added). . . . Delay resulting from an ends-of-justice continuance is excluded from this time period, but "*[n]o such period of delay ... shall be excludable* under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." § 3161(h)([7])(A) (emphasis added). When a trial is not commenced within the prescribed period of time, "the information or indictment *shall be dismissed* on motion of the defendant." § 3162(a)(2) (emphasis added). A straightforward reading of these provisions leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed. The argument that the District Court's failure to make the prescribed findings may be excused as harmless error is hard to square with the Act's categorical terms. *See Alabama v. Bozeman*, 533 U.S. 146, 153-154, 155, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001) (no " 'harmless' " or " 'technical' " violations of the Interstate Agreement on Detainers' "antishuttling" provision in light of its "absolute language").

Id. at 507-08 (emphasis in the original). Here too, the relevant provisions of the Act are "unequivocal." *See* 18 U.S.C. §§ 3161(c)(1), 3161(h)(1)(H) and 3162(a)(2).

The Second Circuit's attempt to distinguish *Zedner* ignores the fact that two of the three "categorical" provisions cited by this Court in *Zedner* are applicable in

this case as well -- §3161(c)(1) (trial "*shall commence*" within 70 days) and §3162(a)(2) (the "indictment or information *shall be dismissed* on motion of the defendant" for *any* violation of the Act. 547 U.S. at 507-08. It also overlooks the equally "categorical" terms of the other provision of the Speedy Trial Act on which Petitioner relies to demonstrate that her rights under the Act were violated, §3161(h)(1)(H).

If, as Petitioner contends, the Trinidad *pro se* motion did not stop the running of *her* Speedy Trial Act time, only the pendency of her own pretrial motion could affect her "clock." Her motion was fully submitted by February 23, 2015, but was not decided by the District Court until October 1, 2015 – *219 days* later. AA. 52-53, 60, 200-08. Section 3161(h)(1)(H) limits to 30 days the exclusion of time while such motions are "under advisement": it excludes a "delay reasonably attributable to any period, *not to exceed thirty days*, during which any proceeding concerning the defendant is actually under advisement" (emphasis added). *Henderson,* 476 U.S. at 329; *see United States v. Bert,* 814 F.3d 70, 78 (2d Cir. 2016). Thus, the terms of §3161(h)(1)(H) are as "categorical" as the terms of §3161(h)(7)(A), relating to "interest of justice" exclusions, and *Zedner* applies here as well. As with §3161(h)(7), "excusing as harmless error [a violation of §3161(h)(1)(H)] is hard to square with the Act's categorical terms." 547 U.S. at 508.

This Court's express language in *Zedner* makes it clear that it was not limiting its holding to "interest of justice" exclusions. The Court defined the issues before it to include "the application of the doctrine[] of . . . harmless error *to a violation of the Speedy Trial Act* of 1974 (Speedy Trial Act or Act) 18 U.S.C. §§3161-3174," 547 U.S. at 492 (emphasis added), and not merely to §3161(h)(7) of the Act. Moreover, while recognizing that finding an "implied repeal" of the harmless error rule embodied in Rule 52(a), F.R.Crim.P., requires "strong support" in the statute under consideration, the Court went on to state that "[w]e conclude, however, that *the provisions of the Act* provide such support here." *Id.* at 507. (emphasis added). Thus, the Court's holding is not limited §3161(h)(7) of the Act, but encompasses the entire Speedy Trial Act.

Moreover, the policy reasons stated by the Court for its decision in *Zedner* apply equally here. Applying harmless error analysis to violations of the 30 day limit in §3161(h)(1)(H) would equally "subvert the Act's detailed scheme" designed to "counteract substantive openendedness" that could result from failure to enforce the rules "with procedural strictness," and would be "inconsistent with the strategy embodied in §3161(h)." *Id* at 508-09. While "interests of justice" exclusions may be "the most open-ended type of exclusion recognized under the Act," *id.* at 508, the 30 day limit on the exclusion for motions "actually under advisement" is what prevents those exclusions from becoming equally "open-

ended." Failure to enforce that 30 day limit would undermine the "procedural strictness" on which the application of the Act depends. "Applying the harmless-error rule would tend to undermine the detailed requirements of the" "actually under advisement" exclusion as much as it would with respect to "ends-of-justice continuances." 547 U.S. at 508. Unchecked delay in deciding pretrial motions could be the result. *See Bert, supra,* 814 F.3d at 80. Since there can be no interlocutory appeal of a Speedy Trial violation, *see United States v. MacDonald,*435 U.S. 850, 857-58 (1978), applying harmless error to the 30 day rule would give district court's *carte blanche* to ignore it, because "[s]uch an approach would almost always lead to a finding of harmless error," *id.* at 509, creating a "big loophole" and making §3161(h)(1)(H) virtually unenforceable. *See Bloate, supra,* 559 U.S. at 212-13.

B. The Conflict with the Eleventh Circuit

The Second Circuit's decision in this case also conflicts with a decision of the Eleventh Circuit in *United States v. Jones,* 601 F.3d 1247 (11th Cir. 2010). There, the district court commenced the trial five days beyond the expiration of the Speedy Trial Act's permitted seventy days. 601 F.3d at 1256. As Petitioner argued in this case, the Eleventh Circuit held that the exclusion for a district court's consideration of a motion that did not require a hearing was limited to thirty days

from the receipt of the last relevant filing, citing the combination of §§ 3161(h)(1)(D) and (H). *Id.* at 1255. The court said as follows:

> We must . . . decide whether a motion that requests a hearing necessarily tolls the speedy trial clock until the district court disposes of the motion, even when the district court disposes of the motion without either scheduling or holding a hearing. We conclude that it does not.

Id. The Eleventh Circuit explained its reasoning as follows:

> Because no hearing was required, the motion was under advisement of the district court as of the date the government filed its response . . . . The district court then had thirty days in which to rule on the motion. When the thirty days of excludable time elapsed on May 10, the speedy-trial clock began to run. Mr. Jones was brought to trial seventy-five nonexcludable days after the district court received this Court's mandate [reversing defendant's conviction at a prior trial] – a violation of the Speedy Trial Act [18 U.S.C. § 3161(e)].

Id. at 1256.

That is the same argument Petitioner made regarding the District Court's failure to decide her bill of particulars motion within the thirty days. A. 12a. If anything, Petitioner's argument that her Speedy Trial Act rights were violated is even stronger because, unlike the defendant in *Jones*, she did not even request a hearing on her motion, and the Speedy Trial Act violation in *Jones* was only five days. Nevertheless, the District Court rejected Petitioner's argument and the Court of Appeals found "harmless error."

What places the *Jones* decision in conflict with the Second Circuit decision in this case is the fact that the Eleventh Circuit did not analyze the Speedy Trial Act

violation under the "harmless error" rule, despite its the short duration. That was no oversight. In considering the appellant's other arguments that the district court had "committed both constitutional and non-constitutional errors," the Eleventh Circuit assumed for the sake of analysis that it had, but nevertheless held that "even assuming these errors, however, they are harmless." 601 F.3d at 1264. The court's decision not to apply "harmless error" analysis to the Speedy Trial Act violation was, therefore, deliberate.

C. The Second Circuit's Decision is Inconsistent with Cases from this Court Decided after Zedner

The significance of the Eleventh Circuit's decision not to employ "harmless error" analysis in *Jones* is bolstered by the fact that the Second Circuit was unable to cite, and diligent research has failed to reveal, a single case from another court applying "harmless error" analysis to a Speedy Trial Act violation since this Court's decision in *Zedner.*[9] In fact, this Court itself has decided two cases since *Zedner* in which it found Speedy Trial Act violations that the lower courts said were not

---

[9] In *United States v. Lewis,* 397 Fed. Appx. 226, 2010 WL 4102570 (7th Cir. 2010), the court implied that it would not have reversed the conviction even if there had been a Speedy Trial Act violation, since the violation would have been "minor" and dismissal of the charges would have been without prejudice. 397 Fed. Appx. at 227, 2010 WL 4102570 at **1. However, since the court had already determined that the appellant waived any violation by failing to move to dismiss the indictment prior to trial, *see* 18 U.S.C. § 3162(a)(2), its comment is merely *dictum.* Moreover, it is inconsistent with the Seventh Circuit's prior clear holding in *Smith, supra,* 190 Fed. Appx. 504, A. 25a.

violations, and did not apply "harmless error" analysis in either of them. *United States v. Tinkleberg,* 563 U.S. 647 (2011) and *Bloate v. United States*, 559 U.S. 196 (2010).

In *Tinkleberg,* this Court held that, contrary to a holding of the Sixth Circuit, the ten day limitation on the automatic exclusion in § 3161(h)(1)(F) for transporting a defendant from another district or to and from a hospital for examination *included* weekends and holidays. 563 U.S. at 660-63. The Court did not apply "harmless error" analysis to that violation, despite the fact that it resulted in only an eight day violation of the Speedy Trial Act. The Court affirmed the Sixth Circuit's judgment dismissing the indictment, but on the basis of a different Speedy Trial Act violation than the one found by the Sixth Circuit. 563 U.S. at 663. This Court affirmed the dismissal rather than remanding the case to the Sixth Circuit for it to consider whether the different violation found by this Court was "harmless."

In *Bloate*, this Court held that the time to prepare pretrial motions was not automatically excluded under § 3161(h)(1)(D), and could be excluded only prospectively after the necessary findings were made for an "interests of justice" exclusion under § 3161(h)(7). 559 U.S. at 203-11. The defendant had been convicted after trial of narcotics and weapons charges and sentenced to 30 years imprisonment. *Id.* at 200-02. The unexcluded time that resulted from disallowing the automatic exclusion recognized by the district court, but rejected by this Court,

amounted to only 28 days. *Id.* 201, 215. Nevertheless, this Court did not apply "harmless error" analysis to the violation, and did not direct the Eighth Circuit to do so on remand, when it was to consider other possible exclusions to decide whether dismissal of the indictment was required. This Court cautioned that "even if dismissal is ultimately required on remand, a desire to avoid this result does not justify reading subsection (h)(1)" as the dissenting opinion argued, and the Eighth Circuit had. *Id.* at 208. That interpretation, said this Court, "threatens the Act's manifest purpose of ensuring speedy trials by construing the Act's automatic exclusion exceptions in a manner that could swallow up the 70-day rule." *Id.* at 210. The same can be said for the application of the "harmless error" rule as the Second Circuit did in this case – it threatens to "swallow up" the thirty day "under advisement" rule. On remand in *Bloate*, the Eighth Circuit ordered the indictment dismissed, without applying any "harmless error" analysis.

Apparently, the full scope of *Zedner*'s rejection of "harmless error" analysis to include violations of any of the Speedy Trial Act's provisions was clear and unchallenged until this case. In fact, the Second Circuit's ruling in this case is difficult to reconcile with its own precedent regarding the import of *Zedner*. *See United States v. Oberoi,* 547 F.3d 436, 447 (2d Cir. 2008), *vacated and remanded in light of Bloate v. United States*, 559 U.S. 999(2010), *rev'd* 379 Fed. Appx. 87 (2d Cir. 2010) (Summary Order).

In its initial decision in *Oberoi,* the Second Circuit cited *Zedner* in rejecting the government's argument that the "harmless error" rule applied to a magistrate judge's "failure to stop the pre-indictment speedy trial clock," and the government's consequent failure to indict the defendant within 30 days of his arrest on a criminal complaint. 547 F.3d at 447; *see* 18 U.S.C. § 3161(b). However, since the court determined not dismiss the indictment because it found that the charges in the indictment were different than the charge in the complaint, 547 F.3d at 445-47, its comments regarding the government's "harmless error" argument may be considered *dictum.*

Moreover, the binding authority of the court's comments on *Zedner* is also open to question since the opinion was vacated by this Court in light of *Bloate*. 559 U.S. at 999. In addition to his claim of preindictment delay, the defendant in *Oberoi* also argued that he had not been brought to trial within the 70 days required by § 3161(c)(1). 547 F.3d at 447-58. Like the Eighth Circuit in *Bloate*, the Second Circuit held in its original *Oberoi* opinion that the time to prepare pretrial motions was automatically excludable under § 3161(h)(1), leading this Court to vacate the original panel decision. Once that opinion was vacated, the precedential weight of its comments on the scope of *Zedner* became questionable. On the other hand, when the *Oberoi* case was remanded to the Second Circuit, it reversed the district court and ordered the indictment dismissed, *without* engaging in any "harmless error"

analysis. 379 Fed Appx. 87, 2010 WL 2135647. That at least implies that it adhered to its previously stated view that *Zedner* precluded "harmless error" review of Speedy Trial Act violations, including those resulting from misinterpretation of an "automatic exclusion" in § 3161(h)(1).

In any event, irrespective of the views expressed by the Second Circuit in the original *Oberoi* opinion about the scope of *Zedner*, this case is the latest word from the Second Circuit on the subject and it held that the "harmless error" rule does apply to violations of the "automatic exceptions" in the Speedy Trial Act. In that, the Second Circuit is in conflict with the Seventh and Eleventh Circuits, and this Court should grant *certiorari* to resolve that conflict.

POINT II

A DISTRICT COURT'S HYPOTHETICAL DETERMINATION THAT DISMISSAL WITHOUT PREJUDICE WOULD HAVE BEEN THE APPROPRIATE REMEDY IS NOT A PROPER BASIS FOR A HARMLESS ERROR RULING

The Second Circuit based its determination that any violation of the Speedy Trial Act in this case was "harmless error" on the fact that the District Court said that even if Petitioner's rights under the Act had been violated, the District Court "would have dismissed [Petitioner's] indictment *without* prejudice, allowing the government to immediately reindict her and continue expeditiously to trial on the same charges." A. 4a. In reaching that conclusion , the Second Circuit is in conflict

with three other Courts of Appeal. The Fourth, Sixth and Seventh Circuits have held a district court's statement that it would have dismissed the indictment without prejudice anyway to be an improper basis on which to affirm denial of a Speedy Trial Act motion. *United States v. Carey,* 746 F.2d 228, 230 (4th Cir. 1984); *United States v. Crane*, 776 F.2d 600, 606 (6th Cir. 1985); *United States v. Janik*, 723 F.2d 537, 546-47 (7th Cir. 1983).

Janik is particularly instructive. Like this one, that case involved a district court's violation of the 30 day "under advisement' rule of § 3161(h)(1)(H). 723 F.2d at 543-45. As here, in *Janik* the district court held there had been no violation of the applicable sections requiring a "prompt disposition" of pretrial motions and allowing 30 days for decision of a motion after it is "under advisement" (now § 3161(h)(1)(D) and (H)). The district judge also said she would have dismissed the indictment without prejudice, even if the Speedy Trial Act had been violated. The Seventh Circuit rejected that as a basis for affirming denial of the motion:

> . . . Congress decided in 18 U.S.C. § 3162(a)(1), rightly or wrongly, to make dismissal without prejudice one of the sanctions for violating the Speedy Trial Act, and its decision is binding on us whatever we may think of its wisdom. It therefore will not do for a judge to say, as the district judge said in this case, that she is denying a motion to dismiss the indictment for violation of the Speedy Trial Act in part because if she granted the motion she would dismiss the indictment without prejudice and then the defendant would be worse off in the event that he was reindicted. A judge may not forgive a violation merely because the sanction that the legislature has provided for the violation seems silly.

Id. at 546. That reasoning applies here as well – the Court of Appeals decided to "forgive" a violation of the Act because it "s[aw] no reason to doubt that the government would have indicted [Petitioner] once again and brought her to trial on or before her actual trial date of September 2016." A. 5a. In other words, the Court of Appeals in this case deemed it "silly" to reverse the conviction and remand the case for imposition of the Congressionally mandated sanction of dismissal without prejudice.

Janik also points out an excellent reason not to accept at face value the District Court's *dictum* in this case that it would have dismissed the indictment without prejudice. The *Janik* court said:

> Although the district judge in this case stated that if there was a violation of the Speedy Trial Act it would not warrant dismissal with prejudice, this conclusion may have been colored by her view that there was no violation. We, on the contrary, have found a serious violation.

723 F.2d at547. Here too, the District Court's judgment on whether dismissal without prejudice was the appropriate remedy was colored by its mistaken belief that Trinidad's *pro se* motion indefinitely tolled the Speedy Trial clock, and therefore no violation of the Act had occurred.

The Fourth Circuit followed the Seventh Circuit's *Janik* decision in *Carey,* 746 F.2d at 229-30. There, the district granted an improper *nunc pro tunc* "interests of justice" continuance, and denied the defendant's motion to dismiss the indictment

on the alternative ground that it was "harmless error." *Id.* at 239. The Fourth Circuit rejected that ruling, saying:

> Also, we cannot accept the district court's alternative ruling that the nunc pro tunc continuance was harmless error. Congress provided in section 3162 for dismissal of the prosecution with, or without, prejudice if the time limits prescribed by the Act are not met. As *Janik* points out, the government's intention to seek another indictment affords no justification for refusing to impose a sanction that Congress has mandated.

Id. at 230 (citation omitted).

Finally, in *Crane* the Sixth Circuit reversed a district court which had denied a Speedy Trial Act dismissal motion because the district court regarded dismissal as a "useless act" since it would have dismissed without prejudice and the government would have reindicted the defendant. Citing *Janik* and *Carey*, the Sixth Circuit held that "[t]his is not a proper justification for excluding the period of delay." 776 F.2d at 606 (citations omitted).

There is particular reason in this case to question the basis for the District Court's *dictum* that dismissal without prejudice would have been the appropriate remedy for the violation. The District Court applied the law incorrectly in reaching its conclusion that dismissal without prejudice would have been appropriate.

Under §3162(a)(2), a key factor to be considered in determining whether and indictment should be dismissed with or without prejudice after a Speedy Trial Act violation is the "seriousness of the offense." Clearly, just as guilt is individual, the determination of whether an offense is "serious" should focus on the conduct of the

particular defendant whose Speedy Trial Act rights were violated. Here, however, the District Court did not limit her consideration to that.

The scheme charged in the indictment involved a widespread network of individuals who prepared and filed Federal income tax returns with fraudulent information in order to obtain improper tax refunds. At most, Petitioner played a minor part in that scheme and received very little from it. In discussing whether the indictment against Petitioner should be dismissed with or without prejudice, the District Court did not focus on Petitioner's individual conduct. Instead, it considered the offenses of Petitioner's codefendants, as well as those of numerous other individuals involved in the widespread fraudulent scheme. For example, in discussing seriousness of the offense, the District Court said as follows:

> In this case, *Defendants* were using stolen identities and social security numbers to unlawfully obtain hundreds of millions of dollars in fraudulent IRS tax refunds. *The offense charged in this case* is very serious, because the losses to the United States taxpayers are in the millions of dollars . . .

A 14a (emphasis added).[10] The District Court did not analyze or discuss Petitioner's personal role in the alleged scheme, and rendered no opinion on the

[10] The scheme was not successful in obtaining "hundreds of millions of dollars in fraudulent tax refunds." The total amount of refunds actually paid by IRS was approximately $24 million (AA. 217) of which, as pointed out within, Appellant received only a few thousand dollars.

seriousness of *her* alleged criminal conduct. Instead, the court based the determination on the aggregate "seriousness" of the overall scheme.[11]

Petitioner was a minor player in the scheme proven at trial. She received very little financial benefit. The government offered in evidence at trial Petitioner's bank records, Govt. Exs. 450, 451; Tr. 178-212 (Doc. No. 487),[12] which showed a few deposits of a few thousand dollars each that the government claimed were linked to the fraudulent scheme. Those records also showed that Petitioner's account seldom, if ever, had what could be considered a significant balance and was often overdrawn – including a $241 overdraft caused by a monthly telephone bill (Tr. 206-07) and a bounced check for a $359 insurance bill (Tr. 208). Thus, the fact that others may have profited significantly from the scheme does not mean that Petitioner did.

Petitioner is a 34 year old mother of three and high school dropout. She began working at K&S Tax Solutions, which was at the center of the scheme, as a secretary/receptionist at the behest of her older, college educated cousin who ran the business and gave Petitioner a job to help her support her young children. AA.

---

[11] The Court of Appeals itself questioned the adequacy of the District Court's analysis of the factors the be considered in determining whether to dismiss with or without prejudice. A. 4a.

[12] References to "Govt. Ex.__" are to government exhibits admitted in evidence at trial; references to "Tr.__" are to pages of the trial transcript, available through the District Court's electronic docket.

164. Although she was later promoted the position of tax return preparer, and trained for it by her cousin, Petitioner played a limited, subordinate role in the scheme. The District Court's failure to give any individualized consideration to the seriousness of *this* defendant's offense in determining whether dismissal of the indictment with or without prejudice was the appropriate remedy for violation of *her* Speedy Trial Act rights was a misapplication of the criteria in §3162(a)(2). Thus, the District Court's statement that it would have dismissed the indictment without prejudice was even a less reliable basis for a "harmless error" finding in this case than in the previously discussed decisions of the Fourth, Sixth and Seventh Circuits.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be granted.

Dated: White Plains, New York
November 21, 2018

Respectfully submitted,
PETITIONER ELIANA SARMIENTO

BY: James R. DeVita

James R. DeVita
Counsel of Record
Law Office of James R. DeVita, PLLC
81 Main St., Suite 504
White Plains, New York 10601
(914) 328-5000

Attorney for Petitioner Eliana Sarmiento