

NO.

**IN THE
SUPREME COURT OF THE UNITED STATES**

COURT OF APPEALS CASE NO. 19-30356

**UNITED STATES OF AMERICA
Plaintiff-Appellee-Respondent**

v.

**DWAYNE WINANS, JR., ALSO KNOWN AS BUTTER WINANS; BRYSON TUESNO
Defendants-Appellants-Applicant**

**On Application to Stay the Mandate of the United States Court of Appeals
for the Fifth Circuit**

Emergency Application for Stay Pending the Filing and Disposition of a Petition for a
Writ of Certiorari – Filed July 2, 2021.

RESPECTFULLY SUBMITTED:
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**MOTION FOR STAY OF MANDATE CURRENTLY SCHEDULED TO
ISSUE BY THE 5TH CIRCUIT COURT OF APPEALS ON JULY 8, 2021.**

To the HONORABLE SAMUEL A. ALITO, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Earlier this week a single Judge of the Fifth Circuit summarily denied a motion by Dwayne Winans to stay the mandate pending a petition for certiorari. Absent emergency relief from this Court, the mandate will issue on July 8th, 2021, and Dwayne Winans will have his rights violated and no further recourse. Dwayne Winans respectfully moves this Court to stay the issuance of the mandate in this matter. Appellant seeks a stay of 90 days pending filing of a petition for writ of certiorari with the Supreme Court. The government has been informed of this motion, and they oppose the relief sought.

Winans' original brief for this appeal presented one issue, whether there was violation of the speedy trial act 18 U.S.C. § 3161 (b) due to the District Judge incorrectly interpreting 18 U.S.C. § 3161(h)(1)(D). Mr. Winans was indicted 44 days after the date of arrest, which is 14 days beyond the time allowed by the law, and 31 nonexcludable days elapsed between the arrest and the indictment, due to Saturday August 27th, 2016 and Sunday August 28th 2016 being non excludable days under 18 U.S.C. § 3161(h)(1)(D), prompt disposition of such motion, *United States of America v. Jason Tinklenberg* 563 U.S. 647 (2011) at 131 S. Ct. 2017, under Federal Rule of Criminal Procedure Rule 50 dealing with prompt disposition of such motions, and under 18 U.S.C. § 3142(f)(2) under the Bail Reform Act, and under Federal Rule of Criminal Procedure Rule 45 the computation of time.

A panel of 5th Circuit Judges held that under the Bail Reform Act August 27th, 2016 and August 28th 2016 were excludable days. On June 21, 2021 the 5th Circuit denied a petition for rehearing which was timely filed.

Mr. Winans is entitled to a stay of the mandate to pending disposition of a petition for writ of certiorari to answer the question of did the panel err in excluding Saturday August 27th, 2016 and Sunday August 28th 2016 out of the 30-day window in indicting Mr. Winans due to the clock stopping and resuming under the speedy trial act 18 U.S.C. § 3161 (b).

There is a reasonable probability that the United States Supreme Court will grant a petition for writ of certiorari in this case, and if it does, there is a significant possibility of reversal. Failure to grant this motion will cause irreparable harm to Mr. Winans.

BREIF FACTUAL SUMMARY

The government argues that 5 days are excluded from the computation under the Speedy Trial Act due to the government's filing a motion for continuance of the detention hearing on Wednesday August 24, 2016 through the conclusion of the hearing on Monday August 29, 2016 causing the indictment to return under 29 "countable" days under the Speedy Trial Act. But the key part of 18 U.S.C. 3161 (h)(1)(d) dealing with prompt disposition of cases in which there is a reason to believe the pretrial liberty of a defendant poses danger to himself, to any other person or to the community. Rule 50 may provide an alternative to the pretrial detention. Rule 50, Prompt Disposition, state that scheduling preference must be given to criminal proceedings as far as practical. The notes under rule 50 continue maintaining that preventing undue delay in the administration of criminal justice has become an object of increasing interest and concern. This is reflected in Congress see, e.g. 116 cong. Rec 57291-96 (daily ed. May 18 1970). Bills have

been introduced fixing specific time limits. The note continues stating that proposals for dealing with the problem of delay have also been made by the president's commission on law enforcement and administration of justice . . .Historically, the right to a speedy trial has been thought of as a protection for the defendant. Delay can cause hardship to a defendant . . . The district court plans must contain special provisions for prompt disposition of cases in which there is a reason to believe that the pretrial liberty of a defendant poses danger to himself, to any other person, or to the community.

The government sought a continuance on the motion under 18 U.S.C. 3142 (f)(2) to the detention hearing in a case that involved (A) a serious risk that such person will flee; or (B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate or attempt to threaten, injure, or intimidate a prospective witness or juror. When the government seeks a continuance that continuance may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday.) However, under the Speedy Trial Act and under *United States of America v. Jason Tinklenberg* 563 U.S. 647 (2011), the government had no right under the constitution of the law of the United States of America to exclude the intermediate Saturday and Sunday on August 27, and August 28 2016. The government is now allowed to gain a tactical advantage against the defendant by requesting continuances and obtaining additional time under the Speedy Trial Act. When a court determines that a speedy trial violation occurred, it must address whether the dismissal will be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider the seriousness of the offense, the facts and circumstances of the case, and the impact of reprosecution. In this case, Mr Winans has been charged with very serious offenses, and the

government has used a tactical advantage of requesting a continuance to gain additional time under the Speedy Trial Act.

SUMMARY OF THE ARGUMENT

The issue in this appeal is whether the trial judge erred in using an incorrect interpretation of 18 U.S.C. § 3161(h)(1)(D) in ruling that only 29 countable days occurred between Mr. Winans' arrest and his indictment. Although the panel relied on 18 U.S.C. § 3142(f)(2), Mr. Winans' appeal is based on 18 U.S.C. § 3161(h). The panel did not address that under the Speedy Trial Act, Saturdays and Sundays are countable days, and in the present case, the government was only allowed the three business days to be excluded from the computation under the Speedy Trial Act.

On August 23, 2016 Winans was arrested. The 30-day period to indict Mr. Winans under the Speedy Trial Act 18 U.S.C. § 3161 started on August 24th, 2016. See FRCP rule 45 stating that in calculating time “exclude the day of the event that triggers the period.” The government moved to continue the detention hearing which was granted. Under 18 U.S.C. § 3142 (f)(2) the government is entitled to a three-day delay; therefore, it stopped the 30-day Speedy Trial Act Clock on August 25, 2016. The clock started again on August 27th, 2016, then stopped again on August 29th, 2016. After the detention hearing was heard, the clock resumed again on August 30th, 2016. Winans does not argue that 18 U.S.C. § 3142 (f)(2) The Bail Reform Act was violated. The Bail Reform Act expressly states that the “continuance may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday.)” However, under the Speedy Trial Act 18 U.S.C. § 3161, Federal Rule of Criminal Procedure 45(a)(1)(B) Computing and Extending Time, and Federal Rule of Criminal Procedure 50 Prompt Disposition, and under

United States of America v. Jason Tinklenberg 563 U.S. 647 (2011), the government had no right under laws of the United States of America to exclude the intermediate Saturday and Sunday on August 27, and August 28 2016. This is a substantial question of law which the Supreme Court is likely to hear.

ARGUMENT

This 5th Circuit did err in holding that Saturday August 27th, 2016 and Sunday August 28th 2016 were excludable days solely under the Bail Reform Act and not considering if they were non excludable days in indicting Mr. Winans under the 30-day window in 18 U.S.C. § 3161(h)(1)(D) prompt disposition of such motion making the speedy trial clock stop and start under the Speedy Trial Act 18 U.S.C. § 3161 (b) and Federal Rule of Criminal Procedure Rule 45 computing and extending time.

A panel of the 5th Circuit Court ruled against Mr. Winans by ruling that under the Bail Reform Act there was not a violation of countable days that passed between arrest and indictment. Mr. Winans respectfully asserts that it was error for this Court to affirm his convictions without considering when the 30-day clock stopped and started under the Speedy Trial Act and request that this Court stay the mandate until disposition of the writ of certiorari.

The Speedy Trial Act provides, in pertinent part, that an “indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” 18 U.S.C. § 3161(b). The sanction for failing to timely indict under the Speedy Trial Act is the dismissal – with or without prejudice – of the “charge against that individual contained in such

complaint.” 18 U.S.C. § 3162(a)(1). The statute permits various delays to be excluded from the 30 day period including, inter alia, “delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, **or other prompt disposition of, such motion**” and “delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable.” 18 U.S.C. § 3161(h) (emphasis added).

Even if the Government were granted the maximum amount of time to transport Mr. Winans – ten days under 18 U.S.C. §3161(h)(1)(f)– the Government was only entitled to a three-day delay for any continuance on any August 24, 2016 oral motion for detention pursuant to the Bail Reform Act under *United States of America v. Jason Tinklenberg* 563 U.S. 647 (2011), at 131 S. Ct. at 2017; therefore, August 27 and 28th, the intermediate Saturday and Sunday were non excludable days under the Speedy Trial Act 18 U.S.C. § 3161, Federal Rule of Criminal Procedure 45(a)(1)(B) Computing and Extending Time, and Federal Rule of Criminal Procedure 50 Prompt Disposition, and under *United States of America v. Jason Tinklenberg* 563 U.S. 647 (2011). Therefore, a maximum of 13 days were excludable from the 44-day period that it took the Government to obtain an indictment. Consequently, excluding the 13-day delay, 31 days elapsed between the complaint and the indictment, requiring the dismissal of the charge in the indictment. 18 U.S.C. § 3162(a)(2).

However, given that the Government bears the burden of proof in connection with claims of exclusion of time under the Speedy Trial Act, 18 U.S.C. § 3161(h), the Government is credited for only a 10 day delay for the time “resulting from transportation of any defendant from another district,” August 27th, and August 28th, 2016 were non excludable under

18 U.S.C. §3161(h)(1); *United States of America v. Jason Tinklenberg* 563 U.S. 647 (2011), at 131 S. Ct. at 2017.

United States of America v. Jason Tinklenberg explains why, in Mr Winans case, Saturdays and Sundays are not excluded under 18 U.S.C. § 3162(a)(2) –

Under the common-law rule, weekend days and holidays are included when counting a statutory time period . . . unless the statute specifically excludes them. See 74 Am.Jur.2d, Time § 22, p. 589 (2001) (in calculating time periods expressed in statutes, "when the time stipulated must necessarily include one or more Saturdays, Sundays, or holidays, those days will not be excluded, in the absence of an express proviso for their exclusion"

Id at 2017. Under 18 U.S.C. §3161(h)(1)(D), any delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. Under 18 U.S.C. §3161(b) the indictment shall be filed within thirty days from the date the defendant was arrested. Under 18 U.S.C. §3161 there are no exclusions for Saturdays and Sundays, only specific exceptions under 18 U.S.C. §3161(h). Under 18 U.S.C. § 3142 (f)(2) when the government requests a continuance, the delay cannot exceed three days. While 18 U.S.C. § 3142 (f)(2) excludes weekends, 18 U.S.C. §3161(h) does not exclude weekends and does not incorporate the Bail Reform Act; therefore, the government is only entitled to the three days allowed by 18 U.S.C. § 3142 (f)(2). The 30-day period under The Speedy Trial Act Stopped on Thursday August 25th, and Friday August 26th, then the clock started again on Saturday August 27th, and Sunday August 28th, then the clock stopped again on Monday August 29th. On this basis, 31 non excludable days elapsed between the arrest and the indictment, requiring the reversal of Mr. Winans conviction, and the dismissal of the indictment with prejudice. See the Speedy Trial Act 18 U.S.C. § 3161, Federal Rule of Criminal Procedure 45(a)(1)(B) Computing and Extending

Time, and Federal Rule of Criminal Procedure 50 Prompt Disposition, and under *United States of America v. Jason Tinklenberg* 563 U.S. 647 (2011).

CONCLUSION

The Government impermissibly delayed Mr. Winans' indictment, in violation of the Speedy Trial Act. These violations violated Mr. Winans' statutory and constitutional right to a speedy trial and are prejudicial. On this basis, Mr. Winans respectfully urges that this Court grant this motion to stay the mandate until the disposition of a Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

/s/Jerome Matthews, Jr

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