11-876-CR

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM RUBENSTEIN,

Defendant,

and

DOV SHELLEF,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York (Central Islip)

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This appeal presents a single issue: whether, following a remand from this Court for a new trial in a criminal case, the government is permitted to allow the case to languish, un-tried and inactive, for eight months before finally commencing prosecution. The district court held that the government's egregious delay in reactivating this case – prosecutors spent months without taking any action at all, even after being warned by the trial judge that the statutory clock was ticking – did not violate the Speedy Trial Act, even thought that statute ordinarily requires that a new trial following a remand be commenced within 70 days of the appellate court's mandate. The court arrived at this conclusion by holding, retroactively, that a trial within the normal statutory period would have been "impractical," and that therefore, it was appropriate to apply an alternative statutory period of 180 days.

The court's finding was wrong: as the original trial judge had stated repeatedly at every status conference and hearing throughout the statutory period, both parties had completed the necessary preparation for trial years before, when this case was first tried to verdict. The passage of time had not resulted in the unavailability of witnesses or the loss of any relevant evidence. Indeed, once the parties and the court agreed on a trial date, no significant delay was necessary in

order to prepare the case. There was nothing "impractical" about commencing trial within the normal statutory period.

But there is an even more straightforward problem. Even if the district court's factual conclusion had been defensible, it was made far too late. The Speedy Trial Act does not allow a district judge retroactively to excuse the government's delay in prosecuting a criminal case. If the government thought that the case was so complex that it needed extra time to prepare for trial, or if it thought that the passage of time had made a speedy trial impractical, it should have sought and obtained rulings under the Speedy Trial Act granting exclusions of time or expanding the permissible time to commence trial. The government never once sought such an exclusion or expansion, and the statute – for good reason – does not permit the court to grant one retroactively.

The defendant in this case was indicted in 2003. As of this writing, more than eight years have passed since that indictment was returned, and the case remains unresolved. The Speedy Trial Act was enacted to prevent precisely this type of interminable, constitutionally problematic delay in the prosecution of a criminal case. The government should not be permitted to ignore the dictates of the Act and allow indicted defendants to remain under a cloud of accusation indefinitely. The only appropriate remedy is to vacate the conviction and dismiss the indictment with prejudice. As the Supreme Court noted in a case involving

another Speedy Trial Act violation by the same prosecutor's office and trial judge, such a dismissal is the only sanction that "gives the prosecution a powerful incentive to be careful about compliance." *Zedner v. United States*, 547 U.S. 489, 499 (2006).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. Appellant Dov Shellef was sentenced on January 31, 2011, and final judgment of conviction was entered on February 24, 2011. Notice of Appeal was filed on March 4, 2011. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES FOR REVIEW

1. With respect to Judge Platt's retroactive grant of an exclusion of time based on the case's complexity:

   Whether the Speedy Trial Act permits a district court, after expiration of the 70-day period for commencing a post-appeal retrial, to grant a retroactive continuance of indefinite duration due to a case's "complexity" without having made an explicit on-the-record finding that the ends of justice require such a continuance.

2. With respect to Judge Bianco's ruling that it was "impractical" to try the case within the 70-day period, and that the alternative 180-day period was satisfied:

   a. Whether a district court is permitted to make a retroactive finding that it was "impractical" to retry a case within the normal 70-day period specified by the Speedy Trial Act.

   b. Whether a district court is permitted, under 18 U.S.C. § 3161(e), to extend the statutory period for re-trying a case following an appellate remand from 70 to 180 days for reasons unrelated to the "passage of time."

c. Whether the court correctly determined that the 180-day period it found applicable had not been exceeded.

3. Whether the dismissal in this case should be with prejudice.

STATEMENT OF THE CASE AND FACTS

A. Prior Proceedings

In June 2003, the appellant, Dov Shellef, and a co-defendant named William Rubenstein, were indicted in the Eastern District of New York. The indictment charged the defendants with various tax crimes, nearly all of which related to the defendants' alleged conspiracy to defraud the government of excise taxes purportedly due on sales of a regulated industrial chemical called CFC-113.

The 2003 indictment charged Shellef and Rubenstein with conspiracy to defraud the IRS and with several counts of wire fraud against a chemical manufacturer with whom Shellef did business. The indictment also charged Shellef with money laundering, predicated on the wire fraud counts. Finally, the original indictment charged Shellef with one count of personal income tax evasion and two counts of subscribing to false corporate income tax returns.

The defendants were tried in 2005 before Judge Joanna Seybert and found guilty. Both defendants appealed. On appeal, this Court held that the indictment had improperly joined two of the personal tax evasion counts against Shellef with the other charges against both defendants, and that the joinder of Shellef and

Rubenstein as defendants was also improper. *United States v. Shellef*, 507 F.3d 82, 88 (2d Cir. 2007). The case was remanded to the district court for new trials. *Id.*

B. Proceedings on Remand

1. Initial Activity

This Court's mandate issued on March 4, 2008, returning jurisdiction to the district court. JA69.[1] Ten days later, on March 14, 2008, the government wrote to Judge Seybert and requested that the Court hold a scheduling conference for the purpose of setting new trial dates. JA126. Judge Seybert did not act on the government's request; instead, in accordance with a local rule requiring that all criminal cases remanded for retrial be assigned to new judges, the case was re-assigned on March 21, 2008 to Judge Thomas Platt. JA127.

Five days later (on March 26), Judge Platt issued a notice setting a scheduling conference for April 10. Meanwhile, on March 28, Shellef submitted a letter requesting permission to travel outside his bail limitations. JA128-29. Judge Platt granted the request in part on April 1, 2008. JA131-32.

2. The April 10 Status Conference

At the April 10 conference, the parties discussed the plan for re-trying the defendants. Because this Court had held that it was error both to join the two

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[1] Citations to "JA" refer to the Joint Appendix. Citations to "SPA" refer to the Special Appendix.

defendants in one indictment and to join the personal tax counts against Shellef with the counts involving chemical sales, the government indicated to Judge Platt that it intended to hold three separate retrials: (1) of Rubenstein on all charges against him; (2) of Shellef on the chemical charges; and (3) of Shellef on the charges relating to personal tax evasion.

Initially, the government stated that it intended to proceed with the three different trials without seeking new indictments from the grand jury. Instead, it planned to prepare three redacted versions of the original indictment – one for each contemplated retrial – and to proceed to trial on the redacted indictments. JA141. Judge Platt expressed some skepticism about that approach, stating that although he was unsure of the proper procedure, his "stomach reaction" was that the government had to seek new indictments. JA142. The government responded that it would seek new indictments if that was the court's preference, but it also sought permission to "research the issue of whether or not severance of counts would be sufficient to comply with the mandate, or whether we need to present to the grand jury." JA143-44.

Judge Platt told the government that it could make whatever decision it deemed appropriate, but whatever course it chose to take, it "should move with alacrity because at some point here [the defendants] may gain some speedy trial rights." JA143. The government agreed and suggested that it would try to resolve

the open legal question and, if necessary, schedule time with the grand jury "as soon as reasonably possible." JA144. Judge Platt once again counseled the government to act quickly: "You should do it promptly," he said, because "they take the speedy trial question very seriously up here." JA144-45. The prosecutor agreed, promising "to move as quickly as I can." JA145.

Judge Platt suggested that if the government obtained superseding indictments, the time periods under the Speedy Trial Act would start running once the defendants were arraigned on the superseding indictments. JA145-46. At that point, the judge said, he would consider what excludable time might exist under the Speedy Trial Act and set a tentative date for trial. JA147. Counsel for the government stated that the parties had spoken informally, and that they were considering trial dates in early 2009. The court urged caution: absent exclusions of time, the Speedy Trial Act would require commencing trial well before 2009. If the parties wished to postpone trial until then, the court said, they would "have to agree on excludable time and whatever the reasons are and be prepared to present them on the record here in court from time to time." JA147.

The government agreed, noting that the case had been previously classified by Judge Seybert as "complex." "Complex" cases, under certain circumstances, may be eligible under the Speedy Trial Act for extended preparation time, assuming the trial judge makes a finding on the record that the "interests of justice"

are served by allowing the parties additional time to prepare. 18 U.S.C. § 3161(h)(7)(B)(ii). The government did not ask the court to make such a finding; to the contrary, the government agreed with the court's assessment that although the case was complex, "both sides are basically ready for trial," because "[i]t's going to be essentially the [same] evidence [that was] presented before." JA146.

The court then asked defense counsel if he had "any disagreement with this discussion." Tr. JA148. Counsel identified only one topic with which he disagreed: he said that he did not "want to mislead anybody" regarding agreements on scheduling, and that Shellef was not prepared to agree to any "open-ended extensions of speedy trial time." JA148. Instead, given the government's apparent plan to seek new indictments, defense counsel suggested that the court should proceed "one step at a time" following the return of any superseding indictments. The judge agreed, and he instructed the government to notify the court when superseding indictments were returned. Defense counsel agreed with the government's assessment that the case was "complex," but neither counsel sought a ruling from the court that trial should be delayed as a result.

When the proceeding adjourned, the plan was for the government to report to the court when it had obtained superseding indictments or instead decided to redact the existing indictment.[2] As the government was aware, by that point over

[2] The Minute Entry on the docket states:

30 days had already elapsed since this Court issued the mandate returning the case for retrial.

3. The Government's May 19, 2008 Letter

The government did not heed the Court's instruction to act "with alacrity" in light of the requirements of the Speedy Trial Act. Instead, it did nothing for the next 39 days. Finally, on May 19, 2008 – 76 days after the issuance of this Court's mandate – the government advised Judge Platt that it had decided not to seek superseding indictments after all, and that it instead wished to proceed with three trials under some versions of the existing indictment. JA153. The government's letter did not request that the court enter an order excluding time under any provision of the Speedy Trial Act; indeed, it did not refer to the Act at all. Nor did the government's letter attach any proposed redacted indictments.

On May 27, 2008, Judge Platt's law clerk wrote to the attorney for the government stating that the government should send "copies of the new

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> The Government will seek 3 separate indictments on the case. Three separate trials will be held. The parties request a early 2009 trial date. The Court and parties discuss an excludable delay. The Court and parties agree that the case is complex, especially in light of the 2nd Circuit's Opinion citing its complexity. The Government will communicate with the Court once the new indictments are filed to set up an arraignment date.

JA134.

indictments" to the court. JA157. The government did not respond for nearly two months. Finally, on July 22, 2008, the government wrote the court and attached three proposed new indictments for the court's review. JA163-65. These new charging instruments were exactly the documents that had been described by the prosecutor at the initial status conference some four months earlier: copies of the original indictment that had simply been redacted so that they each contained the limited subset of allegations relevant to the three respective trials for which they were intended.

4. Shellef's Motion to Dismiss

Meanwhile, on June 3, 2008, while the district court was still waiting for the government to comply with its months-old request for new charging documents, Shellef moved to dismiss the indictment against him, pursuant to the Speedy Trial Act. JA159-62. At that point, 91 days had elapsed since the issuance of this Court's mandate. The Speedy Trial Act ordinarily requires that a retrial following an appellate reversal take place within 70 days of the appellate court's mandate (18 U.S.C. § 3161(e)), unless time has been "excluded" from that period for one of several enumerated reasons. Other than the five days during which Shellef's motion to modify his bail had been pending, and the one day the parties had attended a status conference, none of the 91 days were automatically excludable

under the Act. The government had made no motions asking the court to exclude additional time, and the district court had entered no orders doing so.

Shellef's motion to dismiss was pending for a little over seven weeks. On July 24, 2008, Judge Platt issued a memorandum and order denying the motion. JA321-29. The judge offered two somewhat inconsistent grounds for doing so. First, he stated that the 70-day time limit for retrying the defendants after an appellate remand had not yet expired, because he had, at the April 10 conference, excluded time from the Speedy Trial period due to the fact that the case was "complex." JA326-27. The judge acknowledged that he had not done so explicitly ("[I]t is true that the Court did not on April 10, 2008 specifically state that it was excluding time based on the fact that this is a 'complex' case."), but wrote that an explicit finding "seemed unnecessary given that the attorneys for both parties, during a discussion on the record concerning excludable time pursuant to the Speedy Trial Act, agreed that this case was complex . . . [and] requested a date in January 2009 to commence the retrials of these defendants." JA327-28. The judge did not specify how much time he had excluded due to the case's complexity.

Second, the court held that a motion under the Speedy Trial Act was "premature," given that the government had not yet obtained superseding indictments:

> The fact is that the Government unquestionably needs time to determine how best to try two separate defendants

> for their specific offense which, in light of the Court of Appeals finding of misjoinder, necessarily means that the defendants are not currently facing any charges. Accordingly, any accusations of speedy trial violations would logically appear to be premature. If, as and when one or more of the indictments are returned, this Court will entertain Speedy Trial Act motions.

JA328. Under this rationale, it would have been unnecessary for the court to "exclude" time under the Speedy Trial Act – because the case was "complex" or for any other reason – because if the defendants were truly not facing any charges, no clock was ticking.[3]

The court's July order did not specify a plan for future action, and it did not set a date for trial.

5. Proceedings After Denial of the Speedy Trial Motion

For the next 97 days after Judge Platt denied the Speedy Trial motion, there was no activity on the Court's docket at all, other than several entries relating to Mr. Rubenstein's motion for the return of his restitution payments. Then, on October 29, 2008, the government wrote to the court requesting a conference to set trial dates for both defendants. The entire letter reads as follows:

> The United States, by and through undersigned counsel, respectfully requests that the Court schedule a Status Conference or Teleconference to set trial dates in the above-captioned matter. Per the Court's request, the

[3] Significantly, although Shellef allegedly was not facing any charges, he remained subject to onerous bail restrictions.

> United States has submitted Indictments charging the Defendants separately, as well as a proposed order of the re-trials, and an estimated duration of each trial. (Documents 266, 275). Undersigned counsel is unaware of any pending matter which must be resolved before trial dates may be set. Accordingly, the United States stands ready for trial at the Court's convenience.

JA330.

The court responded five days later (on November 3) with a notice setting a pretrial conference for November 6, 2008. The next day, Shellef moved to modify the conditions of his release and exonerate bail.

At the November 6 conference, Judge Platt stated that he had not yet read the three redacted indictments that had been submitted by the government in July, but that, assuming those documents accurately reproduced the substance of the original indictment, he believed them to be sufficient charging instruments to allow the cases to proceed to trial immediately. Because the case now "apparently" had a "speedy trial problem," the judge expressed a preference for beginning right away. JA355. The lawyer for the government stated that he needed approximately two weeks to schedule witness appearances; the court therefore set the case for trial on November 24. Shellef's counsel informed the judge that he was engaged in another criminal trial that would not be over until December; Judge Platt said that was "too bad" (JA360), and that Shellef would need to get another attorney. "This is not a first trial, counsel," the Judge remarked. "This is a retrial. . . . Some other

competent attorney . . . will come in, read the trial transcript, and be prepared in two weeks." JA362.

Shellef spent the next ten days searching for replacement counsel. When he was unable to procure an attorney who could try the case on such short notice, he requested that the November trial date be adjourned, and that time be excluded under the Speedy Trial Act. The judge granted the request and adjourned the trial date until February 17, 2009. JA375.

From that point forward, trial was delayed several times for reasons that are not relevant to this appeal, including a conflict that arose between Shellef and his attorney, and a mandamus petition that was filed in this Court and ultimately resolved via a mandate ordering that the case be re-assigned to a new judge. JA388-89. The case was re-assigned to Judge Joseph Bianco on June 17, 2009. The following week, Judge Bianco granted Shellef's motion to relieve his prior attorney and to substitute new counsel, and entered an order setting the case for trial on December 7, 2009. At this time, Shellef preserved his prior Speedy Trial objections but agreed prospectively to an "ends of justice" exclusion of time under the Speedy Trial Act until December 7, 2009, so that new counsel would have time to file motions and prepare for trial. JA392.

6. Shellef's Renewed Motion to Dismiss

Pursuant to Judge Bianco's scheduling order, Shellef filed pretrial motions in September 2009. JA395-96. Among those motions was one seeking dismissal of the indictment because of the Speedy Trial Act violations that had occurred before Judge Bianco was assigned to the case. The basis for Shellef's motion was the same as before: Despite the statutory requirement that a new trial following a remand take place not more than 70 days following the appellate court's mandate, the prosecutors and Judge Platt had allowed eight months to pass before initially setting the case for trial in November 2008. All told, Shellef contended, over 190 days of includable Speedy Trial time had elapsed before any exclusions were entered beginning in November 2008.

Judge Bianco heard argument on the renewed motion to dismiss in November 2009 and denied it from the bench. JA399-417. Trial commenced on schedule in December 2009, and Shellef was convicted in January 2010. Following trial, and prior to sentencing, Judge Bianco issued a written memorandum and order in which he memorialized and expanded upon the grounds he had stated orally prior to trial for denying the motion. JA535-55.

Without disturbing Judge Platt's ruling that the motion was properly denied because the case's "complexity" warranted an "ends of justice" exclusion of time from the 70-day limit, Judge Bianco offered an alternative statutory rationale to

excuse the government's delay in renewing the prosecution: Citing a provision of the Speedy Trial Act that had never been invoked by either the government or Judge Platt at the time, Judge Bianco held that the trial court was permitted to expand the statutory period for a retrial from 70 days to 180 days "if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical." 18 U.S.C. § 3161(e). In Judge Bianco's view, Judge Platt had likely made an "implicit" finding at the original April 10 status conference that trial within 70 days was "impractical," for four reasons: (1) the belief that the government needed to re-indict the defendants before a grand jury; (2) the possibility that the government would present new evidence at the retrial; (3) the parties' agreement that the case was complex; and (4) the parties' discussion of a possible trial date in 2009, outside the 70-day window. JA544-45. And even if Judge Platt had not made such a determination, Judge Bianco held, he himself was making the same determination retroactively: for the same four reasons (and also because of the fact that the case had been re-assigned from Judge Seybert to Judge Platt following remand), Judge Bianco held that proceeding to trial within 70 days of this Court's remand would have been "impractical" and that it was therefore appropriate to expand the statutory window to 180 days. JA545. Judge Bianco further found that as a result of various motions that had been filed, only 173 days of includable time had elapsed during

the eight months between this Court's mandate and the November 2008 conference. JA554. Thus, he found that the statute had not been violated and that Shellef's motion to dismiss was properly denied.

Shellef was sentenced in January 2011, and judgment was entered in February 2011. This timely appeal followed.

SUMMARY OF ARGUMENT

The Speedy Trial Act requires that a re-trial following an appellate remand commence within 70 days after the issuance of a mandate (not counting delays resulting from certain enumerated causes), unless the trial judge finds that impracticalities stemming from the "passage of time" justify extending the re-trial period to 180 days. In this case, despite multiple reminders that the Speedy Trial clock was ticking, the government and the district court allowed eight months to pass before even making an attempt to set a trial date following this Court's remand. During this entire period, no exclusions of time were sought by the government or entered by the district court. Nearly the entire eight-month period – a total of over 190 days – was includable time under the Speedy Trial Act.

The two district judges who presided over the case following this Court's remand offered shifting and contradictory justifications for excusing the government's delay in renewing this prosecution. Ultimately, none of these after-the-fact rationalizations hold water: Judge Platt's assertion that he had excluded

time from the standard 70-day period due to the case's "complexity" is belied by the record, and his attempt to do so retroactively is explicitly prohibited by statute and case law. And Judge Bianco's conclusion that the 70-day period was permissibly expanded to 180 days is both incorrect and irrelevant. The statute does not permit the type of retroactive extension the court purported to grant – an extension that was not, in any event, based on "factors resulting from the passage of time." And even if a 180-day period *had* applied, the government *still* missed its deadline, by nearly two weeks.

As a result of this impermissible delay, the district court was required by the statute to dismiss the indictment, and failing to do so was error. This Court should vacate the judgment and dismiss the indictment. And, because the delay was the result of particularly neglectful acts on the part of the government and the district court, the dismissal should be with prejudice.

ARGUMENT

I. The Requirements Of The Speedy Trial Act

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, fixes a 70-day time limit for trial following an indictment or arraignment. 18 U.S.C. § 3161(c)(1). The same time limit generally applies to cases that are to be retried following a successful appeal. Specifically, the statute states:

> If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within

> seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical.

18 U.S.C. § 3161(e). For a retrial following appeal, the statutory period runs from the date of the issuance of the appellate court's mandate. See *United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988).

The Act provides for periods of "excludable" time that do not count against the running of the statutory period. 18 U.S.C. § 3161(h). These include certain "automatic" exclusions, such as periods of time during which pre-trial motions are pending (18 U.S.C. § 3161(h)(1)(D)) and periods of time during which the defendant is being tried on other charges (18 U.S.C. § 3161(h)(1)(B)), as well as certain exclusions that may be granted by the district court only if requested by a party or brought to the parties' attention *sua sponte* by the court. Particularly relevant here is a provision that permits the district court to grant a continuance, on the court's own motion or at the request of a party, on the basis of a finding "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). Such continuances may not be open-ended (*United States v. Upton*, 921 F. Supp. 100, 102. (E.D.N.Y. 1995)), and must be accompanied by explicit findings.

Specifically, the Act requires that an "ends of justice" continuance is *not* excludable from the applicable Speedy Trial time limits

> 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 interest of the public and the defendant in a speedy trial.

Id. Such findings may not be made retroactively; they must be "set forth in the record of the case" at the time the judge grants the continuance. See, *e.g.*, *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985) ("the decision to grant an ends-of-justice continuance [must] be prospective, not retroactive; an order granting a continuance on that ground must be made at the outset of the excludable period"). The Act sets forth a list of mandatory factors a court must consider when determining whether or not to grant an ends-of-justice continuance, including whether "the case is so unusual or so complex . . . that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the [applicable] time limits." 18 U.S.C. § 3161(h)(7)(B)(ii). It also specifies that an ends-of-justice continuance may not be granted "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." 18 U.S.C. § 3161(h)(7)(C).

If a trial does not begin within the appropriate time period, the defendant may move to dismiss the charges. If a meritorious and timely motion to dismiss is filed, the district court *must* dismiss the charges. 18 U.S.C. § 3162(a)(1). The Act provides that dismissal may be with or without prejudice, taking into account, among other things, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(2).

On appeal from a denial of a speedy trial motion, legal questions are reviewed de novo and factual findings for clear error. *United States v. Patterson*, 135 Fed. Appx. 469, 471 (2d Cir. 2005); *United States v. Gaskin*, 364 F.3d 438, 449-50 (2d Cir. 2004).

II. Judge Platt Erred By Holding That The Case's "Complexity" Justified A Retroactive, Open-Ended Exclusion Of Time From The 70-Day Limit.

In his order denying Shellef's motion to dismiss, Judge Platt accepted that a 70-day time limit applied under the Speedy Trial Act. He held, however, that the time limit had not yet expired because, at the initial status conference in April 2008, he had purportedly granted a continuance of indefinite duration based on the fact that the case was "complex."

That assertion is belied by the record. The judge did not order a continuance at the April conference; to the contrary, he expressly told the government that the Speedy Trial clock was ticking, and that prosecutors should act "with alacrity" to avoid violating the statute. And when the government cavalierly disregarded that warning – it took nearly three months, for example, simply to cut and paste parts of the indictment into separate documents – the court made a retroactive finding that the ends of justice favored an indefinite delay. The law expressly prohibits such an action.

A. No Exclusion Of Time Was Entered At The Status Conference.

Judge Platt asserted in his order that although he did not "specifically [so] state," he had in fact excluded an unspecified amount of time from the 70-day speedy trial clock at the initial status conference based on the fact that the case was "complex." That is simply not what happened. The court never made a finding of excludable delay, and it never entered an order granting any continuance. To be sure, the parties discussed whether time would be excluded under the Act, and the attorney for the government stated that the parties had tentatively discussed trial dates in early 2009. But no party asked the court to grant a continuance until then, and the court did not even arguably do so. To the contrary: when the prosecutor told the judge he was considering 2009 trial dates, the court immediately interjected to warn the parties that the Speedy Trial Act would not permit such a

long delay absent express findings of excludable time. "You and your adversaries," the judge told the prosecutor, "are going to have to agree on excludable time and whatever the reasons are and *be prepared to present them on the record here in court from time to time* to take you up to the first of the year, if that's what you were planning on." JA147 (emphasis added).

No such application was ever made – certainly not at the initial status conference. This was due, in large part, to the fact that the court anticipated that the government would be obtaining superseding indictments. As the judge stated multiple times at the status conference, he believed (mistakenly) that the arraignment of the defendants on those new indictments would start the running of the Speedy Trial Act clock anew.[4] Indeed, even three months later, in the very order in which the judge claimed that he had granted an ends-of-justice continuance, the judge reiterated this belief: he held that a motion to dismiss under the Speedy Trial Act was "premature," because the defendant was not yet facing any charges. JA328.

The mere fact that the parties discussed trial dates at the status conference does not mean that the court entered an order excluding time under § 3161(h)(7). See *United States v. Sanders*, 485 F.3d 654, 658-59 (D.C. Cir. 2007) (colloquy

[4] In fact, superseding indictments inherit the Speedy Trial clocks of their predecessors. *See United States v. Gambino*, 59 F.3d 353, 362 (2d Cir. 1995).

about trial dates did not constitute an order excluding time under the ends-of-justice provision). The same is true of the parties' discussion of the case's "complexity." Complexity is only one of several factors a court must consider when determining whether to grant an ends-of-justice continuance; a mere reference to this factor is insufficient to support an exclusion. See *Zedner*, 547 U.S. at 507. Indeed, even though both parties and the court acknowledged that the case was complex, the judge nonetheless appeared to believe that no extraordinary delay was necessary as a result, since the case had been tried in much the same form once before. See JA146 ("THE COURT: "[P]resumably both sides are basically ready for trial. It's going to be essentially the evidence you presented before." "[Prosecutor]: Basically, your Honor."). The judge remained firm in this belief for the better part of a year. When the parties finally appeared before the judge a second time in November 2008, Judge Platt told Shellef's lawyer that there was no reason trial could not begin – with a brand new defense attorney – within two weeks: "This is not a first trial, counsel. . . . [T]his is a retrial. . . . Some other competent attorney . . . will come in, read the trial transcript, and be prepared in two weeks." JA362.

In sum, there is no basis for concluding that in April 2008 Judge Platt entered an order, *sub silentio*, excluding time due to the case's complexity, something neither party asked the court to do.

B. Judge Platt's July 2008 Order Could Not Exclude Time Retroactively.

What Judge Platt really did in July 2008 was to retroactively excuse a theretofore unauthorized delay by concluding, after the fact, that the "ends of justice" necessitated a continuance. The Speedy Trial Act does not permit such after-the-fact rationalization of an otherwise unauthorized delay.

As discussed above, it has long been the law in this Circuit that district courts may not grant ends-of-justice continuances retroactively. As this Court held in *Tunnessen*, an order granting a continuance on the ground that the ends of justice require that the parties be granted extra time to prepare the case "must be made at the outset of the excludable period." 763 F.2d at 77. This rule was reaffirmed in *United States v. Kelley*, 45 F.3d 45, 47 (2d Cir. 1995) (the "district court's *nunc pro tunc* 'ends of justice' finding was ineffective to toll the speedy trial clock"), and *United States v. Breen*, 243 F.3d 591 (2d Cir. 2001). The district court may certainly wait until later in the case to flesh out its reasoning in a written order (see *Zedner*, 547 U.S. at 506-07; *Breen*, 243 F.3d at 594-97 (allowing a Speedy Trial Act exclusion where the trial court made the relevant findings and balanced the relevant factors at the outset, but failed to use the specific language of the statute until after the fact)), so long as the subsequent articulation recounts "the genuine reasons the district judge had in mind at the time he or she granted the continuance" (*United States v. Thomas*, 272 Fed. Appx. 479, 484 (6th Cir. 2008)).

But the case law is clear that the underlying findings and balancing of statutory factors must be conducted contemporaneously. See *United States v. Jarzembowski*, 2007 WL 2407275 (W.D. Pa. 2007) (*Zedner* does not permit "retroactive tolling findings under the Speedy Trial Act"); *United States v. Correa*, 182 F. Supp. 2d 326, 328 n. 1 (S.D.N.Y. 2001).

The reason for the rule is clear: Without a requirement of specific, contemporaneous findings, there is a strong "risk that a district judge in a particular case may simply rationalize his action long after the fact, in order to cure an unwitting violation of the Act." *Tunnessen*, 763 F.2d at 78. "If the judge gives no indication that a continuance was granted upon a balancing of the factors specified by the Speedy Trial Act until asked to dismiss the indictment for violation of the Act, the danger is great that every continuance will be converted retroactively into a continuance creating excludable time." *United States v. Janik*, 723 F.2d 537, 544-45 (7th Cir. 1983).

That is exactly what happened in this case. It is clear from the record that at the time the parties appeared in April 2008, the court did not balance the statutory factors or make a finding that the case's complexity required additional time to prepare for trial. Just the opposite: the judge stated his belief that the parties should be able to commence with trial as soon as new charging documents were in place, because everyone had completed the necessary preparation years before.

Indeed, the court warned the government several times that it had to move quickly to avoid violating the Speedy Trial Act. And the judge expressly told the prosecutor that if he wanted to delay the trial beyond the statutory period, he would have to justify his request, on the record, with specific grounds, and await rulings.

The government did not do what the judge asked. But rather than forcing the government to deal with the consequences of its laxity, the court papered over the problem by making ends-of-justice findings after the fact. As this Court held 25 years ago in *United States v. Stayton*, "[e]nds of justice continuances cannot be used in hindsight to mop up such excessive delay." 791 F.2d 17, 21 (2d Cir. 1986).

C. Judge Platt Did Not Purport To Exclude Time Prospectively.

In any event, even if Judge Platt had been permitted to retroactively excuse the government's failure to commence prosecution within the *first* 70 days following the mandate, there is certainly nothing in the court's July 2008 order that even purports to excuse prospectively the massive delay that occurred *after* the order issued. Following the denial of Shellef's first Speedy Trial motion, another *97* days passed before the government did anything at all in this case. From July 22 until October 29, 2008, there are no entries on the docket, except for a few matters concerning Mr. Rubenstein's restitution obligations. In other words, for over three months, even after it had litigated a motion seeking to dismiss the indictment for violation of the Speedy Trial Act, the government did absolutely

nothing to move the case forward. As far as the record reveals, no justification for this delay was even asserted. The government did not claim to have been engaged in preparing its case for trial, or negotiating a plea agreement with the defendant, or even attempting to coordinate attorney or witness schedules in order to find a convenient date for trial. Literally nothing happened in this case for 97 days following Judge Platt's denial of Shellef's speedy trial motion. The government did not seek, and the court did not enter, any exclusions of time under the Speedy Trial Act. That delay alone justifies dismissal, even if the earlier delay somehow did not.

III. Judge Bianco Erred By Retroactively Expanding The Statutory Period To 180 Days Based On Factors Not Related To The Passage Of Time.

Judge Bianco's attempt to excuse the government's delay on alternative legal grounds fares no better than Judge Platt's. Judge Bianco held that even though Judge Platt had not said so – indeed, even though it is "unclear" whether Judge Platt was even aware of the statutory possibility of doing so – he had nonetheless "implicitly extended the time under Section 3161(e) from seventy days to 180 days . . . because it was impractical for the case to be tried within the seventy-day period." JA544. In the alternative – that is, if Judge Platt had not actually made such a determination – Judge Bianco purported to make it himself, retroactively.

This was error. Section 3161(e) is no different from the rest of the Speedy Trial Act. If the district court sees fit to extend the time for trial based on a discretionary finding that extra time is necessary, it is required to do so prospectively and explicitly. Judge Platt did not make the determination that Judge Bianco attributed to him, and Judge Bianco was not permitted to make such a determination years after the fact. In any event, even if there had been no problem with timing, the decision is substantively unsustainable. There was nothing "impractical" about retrying this case within the ordinary 70-day period, and the factors cited by Judge Bianco to excuse the delay did not "result[] from passage of time," as the statute requires. If the commonplace factors cited by the court – re-assignment to a new judge, for example, or the mere possibility that new evidence might be introduced on retrial – were sufficient to justify a 180-day extension in this case, then there is no reason why *any* remanded case would ever need to be tried within 70 days.

A. Judge Platt Did Not Make An "Implicit" Finding Of Impracticality.

To begin, Judge Bianco was wrong, as a matter of historical fact, to conclude that Judge Platt had made a contemporaneous, though "implicit," finding under § 3161(e) that it was "impractical" to try the case within 70 days of the appellate mandate. As we have detailed above, quite the opposite is true. The judge stated several times, both at the initial status conference, and at the

scheduling conference in November 2008, that although the case was undeniably "complex," the necessary trial preparation was largely complete. See JA146 ("[O]nce you get the indictment, presumably both sides are basically ready for trial. It's going to be essentially the evidence you presented before."). Indeed, when questions arose about defense counsel's availability for trial, the judge stated that in his view, a "competent attorney" with no background in the case whatsoever could simply "read the . . . transcript" of the first trial "and be prepared in two weeks." JA362. The judge told the government several times that if it wished to obtain new indictments, it should do quickly; the prosecutor responded by saying that he was "going to move as quickly as I can." JA145.

What subsequently happened, as detailed above, was that Judge Platt *retroactively* declared that the ends of justice had favored a delay in the start of the trial. We explain above why the court was not permitted to act in this manner. Judge Bianco's subsequent order implicates the related question whether either judge was permitted to make an alternative retroactive finding – implicitly or explicitly – that a speedy trial was "impractical." They were not.

B. Judge Bianco Was Not Permitted To Make An "Impracticality" Finding Retroactively.

Judge Bianco's order denying Shellef's motion to dismiss was issued from the bench in November 2009, over a year and a half after the initial status conference. The written order memorializing the judge's findings and expanding

on his reasoning was issued over a year later, in January 2011. In those two orders, Judge Bianco found retroactively that as of April 2008, it had been "impractical" to re-try the case within 70 days of the appellate mandate, and that an extension of the speedy trial clock to 180 days had thus been warranted. Neither the plain language of the statute, nor its structure or purpose, permit such a retroactive finding.[5]

1. Plain Language

To begin, the plain language of the statute calls for a district judge to make a prospective finding of impracticality in order to justify an expansion of the permissible time to conduct a retrial. The provision permits the trial court to extend the period from 70 days to as long as 180 days if it determines that "unavailability of witnesses or other factors resulting from passage of time *shall make* trial within seventy days impractical." 18 U.S.C. § 3161(e). The use of the

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[5] To our knowledge, no federal court of appeals has considered the question whether retroactive findings are impermissible under § 3161(e), though two courts appear to have assumed as much without expressly so holding. *See United States v. Goetz*, 826 F.2d 1025, 1027 (11th Cir. 1987) (upholding an extension to 180 days under § 3161(e) because the government filed its motion "prior to the expiration of the original 70 days. Because the government filed its motion within the initial time limit provided in section 3161(e), Goetz cannot complain that this extension violated the express terms of the Speedy Trial Act."); *United States v. Mack*, 511 F. Supp. 802, 803 (D. Mass. 1981) (assuming without analyzing that extension under § 3161(e) may not be made retroactively), rev'd on other grounds, 669 F.2d 28 (1st Cir. 1982). There is, as Judge Bianco noted in his order, one decision from a federal district court in the District of Columbia holding that retroactive extensions are permissible. *United States v. Ginyard*, 572 F. Supp. 2d 30, 36 (D.D.C. 2008).

word "shall" is critical: The statute could say, but does not, that a judge may extend the deadline if he finds that a 70-day period "was impractical" or "was made impractical" by the passage of time. It could say that an extension is permissible if such factors "have made trial" impractical, or simply "made trial" impractical. But the statute does not say any of those things. Rather, a trial court can extend the deadline only if it determines that these factors "shall make" a speedy trial impractical. "Shall" is a forward-looking construction, commonly and purposefully employed by Congress to express "simple futurity." See, *e.g.*, *Lopez v. Monterey County*, 525 U.S. 266, 291 (1999) (Thomas, J., dissenting).

Courts routinely interpret similar statutory language, as well as similar language in contracts, wills, and other carefully drafted instruments, to mean that the drafters intended the language to apply prospectively. This Court, in an opinion by then-Judge Sotomayor, put it in stark terms in *Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999), in which the question was whether Congress intended a particular provision of the Prison Litigation Reform Act to apply prospectively or retroactively:

> There is no doubt that "shall" is an imperative, but it is equally clear that it is an imperative that speaks to future conduct. Even the most demanding of us cannot reasonably expect that a person "shall" do something yesterday.

Id., 174 F.3d at 274. Other courts throughout the country are in accord. See, *e.g.*, *Lopez*, 525 U.S. at 291 (Thomas, J., dissenting) (interpreting a provision of the Voting Rights Act containing the phrase "shall enact" to be a "temporal limitation" on the statute); *City of New York v. Berretta U.S.A. Corp.*, 228 F.R.D. 134, 144 (E.D.N.Y. 2005) (Weinstein, J.) ("Given the particular use, in this instance, of 'shall' and 'may,' a reading suggests that the provision in question applies only to actions that have yet to be brought – not to ones that have already been filed."); *Ward v. Dixie Nat'l Life Ins. Co*., 595 F.3d 164, 178 (4th Cir. S.C. 2010) (finding that a statute was meant by Congress to apply only prospectively, in part because it "uses the future tense 'shall'"); *City of Gary v. Shafer*, 2007 U.S. Dist. LEXIS 75504, 18-19 (N.D. Ind. Oct. 4, 2007) ("Sections 95.202 and 95.210 contain several prospective words and phrases, such as 'shall cause' and 'potentially.' . . . Thus, from every indication, the language of the Ordinance as a whole is concerned with preventing future pollution, not redressing past pollution."); *In re Estate of Eisner*, 34 Misc. 2d 662, 664 (N.Y. Sur. Ct. 1962) (interpreting a will: "Significant in the quoted language is the word 'shall'. One of the meanings of the word 'shall' as found in the dictionary defines its use as 'expressing simple futurity.' The court is satisfied that decedent intended by the use of the word 'shall' to adopt its plain meaning; in other words, she was contemplating an occurrence at some time in the future after the date of the will."); *In re Avon Secs.*

Litig., 2004 U.S. Dist. LEXIS 8942, 21-22 (S.D.N.Y. Mar. 26, 2004) ("'[S]hall' is used to express 'simple futurity.'").

Given the statute's language, it was error for Judge Bianco to hold that he was permitted to determine retroactively that an extension under § 3161(e) "was warranted given the impracticalities due to the passage of time." JA550; SPA25.[6]

2. Statutory structure

Even if the language of the provision were somehow ambiguous, it would nonetheless be clear from the structure of the statute that Congress intended "impracticality" findings to be made contemporaneously.

The Speedy Trial Act specifies precise deadlines for the commencement of trial under a wide variety of disparate circumstances. In ordinary cases, the court is instructed to set a case for trial "on a day certain" as soon as possible. 18 U.S.C. § 3161(a). Indictments are to be filed within 30 days of an arrest, unless no grand jury is in session, in which case the deadline is extended an additional 30 days. *Id*., § 3161(b). Trials ordinarily must take place within 70 days from the date the indictment is filed or the defendant is arraigned. *Id*. at § 3161(c)(1). "Exclusions" of time under 18 U.S.C. § 3161(h) are similarly well defined: periods of time are

[6] Shellef made this argument to Judge Bianco, but it was apparently misunderstood. Earlier in the operative clause, the statute states that "the trial *shall commence* within seventy days"; Judge Bianco mistakenly believed that Shellef was arguing that *this* phrase indicated Congress's intention to prohibit retroactive findings of impracticality. JA546 n.11; SPA21 n.11.

excluded from the limitations imposed by the remainder of the statute only upon the occurrence of enumerated, pre-defined actions: a motion is filed (§ 3161(h)(1)(D)), for example, or the defendant is committed for evaluation of mental or physical capacity (§ 3161(h)(1)(A)), or prosecution is deferred pursuant to a written cooperation agreement (§ 3161(h)(2)).

Nearly all of these provisions – those setting deadlines and those providing for extensions or exclusions – operate outside the discretion of the court and are triggered by objective, measurable, recordable events. Some delays are automatic: if a motion is filed, for example, the clock stops automatically and restarts on a date certain when the matter is resolved. Other delays are triggered by findings made by the court in advance: the court may grant a continuance of up to a year, for example, upon a finding by a preponderance of the evidence that critical evidence is in a foreign country. § 3161(h)(8).

Other than the "impracticality" extension permitted by § 3161(e) (and by § 3161(d), a parallel provision governing trials following appellate reversals of trial court decisions to dismiss indictments), there is only one other provision of the Speedy Trial Act that permits the granting of an extension by a district judge as a matter of discretion after making a factual finding: § 3161(h), which permits exclusions of time if necessitated by the "ends of justice." And as we have detailed above, the Supreme Court, this Court, and other tribunals around the

country have been clear for 30 years – not only as a matter of statutory language, but also as a matter of policy – that such findings must be made contemporaneously to avoid the possibility that after-the-fact rationalization will be employed to excuse otherwise avoidable delay. As this Court explained in *Tunnessen*, without such explicit findings, there is a substantial "risk that a district judge in a particular case may simply rationalize his actions long after the fact, in order to cure an unwitting violation of the Act." 763 F.2d at 78.

The requirement of contemporaneous findings extends beyond ends-of-justice exclusions. When, on occasion, this court has identified non-enumerated grounds for permissible discretionary extensions, it has always included the "important caveat" that such extensions may be granted only upon "express" contemporaneous court orders. *United States v. Oberoi*, 547 F.3d 436 (2d Cir. 2008). In *Oberoi*, for example, this court held that a district court is permitted to grant a continuance to allow a party time to prepare a pretrial motion, but it is "critical" that "the lower court must expressly stop the speedy trial clock, either on the record or in a written order" in order for that time period to be excluded from Speedy Trial calculations. *Id.* at 451. Such a "specific finding," like the docket entries generated by "automatic exclusions under the Act . . . facilitate[s] audits for compliance with the Speedy Trial Act (in the trial court and on appeal)." *Id.*

Despite this authority, Judge Bianco held that these concerns – after-the-fact rationalization and the inability for a reviewing tribunal to measure compliance with the Speedy Trial Act – although they might make sense in the context of "ends of justice" exclusions, they are not implicated by extensions granted under § 3161(e). "[U]nlike the 'ends of justice' exclusion which has no particular limit, the Section 3161(e) extension is explicitly capped at 180 days. Therefore, although it gives the district court broad discretion to extend the date of the re-trial to 180 days and allows that determination retrospectively, no contemporaneous finding is necessary because under no circumstances could the court go beyond 180 days." JA548; SPA23.

This Court should not find that logic persuasive. While abuse of the cabined "impracticality" provision may be somewhat less potentially detrimental to an indicted defendant and the public interest than abuse of the open-ended "ends of justice" provision, that does not mean that the same concerns should not animate the Court's reading of both provisions. Congress set 70 days as the presumptive time limit for post-appeal retrials for a reason, and it permitted district courts to extend that period only upon specific, narrow grounds. Just as a district court could "mop up" inadvertent long-term delays through retroactive invocation of the "ends of justice" exclusion, so too could a district judge paper over an inadvertent *medium*-term delay through retroactive invocation of the "impracticality"

provision. Just because the potential for mischief is not unlimited does not mean that it is not real.

The fact is, if district courts were permitted to make retroactive "impracticality" findings, that would mean that there is effectively no 70-day deadline for a retrial following an appellate reversal. Under Judge Bianco's logic, a court can always look back and assert that, in retrospect, a 70-day trial schedule would have been impractical. That, coupled with the multiple automatic extensions that regularly delay trials, would mean that defendants whose convictions were vacated in successful appeals would regularly have to wait over a year to defend themselves against renewed charges, after already having been put through the expense, disruptions, and significant mental turmoil that accompany indictment, trial, and appeal. If anything, a previously convicted defendant, who after appeal is once again presumed innocent, has *more* of an interest in a speedy trial than other defendants because of the lengthy ordeal he has already suffered. The ruling below would result in such defendants' cases being pushed to the back of the line. That outcome is especially ironic here, given Judge Platt's view that substitute counsel could prepare to try the case in two weeks – which is hardly consistent with a conclusion that it would be impractical to commence the retrial within 70 days.

C. The Factors Justifying Delay Were Not Related To "The Passage Of Time."

Even if it were permissible for a trial judge to make a backward-looking determination under § 3161(e), the district court's decision would still be unsustainable. The statute permits extension of the deadline only if the "unavailability of witnesses *or other factors resulting from the passage of time*" make a speedy trial impractical. None of the factors listed by the court have to do with the "passage of time," and none of them made trial within 70 days impractical. To the contrary, the cited factors are garden-variety characteristics of nearly all retrials, and indeed, of most first trials. If the factors cited by the court are permissible grounds to extend the time to 180 days, then there is effectively no 70-day time limit for retrials following appellate reversals.

The court cited five factors that led it to conclude that trial within 70 days would have been impractical:

(1) the belief by the court and defense counsel that the government needed to re-indict the case in order to comply with the Second Circuit's mandate that certain counts be severed for purposes of re-trial;

(2) the possibility that the government would present new evidence at the re-trial;

(3) the parties' agreement that the case was complex;

(4) the parties' discussion with the court of a potential trial date beyond the 70-day period;

(5) the re-assignment of the case on re-trial to a different judge.

JA544-45; SPA19-20. None of these factors has to do with the passage of time, and most are just as likely to be characteristic of a first trial as a second.

To begin, factor one – the court's confusion over whether the government needed to seek new indictments in order to comply with the mandate – had nothing to do with the passage of time. The issue would have arisen in exactly the same manner if the case had been pending on appeal for one *day*; the fact that the case returned to the district court after two years did not alter the nature of the issue. Moreover, as noted above, the 70-day period is not tolled by the need to obtain a new indictment, which vitiates the force of this factor. In any event, the government's need to make a strategic decision hardly rendered a trial within two months of the mandate "impractical." All the government needed to do to be prepared for trial was to redact the original indictment – a ministerial task that could have been accomplished in a couple of hours. And even if the strategic thinking had been more complicated, that still has nothing to do with the "passage of time." See, *e.g.*, *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985) ("The granting of a continuance so that the government may decide whether or not to seek certiorari in the Supreme Court has nothing to do with 'unavailability of witnesses or other factors resulting from passage of time.' Because we find no other indications that such factors were involved, we conclude that the 70-day trial

deadline applied in this case and not the 180-day deadline."). And even if the court had been correct, and a new indictment *was* necessary, obtaining one should not have taken very long. Under ordinary circumstances, the Speedy Trial Act requires the government to obtain an indictment within 30 days of an arrest. Here, the indictment was already written, and the evidence marshaled. It was simply a matter of scheduling time with the grand jury.

Factor two – the possibility that the government would wish to present new evidence at trial – not only has nothing to do with the passage of time but is also completely unrelated to the fact that this was a retrial. *Every* trial, and certainly every *initial* trial, involves preparation of witnesses and evidence. If anything, a retrial is less likely to involve "new" evidence than a first trial, because (as here), the vast bulk of the evidence will be the same as before. The same is true for factor five – the reassignment of the case to a new judge. Had this been a new trial, rather than a retrial, the assigned judge would also have been "new." That hardly means that trial within 70 days was "impractical." If that were the case, it would call into question the wisdom of the entire Speedy Trial Act, which sets 70 days as the default time period in new cases as well.

Factor three – the fact that the case was "complex" – also has nothing to do with the passage of time. As both parties and the court acknowledged, the case had been complex for the first trial, and it was no more so on retrial. In fact, the retrial

was actually considerably less complex than the original trial, because this Court's decision had narrowed the charges, eliminated an improper legal theory applicable to several of the remaining counts, and severed the co-defendant.

In any event, as discussed at length above, the Speedy Trial Act already provides a mechanism for extending time due to a case's complexity: if the trial court believes that a case is so complex that additional preparation time is necessary, it can grant an ends-of-justice exclusion. But to do so, the court must follow several specified guidelines. It must explicitly balance the ends-of-justice factors, make findings on the record, and grant pre-defined, limited periods of delay. But under the district court's reading of § 3161(e), no such actions would be required of a district judge who wished to grant a "complexity" extension of up to 110 days in a retrial. That would be a surprising and redundant interpretation that would allow a district judge to do an end run around the clear dictates of the statute.

That leaves factor four: the discussion among counsel of a possible trial date in January 2009. This, again, was not a factor "resulting from the passage of time" that rendered trial within 70 days impractical. For one thing, just because the parties wish to postpone a trial, that does not mean that the Speedy Trial Act allows the court to grant un-articulated extensions of time. As the Supreme Court explained in *Zedner*, 547 U.S. at 501, a defendant cannot, either unilaterally, or in

agreement with the government, simply "waive" the requirements of the Speedy Trial Act through "mere consent." The Act was "designed" not only to protect "a defendant's right to a speedy trial," but also "with the public interest firmly in mind." *Id*. Even where a defendant "may be content to remain on pretrial release, and indeed may welcome delay," the Supreme Court held that it was "unsurprising that Congress refrained from empowering defendants to make prospective waivers of the Act's application." *Id*. at 501-02. In any event, as the Ninth Circuit commented in *United States v. Pitner*, 307 F.3d 1178 (9th Cir. 2002), it is "considerabl[y] doubt[ful]" that "routine scheduling conflicts" fall within the statutory definition of "factors resulting from the passage of time." *Id*. at 1185 n.6.

In the end, not one of the factors cited by the district court suggested that trial within 70 days was "impractical," and none of them was the result of the "passage of time" since the first trial. This underscores why the district court's after-the-fact determination runs so counter to the language, structure, and purpose of the Speedy Trial Act. If district judges are permitted – even in good faith – to scan the pretrial record after the fact and look for reasons to excuse an otherwise avoidable delay, and especially if judges are permitted to characterize *anything* – even-run-of-the-mill pretrial concerns – as factors requiring an extension, then every retrial will take place 180 days from an appellate mandate, with the limit

stretched even further by the host of enumerated exclusions already explicit in the Act.

Congress took care to define a narrow category of factors that can justify more than doubling the available time to recommence a prosecution. This Court should interpret that restriction faithfully and not allow it to be broadened so wide as to make it meaningless. Instead, the Court should join the other courts that have interpreted this provision to allow extensions only if based on factors that are clearly time-related impediments to retrial. See, *e.g.*, *United States v. Hernandez-Urena*, 35 F.3d 572 (9th Cir. 1994) (allowing an extension to 180 days because there was difficulty locating the retired case agent, new counsel for the government, and temporarily misplaced case files); *O'Sullivan v. United States*, 2011 U.S. Dist. LEXIS 7936 (M.D. Fla. Jan. 21, 2011) (permissible factors include "the need for counsel to familiarize himself with a new case and a new client and to perpetuate the testimony of a witness who would be unavailable for trial").

D. Even The 180-Day Time Limit Was Exceeded.

Finally, even if the district court was correct that the permissible time limit under the Speedy Trial Act was 180 and not 70 days, the government *still* exceeded the limit.

As the district court correctly recounted, the Speedy Trial clock began to run on March 4, 2008, when the mandate issued from this Court. All parties agree that

there were legitimate, explicit exclusions of time entered beginning on November 4, 2008. Thus, as the district court calculated, a total of 246 calendar days had elapsed between the issuance of this Court's mandate and the first agreed-upon exclusion of time. If the 180-day clock applied, therefore, there would need to be 66 days of excludable delay in order for the government to have complied with the statute. JA551; SPA26.

The district court held that there were 73 days of excludable delay during the relevant period, stemming from four periods of automatically excluded time: (1) the five days during which Shellef's bail modification motion was pending; (2) the 52 days during which Shellef's Speedy-Trial dismissal motion was pending; (3) the 15 days during which the government's "motion" requesting new trial dates was pending; and (4) the one day the parties attended the initial status conference. As a result of these purportedly excludable delays, the court held, only 173 days of includable time had elapsed by November 4, 2008. JA554; SPA29.

We agree with the district court that (1) and (4) were automatically excludable periods. But the court erred by excluding time for the government's purported "motion" to set a trial date, and for the pendency of Shellef's Speedy Trial motion. Each of these errors independently requires reversal; if the court was wrong about either of these determinations, then it is indisputable that over 180 days of includable time had elapsed by November 4, 2008.

1. The Government's Scheduling Request Was Not A "Motion."

First, it was error to exclude time for the supposed "pendency" of the government's request for new trial dates on May 29, 2008. The district court was certainly correct that time is permissibly excluded from the Speedy Trial calculation for "delay resulting from any pretrial motion." 18 U.S.C. § 3161(h)(1)(D). But the government's May 19 letter requesting that the court set trial dates was not a "motion" within the meaning of the statute.

The district court held that the government's letter was a "motion" because it "attempt[ed] to address an important and substantive legal issue": the question whether the government needed to re-indict the defendants, or whether it could proceed based on redacted versions of the original indictment. JA552; SPA27. But the fact that the government's letter contained two paragraphs of legal argument explaining its decision not to re-indict does not transform a routine scheduling request – one that was not labeled by the government as a motion, filed electronically as a motion, or opposed in any way by the defense – into a "motion." In this respect, *United States v. Brown*, 285 F.3d 959 (11th Cir. 2002), is directly on point. In *Brown*, the government filed a document labeled "Motion for Determination of Speedy Trial Status and/or Trial Setting." The Court scheduled a conference two weeks later, and the government argued that the two weeks between the filing of its "motion" and the scheduling of the conference should be

excluded from Speedy Trial Act computations. The Eleventh Circuit rejected the argument, pointing out that the purported "motion" did not present any "dispute" for the court to resolve (*id.* at 961), concluding that "a document that does nothing more than remind the court that it must set a case for trial under the terms of the Speedy Trial Act is not a motion within the meaning of 18 U.S.C. § 3161(h)(1)(F)." *Id.* at 962. The government's letter in this case was such a reminder; indeed, *Brown* was a much stronger case for excluding time than this one. The document in *Brown* at least was labeled a motion and asked the Court to make a determination as to the relevant computation under the Speedy Trial Act. Here, the only relief sought in the government's letter was to request the scheduling of a trial date and the issuance of appropriate scheduling orders, something that is done as a matter of routine in virtually every case. To hold otherwise could easily render the Speedy Trial Act meaningless. As the *Brown* court explained,

> [The Speedy Trial Act] specifically provides that continuances may not be granted for general calendar congestion, "or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." If the government could extend the seventy-day period merely by filing a request to set a trial date . . . there would be nothing left of [this] requirement[] and no teeth in the Speedy Trial Act as a whole.

Brown, 285 F.3d at 962.[7]

This error alone merits reversal; without the 15 day exclusion for the pendency of this "motion," the government indisputably exceeded even the 180-day limit.

2. The Court Should Not Have Excluded Time For the Pendency Of Shellef's Motion To Dismiss.

But even if it was proper for the court to exclude time based on the government's scheduling request, that still would not be enough, because it was also error to exclude the 52 days during which Shellef's motion to dismiss was pending. As this Court held in *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 375 (2d Cir. 1979), delay caused by pending speedy trial motions "is not chargeable against [defendants] because . . . to do so would improperly penalize defendants for their invocation of speedy trial rules and run counter to the

[7] The district court's reliance on *United States v. Green*, 508 F.3d 195 (5th Cir. 2007), was misplaced. In *Green*, trial had not proceeded as scheduled, and the government filed a "Motion for a Special Trial Setting," alerting the court to the fact that 62 days had elapsed under the Speedy Trial Act, and asking the court to set a trial date within eight days of ruling on the motion. The court granted the motion and set a timely new trial date; the defendant thereafter pleaded guilty. The Fifth Circuit held that the government's motion, which in essence asked the court to exclude time under the Speedy Trial Act, qualified as a motion for purposes of the statute. *Id.* at 200-01. There were no comparable circumstances here. Unlike the motion at issue in *Green*, the government's May 19, 2008 letter did not seek to exclude time under the Speedy Trial Act, did not even refer to the Speedy Trial Act, and did not ask for any specific trial date. The letter in this case was much closer to the letter filed in *Brown* than to the one filed in *Green*.

purposes of those rules." See also *United States v. Didier*, 542 F.2d 1182, 1188 (2d Cir. 1977) (same); *United States v. Upton*, 921 F. Supp. 100 (E.D.N.Y. 1995) (same).

We recognize that a subsequent opinion from this Court, *United States v. Bolden*, 700 F.2d 102 (2d Cir. 1983), reached the opposite conclusion without acknowledging *Buffalo Amusement Corp.* (see *id.* at 103 ("[T]he delay resulting from a speedy trial motion is no different from that resulting from any other pretrial motion.")). We respectfully submit that *Bolden* was erroneously decided and that *Buffalo Amusement Corp.* remains good law: a decision from this Court remains the law of the Circuit, unless it is "overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Where two panel decisions of this Court conflict, the earlier one controls, because the later panel did not have the authority to overrule controlling precedent. See, *e.g.*, *Sousa v. Roque*, 578 F.3d 164, 173 n.7 (2d Cir. 2009); *Messiah v. Duncan*, 2006 U.S. App. LEXIS 8183, 25-26 (2d Cir. Jan. 19, 2006) (noting an "apparent tension" between two panel decisions and stating that the earlier one "remains the law of the Circuit absent any supervening decision by the Supreme Court or an en banc decision of our Court").

IV. The Indictment Should Be Dismissed With Prejudice.

The Speedy Trial Act requires a court to dismiss an indictment if the dictates of the act are violated, as they were in this case. The Act permits dismissals with or without prejudice, and it mandates three factors that courts should consider in determining which option to choose: (1) "the seriousness of the offense"; (2) "the facts and circumstances of the case which led to the dismissal"; and (3) "the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(1).

All three factors weigh in favor of dismissal with prejudice.

A. The Seriousness Of The Offense

While tax and wire fraud are serious crimes, "there are degrees of seriousness." *United States v. Mancuso*, 302 F. Supp. 2d 23, 26 n. 1 (E.D.N.Y. 2004) (dismissing indictment with prejudice despite seriousness of charge that defendant illegally transported hundreds of thousands of dollars worth of stolen or fraudulent checks). Shellef's offense is not as serious as typical tax frauds, even accepting all of the government's allegations as true. In brief (and as this Court's prior opinion recounts), under the government's theory of the case, Shellef was not the party obligated by Congress to pay the relevant taxes. The government's allegation is that Shellef misled a chemical manufacturer into believing that *it* was not responsible to pay the excise taxes. But it was undisputed at trial that the

manufacturer never took the steps it would have needed to take – even in the absence of Shellef's alleged misrepresentations – in order to free itself of tax liability.

This Court and others have ordered dismissals with prejudice in cases involving offenses that were far more serious than those alleged here. *See*, *e.g.*, *United States v. Moss*, 217 F.3d 426 (6th Cir. 2000) (cocaine trafficking charges that triggered a prison sentence of 262 months); *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994) (conspiracy to distribute methamphetamine); *United States v. Stayton*, 791 F.2d 17 (2d Cir. 1986) (trafficking in 200 kilograms of a controlled substance).

B. The Facts And Circumstances That Led To Dismissal

The "facts and circumstances of the case" weigh heavily in favor of a dismissal with prejudice. This inquiry focuses on the length of the pre-trial delay, the nature and cause of the Speedy Trial Act violation, and the level of culpability involved. See *United States v. Taylor*, 487 U.S. 326, 338-43 (1988); *United States v. Giambrone*, 920 F.2d 176, 180-82 (2d Cir. 1990).

Here, the period at issue totals more than six months, almost triple the 70-day time-limit established under the Speedy Trial Act. Courts have dismissed with prejudice in circumstances where the delay was similar or less egregious than it was here. See, *e.g.*, *Giambrone*, 920 F.2d at 182 (affirming dismissal with

prejudice where Act's 70-day period was exceeded by only 20 days and defendant had been left "in the disadvantageous position of an indicted but untried defendant for more than a year"); *United States v. Blackwell*, 12 F.3d 44, 45-48 (5th Cir. 1994) (ordering dismissal with prejudice where invalid "waiver" caused 70-day time limit to be exceeded and defendant was not tried until eight months after his initial appearance).

Here, the violation was an egregious one that involved a total disregard of the dictates of the Speedy Trial Act. This was not simply a case where the court failed to articulate its contemporaneous balancing on the record, or failed to use the operative words "ends of justice." There was a complete failure to enter any exclusions of time throughout the entire period. Moreover, the reason for the delay was not case complexity, as Judge Platt tried to suggest retroactively. Rather, the initial delay was for the purpose of awaiting the government's completion of a simple ministerial task: creating three separate indictments redacted from the original. The second period of delay – from July 2008 (when the redacted indictments were submitted) until November 2008 (when the government finally requested and the court held a scheduling conference) was for no purpose whatsoever. The government and the court simply allowed the case to languish for months. Such serious disregard for the Speedy Trial Act demands the most serious sanction – a dismissal with prejudice.

Dismissal with prejudice is also warranted because the government and Judge Platt – not Shellef – caused the Act to be violated. The government led the Court to believe at the initial status conference that it would file new accusatory instruments expeditiously; but it failed to do so, despite the court's direction to do so with "alacrity" in light of Speedy Trial concerns. In the meantime, it acquiesced to a situation where no exclusion of Speedy Trial time had been entered. See *Zedner*, 547 U.S. at 505 (government shared blame for the Speedy Trial Act violation because it "accepted the District Court's interpretation without objection"). Despite the defense putting everyone on notice of Speedy Trial issues in its June 3 motion, the government continued to drag its feet on filing redacted versions of the indictment, and also failed to seek any prospective exclusion. Judge Platt, in turn, adjourned the initial status conference without balancing Speedy Trial factors and entering an appropriate exclusion, an error he compounded in his decision on July 24, 2008, in which he wrongly concluded that the defendants were subject to no pending charges and failed to make any prospective exclusion of time.

Shellef, by contrast, bears no responsibility for the delay. Although a defendant has "no obligation to take affirmative steps to insure that [he is] tried in a timely manner," *Tunnessen*, 763 F.2d at 79, it is notable that at the April 10 status conference, Shellef's counsel made clear that he was not consenting to any

"open-ended extensions of speedy trial time" (JA148), and Shellef's position on the Speedy Trial issue was made abundantly clear in his motion dated June 3, 2008. Nevertheless, Judge Platt treated the ambiguous and vague discussions on April 10, 2008, as evidence of an agreement to exclude time indefinitely.

Likewise, the government, apparently in no rush to try Shellef, took no action to move this case along. See *Giambrone*, 920 F.2d at 181-82 (affirming dismissal with prejudice where "Government made no effort to have [two-month period of] time excluded on any basis permissible under the Act" and failed to "convey to the court the fact that there was need for an expedited trial"); *United States v. Rivas*, 782 F. Supp. 686, 687 (D. Me. 1992) (dismissing case with prejudice where, inter alia, prosecutor "failed to ask the Court to bring the case forward to trial on an expeditious basis in conformity with the requirements of the Act."), *aff'd sub nom. United States v. Ramirez*, 973 F.2d 36 (1st Cir. 1992).

A dismissal with prejudice is especially appropriate where the failure to comply with the Speedy Trial Act indicates "more than an isolated, unwitting violation, be it a truly neglectful attitude, bad faith, a pattern of neglect, or other serious misconduct." *United States v. Wells*, 893 F.2d 535, 539 (2d Cir. 1990) (internal marks and ellipses omitted). The failure to comply with the Act in this case cannot fairly be described as an "isolated, unwitting violation." Despite being warned of Speedy Trial concerns at the April 10 status conference, the government

procrastinated in filing redacted versions of the indictment, and the court essentially set aside the Speedy Trial Act in anticipation of such indictments. After Shellef's Speedy Trial dismissal motion brought these issues to the forefront again, the government and the court continued to let the case drift, and then evaded the issue by relying on an alleged "ends-of-justice" exclusion that was never entered, much less in accordance with the strictures laid out in clear Supreme Court and Second Circuit precedents.

The government and the district court displayed a "truly neglectful attitude" toward the Act, bordering on deliberate indifference. And "[a]lthough negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett v. United States*, 505 U.S. 647, 657 (1992).

Finally, the government's entire lack of diligence indicates a relatively low priority attached to this prosecution, which indicates that the cost of a dismissal with prejudice to the administration of justice is modest.

C. The Impact Of Reprosecution

The third statutory factor concerns "the impact of a reprosecution on the administration of [the Act] and on the administration of justice." This factor also strongly supports a dismissal with prejudice. Allowing reprosecution would

undermine the administration of the Act. "The purpose of the Speedy Trial Act is not only to protect a defendant's constitutional right to a speedy trial, but also to serve the public interest in bringing prompt criminal proceedings." *Moss*, 217 F.3d at 432 (citing *United States v. Saltzman*, 984 F.2d 1087, 1090 (10th Cir. 1993)). While not all violations of the Act require dismissal with prejudice, the violations here were egregious and easily avoided. Under these circumstances, permitting further prosecution would undermine the Act. It "'would send exactly the wrong signal to those responsible for complying with the Act[']s requirements and would, in all likelihood, foster in [the] future a cavalier regard, if not a concerted disregard of those requirements.'" *Ramirez*, 973 F.2d at 39 (quoting district court opinion).

A dismissal with prejudice is also in the interests of justice. As Judge Platt noted in his July 24 Memorandum, considerable time and energy has already been devoted to this prosecution, during which time Shellef has spent more than eight years under bail restrictions and seven months in custody. By any account, he has already paid a significant debt to society.

CONCLUSION

The judgment of conviction should be vacated, and the indictment should be dismissed with prejudice.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,820 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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