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)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

The government devotes much of its brief to irrelevant and undisputed contentions regarding events that occurred months after the statutory violations to which this appeal relates. We freely acknowledge that after this case languished unprosecuted for the better part of a year, and after two motions to dismiss had been erroneously denied, the district court suddenly decided to try the case immediately, unconcerned that there had been no pre-trial motion practice and that the defendant had developed an irreconcilable conflict with his attorney. The delay caused by those events – during which, among other things, this Court twice intervened in the proceedings below, ultimately ordering reassignment to a new judge to "maintain the appearance of justice" – was agreed to by both sides and did not violate the Speedy Trial Act. The government suggests that Shellef's consent to these later delays somehow made the earlier delays less serious. It did not. By the time these delays became necessary, the Act had already been repeatedly violated.

Its digressions aside, the government's responses to the issues actually raised in this appeal are remarkably thin. We argued that Judge Platt erred by holding that the case's "complexity" justified a retroactive, open-ended extension of the applicable 70-day time limit. The government's only response is to point out, as we already acknowledged, that defense counsel agreed at the initial status

conference that the case was "complex." But "complexity" does not automatically justify a continuance. And here there was no discussion – let alone agreement – that the case's complexity necessitated a continuance. If the district court thought a continuance necessary, the statute required it to say so on the record, clearly articulating its reasons, and to grant an extension to a particular date. None of that happened.

With respect to Judge Bianco's alternative holding that the 70 day limit could be extended to 180 days based on a retroactive finding of "impracticality," the government's response again falls short. We argued that retroactive findings of "impracticality" are impermissible for the same reason as retroactive "ends of justice" findings: so that district judges do not excuse otherwise improper delays by hindsight rationalizations. The government responds, as the district court did, that these concerns are insubstantial because, unlike the "ends of justice" provision, the "impracticality" provision does not permit "open-ended" delay. That is immaterial: without proper limitations, the "impracticality" provision could be invoked to cure a vast array of neglect in administration of the Speedy Trial Act. In any event, none of the factors Judge Bianco cited to support his "impracticality" finding relate to the "passage of time," as the statute requires. The government barely addresses this, and it never explains how the cited factors would fail to justify a 180-day limit in *every* case returning from appeal.

In the end, the government barely disputes that there were long periods of unexplained and inexcusable delay. It disclaims "bad faith" on its part, but it never comes to grips with the fact that the delay undeniably resulted from a severe pattern of neglect and inactivity. The only appropriate remedy, which would provide a real incentive for courts and prosecutors to comply with the Act's requirements, is dismissal with prejudice.

ARGUMENT

I. The Speedy Trial Act Was Violated.

A. Judge Platt Violated The 70-Day Time Limit.

The government barely disputes that the 70-day time limit, if applicable, was exceeded. (Indeed, by *its* calculation, *76* days of non-excludable time passed before the case was tried.) In fact, there were at least two separate periods of delay, each exceeding 70 days: (1) the 91 days from the remand to Shellef's initial motion to dismiss, and (2) an additional 97 days *after* that motion was resolved, when nothing whatever was done to move the case to trial.[1] The government has failed to justify either delay.

[1] There is also the 52-day period when the motion to dismiss was pending. The government claims that Shellef "concedes" that this time was excludable. He does not. *See* DB48-50; *infra*, 23-24.

1. No Exclusions Cover The First Period Of Delay.

Judge Platt sought to excuse the first period by stating in July 2008 that at the April status conference he had ordered a continuance of indefinite duration based on the "complexity" of the case. We showed in our opening brief (DB22-25) that this is not what actually happened. Rather, Judge Platt warned that a contemplated January 2009 trial date would violate the Speedy Trial Act and cautioned that the parties should "agree on excludable time" and "be prepared to present [reasons] on the record here in court from time to time." JA147. The government never made such an application, and the judge never ordered a continuance.

The government does not contend that it actually moved for a continuance, nor does it claim that Judge Platt entered such an order. Instead, it argues that the judge "meant" to do so (GB26),[2] and that such intention was justified because defense counsel "conceded" at the hearing that the case was "complex." But "complexity" does not automatically justify an ends-of-justice continuance, and the record is clear that none was granted at the time.

[2] Citations to "GB" refer to the government's brief. "DB" refers to the defendant's opening brief.

a. The Defense Did Not "Concede" That A Continuance Was Justified.

The government devotes several pages to showing that defense counsel "conceded" that the case was "complex." We freely acknowledge that counsel thought the case was complex, and said so. But agreeing that the case is complicated is not the same as agreeing that a *continuance* is necessary on that basis.

The Speedy Trial Act allows the district court to grant a continuance on the basis of a finding that "the ends of justice" served by an extension "outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. §3161(h)(7)(A). One relevant consideration under the statute is "whether the case is . . . *so* complex . . . that it is *unreasonable to expect adequate preparation* . . . within the time limits." 18 U.S.C. §3161(h)(7)(B)(ii) (emphases added). Here, the complexity of the case did not mean that retrial within 70 days was "unreasonable." After all, the case had been tried once before, by the same two lawyers who appeared at the April conference, and this Court's misjoinder ruling had narrowed the scope of the case considerably.

Given these facts, Judge Platt appeared to believe, throughout the period he presided over this case, that no extraordinary preparation time was necessary. He said as much at the initial conference. 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."). And he repeated that sentiment, with gusto, the following November. See JA362 ("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."). The government contends that these statements do not accurately "represent [the judge's] views," because he also stated several times that he believed the case was complex. GB25. But that is precisely the point: it is possible to believe – particularly in the context of a retrial – that a case is complicated *without* believing that extraordinary preparation time is required.[3]

That is the only fair reading of defense counsel's so-called "concession." The judge asked whether counsel disagreed with classification of the case as complex. Counsel responded that he did not want to "mislead" anyone into thinking that Shellef consented to an "open-ended" extension of speedy trial time. The judge said that he would not order such an open-ended extension, but that he

[3] The government suggests, with respect to the statement about the evidence being "essentially" the same as in the first trial, that "context shows that Judge Platt was just referring to his assumption that the evidence would be the same as in the prior trial—an assumption the Government quickly corrected. [JA146] ("There also may be some new evidence . . . ."). " GB24-25. The government's citation to the record is misleading. The full quotation from the prosecutor, without the government's ellipsis, is: "There also may be some new evidence, which we could present *in a different trial*." JA146. The prosecutor was not referring to new evidence to be presented during the trial being discussed at the April conference but to one of the other two trials then under consideration.

was inclined to agree with the government, "at least *ab initio*," that the case was complex. Defense counsel responded by saying that "the *only* thing we'll agree on, your Honor, . . . is that. It is a complex case." JA149 (emphasis added). In other words, counsel agreed that the case was complex but expressly reserved judgment on whether that complexity warranted a continuance.

b. Judge Platt Did Not Order A Continuance At The Hearing.

In any event, there's no need to engage in a guessing game about what was in the parties' heads at the initial hearing. Whatever ambiguities exist in the transcript and Minute Order (very few, we believe), the judge unquestionably took no action at the time. The government carefully avoids saying that the judge actually ordered a continuance at the April hearing, because he expressly did not. Instead, the judge anticipated a *future* continuance motion based on the case's complexity, at which time the parties could argue about whether complexity justified an extension, and if so, for how long. The judge told counsel "to plan it out," and return with an application for a continuance to a specific date, along with "valid" reasons why such a continuance was necessary. Quoting the prosecutor, the judge said to defense counsel that "[h]e says he's *going to ask me* to classify it as a complex case. There is little doubt in my mind . . . that he's got good arguments in his favor, *at least ab initio*." JA149 (emphases added). The judge then told the prosecutor to "keep it moving," so that he would not "run into" a

speedy-trial "problem." The prosecutor agreed, telling the court that he would "agree with [defense] counsel to a date certain, . . . and just hold to that date." *Id.*

When the parties left court that day, the plan was clear: the government would move "with alacrity" to research the legal question whether new indictments were needed, and then the parties would return to court to set a trial date and make any necessary Speedy Trial Act motion. But instead of following that plan, the government dragged its feet for months, never asking for a continuance. After over 90 days had passed since the remand, the defendant moved to dismiss the case.

c. Judge Platt's Retroactive Continuance Was Improper.

We showed (DB25-27) that although Judge Platt stated in July 2008 that he had granted a continuance at the April conference, what really happened was that the judge made retroactive "ends of justice" findings, which are expressly prohibited under the Speedy Trial Act. The government urges this court eschew a critical examination of the record, however, and to "defer" to the judge's "characterization of his own actions." GB26. Quoting *United States v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985), it notes that the on-the-record "findings" required to justify an ends-of-justice exclusion "need not be placed on the record at the same time that the continuance is granted." GB27.

Tunnessen is indeed instructive, but it does not help the government. *Tunnessen* ruled that "time may *not* be excluded based on the ends-of-justice unless the district court indicates *at the time it grants the continuance* that it is doing so upon a balancing of the factors specified by [the Speedy Trial Act]." 763 F.2d at 78. It is true that "the precise reasons for the decision need not be entered on the record at the time the continuance is granted," so long as the judge makes "[a] prospective statement that time will be excluded based on the ends of justice." *Id.* Such a statement, this Court held, is the only way "to assure the reviewing court that the required balancing was done at the outset." *Id.* Here, the judge made no such prospective statement. To the contrary: he told the parties that he would not even entertain motions to exclude time until after the government determined whether it was necessary to reindict.

Tunnessen is worth some discussion, because of its similarity to this case. In *Tunnessen*, this Court reversed a district court's refusal to dismiss on Speedy Trial grounds because of exactly the same error Judge Platt made here: allowing the applicable Speedy Trial deadline to pass, then justifying the delay by stating, in response to a dismissal motion, that an earlier continuance had been based on the court's belief that the case was too complex to try within the prescribed period. The government made the same argument as it advances here, "contend[ing] that as long as the district court eventually makes the required findings, the timing of

the court's announcement that a particular continuance was based on the ends of justice is largely immaterial." 763 F.2d at 77-78. This Court disagreed, noting that "[i]f 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." *Id*. at 78 (quoting *United States* v. *Janik*, 723 F.2d 537, 544-45 (7th Cir. 1983)). The Court so held even though, unlike here, the district judge in *Tunnessen* had actually granted a continuance to a particular date, although failing to explain contemporaneously that he was doing so based on an ends-of-justice balancing.

This Court had two concerns: First, while there was no indication that the district judge had acted in bad faith, the procedure he employed posed "the 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." *Tunnesen*, 763 F.2d at 78. Second, the procedure increased the risk of unnecessary delay and made appellate review difficult. As the Court explained,

> had the district judge . . . stated at the time he initially set the trial date . . . that he was granting an ends-of-justice continuance, the parties would have been on notice and the whole Speedy Trial problem might have been avoided. . . . [D]uring the more than three-month gap between the initial setting of the trial date and the recording of findings neither side had reason to know that an ends-of-justice continuance had been granted. . . .

> Defense counsel's consequent inability to respond until after the fact to the district court's assertion that they needed more time renders problematic the task of evaluating the court's ends-of-justice findings.

Id. The same is true here.

2. No Exclusions Justify The Second Period Of Delay.

Even if Judge Platt's July order could somehow excuse the delay that had occurred up until that point, an *additional* 97 days passed *after* the judge's order was issued, and before the government or the court took any further action in the case. That delay alone was enough to mandate a dismissal.

The government does not respond directly to this argument, but its apparent answer is that the entire period in question was excludable because of the pendency of its so-called "letter motion" regarding the need to reindict. According to the government, its May 13, 2008 letter was a "motion" within the meaning of the Speedy Trial Act, and the defendant's failure to respond somehow left the motion "pending" for nearly six months.[4]

[4] The government contends (GB37-38 n.9) that we should not be permitted to respond to their argument that the "letter motion" was pending for 112 days because our opening brief addressed Judge Bianco's determination that the motion was pending for 15 days. But an appellant has no obligation to address preemptively a legal argument that was not adopted by the district court in its adverse ruling. The government advances this argument on appeal in response to an argument made in our opening brief; a reply is warranted. See *United States v. Brennan*, 650 F.3d 65, 137 n.77 (2d Cir. 2011) ("It is true that although we normally will not consider *issues* raised only in reply briefs, we will consider

Our opening brief argued (DB46-48) that the government's letter was not a "motion" because, among other things, it sought no relief and was not contested by the defense. The government responds that the letter "changed the posture of the case" by "mov[ing] the district court out of repose." GB38. In the government's view, this letter "should have prompted Shellef to respond," *id*., and should therefore count as a long-pending disputed motion for speedy-trial purposes. The government is wrong.

For one thing, merely "moving the district court out of repose" is not enough to turn an informal administrative request, or a bench brief, into a contested motion. As the government acknowledges, for example, *United States v. Brown*, 285 F.3d 959 (11th Cir. 2002), held that a so-called "motion" that merely "remind[s] the court that it must set a case for trial under the terms of the Speedy Trial Act" is not a "motion" under the statute, even if (in contrast to the government's letter in this case) it is labeled as such. The government tries to distinguish *Brown* by contrasting the brevity of the *Brown* "motion" with its letter in this case. The *Brown* "motion" was only 143 words long, the government states, and did not cite any legal authorities. In contrast, the letter here contained two paragraphs of legal argument and cited "nearly a dozen legal authorities." GB40.

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arguments raised in response to arguments made in [an] appellee's brief.") (emphasis original; citations omitted).

But short as it was, even the *Brown* "motion" "moved the district court out of repose." That is not enough to make it a contested motion. (And, the *Brown* document actually requested relief, which makes it much closer to a "motion," despite its brevity, than the document filed in this case.)

Indeed, Shellef's (and the court's) lack of response to the government's letter is further proof that no one – not the court, not the defendant, and certainly not the government – believed at the time that the letter was a motion seeking some sort of relief. The defendant did not respond because he did not *contest* anything in the government's letter. Judge Platt was the one who had suggested at the initial conference that the government needed to re-indict the defendants. When asked, defense counsel said that he "th[ought]" the judge was right (JA143), and that he was not prepared to waive any arraignment rights the defendant might have.[5] But

[5] Once again, the government's characterization of the record is somewhat aggressive. Throughout its brief, the government suggests that it was the defendant who "insisted" at the initial hearing that the government needed to re-present the case to a grand jury. See GB6; GB37 ("Shellef's attorneys . . . demanded new grand jury proceedings."); GB45. But it was Judge Platt who announced this belief and urged the government to take that course. The prosecutor spent several minutes discussing the subject with the judge (recorded on six consecutive transcript pages), with no involvement whatever from defense counsel. JA136-42. To be sure, the court eventually asked defense counsel if Shellef was willing to waive any requirement of reindictment, and counsel declined. But to suggest that defense counsel "erroneously insisted" that the government needed new indictments, and that "Judge Platt appears to have agreed," GB6, is misleading.

the defendant was not the one who raised the issue, and faced with the government's research memorandum, he did not take a contrary position.

In any event, the suggestion that this "motion" was pending for six months (from May to November), because either the court or the government was waiting for a response from the defendant simply defies belief. Under the Eastern District's local rules, any papers opposing a motion in a criminal case must be served on the moving party within 14 days of the motion's original service date. Reply papers are due seven days after that. E.D.N.Y. Local Crim. R. 12.1(b), (c). If the government thought that Shellef was going to oppose its "motion," it should have realized after two weeks that no opposition was forthcoming.

This is especially true given Judge Platt's individual rules governing the handling of motion papers. Under those rules, the parties are to confer and set up a mutually convenient briefing schedule on any contested motion, or use the default briefing schedules in the federal rules if they cannot agree. Once the parties exchange their briefs, the moving party is required to contact the judge's clerk to schedule oral argument. It is the responsibility of the moving party, at *that* point, to file all the motion papers electronically exactly ten days before the scheduled oral argument date, and to forward courtesy copies to the court. "Motion papers not in compliance with these procedures will be deleted from the docket sheet." Individual Practices of Judge Thomas C. Platt, §2(c) (available at http://www.nyed.

uscourts.gov/pub/rules/TCP-MLR.pdf). The government, of course, followed none of these procedures when it filed its so-called "letter motion." That indicates that the government did not believe its letter was a "motion" at the time it was written. At the very least, it suggests that if the document *was* somehow a "motion," it was not "pending" for decision before Judge Platt unless and until the government gathered and submitted the briefing and requested a hearing date.

The best evidence that even the government did not believe its letter to be a "motion" that was "pending" for six months is the government's own subsequent letter to the Court. After the case had sat dormant for over 90 days, the government wrote Judge Platt on October 29 asking him to set a trial date. In that letter, sent at a time when the government now contends it had a pending motion creating excludable time, the government wrote that "[u]ndersigned 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.

B. Judge Bianco Erred In Expanding The Time Limit To 180 Days.

The government contends that even if the 70-day time limit was exceeded in this case, it does not matter because Judge Bianco properly expanded the limit to 180 days. But the government does not adequately address the retroactivity

problem, and it fails to show that the judge's proffered reasons for doing so were not related to the "passage of time," as required by the statute.

1. Section 3161(e) Cannot Be Invoked Retroactively.

We contended in our opening brief that Judge Bianco's retroactive invocation of 18 U.S.C. §3161(e) violated both the plain meaning of that provision and the structure of the Speedy Trial Act as a whole. The government's responses are thin.

a. Plain Meaning

First, we argued that the wording of the statute is undeniably prospective, permitting the judge to extend the period for retrial from 70 to 180 days 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). As we showed, "shall" is a forward-looking term, used regularly by Congress and other legal drafters to express "futurity." DB31-34. The government responds in two sentences, arguing that our interpretation of the provision "ignores the fact that Congress wrote most of the Speedy Trial Act in a forward-looking manner because the Act specified that its effective date would be in the future." GB32. It is true that the Speedy Trial Act was enacted before its effective date, but that does not explain why this particular provision was drafted the way it was. The "shall" is

part of a conditional clause in the middle of a sentence otherwise written in the present tense. The full clause provides:

> 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). The word "shall" in this sentence is not used to indicate that Act had not taken effect at the time the law was enacted. The full provision is written in the present tense: the court "*may extend*" the period for retrial, "if" certain factors "shall make" a 70-day limit impractical. The embedded "shall" has the meaning we ascribed to it in our opening brief: a judge "may extend" the time only if he finds that certain factors "shall" make a speedy trial impractical. Such a construction is not made necessary by the statute's future effective date. Had Congress intended to allow retroactive determinations but also wanted to make clear that it would not take effect until later, it would have been more logical to state that the district court "shall have the power to extend the time limit" upon a determination that 70 days "would be impractical" or "had been rendered impractical," or some such similar construction.

b. Statutory Structure

Second, we argued that permitting a retroactive finding of "impracticality" would be inconsistent with the structure and purpose of the Speedy Trial Act,

which generally requires contemporaneous, prospective, on-the-record findings to justify *any* discretionary extension. See DB34-38. The reasons for these requirements are those described above: without them, (1) a district judge could rationalize an otherwise impermissible delay by claiming, after the fact, that he had a permissible purpose in mind; and (2) appellate review for abuse of discretion is rendered more difficult. See *Tunnessen*, 763 F.2d at 78; *United States v. Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008).

The government embraces Judge Bianco's reasoning: contemporaneous findings are required for ends-of-justice continuances because that provision is "open-ended." GB28. Section 3161(e), on the other hand, is not a "cure-all"; the permissible extension is capped at 180 days. Thus, the "impracticality" provision allegedly "does not raise the concerns that motivated Congress and the courts to restrict the timing of ends-of-justice continuances." GB29.

We anticipated this argument (see DB37-38), but the government ignores what we said. In short: we fully acknowledge that a district court cannot "cure" an unlimited delay by retroactively invoking §3161(e); it can only cure a delay lasting up to 110 days beyond the 70-day limit. But the ban on retroactive ends-of-justice continuances applies to continuances of any length, and we suspect that most such continuances are for considerably less than 110 days, so it is debatable which provision carries the greater risk of abuse. Moreover, all the reasons why

contemporaneous findings are required for an ends-of-justice exclusion apply equally to the "impracticality" provision: after-the-fact rationalizations and increased difficulty of effective appellate review. As in *Tunnessen*, an aggrieved defendant would have lost the opportunity to disagree effectively with the district court's assessment or to limit the length of any extension. See *Tunnessen*, 763 F.2d at 78 ("If defense counsel had been prepared to go to trial in late July, as they now claim, they could have informed the judge that he was mistaken in concluding that they needed more time. . . . Defense counsel's . . . inability to respond until after the fact to the district court's assertion that they needed more time renders problematic the task of evaluating the court's ends-of-justice findings.")

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

We argued (DB39-44) that, retroactivity aside, the "impracticality" provision was inapplicable. The statute applies only if the "unavailability of witnesses or other factors *resulting from the passage of time*" make a speedy trial impractical. But none of the five factors listed by the district court have to do with the passage of time, and none made a trial within 70 days impractical. The district court claimed that an extension to 180 days was made necessary by (1) the court's belief that the government needed to reindict the case; (2) the possibility that the government would present new evidence; (3) the parties' agreement that the case was complex; (4) the parties' discussion of a potential trial date beyond the 70-day

period; and (5) the re-assignment of the case to a different judge. But most of these are standard characteristics of nearly all retrials; if they are proper grounds for extending the limit, there is effectively no reason why any retrial needs to take place within 70 days of an appellate mandate.

The government's response to this argument is brief. It begins with a half-hearted suggestion that the provision, despite its language, permits extensions for factors other than those related to the passage of time. In support of this argument, the government cites one sentence from a 1974 Senate committee report that characterizes a related provision of the Speedy Trial Act, Section 3161(d), as allowing extensions "if passage of time or other factors" make the shorter limits impractical. GB34 (quoting S. REP. NO. 96-212, at 32 (1979)). We acknowledge that the cited committee report uses this phrasing. But the statute itself does not. The government does not argue that the statutory language is ambiguous; the Court should not assume that loose language in a summary authored by committee staff better reflects Congress's will than the statute itself. See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011) ("Those who voted on the relevant statutory language were not necessarily the same persons who crafted the statements in the later Committee Report; or if they were did not necessarily have the same views at that earlier time; and no one voting at that earlier time could possibly have been informed by those later statements.").

Beyond this, the government barely responds to our argument. It cites an unpublished Fourth Circuit opinion, *United States v. Aboh*, 145 F.3d 1326 (4th Cir. 1998), for the proposition that "complexity" (Judge Bianco's third cited factor) is a valid ground for extending time under §3161(e). But the one-page *Aboh* opinion does not say that. *Aboh* invoked §3161(e), in part, because "due to the complexity of the case," the defendant's newly-appointed counsel needed time to review the transcripts of the prior trial. (The court also noted that the government needed time to locate its nine witnesses, several of whom were, because of the passage of time, no longer in government custody.) It was not the complexity of the case itself that rendered a speedy trial impractical; it was the fact that new counsel had been appointed and needed adequate time to prepare. In any event, *Aboh* also granted an ends-of-justice continuance based on "complexity," which would have been unnecessary if complexity were also a valid independent ground for extension under §3161(e).

The government also cites *United States v. Holley*, 986 F.2d 100 (5th Cir. 1993), for the proposition that "calendar congestion" is a valid ground for extending time under §3161(e). That may or may not be true, depending on whether the congestion at issue relates to the passage of time, but it is certainly immaterial here. There is no suggestion that the district court's docket was too

busy to accommodate a trial within 70 days of the mandate, and neither judge below cited congestion as a ground for extending the deadline.

The government defends only one of Judge Bianco's five factors as actually relating to the "passage of time." It claims that the "potential for new evidence" *was* time-related, because the government "expected one of the co-conspirators to plead guilty and testify against the other." GB35. That expectation may have been a consequence of the outcome of the first appeal, but it is not related to the "passage of time." Plea negotiations are commonplace, especially in cases involving multiple defendants. The government's bargaining position with Shellef's co-defendant may have become stronger due to this Court's prior opinion, but not because the opinion took a long time to issue. That is the essential problem with Judge Bianco's reasoning – not just with respect to the "new evidence" factor but with respect all the cited factors. As we explained (DB43-44), §3161(e) permits extensions only for factors related to the passage of time – things like difficulty locating witnesses or case files having been mislaid. The statute does not broadly permit extensions for reasons related simply to the fact that there has been an appeal in the case. The 180-day limit is only available in post-appeal cases; if it could be invoked simply by showing that the case bears the characteristics of one that has been returned from an appellate court, then *every* retrial would have a 180-day limit. Congress set the presumptive 70-day limit for a

reason. The opinion below, if adopted by this Court, would effectively eliminate that limit. Reversal, on the other hand, would not hinder a district court's ability to allow extra time for things like case complexity, reassignment of judges, confusion about legal issues, or the like. All those considerations could be grounds for ends-of-justice continuances, so long as the judge followed the proper procedures.

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

Finally, we showed in our opening brief that even if the 180-day limit were applied in this case, it was still exceeded, for two independent reasons: (1) the district court erred in excluding time for the pendency of the government's so-called "letter motion" regarding the need to re-indict the defendants; and (2) the court erred by excluding time for the pendency of Shellef's speedy trial motion.

We have already explained why the government's defense of the first exclusion was inadequate, including its assertion that its purported motion was "pending" for nearly six months. See *supra*, 11-15. As for the pendency of the Speedy Trial motion itself, the government does not address our argument that the *Bolden* case, on which it primarily relies, is in tension with two earlier opinions from this Court: *United States v. New Buffalo Amusement Corp*., 600 F.2d 368 (2d Cir. 1979), and *United States v. Didier*, 542 F.2d 1182 (2d Cir. 1977). Both cases held that 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 purposes of those rules." *New Buffalo Amusement Corp.*, 600 F.2d at 375 (quoting *Didier*, 542 F.2d at 1188). *Bolden* apparently overlooked these decisions, neither distinguishing nor purporting to overrule them. And the law in this circuit is clear that where two panel decisions conflict, the earlier one controls because the later panel did not have the authority to overrule controlling precedent. See cases cited at DB49.

It was error for the district court to exclude time for the "pendency" of the government's "letter motion," and for the pendency of Shellef's speedy trial motion. Either error alone suffices to require reversal.

II. The Case Should Be Dismissed With Prejudice.

We explained in our opening brief why all three factors relevant to determining whether a Speedy Trial Act dismissal should be with or without prejudice weigh in favor of a dismissal with prejudice. The government disagrees, seeking remand of the issue to the district court. But yet another remand, and the further delay that would result, is unnecessary and would simply compound the existing prejudice. The factors weigh strongly in favor of dismissal with prejudice. There is no reason this Court cannot so hold.[6]

[6] The government is, of course, correct that this Court may and often does remand cases in this posture. We agree with the government that remand is appropriate if the Court finds the current record inadequate to enable it to decide the issue.

A. The Seriousness Of The Offense

The government claims (GB41) that Shellef "quickly concedes" that this factor weighs against him. Not so. What we said was that tax and wire fraud, like all federal felonies, are serious offenses, but that does *not* mean that the charged conduct was *so* serious that the interests of justice demand a third trial. This was a criminal case that grew out of a contract dispute between two private entities over who was responsible for paying certain federal excise taxes. It is undisputed that it was Shellef's supplier, Allied Signal, that actually owed the taxes in question. Nor is it disputed that Allied never requested from Shellef the documentation it needed in order to avoid the tax. And Shellef never provided false or fraudulent documents to support an unwarranted tax exemption. Despite arguing that the interests of justice demand that Shellef pay restitution, the government has never sought to collect the taxes in question from Allied, which alone owed them. And while this Court upheld the theory underlying Shellef's mail and wire fraud convictions, the deprivation involved was temporary and did not threaten any real loss to Allied. See JA122-23. Thus, those offenses were modest as mail frauds go.

As the government acknowledges (GB42), this Court and others have ordered dismissals with prejudice in cases involving offenses that were assuredly far more serious than those alleged here. See cases cited at DB51.

B. The Facts And Circumstances That Led To Dismissal

We showed in our opening brief that this case presents the paradigmatic "circumstances" favoring dismissal with prejudice. The pretrial delay was long, and it was entirely the fault of the government and the court.

The government responds by attempting to change the subject. It invites this Court, when considering the length of the delay, to "also consider the ways in which Shellef delayed his own trial." GB44. That is inappropriate. For one thing, the "delays" to which the government refers were hardly Shellef's "fault." After the case had languished for many months and the speedy trial violations were apparent to all, Judge Platt suddenly insisted that the case be tried *immediately*. Unconcerned that Shellef's lawyer had a disabling schedule conflict, and, eventually, that Shellef had developed a serious personal conflict with his attorney, Judge Platt refused to allow Shellef time to find a new lawyer – or even to allow the lawyer who was eventually hired to substitute as counsel. These circumstances were serious enough that this Court intervened and ordered the case reassigned to a different judge. Two well-respected members of the bar of this Court, including Stuart Abrams, Shellef's original counsel and a former chief appellate counsel for the S.D.N.Y. U.S. Attorney's office, stated on the record that the change in counsel was made in good faith and not for purpose of delay. SA4, 28, 40-42. The government does not question those statements.

In any event, all of these events took place after the Speedy Trial violations had already occurred. Those violations are not rendered less serious because subsequent changed circumstances justified certain periods of necessary, agreed-upon delay.

The government devotes considerable effort to blaming Shellef for the later delays, but it does not address its own responsibility for the original ones. The government is right that we do not allege "bad faith or tactical intent" by the government to purposely delay the trial for some perceived advantage. This case does, however, suggest a serious pattern of neglect by the government and the court. In nearly 50 pages of briefing, the government offers no explanation for its long delays in moving this case forward. Despite being told by the district court to move quickly in order to avoid speedy trial problems, the government did nothing for months on end, even after the defendant moved to dismiss the case on speedy trial grounds. It took over two months simply to submit redacted indictments at the court's request. And following that, the government sat on the case for over 100 days, doing nothing. The district judge, meanwhile, began the November status conference by announcing that he still had not read the charging documents the government had submitted in July.

As explained in the opening brief, the Supreme Court and this Court have made clear that dismissals with prejudice are appropriate in cases like this to serve

as powerful disincentives to discourage prosecutors and judges from ignoring the Speedy Trial Act. See DB54-55 and cases cited.

C. The Impact of Reprosecution

The impact of a new prosecution on Shellef is clear: it would extend by months or years the nearly nine years he has already spent under onerous bail conditions, including seven months of incarceration, and increase the severe burden of legal expenses that Shellef, who is not wealthy, can ill afford. By any measure, Shellef has already paid a significant price in this case. Indeed, Judge Bianco recognized as much at sentencing, departing downward from the applicable guideline range as a result.

The government claims the public would be ill-served by a dismissal with prejudice because the government would be unable to collect money from Shellef as restitution. But: (1) the government has already *spent* considerable resources conducting two trials and defending two appeals; a third trial would be an additional burden on the public fisc; (2) the government has never attempted to collect the relevant taxes from Allied Signal, the entity that indisputably owed them; and (3) the public has a strong interest in the proper administration of the Speedy Trial Act. A dismissal with prejudice is far more likely to ensure future compliance than the opportunity for a third trial.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen point font Times New Roman.

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