UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
v.	)	
	)	No. 11-876-CR
WILLIAM RUBENSTEIN,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
DOV SHELLEF,	)	
	)	
Defendant-Appellant.	)	

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

The Court should rehear this case *en banc* to consider an important question of first impression in this Circuit: whether the Speedy Trial Act permits a district court to grant a retroactive extension of the 70-day period normally required for retrial of a criminal defendant following an appellate remand. Two members of the panel answered in the affirmative; one dissented. Because the majority opinion misreads the statute, undercuts this Court's long-established precedents, and effectively eviscerates the 70-day time limit, consideration by the full Court is warranted.

The Speedy Trial Act requires that a retrial following an appellate remand commence within 70 days of issuance of the mandate (not including delays caused by certain enumerated causes), unless the district court finds that "factors resulting from passage of time shall make trial within seventy days impractical," in which case the court may extend the retrial period to 180 days. 18 U.S.C. § 3161(e). Here, Judge Platt—who first presided over Mr. Shellef's case after remand—allowed eight months to pass before even attempting to set a trial date, and he never made any statement or even any suggestion that he would be extending the period pursuant to § 3161(e). Nevertheless, Judge Bianco—to whom the case was later reassigned—purported to grant a retroactive extension more than a year and a half after the mandate issued. Following Mr. Shellef's retrial and conviction, the

panel affirmed this ruling by a two-to-one vote, with Judge Pooler dissenting. The majority held that a § 3161(e) extension "may be granted after expiration of the original 70-day retrial period as long as it is based on 'factors resulting from passage of time' arising within that 70-day period." Op. at 36.[1]

Contrary to the majority's analysis, Judge Bianco lacked the statutory authority to grant a retroactive extension. The Act provides that a district court "may extend the period" if "factors resulting from passage of time shall make trial within seventy days impractical." 18 U.S.C. § 3161(e). Congress's use of the forward-looking term "shall" makes clear that the district court is permitted to grant an extension only prospectively. The majority's reasoning to the contrary is unconvincing, as explained below. *See* Part I.A.

In order to justify its interpretation of the statutory language, the majority was forced to undermine decades-old precedent from this Circuit. In *United States*

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[1] As an alternative to his ruling that a § 3161(e) extension could be applied retroactively, Judge Bianco concluded that Judge Platt had himself extended the time to 180 days based on an "implicit" finding that retrial within 70 days of the mandate would have been impractical. This finding was erroneous, but because the majority did not reach that issue on appeal, we do not address it here. We also do not address the majority's conclusions—predicated on its holding that Judge Bianco had the authority to grant a retroactive § 3161(e) extension—that (1) "the factors relied on by Judge Bianco in granting an extension to 180 days resulted from passage of time"; and (2) "Judge Bianco correctly identified sufficient excludable delay to support the conclusion that Shellef was retried within 180 days of this court's mandate." Op. at 14 (alteration and internal quotation marks omitted). We respectfully submit that these conclusions were erroneous, for the reasons set forth in our briefing to the panel.

v. Tunnessen, 763 F.2d 74 (2d Cir. 1985) (Feinberg, J.), this Court held that certain types of discretionary continuances available under the Speedy Trial Act can be granted only prospectively, in part because of the danger that a contrary rule would allow a district judge to "simply rationalize his action long after the fact, in order to cure an unwitting violation of the Act." *Id.* at 78. This rationale for forbidding retroactive extensions of time under the Speedy Trial Act is well established in this Circuit and fully applicable here, although the *Tunnessen* opinion was interpreting a different provision of the Act. The majority considered *Tunnessen* inapplicable because, among other things, it believed that the relevant portion of the decision is "dictum," even though it has never before been treated as such and served as a critical basis for *Tunnessen*'s holding. The Court's ruling thus undermines and does damage to long-established Second Circuit law. *See* Part I.B.

The majority's interpretation, if allowed to stand, would also produce bad results. The majority recognized this: despite its holding, it stated expressly that it is not "best practice" for a district court to wait until after the deadline passes before granting an extension, and that "no one is well served by delaying § 3161(e) determinations until long after the initial 70-day period for retrial has passed." Op. at 22. These are understatements. Defendants like Mr. Shellef, whose convictions have been vacated on appeal, have perhaps the greatest interest in a speedy trial because they have already endured the time, emotional turmoil, uncertainty, and

considerable expense of defending themselves at trial and prosecuting an appeal. If the majority's holding stands, the practical result will be that post-appellate retrials will always be pushed to the back of the line, because, as Judge Pooler explained, "[i]t will always be possible [for a district court] to search the record" after the 70-day period expires and then, without any prior warning to the parties, "find that there were factors that 'make trial within seventy days impractical.'" Diss. Op. at 5. The purpose of the Speedy Trial Act is to avoid making indicted defendants endure years of pretrial delay before being tried. The majority's rule substantially undermines that goal. This case calls for rehearing. *See* Part II.

ARGUMENT

I. THE MAJORITY ERRED.

A. The Plain Language Of The Speedy Trial Act Precludes Retroactive Extensions.

The provision of the Speedy Trial Act relevant to retrial 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).[2]

The language of the Act permits an extension of the deadline only if the court determines that "unavailability of witnesses or other factors resulting from passage of time ***shall*** make trial within seventy days impractical." *Id.* (emphasis added). The word "shall" is forward-looking, employed to express "simple futurity." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 291 (1999) (Thomas, J., dissenting); *In re Avon Sec. Litig.*, No. 91-CV-2287, 2004 WL 3761563, at *6 (S.D.N.Y. Mar. 29, 2004). As this Court has stated: "There is no doubt that 'shall' . . . is an imperative that speaks to future conduct. Even the most demanding of us cannot reasonably expect that a person 'shall' do something yesterday." *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999) (Sotomayor, J.). Thus, the Act permits a court to grant an extension only if factors resulting from the passage of time will ***in the future*** make retrial within 70 days impractical. If Congress had meant otherwise, it could easily have used different wording—perhaps a requirement that the factors "made," "have made," or "did make" trial within 70 days impractical, or that the judge must find that a 70-day period "was impractical" or "was made impractical" by the passage of time.

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[2] If a trial does not begin within the applicable time period, the defendant may move to dismiss the charges, and such a motion must be granted if it is meritorious. *See* 18 U.S.C. § 3162(a)(1). On appeal from the denial of such a motion, legal questions are reviewed *de novo* and factual findings for clear error. Op. at 14.

The majority read the statutory language differently, but its reasoning is unpersuasive. First, while acknowledging that "'shall make' is language that looks to the future rather than the past," the majority noted that "the verb's subject is not the district court but 'factors resulting from passage of time,'" and thus reasoned that "Congress's use of the future tense is properly understood to signal that it is not necessary to wait a full 70 days before granting an extension of retrial, *i.e.*, until there can be no doubt that factors 'made' or 'have made' retrial within that period impractical." Op. at 17. According to the majority, "use of the future tense . . . indicates that the factors themselves must arise before or within the 70-day period," and "says nothing about when a district court must find such circumstances." *Id.*

The majority is correct that the subject of the term "shall make" is not the district court but the "factors resulting from passage of time." 18 U.S.C. § 3161(e). But that does not change the fact that the ***present authority*** of the district court to grant an extension ("may extend . . . if") depends on whether the factors will ***later*** make ("shall make") retrial within 70 days impractical. Once the 70-day period has lapsed, it simply cannot be the case that those factors "shall make" retrial during the period impractical, and any ruling by a district court to that effect—"the unavailability of a key witness shall make retrial yesterday impractical"—would be nonsensical as a grammatical matter.

The majority's reasoning—that the tense of § 3161(e) simply indicates that the district court does not have to wait the full 70 days before granting an extension—does not account for the presence of the word "shall." *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect."). Any ambiguity about the district court's ability to grant an extension before the end of the 70-day period could have been avoided by using the present tense: for example, the statute could have said that the court "may extend the period . . . if unavailability of witnesses or other factors resulting from passage of time ***make*** trial within seventy days impractical." There would have been no need to insert the forward-looking term "shall." Indeed, even past-tense terms like "made" or "have made" would permit the district court to extend the period before it lapses: as long as the judge found that retrial within seventy days had become impractical in light of factors that had already arisen, he would have the authority to extend the period.

Second, the majority reasoned that,

> [h]ad Congress intended to place [ ] a temporal limitation on the exercise of district court extension authority, one would expect it to have done so not through a tense choice for the verb applicable to factors that can demonstrate impracticality, but through a qualifier on the verb authorizing judicial action, as for example, "except that the court retrying the case may, ***within the initial seventy-day period for retrial***, extend the period for retrial not to exceed one hundred eighty days."

Op. at 18.

We agree that Congress could have used clearer wording, but that does not change the Court's obligation to properly interpret the wording Congress actually used. *See Lane v. Pena*, 518 U.S. 187, 212 (1996) (Stevens, J., dissenting) ("Congress could have drafted a clearer statement of its intent. Our task, however, is not to educate busy legislators in the niceties and details of scholarly draftsmanship, but rather to do our best to determine what message they intended to convey."). Once again, Congress modified the verb applicable to the factors using the future-tense "shall." Under the majority's reading, "shall" is superfluous.

B. The Majority's Analysis Conflicts With The Court's Precedents.

In addition to misreading the text of § 3161(e), the majority opinion seriously undercuts this Court's case law interpreting a closely analogous portion of the Act. The Act contains one other provision that permits a court to grant a discretionary extension: 18 U.S.C. § 3161(h)(7)(A), which permits exclusions of time if the court makes an explicit finding "that the ends of justice served by [a continuance] outweigh the best interest of the public and the defendant in a speedy trial." In *United States v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985) (Feinberg, J.), this Court held that "ends of justice" continuances may be granted only prospectively. *Id.* at 76-77. The Court gave several reasons, including: (1) "[a] prospective statement . . . serves to assure the reviewing court that the required

balancing was done at the outset"; (2) "it puts defense counsel on notice that the speedy trial clock has been stopped"; and (3) it avoids "the risk that a district judge in a particular case may simply rationalize this action long after the fact, in order to cure an unwitting violation of the Act." *Id.* at 78. Since it was decided, both *Tunnessen*'s rule and its reasoning have been cited repeatedly in this Circuit and in others. *See, e.g.*, *United States v. Williams*, 511 F.3d 1044, 1056 (10th Cir. 2007); *United States v. Breen*, 243 F.3d 591, 596 (2d Cir. 2001); *United States v. Kelly*, 45 F.3d 45, 47 (2d Cir. 1995) ("reaffirm[ing the] ruling in *Tunnessen*"); *United States v. Keith*, 42 F.3d 234, 238 (4th Cir. 1994); *United States v. Anderson*, 902 F.2d 1105, 1108 (2d Cir. 1990) (characterizing *Tunnessen* as "the law of this circuit"); *United States v. Elkins*, 795 F.2d 919, 924 (11th Cir. 1986).

Each of *Tunnessen*'s rationales is equally applicable to an extension under § 3161(e). A retroactive finding of "impracticality" makes appellate review for abuse of discretion difficult. And as Judge Pooler pointed out, "[r]etroactive application of Section 3161(e), like retroactive application of [the 'ends of justice' provision], is inconsistent with the purposes of the Act because it deprives the parties of notice that an extension is being given," without which "the parties are unable to object to the extension in a timely fashion and make a record of that objection." Diss. Op. at 3. Perhaps most importantly, permitting retroactive extensions creates "a substantial risk that 'a district judge may . . . simply

rationalize his action long after the fact.'" *Id.* (alteration in original) (quoting *Tunnessen*, 763 F.2d at 79).

The majority attempted to avoid the import of *Tunnessen* in four ways.[3] Yet in doing so, it effectively eliminated the basis for *Tunnessen*'s holding.

First, the majority asserted that Mr. Shellef's (and Judge Pooler's) concern about the possibility of post-hoc rationalizations "rests on the unfounded assumption that district courts will act in bad faith in making impracticality findings after the 70-day period." Op. at 19. Respectfully, that is not the basis for the concern. As Judge Pooler explained, "[w]e need not assume . . . that a district court judge acts in bad faith simply by engaging in post-hoc reasoning." Diss. Op. at 3. Indeed, this case presents a perfect example of a good-faith attempt by a judge (Judge Bianco) to rationalize prior rulings made by his colleague (Judge Platt). As Judge Pooler pointed out, "the record . . . amply demonstrates that Judge Platt was acting under the mistaken impression that the speedy trial act had not yet started ticking because the defendants had not been re-indicted." *Id.* at 4 (quoting portions of the record). Judge Bianco quite understandably wanted to prevent Judge Platt's errors from causing further delays of Mr. Shellef's retrial, and so—despite Judge Platt's explicit statements that the speedy trial clock had not yet

[3] Notably, the majority did not address the first two rationales in *Tunnessen* discussed above; it focused only on the third.

begun to run—Judge Bianco made a questionable finding that Judge Platt had "implicitly" extended the time pursuant to Section 3161(e). This case thus illustrates well "the dangers of a retroactive grant of continuances" even where the district judge has only the best intentions. *Id.* at 5.

Moreover, the majority's response to our argument regarding post-hoc rationalizations—that it rests on the improper assumption that district courts will act in bad faith—would necessarily apply to *Tunnessen* itself. The *Tunnessen* Court expressed strong concern about the risks of post-hoc rationalization. *See* 762 F.2d at 78. The necessary implication of the majority's analysis in this case is that the *Tunnessen* holding was improperly based on an assumption of the district court's bad faith. But in *Tunnessen*, not only did the Court make no assumption of bad faith; it explicitly disavowed even any suspicion that the district court had actually engaged in a post-hoc rationalization. *See id.* ("[W]e do not suggest that [a post-hoc rationalization] occurred here . . . ."). Thus, although *Tunnessen* made no assumption of bad faith, it concluded that the Act had to be read to assure against continuances being employed to rationalize inadvertent legal errors. Lower courts will find this analysis impossible to reconcile with the majority's.

Second, the majority said that when this Court "noted a rationalization concern in *Tunnessen*, . . . [it] did so in *dictum*." Op. at 19. We respectfully disagree: *Tunnessen*'s statements about post-hoc rationalizations were part of the

rationale underlying its holding. *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 235 (2d Cir. 2006) ("[W]here two independent rationales support a decision by the Supreme Court, neither can be considered dictum, and each represents a valid holding of the Court."), *overruled on other grounds by Bond v. United States*, 131 S. Ct. 2355 (2011). Indeed, in the years since *Tunnessen* was decided, the "rationalization" justification has been cited and quoted by this Court and others as an essential basis for the Court's holding.[4]

Third, the majority distinguished § 3161(e) from the provision at issue in *Tunnessen* by pointing out that the "ends of justice" provision states that no exclusion shall be permissible "***unless the court*** sets forth . . . its reasons" for the continuance. 18 U.S.C. § 3161(h)(7) (emphasis added); *see* Op. at 19-20. According to the majority, "[s]ection 3161(e) contains no limiting language comparable to § 3161(h)(7)(A)'s phrase 'unless the court' that signals Congress's intent to limit the exercise of judicial extension discretion." Op. at 20.

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[4] *See, e.g.*, *United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990) (citing *Tunnessen* as "requiring contemporaneous statement of 'ends of justice' continuance . . . to guard against risk that district judge 'may simply rationalize his action long after the fact'"); *United States v. Brenna*, 878 F.2d 117, 121-22 (3d Cir. 1989) (noting that "[t]he dangers of sanctioning [a retroactive 'ends of justice' extension] were outlined by the Court of Appeals for the Second Circuit [in *Tunnessen*]," and quoting *Tunnessen*'s discussion of the dangers of post-hoc rationalizations); *United States v. Correa*, 182 F. Supp. 2d 326, 329 (S.D.N.Y. 2001) ("As the [*Tunnessen*] Court noted, allowing [retroactive] exclusions would create '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.'").

But it actually does. Section 3161(e) provides that "***the court*** retrying the case ***may extend*** the period for retrial . . . ***if*** . . . factors resulting from passage of time shall make trial within seventy days impractical." (Emphases added.) There is simply no meaningful difference between a statute that says a court "cannot" do something "unless" something else happens, and a statute that says a court "may" do something "if" something else happens. Either way, the occurrence of that "something else" is a necessary precondition to the Court's authority to act. And here, what triggers the Court's authority is the existence of factors that will in the future ("shall") make retrial within 70 days impractical.

Finally, the Court found no need "to transfer any concern with *post hoc* rationalizations for § 3161(h)(7) continuances to § 3161(e) extensions" because, whereas the Act "places no time limit on § 3161(h)(7) continuances . . . , it caps § 3161(e) extensions at 180 days." Op. at 20. In other words, the majority reasoned that because an improper § 3161(e) extension cannot be open-ended, it is less potentially harmful than an improper "ends of justice" extension.

We respectfully disagree. Congress had its reasons for setting 70 days as the time limit for post-appeal retrials, and it permitted district courts to extend that period only upon specific, narrow grounds that are not present here. 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 court 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 it is not real. *See* Diss. Op. at 3 ("While a set 180-day period may not pose the same danger as an open-ended extension under Section 3161(h)(8), it is not without dangers of its own."). Indeed, if anything, a previously convicted defendant has ***more*** of an interest in a speedy trial than other defendants because of the lengthy process he has already endured.

II. EN BANC REHEARING IS WARRANTED.

As articulated above, a number of considerations justify rehearing. The case presents a purely legal issue that, until now, had never before been addressed in this Circuit or by any other court of appeals.[5] It divided the judges on the panel. It involves a misreading of a critical provision of the Speedy Trial Act. It seriously undercuts *Tunnessen* and the many cases reaffirming it as this Court's controlling law. It renders the 70-day retrial period a virtual nullity. And it is just bad policy. As the majority acknowledged, "no one is well served by delaying § 3161(e) determinations until long after the initial 70-day period for retrial has passed." Op. at 22. That is precisely why both the language of the Act and this Court's precedents forbid such a practice.

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[5] One federal district court has held that retroactive extensions are permissible. *See United States v. Ginyard*, 572 F. Supp. 2d 30, 36 (D.D.C. 2008).

CONCLUSION

The Court should grant rehearing *en banc*.

Dated: New York, New York
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