No. 05-710

# In the Supreme Court of the United States

ROBERT F. FRIEMANN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES**

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## QUESTIONS PRESENTED

1. Whether a defendant may waive his right under the Speedy Trial Act of 1974 to be tried within 70 days of his indictment or appearance before a judicial officer.

2. Whether violations of the Speedy Trial Act are subject to harmless-error analysis.

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## OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter*, but is reprinted in 136 Fed. Appx. 396.

## JURISDICTION

The order of the court of appeals was entered on June 17, 2005. A petition for rehearing was denied on September 6, 2005 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of making a false statement on a federal tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to three years of probation, fined $1000, and ordered to pay $3082 in restitution to the Internal Revenue Service (IRS).

1. The Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Periods of delay resulting from various matters are automatically excluded from the computation of the 70 days. 18 U.S.C. 3161(h).

In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excludable "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and the court "sets forth, in the record of the case, either orally or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(8)(A). In determining whether a continuance would serve the ends of justice, courts are to consider whether the case is so complex that, absent a continuance, it would be unreasonable to expect adequate preparation for trial or pretrial proceedings. 18 U.S.C. 3161(h)(8)(B)(ii).

The STA provides that if the defendant is not brought to trial within the 70-day period, "the informa-

tion or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors, including 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 STA and the administration of justice. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2).

2. Petitioner was one of several defendants in a bribery, money laundering, and tax evasion case involving the award of contracts by Nassau County, New York, to Beneficial Plan Administrators, Inc. (BPA). Petitioner was initially brought to trial, along with co-defendants Albert Isernio and Michael Agoglia, on January 13, 2002. With the consent of the parties, the district court excluded all of the time before that date from the STA's 70-day clock because of the case's complexity. See Pet. App. 104a-105a.

During jury selection, petitioner moved to sever the charges against him from those against Isernio and Agoglia. The district court granted that motion, stating that petitioner "shall be tried on all counts presently pending against him in one trial, to be held subsequent to Mr. Isernio's and Mr. Agoglia's trial." Pet. App. 28a.

The trial of Isernio and Agoglia proceeded without petitioner. The district court dismissed the charges against Agoglia. The jury hung on the charges against Isernio, and the district court declared a mistrial on April 10, 2003. Pet. App. 105a.

On June 27, 2003, the district court held a status conference at which the government indicated that it intended to supersede the indictment against petitioner, reduce the number of charges against him, and then try petitioner separately from Isernio, whose retrial was scheduled to begin in January 2004. Pet. App. 38a-43a. During the conference, petitioner did not raise any speedy trial concerns or request a trial on the existing indictment. Instead, he requested and received a briefing schedule for filing a motion to dismiss the non-tax charges. *Id.* at 39a-40a. In July 2003, petitioner moved to hold that briefing schedule in abeyance pending the government's decision on whether to supersede the indictment. *Id.* at 52a, 57a-58a.

On September 18, 2003, petitioner moved to dismiss under the STA. Petitioner contended that the 70-day clock began to run on April 10, 2003—the date the district court declared a mistrial in the Isernio trial—and therefore expired before the June status conference and the July extension of the briefing schedule. See Pet. App. 47a-48a, 63a.

The district court denied that motion. Pet. App. 103a-109a. The court found that petitioner had repeatedly consented to the designation of the case as "complex" pursuant to 18 U.S.C. 3161(h)(8)(ii), and to the resulting delays. Pet. App. 106a-107a. The court further found that petitioner requested a severance from Isernio and Agoglia, "kn[owing] that his trial would occur *after* a resolution of the case against Isernio and Agoglia." *Id.* at 105a; see *id.* at 107a. In denying reconsideration, the court explained that petitioner "consented and made an agreement with the government that as a condition of the severance, his trial will follow the trial of Mr. Isernio, and until Mr. Isernio's case was

completed, that the speedy trial time clock on behalf of [petitioner] would not begin" to run. *Id.* at 111a.

Following a jury trial, petitioner was acquitted on all but one count, count five, which charged petitioner with making a false statement on a federal tax return, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to three years of probation, fined $1000, and ordered to pay $3082 in restitution to the IRS. Pet. App. 117a, 119a-121a.

3. The court of appeals affirmed. Pet. App. 1a-7a. Relying primarily on its decision in *United States* v. *Zedner*, 401 F.3d 36, 45 (2d Cir. 2005), cert. granted, No. 05-5992 (Jan. 6, 2006), the court held that defendants may validly waive their STA rights by "reqest[ing] an adjournment that would serve the ends of justice." Pet. App. 3a-4a (quoting *Zedner*, 401 F.3d at 45). On the record here, the court of appeals upheld the district court's findings that petitioner waived his speedy trial rights by "agreeing to delay his trial pending the outcome of Isernio's" (*id.* at 3a; see *id.* at 3a-4a), and that the resulting delay served the ends of justice because "(1) the adjournment of [petitioner's] trial was designed to promote goals of judicial efficiency, and (2) this goal could not be attained by proceeding with [petitioner's] trial prior to the ultimate resolution of Isernio's case." *Id.* at 4a.

In an alternative holding, the court of appeals also determined that any error was harmless under its decisions in *Zedner*, 401 F.3d at 47-48, and *United States* v. *Gambino*, 59 F.3d 353, 362-363 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996). Pet. App. 4a-5a. The court held that any dismissal under the STA would be "'without prejudice' because the charged offenses were serious, the Government acted in good faith, [petitioner]

benefitted significantly from delays, and [petitioner] failed repeatedly to raise any speedy trial concerns." *Id.* at 4a. "In such circumstances," the court concluded, "the Government could (and likely would) have re-indicted [petititioner], leaving [petitioner's] legal position unchanged." *Id.* at 4a-5a (footnote omitted). Thus, the court held that denial of the motion to dismiss was harmless. *Id.* at 5a.

**DISCUSSION**

Petitioner contends (Pet. 15-25) that the court of appeals erred in holding that he waived his right to a speedy trial and that any speedy-trial error was harmless. In *Zedner* v. *United States*, No. 05-7009 (Jan. 6, 2006), this Court granted a petition for a writ of certiorari that poses the questions whether an alleged violation of the STA is subject to waiver and harmless-error analysis. Pet. at i, *Zedner*, *supra* (No. 05-7009). The decision below expressly relies on the Second Circuit's decision in *Zedner*, Pet. App. 3a-4a, and the petition here purports to "adopt and incorporate by reference what *Zedner* has set forth in his petition as to why these are issues warranting review by this Court." Pet. 14. Accordingly, this Court should hold the petition pending its decision in *Zedner*, and then dispose of the petition as appropriate in light of that decision.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Zedner* v. *United States*, No. 05-5992, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 2006