

No. 11-953

---

**In the Supreme Court of the United States**

---

ORVIL DUANE HASSEBROCK, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

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

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

JOHN A. DiCICCO  
*Principal Deputy Assistant  
Attorney General*

FRANK P. CIHLAR  
GREGORY VICTOR DAVIS  
KATIE BAGLEY  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

---

---

### QUESTIONS PRESENTED

1. Whether, pursuant to 18 U.S.C. 3162(a)(2), petitioner waived his statutory speedy trial rights by failing to move to dismiss his indictment before trial.

2. Whether the district court committed reversible plain error by not instructing the jury that 26 U.S.C. 7203 (willful failure to file return, supply information, or pay tax) is a lesser included offense of 26 U.S.C. 7201 (attempt to evade or defeat tax).

3. Whether the district court erroneously required petitioner to pay restitution for his tax offense during petitioner's term of imprisonment, and whether, on remand, the district court was required to order the return of restitution already paid when the court made restitution a condition of supervised release.

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	6
Conclusion .....	13

## TABLE OF AUTHORITIES

### Cases:

<i>Adickes v. S.H. Kress &amp; Co.</i> , 398 U.S. 144 (1970) .....	8
<i>Gay v. Ruff</i> , 292 U.S. 25 (1934) .....	12
<i>Pennsylvania Dep't of Corr. v. Yeskey</i> , 524 U.S. 206 (1998) .....	8
<i>Sansone v. United States</i> , 380 U.S. 343 (1965) .....	5, 10, 11, 12
<i>Spies v. United States</i> , 317 U.S. 492 (1943) .....	10
<i>United States v. DeTar</i> , 832 F.2d 1110 (9th Cir. 1987) .....	11, 12
<i>United States v. Doyle</i> , 956 F.2d 73 (5th Cir. 1992) ..	11, 12
<i>United States v. Helmsley</i> , 941 F.2d 71 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992) .....	11
<i>United States v. McGill</i> , 964 F.2d 222 (3d Cir.), cert. denied, 506 U.S. 1023 (1992) .....	11, 12
<i>United States v. McKee</i> , 506 F.3d 225 (3d Cir. 2007) ....	10
<i>United States v. Olano</i> , 507 U.S. 725 (1993) .....	9
<i>United States v. Rosenthal</i> , 454 F.2d 1252 (2d Cir.), cert. denied, 406 U.S. 931 (1972) .....	12
<i>United States v. Taylor</i> , 487 U.S. 326 (1988) .....	7
<i>Zedner v. United States</i> , 547 U.S. 489 (2006) .....	4, 8, 9

## IV

Constitution, statutes and rule:	Page
U.S. Const. Amend. VI .....	3, 4
Speedy Trial Act of 1974, 18 U.S.C. 3161	
<i>et seq.</i> .....	3, 4, 6, 7, 8
18 U.S.C. 3161(c)(1) .....	7
18 U.S.C. 3162(a)(2) .....	3, 4, 7, 9
18 U.S.C. 3583(d) .....	5
18 U.S.C. 3663 (2006 & Supp. IV 2010) .....	5, 6
18 U.S.C. 3663A .....	5, 6
26 U.S.C. 7201 .....	<i>passim</i>
26 U.S.C. 7203 .....	<i>passim</i>
28 U.S.C. 1254 .....	12
Fed. R. Crim. P. 52(b) .....	9

# In the Supreme Court of the United States

---

No. 11-953

ORVIL DUANE HASSEBROCK, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

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

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A38) is reported at 663 F.3d 906. The memorandum and order on remand of the district court (Pet. App. A39-A42) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on November 22, 2011. The petition for a writ of certiorari was filed on February 1, 2012. 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 Southern District of Illinois, petitioner was convicted on one count of tax evasion, in violation of 26 U.S.C. 7201, and one count of failure to file a tax re-

turn, in violation of 26 U.S.C. 7203. Pet. App. A1. The district court sentenced petitioner to 36 months of imprisonment, to be followed by 36 months of supervised release. *Id.* at A3. The court also ordered petitioner to pay \$997,582 in restitution to the IRS. *Ibid.* The court of appeals vacated the restitution order and remanded for the district court to clarify the statutory source of its authority to order restitution and otherwise affirmed. *Id.* at A1-A38.

1. In 2004, petitioner earned income from the proceeds of his oil business, including \$2.5 million from a business-related settlement. Pet. App. A2. When petitioner received the three checks that made up his settlement proceeds, he deposited them into an attorney's trust fund account. Gov't C.A. Br. 6. Petitioner then transferred the funds to newly created and purportedly irrevocable trusts for the benefit of his children; he subsequently directed that funds from the trusts be paid out for his own benefit. *Id.* at 6-7. He also deposited some of the settlement proceeds into a checking account in his son's name. *Id.* at 8.

In February 2005, petitioner asked his accountant to calculate his 2004 federal tax liability. Pet. App. A2. The accountant prepared two draft returns, one that took into account the \$2.5 million settlement and one that did not. *Ibid.* Petitioner did not ask that his accountant take any further action (such as filing a return or requesting an extension) before his taxes were due on April 15, 2005. *Id.* at A2-A3. Nor did petitioner himself file a return or an extension request by April 15, 2005. *Ibid.* Petitioner first requested an extension of time in which to pay his taxes on August 12, 2005. *Id.* at A3.

2. On June 17, 2009, petitioner was indicted for willfully attempting to evade or defeat the assessment and

payment of a tax, in violation of 26 U.S.C. 7201, and for willfully failing to file an income tax return, in violation of 26 U.S.C. 7203. Gov't C.A. Br. 3. On July 7, 2009, petitioner made his initial appearance in the district court. Pet. App. A5. On July 10, petitioner filed a motion to continue his trial date for at least six months in order to afford defense counsel time to review discovery and prepare a defense. *Id.* at A7. On December 17, petitioner requested a further continuance of six weeks because defense counsel had a scheduling conflict. *Id.* at A7-A8. Petitioner attached to each motion an affidavit stating that he had been informed of and understood his rights under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, had opted to “waive all his rights and entitlements under and by virtue of said Act, and consent[ed] to a continuance of this cause to a time beyond the time limits and exclusions set forth in said ‘Speedy Trial Act.’” Pet. C.A. Br. A33-A38. On April 23, 2010, petitioner’s trial commenced. Pet. App. A5. Despite the Speedy Trial Act’s provision that “[f]ailure of the defendant to move for dismissal prior to trial \* \* \* shall constitute a waiver of the right to dismissal,” 18 U.S.C. 3162(a)(2), petitioner did not file a motion to dismiss the indictment before trial based on an alleged violation of the Speedy Trial Act or his Sixth Amendment right to a speedy trial. Pet. App. A5.

The jury convicted petitioner on one count of tax evasion, in violation of 26 U.S.C. 7201, and one count of failure to file a tax return, in violation of 26 U.S.C. 7203. Pet. App. A1. The district court sentenced petitioner to 36 months of imprisonment, to be followed by 36 months of supervised release. *Id.* at A3. The court also ordered petitioner to pay \$997,582 to the IRS in restitution. *Ibid.* Although the government informed the district

court that the court's authority to order restitution in a tax case such as this was limited to its authority to impose conditions on supervised release, see *id.* at A33, the district court's statements at sentencing were unclear about whether the restitution was to be paid immediately or upon the commencement of petitioner's supervised release, see *id.* at A32-A35.

3. The court of appeals affirmed petitioner's conviction and sentence, Pet. App. A1-A38, but vacated the restitution order and remanded for "the district court to clarify the statutory basis for its order of restitution," *id.* at A35.

The court of appeals rejected petitioner's argument—asserted for the first time on appeal—that his rights under the Speedy Trial Act and the Sixth Amendment had been violated. Pet. App. A4-A14. The court concluded that petitioner had waived his statutory right by failing to file a motion to dismiss the indictment before his trial, as required by 18 U.S.C. 3162(a)(2). Pet. App. A5. In light of the statute's specific instruction that a defendant must move for dismissal of an indictment before trial, the court concluded that it could not view petitioner's belated Speedy Trial Act claim under plain error review. *Id.* at A5-A9. In response to petitioner's contention that the written waivers of his rights under the Speedy Trial Act were invalid under this Court's holding in *Zedner v. United States*, 547 U.S. 489, 500 (2006), that a defendant may not prospectively waive his rights under the Speedy Trial Act, the court of appeals found that the validity of those waivers was irrelevant because petitioner had retrospectively waived his rights by failing to move for a dismissal of the indictment before trial. Pet. App. A7-A9. The court also rejected peti-



tioner's constitutional speedy-trial claim under plain error review. *Id.* at A10-A14.

In addition, the court of appeals rejected petitioner's argument that the district court erred by failing to instruct the jury that failure to file a tax return, in violation of 26 U.S.C. 7203, is a lesser included offense of tax evasion, in violation of 26 U.S.C. 7201. Pet. App. A17-A18. Because petitioner did not request such an instruction, the court of appeals reviewed his argument for plain error. The court found no error because it was well settled in the Seventh Circuit that the failure to file a tax return is not a lesser included offense of tax evasion. *Id.* at A17. The court considered this Court's statement in *Sansone v. United States*, 380 U.S. 343, 351 (1965), that Section 7203's failure-to-file offense may be a lesser included offense of Section 7201's attempt-to-evade offense when there is "a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the § 7203 omission." This is not such a case, the court concluded, because "ample evidence in the record suggests that [petitioner] engaged in affirmative acts of tax evasion beyond a mere failure to file." Pet. App. A16, A18.

Finally, the court of appeals considered the district court's order of restitution. Pet. App. A31-A35. The court recognized that, although the district court could not sentence petitioner to pay restitution under 18 U.S.C. 3663 (2006 & Supp. IV 2010) or 3663A for a Title 26 offense, it had authority under 18 U.S.C. 3583(d) to order restitution as a condition of supervised release. Pet. App. A31-A32. Although the court noted that the government had alerted the district court to that limit on its authority, the record was "ambiguous" and conflicting about whether the district court properly or-

dered the restitution as a condition of supervised release or whether the district court erroneously relied on 18 U.S.C. 3663 (2006 & Supp. IV 2010) or 3663A to impose restitution as a general condition of the sentence. Pet. App. A35. The court of appeals therefore remanded for the limited purpose of allowing the district court to clarify the statutory basis of its order of restitution. *Ibid.* On January 13, 2012, the district court did so by entering an order specifying that it was ordering restitution as a condition of petitioner’s supervised release. *Id.* at A39-A42.

Before the court of appeals issued its decision—and before petitioner’s term of supervised release began—petitioner paid the full amount of the restitution that would be due during his supervised release. Pet. App. A41 n.2. Although petitioner did not object to the district court’s ordering restitution as a condition of supervised release or request reimbursement of the money he had already paid, see *id.* at A40-A42, petitioner did request the court’s “consideration” of the fact that he had already paid the amount that would be due, *id.* at A41. The district court noted that the court of appeals had not specified how to handle petitioner’s prepayments, ordered that the amended judgment would state that petitioner would receive credit for all payments previously made, and noted that petitioner had fully satisfied the restitution condition of supervised release. *Id.* at A42. Petitioner did not appeal that order.

#### ARGUMENT

Petitioner reasserts his arguments that his rights under the Speedy Trial Act were violated and that the district court erred in not instructing the jury that 26 U.S.C. 7203 is a lesser included offense of 26 U.S.C.

7201. Review of those issues is not warranted because the court of appeals correctly rejected petitioner's arguments and because the result in this case does not conflict with any decision of this Court or of any other court of appeals. Petitioner also argues that the district court erred by not returning the money he prepaid as restitution and by not fully resentencing petitioner on remand. Review of those claims is not warranted because they are not properly presented in the petition for a writ of certiorari; petitioner failed to appeal from the district court's order amending petitioner's judgment on remand.

1. Petitioner first argues (Pet. 8-12) that the court of appeals erred in holding that he had waived any claim that his rights under the Speedy Trial Act were violated. Review of that issue is not warranted.

a. The Speedy Trial Act requires a criminal defendant's trial to commence within 70 days of his indictment or initial appearance, whichever occurs later, 18 U.S.C. 3161(c)(1), and entitles the defendant to dismissal of the charges if that deadline is not met, 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending upon the district court's weighing of various factors. *Ibid.*; *United States v. Taylor*, 487 U.S. 326, 336-337, 342-343 (1988). But the Act specifically provides that "[f]ailure 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). The court of appeals correctly concluded that petitioner's failure to move for dismissal of the indictment before trial waived any claim that his rights under the Speedy Trial Act were violated. See Pet. App. A5-A9.

b. Petitioner’s argument (Pet. 8-11) that the court of appeals’ decision conflicts with this Court’s decision in *Zedner v. United States*, 547 U.S. 489 (2006), lacks merit. The Court in *Zedner* held that criminal defendants generally may not prospectively waive their statutory right to a timely trial under the Speedy Trial Act. *Id.* at 500-501. The Court reasoned that permitting such prospective waivers “would seriously undermine the Act because there are many cases \* \* \* in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest.” *Id.* at 502.

Whatever the merits of petitioner’s *Zedner*-based challenge to his purported waiver of his Speedy Trial Act rights in the affidavits he attached to his motions for continuance, that issue is not properly presented in this case. The court of appeals did not rely on the written waivers petitioner filed and did not determine whether such statements would constitute valid prospective waivers under *Zedner*. Pet. App. A8-A9. There is therefore no occasion in this case to consider that question. Accordingly, petitioner’s suggestion (Pet. 9-10) that the Court grant his petition for a writ of certiorari in order to resolve a disagreement among courts of appeals about “whether prospective waivers are valid under *Zedner*” is without merit. This Court is one of review, not first view, see *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and no justification exists for review of an issue not decided below and not germane to the outcome.

As the court of appeals correctly held, petitioner—unlike the defendant in *Zedner*—waived his statutory right to a timely trial by failing to move for dismissal of

the indictment before the commencement of his trial. Pet. App. A9 (“In contrast [to *Zedner*], there is no question that [petitioner] has retrospectively waived his rights [under the Speedy Trial Act].”). As the Court noted in *Zedner*, the waiver rule in Section 3162(a)(2) “assigns the role of spotting violations of the Act to defendants” and “limits the effects of a dismissal without prejudice (by ensuring that an expensive and time-consuming trial will not be mooted by a late-filed motion under the Act).” 547 U.S. at 502-503. Importantly, it also “prevents undue defense gamesmanship” and “restrict[s]” the ability of a defendant to use a motion to dismiss “for strategic purposes” by preventing defendants from “wait[ing] to see how a trial is going (or how it comes out) before moving to dismiss.” *Id.* at 503 & n.6. And, as the court of appeals correctly stated, Pet. App. A5-A9, the consequence of petitioner’s retrospective waiver is that any error is extinguished rather than being subject to plain error review as a forfeited error would be. *United States v. Olano*, 507 U.S. 725, 733 (1993). Petitioner does not dispute the court of appeals’ view that every circuit to consider the issue agrees on this point, see Pet. App. A5-A6, and no further review is warranted.

2. Petitioner’s argument (Pet. 12-15) that the district court erred by failing to instruct the jury that failure to file a tax return, 26 U.S.C. 7203, is a lesser included offense of tax evasion, 26 U.S.C. 7201, also does not warrant review. Because petitioner failed to request such a lesser-included-offense charge, his assignment of error must be reviewed for plain error. Fed. R. Crim. P. 52(b). Petitioner’s argument lacks merit because the district court did not err in failing to give that instruc-

tion, and certainly did not commit obvious error, as plain error review demands.

a. Petitioner asserts (Pet. 12) that “[i]t is well settled by this Court[] that when a defendant is prosecuted for the felony tax offense of willfully attempting to defeat or evade tax (26 U.S.C. §7201), he is entitled to a lesser included offense charge based on the misdemeanor offense of willfully failing to pay tax when due (26 U.S.C. §7203), as long as there w[ere] disputed issues of fact as to the existence of an affirmative commission required in the felony offense.” This Court explained in *Sansone v. United States*, 380 U.S. 343 (1965), that Section 7201 is “the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.” *Id.* at 350-351 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). “As such,” the Court explained, Section “7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses in this hierarchical system of sanctions.” *Id.* at 351. As relevant here, for example, the elements of a Section 7203 offense are willfulness, a requirement that a defendant file a tax return, and the defendant’s failure to file the return at the time required by law. *E.g.*, *United States v. McKee*, 506 F.3d 225, 244 (3d Cir. 2007). The elements of a Section 7201 violation are willfulness, the existence of a tax deficiency, and some affirmative act on the part of the defendant “constituting an evasion or attempted evasion of the tax.” *Sansone*, 380 U.S. at 351. Given the related nature of the two offenses, the Court thus held in *Sansone* that, “[w]here there is, in a § 7201 prosecution, a disputed issue of fact as to the existence

of the requisite affirmative commission in addition to the § 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on § 7203.” *Ibid.*

As the court of appeals correctly held, Pet. App. A18, petitioner’s case does not fall within the category of cases identified by the Court in *Sansone* as possibly requiring a lesser-included-offense instruction. The court of appeals found that “ample evidence in the record suggests that [petitioner] engaged in affirmative acts of tax evasion beyond a mere failure to file, thereby rendering a lesser included offense instruction inappropriate even under *Sansone*.” *Ibid.* Those affirmative acts included setting up trust accounts in the names of his children, depositing his own income into those accounts, and then using funds from the accounts for his personal expenses. *Id.* at A20. Petitioner does not take issue with the court of appeals’ characterization of the record in his petition for a writ of certiorari (see Pet. 12-15), and those factual findings are sufficient to defeat his argument.

b. Petitioner urges the Court to review this question in order to resolve what he describes as a “circuit split” on the question whether Section 7203 is a lesser included offense of Section 7201. Pet. 13 (citing *United States v. Helmsley*, 941 F.2d 71, 99 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992); *United States v. Doyle*, 956 F.2d 73 (5th Cir. 1992); *United States v. DeTar*, 832 F.2d 1110 (9th Cir. 1987); *United States v. McGill*, 964 F.2d 222 (3d Cir.), cert. denied, 506 U.S. 1023 (1992)). Review is not warranted, however, because the court of appeals’ decision here does not conflict with the rule adopted by any of the circuits on which he relies. Each of those circuits agrees with the court of appeals here that the question whether Section 7203 is a lesser included of-

fense of Section 7201 depends on the facts of the particular case. See *McGill*, 964 F.2d at 239; *Doyle*, 956 F.2d at 75; *DeTar*, 832 F.2d at 1113; *United States v. Rosenthal*, 454 F.2d 1252, 1255-1256 (2d Cir.), cert. denied, 406 U.S. 931 (1972). That is consistent with this Court's statement in *Sansone* that, "[w]here there is, in a § 7201 prosecution, a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the § 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on § 7203." 380 U.S. at 351. Review of the court of appeals' factbound determination that no such charge was appropriate here is not warranted, particularly in light of petitioner's failure to request such a charge in the district court.

3. Finally, petitioner argues (Pet. 15-18) that the district court erred on remand by not refunding to petitioner the money he had already paid to satisfy the restitution order. That claim is not properly presented in the petition for a writ of certiorari. Petitioner seeks review of the court of appeals' November 22, 2011, decision. But the relevant district court order addressing the restitution question petitioner would raise was issued after the court of appeals' decision and petitioner failed to file a notice of appeal from that order. Review of that order is therefore not available through this petition for a writ of certiorari. See 28 U.S.C. 1254 (specifying that the Court's certiorari jurisdiction extends to "[c]ases in the courts of appeals"); *Gay v. Ruff*, 292 U.S. 25, 30 (1934) ("[T]he sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals."). In any event, the district court did not abuse its discretion in determining to impose restitution as a condition of supervised release and to credit any



prepayment of restitution against that future obligation.  
Pet. App. A41-A42. No further review is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*

JOHN A. DICICCO  
*Principal Deputy Assistant  
Attorney General*

FRANK P. CIHLAR  
GREGORY VICTOR DAVIS  
KATIE BAGLEY  
*Attorneys*

APRIL 2012