No. 02-1513

In the Supreme Court of the United States

DANIEL K. STEWART AND DONNA G. STEWART,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment excused petitioners' failures to file income tax returns.

2. Whether continuances granted by the district court based on the complexity of the case resulted in a violation of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 274 F.3d 1053, and an amended and superseding opinion is reported at 307 F.3d 446.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2001. On October 16, 2002, the court of appeals granted the government's petition for rehearing and issued an amended opinion. Petitioners' petition for rehearing was denied on January 8, 2003 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on April 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioners were found guilty of conspiring to defraud the United States by obstructing the functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371, and willfully attempting to evade tax, in violation of 26 U.S.C. 7201. Pet. App. 2a.

1. In 1989, the Criminal Investigation Division of the IRS conducted an investigation of Phillip Marsh, the founder of an organization called the Pilot Connection Society (PCS), which, among other things, instructed individuals on methods to evade paying federal and state income taxes. Through the execution of a search warrant on Marsh's residence and property, the IRS obtained a list of people who were affiliated with PCS. Petitioners, who owned and operated Danco Transmission, Inc. (Danco), were on that list. Pet. App. 3a.

As a result of petitioners' connection with PCS, the IRS began a civil investigation of petitioners' compliance with the tax laws. The investigation revealed that petitioners had not submitted their tax return for 1990. The IRS questioned petitioners about their failure to file the return, and they responded by "revoking" their tax returns for the years 1955 through 1989. Later, they sent the IRS anti-tax information they had obtained through their connection with PCS and other sources. Petitioners eventually filed a return for 1990, but they did not file any personal income tax returns for the years 1991 through 1994. Danco failed to file corporate tax returns for 1992, 1993, and 1994. Pet. App. 3a-4a.

The IRS then began a criminal investigation of petitioners. The investigation revealed that, in 1990, peti-

tioners closed all of their personal checking and savings accounts, redeemed certificates of deposit, and paid off loans. In addition, in 1991, they dissolved Danco under Ohio law. Danco nonetheless continued to operate. Adhering to PCS's anti-tax instructions, petitioners created seven primary trusts and transferred all of their assets, including Danco, to the trusts. The trusts paid petitioners' personal and business expenses and were used to purchase various personal items for use by petitioners and their family. No tax returns were filed on behalf of the trusts for 1992 through 1994. Pet. App. 4a.

Petitioners asked relatives, friends, and employees of Danco to serve as trustees of the trusts. The nominal trustee for each trust frequently changed. Many of the trustees did not know the nature of a trust or could not explain the nature of their responsibilities as trustee. Some trustees indicated that petitioner Donna Stewart directed the daily operations of the trusts. Petitioners' co-defendant Joe Sabino served as trustee for several of the trusts. Pet. App. 4a-5a.

2. On April 2, 1996, a federal grand jury returned an indictment against petitioners. On June 19, 1996, the grand jury returned a superseding indictment adding Sabino as a defendant. The superseding indictment charged petitioners and Sabino with conspiracy to defraud the United States by obstructing the functions of the Internal Revenue Service, in violation of 18 U.S.C. 371, and charged petitioners with four counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. 7201. Following a 32-day trial, the jury found petitioners and Sabino guilty on all counts, except that petitioner Daniel Stewart was acquitted on one count of tax evasion. The district court sentenced each of the petitioners to eighteen months of imprisonment,

three years of supervised release, and a fine of $41,750. The court also ordered petitioners to pay restitution totaling $129,000. Pet. App. 5a.

3. On appeal, petitioners contended, *inter alia*, that they were entitled under the Fifth Amendment to avoid filing income tax returns and that their trial was commenced beyond the deadline allowed by the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* The court of appeals rejected those claims. Pet. App. 6a-13a.

a. In support of their Fifth Amendment claim, petitioners alleged that an IRS investigator had read them their *Miranda* rights during a 1992 interview and that an attorney later advised them not to file tax returns so as to avoid making incriminating statements in the returns. Petitioners argued that their privilege against compulsory self-incrimination was infringed when their failures to file a return were alleged as overt acts in furtherance of the charged conspiracy and were introduced by the government at trial to demonstrate petitioners' willfulness. According to petitioners, because the IRS had placed a "freeze code" on their accounts as a result of the criminal investigation, any tax returns they filed could have been used as evidence against them in a prosecution. Pet. App. 11a-12a.

In rejecting petitioners' Fifth Amendment claim, the court of appeals explained that a "taxpayer claiming a Fifth Amendment privilege against the filing of a tax return must specifically claim the privilege 'in response to particular questions, not merely in a blanket refusal to furnish any information.'" Pet. App. 11a (quoting *United States* v. *Saussy*, 802 F.2d 849, 855 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987), and *United States* v. *Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978)). Here, the court observed, petitioners "did not file any returns and thus did not lodge any particular objections

to filing the requisite information." Pet. App. 12a. The court explained that the existence of a "freeze code" on petitioners' accounts did not advance their claim, because a freeze code "constitutes nothing more than an internal act of the IRS." *Ibid.*

b. The court of appeals also rejected petitioners' claim under the Speedy Trial Act. Pet. App. 6a-11a. Petitioners acknowledged that, because of pending motions, the 70-day period allowed by the Speedy Trial Act was suspended from the date of the return of the indictment through April 2, 1997. Petitioners argued that, after that date, 350 days that were not covered by any statutory exclusion had elapsed before the trial commenced on July 7, 1998. The district court denied petitioners relief (Pet. App. 52a-59a), explaining that it had granted a series of continuances because of the complexity of the case and that those continuances suspended the 70-day period under the statutory exclusion for delays based on findings that the "ends of justice" warrant a continuance, 18 U.S.C. 3161(h)(8)(A).

The court of appeals affirmed, explaining that "[t]his was a tax evasion case of complex proportions involving the wrongful use of third parties and the hiding of assets in trusts," Pet. App. 8a, and that the district court had "granted continuances based upon ends-of-justice findings stemming from the complexity of the case," *id.* at 7a. The court added that petitioners waited to file their Speedy Trial Act motion until more than one year after the date on which they contended that the statutory period began to run, "reflect[ing] their agreement with the district court's calendar for bringing the case to trial." *Id.* at 8a. The court also observed that the district court had "convened periodic status conferences to ensure that the case proceeded expeditiously to trial." *Ibid.* Finally, the court rejected peti-

tioners' claim that the ends-of-justice provision did not permit open-ended continuances. The court agreed with the majority of courts of appeals "that open-ended ends-of-justice continuances for reasonable time periods are permissible in cases where it is not possible to preferably set specific ending dates." *Id.* at 10a.[1]

ARGUMENT

1. Petitioners renew their argument (Pet. 1-17) that their convictions were obtained in violation of the Fifth Amendment. That contention lacks merit and does not warrant further review.

a. This Court held in *United States* v. *Sullivan*, 274 U.S. 259 (1927), that the Fifth Amendment privilege against compulsory self-incrimination does not excuse an outright failure to file a tax return. As the Court explained, if a return calls for particular answers that a "defendant [is] privileged from making he could * * * raise[] the objection in the return, but could not on that account refuse to make any return at all." *Id.* at 263; see *Garner* v. *United States*, 424 U.S. 648, 650 (1976). It follows that petitioners, who filed no tax return at all for 1992 through 1994, have no valid Fifth Amendment objection to their convictions. In fact, petitioners have yet to identify any particular information required by the returns that would have been incriminating.

The fact that petitioners were the subject of a criminal investigation or that they had been issued *Miranda* warnings did not entitle them to refuse to make a return. See *United States* v. *Dack*, 987 F.2d 1282, 1284

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[1] The court of appeals granted the government's motion for rehearing and revised its initial opinion on an issue not encompassed by the petition: whether petitioner Donna Stewart should receive a sentencing enhancement for obstruction of justice. See *United States* v. *Sabino*, 307 F.3d 446 (6th Cir. 2002).

(7th Cir. 1993). Petitioners' alleged reliance on the issuance of *Miranda* warnings by an IRS agent was a matter the jury could consider in deciding whether petitioners acted willfully, not a complete defense to their failures to file a return. And contrary to petitioners' assertion (Pet. 16), the IRS's placement of a "914 freeze code" on their accounts because of the criminal investigation did not mean that the IRS had abandoned its civil function of collecting revenues and would use the returns solely for the purpose of criminal prosecution. As the Eighth Circuit explained in *United States* v. *Pillsbury Credit Union*, 661 F.2d 1195, 1197 (1981), "the TC 914 control does not permanently prohibit the assessment and collection of taxes, but serves as an interdepartmental notice of criminal investigation so that the IRS may coordinate its efforts. We see no abandonment of a civil purpose by use of a TC 914 control."[2]

b. Contrary to petitioners' assertion (Pet. 7-8, 11-14), the decision of the court of appeals does not conflict with this Court's decisions in *Garner* v. *United States*, 424 U.S. 648 (1976), *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968). In *Garner*, the petitioner's income tax returns, in which he revealed himself to be a professional gambler, were introduced into evidence as proof of a charged federal conspiracy. 424 U.S. at 649-650. This

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[2] In addition, an IRS freeze code affects a taxpayer's account only with respect to the particular tax periods under investigation. See IRS Document 6209, at 1-14, 8-52 (2002). The freeze code affects other tax periods only insofar as it prevents removal of the taxpayer from the IRS's files as an expired account. See *id.* at 1-11, 8-52. Accordingly, the freeze codes in petitioners' account did not transform the returns petitioners were required to file into investigative tools.

Court held that, because the petitioner had made incriminating statements on his returns instead of claiming the privilege and withholding the information, his disclosures were not compelled and his Fifth Amendment rights were not violated. *Id.* at 650-665. Nothing in the Court's opinion suggests that a taxpayer may validly invoke the privilege by failing to file a return. Indeed, the Court reiterated its holding in *Sullivan* "that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all," and observed that "nothing we say here questions the continuing validity of *Sullivan*'s holding that returns must be filed." *Id.* at 650-651 & n.3.

This Court's decisions in *Marchetti* and *Grosso* concerned specific tax returns required to be filed by individuals involved in gambling activities for the payment of federal occupational and excise taxes on wagering. The Court distinguished *Sullivan*, reasoning that, "[u]nlike the income tax return in question in [*Sullivan*], every portion of these requirements [to pay the excise tax and file the return] had the direct and unmistakable consequence of incriminating petitioner" in view of the "comprehensive system of federal and state prohibitions against wagering activities." *Marchetti*, 390 U.S. at 48-49; see *Grosso*, 390 U.S. at 66-67. The Court also found that asserting the privilege in lieu of filing a return would itself be incriminating. *Marchetti*, 390 U.S. at 50-51. Thus, the Court held that the privilege afforded a defense against prosecution for failure to file the returns. Unlike the gambling tax returns involved in *Marchetti* and *Grosso*, "federal income tax returns are not directed at those 'inherently suspect of criminal activities.'" *Garner*, 424 U.S. at 660 (quoting *Marchetti*, 390 U.S. at 52). The questions on an income tax form are "neutral on their face and

directed at the public at large." *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965). Accordingly, the court of appeals' decision in this case does not conflict with *Marchetti* or *Grosso*.

The court of appeals' decision also does not conflict (Pet. 14-15) with the Ninth Circuit's opinion in *United States* v. *Troescher*, 99 F.3d 933 (1996). In *Troescher*, the court held that there is no general tax-crime exception to the Fifth Amendment. Petitioners err in contending (Pet. 14) that "[t]he decision below clearly implemented" such an exception. The decision instead turned on the settled principle that "[a] taxpayer claiming a Fifth Amendment privilege against the filing of a tax return must specifically claim the privilege 'in response to particular questions, not merely in a blanket refusal to furnish any information.'" Pet. App. 11a (quoting *United States* v. *Saussy*, 802 F.2d 849, 855 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987), and *United States* v. *Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978)). The court correctly found that, because petitioners "did not file any returns and thus did not lodge any particular objections to filing the requisite information," they "are not protected by the Fifth Amendment privilege." Pet. App. 12a.

2. Petitioners also argue (Pet. 17-29) that the court of appeals erred in rejecting their claim under the Speedy Trial Act. That contention is without merit.

a. Petitioners acknowledged in the court of appeals (Pet. 6a-7a) that pending motions stayed the speedy trial clock from the date of the return of the indictment until April 3, 1997. See 18 U.S.C. 3161(h)(1)(F) and (J). Petitioners state (Pet. 19) that they moved to dismiss under the Speedy Trial Act "because of a long period of virtually no activity on the docket sheet from April 2,

1997, to April 6, 1998." That period was excludable under the Act, however, pursuant to the provision excluding continuances granted on the basis of "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," 18 U.S.C. 3161(h)(8)(A), including when the case is "so complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by" the Act, 18 U.S.C. 3161(h)(8)(B)(ii).

In May, September, and October 1996, the district court, without defense objection, ordered continuances on the basis of ends-of-justice findings concerning the complexity of the case. Pet. App. 6a; see *id.* at 7a (observing that the "record establishes that the district court declared the case as complex, ostensibly with the agreement of the defendants' attorneys"); *id.* at 55a (explaining that the case was "unanimously recognized to be a complex case").[3] Petitioners did not request a trial date or raise any objections concerning delays in the proceedings until they filed their motion to dismiss under the Speedy Trial Act on June 2, 1998, which was more than one year after the date they allege the speedy trial clock had commenced and more than three

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[3] Petitioners assert (Pet. 27) that the district court invoked the ends-of-justice exclusion on a "post hoc" basis because the court did not invoke the terms of the statutory exclusion at the time that it ordered the continuances. As the district court explained, however, a review of its orders demonstrates that "the findings of complexity and in the interest of justice were actually the factors motivating the decision." Pet. App. 55a. Accordingly, the court of appeals rejected petitioners' contention "that the district court did not make sufficient findings to buttress an ends-of-justice continuance." *Id.* at 7a.

months after the trial date had been set, and less than five weeks before the trial was to begin. *Id.* at 6a-7a, 56a. Petitioners do not challenge the conclusion that this case fits within the category of complex cases encompassed by the ends-of-justice exclusion: the case required a 32-day trial and involved multiple defendants and complicated facts concerning petitioners' various schemes to conceal assets in third-party trust arrangements.

b. Petitioners assert (Pet. 23-28) that the court of appeals' decision conflicts with this Court's opinion in *Henderson* v. *United States*, 476 U.S. 321 (1986), and with decisions of other circuits. That is incorrect.

Henderson did not involve the ends-of-justice exclusion, but instead concerned a separate statutory exclusion pertaining to delays resulting from proceedings on pretrial motions. 18 U.S.C. 3161(h)(1)(F). Moreover, in *Henderson*, this Court rejected the contention that the exclusion for pretrial motions applies only if the delay is reasonably necessary, explaining that the terms of the exclusion do "not require that a period of delay be 'reasonable' to be excluded." 476 U.S. at 326-327. The Court further observed that "Congress clearly envisioned that any limitations [on excessive delays] should be imposed by circuit or district court rules rather than by the statute itself." *Id.* at 328. Like the exclusion for pretrial motions, the ends-of-justice exclusion contains no language setting forth a reasonableness requirement for delays. Accordingly, as the court of appeals explained, insofar as *Henderson* speaks to the application of the ends-of-justice exclusion, the decision "signals

that district courts may devise their own time limits" for ends-of-justice continuances. Pet. App. 10a.[4]

Petitioners argue (Pet. 28) that the court of appeals' decision conflicts with the Ninth Circuit's opinion in *United States* v. *Clymer*, 25 F.3d 824 (1994). There is no conflict warranting review. In *Clymer*, the trial "court never stated how much time would be excluded as a result of his finding, and it never explained when the case's complexity would terminate for Speedy Trial Act purposes." *Id.* at 828. The Ninth Circuit concluded that its precedents prohibited "this kind of open-ended declaration," and held that an ends-of-justice continuance must be "specifically limited in time." *Ibid.* (quoting *United States* v. *Jordan*, 915 F.2d 563, 565 (9th Cir. 1990)).

Although the district court in the instant case did not set a new trial date when ordering ends-of-justice continuances, the court stated that "we'll meet with counsel and the Court case manager * * * and we will set up a schedule of meetings for hearings and motions at the convenience of the parties so that we can be sure that the issues and problems that may arise may be addressed with dispatch." Gov't C.A. Br. 11 (quoting 10/31/96 Tr. 24-25). The court therefore did not contemplate an unlimited continuance. Instead, as the court of appeals explained, the "district court convened periodic status conferences to ensure that the case proceeded expeditiously to trial." Pet. App. 8a. There

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[4] Petitioners argue (Pet. 25-26) that the term "unreasonable" in the ends-of-justice provision shows that the exclusion contains a reasonableness requirement. But the term "unreasonable" in the statute pertains to whether it is "unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits" of the Act, not to whether the duration of any specific continuance is unreasonable. 18 U.S.C. 3161(h)(8)(B)(ii).

is no indication in *Clymer* that the district court had established a series of status conferences to ensure that the case proceeded to trial in an expeditious manner, and it therefore is unclear whether the Ninth Circuit would view the circumstances of this case to amount to the "kind of open-ended declaration" at issue in *Clymer*. 25 F.3d at 828.

Moreover, the Ninth Circuit has held that a defendant is barred from maintaining that a continuance violates the Speedy Trial Act if the defendant has stipulated to the need for a continuance to enable his preparation for trial. *United States* v. *Palomba*, 31 F.3d 1456, 1462 (9th Cir. 1994). Here, petitioners, while not stipulating to the need for a continuance, told the district court that the case was complex and that they would need additional time to prepare for trial when the court initially ordered a continuance in May 1996. Gov't C.A. Br. 10. Moreover, petitioners did not object when the district court ordered continuances without specifying a start date for the trial, and petitioners waited to bring a motion to dismiss the indictment until more than one year after the date on which they contend that the Speedy Trial Act clock began to run. Pet. App. 8a.

Petitioners also assert (Pet. 28) that the decision in this case conflicts with decisions of other circuits that "allowed open[] ended continuances, but * * * expressed a belief that such continuance should be reasonably limited." The court of appeals' opinion in this case is consistent with that standard, however, noting a preference for bound continuances but holding that "open-ended ends-of-justice continuances *for reasonable time periods* are permissible in cases where it is not possible to preferably set specific ending dates." Pet. App. 10a (emphasis added). In addition, the court

specifically found that the delay in commencing the trial in this case "was reasonable given the volume of evidence the government marshaled and the complexity of the defendants' tax evasion scheme." *Id.* at 11a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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