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## The Not So Speedy Trial Act

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# THE NOT SO SPEEDY TRIAL ACT

Shon Hopwood\*

*Abstract:* The Speedy Trial Act (STA) of 1974 occupies a peculiar place in the criminal justice system. Very few pieces of legislation can lay claim to protecting both the rights of criminal defendants and the public's significant interest in timely justice, while reducing the cost of judicial administration. The STA formerly accomplished these lofty aims by reducing pretrial delays. But for the past two decades legal scholars have ignored the STA, and both prosecutors and defense attorneys have subverted the STA's goals by routinely moving for continuances. And although the Act categorically applies in every federal criminal case, it has been effectively marginalized by federal district and circuit courts. The reason this happens is simple: no actor in the criminal justice system has an incentive to follow it. Prosecutors and defense attorneys alike rely on delays in the system; and overburdened district courts, which have opposed the STA since its inception, have failed to enforce it as written. Appellate courts, too, prefer to thwart the STA's requirements rather than reverse a conviction obtained by otherwise constitutional means. The institutional inertia that pulls courts away from the STA's commands has led to a predictable result: an increase in pretrial delays, the very ill that Congress intended to cure when it passed the Act. This Article highlights and examines the ways in which federal courts undermine the STA and details a number of open circuit court conflicts involving the Act. The Article then proposes a comprehensive, but non-Congressional, fix that prescribes how every actor in the criminal justice system can comply with the Act as Congress intended.

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\* The author worked on *Wasson v. United States*, cited below, with the University of Virginia School of Law Supreme Court Clinic, which represented Mr. Wasson before the Supreme Court of the United States. The author was a William H. Gates Public Service Law Scholar at the University of Washington School of Law where he received his J.D. Thanks to Professors Tom Cobb, Mary Fan, and Jacqueline McMurtrie for their helpful comments. I also would like to thank my lovely wife, Ann Marie, for making it possible for me to write this article while raising two young children, and my constitutional law professor, Ronald K.L. Collins, who has graciously provided me with more mentorship and friendship than any student is realistically entitled to. Lastly, I would like to thank Bruce McWilliams, who provided some of the source material; rest in peace, Bruce.

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## INTRODUCTION

It is an idea as old, if not older, than Magna Carta: “justice delayed is justice denied.”<sup>1</sup> That principle is a vital component of any equitable system of criminal justice. It is vital for a reason: delays in justice are destructive to defendants’ rights and to the public good.<sup>2</sup> For this reason, Congress passed the Speedy Trial Act of 1974<sup>3</sup> (STA or Act) to reduce delays between a criminal defendant’s arraignment and trial. Congress believed the STA would protect the public’s significant interest in timely justice, both as a matter of fairness and as a way to reduce the financial burden of judicial administration.<sup>4</sup>

Given the enormous public interest involved in speedy trials, one would think that federal trial and appellate courts would follow the strict structures of the Act;<sup>5</sup> those structures were designed precisely to

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1. See MAGNA CARTA cl. 40 (1215), *translation reprinted in* J.C. HOLT, MAGNA CARTA app. 6, at 461 (2d ed. 1992) (“[T]o no one will we deny or delay right or justice.”); *United States v. Wilson*, 27 C.M.R. 472, 477 (1959) (Ferguson, J., dissenting) (“From the historic day at Runnymede, in 1215, when the English barons exacted the Magna Carta from King John, a guiding principle in English, and later American, jurisprudence has been that justice delayed is justice denied.”). The quote “justice delayed is justice denied” has been attributed to the British Statesman William E. Gladstone. THE YALE BOOK OF QUOTATIONS 312 (Fred R. Schapiro ed., 2006).

2. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

3. 18 U.S.C. §§ 3161–3174 (1976).

4. S. REP. NO. 96-212, at 6–7 (1979).

5. 18 U.S.C. § 3161 (2012).

prevent pretrial delays and the concomitant weakening and expense of the federal criminal justice system.<sup>6</sup> Although the STA has now been in place for over thirty years, federal courts continue, whether through inadvertence or intention, to skirt its statutory text and purpose. Lower federal courts also routinely flout the Supreme Court's repeated admonishments that courts must abide by the STA as it is written—without adding judicial gloss.<sup>7</sup> Twice the Supreme Court has admonished lower courts not to impose their own extra-textual limitations onto the Act. Yet, as will be shown in Parts III through V, lower federal courts have failed to heed the Court's commands. The frequency of these end-runs around the STA are problematic because they lead to unreasonable delays in criminal cases which, in turn, create a detriment to criminal defendants and to the public interest.

So what can be done? This Article argues that the legal academy, lawyers, and federal courts at all levels can ensure—through scholarship, advocacy, and statutory interpretation—that the Act's text and central purpose are faithfully followed, and consequently, that unacceptably long pretrial delays will be an anomaly and not the growing norm. Part I summarizes the interests animating the STA, how it operates, and the judiciary's initial response to it. The next four Parts cover specific STA issues. Part II highlights how district courts continue to disregard the Supreme Court's decision about when STA rights can be waived by criminal defendants. Part III details how lower courts continue to undermine the STA through erroneous interpretations and applications of the ends-of-justice provision. Parts IV and V discuss how federal courts mistakenly apply the doctrines of judicial estoppel and ineffective assistance of counsel to claims implicating the STA. And Part VI explains the reasons why courts undermine the STA and provides a comprehensive approach for resolving such problems so far as they affect every actor in the criminal justice system, from defense attorneys to the legal academy, to the courts.

Then Assistant Attorney General (and later Chief Justice of the United States Supreme Court) William H. Rehnquist, may have said it best—or at least most directly—when he considered the solution to

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6. The speedy trial legislation achieved three goals simultaneously: it strengthened public safety while at the same time lowering costs and protecting the rights of criminal defendants. See SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 205 (2006); Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 668–69 (1976).

7. See, e.g., *Bloate v. United States*, 559 U.S. 196, 213 (2010); *Zedner v. United States*, 547 U.S. 489, 502 (2006).

pretrial delays in federal courts. He declared, “[I]t may well be . . . that the whole system of federal criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time.”<sup>8</sup> That boldness indicated severity of the problem. The lingering question, however, was what, if anything, was to be done about the problem of justice delayed?

## I. UNACCEPTABLE DELAY

### A. *The Interests Animating the Speedy Trial Act and the Judiciary’s Initial Response*

The right to a speedy trial has roots going back to the Magna Carta.<sup>9</sup> From those early roots it began to sprout in the colonial Bill of Rights where George Mason wrote that “a man has a right . . . to speedy trial.”<sup>10</sup> The right was considered so essential that in the early period of our history, several states guaranteed a speedy trial in their bill of rights.<sup>11</sup> Not only does the right occupy a precious position in the Sixth Amendment today, but it also shares space in all fifty State Constitutions.<sup>12</sup> And the Supreme Court has labeled the right “fundamental” and “one of the most basic rights preserved by our Constitution.”<sup>13</sup>

But while the speedy trial right’s importance was undeniable, Congress had recognized by the mid-1970s that the right required some teeth in order to prevent the considerable pretrial delays that plagued federal courts.<sup>14</sup> Congress noted that “both the defense and the prosecution rely upon delay as a tactic in the trial of criminal cases,”<sup>15</sup> and that those delays had a “detrimental effect on the rights of

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8. *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92d Cong. 107 (1971) (statement of William H. Rehnquist, Assistant Att’y Gen. of the United States), reprinted in A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 226–27 (Fed. Judicial Center 1980).

9. *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967).

10. See Virginia Declaration of Rights § 8 (1776).

11. *Klopper*, 386 U.S. at 225.

12. *Id.* at 225–26.

13. *Id.* at 226.

14. H.R. REP. NO. 93-1508 (1974), reprinted in 1974 U.S.C.C.A.N. 7401, 7407.

15. *Id.* at 7407–08.

defendants.”<sup>16</sup>

Congress, however, was not just concerned with the effect of pretrial delays on defendants’ rights but also with how those delays impacted the public interest. Such delays are dangerous within the criminal justice system because a testifying witness’ memory may fade with the passage of time.<sup>17</sup> Delays further weaken the system by creating large backlogs of cases, enabling criminal defendants to better negotiate for lenient plea bargains that lead to substantial sentencing disparities for defendants who commit similar crimes.<sup>18</sup> In cases where the defendant is granted bail, long pretrial delays create a tempting opportunity for the defendant to escape from the charging jurisdiction or commit new crimes.<sup>19</sup> If that were not enough, pretrial delays erode the public’s confidence in the criminal justice system<sup>20</sup> and burden the government with additional costs that are ultimately borne by taxpayers.<sup>21</sup>

Recognizing the sizeable dangers that delays pose to the public interest and acknowledging that the Supreme Court’s interpretation of the Sixth Amendment right to a speedy trial had not provided “adequate guidance”<sup>22</sup> to lower courts, Congress enacted the Speedy Trial Act to “give real meaning” to a defendant’s Sixth Amendment right to a speedy trial<sup>23</sup> and “to assist in reducing crime and the danger of recidivism by requiring speedy trials.”<sup>24</sup>

Although Congress recognized the negative effects of pretrial delays as a significant problem,<sup>25</sup> the STA engendered significant opposition from the courts.<sup>26</sup> The Judicial Conference of the United States opposed

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16. *Id.* at 7407.

17. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

18. *Id.* at 519.

19. See H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N at 7409.

20. *Zedner v. United States*, 547 U.S. 489, 501 (2006).

21. See H.R. REP. NO. 93-1508, *reprinted in* 1974 U.S.C.C.A.N at 7408–09 (pretrial delays “create[ ] a financial as well as an administrative burden on the taxpayer”); AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSIONS AND EFFECTIVE PUBLIC SAFETY STRATEGIES 18 (2008), *available at* [http://www.justicepolicy.org/images/upload/08-04\\_REP\\_JailingCommunities\\_AC.pdf](http://www.justicepolicy.org/images/upload/08-04_REP_JailingCommunities_AC.pdf) (noting that the average daily cost to the county of incarcerating one pretrial detainee is \$58.64, for a minimum of \$21,403 if pretrial detention lasts a year).

22. H.R. REP. NO. 93-1508, *reprinted in* 1974 U.S.C.C.A.N at 7405.

23. *Id.* at 7404.

24. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076.

25. See STANDARDS RELATING TO SPEEDY TRIAL (AM. BAR ASS’N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, Approved Draft 1968); John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265 (1972).

26. H.R. REP. NO. 96-390, *reprinted in* 1979 U.S.C.C.A.N. 805, 808 (1979) (“[B]oth the

the bill and asked the Congress to postpone its enactment until the judiciary could first evaluate the effectiveness of its rules in reducing pretrial delays.<sup>27</sup> After Congress passed the Act anyway, thirteen district courts recommended that it be repealed.<sup>28</sup> Other criticisms were voiced in the case law.<sup>29</sup>

Perhaps the most significant judicial opposition centered on the STA's district court reporting requirements,<sup>30</sup> which mandated that each district court convene a planning group "responsible for the initial formulation of all district plans."<sup>31</sup> The STA required district court clerks to assemble speedy trial information, including statistics on the number and length of delays.<sup>32</sup> That information, the Act stated, was to be made available to the Circuit Council and the Administrative Office of the United States Courts,<sup>33</sup> the latter of which must then submit periodic reports to Congress based on this information.<sup>34</sup> Many district courts nevertheless failed to comply with the reporting requirements.<sup>35</sup>

### B. *The Speedy Trial Act*

The Speedy Trial Act "sets forth a basic rule" that a defendant must be tried within seventy days of indictment or the date the defendant first appears in court, whichever is later.<sup>36</sup> But not every pretrial day counts toward the seventy-day total. Rather, the STA "excludes" eight categories of time from the speedy trial calculation;<sup>37</sup> only seventy days of *nonexcludable* time triggers a STA violation. If a defendant is not

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Department of Justice and the Judicial Conference opposed enactment of the legislation in 1974, and information available to the committee leads us to the conclusion that, 5 years later, opposition within the Justice Department and the courts has not entirely withered away.").

27. Letter from Rowland F. Kirks, Dir. of the Admin. Office of the United States Courts, to the Hon. Peter W. Rodino, Jr., Chairman of the House Judiciary Comm. (Nov. 8, 1974), *reprinted in* H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 7446.

28. ADMIN. OFFICE OF THE UNITED STATES COURTS, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 52 (1980).

29. *See* United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977); United States v. Martinez, 538 F.2d 921, 923 (2d Cir. 1976).

30. Robert L. Misner, *District Court Compliance with the Speedy Trial Act of 1974*, ARIZ. ST. L.J. 1, 15-25 (1977).

31. 18 U.S.C. § 3168(a) (Supp. IV 1976).

32. 18 U.S.C. § 3170(a) (Supp. IV 1974).

33. *Id.* § 3170(c).

34. *Id.* § 3167.

35. Misner, *supra* note 30, at 25 nn.117-19.

36. United States v. Tinklenberg, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2007, 2011 (2011).

37. *See* 18 U.S.C. § 3161(h) (2012).

tried within the requisite period and the defendant timely files a motion to dismiss,<sup>38</sup> a court must dismiss the indictment, with or without prejudice.<sup>39</sup>

Section 3161(h)(1) is littered with eight enumerated subcategories of time that are excludable.<sup>40</sup> Those subcategories include delay resulting from: issues involving the defendant's mental incompetency,<sup>41</sup> interlocutory appeals,<sup>42</sup> the filing of pretrial motions and their consideration by the court,<sup>43</sup> transferring a case or the removal of defendants from another district;<sup>44</sup> transporting defendants from other districts or from hospitalization;<sup>45</sup> and consideration by the court of proposed plea agreements.<sup>46</sup> While this may seem like an abundance of exceptions, all but one—the exception for pretrial motions—do not apply in the run-of-the-mill criminal case.

The part of the Act that is routinely employed, and that provides district courts with a level of flexibility, is the ends-of-justice continuance. That provision excludes any delay resulting from a continuance where a judge concludes “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.”<sup>47</sup>

But just because a judge grants an ends-of-justice continuance does not mean the continuance automatically constitutes excludable time under the Act; no such period of delay is excludable “unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.”<sup>48</sup> To put it differently, under the Act it is not enough for a court to merely cite to the ends-of-justice provision; instead, a court must state its reasons on the record as to why granting a continuance is in the best interest of the public and the defendant. This is an important

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38. *Id.* § 3162(a)(2).

39. Under the Act, district courts possess discretion to dismiss the indictment with or without prejudice. *See* *United States v. Taylor*, 487 U.S. 326, 333 (1988).

40. 18 U.S.C. §§ 3161(h)(1)(A)–(H).

41. *Id.* § 3161(h)(1).

42. *Id.* § 3161(h)(1)(C).

43. *Id.* § 3161(h)(1)(D) & (h)(1)(H).

44. *Id.* § 3161(h)(1)(E).

45. *Id.* § 3161(h)(1)(F).

46. *Id.* § 3161(h)(1)(G).

47. *Id.* § 3161(h)(7)(A).

48. *Id.*



statutory feature that this Article will highlight in detail below.<sup>49</sup>

Among the factors that a district court must consider in deciding whether to grant an ends-of-justice continuance are a defendant's need for reasonable time to obtain counsel, continuity of counsel, and effective preparation of counsel.<sup>50</sup> Conversely, courts are altogether barred from granting ends-of-justice continuances "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."<sup>51</sup> The ends-of-justice provision thus grants courts substantial flexibility to continue trials, yet it nevertheless limits that flexibility by providing procedural safeguards that courts must satisfy before such a continuance will comply with the Act.

## II. WAIVER OF SPEEDY TRIAL ACT RIGHTS

Lower federal courts have found that, just like most legal rights, defendants can waive their right to a speedy trial.<sup>52</sup> The question has become when waiver is appropriate. In *Zedner v. United States*,<sup>53</sup> the Supreme Court largely answered that question.

The case began when the government indicted the defendant in April of 1996. The district court granted several ends-of-justice continuances<sup>54</sup> before the defendant requested a continuance of his own. Prior to granting the defendant's continuance, the court instructed the defendant to sign a preprinted waiver form and waive his speedy trial rights "for all time,"<sup>55</sup> which the defendant promptly did. A few months later, the court granted yet another continuance, so that defendant could attempt to authenticate evidence the prosecution planned to present at trial.<sup>56</sup> In granting the last continuance, the court made no finding that the ends of justice outweighed the best interest of the public and the defendant in a speedy trial as required by the STA. In fact, the court made no mention of the Act,<sup>57</sup> and yet the continuances totaled four years of delays

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49. See *infra* text accompanying notes 79–88.

50. 18 U.S.C. § 3161(h)(7)(B)(iv).

51. *Id.* § 3161(h)(7)(C).

52. See *United States v. Kucik*, 909 F.2d 206, 211 (7th Cir. 1990); *United States v. Pringle*, 751 F.2d 419, 434–35 (1st Cir. 1984).

53. 547 U.S. 489 (2006).

54. *Id.* at 493.

55. *Id.* at 494.

56. *Id.* at 495.

57. *Id.*

between indictment and trial.<sup>58</sup> When the defendant filed a motion to dismiss the indictment, the court denied it on grounds that defendant had waived his speedy trial rights. The defendant was ultimately convicted and the Second Circuit affirmed.<sup>59</sup>

Writing for a unanimous Court, Justice Samuel Alito first considered whether a defendant might prospectively waive the application of the Act. Looking to the text of the statute, Justice Alito noted that § 3161(h) contains no provision providing for prospective waivers, and this omission by Congress, he concluded, “was a considered one.”<sup>60</sup> Justice Alito next emphasized that a waiver would run counter to one of the Act’s core purposes: safeguarding the public interest “by, among other things, reducing defendants’ opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment.”<sup>61</sup> To allow prospective waivers would seriously undercut the Act, Justice Alito explained, “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.”<sup>62</sup> The Court went on to hold that defendants can waive the Act’s application by failing to file a timely motion to dismiss prior to the start of trial.<sup>63</sup>

Although the *Zedner* Court in 2006 unambiguously held that criminal defendants are unable to prospectively waive their rights under the Act,<sup>64</sup> defense lawyers continue to assert broad, open-ended speedy-trial waivers on behalf of their clients,<sup>65</sup> and district courts continue to accept those waivers.<sup>66</sup>

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58. *Id.*

59. *Id.* at 495–96.

60. *Id.* at 500.

61. *Id.* at 501.

62. *Id.* at 502.

63. *Id.* at 502–03 (citing 18 U.S.C. § 3161(a)(2)).

64. *Id.* at 506.

65. Wildwood Partners sent me motions to waive Speedy Trial Act rights filed by criminal defense lawyers, post-*Zedner*, in the following federal districts: Middle District of Florida; Southern District of Florida; District of Nevada; Central District of California; Northern District of Indiana; and the District of Oregon. See E-mail from Wildwood Partners to author (Dec. 22, 2012, 15:48 PST) (on file with author).

66. *E.g.*, Reid v. United States, 871 F. Supp. 2d 324, 336 (D. Del. 2012) (noting that the district court granted defendant’s multiple waivers of STA rights); United States v. Beals, 755 F. Supp. 2d 757, 760 (S.D. Miss. 2010) (granting waiver, but in ruling on a motion to dismiss the court recognized that STA rights cannot be waived); United States v. Reddick, CRIM. 09-MJ-2001 JS, 2010 WL 5253527 (D.N.J. Dec. 17, 2010) (holding that defense counsel had authority to waive STA rights for defendant, even where defendant desired a speedy trial); United States v. Dean,

The district court in *United States v. Gates*,<sup>67</sup> for example, faced a motion to dismiss after the court had accepted the defendant's waiver of speedy-trial rights and granted a number of continuances. The defendant argued that because he had not agreed to his defense counsel's request for continuances, the time that elapsed from those continuances did not constitute excludable time and thus his STA rights were violated.<sup>68</sup> The court rejected the defendant's argument in part "because waiver of speedy trial rights may be made by the lawyer without the knowledge of the defendant."<sup>69</sup> Conspicuously absent from the court's discussion was mention of *Zedner*'s holding that the STA does not allow prospective waivers, let alone prospective waivers made by counsel without notice to the defendant.

Another way that district courts circumvent *Zedner* is by converting waivers of STA rights into ends-of-justice continuances months after the court has granted the waivers. In *Reid v. United States*,<sup>70</sup> a defendant argued that his lawyer committed ineffective assistance of counsel by failing to file a motion to dismiss under the STA.<sup>71</sup> The district court acknowledged that it had granted the defendant's waiver, but the court still found that it had cited the ends-of-justice provision in granting the waiver and continuing the trial for fifteen months.<sup>72</sup> The court therefore concluded that the continuance was based on the ends-of-justice provision and not the waiver.<sup>73</sup>

Retroactively converting waivers into ends-of-justice continuances is no less an anathema to *Zedner* than is a prospective waiver. *Zedner* itself forbids such a move: "We see little difference between granting a defendant's request for a continuance in exchange for a promise not to move for dismissal and permitting a prospective waiver."<sup>74</sup> At least one district court, the District of the District of Columbia, has explicitly rejected the argument that a court may conceal a mistakenly granted

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3:05CR25/LAC, 2010 WL 3958673 (N.D. Fla. Sept. 7, 2010) *report and recommendation adopted*, 3:05CR25/LAC, 2010 WL 3958668 (N.D. Fla. Oct. 7, 2010) (granting defendant's waiver of STA rights and finding no STA violation, in part, because of defendant's waiver).

67. 650 F. Supp. 2d 81, 85 (D. Me. 2009).

68. *Id.* at 84.

69. *Id.* at 85.

70. 871 F. Supp. 2d 324 (D. Del. 2012).

71. *Id.* at 336.

72. *Id.*

73. *Id.*

74. *Zedner v. United States*, 547 U.S. 489, 505 (2006).

waiver by converting it into an ends-of-justice continuance.<sup>75</sup>

Lastly, one entire federal district continued to accept STA waivers long after *Zedner*. The Southern District of Florida continued, by local rule, to allow district courts to accept waivers of STA rights by defendants, and the district did not change its local rule until 2011, five years after the Supreme Court's decision in *Zedner*.<sup>76</sup>

Seven years after the *Zedner* Court unanimously held that defendants may not opt out of the Act by waiving speedy trial rights, defense lawyers continue to file waiver motions and district courts continue to grant broad waivers, which, almost always, result in lengthy delays. This is precisely the result the Supreme Court meant to prevent.

### III. THE ENDS-OF-JUSTICE CONTINUANCE

As noted above, district courts employ the ends-of-justice continuance to delay trials for reasons such as defendant's need for reasonable time to obtain counsel, continuity of counsel, and effective preparation of counsel.<sup>77</sup> Because the ends-of-justice continuance provides district courts with flexibility and a degree of subjectivity about the need for pretrial delays, the continuance has been one of the most frequently abused provisions of the STA.

#### A. *The Need to Provide On-the-Record Reasons for Ends-of-Justice Continuances*

The STA provides in unmistakable language that a district court must make a finding that the ends of justice are warranted before a continuance under § 3161(h)(7) counts as excludable time. A district court must also “se[t] forth, in the record of the case, [] its reasons” for finding that the ends of justice outweigh other interests.<sup>78</sup>

The *Zedner* Court noted that the Act's procedural requirements (i.e., ends-of-justice findings and placing reasons on the record) serve an important purpose:

The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act and, in allowing district courts to grant

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75. See *United States v. Ferguson*, 574 F. Supp. 2d 111, 114 (D.D.C. 2008).

76. See S.D. FLA. CT. R. 88.5, Comments (2011) (“Amended [in 2011] to eliminate authority of Court to accept a waiver of Speedy Trial rights.” (citing *Zedner*, 547 U.S. 489)).

77. 18 U.S.C. § 3161(h)(7)(B)(iv) (2012).

78. *Id.* § 3161(h)(7)(A).

such continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases. But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of § 3161(h)(7), then, is to counteract substantive open-endedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings.<sup>79</sup>

So what constitutes valid reasons? The Court in *Zedner* held that the Act was not satisfied by the trial court's mere "passing reference to the case's complexity" in its ruling on defendant's motion to dismiss.<sup>80</sup> The D.C. Circuit has taken that to mean that implicit findings are not enough.<sup>81</sup> If passing references to the listed factors and implicit findings do not suffice, it is likely that courts must generate genuine reasons as to why a continuance should be granted and then place those reasons on the record.<sup>82</sup>

It is not an exaggeration to say that district courts have given short shrift to the STA's requirement of providing on-the-record reasons to justify ends-of-justice continuances. One way that courts pretend to comply with the Act is by granting the requested continuance and signing an order stating that the ends of justice outweigh the interests of the public and the defendant in a speedy trial, even though the court does not actually make such a finding or provide reasons for the finding on the record.<sup>83</sup> Some courts have also cited the ends-of-justice provision in minute orders with no indication as to how the ends-of-justice provision applies to the case at hand.<sup>84</sup> These courts appear to believe that saying

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79. *Zedner*, 574 U.S. at 508–09.

80. *Id.* at 507.

81. *See* *United States v. Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008) (holding that "implicit" findings are insufficient to invoke the ends-of-justice exclusion).

82. *See* *Bloate v. United States*, 559 U.S. 196, 210 (2010) ("Subsection (h)(7) provides that delays 'resulting from a continuance granted by any judge' may be excluded, but only if the judge finds 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 records those findings." (emphasis in original)).

83. *See, e.g.*, Order at 1, *United States v. Anderson*, No. 5:09-cr-34-Oc-10GRJ (M.D. Fla. Oct. 20, 2009).

84. *E.g.*, Minutes of Court, *United States v. Gearhart*, No. 4:06-cr-40004 (S.D. Ill. Jan. 3, 2007), ECF No. 114; Minutes of Court, *United States v. Gearhart*, No. 4:06-cr-40004 (S.D. Ill. Jan. 31, 2007), ECF No. 119; Minutes of Court, *United States v. Gearhart*, No. 4:06-cr-40004 (S.D. Ill. Apr. 19, 2007), ECF No. 144; Minutes of Court, *United States v. Gearhart*, No. 4:06-cr-40004 (S.D. Ill.

the magic words “ends-of-justice” and citing to the United States Code are valid substitutes for making real findings and providing those findings on the record.

Another way that courts avoid providing on-the-record reasons is through the use of a check-the-box form. These courts employ an “Order of Excludable Delay” form that provides a list of common excludable time provisions that can be used to justify a delay. One court in particular, the United States District Court for the District of Massachusetts, uses this type of form, and when it grants an ends-of-justice continuance, the court checks a box labeled: “Continuance granted in the interest of justice.”<sup>85</sup> That is it. No other reasons are provided, other than a simple check in a box citing to the ends-of-justice provision. Once again, merely citing to the ends-of-justice provision alone is not enough.<sup>86</sup>

A number of district courts employ a different means for granting ends-of-justice continuances without providing on-the-record findings. These courts state no reasons at all because they understand that their circuit courts will infer the reasons from the context, i.e., from the reasons provided by the parties in a motion to continue.<sup>87</sup> The standard of review that allows reviewing courts to infer reasons from context will be addressed in the next section.

Congress, through the enactment of the ends-of-justice provision, sought to allow judicial flexibility combined with uniformity; but above all else, Congress sought certainty: the certainty that an ends-of-justice continuance was indispensable to protect the public interest and the defendant’s rights, and the certainty that a judge would place that fact on the record for the public, defendant, and reviewing courts to see and scrutinize. But the courts described above thwart Congressional design by acting as if the on-the-record reasoning requirement is a nice

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May 3, 2007), ECF No. 150; Minutes of Court, *United States v. Gearhart*, No. 4:06-cr-40004 (S.D. Ill. July 9, 2007), ECF No. 185 (minute orders granting continuances, stating that continuances would serve the “ends of justice” but with no indication of the factors employed in the ends of justice determination).

85. See Order of Excludable Delay, *United States v. Brown*, No. 1:10cr10101-RGS (D. Mass. Jan. 20, 2011).

86. See *United States v. Toombs*, 574 F.3d 1262, 1271 (10th Cir. 2009) (“A record consisting of only short, conclusory statements lacking in detail is insufficient.”); *Bryant*, 523 F.3d at 360 (holding that a “passing reference to the ‘interest of justice’ made by the trial judge at the . . . status hearing does not indicate that the judge seriously considered the ‘certain factors’ that § 3161(h)(7)(A) specifies” and the time period is therefore not excluded).

87. See *United States v. Levis*, 488 F. App’x 481 (2d Cir. 2012), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2020 (2013); *United States v. Wasson*, 679 F.3d 938 (7th Cir. 2012), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1581 (2013).

suggestion, or something that can be satisfied by a routine check in a box, as opposed to an authoritative command requiring actual reasoning and analysis. These courts are wrong.

*B. Finding Reasons from Context Instead of Explicit Findings*

Although *Zedner* made clear that the STA requires “express” findings before an ends-of-justice continuance counts as excludable time,<sup>88</sup> several circuit courts hold that implied findings are enough. These courts hold that the STA is satisfied if a reviewing court can gather from context a conceivable basis upon which the district court possibly granted the continuance.<sup>89</sup> That context can take many forms, but courts generally rely on the reasons provided by the parties in the motions to continue.<sup>90</sup> And one court went so far as to impute to the district court reasons that would have complied with the STA, all while acknowledging that the court had failed to set forth such reasons.<sup>91</sup> These circuits, in effect, conduct the equivalent of fact-finding, before concluding that because the record may support ends-of-justice findings, district courts cannot be faulted for failing to make a finding on the record.<sup>92</sup>

Such decisions undercut the Act’s text, undermine its purposes, and do major damage to its intended application. To begin with, the STA’s plain language simply does not allow appellate courts to rely upon the reasons provided by the parties or upon some amorphous “context” derived from the lower court proceedings.<sup>93</sup> Rather, the STA states that

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88. *Zedner v. United States*, 547 U.S. 489, 507 (2006).

89. See, e.g., *Wasson*, 679 F.3d at 947; *United States v. Napadow*, 596 F.3d 398, 405 (7th Cir. 2010); *United States v. Pakala*, 568 F.3d 47, 59–60 (1st Cir. 2009); *United States v. Edelkind*, 525 F.3d 388, 397 (5th Cir. 2008); *United States v. Thomas*, 272 F. App’x 479, 484 (6th Cir. 2008); *United States v. Lucas*, 499 F.3d 769, 782–83 (8th Cir. 2007); *United States v. Gamboa*, 439 F.3d 796, 803 (8th Cir. 2006); *United States v. Bruckman*, 874 F.2d 57, 62 (1st Cir. 1989).

90. *Wasson*, 679 F.3d at 947.

91. *United States v. Whitfield*, 590 F.3d 325, 358 (5th Cir. 2009) (affirming conviction and holding that since “this case is facially and actually complex,” the ends-of-justice continuance satisfies the STA, “even if the district court did not explicitly state as much when granting the continuance”).

92. Currently, there is a circuit split on the question of whether explicit findings are needed. Compare *Wasson*, 679 F.3d at 938, with *United States v. Larson*, 627 F.3d 1198, 1206–07 (10th Cir. 2010) (implicit findings not enough); *United States v. Lloyd*, 125 F.3d 1263, 1268, 1269 (9th Cir. 1997) (same); *United States v. Toombs*, 574 F.3d 1262, 1271 (10th Cir. 2009) (same); *United States v. Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008) (same); *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (same).

93. *Wasson*, 679 F.3d at 947.

“the court”—meaning the trial court—must set forth “its reasons.”<sup>94</sup> Congress, of course, could have said that the parties, reviewing courts, or even the trial court’s deputy clerk can make the ends-of-justice finding and place the reasons for that finding on the record.<sup>95</sup> But this it did not do. As with the other features of the STA, “this omission was a considered one.”<sup>96</sup>

Nor does the STA allow appellate courts to rely on implied findings. The STA specifically states that “[n]o such period of delay resulting from [an ends-of-justice] continuance granted by the court . . . shall be excludable” unless a district court “sets forth” its reasons “in the record.”<sup>97</sup> The STA thus conditions ends-of-justice continuances upon certain findings before such a continuance counts as excludable time.<sup>98</sup> This was the *Zedner* Court’s understanding when it concluded that the Act requires express findings and also that a district court’s “passing reference to the case’s complexity” did not suffice.<sup>99</sup> When a reviewing court, in effect, finds and provides the ends-of-justice reasons for a trial judge, it renders the second sentence of § 3161(h)(7) “insignificant, if not wholly superfluous,”<sup>100</sup> destroying the procedure that Congress intended.

Congress, in fact, had a specific purpose in mind when it required the particular procedure that courts place express reasons on the record. Congress wanted to ensure that a district judge would give careful consideration when balancing the need for delay against the interest of the defendant and of society in achieving a speedy trial.<sup>101</sup> Congress also added the requirement to provide appellate courts with an adequate record to review.<sup>102</sup> Without a well-defined record, appellate courts are left to guess as to the reasons a trial court felt the need to grant a continuance, and holding trial courts’ feet to the fire by requiring express findings eliminates that guesswork.

Congress expected that ends-of-justice continuances would be needed

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94. 18 U.S.C. § 3161(h)(7) (2012).

95. *See* *United States v. Carrasquillo*, 667 F.2d 382, 385 (3d Cir. 1981) (“We think the statutory language strongly suggests that Congress intended the trial judge, not his deputy clerk, to decide whether to grant a continuance.”).

96. *Zedner v. United States*, 547 U.S. 489, 500 (2006).

97. 18 U.S.C. § 3161(h)(7)(A).

98. *United States v. Tinklenberg*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2007, 2019 (2011).

99. *Zedner*, 547 U.S. at 507.

100. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

101. S. REP. NO. 93-1021, at 41 (1974).

102. *Id.*



to provide trial courts with flexibility, but it also believed such continuances would be a “rarely used” tool, employed only after a court balanced the competing interests and provided on-the-record findings.<sup>103</sup> Contrary to this expectation, circuit courts have approved delays of several years<sup>104</sup> without explicit findings from trial courts stating the reasons why such significant delays were needed in the first place.

### C. *Open-Ended Continuances*

Despite the Congressional belief that the ends-of-justice continuances would be a highly circumscribed and rarely used process, several courts of appeals have held that trial courts may grant open-ended ends-of-justice continuances. The First Circuit allows open-ended continuances, reasoning that while “it is generally preferable to limit a continuance to a definite period for the sake of clarity and certainty,” it is still “inevitable” that a trial court will need to grant a continuance “without knowing exactly how long the reasons supporting the continuance will remain valid.”<sup>105</sup> The Fifth Circuit, too, permits open-ended continuances where “it is impossible, or at least quite difficult for the parties or the court to gauge the necessary length of an otherwise justified continuance.”<sup>106</sup> And some circuits add one proviso: a reasonableness requirement. The Third Circuit will permit open-ended continuances as long as “they are reasonable in length.”<sup>107</sup> Other circuits have followed suit.<sup>108</sup>

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103. S. REP. NO. 93-1021, at 39–41 (1974), *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 163 n.108 (Fed. Judicial Center 1980).

104. *United States v. Wasson*, 679 F.3d 938, 942 (7th Cir. 2012), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1581 (2013).

105. *United States v. Rush*, 738 F.2d 497, 508 (1st Cir. 1984).

106. *United States v. Jones*, 56 F.3d 581, 586 (5th Cir. 1995); *see also* *United States v. Westbrook*, 119 F.3d 1176, 1188 (5th Cir. 1997) (finding that a five month open-ended continuance was not unreasonable and collecting cases to support the finding).

107. *United States v. Lattany*, 982 F.2d 866, 868 (3d Cir. 1992).

108. *United States v. Sabino*, 274 F.3d 1053, 1065 (6th Cir. 2001) (“[W]e will follow the rule of the First, Third, Fifth, and Tenth Circuits and hold 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.”), *amended on other grounds en banc*, 307 F.3d 446 (6th Cir. 2002); *United States v. Spring*, 80 F.3d 1450, 1458 (10th Cir. 1996) (“We agree with the First, Third, and Fifth Circuits that, while it is preferable to set a specific ending date for a continuance, there will be rare cases where that is not possible, and an open-ended continuance for a reasonable time period is permissible.”). *But see* *United States v. Gambino*, 59 F.3d 353, 358 (2d Cir. 1995) (reasoning that by granting an open-ended continuance for complexity, a district court “risks having the exclusion used ‘either as a calendar control device or as a means of circumventing the requirements of the Speedy Trial Act’” (internal quotation omitted)); *United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) (“The Speedy Trial Act and its amendments are the product of a series of delicate

Open-ended continuances are potentially the device most destructive to the STA's goals. With such continuances there is a grave danger that courts will commit an end-run around the Act by granting one long ends-of-justice continuance. Allowing a continuance for an uncertain period of time also "would dissociate the period of exclusion from the specific delay which occasioned the exclusion."<sup>109</sup> The Supreme Court in *Zedner* was unwilling to allow a defendant to waive STA rights for all time given the great public interest at stake in speedy trials; open-ended continuances perform the very same harm to that public interest as a prospective waiver does.

Open-ended continuances also seem contrary to the STA's statutory language. For one, the STA commands that once a defendant is charged with an offense, a trial court shall, "at the earliest practicable time," set the case for trial "so as to assure a speedy trial."<sup>110</sup> But a judge who orders an open-ended continuance is by definition *not* setting a case for trial. Additionally, a trial judge must, for "[a]ny period of delay," set forth reasons for each "such continuance."<sup>111</sup> The STA thus seems to indicate that if a trial judge needs additional time for delay, the proper procedure would be to order several continuances limited to a particular period of time with additional findings provided for each such continuance.<sup>112</sup>

If a trial court is unable to know when a trial can take place, the solution is not to grant an open-ended continuance at the beginning of the case that lasts until the court or the parties decide on an appropriate trial date. The better solution, and the one most consistent with the STA, is for a court to grant, say, a seventy-day continuance at the end of which the court could reconsider whether an additional continuance is necessary. Such a procedure is less likely to subvert the important public interest in speedy trials because it would force courts to examine

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legislative compromises. . . . This delicate balance could be seriously distorted if a district court were able to make a single, open-ended ends of justice determination early in a case, which would 'exempt the entire case from the requirements of the Speedy Trial Act altogether.'" (internal quotation omitted); *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) (open-ended ends-of-justice continuances impermissible); *United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984) (same).

109. *Pollock*, 726 F.2d at 1461.

110. 18 U.S.C. § 3161(a) (2012).

111. *Id.* § 3161(h)(7)(A).

112. *Jordan*, 915 F.2d at 565–66 (holding that to prevent "one early 'ends of justice' continuance [from] exempt[ing] the entire case from the requirements of the Speedy Trial Act altogether," the district court must provide for each continuance "findings supported by the record"); *Gambino*, 59 F.3d at 358 ("The length of an exclusion for complexity must be not only limited in time, but also reasonably related to the actual needs of the case.").

whether further delays are warranted—rather than ignoring the STA’s requirements altogether, which is what occurs when courts grant open-ended continuances.

Although the STA provides that in the ideal case a trial should commence no later than seventy days after indictment or arraignment, the circuit courts have approved considerably longer delays resulting from open-ended continuances. In *Sabino*, the Sixth Circuit approved a 350-day continuance.<sup>113</sup> In *Lattany*, the Third Circuit upheld a 425-day continuance,<sup>114</sup> and in *Rush*, the First Circuit approved an approximately 540-day open-ended continuance.<sup>115</sup> The judicial approval of these lengthy delays provokes the question whether the STA’s commands are actually taken seriously.

#### D. *Non-Contemporaneous Ends-of-Justice Findings*

The Speedy Trial Act does not explicitly address the timing for when a district court must put forth its reasons on the record. But the statute does state that an ends-of-justice finding will not count as excludable time unless the court sets forth “reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial.”<sup>116</sup> Some courts have taken this to mean that a judge cannot grant an ends-of-justice continuance absent these findings only to then create them retroactively at a later date.<sup>117</sup> Or, to put it differently, while ends-of-justice findings “may be *entered on the record* after the fact, they may not be *made* after the fact.”<sup>118</sup>

The Supreme Court in *Zedner* added to the uncertainty as to when the

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113. 274 F.3d at 1063.

114. 982 F.2d 866, 868 (3d Cir. 1992).

115. 738 F.2d 496, 506 (1st Cir. 1984).

116. 18 U.S.C. § 3161(h)(7)(A).

117. *See, e.g.*, *United States v. Crane*, 776 F.2d 600, 606 (6th Cir. 1985) (“A district judge cannot wipe out violations of the Speedy Trial Act after they have occurred by making the findings that would have justified granting an excludable delay continuance before the delay occurred.” (quotation omitted)); *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985); *United States v. Carey*, 746 F.2d 228, 230 (4th Cir. 1984) (holding that “retroactive continuances that are made after expiration of [speedy trial clock] for reasons the judge did not consider before lapse of the allowable time are inconsistent with the Act”); *United States v. Frey*, 735 F.2d 350, 353 (9th Cir. 1984) (holding that “the district court erred by making *nunc pro tunc* findings to accommodate its unwitting violation of the Act”); *United States v. Richmond*, 735 F.2d 208, 216 (6th Cir. 1984) (reversing because the “district court cannot fairly be said to have granted the continuance . . . based on the findings that it set forth” nearly a month later).

118. *United States v. Doran*, 882 F.2d 1511, 1516 (10th Cir. 1989) (emphasis in original).

findings must be set forth:

Although the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be "granted . . . on the basis of [the court's] findings"), the Act is ambiguous on precisely when those findings must be "se[t] forth, in the record of the case." However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2).<sup>119</sup>

The Court also noted that the "best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance."<sup>120</sup>

Seizing upon this permissive language from *Zedner*, courts have taken the invitation to delay setting forth ends-of-justice findings on the record until defendants have filed motions to dismiss. The procedures used in *United States v. Smith*<sup>121</sup> illustrate this paradigm of STA procedure. There, the district court granted a continuance on October 25, 2005, but failed to make an ends-of-justice finding.<sup>122</sup> Almost a year later, the court "memorialized" its ends-of-justice findings.<sup>123</sup> Acknowledging that such a procedure was not ideal, the court nevertheless concluded that a late ends-of-justice finding was acceptable, even though by the time the court "memorialized" its finding, the seventy-day STA time limit had long since expired.<sup>124</sup> This retroactive memorializing of findings is a common way for courts to justify ends-of-justice continuances, and other courts routinely employ the same maneuvers.<sup>125</sup>

In contrast, there are very few cases where a district court confesses a failure to make an ends-of-justice finding when asked by the government to memorialize its prior findings.<sup>126</sup> Facing a motion to dismiss the

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119. *Zedner v. United States*, 547 U.S. 489, 506–07 (2006).

120. *Id.* at 507 n.7.

121. No. 05-cr-30133-07-DRH, 2007 WL 118123 (S.D. Ill. Jan. 11, 2007).

122. *Id.* at \*1.

123. *Id.*

124. *Id.*

125. *See, e.g.*, *United States v. McNealy*, 625 F.3d 858, 863 (5th Cir. 2010) (upholding district court's reasons provided only after a motion to dismiss was filed); *United States v. Sain*, No. 2:08 CR 214, 2010 WL 2776185, at \*2 (N.D. Ind. July 13, 2010); *United States v. Allen*, No. 06-40056-01-SAC, 2008 WL 4511035, at \*2–3 (D. Kan. Sept. 30, 2008); *United States v. Hardimon*, No. 2:07-CR-47 PPS-PRC-17, 2008 WL 141511, at \*2 (N.D. Ind. Jan. 11, 2008); *United States v. Mudd*, No. 1:06CR-57-R, 2007 WL 2815841, at \*2 (W.D. Ky. Sept. 24, 2007).

126. I could only find two examples of this phenomenon: *United States v. Estrada*, No. 08-CR-

indictment in *United States v. Estrada*,<sup>127</sup> District Judge J.P. Stadtmueller of the Eastern District of Wisconsin could have simply created findings and claimed that they were made when the court granted the ends-of-justice continuance. Instead, Judge Stadtmueller admitted that to do so “would confuse validly granted continuances which are later substantiated during the speedy trial time period with retroactive continuances forbidden under the Act.”<sup>128</sup> Other courts have not been so forthcoming.<sup>129</sup>

Allowing district courts to wait until a motion to dismiss is filed before providing on-the-record reasons is problematic. As noted, very few judges have the wherewithal to acknowledge that they failed to make a proper record of reasons for granting a continuance by the time a defendant moves for dismissal.<sup>130</sup> Delayed record making thus invites abuse.<sup>131</sup>

There are also practical reasons judges should not postpone providing on-the-record findings. In some districts, it is a magistrate judge who grants the continuance but a district court that rules on the motion to dismiss. In these cases, a district court would need to either infer the reasons or provide the reasons after the fact—a procedure several circuits prohibit.<sup>132</sup> Another problematic scenario occurs when the judge has not provided reasons on the record and, by the time the motion to dismiss is filed, the judge can no longer provide the reasons due to death or disability.<sup>133</sup>

Finally, there is an even better reason district courts should not delay in providing on-the-record reasons. Trials that do not take place within seventy days must be dismissed, and unless a period of time is excludable, once the seventy days is up, a defendant can move for

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231, 2011 WL 1696262 (E.D. Wis. May 4, 2011) and *United States v. Shanahan*, No. 04-cr-126-04-PB, 2007 WL 2332727, at \*4–5 (D.N.H. Aug. 15, 2007).

127. No. 08-CR-231, 2011 WL 1696262 (E.D. Wis. May 4, 2011).

128. *Id.* at \*6.

129. *See supra* note 125.

130. *See supra* note 121.

131. *See United States v. Janik*, 723 F.2d 537, 544–45 (7th Cir. 1983) (“If 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, which is clearly not the intent of the Act.”).

132. *See supra* note 90.

133. *Cf. United States v. Tomkins*, No. 07 CR 227, 2011 WL 4840949, at \*13 (N.D. Ill. Oct. 12, 2011) (“Finally, the Court notes the obvious difficulty in a second judge deciphering the circumstances—including the mindset of the previously assigned judge—at the time that a prior continuance was granted.”).

dismissal.<sup>134</sup> Although a judge has the power to grant a continuance at any time, a continuance does not become an ends-of-justice continuance, and thus count as excludable time, until the judge sets forth reasons on the record.<sup>135</sup> A judge who waits until after the seventy days have passed without providing on-the-record reasons, therefore, runs the risk, under the plain language of the statute, that the indictment must be dismissed.<sup>136</sup> Indeed, this was the understanding of the Congress when it passed the STA.<sup>137</sup>

#### IV. JUDICIAL ESTOPPEL

In *Zedner*, the Supreme Court, for a time, stopped circuit courts from employing a broad form of judicial estoppel with every defendant who requested a continuance and then later challenged a district court's decision to grant the continuance. The Government had argued in *Zedner* that since defendant's waiver had led the district court to grant a continuance without making an ends-of-justice finding, the defendant's speedy trial claim was barred by the doctrine of judicial estoppel.<sup>138</sup> Under that doctrine, when a party assumes a certain position in a legal proceeding and that position is successful, the party may not put forth a contrary position in another legal proceeding, especially if it prejudices the other party.<sup>139</sup>

Justice Alito, writing for the Court, noted that in order for judicial estoppel to apply, the defendant's current position had to be "clearly inconsistent" with its prior position in the district court.<sup>140</sup> Justice Alito then noted that there were three possible positions that the defendant

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134. 18 U.S.C. §§ 3161(c)(1), 3161(h), 3162(a)(2) (2012).

135. *Id.* § 3161(h)(7)(A).

136. *See* United States v. Rivera Constr. Co., 863 F.2d 293, 297 (3d Cir. 1988) (holding that trial judges can delay articulating their on-the-record reasons for granting the continuance if those reasons are entered before the Act's seventy-day limit would have otherwise expired).

137. S. REP. NO. 93-1021, at 39-41 (1974), *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 161 (Fed. Judicial Center 1980) ("[T]he new provision allows a judge to grant a continuance only where he finds that the 'ends of justice' outweigh the best interest of the public and the best interest of the defendant in speedy trial. This means that in each case where a continuance is requested, . . . the judge must determine before granting the continuance that society's interest in meeting the 'ends of justice' outweighs the interest of the defendant and of society in achieving speedy trial. Furthermore the judge must set out in writing his reasons for believing that in granting the continuance he strikes the proper balance between these two societal interests.").

138. *Zedner v. United States*, 547 U.S. 489, 503 (2006).

139. *Id.* at 504 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

140. *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)).

could have taken in the district court: 1) defendant's promise not to move for dismissal on STA grounds; 2) defendant's implied position waiving his STA rights; and 3) defendant's claim that his counsel needed additional time to research the authenticity of certain bonds that would be used as evidence at trial.<sup>141</sup>

Though Justice Alito did not explicitly rule out applying judicial estoppel to claims under the Act, he did find that under any of the three positions, estoppel did not apply.<sup>142</sup> Justice Alito expressly declined to apply a broad application of estoppel for to do so "would entirely swallow the Act's no-waiver policy."<sup>143</sup> Additionally, even though defendant requested a continuance on the basis of defense counsel's need to authenticate evidence of bonds, the Court found that estoppel was not applicable because the district court never addressed that reason in granting the continuance.<sup>144</sup> For this reason, defendant's position at the continuance hearing was not "clearly inconsistent" with his position that the district court failed to comply with the Act's requirements for an ends-of-justice continuance.<sup>145</sup>

Justice Alito, however, did provide an escape hatch for circuit courts looking to bar defendants that move for continuances from later challenging them. He stated:

This would be a different case if petitioner had succeeded in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds.<sup>146</sup>

Clutching to this language, one circuit has held that judicial estoppel applies to STA claims, and another circuit is poised to do the same in the appropriate case. In *Pakala* the First Circuit concluded that since the defendant moved for an ends-of-justice continuance and the trial court accepted his reasons for the continuance, the defendant could not later challenge the continuance on the ground that the trial court failed to set forth its reasons on the record.<sup>147</sup> In doing so, the First Circuit had to

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141. *Id.* at 504–05.

142. *Id.* at 505.

143. *Id.*

144. *Id.* at 505–06.

145. *Id.* at 506.

146. *Id.* at 505.

147. 568 F.3d 47, 60 (1st Cir. 2009).

dismiss the fact that even though the trial court may have relied on Pakala's reasons for needing a continuance, the court failed to set forth those reasons on the record.<sup>148</sup> Likewise, the Seventh Circuit stated that although it was reserving judgment on the question, it believed that a defendant who asked for one continuance and did not contest a government-requested continuance had a clearly inconsistent position in later challenging those continuances on appeal.<sup>149</sup>

So when exactly did the *Zedner* Court intend for judicial estoppel to apply? To answer that question it is important to clarify the two types of challenges to ends-of-justice continuances under the STA. First, a defendant can challenge whether a district court complied with the STA's procedural requirements (i.e., when a court fails to make findings and set them forth on the record).<sup>150</sup> As with any question of legal error, appeals courts review such challenges de novo.<sup>151</sup> Second, a defendant can challenge the sufficiency or merits of the trial judge's reasons, but to prevail the defendant must establish an abuse of discretion.<sup>152</sup> In this second type of challenge, a defendant can argue that a trial court granted an ends-of-justice continuance for an improper reason, such as "general congestion of the court's calendar."<sup>153</sup> The defendant in *Pakala*, for example, challenged the district court's failure to comply with the Act's requirement of making express findings on the record (a procedural challenge).<sup>154</sup> The defendant did not challenge the district court's reasons for granting the continuance (a merits challenge), because again, the district court failed to provide reasons.

This distinction between procedure and merits goes to the heart of the question of when judicial estoppel applies. Judicial estoppel could apply, as the *Pakala* court held, anytime a defendant successfully requests a

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148. *Id.* ("[W]e stress that the far better course for the district court would have been to articulate its reasons for granting the 'ends of justice' continuances.")

149. *United States v. Wasson*, 679 F.3d 938, 948–49 (7th Cir. 2012) ("So although we reserve judgment on the question of when estoppel prevents a plaintiff from challenging continuances under the Act, we note that Wasson's support for the continuances certainly does little to enhance his position on appeal."), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1581 (2013).

150. *See Zedner*, 547 U.S. at 507.

151. *See United States v. Rollins*, 544 F.3d 820, 829 (7th Cir. 2008) (citing *United States v. Parker*, 508 F.3d 434, 438 (7th Cir. 2007)).

152. *See United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010) (citing *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009)); *United States v. Jean*, 25 F.3d 588, 594 (7th Cir. 1994) (quoting *United States v. Marin*, 7 F.3d 679, 683 (7th Cir. 1993)).

153. 18 U.S.C. § 3161(h)(7)(C) (2012).

154. *United States v. Pakala*, 568 F.3d 47, 57 (1st Cir. 2009); *see also Zedner*, 547 U.S. at 507 ("Thus, without on-the-record findings, there can be no exclusion under § 3161(h)(7).").



continuance and the defendant later challenges it, no matter the type of challenge.<sup>155</sup> Or, it could apply when a defendant convinces a trial court to grant a continuance for a particular reason and the court does so, but the defendant later argues that the court was wrong in granting the continuance for that particular reason (a merits challenge).

There are a number of reasons why judicial estoppel should apply to the latter but not the former. First, if judicial estoppel applied every time a defendant filed a motion to continue, such a rule would amount to waiver, which *Zedner* explicitly forbids.<sup>156</sup> In fact, the *Zedner* Court stressed that since the STA is animated by a powerful public-interest purpose, defendants may not opt out of the Act simply by failing to assert their rights prior to filing a motion to dismiss.<sup>157</sup> For this reason, some defendants who have filed multiple motions to continue trial have nonetheless succeeded in challenging a district court's failure to set forth proper ends-of-justice findings without running into trouble with the doctrine of judicial estoppel.<sup>158</sup>

Second, contrary to the panel decision in *Pakala*, the defendant there did not convince the district court that the factual predicates for an ends-of-justice continuance existed.<sup>159</sup> Rather, as the *Pakala* panel acknowledged, the district court never provided on the record the reasons why the continuance was needed; instead, the court merely stated that the ends of justice were best served by granting a continuance.<sup>160</sup> And that is the point: a defendant cannot convince a court to do something it never did.

Third, *Pakala's* position at the continuance hearing was not clearly inconsistent with his position on appeal. At the continuance hearing, *Pakala's* attorney argued that he needed additional time to prepare, whereas on appeal, he argued that the trial judge failed to make that finding of additional preparation time and failed to set forth that reason on the record.<sup>161</sup> The two types of challenges were separate and not clearly inconsistent.<sup>162</sup>

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155. *Pakala*, 568 F.3d at 60.

156. *Zedner*, 547 U.S. at 500 (“If a defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put [the § 3161(h)(7)] considerations before the court under the rubric of an ends-of-justice exclusion.”).

157. *Id.* at 500–01.

158. *See, e.g.*, *United States v. Larson*, 627 F.3d 1198, 1205–07 (10th Cir. 2010).

159. *Pakala*, 568 F.3d at 60.

160. *Id.*

161. *Id.*

162. *See United States v. Oberoi*, 547 F.3d 436, 445 (2d Cir. 2008) (“As a result, Oberoi’s earlier position (ignoring the Speedy Trial Act) is not ‘clearly inconsistent’ with his later position

What the *Zedner* Court was concerned about was the situation in which a defendant argues before a trial judge that the case is complex, the judge makes such a finding, and then the defendant challenges the judge's finding of complexity on appeal.<sup>163</sup> What *Zedner* did not say was that judicial estoppel applies whenever a defendant requests a continuance; indeed, it was the defendant who requested the continuance in *Zedner*.<sup>164</sup>

## V. INEFFECTIVE ASSISTANCE OF COUNSEL

Because many district courts and defense attorneys ignore the STA, criminal defendants often raise ineffective assistance of counsel (IAC) claims arguing that their attorneys erroneously failed to file a motion to dismiss on STA grounds. In order to prevail on an IAC claim, a defendant must establish that: (1) trial counsel's performance fell below objective standards for reasonable effective representation (deficient performance prong); and (2) the lawyer's errors affected the outcome of the proceedings (prejudice prong).<sup>165</sup>

### A. *Ineffective Assistance of Counsel: Deficient Performance*

How district courts cope with IAC claims raising STA deficiencies largely mirrors how they handle motions to dismiss on STA grounds; except there is even more reluctance to find an STA violation at the post-conviction stage, after the judicial system has devoted an enormous amount of resources into obtaining a conviction. Courts, therefore, struggle to find that an attorney's failure to raise an STA claim amounts to constitutionally deficient performance, even when such a claim has merit.

*Cooper v. United States*<sup>166</sup> is one such model of judicial apathy toward a defense attorney's failure to follow the Supreme Court's commands. In that case, the defendant claimed that his lawyer had

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(invoking the Speedy Trial Act.), *vacated*, 559 U.S. 999 (2010), and *abrogated by* *Bloate v. United States*, 559 U.S. 196 (2010).

163. *See Zedner v. United States*, 547 U.S. 489, 505 (2006) ("This would be a different case if petitioner had succeeded in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds.").

164. *Id.*

165. *Strickland v. Washington*, 466 U.S. 668, 687–94 (1984).

166. No. 09-162-DRH, 2012 WL 996947 (S.D. Ill. Mar. 23, 2012).

committed ineffective assistance in advising him to sign an STA waiver, which resulted in lengthy pretrial delays.<sup>167</sup> The court found that counsel's performance was not unreasonable because it appeared the defendant was going to enter into plea negotiations, and "[p]erhaps [defense counsel] believed that no speedy trial violation had occurred but he wanted to try and curry favor with the government by filing a waiver of his speedy trial rights, whether valid or not, as they entered into plea negotiations."<sup>168</sup> The court thus concluded that counsel's performance in waiving the defendant's STA rights was not unreasonable,<sup>169</sup> even though counsel's performance directly contravened *Zedner*.<sup>170</sup>

Similarly, in *East v. United States*,<sup>171</sup> a case decided five years after *Zedner*, a district court concluded that trial counsel's failure to file an STA motion to dismiss did not constitute ineffective assistance of counsel. The court concluded that since East had signed a waiver of speedy trial rights and the court had granted that waiver, there was no STA violation, and hence, counsel was not ineffective for failing to file a meritless motion to dismiss.<sup>172</sup> Other courts have held similarly.<sup>173</sup>

In another case, a district court flipped the law on its head in order to avoid declaring that it or defense counsel was wrong about an STA issue. In *United States v. Smith*,<sup>174</sup> a district court acknowledged with the benefit of decisions from the Tenth Circuit that, "it appears likely that my open-ended [continuance order] was not sufficient *per se* to have warranted a nearly three-year continuance of the trial and that the significant lapse of time between the filing and resolution of many of the numerous motions submitted in this case was not entirely excludable either."<sup>175</sup> Still the court found no ineffective assistance of counsel because "[t]he fact that neither defendant's seasoned co-counsel nor any

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167. *Id.* at \*13.

168. *Id.* at \*15.

169. *Id.*

170. *See* 547 U.S. 489, 500 (2006).

171. No. 11-3239-CV-S-RED, 2011 WL 5404160 (W.D. Mo. Nov. 8, 2011).

172. *Id.* at \*3.

173. *See* *United States v. Gates*, 650 F. Supp. 2d 81, 85 (D. Me. 2009) ("In sum, because waiver of speedy trial rights may be made by the lawyer without the knowledge of the defendant and because Gates's previous lawyer did seek the delays in question, Gates's argument under the Speedy Trial Act fails.").

174. Order Denying Michael D. Smith's Verified 28 U.S.C. § 2255 Habeas Petition to Vacate Judgment of Conviction and Set Aside Sentence, *United States v. Smith*, No. 08-cv-01438-REB (D. Colo. May 26, 2010), ECF No. 1818.

175. *Id.* at 6 (emphasis in the original).

of the other able attorneys or, indeed, this court, perceived a speedy trial issue strongly suggests that the lapse, if such there was, was not outside the boundaries of competence at the time the case was tried.”<sup>176</sup> Or, to put it somewhat differently, how can counsel be faulted for providing unreasonable assistance by missing an STA issue if a supposedly infallible federal court was unable to spot it?

As these cases demonstrate, courts are hesitant if not downright hostile to the idea of reversing a conviction based on ineffective assistance, even where it is plain that the lawyer overlooked or outright missed a meritorious STA claim.<sup>177</sup>

### B. *Ineffective Assistance of Counsel: Prejudice*

A criminal defendant must also establish prejudice in order to succeed on an IAC claim.<sup>178</sup> To establish *Strickland*<sup>179</sup> prejudice, a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>180</sup> For ineffective assistance of trial counsel claims, the relevant standard is whether there is a reasonable probability that a defendant would have been acquitted but for counsel’s errors.<sup>181</sup>

In other contexts, the *Strickland* prejudice standard adapts to the proceeding at issue. In *Hill v. Lockhart*<sup>182</sup> the Supreme Court evaluated a defendant’s claim that his attorney’s errors led to the imprudent acceptance of a guilty plea.<sup>183</sup> The Court there required the defendant to show “that there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”<sup>184</sup> In *Evitts v. Lucey*<sup>185</sup> the Court concluded that criminal defendants are guaranteed the effective assistance of counsel on

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176. *Id.*

177. *See also* United States v. Osborne, No. 4:05CR00109-12 JLH, 2010 WL 5283297, at \*8–12 (E.D. Ark. Dec. 16, 2010) (finding no ineffective assistance of counsel, and thus no STA violation, because the *nunc pro tunc* ends-of-justice continuances “neither rewrote history nor substantially changed Osborne’s rights under the Speedy Trial Act.”).

178. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

179. *Id.*

180. *Id.* at 694.

181. *Id.*

182. 474 U.S. 52 (1985).

183. *Id.* at 57.

184. *Id.* at 59.

185. 469 U.S. 387 (1985).

appeal,<sup>186</sup> and in order to establish prejudice on appeal a defendant must show that the “omitted issue ‘may have resulted in a reversal of the conviction, or an order for a new trial.’”<sup>187</sup> The Court has yet to address the appropriate inquiry when a defendant claims that his lawyer failed to file a meritorious motion to dismiss on speedy trial grounds.

Several circuits, however, have addressed such claims. The Tenth Circuit in *United States v. Rushin*<sup>188</sup> concluded that a defendant could not establish *Strickland* prejudice unless he could show that but for his attorney’s deficient performance the indictment would have been dismissed *with* prejudice under STA.<sup>189</sup> In doing so, the court noted that it would not confine “proceeding” to only the particular indictment at issue.<sup>190</sup> Instead, the court decided that “proceeding” meant the entire case, and thus in order to establish *Strickland* prejudice the defendant needed to show that the government would be unable to re-indict him.<sup>191</sup> Several other circuits hold the same.<sup>192</sup>

But that cannot be right: *Strickland* prejudice is not synonymous with establishing that a dismissal with prejudice under the STA would have occurred. In determining whether the outcome of the proceeding would have been different absent an attorney’s deficient performance, the Supreme Court has looked to the particular proceeding at issue, not whether the entire case must be dismissed never to be retried. The Court in *Glover v. United States*<sup>193</sup> considered a sentencing IAC claim, and there the Court discussed the prejudice inquiry in terms of the particular proceeding at issue—sentencing, not the entire case.<sup>194</sup> Similarly, the

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186. *Id.* at 396.

187. *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *see also* *Kitchen v. United States*, 227 F.3d 1014, 1021 (7th Cir. 2000).

188. 642 F.3d 1299 (10th Cir. 2011), *cert. denied*, \_\_ U.S. \_\_, 132 S. Ct. 1818 (2012).

189. *Id.* at 1309–10.

190. *Id.* at 1309.

191. *Id.* at 1309–10.

192. *See, e.g.*, *Chambliss v. United States*, 384 F. App’x 897, 899 (11th Cir. 2010); *United States v. Thomas*, 305 F. App’x 960, 964 (4th Cir. 2009); *United States v. Fowers*, 131 F. App’x 5, 6–7 (3d Cir. 2005); *Campbell v. United States*, 364 F.3d 727, 731 (6th Cir. 2004); *Clark v. United States*, Nos. 4:02-cr-17, 4:10-cv-39, 2012 WL 3991066, at \*8 (E.D. Tenn. Sept. 11, 2012); *Namur-Montalvo v. United States*, No. 1:05-CR-477-16-CC-GGB, 2012 WL 3758152, at \*6 (N.D. Ga. Aug. 8, 2012), *report and recommendation adopted*, 1:05-CR-477-16-CC, 2012 WL 3758133 (N.D. Ga. Aug. 28, 2012); *United States v. De La Cruz*, No. CRIM.2001-10118-JLT, 2012 WL 769761, at \*8 (D. Mass. Feb. 21, 2012), *report and recommendation adopted*, CIV.A. 01-10118-JLT, 2012 WL 773617 (D. Mass. Mar. 5, 2012); *United States v. Osborne*, No. 4:05CR00109-12 JLH, 2010 WL 5283297, at \*11 (E.D. Ark. Dec. 16, 2010).

193. 531 U.S. 198 (2001).

194. *Id.* at 204.

Court in *Hill* considered whether counsel had provided ineffective assistance at the defendant's guilty plea proceedings, and in assessing prejudice, the Court asked whether the defendant would have insisted on going to trial had counsel been effective.<sup>195</sup> What the Court did not do is ask whether the defendant would have been found guilty anyway. Even in a run-of-the-mill trial IAC claim, to prove *Strickland* prejudice the defendant must only show there was a reasonable probability of acquittal, not that the defendant would have been acquitted *and* that the government would not have been allowed to retry the defendant.<sup>196</sup> The Court has thus defined proceedings, for *Strickland*-prejudice purposes, to the proceeding at issue, not the case as a whole.

Moreover, if a defendant had to show that the entire case would have to be dismissed with no chance for re-indictment or retrial, then defendants would rarely, if ever, succeed on appellate ineffective assistance claims. A defendant would need to show both that the lawyer failed to raise a meritorious claim that would have resulted in a reversal on appeal *and* that the government could not bring a retrial upon remand. This is something no court has ever required—except, it seems, in the STA context. And it would be anomalous indeed if a defendant could prevail on an ineffective assistance of appellate counsel claim due to a lawyer's failure to raise a meritorious STA issue on appeal (i.e., because counsel's error affected the appellate proceedings), and yet lose on a pretrial IAC claim because the defendant was unable to show both that a motion to dismiss would have been granted *and* that the government would be unable to retry the defendant in a new proceeding.

One purpose of an IAC claim is to put the defendant back in the position one would have occupied had one been represented by competent counsel.<sup>197</sup> The Supreme Court in fact recently considered a case where the defense lawyer's incompetence resulted in the defendant rejecting a plea bargain.<sup>198</sup> There, the Court said that prejudice can be shown when the defendant "lose[s] benefits he would have received in the ordinary course but for counsel's ineffective assistance."<sup>199</sup> Applying that doctrine to the *Rushin* case, had the defendant there received effective assistance, his counsel would have filed a motion to dismiss the

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195. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

196. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

197. *See United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994) (concluding that the remedy for counsel's ineffective assistance "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred").

198. *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1367, 1385 (2012).

199. *Id.* at 1388.

indictment. Then the court would have ordered dismissal (albeit without prejudice), and the defendant would have received vindication of his speedy trial rights regardless of whether the government could have re-indicted him.

Even if an indictment is dismissed without prejudice, that is not a toothless sanction because “it forces the Government to obtain a new indictment if it decides to re-prosecute, and it exposes the prosecution to dismissal on statute of limitations grounds.”<sup>200</sup> The defendant may also derive some benefit from a dismissal without prejudice: “the time and energy that the prosecution must expend in connection with obtaining a new indictment may be time and energy that the prosecution cannot devote to the preparation of its case.”<sup>201</sup> And, if the defense lawyer knows that an STA violation has occurred, the lawyer could use the threat of dismissal as a bargaining chip with the government. Defendants who do not receive competent counsel with regard to STA claims, therefore, miss out on important procedural rights and benefits that the STA provides.

And by forcing defendants raising STA ineffective assistance claims to show that their indictment would be dismissed with prejudice, courts in effect make such claims unwinnable. In determining whether to dismiss the case with or without prejudice, § 3162(a)(2) requires the district court to consider each of the following factors: “the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re-prosecution . . . on the administration of justice.” Because it is the rare federal case that does not qualify as a serious offense, very few federal cases are dismissed with prejudice.<sup>202</sup>

Once again, one cannot help but get the feeling that federal circuit courts are unreceptive if not downright antagonistic to the notion of reversing a conviction on STA grounds.

## VI. SOLUTIONS: THE ACADEMY, ADVOCACY, AND THE COURTS

### A. *Why Is this Happening?*

STA violations occur with such regularity because there is no real

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200. *United States v. Taylor*, 487 U.S. 326, 342 (1988).

201. *Zedner v. United States*, 547 U.S. 489, 503 n.5 (2006).

202. *United States v. Clark*, 577 F.3d 273, 282 n.1 (5th Cir. 2009) (citing cases holding that even nonviolent property crimes are “serious” for STA purposes).

incentive for anyone to follow the Act.<sup>203</sup> Delay is a federal prosecutor's friend. The longer the delay, the greater the chance a prosecutor has to flip a co-defendant into a cooperating witness through a negotiated plea deal. Defense attorneys also desire and create delays. Trials take an enormous amount of preparation, so defense lawyers often will defer trials as long as possible out of convenience. For those defense lawyers who bill by the hour or are paid per CJA-appointment,<sup>204</sup> there can be a direct correlation between delays and larger profits, and as a result, defense attorneys are sometimes incentivized to create delay. Defense attorneys may also act as proxies for defendants who wish to delay their trials as long as possible in order to avoid the consequences of a guilty verdict.

With increasing federal criminal prosecutions, district court dockets are teeming with cases, and the courts are ill equipped to monitor pretrial delays in every case that comes before them. And, as this article has illustrated, there are few incentives for trial courts to follow the Act because they can rest assured that their actions will be upheld by reviewing courts in all but the most egregious abuses. Appellate courts also prefer to look the other way when it comes to the Act's requirements rather than reverse an otherwise error-free conviction.

Because the STA is not a sexy source for scholarship, critical analysis of the STA's application is nearly non-existent; the last batch of scholarship from the legal academy comprehensively covering the STA occurred in the 1980s.<sup>205</sup> That is a problematic development because scholarship can often have the effect of calling attention to court decisions that lack analytical rigor and can act as a check on those decisions that run contrary to congressional design.

Without probing scholarship, without incentives to prevent delays, and without judicial fealty to the Act's text, the STA has been watered down to the point where it no longer has any taste.

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203. See A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 16 (Fed. Judicial Center 1980) (“[W]hile it is in the public interest to have speedy trials, the parties involved . . . do not feel any pressure to go to trial. The court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason.” (quoting 120 CONG. REC. 41618 (1974))).

204. See 18 U.S.C. § 3006A(d) (2012).

205. See, e.g., George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50 (1982); Suzanne Isaacson, *Speedy Trial Act of 1974—Dismissal Sanction for Noncompliance with the Act: Defining the Range of District Courts’ Discretion to Dismiss Cases with Prejudice* *United States v. Taylor*, 108 S. Ct. 2413 (1988), 79 J. CRIM. L. & CRIMINOLOGY 997 (1988); Martha L. Wood, *Determination of Dismissal Sanctions Under the Speedy Trial Act of 1974*, 56 FORDHAM L. REV. 509 (1987).



B. *The Legal Academy, Defense, and Prosecution*

Although there is an institutional inertia pulling courts away from the STA's requirements, there are ways to ensure that the criminal justice system is protecting the public's interest by enforcing the STA as Congress intended.

The legal academy could help solve the problem associated with STA noncompliance by actually calling attention to it. The academy could conduct empirical studies on pretrial delays in various districts. In particular, academics could conduct a study comparing a district court in, say, the Seventh Circuit, which takes a lax approach to enforcing the STA,<sup>206</sup> to a district court in the Tenth Circuit, which takes a more text-based approach to interpreting the STA.<sup>207</sup> Such a study could perhaps convince circuit courts that their interpretations of the STA create real-world effects in the form of pretrial delays. Other studies could reveal the average length of delay in criminal cases in various federal districts. In addition, the academy could address the many areas where courts effectively disregard the STA, including those areas not covered by this Article.

While prosecutors play no particular role in ensuring that courts comply with the STA, if the STA's requirements are not met, the prosecution suffers the consequences when an indictment is dismissed. Moreover, where a prosecutor has played a role in the violation, the court must consider that information when determining whether to grant a dismissal with prejudice.<sup>208</sup> In many of the cases discussed above, the prosecution either contributed to the delay or argued for a result contrary to the STA's plain language or to the Supreme Court's interpretation of the Act.<sup>209</sup> Prosecutors must begin to act as guardians of the STA and

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206. *See* *United States v. Wasson*, 679 F.3d 938, 947 (7th Cir. 2012), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1581 (2013).

207. *See* *United States v. Toombs*, 574 F.3d 1262, 1271 (10th Cir. 2009).

208. *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992) (citing *United States v. Hastings*, 847 F.2d 920, 925 (1st Cir. 1988)).

209. *See, e.g.,* *United States v. Mathurin*, 690 F.3d 1236, 1242 (11th Cir. 2012) ("For its waiver argument, the government advances the novel theory that the failure to raise a pre-indictment delay objection prior to the return of the indictment constitutes a waiver of that claim." (quotation omitted)); *United States v. Ferguson*, 574 F. Supp. 2d 111, 114–15 (D.D.C. 2008) (noting that government argued for waiver of STA rights and failed to provide evidence for why it needed an ends-of-justice continuance); *United States v. Jarzembowski*, No. 07-122, 2007 WL 2407275, at \*3 n.1 (W.D. Pa. Aug. 20, 2007) ("The court is aware that the government has in other cases taken the route of seeking to have a Magistrate Judge enter a *nunc pro tunc* order excluding time in the ends of justice in an attempt to cure Speedy Trial Act violations resulting from similar waivers to those filed in this case. The government should be advised that should the court be presented with the issue in an appropriate case in the future, it will be constrained to find such *nunc pro tunc* orders as

conduct themselves in accordance with their unique obligation to protect the public interest.

Prosecutors can protect the public interest primarily by ensuring that the STA is followed. Specifically, prosecutors should: 1) limit the number of pretrial continuances they request; 2) argue for courts to seriously evaluate any continuance request made by defense counsel; and 3) ask courts to place their ends-of-justice findings on the record, so that appellate courts possess an adequate record to review in deciding whether the public interest was best served by the trial court granting a continuance. By following the procedures Congress intended, prosecutors can reduce pretrial delays, thus protecting the public interest entrusted to their office.

It is safe to say that many of the deficiencies in STA application lay at the feet of the defense. Defense attorneys should start by familiarizing themselves with the STA, for it should not be the case that defense attorneys continue to file waivers of STA rights seven years after the Court unanimously declared that the STA is unwaivable.<sup>210</sup>

Defense attorneys also need to understand that delays can negatively impact their client's case and potential sentence. Exculpatory witnesses and police records, for example, can be lost through the passage of time.<sup>211</sup> In addition, when defense lawyers create delays between the time the offense occurred and the time the defendant is sentenced, criminal defendants will sometimes face a longer sentence than they would have otherwise faced without the delays.<sup>212</sup> This result occurs when the U.S. Sentencing Commission occasionally amends the U.S. Sentencing Guideline range for a particular offense in between a defendant's indictment and sentence.<sup>213</sup> Given these potential harmful consequences, defense counsel should file for continuances only when necessary, and in doing so, defense counsel must request that courts provide a specific end date for all continuances, lest one continuance lead to years of delays.<sup>214</sup>

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invalid as the initial waivers.”).

210. See *United States v. Qureshi*, No. 09-CR-0102-CVE, 2009 WL 3104042 (N.D. Okla. Sept. 21, 2009); *supra* Part III.

211. See *Dickey v. Florida*, 398 U.S. 31, 38 (1970).

212. See *Peugh v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 2072, 2078 (2013) (finding that a sentencing court violates the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing, rather than the Guidelines in effect at the time of the offense, to increase a defendant's guideline range).

213. See *Proposed Amendments to the Guidelines Manual*, U.S. SENTENCING COMM'N, <http://www.ussc.gov/guidelines-manual/amendments-guidelines-manual> (last visited Apr. 4, 2013).

214. It should be noted, however, that there is one instance where defense-caused delays may

In terms of advocacy the defense bar has come up short. A quick perusal of the briefs filed in some of the cases examined above shows that STA issues are treated as afterthoughts on appeal. Even when those issues are litigated with some depth, many attorneys fail to argue for a faithful application of the Act's text supported by the enormous body of legislative history that Congress produced in passing the STA. Also, many of the circuit conflicts involving the STA have not been—but should be—appealed to the U.S. Supreme Court for resolution, because that Court, unlike the lower courts, has staunchly interpreted the Act according to its text and purposes. In sum, defense counsel has an obligation to understand the STA, to enforce clients' rights under the STA at all levels of the judiciary, and not to delay trial for convenience reasons unrelated—and possibly detrimental—to the client's best interests.

### C. *District Courts*

District courts can comply with the Act's requirements without exerting a significant amount of extra effort. First, when deciding whether to grant a continuance, courts need to inquire into the reasons the continuance is being requested. If district courts start conducting a more searching review of continuance motions, that approach would require the parties to provide more “extensive and specific information about the need for a continuance,”<sup>215</sup> which could inhibit routine filings based on questionable motives. Courts, moreover, should treat ends-of-justice continuances as the exception, not the norm.

Second, in determining the need for delay, a district court must give significant weight to the public's interest in a speedy trial, which is generally served by strict adherence to the STA's requirements.<sup>216</sup> That strict adherence requires a court to place its reasons for granting an ends-of-justice continuance on the record. And this procedure need not consume the court's time—the court can create a record in a few sentences at a continuance hearing, so long as it is clear that the court considered the factors contained in the STA. Or, if the court is so inclined, it can provide a written record explaining why it granted an ends-of-justice continuance.

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work to benefit the defendant: when the defendant is released on bond and has a chance to exhibit post-conviction rehabilitation prior to sentencing.

215. *Qureshi*, 2009 WL 3104042, at \*1 (rejecting continuance due to defense counsel scheduling conflict).

216. *See* *United States v. Toombs*, 547 F.3d 1262, 1273 (10th Cir. 2009).

One district court in particular has exemplified strict adherence to the STA. In granting or denying a motion for an ends-of-justice continuance, District Judge Claire V. Eagan of the Northern District of Oklahoma provides a written record of her decision-making. In one case, Judge Eagan concluded that delays in discovery and the need to locate relevant defense witnesses justified a continuance.<sup>217</sup> In another case, Judge Eagan found that requiring defendant to stand trial for speedy trial “would deny him the opportunity to prepare for trial and could impair his ability to assist in his own defense due to his physical condition.”<sup>218</sup> Judge Eagan, therefore, granted a “limited ends of justice continuance . . . necessary to ensure that defendant is physically capable of standing trial and assisting in his defense.”<sup>219</sup> But in a third case, Judge Eagan found defense counsel’s need for a continuance wanting, in light of the significant public interest implicated by speedy trials.<sup>220</sup> While such a detailed record is not necessary in every case, Judge Eagan’s approach in these cases is surely the best practice for complying with the STA’s commands.<sup>221</sup>

Third, district court judges should provide their ends-of-justice findings contemporaneously with the granting of continuances. A court, for example, could provide a few sentences explaining the reasons for granting the continuance in its minute orders. By employing this procedure, courts can ensure that ends-of-justice findings are not made after the fact, preventing another trial court from having to infer findings in circumstances where the case has changed robes. Courts also would be well advised to place these procedures into their local rules to ensure consistent compliance within the district.<sup>222</sup>

#### D. Circuit Courts

Circuit courts simply need to better police trial courts by reversing

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217. *United States v. Carvajal-Mora*, No. 08-CR-0059-CVE, 2008 WL 2079454, at \*1 (N.D. Okla. May 15, 2008).

218. *United States v. Gregory*, No. 08-CR-0125-CVE, 2008 WL 4601573, at \*2 (N.D. Okla. Oct. 16, 2008).

219. *Id.*

220. *Qureshi*, 2009 WL 3104042, at \*2.

221. It comes as no surprise that judges located in the Tenth Circuit take a serious approach to enforcing the Act as written. The Tenth Circuit has strictly interpreted the Act and, unlike other circuits, has not added judicial gloss to the statute. *See, e.g.*, *United States v. Larson*, 627 F.3d 1198, 1206–07 (10th Cir. 2010); *Toombs*, 574 F.3d at 1271.

222. *See* Greg Ostfeld, *Speedy Justice and Timeless Delays: The Validity of Open-Ended “Ends-of-Justice” Continuances Under the Speedy Trial Act*, 64 U. CHI. L. REV. 1037, 1064 (1997).

convictions—no matter how painful—that fail to follow the procedures outlined in the Act. The Ninth and Tenth Circuits have done an admirable job of interpreting the Act as written.<sup>223</sup> And it is important to note that those courts have not witnessed their federal districts drown in STA procedure. Rather, district court judges, such as Judge Eagan, have faithfully followed the Act as written even where to do so requires additional written orders.<sup>224</sup>

Many of the circuits have open questions regarding STA issues such as judicial estoppel, IAC, and whether explicit ends-of-justice findings are required. The Supreme Court has indicated that lower courts must be vigilant in enforcing the statute as intended, regardless of whether faithful application leads to reversal of convictions. And, as this article argues, courts can apply the Act as Congress intended without needlessly burdening federal district courts and sacrificing judicial economy.

#### *E. The U.S. Supreme Court*

The Supreme Court needs to reign in circuit courts that either disregard the Act's text and purposes or impermissibly add to the Act's text. The Court might even need to hand down a strongly worded opinion, given that lower courts continue to disregard the Court's decisions interpreting the Act.

In particular, the Court should address the ends-of-justice provision because the circuits are divided on what constitutes proper on-the-record reasons and on the issue of open-ended continuances.<sup>225</sup> These two circuit conflicts would seem to merit the Court's attention because the ends-of-justice provision is one of the most frequently used STA provisions and because circuit conflicts affecting a large number of cases are generally considered important federal questions for the Court to review.<sup>226</sup> And without review, there is a real danger that lower courts will continue to ignore the procedural protections contained in § 3161(h)(7)(A)—what Congress labeled the “heart” of the STA.<sup>227</sup>

The Court also could resolve some STA issues through the device of

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223. *Larson*, 627 F.3d at 1206–07; *United States v. Lewis*, 611 F.3d 1172, 1176 n.2 (9th Cir. 2010); *Toombs*, 574 F.3d at 1271; *United States v. Lloyd*, 125 F.3d 1263, 1268–69 (9th Cir. 1997).

224. *United States v. Carvajal-Mora*, No. 08-CR-0059-CVE, 2008 WL 2079454, at \*1 n.1 (N.D. Okla. May 15, 2008); *Gregory*, 2008 WL 4601573.

225. See Ostfeld, *supra* note 222, at 1038 n.5; J. Andrew Read, *Open-Ended Continuances: An End Run Around The Speedy Trial Act*, 5 GEO. MASON L. REV. 733, 736–37 (1997).

226. See SUP. CT. R. 10.

227. S. REP. NO. 93-1021, at 39 (1974).

summary reversal rather than consuming the Court's precious plenary review resources.<sup>228</sup> For example, prime candidates for summary reversal are the Sixth Circuit's decisions holding that in order to prevail on the basis of an STA violation "a defendant must show 'actual prejudice.'"<sup>229</sup> Such a holding runs headfirst into the *Zedner* Court's view that harmless-error review is inapplicable with regard to a district court's failure to make ends-of-justice on-the-record findings.<sup>230</sup> It is also contrary to the STA's text, which says that a trial not commencing within the seventy-day period "shall be dismissed" without the need for defendants to establish actual prejudice.<sup>231</sup>

## CONCLUSION

For the past fifteen years lower federal courts have diluted the STA's requirements, resulting in considerable delays between criminal defendants' arraignments and trials. As Congress has explicitly found, justice delayed is not only justice denied but also justice at a higher price. Such delays were once tolerated, but in enacting the STA, Congress sought to cure the disease of delayed justice.

The Act can only reduce those delays if the criminal justice system as a whole begins to staunchly follow the Act's provisions. To begin with, the Academy must evaluate delays between indictment and trial, and then bring it to the attention of both federal courts and practitioners. Prosecutors must move to uphold the STA, even where courts are willing to forego its procedures. Defense lawyers, in turn, must only request delays where such a move complies with the Act and benefits their clients. Finally, federal courts must faithfully follow and interpret the Act according to what Congress intended, even where it would require the court to reverse a conviction and even where it would force courts to make additional findings. If these actors within the criminal justice system are dedicated to upholding the STA as written, criminal defendants, and the public alike, will benefit.

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228. Kevin Russell, *An Increase in the Court's Summary Docket*, SCOTUSBLOG, (Feb. 16, 2010, 11:03 AM), <http://www.scotusblog.com/2010/02/an-increase-in-the-court's-summary-docket/> ("Summary reversals tend to be directed at correcting an error in a particular case, rather than resolving circuit conflicts or establishing general principles of law, which is what the Supreme Court spends the vast majority of its time doing in its typical argued cases.").

229. *United States v. Stewart*, 628 F.3d 246, 254 (6th Cir. 2010) (citing and quoting *United States v. Gardner*, 488 F.3d 700, 718 (6th Cir. 2007)).

230. *Zedner v. United States*, 547 U.S. 489 (2006).

231. 18 U.S.C. § 3162(a)(2) (2012).