No.

In the

Supreme Court of the United States

SCOTT D. GEISE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni Jr.*
Andrew B. Greenlee
Paetra T. Brownlee
Michael M. Brownlee
Cameron W. Eubanks
BROWNSTONE, P.A.
400 North New York Avenue
Suite 215
Winter Park, Florida 32789
(407) 388-1900
**Counsel of Record*

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QUESTIONS PRESENTED

1. Does the *Teague* test for retroactivity on collateral review apply to 28 U.S.C. § 2255 motions?

2. Does *Bloate v. United States*, 130 S. Ct. 1345 (2010), apply retroactively on collateral review?

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PETITION FOR WRIT OF CERTIORARI

In this case, Petitioner, Scott D. Geise, respectfully petitions the Court for a writ of certiorari to review the order denying a certificate of appealability issued by the United States Court of Appeals for the Second Circuit.

JURISDICTION

The court of appeals issued the challenged order on February 9, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

DECISIONS BELOW

The Second Circuit Court of Appeals issued an order on February 9, 2012, denying Petitioner's Motion for a Certificate of Appealability and dismissing his appeal. That order is unpublished, but is reproduced in the appendix hereto ("App.") at App. 1a.

The unpublished Order and Decision of the United States District Court for the Western District of New York denying Petitioner's motion to vacate under 28 U.S.C. § 2255 and denying a certificate of appealability is available on Westlaw at 2011 WL 2912797 and is reproduced at App. 3a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence."

Title 18, Section 3161, of the United States Code (the "Speedy Trial Act") and Title 28, United States Code, Section 2255, are reproduced in the Appendix.

INTRODUCTION

Petitioner asks this Court to answer two questions of paramount importance. First, Petitioner asks the Court to resolve whether the test for retroactivity on collateral review announced in *Teague v. Lane*, 489 U.S. 288 (1989), applies to motions brought under 28 U.S.C. § 2255. Every circuit court of appeals that has considered the issue has held that it does.

Yet, in *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court called those rulings into doubt in strongly-worded dicta. *Danforth*, 552 U.S. 264, 279 ("the text and reasoning of Justice O'Connor's opinion [in *Teague*] also illustrate that <u>the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions</u>.") (emphasis added). Whether or not *Teague* applies to motions filed pursuant to 28

U.S.C. § 2255 directly impacts thousands of citizens in federal custody as well as the majority of circuit courts of appeals, which remain uncertain that their settled precedent is good law. *See, e.g.*, *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1190 (9th Cir. 2011) ("there is now some doubt as to whether *Teague* applies to federal-prisoner petitioners."). There can be no doubt that this issue is of critical importance.

Petitioner also asks the Court to decide the important question of whether *Bloate v. United States*, 130 S. Ct. 1345 (2010), applies retroactively on collateral review. Petitioner raised a claim of ineffective assistance of counsel under 28 U.S.C. § 2255 in the district court. His claim was based in part on counsel's failure to move for dismissal of criminal charges based on violations of the Speedy Trial Act. Under *Bloate*, charges brought against Petitioner would have been dismissed.

However, *Bloate* was decided three days after Petitioner entered a guilty plea. For Petitioner to invoke the holding in *Bloate*, this Court must answer the threshold question of whether *Bloate* applies retroactively on collateral review. This Court's precedent dictates that *Bloate*, which declared what the provision at issue meant from the time of its enactment, must be a retroactively applicable old rule.

However, every court that has considered this issue has held, relying predominantly on *Teague*, that *Bloate* does not apply retroactively on collateral

review. This Court should correct this wholesale misapplication of law and answer the important question of whether cases interpreting the language of the Speedy Trial Act are old rules under *Teague*.

STATEMENT OF THE CASE

A. Procedural History

On June 26, 2007, Scott D. Geise, a dentist, was indicted on one count of embezzlement under 18 U.S.C. § 664 and eight counts of false statements relating to health care matters under 18 U.S.C. § 1035(a)(2). The court held a scheduling conference on August 22, 2007, during which the magistrate judge set deadlines for the submission of pretrial motions and responses by the government. The magistrate judge excluded the period required for the preparation of the pretrial motions—between August 22, 2007, and November 21, 2007—from Speedy Trial calculation under 18 U.S.C. § 3161(h)(1)(F).[1]

After the court granted another continuance under 18 U.S.C. § 3161(h)(1)(F), Dr. Geise filed his first substantive pretrial motion on December 7, 2007, and filed another omnibus pretrial motion on December 11, 2007. The court excluded a total of 107 days under 18 U.S.C. § 3161(h)(1)(F) prior to the automatic exclusion triggered by the filing of pretrial

[1] 18 U.S.C. § 3161(h)(1)(F) has since been renumbered and is now found at 18 U.S.C. § 3161(h)(1)(D). The magistrate judge issued a Speedy Trial Order explaining the exclusion on May 12, 2009, more than one year and eight months after the exclusion.

motions. Under *Bloate v. United States*, 130 S. Ct. 1345 (2010), the 70-day Speedy Trial period expired because no specific findings were made in conjunction with this first 107-day exclusion. *See Bloate*, 130 S. Ct. at 1357.

On December 18, 2007, the Government issued a superseding indictment, which retained the original counts in the indictment and charged Dr. Geise with an additional 49 counts of false statements in violation of 18 U.S.C. § 1035(a)(2) and seven new counts of willfully filing a false tax return in violation of 26 U.S.C. § 7206(1).

On January 10, 2008, the court held another scheduling conference at which the magistrate judge once again excluded time for the preparation of pretrial motions from Speedy Trial calculations under 18 U.S.C. § 3161(h)(1)(F).[2] This second exclusion, which ran from January 10, 2008, through April 30, 2008, was not automatically excludable, and the court made no specific findings justifying the exclusion as required under *Bloate.* If the superseding indictment triggered a new 70-day period, the Speedy Trial window would have once again expired during this second 111-day exclusion.

On April 30, 2008, Dr. Geise filed another pretrial motion that incorporated arguments made in his original omnibus motion and also provided

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[2] A separate Speedy Trial Order explaining the exclusion was issued on May 12, 2009. Five other retroactive Speedy Trial orders were issued that very same day, including the exclusion commencing August 22, 2007.

supplementary arguments in response to the superseding indictment. That motion stopped the Speedy Trial clock. *See* 18 U.S.C. § 3161(h)(1)(D).

Ultimately, after a series of continuances, the court commenced with the jury trial of Dr. Geise on March 3, 2010, more than two years and eight months after his initial indictment. On March 5, prior to the conclusion of the first witness's testimony, Dr. Geise entered a guilty plea on counts 3 and 63 of the superseding indictment. Three days after the entry of his plea, on March 8, 2010, this Court rendered the *Bloate* decision.

Dr. Geise, proceeding *pro se*, filed a motion to vacate his sentence under 28 U.S.C. § 2255 on April 28, 2011. Dr. Geise alleged that he had received ineffective assistance of counsel because trial counsel failed to move for dismissal of the indictments based upon violations of the Speedy Trial Act and the statute of limitations.

With respect to the Speedy Trial Act, Dr. Geise specifically pointed to two exclusions as potential violations: (1) the period commencing on August 22, 2007; and (2) the period commencing on January 10, 2008. In its response, the Government declined to address the first exclusion based on its conclusion that the addition of new charges commenced a new Speedy Trial clock. The Government conceded that the second period was not automatically excludable under *Bloate*. However, the Government argued that *Bloate* should not be applied retroactively because Dr. Geise's counsel was not ineffective under the Second

Circuit's interpretation of the law at that time.

The district court denied the motion to vacate, finding that Dr. Geise had waived his right to challenge the Speedy Trial violations by entering into a plea bargain. The district court also found that there was no violation of the Speedy Trial Act. The district court noted that the Government's response regarding the second exclusion was "somewhat puzzling." According to the court, the second period was automatically excludable under 18 U.S.C. § 3161(h)(1)(D) because Dr. Geise's omnibus motion was still pending during that period. The district court failed to address the first exclusion challenged by Dr. Geise.

In addition, the district court refused to issue a certificate of appealability, finding that the issues raised "are not the kinds of issues that a court could resolve in a different manner" and are "not debatable among jurists of reason." The Second Circuit also denied Dr. Geise's Motion for Certificate of Appealability[3] without addressing the merits of his claims.

B. Errors of the District Court

The district court erred in its analysis. First, though it acknowledged that the government asked it

[3] The Second Circuit also dismissed claims raised in a Motion for Reconsideration filed by Dr. Geise, in which he argued that (1) the magistrate judge lacked authority to preside over his arraignment; and (2) the magistrate judge violated 18 U.S.C. § 3161(a) by failing to set a trial date at the arraignment after Petitioner entered a plea of not guilty.

not to apply *Bloate* retroactively, it declined to decide this threshold issue. If the *Teague* test applies, then the district court should have addressed the threshold issue retroactivity, and it erred in failing to do so. *See Horn v. Banks*, 536 U.S. 266, 271–72 (2002).

Second, with respect to the speedy trial issues, Dr. Geise identified two violations of the Speedy Trial Act under *Bloate*. The first violation, which pertains to the original indictment, arose before the superseding indictment and before the filing of any substantive pretrial motions.

The second violation arose after the superseding indictment and before the renewal of and supplement to the original omnibus motion. Even if the district court is correct in ruling—in spite of the Government's concession—that the second exclusion was permissible under the Speedy Trial Act, the court failed to recognize that the *Bloate* decision compels the dismissal of charges in the original indictment stemming from the first violation of the Speedy Trial Act.

Petitioner submits that, if *Bloate* is retroactively applicable on collateral review, then he has a colorable claim of ineffective assistance of counsel based on the failure to move for a continuance to permit consideration of the imminent and potentially dispositive *Bloate* decision and the failure to move to withdraw the plea after the rendition of *Bloate*. *See Young v. Dretke*, 356 F. 3d 616 (5th Cir. 2004) (reversing denial of habeas

petition based on counsel's failure to move for dismissal under state speedy trial statute); ABA STANDARDS FOR CRIMINAL JUSTICE, Pleas of Guilty 14-3.2(b) (3d ed. 1999) ("Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.").

Before any decision is rendered on the issue of ineffective assistance of counsel, however, Petitioner asks this Court to answer the "threshold question" of whether *Bloate* is retroactively applicable on collateral review. *See Teague v. Lane*, 489 U.S. 288, 300 (1989); *Horn v. Banks*, 536 U.S. 266, 267 (2002).

REASONS FOR GRANTING THE WRIT

This Petition presents an opportunity for the Court to take up a critical issue left unresolved in *Danforth v. Minnesota*, 552 U.S. 264 (2008): whether the *Teague* test for retroactivity applies to motions filed under 28 U.S.C. § 2255. The Court stated unequivocally in dicta that *Teague* applied "only to federal courts considering habeas corpus petitions challenging state-court criminal convictions," *id.* at 279; however, it declined to rule on the issue presented here. *Id.* at 269 n.4.

Several circuit courts of appeals have expressed doubt as to whether their settled precedent survives *Danforth*. *See Reina-Rodriguez v. United States*, 655 F.3d 1182, 1190 (9th Cir. 2011) ("there is now some doubt as to whether *Teague* applies to federal-prisoner petitioners"); *United States v. Chang Hong*, 671 F.3d 1147, 1150 n.4 (10th

Cir. 2011), as amended (Sept. 1, 2011) (citing *Danforth* and noting that the Supreme Court has "never applied Teague to a § 2255 petition"); *see also Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009) ("It is not entirely clear that *Teague*'s framework is appropriate for federal habeas petitions under 18 U.S.C. § 2255 . . .").

By granting this petition, this Court can resolve this uncertainty and provide the lower courts with clarity on this important issue.

If this Court decides that *Teague* applies to 18 U.S.C. § 2255 motions, then it can also provide lower tribunals with guidance regarding the second question presented in this petition: whether *Bloate* applies retroactively on collateral review.

Under *Teague* and its progeny, whether or not a Supreme Court decision applies on collateral review depends upon whether the decision is an "old rule" or a "new rule." *Teague*, 489 U.S. at 310. "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

However, the *Teague* test is "inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." *Bousley v. United States*, 523 U.S. 614, 620 (1998). The *Bousley* Court held that new substantive rules that define the reach of criminal statutes are

retroactively applicable, while new procedural rules are subject to the *Teague* test. *See id.* at 620–21.

This petition poses a question left unresolved by the *Bousley* Court: Is a decision that interprets a statute, which governs criminal procedure and is enacted to protect a constitutional guarantee, an old rule under *Teague* and thus retroactively applicable?

On the one hand, as recognized by Justice Stevens in *Bousley*, a Supreme Court decision construing a statute should not be considered a "new rule of law" because the ruling "merely explained what the statute had meant ever since [it] was enacted." *Bousley*, 523 U.S. at 624 (Stevens, J., concurring in part and dissenting in part).

If one accepts this premise, *Bloate* cannot be considered a new rule. There is nothing "new" about the constitutional right to a speedy trial or the Speedy Trial Act. Moreover, the interpretation adopted by the *Bloate* Court was mandated all along by the language of the statute, which some circuit courts of appeals correctly interpreted from the outset. Thus, logic compels the conclusion that, if *Teague* is the test, then *Bloate* is retroactively applicable as an old rule, regardless of whether it is procedural or substantive in nature.

On the other hand, *Bousley* and subsequent decisions suggest that procedural rules are not retroactively applicable, unless they fall within the two exceptions articulated in post-*Teague* decisions. Petitioner concedes that *Bloate*, which interprets the

Speedy Trial Act, is a likely procedural decision. Nevertheless, because it cannot logically be considered a new rule and because it protects a substantive right guaranteed under the Sixth Amendment, Petitioner submits that it should be retroactively applicable.

This Court should take the opportunity to resolve the pressing question of whether *Teague* applies to motions brought under 18 U.S.C. § 2255. If it finds *Teague* applies, the Court should also resolve the question of whether *Bloate* applies retroactively to cases on collateral review. Doing so would allow the Court to fill the interstices of its test for collateral retroactivity following the *Bousley* decision and determine whether, as Petitioner contends, a Supreme Court decision interpreting the Speedy Trial Act is an old rule under *Teague*.

I. DECIDING WHETHER *TEAGUE* APPLIES TO MOTIONS BROUGHT UNDER 28 U.S.C. § 2255 IS A MATTER OF OVERRIDING IMPORTANCE.

Every circuit court of appeals that has considered the issue has concluded that *Teague v. Lane* applies to motions brought under 18 U.S.C. § 2255. *See Sepulveda v. United States*, 330 F.3d 55, 57 (1st Cir. 2003); *Gilberti v. United States*, 917 F.2d 92, 94 (2d Cir. 1990); *United States v. Swinton*, 333 F.3d 481, 487 (3d Cir. 2003); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998); *United States v. Brown*, 305 F.3d 304, 307 (5th Cir. 2002); *Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th

Cir. 2009); *Van Daalwyk v. United States*, 21 F.3d 179, 181 (7th Cir. 1994); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001);*United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002); *Daniels v. United States*, 254 F.3d 1180, 1193 (10th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245, 1255 (11th Cir. 2001); *see also Ufele v. United States*, No. 86–143 (RCL), 2011 WL 5830608, at *2 n.2 (D.D.C. 2011) (noting that the D.C. Circuit has yet to rule on the issue).

This Court has yet to decide whether *Teague* applies to motions brought under 18 U.S.C. § 2255. *See Danforth*, 552 U.S. at 269 n.4 (declining to decide "whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255"); *see also* J. Thomas Sullivan, *Danforth, Retroactivity, and Federalism*, 61 OKLA. L. REV. 425, 463 (2008) (noting the issue remains unresolved).

However, in *Danforth*, the Court suggested that *Teague* might not apply to cases brought under 28 U.S.C. § 2255. Regarding *Teague*, the Court noted that the "text and reasoning of Justice O'Connor's opinion also illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions." *Danforth*, 552 U.S. at 279. The Court further stated that Justice O'Connor justified the "general rule of nonretroactivity in part by reference to comity and respect for the finality of state convictions. Federalism and comity concerns are unique to *federal* habeas review of state convictions." *Id.* (emphasis in original).

It must be noted, of course, that the foregoing discussion in *Danforth* arose in the context of the Court's explanation of why states are not constrained by *Teague* and may give broader effect to new rules of criminal procedure than that afforded by *Teague*. The Court also made clear that it expressed no opinion on the applicability of *Teague* to motions under 28 U.S.C. § 2255. In addition, the Court recognized that "lower federal courts have also applied the *Teague* rule to motions to vacate, set aside, or correct a federal sentence pursuant to 28 U.S.C. § 2255" and that "[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of § 2255 motions." *Id*. at 281 n.16.

Nevertheless, several circuit courts of appeals have read *Danforth* to cast doubt on what they believed to be firmly-settled precedent. For instance, in *Reina-Rodriguez v. United States*, 655 F.3d 1182 (9th Cir. 2011), the Ninth Circuit opined that in the wake of *Danforth* "there is now some doubt as to whether *Teague* applies to federal-prisoner petitioners." *Reina-Rodriguez*, 655 F.3d at 1190 (citing *Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009)). The court, echoing the logic of *Danforth*, suggested that the absence of concerns regarding federalism and comity in § 2255 proceedings might obviate the need for application of *Teague*. However, the Ninth Circuit declined to reach the issue of whether its settled precedent "requires re-examination in light of *Danforth*'s construction of *Teague*." *Id*.

In *Duncan v. United States*, 552 F.3d 442 (6th Cir. 2009), the Sixth Circuit similarly remarked that it "is not entirely clear that *Teague*'s framework is appropriate for federal habeas petitions under 18 U.S.C. § 2255 because many of the comity and federalism concerns animating *Teague* are lacking." *Duncan*, 552 F.3d at 444 n.2 (citing *Valentine v. United States,* 488 F.3d 325, 341 (6th Cir. 2007) (Martin, J., dissenting)). As in *Reina-Rodriguez*, though, the Sixth Circuit declined to reach the issue in light of its binding precedent. *Id*.

It is clear from these opinions that a circuit court of appeals might read *Danforth* to require reconsideration of established authority. This Court should grant this petition, thereby heading off any such upheaval and settling the issue once and for all.

II. LOWER COURTS NEED GUIDANCE ON THE RETROACTIVE APPLICABILITY OF *BLOATE* ON COLLATERAL REVIEW.

Courts across the country are adjudicating collateral challenges to final convictions based on claims of Speedy Trial violations under *Bloate*. The courts that have considered the question have universally concluded that *Bloate* is not retroactively applicable on collateral review. *See Owens v. Jett*, No. 10–CV–4316 (PJS/TNL), 2011 WL 4860168, Slip Copy (D. Minn. Oct. 13, 2011); *Torres-Montalvo v. Keith*, No. 2:11–CV–00161, 2012 WL 90128, Slip Copy (S.D. Tex. Jan. 11, 2012); *Felder v. United States*, No. 4:10–70188–TLW, 2011 WL 5320991,

Slip Copy (D.S.C. Nov. 3, 2011); *Miner v. Roy*, No. C–11–039, 2011 WL 5416311, Slip Copy (S.D. Tex. Nov. 8, 2011); *see also Hall v. Wilson*, No. 6:10-CV-00188-KSF, 2011 WL 676935, Slip Copy (E.D. Ky. Feb. 16, 2011) (refusing to apply *Bloate* retroactively on collateral review).

These cases are wrongly decided, not only in their outcome, but in their application of the analysis governing the decisions.

Assuming *Teague* is the test, the first substantive step in the collateral retroactivity analysis is to determine whether a rule is an old rule or a new one. *See Yates v. Aiken,* 484 U.S. 211, 216–17 (1988). A decision is considered a new rule "when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. Put differently, new rules are rules that are not "*dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis in original). An "old rule" is conversely defined as any decision compelled by prior precedent. *See, e.g., Yates v. Aiken,* 484 U.S. at 216–17 (1988). It is well established that when a rule is an old rule it must be applied retroactively on collateral review. *Id.*

All of the courts facing collateral challenges based upon *Bloate* have skipped the step of determining whether the decision is a new rule. Instead, the courts uniformly proceed from the premise that the *Bloate* decision is a new rule of criminal procedure. *See* cases cited *supra* at 16–17.

This premise is faulty. *Bloate* is different from the vast majority of the cases considered in this Court's collateral retroactivity jurisprudence because it did not announce a constitutional rule of criminal procedure. It declared the meaning of a pre-existing *statute* governing criminal procedure. *Bloate*, 130 S. Ct. at 1349.

When this Court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). If this is true, it follows that a case of statutory construction is an old rule. Such a case cannot be said to break new ground. Congress broke that ground upon the enactment of the statute. Any obligation imposed on the government arose on the date Congress passed the law, not on the date of a decision by this Court. Any such decision, moreover, was dictated by the language of the statute upon its inception, not upon the issuance of a decision construing that language.

Under this logic, *Bloate* is an old rule. The *Bloate* decision resolved a "narrow question" of statutory interpretation under the Speedy Trial Act. *Bloate*, 130 S. Ct. at 1349. There is no suggestion in the opinion that it broke any new ground, imposed some new obligation on the government or otherwise announced any new rule of law not already dictated by the plain language of the statute. It simply set forth the authoritative reading of a subsection of the statute.

That certain circuit courts of appeals, including the Second Circuit, had reached contrary conclusions in interpreting the statute has no bearing on whether the case announced a new rule of law. *See Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part). If the divergent decisions of appellate courts were decisive, then *Bloate* could be considered an old rule in one jurisdiction and a new rule in another.

It would be odd if Dr. Geise's collateral attack could gain purchase in courts of the Fourth Circuit, which correctly interpreted the statute all along, but not in those of the Second Circuit, where the law was misapplied. This would permit some lucky prisoners in certain locations to avail themselves of the proper interpretation of a statute on collateral review, while depriving other similarly situated prisoners of relief. Such anomalous results should not be tolerated.

If, as logic and precedent dictate, *Bloate* is an old rule, then each court that has considered the issue on collateral review has decided it incorrectly. This Court should grant this petition for writ of certiorari to correct the wholesale misapplication of the *Teague* test for collateral retroactivity.

CONCLUSION

For the reasons described herein, the Petitioner respectfully requests that this Court grant his petition for a writ of certiorari, and review the proceedings below.

Respectfully Submitted on this 9th day of May, 2012.

____
Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
400 N. NEW YORK AVE.
SUITE 215
WINTER PARK, FLORIDA
32789
(800) 215-1839

APPENDIX

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APPENDIX A

W.D.N.Y.
11-cv-362
Arcara, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

No. 11-3693-pr

[Filed February 9, 2012]

Scott D. Geise,	)
	)
Movant-Appellant,	)
	)
v.	)
	)
United States of America,	)
	)
Respondent-Appellee	)
	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of February, two thousand twelve,

Present:

Robert A. Katzmann,
Susan L. Carney,
Circuit Judges,
Jane A. Restani,
U.S. Judge of International Trade.[*]

Appellant, *pro se*, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Insofar as Appellant challenges the denial of his Fed. R. Civ. P. 60(b) motion, his motion is DENIED and the appeal is DISMISSED because Appellant has failed to show that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the Rule 60(b) motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack,* 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[stamp]

[*] Judge Jane A. Restani, of the United States Court of International Trade, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

11-CV-362A
07-CR-145A

[Filed July 18, 2011]

SCOTT D. GEISE,	)
	)
Petitioner,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

DECISION AND ORDER

I. INTRODUCTION

Pending before the Court is a motion by petitioner Scott Geise to vacate his sentence pursuant to 28 U.S.C. § 2255. In support of his motion, petitioner submits two ways in which he received ineffective assistance of counsel in violation of his Sixth Amendment rights. First, petitioner argues that his trial counsel failed to challenge

Count One of the superseding indictment as untimely. Second, petitioner argues that his trial counsel failed to take advantage of alleged violations of the Speedy Trial Act. Respondent counters that petitioner voluntarily stopped the trial that had begun, and then knowingly and voluntarily entered a plea agreement that waived his right to collateral attack on any sentence falling within the advisory guidelines range. In the alternative, respondent contends that the two counts that formed the factual basis of the plea agreement were timely, and that none of the exclusions of speedy trial time were improper.

The Court has deemed the motion submitted on papers pursuant to Rule 78(b) of the Federal Rules of Civil Procedure. For the reasons below, the Court denies the motion.

II. BACKGROUND

This case concerned allegations that petitioner, a dentist who practiced in Newfane, New York, billed insurance companies for services that he did not perform and hid the resulting income from the Internal Revenue Service. Respondent filed the original indictment on June 26, 2007. The original indictment charged petitioner with one count of embezzlement from an employee welfare benefit plan, in violation of 18 U.S.C. § 664; and eight counts of false statements relating to health care matters, in violation of 18 U.S.C. § 1035(a)(2). The original indictment came several months after petitioner, his trial counsel, and respondent all signed a written agreement dated December 6, 2006 concerning the

possibility of a defense on limitations grounds. (*See* Dkt. No. 101-1.) In the agreement, petitioner agreed to waive any limitations defenses for a one-year period running from June 30, 2006, in exchange for continued discussions about a possible pre-indictment disposition. The agreement stated that during such discussions, petitioner would remain "fully cognizant that such a settlement is not a certainty, nor is it a condition of the statute of limitations waiver previously mentioned." (*Id.* at 1.)

Respondent subsequently replaced the original indictment with a superseding indictment that it filed on December 18, 2007. Count One, alleging embezzlement in violation of 18 U.S.C. § 664, did not change. The eight counts from the original indictment alleging false statements in violation of 18 U.S.C. § 1035(a)(2) also did not change, though they were renumbered. As for changes in the superseding indictment, respondent added 49 more counts of false statements in violation of 18 U.S.C. § 1035(a)(2). Each of these 57 counts constituted one alleged instance of a claim that petitioner submitted to an insurer for a service that he did not perform. The superseding indictment also contained seven new counts of willfully filing a false tax return in violation of 26 U.S.C. § 7206(1).

From the filing of the original indictment, petitioner's case proceeded through a course of pretrial proceedings and motion practice, with corresponding exclusions of time under 18 U.S.C. § 3161. One part of this course warrants specific mention because it forms part of the basis for petitioner's motion. On December 11, 2007,

petitioner filed an amended omnibus motion (Dkt. No. 11) that included a motion to sever Count One of the original indictment from other counts and a motion for a bill of particulars for all counts, including Count One. After respondent filed the superseding indictment, petitioner supplemented his pending omnibus motion (Dkt. No. 15) to account for the new indictment. Magistrate Judge Hugh B. Scott issued an order on July 8, 2008 (Dkt. No. 21) granting in part and denying in part the relief requested in the original and supplemental omnibus motions. While these motions were pending, Magistrate Judge Scott[1] excluded time pursuant to 18 U.S.C. § 3161(h)(1)(F).[2] On the issue of severance and other issues relating directly to trial, Magistrate Judge Scott deferred to this Court. (See Dkt. No. 21 at 2 n.3 (noting that these issues would be "better addressed by the District Court Judge presiding over the trial in this case").) This Court granted the motion for severance on January 20, 2009. (Dkt. No. 33.)

The Court presided over jury selection on March 2, 2010 and began petitioner's trial on March 3, 2010. On March 5, 2010, before respondent's first witness had finished testifying, petitioner decided to

---

[1] A small portion of time that passed while the motions were pending, covering December 28, 2007 to January 10, 2008, had been excluded by Magistrate Judge Jeremiah J. McCarthy in the interests of justice pursuant to 18 U.S.C. § 3161(h)(8)(A), upon arraignment on the superseding indictment.

[2] Section 3161(h)(1)(F) has since been renumbered to Section 3161(h)(1)(D). *See* Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291, 4294 (2008).

stop the trial and to enter a plea agreement. In paragraph 1 of the plea agreement, petitioner agreed to plead guilty to Count Three and Count 63 of the superseding indictment. In paragraph 15, the parties agreed that petitioner's criminal history category would be I and that his total offense level would be 14. The parties agreed further that the advisory sentencing range would be a term of imprisonment of 15 to 21 months, a fine of $4,000 to $40,000, and a period of supervised release of 2 to 3 years. In paragraph 22, petitioner agreed to waive his right to appeal and collaterally attack any component of a sentence that the Court imposed that fell within or below the advisory sentencing range. In paragraph 23, petitioner agreed that his waiver of his rights to a collateral attack included a waiver of "the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence." (Dkt. No. 85 at 15.) In the last paragraph, above his signature, petitioner agreed that he understood all of the consequences of his guilty plea, that he agreed fully with the contents of the agreement, and that he was signing the agreement voluntarily and of his own free will. During the plea colloquy on March 5, 2010, the Court had respondent review the paragraphs of the plea agreement noted above and asked petitioner whether he had any questions about the agreement. Petitioner said no. (Dkt. No. 97 at 40.) Upon further questioning by the Court, petitioner indicated that no one was forcing him to plead guilty, that no one threatened him in any way, and that he understood that he was waiving his right to appeal the

conviction. (*See id.* at 42–43.) Before formally entering his plea of guilty, petitioner stated one more time that he understood all the possible consequences of his plea and that he had no questions. (*Id.* at 45.)

The Court sentenced petitioner on July 19, 2010. The Court sentenced petitioner to a term of imprisonment of 15 months on Count Three and of 15 months on Count 63, with both terms to run concurrently; a term of supervised release of three years on Count Three and of one year on Count 63, with both terms to run concurrently; and restitution in the amount of $127,804.82 with no fine. Petitioner's sentence thus fell within the range that the parties had contemplated in the plea agreement.

On April 28, 2011, petitioner filed the pending motion to vacate. Petitioner raises two grounds for relief based on ineffective assistance of counsel. First, petitioner argues that Count One of the original and superseding indictments was untimely. According to petitioner, the factual basis for Count One ended by January 9, 2002, while he was not originally indicted until June 26, 2007. Because more than five years passed between the events underlying Count One and his original indictment, petitioner believes that his trial counsel should have moved to dismiss Count One on limitations grounds and then moved to dismiss the rest of the superseding indictment as too dependent on Count One. Second, petitioner argues in essence that every exclusion of speedy trial time that occurred in his case violated the Speedy Trial Act because they

caused his trial to begin far more than 70 days after his initial indictment.

Respondent counters that the waiver provisions of the plea agreement bar petitioner's motion because he was sentenced within the advisory guidelines range. Alternatively, respondent considers the argument about limitations periods groundless because petitioner knowingly and voluntarily signed a one-year waiver of that defense and because the original indictment was filed before the waiver expired. Respondent's response to the argument about speedy trial time is somewhat puzzling. Respondent contends that all but one exclusion of speedy trial time occurred after a proper finding that the exclusion would serve the interests of justice. As for the time between January 10, 2008 and April 30, 2008, however, respondent apparently overlooks the omnibus motion that was pending as of December 11, 2007 and concedes that any time excluded for the preparation of the supplemental omnibus motion was not accompanied by any findings in the interest of justice. Respondent then advances two reasons why petitioner's argument should be rejected anyway. First, respondent contends that the exclusion of time for motion preparation without a finding in the interest of justice occurred while such an exclusion was still proper under *U.S. v. Oberoi*, 547 F.3d 436 (2d Cir. 2008), *abrogated by Bloate v. U.S.*, ___ U.S. ___, 130 S. Ct. 1345 (2010). In this context, respondent essentially is asking the Court to uphold the provision of the plea agreement concerning future changes in the law and not to make *Bloate* retroactive. Second, respondent argues that any

speedy trial error that occurred between January 10, 2008 and April 30, 2008 would not have prejudiced petitioner because the worst penalty for such an error would be dismissal without prejudice.

III. DISCUSSION

A. *Section 2255 and* Pro Se *Papers Generally*

To prevail on his motion, petitioner must demonstrate that the "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). For the specific issue of ineffective assistance of counsel, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As for petitioner's papers, "the Court is mindful that Plaintiff[] [is] proceeding *pro se*, and that [his]

submissions should thus be held to less stringent standards than formal pleadings drafted by lawyers. Moreover, when plaintiffs bring a case *pro se*, the Court must construe their pleadings liberally and should interpret them to raise the strongest arguments that they suggest. Still, *pro se* status does not exempt a party from compliance with relevant rules of procedural and substantive law." *Rotblut v. Ben Hur Moving & Storage, Inc.*, 585 F. Supp. 2d 557, 559 (S.D.N.Y. 2008) (internal quotation marks and citations omitted).

The Court will assess the pending motion in this context.

B. *Waiver*

"In no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." *U.S. v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993). Here, petitioner entered two different agreements from which he benefitted and that constitute two different types of waiver. Petitioner signed respondent's December 6, 2006 letter explicitly exchanging a statute of limitations defense for one year for a continued discussion of a possible plea resolution. Although the case did not end in a plea at that time, petitioner did have the chance to explore that possibility. All of the circumstances underlying petitioner's argument about the failure to raise the

limitations defense occurred during the one-year period set forth in this agreement. At no time during the pretrial proceedings, the trial that had begun, the plea colloquy, or the sentencing proceedings did petitioner ever suggest anything improper about this agreement. *Cf. Javier v. U.S.*, 590 F. Supp. 2d 560, 561 (S.D.N.Y. 2008) ("[Defendant] stated under oath at his plea hearing that he understood that as part of the plea agreement, he was giving up any defense based on the statute of limitations. Counsel did not raise a statute of limitations defense because [defendant] himself waived that defense. Counsel's conduct was therefore entirely reasonable, thus warranting denial of [defendant's] claim of ineffective assistance of counsel on this ground.") (citation omitted). In this context, the Court finds no reason to disturb the terms of the December 6, 2006 agreement almost 5 years after the parties entered it. The Court also finds no reason to conclude that trial counsel should have taken any action that would have constituted reneging on the agreement. *Cf. U.S. v. Arena*, 180 F.3d 380, 396 (2d Cir. 1999) ("Failure to make a meritless argument does not amount to ineffective assistance.") (citation omitted), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 n.8 (2003).

The plea agreement that petitioner entered similarly constitutes a waiver of his argument concerning speedy trial time. As noted above and in respondent's papers, every exclusion of speedy trial time that occurred either was accompanied by a finding in the interest of justice or was automatic in light of pending motions. In particular, petitioner's

original omnibus motion was pending between January 10, 2008 and April 30, 2008, meaning that Magistrate Judge Scott properly excluded time under 18 U.S.C. § 3161(h)(1)(F) (now renumbered to 3161(h)(1)(D)). *See Henderson v. U.S.*, 476 U.S. 321, 330 (1986) ("We . . . hold that Congress intended subsection (F) [now subsection D] to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'"); *U.S. v. Douglas*, 81 F.3d 324, 327 (2d Cir. 1996) (citing *Henderson*). Since the exclusions of time were proper, anything left of petitioner's argument would amount to a complaint that trial counsel made a strategic decision not to insist on an immediate trial. *Cf., e.g., Gilmore v. U.S.*, No. 09 Civ. 1183, 2011 W L 2581774, at *5 (S.D.N.Y. June 23, 2011) ("A defense counsel's strategic decisions will not support an ineffective assistance claim, so long as they were reasonably made.") (citing *Strickland*, 466 U.S. at 689). Disagreements over strategy do not suffice to escape a plea agreement that petitioner said more than once that he was entering knowingly and voluntarily. Additionally, any argument about strategy falls well within the scope of post-conviction challenges that petitioner waived through the plea agreement.

IV. CONCLUSION

For all of the foregoing reasons, the Court denies petitioner's motion to vacate his sentence (Dkt. No. 99). The Clerk of the Court is directed to close the associated civil case, Case No. 11-CV-362.

In addition, because the issues that petitioner raised here are not the kinds of issues that a court could resolve in a different manner, and because these issues are not debatable among jurists of reason, the Court concludes that petitioner has failed to make a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), and accordingly denies a certificate of appealability.

The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and thus denies leave to appeal as a poor person. *Coppedge v. U.S.*, 369 U.S. 438 (1962).

Petitioner must file any notice of appeal with the Clerk of the Court within thirty (30) days of the entry of judgment in this action. Requests to proceed on appeal as a poor person must be filed with the United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

SO ORDERED.

s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: July 18, 2011

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

07-CR-145-A

[Filed May 12, 2009]

UNITED STATES OF AMERICA,	)
	)
v.	)
	)
SCOTT D. GEISE,	)
	)
Defendant.	)
	)

SPEEDY TRIAL ORDER
(August 22, 2007 through November 21, 2007)

On August 22, 2007, the parties appeared before the Court in order to set a motion schedule. Assistant United States Attorney Robert C. Moscati appeared on behalf of the government; the defendant appeared by his attorneys, George Muscato, Esq., Joel L. Daniels, Esq., and his personal appearance was waived.

At that time, the Court set a pretrial motion schedule in the case, with discovery due by September 21, 2007, defense motions due by October

30, 2007, a Government response by November 19, 2007 and oral argument on November 21, 2007 at 10:00 a.m. The parties agreed to the schedule with no objections.

With the consent of the defendant, the Court further excluded the time in this action from the Speedy Trial Act calculation from and including August 22, 2007, to and including November 21, 2007, as pretrial motions are pending before the Court pursuant to 18 U.S.C. §3161(h)(1)(F).

NOW, it is hereby

ORDERED, for the reasons set forth above that the scheduled oral argument on motions is hereby adjourned until November 21, 2007 at 10:00 am; and it is further

ORDERED, that the time in this action from and including August 22, 2007, to and including November 21, 2007, is properly excluded from the time within which the defendants should be brought to trial, in accordance with the Speedy Trial Act, pursuant to Title 18, United States Code Sections 3161(h)(1)(F).

The Court further finds that as of November 21, 2007, zero days of Speedy Trial Act time will have elapsed in this action and 70 days remain in the period within which defendant must be tried.

DATED: Buffalo, New York, May 12, 2009.

/s/ Hugh B. Scott
HONORABLE HUGH B. SCOTT
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

07-CR-145-A

[Filed May 12, 2009]

UNITED STATES OF AMERICA,)
v.)
SCOTT D. GEISE,)
Defendant.)

SPEEDY TRIAL ORDER
(January 10, 2008 through May 23, 2008)

On January 10, 2008, the parties appeared before the Court in order to set a revised motion schedule on the Superseding Indictment. Assistant United States Attorney Robert C. Moscati appeared on behalf of the government; the defendant appeared by his attorney, Joel L. Daniels, Esq., and his personal appearance was waived.

At that time, the court set a pretrial motion schedule with oral argument set for May 23, 2008 at

10:00 a.m. The parties had no objection to this schedule.

With the consent of the defendant, the Court further excluded the time in this action from the Speedy Trial Act calculation from and including January 10, 2008, to and including May 23, 2008, as pretrial motions are pending before the Court pursuant to 18 U.S.C. §3161(h)(1)(F).

NOW, it is hereby

ORDERED, for the reasons set forth above that the scheduled oral argument on motions is hereby adjourned until May 23, 2008 at 10:00 am; and it is further

ORDERED, that the time in this action from and including January 10, 2008, to and including May 23, 2008, is properly excluded from the time within which the defendants should be brought to trial, in accordance with the Speedy Trial Act, pursuant to Title 18, United States Code Sections 3161(h)(1)(F).

The Court further finds that as of May 23, 2008, zero days of Speedy Trial Act time will have elapsed in this action and 70 days remain in the period within which defendant must be tried.

DATED: Buffalo, New York, May 12 2009.

/s/ Hugh B. Scott
HONORABLE HUGH B. SCOTT
United States Magistrate Judge

APPENDIX E

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18 U.S.C. § 3161

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried

before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or

other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-

five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection 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.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted 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.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

APPENDIX F

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28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and

made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.