IN THE SUPREME COURT OF THE UNITED STATES

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JACOB ZEDNER, :

Petitioner :

v. : No. 05-5992

UNITED STATES. :

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Washington, D.C.

Tuesday, April 18, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

EDWARD S. ZAS, ESQ., New York, New York; on behalf of the Petitioner.

DARYL JOSEFFER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Zedner v. United States.

Mr. Zas.

ORAL ARGUMENT OF EDWARD S. ZAS

ON BEHALF OF THE PETITIONER

MR. ZAS: Mr. Chief Justice, and may it please the Court:

The Speedy Trial Act protects the public, as well as the personal interests of defendants, by mandating the prompt disposition of Federal criminal prosecutions. In this case, the Government and the district court failed to comply with the clear requirements of the act.

As relevant here, the act provides that the trial of a defendant who pleads not guilty and who is released on bail shall commence within 70 days after the indictment. The act, however, is not as inflexible as it sounds. The act permits numerous categories of delay to be excluded from the 70-day limit.

The act also provides an enforcement mechanism. If more than 70 nonexcludable days elapse between the indictment and the trial, the indictment shall be dismissed.

This case concerns two periods of delay, that each exceed the 70-day time limit, and I'd like to focus initially on the longer period of delay.

This is the delay that took place between 2000 and 2001, after a competency proceeding was taken under advisement. Just to put this delay in context, a competency hearing was held on July 10, 2000. The judge solicited post-hearing briefs. The matter was taken under advisement on August 23rd, and in our papers, we asked the judge to find Petitioner competent and to set the matter for trial as soon as possible. We noted that at that point the case was already more than 4 years old. We offered to waive a jury and proceed to a bench trial immediately.

And at that point, the case sat idle for the next 195 days. Now, the act excludes only the first 30 days of that period. That's section 3161(h)(1)(J). For reasons that have never been explained, the court sat on the proceeding.

When 7 months went by, we filed a motion.

JUSTICE GINSBURG: What about, Mr. Zas, that the court thought it was home free on the Speedy Trial Act? After all, it had gotten a waiver for all time. Isn't that why the 165 days?

MR. ZAS: That may be, Justice Ginsburg, but

-- but as of our filing after the competency proceeding, we asked for a trial as soon as possible. So putting aside whether the waiver had any validity at all, which I'll get to shortly, the waiver had no effect when we came in and asked for a trial. Otherwise, defendants would have no right to a speedy trial and --

JUSTICE BREYER: Yes, but on -- on that one, the -- the Second Circuit said that he was incompetent, and you could have excluded the time on (4) because (4) allows you to exclude time when he's incompetent. And if, in fact, the district judge is sitting there thinking he's incompetent, then the failure is simply a failure to write down his reason why it's excluded. I guess there's uncertainty here as to what reason was the district judge excluded that time, and it's a little bit hypothetical for the reason that Justice Ginsburg mentioned.

But if you were to lose on the first point, then I guess on this point, the thing to do would be to send it back and determine whether, in fact, the judge intended to exclude on the ground of competency, in which case his failure was simply a failure to note down his reason, which is not required by the act.

MR. ZAS: Well, Justice Breyer, I have

several responses for that.

The court only made a finding that Mr. Zedner was incompetent on March 21, 2001. Prior to that time, the competency issue was under advisement. It couldn't be that Mr. Zedner's incompetency, if it existed before the finding, is what prevented the court from declaring him incompetent.

JUSTICE KENNEDY: You're not quite through your answer yet, but is there also a requirement that the competency determination be made within 30 days? Or am I -- am I in error on that point?

MR. ZAS: Your Honor is -- is exactly right. Any proceeding under section 3161(h)(1)(J) is excluded but only for 30 days once it's taken under advisement.

JUSTICE BREYER: I'm sorry. My act must read differently. My act says in (4), any period of delay resulting from the fact that the defendant is mentally incompetent. It doesn't say anything about 30 days.

JUSTICE KENNEDY: But that -- but that's different, I take it, from the judge's delay in making the finding of competency.

MR. ZAS: That's right, Your Honor. Yes.

On -- Justice Breyer, on your reading, a -- a court could sit indefinitely with the competency proceeding under advisement.

JUSTICE BREYER: Yes, that's why, see, I guess on this point, we'd have to send it back because if, in fact, the judge had determined in his mind within the 30-day period that the person was incompetent or he was incompetent in fact, then that could have been his reason.

I'm not sure what to do about this point in any case, and I understand that you think he wasn't incompetent, or at least it hadn't been so found. The Second Circuit seemed to think he was incompetent because that was their basis. So I guess if he was, it's excluded, and if he wasn't, it isn't excluded. And I don't know. The Second Circuit said he was. So maybe you should have another chance to argue this before the Second Circuit.

MR. ZAS: Your Honor, I'm -- I'm just trying to envision what that remand would look like. If the Court were -- if the -- if the case were to go back to the Second Circuit and then go back to the district court for a finding that this delay resulted from Mr. Zedner's incompetency, that finding would be clearly erroneous. There is no -- there is no basis --

JUSTICE SCALIA: The delay -- the delay was not because we can't try this man because he's incompetent, and until he's rendered competent, we --

we have to stay proceedings. That wasn't the basis at all. It was just I haven't made up my mind yet.

MR. ZAS: That's right, Your Honor, and the act --

JUSTICE SCALIA: Which is what is specifically precluded by the requirement that -- that you act within 30 days, and -- and all the rest of the time, the clock is running.

MR. ZAS: That's correct, Your Honor.

JUSTICE KENNEDY: And I take it the trial -- the Speedy Trial Act doesn't say if the judge is thinking about something, it requires him to make an order.

MR. ZAS: No, Your Honor. It -- it says that the court has decide the matter within 30 days or the clock will start running.

Now, the court, in a particularly difficult or novel question, could -- could enter an order of ends of justice exclusion and exclude perhaps an additional period of time.

JUSTICE KENNEDY: Well, I was going to ask you about that. Or could he vacate submission because he wants new evidence or something? Could you vacate submission of the -- of the first competency hearing in order to take new evidence?

MR. ZAS: Absolutely, Your Honor. And that matter would -- would be back to a -- a situation in which there's examinations or hearings or argument or post-hearing brief, and -- and the judge can take as long as the judge wants there. But once the court has the matter under advisement, the court only has 30 days.

JUSTICE BREYER: So your view is that we should say that the Second Circuit's statement that the defendant could not have been tried because, at that time, he was incompetent, that we should simply say that's false, that the Second Circuit is wrong to say that.

MR. ZAS: Well, not quite, Your Honor. The question -- the question is did more than 70 nonexcludable days elapse during this period or not. Once the finding was made in March, that's when Mr. Zedner was incompetent. No further findings was necessary -- were necessary, and the time is then automatically excluded. The time prior counts toward the 70-day period whether or not he was in some metaphysical sense incompetent before then.

The question is not whether he could have been tried or not in that period. The question is did more than 70 days elapse. And if the judge had decided

this matter sooner, Mr. Zedner would have been -- received the treatment he ultimately got much sooner, and the trial would have occurred much sooner. That's the purpose of the Speedy Trial Act.

Now, the Government has abandoned the Second Circuit's holding to the effect that harmless error analysis applies to a violation of the 70-day limit. That's a wise position for the Government take -- to take, given this Court's holding in Bozeman which interpreted essentially the same language. The Court there held that where the statute says the indictment shall be dismissed, there's no room for harmless error analysis. That's the remedy that Congress chose. So in this case on the -- on the -- this period of delay we're talking about, more than 70 days elapsed, and the remedy must be dismissal.

JUSTICE KENNEDY: Now, we've been talking about the competency period. I take it the first period was one of just repeated requests for extensions. That's January '97 until May '97.

MR. ZAS: That's correct.

JUSTICE KENNEDY: And that's this -- that's the first of the two periods that's involved here.

MR. ZAS: That's correct. This was -- this was a -- an adjournment that was requested by Mr.

Zedner's first lawyer for the stated purpose of investigating whether the Onited States Bond, supposedly issued by the Ministry of Finance of USA, was genuine. The court, having already obtained a purported waiver of a speedy trial for all time, granted the continuance, but made no order of excludable delay, as it had done previously, made no --

JUSTICE KENNEDY: I don't know if it makes any difference to the case. Do you -- do you think the court could have made findings that would have been justified? I mean, it takes a while to find an expert to say that a bond is genuine when it spells United with O, but --

(Laughter.)

MR. ZAS: It could take for all time, Your Honor.

I think it would be a very close question as to whether that could survive appellate review. That may well be an abuse of discretion to find, after having let the matter -- delayed the matter already 10 months, to grant another 3 months for that purpose.

JUSTICE KENNEDY: Are there -- are there cases in which the judge's findings -- let's assume that he made the findings -- are set aside for abuse of discretion on -- on review for a violation of the

Speedy Trial Act?

MR. ZAS: That is the standard that the courts of appeals have generally applied. I can't recall a case where the court actually reversed an ends of justice finding. There may well be one based on a legal error where it was some obvious ground that -- that is not a basis for an adjournment such as --

JUSTICE GINSBURG: Who -- who could complain? Because in -- in all of these instances, it was the defendant who sought the enlarged time. In fact, even though the judge had given -- gotten this all-purpose waiver, he didn't give defense counsel as much time as defense counsel asked for to -- to investigate the genuineness of the bond.

MR. ZAS: Well, Justice Ginsburg, you're right. Certainly the Petitioner and his counsel at the time requested this adjournment. They did get the full adjournment they requested, but the judge said that that would be the last adjournment and that the matter would be set for trial then.

But whether that time is excludable or not is answered by the statute. The ends of justice provision recognizes that defendants or prosecutors and judges on their own motion would seek or grant continuances, but that's not enough under the statute. The statute is --

although it's flexible, is rigorous. The court must make a finding that the ends of justice outweigh the public's and the defendant's interest in a speedy trial.

JUSTICE SCALIA: And you think it's -- it's not harmless error if they didn't make the finding but -- but could have?

MR. ZAS: That's right, Your Honor. It's not harmless for the same reason the later period is not harmless because the statute says that if the defendant is not brought to trial within the time limits, the indictment shall be dismissed. And it makes very clear that in the absence of an ends of justice finding, the time is not excludable.

JUSTICE SOUTER: No, but isn't -- isn't the difference that in the latter period, the court took no action, and there is a mandate on the court to act? With respect to this earlier period, the court did act. Incidentally, it did exactly what the defendant wanted it to do, but it acted so that the only -- the only reason for arguing error here is, in effect, a clerical reason. He didn't say the magic words or make the magic conclusion. If, in fact, that's because he couldn't have made it, no question. You -- you got a violation of the statute. But if he could have made it

and -- and simply didn't say the magic words, you're in a very different position here from what you are in -- in the case of -- of the failure to act on the -- on the competency issue.

MR. ZAS: Justice Souter, I would -- I would not characterize this as a clerical error. Congress considered this provision the heart of -- of a scheme. This was where --

JUSTICE SOUTER: Well, let's put it this way. It's a failure to speak rather than a failure to act. In -- in the latter case, no action. In this case, action, in fact, action as more -- it's as requested. But a failure to speak contemporaneously with the action, that's different.

MR. ZAS: Well, I would disagree, again with the characterization that it's just a failure to speak. The act requires a careful weighing of the public's interest, the ends of justice, the defendant's interest. So it's not just a matter of speaking. This is --

JUSTICE SOUTER: Well, we don't -- we don't know. I mean, on the face of the record, we don't know whether he weighed or whether he didn't weigh. In the second case, we know that he didn't act, and -- and action is what he's got to -- to accomplish. But

whether he weighed or not, we don't know. He just didn't say whether he weighed.

MR. ZAS: That's right, and the court also didn't make the finding --

JUSTICE SOUTER: Right.

MR. ZAS: -- or state the reasons that the statute specifically requires. And the question for the Court is what flows from that failure. And the answer is given in the sanctions provision. It says that if more than 70 nonexcluded days elapse, the indictment shall be dismissed.

Now, that provision itself builds in flexibility to take into account exactly what Your Honor is talking about. A judge may dismiss without prejudice to re-prosecution depending on various factors, including whether it was just an oversight, a failure to recite words. So that's where --

JUSTICE SOUTER: No. I -- I --

MR. ZAS: -- that's where this -- this distinction that you're drawing can be taken into account.

JUSTICE SOUTER: But it's -- it requires -- in order for us to conclude that that's the only way it can be taken account -- into account, we -- we'd have to conclude that -- that rule 52 was, in effect,

partially repealed and made inapplicable implicitly here without any reference to it. And that's -- that kind of, let's say, implicit modification of -- of one of the rules is, as a matter of normal interpretation, disfavored.

MR. ZAS: Well, Your Honor, I think that the principle -- well-accepted principle that the more specific provision will govern over the general governs here. So the remedy provision, the sanctions provision here says that the indictment shall be dismissed whether it's 71 days that elapsed or 200 days or 5 years.

JUSTICE SOUTER: But there's always some sanction for error, and the point of the harmless error rule is to determine whether that specific sanction should be applied.

MR. ZAS: Yes, but there's not always a -- an express command from Congress as to what the remedy should be. Once Congress says the indictment shall be dismissed, there's no room for a court to say that the indictment shall not be dismissed unless there's some harm shown. So this specific provision trumps the more general provisions of rule 52(a).

JUSTICE BREYER: I'd like to know how -- how do we know that the judge didn't set forth orally his

reasons for finding that the ends of justice outweigh the interest, et cetera? Is that in the record what he actually said?

MR. ZAS: Well, you only --

JUSTICE BREYER: Because I don't know that you'd have to use the exact words, the ends of justice served. You know, you don't have to -- I'd like to read what he actually said, and where -- where is that? It's not on page 192, which is somebody's opinion. But rather, if I want to read the words, where do I look?

MR. ZAS: Your Honor, this -- the only place you will find the words here are the transcript of the status conference on January 31, 1997. That's the joint appendix beginning at page 80, and you will not find a finding regarding the ends of justice. You will not find mention of the -- the public interest or any of the other balancing factors in the act --

JUSTICE SCALIA: He didn't think he needed it. He had a perpetual waiver.

MR. ZAS: That's correct. This judge stopped complying with the act on November 8th, 1996 because the court ruled that the waiver for all time was valid. That was a -- an injudicious finding, to say the least. 5 minutes worth of legal research would have

shown that all the courts of appeals at the time had already held that the waivers were invalid.

So the court didn't do a balancing, didn't think it was doing a balancing. The court has a colloquy in which it appropriately expressed skepticism about the need for this delay, and the court does, in effect, what Congress was concerned about. It indulged defense counsel and said, well, if you don't care enough, I don't care enough. Take 3 more months. That's basically what happened.

JUSTICE SCALIA: Mr. Zas, are you going to talk about estoppel?

MR. ZAS: Yes, Your Honor. The -- the Government, for the first time, here in this Court has unveiled a new doctrine that hadn't been in the case before. It's no longer relying on either the waiver for all time or the sort of mini-waiver for the -- the January delay. But it argues that Petitioner is estopped from challenging the 90-day delay in 1997.

There are several problems with the Government's argument, but the most obvious one is that the only conduct that the Government cites to trigger the estoppel is the waiver.

JUSTICE SOUTER: Well, isn't there something more than a waiver here? I mean, waiver is a very

broad term. I mean, it would cover a situation, for example, in which the Government asked for time and the defendant said, okay, I waive. In -- in this case, there's -- there's an affirmative act on the part of the defendant. He's not merely waiving. He is affirmatively asking for action on the part of the court, and subject I guess to cutting down the period somewhat, he got what he asked for. This is something more than waiver. This is, in fact, a -- a grant of specific relief requested by him, and he now wants to turn the tables based on receiving exactly what he asked for. That's more than waiver.

MR. ZAS: Well, Your Honor, I can't disagree with what you've said, but -- but the --

JUSTICE SCALIA: Well, I can. Did he ask for a perpetual waiver? I thought the way the colloquy went, the judge said, no, you know, I can't give you a waiver unless you'll -- unless you'll make it a perpetual waiver. And then he said, okay, I'll make it a perpetual waiver. Wasn't -- wasn't the -- the initiative for the perpetual waiver from -- from the court?

MR. ZAS: That's right, Your Honor.

JUSTICE SOUTER: And hasn't my brother cleverly changed my hypothetical? Because I was --

(Laughter.)

JUSTICE SOUTER: -- I was not talking about the perpetual waiver. I was talking about the waiver for whatever number of days he actually took in -- in that case, which was what? 90 days?

MR. ZAS: Yes.

JUSTICE SOUTER: Yes.

MR. ZAS: I think -- I think there are two different waivers that --

JUSTICE SCALIA: Okay.

MR. ZAS: -- that are before the Court.

So, Justice Souter, your question is about not the waiver for all time, but the more limited action in requesting and obtaining the continuance.

Now, ordinarily without a statute like this, the defendant getting what he wants would amount to a waiver and the defendant could complain. For example, an evidentiary ruling. If -- if the defendant wants to allow -- he doesn't object to evidence coming in, that's it. He can't later argue that it should not have come in.

The problem here is that the statute -- the Congress knew that this kind of thing would happen. Defendants would want delay. Defendants would be quite happy to put off their trial for as long as they could.

JUSTICE GINSBURG: As long as they're not in jail pending trial.

MR. ZAS: That's right. That's right. If they're out in the community, Congress wanted those people to be tried. And so the ends of justice provision specifically says that a request for a continuance granted by the court is not enough to exclude time. There has to be both a finding and a statement of reasons in the record to support the finding before the time will be excluded.

Justice Breyer --

JUSTICE BREYER: Maybe you could say then that it's the Government that has the right. If it's the Government that has the right, then Government should have objected.

I mean, the problem, of course, is obvious, that it's a little hard on the district judges that people come in and both sides tell them what you have to have here is a waiver. Are you sure you won't raise this against me later? I'm positive. I swear. You mean you absolutely swear a thousand times that no matter what I do and have delay, you will never raise this as an error and it's fine? Yes. Okay? So he says, okay, fine, done. You win. Then he raises it as an error. That's rather -- called sandbagging the

judge.

And obviously, one would look to -- or I would look to ways to avoid that, but you're telling me I can't avoid it, and that's what Congress wanted and so be it. Is that right?

MR. ZAS: Well, it's -- it's partially correct, Your Honor.

JUSTICE BREYER: How is it not correct? That's what I'm --

MR. ZAS: Well, it's not correct because I would -- I would disagree with the characterization, if that's what Your Honor is doing, of -- of anything that happened here as being sandbagging.

JUSTICE BREYER: I'm not talking about here. I'm saying that in your -- if I adopt your position in this case, I would have to have the same position, I would think, in the most egregious cases. Wouldn't I? Because the only reason I'd adopt it here is because Congress wanted it no matter what.

MR. ZAS: Yes.

JUSTICE BREYER: Is that right?

MR. ZAS: Yes, that -- that is --

JUSTICE BREYER: Okay. Then you're -- then am I right in characterizing?

MR. ZAS: Well, that -- that is what the --

that is what the statute says. But Your Honor shouldn't -- shouldn't tarry too long about the consequences because if this Court holds, as we ask the Court to hold, that waivers are no good -- waivers have to be treated essentially as a request for a continuance -- this problem goes away.

JUSTICE BREYER: Maybe. I mean, judges are very busy. Not all the prosecutors get the word. It's very hard to ask district judges to raise something on their own in the face of lawyers who are telling them the opposite. So you say, oh, they'll all know. I've noticed there are a lot of opinions we write that they don't know about --

(Laughter.)

JUSTICE BREYER: -- until, say, the lawyers point them out.

MR. ZAS: Well, Your Honor, the alternative, if you go sort of the Government's route here, is to essentially perpetuate the confusion that brought us here in the first place. The Government essentially argues, well, you can't waive, but sometimes you can waive. We're not quite -- we're not going to tell you exactly when you can waive. That's going to put district judges in a -- in a worse position, in a more confused position.

JUSTICE GINSBURG: This -- this was a judge who apparently was doing this as a -- a matter of standard practice. He had a form that he whipped out. It must be a very old form. It looked like it was typed on a regular typewriter.

MR. ZAS: That -- that's right, Your Honor. This form was -- was preprinted or pretyped.

JUSTICE SCALIA: And Gothic print, right?

JUSTICE SOUTER: It could have come from my chambers.

(Laughter.)

MR. ZAS: And as we point out in the reply brief, the judge had taken a strong legal position 20 years earlier that the requirements of the act could be waived.

JUSTICE KENNEDY: I was going to ask what is the date of the Speedy Trial Act? 1975?

MR. ZAS: I think President Ford signed it on January 3rd, 1975.

JUSTICE KENNEDY: And it was widely publicized among the judiciary then.

MR. ZAS: Yes, yes. Yes, and you know, this is not a new statute. Judges are used to -- to complying with it. Prosecutors are used to doing it. Frankly, I've never seen a waiver for all time before.

It's not the kind of thing that will happen and it should never happen again.

CHIEF JUSTICE ROBERTS: Can you make an ends of justice finding for all time? Could he start at the beginning, any continuance I grant is granted after my weighing the different factors set forth in the statute and it's in the ends of justice?

MR. ZAS: I don't think so, Your Honor. In fact, there -- there is a circuit split on -- on whether you can -- whether a court can grant an open-ended continuance. I think Your -- Your Honor's ends of justice continuance would amount to a waiver or a suspension of the act.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Joseffer.

ORAL ARGUMENT OF DARYL JOSEFFER

ON BEHALF OF THE RESPONDENT

MR. JOSEFFER: Mr. Chief Justice, and may it please the Court:

On the first of the time periods, it might help if I could start by laying out three basic principles.

The first is that a defendant may not opt out of the act by waiver.

The second is that a -- a defendant is, nonetheless, precluded from challenging the grant of a continuance that he requested if the continuance satisfies the substantive ends of justice standards of the act and the defendant's waiver or other litigation conduct induced the court to commit the procedural error of not recording an ends of justice finding in the record.

And the third related point, although it's not presented here, is that the courts of appeals have recognized that if a defendant requests an ends of justice continuance and the court in a procedurally regular manner grants the ends of justice continuance, the defendant cannot later be heard to contend that there was -- the ends of justice were not really satisfied even though he had told the court that they were.

We think the reasons for those three rules stems from the reason that defendants cannot opt out of the act in the first place. Although the act does not contain an express anti-waiver or anti-estoppel provision, it does manifest an intent to bind defendants to its requirements in order to protect the public interest in a speedy trial. If a defendant could opt out of the act altogether and thereby obtain

delays that are not authorized by the act, that would thwart the public interest in a speedy trial.

JUSTICE KENNEDY: But -- but as we've indicated, the -- the judge was the one that opted out of the act by this regular practice of requiring the perpetual waiver, or whatever we call it.

MR. JOSEFFER: I guess there -- there are couple things there. One is that we are not -- we -- we are not here relying on the waiver for all time. Our point, instead, here is that when defendant requested the continuance at issue here, it was the defendant that said, Your Honor, I -- I need a continuance and I waive my rights so you should give me the continuance and then also said he needed additional preparation time.

The court then -- and this -- this is at J.A. from about page 81 to 85. The court then said, well, why do you need the time? And the court discussed with him for a while why he really needed additional preparation time, reminded counsel that, notwithstanding the waiver, this was a criminal case and criminal cases do need to be tried, and ended up balancing the defendant's desire for preparation against the need for a speedy trial by granting a much shorter continuance than requested. And that is

actually an entirely appropriate ends of justice balancing, ends of justice reasoning.

JUSTICE BREYER: It's pretty hard to read those pages as if they were anything other than what they seemed to be on their face, that he didn't worry about the Speedy Trial Act because he thought that it had been waived.

MR. JOSEFFER: I think you're absolutely right that the court was not, at that point, thinking in terms of applying the Speedy Trial Act.

JUSTICE BREYER: Well, then why isn't that the end of that, that the -- if you agree that the defendant can't waive it, well, the reason that he got the continuance is because he waived it, otherwise there would have been something else done and -- or at least might have been.

MR. JOSEFFER: Right. No. Our -- I mean, we think there are two related points. One is that a genuine opt-out of the waiver and a general opt-out of the act, an attempt to obtain time that's not excludable under the act is not permissible because that would thwart the public interest in a speedy trial.

But where the error is a purely procedural one, a failing to record findings in the record

regarding a continuance that is permitted under the substantive standards of the act, then holding the defendant to the waiver, under a theory of either waiver or estoppel -- in our view doesn't matter which --

JUSTICE GINSBURG: How can we say it's purely procedural with respect to the first time? I mean, the reason that was given is I have to -- I need this time to find out if these really peculiar looking bonds are genuine.

Now, the -- the Second Circuit said -- and I don't understand why they said this -- this is a complex case so that continuance is warranted. Was this a complex case?

MR. JOSEFFER: Complex defendants can make for complex cases.

(Laughter.)

MR. JOSEFFER: And this is, I think, the ultimate example of that.

But in addition, it's important to remember that at the end of this 90-day period that was granted, defense counsel withdrew on the ground that his client was still insisting that he present the frivolous defense that -- that the bonds were genuine. And before withdrawing and telling the court that, the --

the defense counsel had a very serious duty to his client and the court to continue to investigate what his client was saying was the defense and to continue to try to work with his client and try to come up with a plausible defense strategy. Now, it didn't work and counsel had to withdraw, but I don't think he can be faulted for trying.

JUSTICE KENNEDY: Did the Government at any point tell the -- tell the court, Your Honor, we think the act requires you to make a specific finding and we request you do that?

MR. JOSEFFER: No. The Government -- I mean, on the one hand, the Government did not seek these delays, did not encourage the waiver, did not rely on the waiver at the -- at the relevant times. However, at the time -- I mean --

JUSTICE KENNEDY: Because, I mean, you're -- you're coming in and saying, oh, well, he waived, but certainly the Government could -- could have asked the -- asked the district court to make the necessary findings.

MR. JOSEFFER: Right, and at the time of -- of this -- this was about 10 years ago now -- the Second Circuit recently held that waiver is not ordinarily appropriate, but sometimes is. And so

everyone in the bar, I mean, has been acting under some -- some confusion, we think, that -- that frankly, to some extent, persists to this day.

We think that the best way to clarify matters going forward is -- is a combination of the two things I mentioned earlier, to say, first, defendants cannot opt out of the act by waiver, to just try to discourage waivers. But to say that mistakes will happen and that when a -- a continuance -- when a court grants a specific continuance that is authorized under the substantive standards of the act, that at that point in time, the defendant's waiver or other conduct that induces a court not to make the findings prevents the defendant from trying to seize on a purely procedural violation on appeal because at that point -- remember, the -- the reason for -- for a -- a partial anti-waiver rule here is not that there's a specific anti-waiver or anti-estoppel provision in the act. It's that Congress has, on the whole, manifested an intent to protect the public interest in a speedy trial. But if the time is excludable under the substantive standards of the act, a purely procedural error does not diminish the public's interest in a speedy trial because the --

JUSTICE SCALIA: What -- what are you hypothesizing? That the court actually made this

finding in its mind but just didn't express it? Or are you hypothesizing that the court could have made it but didn't make it, never even went through the mental process?

MR. JOSEFFER: We think that, legally speaking, all that matters is that the court could have, and that once --

JUSTICE SCALIA: Could have made it. So -- so we're going to -- why can't life be simple? We're going to have to have trials all the time as to whether, in this hypothetical situation, this finding could have been made. I mean, you know, this creates subsidiary litigation that we really don't need.

MR. JOSEFFER: In -- in some instances, it may add to an additional degree of complexity, although I'll say that whatever that might be, it's still less than the complexity of retrying the case. And also, I think more often than not, on the face of the record -- I mean, these -- these determinations can be made.

Here, for example -- I mean, if -- if a court grants a continuance for any reason, it's going to ask the reasons why. Here, the court questioned counsel as to whether he really needed more time, explained his basic reasoning for doing so. And so when -- when it's apparent on the record that a continuance could have

been granted, that's certainly a much less complex inquiry than trying the case.

JUSTICE BREYER: Suppose you ask the judge. You say, Judge, 2 months ago the defendant came to you and said, I waive the Speedy Trial Act. Now the defendant says, Judge, I now would like a month's continuance. The judge says, I'll give it to you. The opposing counsel says why. He says, because he waived it.

Now, you're telling me that, one, he cannot waive it, but two, even though the judge said I did it because he waived it, that still itself is okay. We go ahead and let him exclude it because the judge might have done something differently. Is that what you're saying?

MR. JOSEFFER: Well, either -- you would need more on the record there because if the record was limited to what you just said, I don't think there would be a basis for --

JUSTICE BREYER: But it's possible you could argue, looking at the record, that the judge should have tried it -- should have excluded it on a different basis. He should have excluded it on the basis of the interests of justice, et cetera required.

So what the judge said, just to make it

clear, is I'm not even thinking about this different basis, though I might. I'm doing it just because he waived it. And now you're telling me, I take it, he can't waive it, but nonetheless, the error is harmless because he waived it, or something like that.

MR. JOSEFFER: At this -- at this point we're not at the harmlessness point yet. This would be --

JUSTICE BREYER: It's not harmless. You're saying it's a procedural error.

MR. JOSEFFER: Right, and --

JUSTICE BREYER: So we don't say the judge is right because he waived it. We're saying he's right because the judge made a procedural error. I'm having a hard time following that.

MR. JOSEFFER: Well, anytime you're talking about a waiver or estoppel theory, the premise is that there -- there may well have been underlying error, and the question is whether the defendant is precluded. And here, there's no question there was an underlying error because the findings were not required -- were not reported in the act.

But the act does -- again, does not contain an express anti-waiver provision, and the speedy trial interests, which are the reason for reading, to some extent, an anti-waiver provision, are -- are not

diminished when the court could have properly excluded the time from the act. And to the contrary, speedy trial interests would be harmed in that manner for three reasons.

First, it gives defendants every reason to delay in hopes of manufacturing a speedy trial violation.

Second, waiver and estoppel are generally important to the efficient and orderly conduct of litigation, and if you take those -- that out, what you will get is less efficient litigation and more delays, which Congress recognized when, as part of the Speedy Trial Act, it required the courts to develop management plans for the efficient handling of cases.

JUSTICE SCALIA: But, you know, Congress could have -- could have written it the way -- the way you're proposing it. Congress could have said, you know, when there -- when -- when there is good cause for the continuance, the clock won't run. It didn't say that. It -- it said the judge has to make a finding. I mean, don't we have to give that some effect?

You're saying it really doesn't matter whether he makes the finding or not. So long as there was good cause so that a finding could have been made,

that will be enough.

MR. JOSEFFER: No. Our -- our view is that, I mean, like anytime the waiver or estoppel is at issue, one could say that that's being read into the statute, but the point, as this Court has explained in Hillen and -- and Mezzanatto, is that those are background principles of law that presumptively apply.

Our view is this: a court should make the finding, but a -- a defendant may not challenge the finding if a few conditions are satisfied. First, the defendant was the one requesting the continuance and benefiting from it. Second, the finding could have been made on the record in the case, and third, the defendant is responsible in some way for inducing the court not to make the finding. It could be by a waiver or it could be the defendant's -- or it could be the court saying, I've decided it's appropriate to make an ends of justice finding. Now, let me record this in the record, and defense counsel saying, Your Honor, please don't bother. It's late. We've got four more things to do. We don't need the findings. In that circumstance as well, it's not a waiver, but defense counsel would have -- the defendant at that point should not be heard to complain about the absence of a finding that should ultimately --

JUSTICE KENNEDY: Well, it seems to me the Government is equally remiss for not pointing out the obligations of the court under the act.

But let me ask you this. Probably you can respond to that as well if you like. What are the problems with reindicting -- I mean, how -- how is the Government hurt if it can reindict? I recognize that it's costly to the system, et cetera. But is there any real prejudice there?

MR. JOSEFFER: Well, I mean, there are two concerns. One is, as you said, the -- the cost of having to do a brand new jury trial after you've already done a fair one. The second is that -- I mean, in this case, the trial was 3 years ago.

JUSTICE KENNEDY: Well, of course, I'm -- I'm supposing that after this rule, there would be no trial because there would be -- if -- if you don't prevail, there wouldn't be a trial.

MR. JOSEFFER: Oh, I -- well, if dismissal was required in this case, I think dismissal would be without prejudice as opposed to with prejudice and therefore --

JUSTICE KENNEDY: And I'm asking are there -- are there severe costs with that when there's been no trial?

MR. JOSEFFER: If there had not already been -- oh.

JUSTICE KENNEDY: There's -- there's no trial.

MR. JOSEFFER: This is pretrial.

JUSTICE KENNEDY: The -- the action is dismissed for a Speedy Trial Act violation because the position of the Petitioner here is accepted by this Court and the Government just reindicts.

MR. JOSEFFER: Oh, there's already been a trial.

JUSTICE KENNEDY: I'm hypothesizing that there hasn't been.

MR. JOSEFFER: Okay.

JUSTICE KENNEDY: The case is dismissed.

MR. JOSEFFER: I see. It's dismissed before trial.

JUSTICE KENNEDY: And there is a reindictment.

MR. JOSEFFER: Right. I understand.

JUSTICE KENNEDY: How costly is that to the system other than getting the grand jury together?

MR. JOSEFFER: Sorry. I understand. Yes, if -- if pretrial --if the district court dismisses, then the Government ordinarily could reindict for -- if the

court dismisses without prejudice, the Government ordinarily could reindict very quickly, and the cost to the system would not be great.

The real cost to the system comes in when the district court does not dismiss and holds the trial because then the trial has been held and then by the time you get back down to the trial court -- I mean, in this case, it'll probably be 4 years. And at that point, sometimes you can do a retrial, but sometimes memories fade, witnesses are lost, other sources of proof are lost. And as a result, you end up with -- with fairly -- you can end up with very severe consequences in situations where the first trial is held.

JUSTICE GINSBURG: In this -- is there a statute of limitations problem in -- in these cases if their dismissal is without prejudice?

MR. JOSEFFER: No. There's a -- the Judicial Code contains a -- a provision that generally contains a 6-month grace period for limitations following dismissal by a court. So we would have -- I mean, by now the limitations period would have run, but we would have 6 months to -- to reindict.

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE SOUTER: Mr. --

CHIEF JUSTICE ROBERTS: -- the -- the argument you're making is really one of invited error, and I'm not sure it even applies on these facts. I mean, the -- the defense lawyer didn't, as you hypothesized in one of your answers, say something to the effect of don't worry, you don't need to make any findings of the ends of justice or anything like that. He just said I'm waiving my speedy trial rights, and that may mean he's not gong to argue, you know, that the ends of justice don't justify it or whatever. He's just saying I don't have any objection. Maybe he assumed that the judge would go on and say, okay, I'm making the findings required by subsection 8(a).

MR. JOSEFFER: Well, I think that when a -- when a litigant expressly waives his rights under an act, that the very natural effect of that is to make the court think he does not have to follow that act and that would include the findings requirement.

JUSTICE GINSBURG: Well, in this case, the judge told the defendant I've got a solution to this. Here's my form.

MR. JOSEFFER: No. It was the -- I mean, in context, there were two -- at the earlier status conference that does not relate to this hearing, but at the earlier status, it was defendant who said, Your

Honor, I want a continuance and I want to waive my rights. In response to defendant's invocation of a waiver, the court said, well, if you're going to waive, you have to waive for all time, because the court was concerned the defendant would selectively waive until it was inconvenient for the court to try the case. We don't defend the court's response to that, but the point is that even then it was the defendant who raised waiver first.

And then at this status conference regarding this particular continuance, it was -- defendant was the only one talking about waiver. Defendant said -- defendant initially raised it and said I -- I waive my rights, then came back to it again. I waive my rights, just give me the continuance. And the court said -- I mean, the court did say that, well, if you've already waived, you don't have to again. But he then said that, notwithstanding the waiver, he couldn't give the defendant an open-ended amount of time because this is a criminal trial. So it was defendant who was -- who was pressing this at all times.

JUSTICE ALITO: Do you have any idea how often this -- this sort of situation comes up where there's an alleged violation of the act and then a denial by the district court of a pretrial motion to

dismiss?

MR. JOSEFFER: I think that happens with some regularity. There's quite a lot of court of appeals case law in which defendants are protesting speedy trial violations. I mean, actually quite a lot.

JUSTICE SOUTER: You -- you made an argument a moment ago which included the point that he asked for this particular relief and represented what he needed to do if he got the relief, the continuance. You -- you came right up within a step of -- of making a judicial estoppel claim, although you did not use those terms. I have two questions.

Did the Government raise at least the -- the theory of judicial estoppel in the litigation before it reached this point?

And the second question is, even if the Government did not raise that term, asked for -- for estoppel to be applied in those terms, did the Government make the same argument that you have just made which emphasizes the fact that he asked for it and he represented the reasons for -- for needing it?

MR. JOSEFFER: Yes. In the -- in the court of -- the answer your first question, in the court of appeals -- we referred to our argument as one of waiver rather than estoppel, in part because that's what the

Second Circuit had in -- in the past referred to it as being. And yes, in substance, we were -- we -- we raised -- I mean, we were raising a similar waiver argument below as the one that we are now.

We don't think it matters greatly whether one calls it waiver or estoppel, except that we do think that estoppel is the -- is the -- the preferable way of looking at because we're -- as -- as has been pointed out, we're talking here not just about a waiver, but also about a situation where a defendant requests relief --

JUSTICE SOUTER: Yes. The difference between acquiescence and -- and potentially sandbagging.

MR. JOSEFFER: Yes. I mean, here the -- the defendant is affirmatively requesting relief on the basis of one -- one position and is now seeking dismissal based on the fact that his first position was accepted and received that relief. And that's a situation in which judicial estoppel is -- is, frankly, tailor-made for, and I think the fact that judicial estoppel prevents that very situation helps to underscore the -- that if -- if Congress really wanted to --

JUSTICE SCALIA: Except -- except where there's a public policy against what you want to estop

him into doing. I mean, it seems to me for the same reason that you don't allow a waiver, you shouldn't allow an estoppel. There's a public policy against it. The -- the Congress wanted these things tried promptly, and -- and whether he merely waives or -- or goes further and affirmatively causes the court to do something which it shouldn't have done, you're just as much violating the policy it seems to me.

MR. JOSEFFER: Well, I think the -- I mean, I -- I agree that -- I mean, whether it's waiver or it's estoppel, if Congress manifests an affirmative intent to displace those doctrines, they don't apply. And it doesn't matter which -- which one you're under.

But the -- the affirmative intent that Congress manifested here, notwithstanding -- I mean, remember, there's no express anti-waiver or anti-estoppel provision, but the affirmative intent is to protect the public's interest in a speedy trial. And that -- that intent is entirely protected when a delay could be -- is permitted by the substantive standards of the act, and the only error is a procedural one that the defendant helped to induce the court to commit. And I mentioned -- in that circumstance, there's not only no delay that was not contemplated by Congress.

But as I mentioned before there are three

reasons that permitting a defendant to seek dismissal in that circumstance would actually harm speedy trial rights. First, the incentive for defendants to delay. Second, the inefficiency, and the third is that, remember, one of the main reasons, if not the main reason, that Congress wanted speedy trials was that it was concerned that defendants out on bail were committing crimes. And Congress' concern with crime prevention is not served in the least by letting a defendant seek dismissal of an indictment based on a purely procedural error that he helped to cause.

JUSTICE SCALIA: If -- if what you say is true, I don't know why it makes any difference that the defendant led the court into it. If you -- if you believe that this is just a procedural nicety that was not complied with, why shouldn't you do the same thing when -- when the court fails to make the finding but could have made the finding whether or not the defendant was the one that led him into it?

MR. JOSEFFER: Well, the question then would be harmless error analysis. I mean, we agree the statute requires the finding to be made. It was not made. Therefore, there was an error. And it's the defendant inducing the court to --

JUSTICE KENNEDY: It's harmless error because

he -- the evidence of guilt was substantial? What -- how does the harmless error work?

MR. JOSEFFER: No. If -- if one moved beyond the inducement and into harmless error, the question would be -- would be that there here the -- the error -- I think as I mentioned before, the error here would be the failure -- would -- would be the clerical one, the error to record findings in the act.

And I think -- and we would agree that the act -- pointing to the second question now. But the act does expressly say that if a defendant is not tried within 70 relevant days, the indictment shall be dismissed. And that suggests that harmless error analysis would not be appropriate to the question whether 71 or 81 days of delay is appropriate because Congress said 70 is 70.

But when the error is not that, but the error is failing to record something in the record, that's a distinct type of error that's not covered by the mandatory dismissal provision. And it could be considered harmless, especially in circumstances where the record reflects --

CHIEF JUSTICE ROBERTS: Why do you -- why do you put that in a separate category? It's kind of unusual for Congress to put that type of a requirement

in the statute. They could have normally -- I suspect they normally would write it. You know, you -- you -- they're excludable only if the court finds in the interest of justice. But they went further and they said if the court sets forth orally or in writing in the record of the case. I mean, they set it forth as a separate requirement. I don't know that we can give it sort of a second-class status.

MR. JOSEFFER: Well, I -- I agree that -- that section (h)(8) is different from the incompetency exclusion, for example, which I'll turn to in a minute, in that it does tie the -- the findings to the excludability. And that makes the -- the harmless error argument that we have on that issue, obviously, more difficult than on the -- the incompetency issue.

But it's still -- I think it ultimately comes down to how you -- how you view the error. Is the error not trying someone within 70 days, or is the error not recording a finding in the record? And if -- if you focus on -- on the findings aspect --

CHIEF JUSTICE ROBERTS: Or say the error is not complying with the act.

MR. JOSEFFER: Right, and then -- but the -- but the -- I mean, ordinarily that -- just not complying with the act generally is harmless, and the

question would be is -- is that -- because, remember, the -- the only thing that's subject to mandatory dismissal is not trying someone within 70 relevant days.

JUSTICE SCALIA: Yes, within 70 relevant days counted as the statute requires them to be counted, which includes the requirement of this finding set forth in the record before you can stop the clock running for -- you know, for some period. I don't think that that's -- I don't think that's very complicated.

MR. JOSEFFER: Right. And then, I mean, if that's the way it's viewed, then on the first time period, the (h)(8), then we would stand on our -- stand on either of the -- the waiver and estoppel argument or also on the possibility that another middle ground would be if what we're missing is a finding in the record, the other option would be to remand for the court to clarify the record.

JUSTICE GINSBURG: Which court?

CHIEF JUSTICE ROBERTS: Oh, no, that -- pardon?

JUSTICE GINSBURG: The -- is that -- is there any reason to believe that the judge, of course, would clarify it and say the ends of justice, if we took your

remand solution.

MR. JOSEFFER: Right. And obviously, ordinarily courts would not be doing that. It's a very inefficient thing to do in the ordinary course. But here, where the transcript does reflect the court actually considered, on the one hand, the defendant's need for additional time and, on the other hand, the interest in trying -- trying criminal cases sooner rather than later and balanced them by granting a lesser --

JUSTICE GINSBURG: Well --

MR. JOSEFFER: It does seem more reasonable. But --

JUSTICE GINSBURG: It seems to me that in this case, that -- that all-purpose waiver that the judge, and not for the first time, proposed is -- is what caused all this. And -- and my question that I had is knowing that this was the judge's practice -- and indeed, he had written about it -- did the U.S. Attorney's Office try to do something to say, look, the act doesn't permit that kind of thing?

MR. JOSEFFER: At -- at the time, I mean, there was -- there was -- especially this was 10 years ago. There was, in some sense still is, quite a lot of confusion in the bar on these issues because there's no

express anti-waiver provision. There's an end, and as I said, the -- the Second Circuit in Gambino had held waiver is not ordinarily appropriate, but had not said it was never appropriate. So there was some confusion.

But what -- what the Government never did was to encourage a waiver or to encourage any of these delays either.

Now, in this -- I blurred to some extent in the second question presented and talking about the -- the remand and the harmlessness.

On the second question presented, the first question is whether the incompetency exclusion applies in the first place. In our view, it's a very simple exclusion. If -- if delay results from the defendant's incompetency, the time is excluded, and if the defendant is incompetent, delay results from that because a person cannot be tried when he is incompetent. Because we have a finding here the defendant was incompetent during the relevant period of time, the exclusion applies.

JUSTICE SCALIA: But it was not known at the time that he was incompetent. And -- and therefore, that could not have been the reason that he was not being tried. The reason he was not being tried was that the -- that there was pending before the judge the

inquiry into whether he was competent.

MR. JOSEFFER: Well, the -- the act has a lengthy series of these resulting from exclusions, and with the exception of (h)(8), which is unusual in terms of the ends of justice finding, these operate automatically as this Court said in Henderson. It's -- it's an objective standard. If -- if the defendant could not have been tried then, then the delay resulted, at least as a concurrent cause, from that.

And there's -- and it's -- it's very important to understand too that in the context of especially the -- the exclusion for when pretrial motions are pending, the courts of appeals have unanimously held that a more complicated causation analysis not only is not required but would throw a wrench into the practical application of the act because what happens, for example, is someone files a pretrial motion and the parties assume that the -- the clock is turned off then for at least some time. But a defendant later argues that, well, the same delay would have resulted anyway because, say, the judge was on vacation or the judge was planning on recusing himself and reassigning the case. And at that point, the courts have recognized that you don't look to try to figure out which of several potential causes is -- is

the relevant one. They're all potential objective concurrent causes, and any other approach make it very difficult to administer the act.

JUSTICE SCALIA: You really don't know the answer of whether the clock is running until the finding is made. If the -- if the judge finds that -- that he's not incompetent, well, too bad. You know, the Speedy Trial Act requires dismissal. On the other hand, if the judge finds that he is incompetent to be tried, there hasn't been a violation of the act. I mean, it's a very strange situation.

And it also, as -- as the -- the other side points out, it -- it puts considerable pressure on the judge when -- when he is in violation of the Speedy Trial Act, to find that the individual is incompetent because, otherwise, there has to be a dismissal.

MR. JOSEFFER: I -- I don't think it's appropriate to presume that an Article III judge would have a defendant imprisoned and committed if he was not actually incompetent.

But you are right that the incompetency exclusion is -- is, along with the unavailability of the defendant or witness exclusions, are somewhat unusual in that you could discover, after the fact, that they applied. But the reason is that if -- if you

had tried to try him sooner, you would have discovered the same thing. He actually was incompetent. The witness actually was unavailable. And from a Speedy Trial Act perspective, it makes no sense to say the speedy trial clock ran because you didn't try a defendant when he was legally unable to be tried.

JUSTICE GINSBURG: Are you -- are you relying to any extent on something that I think you brought up? He also could not have been tried because the prosecutor was having a difficult pregnancy and she was on extended leave, which was occurring in this period?

MR. JOSEFFER: We haven't relied on that because that would have been the -- that -- that's an appropriate basis for an ends of justice continuance, but no continuance was ever sought or granted for the relevant period. So we -- although that is true that an ends of justice continuance might have been granted for that reason, there was no continuance of any kind granted during that period. So we're relying solely on the plain language of the incompetency exclusion.

If you think about it --

CHIEF JUSTICE ROBERTS: Even if we agree with you on the incompetency exclusion, we still have to reach the waiver for all time question. Correct? You don't argue that the incompetency goes back that far,

do you?

MR. JOSEFFER: No. We -- we -- no. With respect to the first time period, we're relying on the specific waiver that was tendered in connection with that actual continuance.

CHIEF JUSTICE ROBERTS: You're not suggesting he was incompetent during that period as well.

MR. JOSEFFER: Oh, that defendant was incompetent the whole time?

CHIEF JUSTICE ROBERTS: Yes.

MR. JOSEFFER: No. There was -- actually earlier on in the case, there was -- there were three competency hearings. The first one, he was held competent, and that -- that was earlier on in the proceedings.

The finding of incompetency in the record here is the defendant found the defendant incompetent at the end of the relevant period based entirely on evidence and argument presented at the beginning of the relevant period. So when the -- when the court held that the defendant must be incompetent based on that evidence, he was saying the defendant -- necessarily was saying the defendant must have been incompetent during the entire relevant period based on the evidence from the beginning of the period.

JUSTICE SOUTER: Am -- am I correct that the -- the particular provision that you think is relevant here is -- is (h)(1)(A) on page 4 of the -- the appendix in the blue brief?

MR. JOSEFFER: No. I'm sorry. It is (h)(4). (h)(1)(A) deals with proceedings regarding the defendant's incompetency.

JUSTICE SOUTER: I've -- I've got it. Okay.

MR. JOSEFFER: And that applies whether the defendant is competent or not. We're relying on (h)(4) which applies when the defendant was incompetent.

JUSTICE SOUTER: What -- what do you make of the language, any period of delay resulting from the fact that the defendant is mentally incompetent? I mean, the claim here is that -- that the -- that the delay did not result from that fact, but simply from the failure of -- of the judge to make that determination so that what you're really doing is making a harmless error analysis.

MR. JOSEFFER: Well, I'm happy to move to that as well, but before that, I mean, it is -- there can be concurrent causes and there can be objective concurrent causes. And the defendant could not have been tried during the relevant time period, and therefore, objectively speaking, that was -- I mean, if

the -- if the court had tried to try him --

JUSTICE SOUTER: Okay, but isn't that a --

MR. JOSEFFER: -- during the relevant time period, he couldn't.

JUSTICE SOUTER: -- isn't that a harmless error analysis rather than a -- a subsection (4) analysis?

MR. JOSEFFER: Well, I think Congress -- you're right that it's based in part on the principle that, look, of course, he couldn't have been tried then. But, no, Congress also made that relevant whether there's a violation at all. Just to simplify things, let's take that off the table. If the defendant is incompetent, there certainly couldn't be a constitutional Speedy Trial violation. Let's just take it off the table for -- for the act purposes as well. The argument has been made that --

JUSTICE SOUTER: But -- but I guess my only point is that (4) does not say any period during which the defendant is mentally incompetent. It says any period of delay resulting from the fact that he was mentally incompetent, and this did not result from that fact until at the end of the period the judge says, oh, I find him incompetent, so that any period after that would be the result of the fact that he was

incompetent. But the -- the delay up to that point was attributable solely to the judge's failure to make a determination.

MR. JOSEFFER: If I could answer the question.

CHIEF JUSTICE ROBERTS: If it was a question, yes.

MR. JOSEFFER: The -- the fact --

(Laughter.)

JUSTICE SOUTER: It was -- it was cleverly disguised, but it really was a question.

(Laughter.)

MR. JOSEFFER: I -- I -- I'll try to give a cleverly disguised answer.

JUSTICE SCALIA: Isn't -- isn't that so?

(Laughter.)

MR. JOSEFFER: The -- the fact existed all along. I mean, the -- the fact doesn't come into existence once it's found. The finding reflects the fact that the fact of an incompetency had existed during the entire relevant period.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Zas, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF EDWARD S. ZAS

ON BEHALF OF THE PETITIONER

MR. ZAS: Mr. Chief Justice, I'd like to pick up on questions that both you and Justice Scalia asked regarding the -- the language of the statute.

One of the Court's bedrock principles is that judges are not free to rewrite the statute that Congress has enacted. This statute and the whole statutory scheme here speaks very clearly and very precisely, and it would be unwise, even if permitted, for the Court to start tinkering with it because the whole system will start to unravel if the -- if the requirement of express findings and reasons turns into a could have/would have/should have contest, in which case trial judges will take the act less seriously knowing that the court of appeals could make the findings for them. And it will make the court of appeals' job harder because they'll be guessing after the fact what discretionary decision the trial judge would have made.

This statute -- the ends of justice provision is very clear. The Government has cited no ambiguity, and it controls. Because the findings were not made, whether they could have been made or should have been made or would have been made, they weren't made, and therefore, the time ran and dismissal is required.

Now, the Government proceeds under the false

assumption that but for the waiver, the judge would have granted this continuance on January 31, 1997. There's absolutely no support for that in the record. Even before this occasion, on November 8th, 1996, which was the prior court appearance, the court said you're not getting another adjournment unless you waive for all time. So there's no reason to think that at this later date the court was about to say, well, forget the waiver, okay, I'll give you 3 months. It's -- it's the waiver that is providing the basis for the exclusion. The judge, if pushed, would have said, no, we're going to trial soon. No waiver, no more time. So it's a false assumption.

I'd like to turn to the second period again. The Government again assumes that when the judge found Mr. Zedner incompetent in March of 2001, that that is a retroactive determination that he was incompetent from July, August, September, October, November, et cetera. And as the Court is aware --

CHIEF JUSTICE ROBERTS: It goes back some way because he's looking at reports from those earlier times. It's not only effective as of the date he makes the finding.

MR. ZAS: Well, the -- the finding is effective from that point forward. That has to be the

case because, as Justice Scalia pointed out, it's important for the parties to know, as matters are unfolding, what the speedy trial clock is. That way the Government knows to push the cases that are approaching the 70-day limit to trial. People can't know that answer if everyone is waiting to find out what the outcome of a pending motion is. And the defendant, in fact, couldn't move for dismissal under the act until the -- the judge said after 1 or 2 years, I find the defendant incompetent.

JUSTICE ALITO: What do you mean --

JUSTICE SCALIA: I guess you can be -- I'm sorry, go ahead.

JUSTICE ALITO: If the judge, when he finally found the defendant competent, had said expressly, and I -- I made this determination in my mind shortly after the hearing and the -- the briefs that were submitted at that time, but now I'm putting it on the record, that wouldn't be sufficient?

MR. ZAS: No, Your Honor. If the judge had said, I knew this all along back when I heard the evidence that this defendant was incompetent, that would be an even more egregious violation. The court is not supposed to sit and just let the defendant sit out on the streets for month after month after month

when -- when the defendant is incompetent. The court is supposed to make a -- a prompt finding.

JUSTICE ALITO: Where does the act say that, that there has to be a finding at the time?

MR. ZAS: Well, the court said -- the act says it in -- in section (h)(1)(J). That's the -- the -- in the appendix to the blue brief on page 5. The act excludes time while the proceeding is -- is going on for examinations and hearings, et cetera, but at the end, it excludes only delay reasonably attributable to any period not to exceed 30 days during which any proceeding concerning the defendant is actually under advisement by the court. So -- so if the --

JUSTICE ALITO: No. But there's no provision, is there, that says that the finding under (b)(4), that there has to even be a finding under (b)(4), much less when the finding has to be made?

MR. ZAS: If I may answer the question, Your Honor.

Well, the only finding that the court has to make under (b)(4) is that the defendant is incompetent. That automatically will exclude the time going forward until the defendant is restored to competency.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)