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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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ZEDNER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–5992. Argued April 18, 2006—Decided June 5, 2006

The Speedy Trial Act of 1974 (Act) generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance. 18 U. S. C. §3161(c)(1). Recognizing that criminal cases vary widely and that there are valid reasons for greater delay in particular cases, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. Section 3161(h)(8) permits a district court to grant a continuance and exclude the resulting delay if it makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. To promote compliance without needlessly subverting important criminal prosecutions, the Act provides that, if the trial does not begin on time and the defendant moves, before the trial's start or entry of a guilty plea, to dismiss, the district court must dismiss the charges, though it may choose whether to do so with or without prejudice.

In April 1996, petitioner was indicted on charges arising from his attempt to open accounts using counterfeit United States bonds. The District Court granted two "ends-of-justice" continuances, see §3161(h)(8). When, at a November 8 status conference, petitioner requested another delay to January 1997, the court suggested that petitioner waive the application of the Act "for all time," and produced a preprinted waiver form for petitioner to sign. At a January 31, 1997, status conference, the court granted petitioner another continuance so that he could attempt to authenticate the bonds, but made no mention of the Act and no findings to support excluding the 91 days between January 31 and petitioner's next court appearance on May 2 (1997 continuance). Four years later, petitioner filed a motion to dis-

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miss the indictment for failure to comply with the Act, which the District Court denied based on the waiver "for all time." In a 2003 trial, petitioner was convicted. The Second Circuit affirmed. Acknowledging that a defendant's waiver of rights under the Act may be ineffective because of the public interest served by compliance with the Act, the court found an exception for situations when the defendant causes or contributes to the delay. It also suggested that the District Court could have properly excluded the 91-day period based on the ends of justice, given the case's complexity and the defense's request for additional time to prepare.

Held:

1. Because a defendant may not prospectively waive the application of the Act, petitioner's waiver "for all time" was ineffective. Pp. 9–12.

(a) The Act comprehensively regulates the time within which a trial must begin. Section 3161(h), which details numerous categories of delay that are not counted in applying the Act's deadlines, conspicuously has no provision excluding periods of delay during which a defendant waives the Act's application. It is apparent from the Act's terms that this was a considered omission. Instead of allowing defendants to opt out, the Act demands that continuances fit within one of §3161(h)'s specific exclusions. In deciding whether to grant an ends-of-justice continuance, a court must consider a defendant's need for "reasonable time to obtain counsel," "continuity of counsel," and "effective preparation" of counsel. §3161(h)(8)(B)(iv). If a defendant could simply waive the Act's application in order to secure more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion. The Act's purposes also cut against exclusion on the grounds of mere consent or waiver. Were the Act solely designed to protect a defendant's right to a speedy trial, such an application might make sense, but the Act was also designed with the public interest firmly in mind. This interpretation is entirely in accord with the Act's legislative history. Pp. 9–11.

(b) This Court rejects the District Court's reliance on §3162(a)(2), which provides that a defendant whose trial does not begin on time is deemed to have waived the right to move for dismissal if that motion is not filed prior to trial or entry of a guilty plea. That section makes no mention of prospective waivers, and there is no reason to think that Congress wanted to treat prospective and retrospective waivers similarly. Allowing prospective waivers would seriously undermine the Act because, in many cases, the prosecution, defense, and court would all like to opt out, to the detriment of the public interest. Section 3162(a)(2)'s retrospective waiver does not pose a comparable danger. Because the prosecution and court cannot know until the

trial starts or the guilty plea is entered whether the defendant will forgo moving to dismiss, they retain a strong incentive to make sure the trial begins on time. Pp. 11–12.

2. Petitioner is not estopped from challenging the excludability under the Act of the 1997 continuance. Factors that "typically inform the decision whether to apply the [estoppel] doctrine in a particular case" include (1) whether "a party's later position [is] clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that . . . earlier position"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine,* 532 U. S. 742, 750–751. None of the three possible "positions" taken by petitioner gives rise to an estoppel. First, recognizing an estoppel based on petitioner's promise not to move for dismissal under §3162(a)(2) would entirely swallow the Act's no-waiver policy. Second, petitioner's (mistaken) agreement that waivers are enforceable does not provide a ground for estoppel because petitioner did not "succee[d] in persuading" the District Court to accept the validity of prospective waivers. On the contrary, the District Court requested the waiver and produced the form for petitioner to sign. Even if the other factors favor estoppel, they do not predominate. Finally, petitioner's representation at the January 31 status conference that a continuance was needed to gather evidence of the bonds' authenticity does not support estoppel because that position was not "clearly inconsistent" with the position that he now takes in seeking dismissal, *i.e.,* that delay from that continuance was not excluded under the Act. Nothing in the discussion at the conference suggests that the question presented by the continuance request was viewed as anything other than a case-management question laying entirely within the District Court's discretion. Pp. 12–15.

3. When a district court makes no findings on the record to support a §3161(h)(8) continuance, harmless-error review is not appropriate. The Government argues that an express finding need not be entered contemporaneously and could be supplied on remand. But the Act requires express findings, see §3161(h)(8)(A), and at the very least implies that those findings must be put on the record by the time the district court rules on the motion to dismiss. Because the District Court made no such express findings, the 1997 continuance is not excluded from the speedy trial clock. This error is not subject to harmless-error review. Harmless-error review under Federal Rule of Criminal Procedure 52(a) presumptively applies to "*all* errors where a proper objection is made," *Neder* v. *United States,* 527 U. S. 1, 7, but strong support for an implied repeal of Rule 52(a) in this context

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is provided by the Act's unequivocal provisions, which specify that a trial "*shall* commence" within 70 days, §3161(c)(1) (emphasis added), and that "*[n]o . . . period of delay"* from an ends-of-justice continuance "*shall be excludable"* from the time period unless the court sets forth its reasoning, §3161(h)(8)(A) (emphasis added). Applying harmless-error review would also tend to undermine the detailed requirements of the provisions regulating ends-of-justice continuances. Pp. 15–18.

4. Because the 91-day continuance, which was not excluded from the speedy trial clock, exceeded the maximum 70-day delay, the Act was violated, and there is no need to address whether other periods of delay were not excludable. The District Court may determine in the first instance whether the dismissal in this case should be with or without prejudice. Pp. 18–19.

401 F. 3d 36, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined, and in which SCALIA, J., joined as to all but Part III–A–2. SCALIA, J., filed an opinion concurring in part and concurring in the judgment.