No. 09-1498

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,
v.

JASON LOUIS TINKLENBERG,
Respondent.

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

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.[1] NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has 10,000 members nationwide – joined by 80 state and local affiliate organizations with 28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Because this case raises important questions concerning a criminal defendant's right to a speedy trial, NACDL offers its practical view of the issues considered by this Court.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, has made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

This Court need not guess whether an "actual delay" rule will create significant administrative burdens, or whether it will "frustrate altogether, the parties' and the court's ability to comply with the Act." See U.S. Br. 36. Parties and courts have applied the rule in the Sixth Circuit for over fifteen months. See United States v. Tinklenberg, 579 F.3d 589 (6th Cir. 2009) (decided September 3, 2009). District courts have had ample time to implement any changes deemed necessary, and practicing attorneys have had an opportunity to adjust to the rule.

To assess the effect of Tinklenberg, amicus contacted defense attorneys who regularly practice in each of the district courts in the Sixth Circuit, including the Northern and Southern Districts of Ohio, the Eastern and Western Districts of Michigan, the Eastern, Western, and Middle Districts of Tennessee, and the Eastern and Western Districts of Kentucky. The attorneys were asked how Tinklenberg has affected their practice and how courts have managed pretrial motions under the Speedy Trial Act ("STA") both before and after Tinklenberg.

As discussed below, the Tinklenberg "actual delay" rule has not created administrative chaos with respect to administration of the speedy trial clock. Courts have easily determined whether motions cause delay. The rule is both workable in practice and fair in result. For these and other reasons, amicus urges this Court to adopt the "actual delay" rule established by the Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The Tinklenberg "actual delay" rule has not frustrated the courts' and parties' management of the speedy trial clock.

First, practicing attorneys made clear that Tinklenberg has had little impact on the administration of the speedy trial clock. In fact, many attorneys in the Circuit were unaware that a rule had changed with respect to pretrial motions and STA.

Attorneys familiar with the Tinklenberg rule reported that it has been easy to determine whether a motion is likely to cause delay. The rule has not resulted in a noticeable increase in the amount of litigation pertaining to pretrial motions and the speedy trial clock.

To be sure, some courts made minor adjustments to their procedures after the Sixth Circuit decided Tinklenberg. In the Eastern District of Tennessee, for example, attorneys observed that post-Tinklenberg, courts began to ask defense counsel if they object to time being excluded under the STA when a motion was filed. The same was reported in the Western District of Michigan where Mr. Tinklenberg's case originated.[2]

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2. Some attorneys reported that Tinklenberg has had an impact on district courts' treatment of time associated with mental competency evaluations. One practitioner, for example, explained:

Practitioners in those districts, however, reported that they rarely object to the tolling of the clock, and have seen no increase in litigation with respect to the exclusion of time for pretrial motions. Courts simply ask parties whether they agree if time should be excluded. In the rare case that the parties disagree, the court makes a finding.

Likewise, practitioners have not experienced an increased difficulty in tracking the number of days that have expired under the speedy trial clock. Judges simply state whether a motion stops the clock, and the parties then have a clear sense of the time that has expired.

> Before this email, I was familiar with the [Tinklenberg] case. I was always required to stipulate whether motion time was excluded, but not usually in cases involving mental health questions. Since Sept. 2009, now especially in mental health cases, we are not only required to stipulate, but Tinklenberg is specifically mentioned in the orders.

This comment relates to a specific aspect of the Tinklenberg opinion. In any event, these observations do not evidence any particular difficulty managing the speedy trial clock. With regard to other types of pretrial motions, no practitioners reported difficulties in managing the speedy trial clock.

In sum, Tinklenberg's "actual delay" rule does not appear to have complicated the administration of pretrial motions and the speedy trial clock for parties or district judges in the Sixth Circuit. The experience of local attorneys provides no support for the government's apparent concern that the rule will frustrate the parties' and the courts' ability to comply with the STA.

II. Courts have effective systems for informing parties when an event tolls the speedy trial clock.

The lack of practical impact of the "actual delay" rule can be explained, at least in part, by systems courts have developed to communicate a motion's effect on the speedy trial clock. Many of these systems pre-date Tinklenberg.

Courts communicate STA findings in a variety of ways, depending on how a judge manages his or her courtroom and docket. In one district, judges announce a motion filing deadline, and schedule a status report conference for that date. In the status conference, each party provides a summary of the motions he or she is filing, and indicates whether he or she agrees that the speedy trial clock should be tolled with respect to each motion. The court makes a STA finding, and communicates the finding in an order or a docket journal entry. This system very rarely results in litigation relating to the STA, and is easy to manage.

In other districts, courts designate whether time

is "excludable" in the Electronic Case Filing system when a motion is filed. Time associated with motions is marked "excludable" by default. If the court determines that a motion, such as a motion for discovery, is administrative and does not toll time, the clerk manually removes the "excludable" flag in the system. The court and parties can then view the docket, and easily determine how many days have elapsed under the speedy trial clock. Again, these are simple, manageable procedures that do not generate litigation or delay adjudication of the case.

In sum, while the mechanics of managing the speedy trial clock vary, judges and their clerks have developed user-friendly systems to ensure that both parties are informed "at the time that a motion is filed whether the motion has stopped the speedy trial clock." U.S. Br. 36-37. The courts appear to make and communicate findings simply and effectively, using a system that is convenient for them, the litigants, and counsel.

III. It is typically easy to determine which motions are likely to cause delay.

Practitioners across the Circuit also report that it is almost always easy to determine whether a motion is likely to cause delay.

Motions can generally be divided into one of three categories. First, there are substantive motions, such as motions to suppress or motions in limine, which almost always cause delay. These motions address contested legal issues, are frequently opposed,

and may require evidentiary hearings or oral arguments.

In applying Tinklenberg, many district courts in this Circuit have readily found that these types of substantive motions cause delay. In United States v. Siler, for example, the court found a defendant's motion to suppress was "of such a nature that the time required to determine the issue created excludable time." No. 3:10-CR-71, 2010 U.S. Dist. LEXIS 76333, at *2 (E.D. Tenn. July 28, 2010). Likewise, in United States v. Gump, the court held it would "need time to hear and rule upon" a motion to dismiss, and that "[d]efendants' motion [wa]s of such a nature that the time required to determine the issues creates excludable time." No. 3:10-CR-94, 2010 U.S. Dist. LEXIS 95889, at *6-7 (E.D. Tenn. Sept. 14, 2010).[3]

In these cases, district courts made "actual delay" determinations easily and with little fanfare. Moreover, practitioners report that defense counsel rarely object to excluding time under the STA for

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3. Courts have reached similar results in a number of other cases. See , e.g., United States v. Sutton, No. 3:09-CR-139, 2009 U.S. Dist. LEXIS 119436, at *2 (E.D. Tenn. Dec. 22, 2009) (finding that defendant's pretrial motions "[were] of such a nature that the time required to determine the issues creates excludable time"); United States v. Jerdine, No. 1:08-CR-00481, 2009 U.S. LEXIS 117919, at *13 (N.D. Ohio Dec. 18, 2009) (finding that defendant's motions were "complex in nature and that the time required to rule upon these motions causes a delay of the trial, and thus, creates excludable time").

substantive motions. There is no practical support for the Government's suggestion that individualized determinations of whether a particular motion actually caused delay would "force courts to resolve intractable causation issues," and could raise "metaphysical" questions that "frequently would pose more difficult issues than the trial itself[.]." U.S. Br. 37-38 (internal quotations and citations omitted).

Second, there are "administrative" motions for which it is obvious that no delay will ensue. These motions ordinarily are short, unopposed, and require no hearing. Parties may file these motions as a matter of protocol, to ascertain the logistics of a trial, or to record an agreement the parties have reached. Examples include a routine motion for discovery, a motion to permit defense counsel to appear in a case pro hac vice, or an unopposed motion to modify a defendant's bond to permit travel outside the district.[4] Because it is obvious to both the court and the parties that these motions are administrative, it is easy for courts to determine that these motions do not cause delay.

Third, there are "borderline" motions that are

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4. Two of the motions addressed in Tinklenberg – a motion to bring two guns into the courtroom as evidence, and a motion to conduct a video deposition of a witness – are also examples of administrative motions. See Tinklenberg, 579 F.3d at 597. As the Sixth Circuit explained, "these motions were resolved without a hearing, and without any motion or order to delay the start of trial." Id.

not obviously substantive or administrative. These motions might require a hearing, and might be opposed, depending on the circumstances of the case. For this category of motions, a court can ask the parties whether they object to tolling the speedy trial clock. If there is an objection, the court can hear each party's position, and then make a finding.

In sum, based on attorney practices throughout the Sixth Circuit, it is almost always possible to determine, at the time a motion is filed, whether it will cause delay. For those instances where that is not so, defense counsel are typically willing to stipulate to the exclusion of time for adjudication of the motion. Moreover, decisions within this Circuit show that courts are well-equipped to apply Tinklenberg in a practical, straightforward manner. Consequently, the "actual delay" rule has not been difficult to manage in day-to-day litigation.[5]

IV. Defense attorneys commonly stipulate to exclude time under the STA.

As discussed above, there are relatively rare occasions when it is not clear at the time of filing whether a motion will cause delay. In these situations, defense counsel are often willing to stipulate to excluding time from the speedy trial clock

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5. While amicus canvassed defense counsel only in the Sixth Circuit, there is nothing in the responses to suggest any substantially different experiences would arise in other circuits if the "actual delay" rule were applied there.

so that the motion can be considered.

The willingness of counsel to stipulate stems from circumstances unique to federal court. In many state prosecutions, the state arrests a defendant with little or no advance planning in response to an officer's observation or a report of a crime. The parties, therefore, have relatively equal knowledge of the facts and circumstances of the case at the time of arrest. As a consequence, it may be strategically advisable for a defendant to assert his or her right to a speedy trial.

In federal prosecutions, in contrast, crimes tend to span a considerable period of time. It is not unusual for the government to investigate a case for months or even years, and then arrest the defendant when it feels its case is ready. When an arrest is made, the defendant needs time to understand the charges, review voluminous discovery, and investigate the case. This situation is exacerbated in many cases where the defendant faces the logistical challenges of being detained in a federal facility that is out of state or far from the defense attorney's office.

Federal defendants also need time to come to terms with often severe (and unanticipated) potential punishments, negotiate a detailed plea agreement, and/or prepare for trial. Moreover, defendants are often the moving parties for substantive or "borderline" motions, and rarely want to pressure a court to decide a motion quickly for fear of a STA violation.

For these and other reasons, counsel throughout

the Sixth Circuit report that they rarely contest the exclusion of time under the STA.[6] Stipulations are, therefore, an eminently useful and simple tool to aid in management of the speedy trial clock.

V. Amicus supports a rule that does not exclude time for routine, administrative motions. However, district courts should retain the flexibility to accept stipulations and toll time for substantive motions.

This case has the potential to impact two categories of defendants.

The first category includes the relatively rare but important defendant, like Mr. Tinklenberg, who asserts his right to a speedy trial. This client plainly benefits from an "actual delay" rule that does not exclude time for routine, administrative motions. The rule is fair. If a defendant insists upon his or her constitutionally guaranteed right to a speedy trial, the government should not be able to stop the clock by filing routine administrative motions, as it did in Tinklenberg. A rule that is so easily manipulated frustrates the purpose of the STA.

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6. To be sure, once a defendant, like Mr. Tinklenberg, decides to proceed to trial, the strategy may change. The defendant then is more likely to assert his or her right to a speedy trial. Under these circumstances, the defendant should have the right to insist on the constitutional protections of the STA and to prevent the government from manipulating the clock by filing administrative motions.

The second category of defendants encompasses the majority of federal defendants who seek to delay prosecution and to slow down the speedy trial clock for the legitimate reasons discussed above.

These defendants would not oppose a rule that prohibits tolling the speedy trial clock for administrative motions. This rule would benefit them if they chose to proceed to trial. They would be harmed, however, by a rule that inadvertently causes judges to rush to judgment on substantive pretrial motions for fear that they are under greater scrutiny or are more likely to violate the STA.

In the interest of both categories of defendants, amicus urges this Court to affirm the Sixth Circuit's holding and to implement a rule that does not toll time for administrative motions that obviously do not cause delay. As explained above, this type of common sense rule is eminently workable in practice and fair in result. Amicus also urges this Court to emphasize that district court judges are free to accept stipulations by counsel, so long as a motion is substantive, or "borderline," in nature.

In sum, an "actual delay" rule is a fair, workable rule that prohibits exclusion of time for non-substantive, administrative motions. It can also provide parties and courts the flexibility to take ample time to consider motions that involve substantive issues of law. For these reasons, amicus urges this Court to affirm the judgment of the Sixth Circuit.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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