No. 12-1056

In the Supreme Court of the United States

TIMOTHY S. DUNN, MICHAEL A. VALLONE, WILLIAM S. COVER, ROBERT W. HOPPER, AND EDWARD BARTOLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of conspiracy, in violation of 18 U.S.C. 371, when the indictment alleged that petitioners conspired both to defraud the United States and to prepare and present false tax returns, and the district court instructed the jury that it had to unanimously agree on the conspiracy's objective.

2. Whether the court of appeals correctly rejected petitioners' claims that the district court made insufficient findings to support its orders granting "ends of justice" continuances under 18 U.S.C. 3161(h)(7)(A), when the court of appeals found those claims to have been waived.

3. Whether the Ex Post Facto Clause required the district court to consult the version of the advisory Sentencing Guidelines in effect at the time of petitioner Hopper's offenses, rather than the version in effect at the time of his sentencing, when determining the appropriate sentence under 18 U.S.C. 3553(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-199) is reported at 698 F.3d 416. The relevant opinions and orders of the district court (Pet. App. 286-305, 306-309) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2012. On December 13, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 25, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner Dunn was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; 11 counts of aiding in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2); two counts of filing a false income-tax statement, in violation of 26 U.S.C. 7206(1); and one count of attempted tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 201. Petitioner Bartoli was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; seven counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343; 24 counts of aiding in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2); and four counts of attempted tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 214-215. Petitioner Hopper was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; two counts of mail fraud, in violation of 18 U.S.C. 1341; one count of wire fraud, in violation of 18 U.S.C. 1343; 17 counts of aiding in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2); and four counts of attempted tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 232-233. Petitioner Cover was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; seven counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343; 13 counts of aiding in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2); and three counts of attempted tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 244-245. Petitioner Vallone was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; seven counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343;

24 counts of aiding in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2); and three counts of attempted tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 265-266.

Dunn was sentenced to 210 months of imprisonment, to be followed by three years of supervised release, Pet. App. 205-206; Bartoli was sentenced to 120 months of imprisonment, to be followed by three years of supervised release, *id.* at 216-217; Hopper was sentenced to 200 months of imprisonment, to be followed by three years of supervised release, *id.* at 234-235; Cover was sentenced to 160 months of imprisonment, to be followed by three years of supervised release, *id.* at 246-247; and Vallone was sentenced to 223 months of imprisonment to be followed by three years of supervised release, *id.* at 267-268. The court of appeals affirmed the convictions and sentences. *Id.* at 1-199.

1. Petitioners are former principals of a company that sold "multi-trust systems" to high-income individuals as a way for those individuals to avoid paying federal income taxes. Pet. App. 3-5. Although "portrayed as a legitimate, sophisticated means of tax minimization grounded in the common law, the system was in essence a sham, designed solely to conceal a trust purchaser's assets and income" from the Internal Revenue Service. *Id.* at 4. A client "nominally would transfer his assets—including his businesses and residence—to one or more trusts" and then obtain control over the trusts, so as to appear to "own nothing" while at the same time "control[ling] everything." *Id.* at 8; see generally *id.* at 7-14. Petitioners charged clients $10,000 to $50,000 to set up the trusts, plus annual fees for management services. *Id.* at 7. They also used the trust scheme themselves. *Id.* at 32-33. And they persisted in these activities even

after it was clear that the government considered the trust system to be illegal, reassuring prospective clients that the system was lawful and offering (for a price) to defend clients from governmental inquiries (which they did largely by obstructing those inquiries). *Id.* at 13-31. All told, petitioners' scheme cost the government roughly $60 million in tax revenue. *Id.* at 4-5.

2. A grand jury indicted petitioners on one count of conspiracy, in violation of 18 U.S.C. 371, along with multiple counts of mail fraud, in violation of 18 U.S.C. 1341; wire fraud, in violation of 18 U.S.C. 1343; aiding in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2); filing false tax returns, in violation of 26 U.S.C. 7206(1); and tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 34. The conspiracy count alleged that petitioners had conspired to "(a) defraud the United States" by impeding tax collection and "(b) commit offenses against the United States" by aiding in the preparation of false tax returns. *Id.* at 71. Before trial, petitioners moved to dismiss that count as duplicitous, arguing that it alleged two separate conspiracies and thus two different crimes. *Id.* at 72. The district court denied the motion, reasoning that the count "only charges a single conspiracy, with two objectives" and that such a charge was permissible under circuit precedent. *Id.* at 309.

In a separate pre-trial motion, Vallone sought dismissal of the case under the Speedy Trial Act of 1974, 18 U.S.C. 3161, *et seq.*, contending that the trial had failed to commence despite the passage of over 70 untolled days since the indictment. Pet. App. 35-36; see 18 U.S.C. 3162(a)(2). He contended, in particular, "that from February 7 to May 3, 2007, the court had failed to enter an order properly tolling the running of the

speedy-trial clock." Pet. App. 36. The government argued that the absence of such an order was irrelevant, "because the court in December 2006 had continued the trial date at the request of the defendants until October 23, 2007, and had excluded time through that new trial date from the [Act's] seventy-day mandate with the agreement of the parties." *Id.* at 36-37. The district court denied Vallone's motion, reading into the record the relevant portion of the December 7, 2006, continuance cited by the government. *Id.* at 37.

After an 11-week trial, each petitioner was convicted on the conspiracy charge and various other charges. Pet. App. 1-2. Petitioners filed a post-trial motion seeking, *inter alia*, acquittal on Speedy Trial Act grounds, which the district court denied. *Id.* at 293-296. Even assuming in "an abundance of caution" that petitioners other than Vallone had preserved the speedy-trial issue, the district court observed that during the time period about which Vallone had complained, the court had "granted continuances * * * based on Defendants' representations regarding the complexity of the case and the length of time needed to prepare for trial." *Id.* at 294-295.

Before sentencing, Hopper argued that applying the version of the Sentencing Guidelines then in effect violated his rights under the Ex Post Facto Clause (U.S. Const. Art. I, § 9, Cl. 3), because the relevant Guidelines provisions recommended a higher sentencing range (235-293 months) than the provisions in effect when he committed his crimes (135-168 months). Pet. App. 151-152, 315-318. In accordance with circuit precedent, however, the district court consulted the then-current Guidelines range (and ultimately imposed a below-range sentence of 200 months). *Id.* at 151-152, 234.

3. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 1-199. As relevant here, the court of appeals first rejected the contention that the conspiracy count had duplicitously charged two offenses, rather than just one. *Id.* at 71-74. Although it acknowledged "some division of authority on this point," the court of appeals relied on this Court's decision in *Braverman* v. *United States*, 317 U.S. 49 (1942), to reason that the co-conspirators' illicit agreement constituted a singular offense and that defrauding the United States and committing offenses against the United States were "multiple goals" of that single conspiracy "rather than two distinct crimes." Pet. App. 72-73. The court of appeals additionally observed that the "principal vice of duplicity"—namely, "the possibility that jury members, although agreeing that there was a conspiracy, might not be unanimous as to what the object of the conspiracy was"—was absent in this case, because the district court had instructed that jury "that it must unanimously agree on at least one of the alleged objectives of the conspiracy." *Id.* at 74. The court further noted that "other concerns potentially implicated by duplicity, including notice to the defendants," had not been raised in this case. *Ibid.*

The court of appeals also rejected petitioners' Speedy Trial Act claims, concluding that petitioners had "waived this argument." Pet. App. 38. The court of appeals explained that a district court may exclude time from the 70-day speedy-trial clock if it determines that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," so long as the district court "sets forth, in the record of the case, either orally or in writing, its reasons" for granting such a continuance. 18 U.S.C.

3161(h)(7); see Pet. App. 38-39. The court of appeals reasoned that, in this case, because the district court had "relied on what had transpired on December 7 to deny Vallone's [speedy-trial] motion," the "threshold question" on appeal was "whether * * * the December 2006 continuance of the trial date and the accompanying exclusion of time complied with the [Act's] ends-of-justice provision." *Id.* at 39. But it found petitioner's opening appellate brief to be "altogether silent as to December 7," neither mentioning it nor providing any argument why the order entered on that date "was insufficient to comply with" the Speedy Trial Act. *Id.* at 40. Accordingly, although petitioners "belatedly" addressed the matter in their reply brief, the court of appeals determined that petitioners had "waived this aspect of their challenge." *Ibid.* The court of appeals also determined that challenges to the sufficiency of various other continuance orders had been waived by failing to raise them in the district court. *Id.* at 41-42.

Finally, the court of appeals relied on circuit precedent to reject Hopper's ex post facto challenge to the use of the then-current Sentencing Guidelines. Pet. App. 151-152 (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)).

ARGUMENT

Petitioners challenge the conspiracy count in the indictment, arguing that it improperly joined two separate offenses under 18 U.S.C. 371. The court of appeals correctly rejected that claim, and its conclusion does not warrant this Court's review. Petitioners' separate request to hold this case pending the disposition of the petitions for writs of certiorari in *Wasson* v. *United States*, 133 S. Ct. 1581 (2013) (No. 12-546), and *Levis* v. *United States*, No. 12-635 (Apr. 29, 2013), is moot, now

that the Court has denied certiorari in those cases. Petitioners also request, however, that the petition be held pending the Court's decision in *Peugh* v. *United States*, No. 12-62 (argued Feb. 26, 2013), which presents the same ex post facto issue preserved by Hopper. The government agrees that it would be appropriate to hold the petition on that issue.

1. The rule against duplicity prohibits the joining in a single count of two or more distinct and separate offenses. See, *e.g.*, *In re Lane*, 135 U.S. 443, 448 (1890); *Andersen* v. *United States*, 170 U.S. 481, 500-501 (1898); 5 Wayne R. LaFave et al., *Criminal Procedure*, § 19.3(c), at 285-286 (3d ed. 2007) (LaFave). Petitioners contend (Pet. 11-19) that the conspiracy count of the indictment in this case violated the duplicity rule by charging two separate conspiracy offenses: one to defraud the United States and one to commit offenses against the United States.

The conspiracy statute, 18 U.S.C. 371, provides that "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." As petitioners appear to acknowledge (Pet. 11 & n.6), a number of circuits have concluded, in accord with the decision below, "that single counts alleging violations of both the 'offense' and 'defraud' prong of § 371 are not duplicitous" because "§ 371 creates a single offense" and such counts thus "charge one crime, not two." *United States* v. *Rigas*, 605 F.3d 194, 210-211 (3d Cir. 2010) (en banc) (citing, *inter alia*, *United States* v. *Harmas*, 974 F.2d 1262, 1266 (11th Cir. 1992); *United*

States v. *Smith*, 891 F.2d 703, 712-713 (9th Cir. 1989), non-substantively amended by 906 F.2d 385 (9th Cir.), cert. denied, 498 U.S. 811 (1990); *United States* v. *Williams*, 705 F.2d 603, 623-624 (2d Cir.), cert. denied, 464 U.S. 1007 (1983); *May* v. *United States*, 175 F.2d 994, 1002-1003 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949)).

Petitioners contend that this Court's review is warranted based on decisions in the Fifth, Eighth, and Tenth Circuits that view Section 371 as setting forth two separate offenses. See Pet. 12-13 n.7 (citing *United States* v. *Ervasti*, 201 F.3d 1029, 1039-1040 (8th Cir. 2000); *United States* v. *Haga*, 821 F.2d 1036, 1039 (5th Cir. 1987); *United States* v. *Thompson*, 814 F.2d 1472, 1477 (10th Cir.), cert denied, 484 U.S. 830 (1987)); see also *United States* v. *Twomey*, 806 F.2d 1136, 1143-1144 (1st Cir. 1986).[*] As petitioners apparently recognize (Pet. 13 & n.9), however, none of those decisions arises in the context of a duplicity claim. Rather, they address double-jeopardy claims or claims that the indictment did not cover the offense for which the defendant was convicted. Although some courts of appeals have equated

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[*] Petitioners also appear to suggest that the decision below creates an intra-circuit conflict in the court of appeals. See Pet. 12 n.7; *id.* at 13 n.8. They interpret a sentence in *United States* v. *Jackson*, 33 F.3d 866 (7th Cir. 1994), cert. denied, 514 U.S. 1005 (1995), which states that "there are two different conspiracies with which a defendant can be charged under § 371—a conspiracy 'to commit any offense against the United States,' *or* a conspiracy 'to defraud the United States,'" *id.* at 870 (citation omitted), as a holding that Section 371 defines two separate offenses. Assuming *arguendo* that Seventh Circuit precedent on this issue is not uniform, that would counsel against, rather than in favor of, granting certiorari in this case. The proper recourse would be a rehearing petition in the court of appeals, not review in this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

the separate-offense analysis in the context of a double-jeopardy claim with the separate-offense analysis in a duplicity claim, see *ibid.*, other circuits have rejected duplicity claims like petitioners' even though they have in other contexts construed Section 371 to set forth two separate offenses. See *United States* v. *Pierce*, 479 F.3d 546, 552 (8th Cir. 2007) ("Here, the jury convicted Appellants of entering into an unlawful agreement to defraud the United States and commit offenses against the United States in violation of 18 U.S.C. § 371. Each of the three sets of object offenses—fraudulent tax returns, mail fraud and wire fraud—further the general agreement and are multiple facets of one conspiracy."); *United States* v. *Hauck*, 980 F.2d 611, 615 (10th Cir. 1992) (rejecting duplicity argument with respect to a charge similar to the one here). Accordingly, any tension in analysis does not indicate a conflict in results.

Critically, petitioners identify no decision of any court of appeals granting relief on a duplicity claim like theirs. "It is black letter law that duplicitous indictments can be cured through appropriate jury instructions." *United States* v. *Robinson*, 627 F.3d 941, 958 (4th Cir. 2010); see Charles A. Wright and Andrew D. Leopold, *Federal Practice and Procedure* § 145, at 94-95 & n.5 (4th ed. 2008); LaFave § 19.3(c), at 286-287 & n.189. As the court of appeals recognized, any duplicity problem in this case was cured by the district court's instruction requiring jury unanimity about the object of the conspiracy. Pet. App. 74. Petitioners identify no decision holding otherwise and offer no reason why review would nonetheless be warranted in this case.

2. Petitioners' second question presented challenges whether the district court made sufficient findings to support an "ends of justice" continuance under the

Speedy Trial Act, 18 U.S.C. 3161(h)(7)(A). Pet i. Petitioners do not seek plenary review on that question, but instead request that the case be held for the petitions *Wasson* v. *United States*, *supra*, and *Levis* v. *United States*, *supra*. Because both of those petitions have now been denied, that request is moot. In any event, this case does not actually present the issue raised by petitioners, because the court of appeals concluded that petitioners waived their Speedy Trial Act argument by failing to sufficiently develop that argument in their opening appellate briefing. See Pet. App. 38-43. The court of appeals' fact-bound waiver determination does not itself warrant this Court's review, and it forecloses petitioners from obtaining relief on their Speedy Trial Act claims.

3. Hopper's ex post facto argument (Pet. 25-27) presents the same question currently before the Court in *Peugh* v. *United States*, *supra*. It would thus be appropriate for the Court to hold this petition pending its decision in *Peugh*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

As to the third question presented, the petition for a writ of certiorari should be held pending the decision in *Peugh* v. *United States*, No. 12-62 (argued Feb. 26, 2013), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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