sideration only of the circumstance related to the "commission of the crime by the defendant" that also "excuses or mitigates his culpability for the offense" was "narrow" and "unrealistic." The Court opined that the proper interpretation of the instruction was that the jury could consider "any other circumstance that might excuse the crime" or "extenuate the gravity of the crime," which could include "precrime background and character [*Boyde*] and postcrime rehabilitation [*Payton*]." The Court also noted that "some likelihood of future good conduct" could similarly "count as a circumstance tending to make a defendant less deserving of the death penalty."

Finally, the Court concluded that its interpretation of the factor (k) instruction was "most consistent" with the totality of the circumstances of the *Belmontes* trial, including the nature of the evidence presented to the jury, closing arguments, and additional instructions provided by the court. Specifically, the Court determined that "nothing barred the jury from viewing the inmate's future prospects as extenuating the gravity of the crime" and therefore, there was no "reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence." The Court reversed the lower court's decision and remanded the case for further proceedings.

Dissent

In the dissenting opinion (of four justices), Justice Stevens posited that pervasive "confusion" in Mr. Belmontes' sentencing hearing raised significant doubt as to whether the jury had applied the factor (k) instruction in a way that did not preclude constitutionally relevant information. Justice Stevens identified, among other factors, jurors' questions to the court and the court's responses as indicators of this confusion about permissible mitigating evidence. For example, one juror asked whether Mr. Belmontes would receive psychiatric treatment if incarcerated, and the judge replied, "That is something you cannot consider in making your decision." Justice Stevens argued this "lent further support to the conclusion that respondent's future conduct. . .was not relevant" in contrast to the Supreme Court's majority opinion to the contrary. Moreover, Justice Stevens noted that the uncertain and risky nature of the factor (k) instruction was confirmed by subsequent amendments made to the instruction by the California Supreme Court in *People v. Easley*, 34 Cal.3d 858 (Cal. 1983), and by the California legislature in 2005. By statute, the instruction was amended to include "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial."

Discussion

In this decision, the United States Supreme Court addressed whether evidence about a defendant's potential for future good conduct, including his likelihood of making a positive contribution to society while in prison, was unconstitutionally precluded from consideration as mitigating evidence by the jury that sentenced him to death. Although the case primarily concerned the constitutionality of a specific California juror instruction, factor (k), the nature of the reasoning and rulings throughout the history of the case reveal an ongoing affirmation that a defendant's future potential good conduct, rehabilitation, or positive contribution to society can be considered mitigating evidence in death penalty sentencing. To the extent that a defendant's future potential may be affected by psychological factors and that the courts may solicit the opinions of mental health clinicians as to the nature and prognosis of mental disorders and the likelihood of treatment outcomes for defendants, this case has relevance to mental health clinicians.

Speedy Trial Act of 1974

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Prospective Waiver of the Application of the Speedy Trial Act Is Not Permissible

In *Zedner v. United States*, 126 S. Ct. 1976 (2006), the Supreme Court considered whether a prospective waiver of a defendant's right to a speedy trial for "all time" violated the federal Speedy Trial Act of 1974 (18 U.S.C.S. §§ 3161-3174).

Facts of the Case

In March 1996, Jacob Zedner, a federal criminal defendant with mental illness, was arrested when he attempted to open bank accounts with $10 million worth of counterfeit U.S. bonds. One bond was allegedly issued by the "Ministry of Finance of the U.S.A," and others had misspellings such as, "Thunted States," (United States), and "Dhtladelphla (Philadelphia)" (*United States v. Zedner*, 401 F.3d 36 (2nd Cir. 2005)). Mr. Zedner was indicted for seven counts of attempting to defraud a federal institution and one count of knowingly possessing counterfeit U.S. bonds. In June 1996 the court granted two "ends of justice" continuances based on the complexity of the case (see 18 U.S.C.S. § 3161(h)(8)(B)(ii)). In November 1996, Mr. Zedner's counsel requested a continuance until January 1997. Under the Speedy Trial Act (the Act), the court instructed Mr. Zedner as follows: "I think if I am going to give you that long an adjournment, I will have to take a waiver for all time" (*Zedner v. United States*, p 1980). The court provided, and Zedner signed, a court-created form entitled, "Waiver of Speedy Trial Rights" (*Zedner v. United States*, p 1982). On January 31, 1997, Mr. Zedner's attorney sought yet another continuance "to tap. . .the proper channels to authenticate [the] bonds" (*Zedner v. United States*, p 1982), which was not contested because of Mr. Zedner's "waiver for all time."

Mr. Zedner's trial failed to commence for more than four years. During this time, his attorney withdrew because of his insistence on arguing the legitimacy of the bonds, and the court ordered an evaluation of Mr. Zedner's competency to stand trial. Although he was found to be competent, he requested to proceed *pro se* and spent the next year seeking questionable subpoenas for the President, the Chairman of the Federal Reserve Board, and the late Chinese leader Chiang Kai-shek among others. Despite the delays due to quashed subpoenas, the case was finally set for trial, but on the day of jury selection, Mr. Zedner's competency was again called into question. In this evaluation, he was found incompetent to stand trial and was committed to a hospital for treatment. On March 7, 2001, Mr. Zedner moved to dismiss the indictment because of the government's failure to begin the trial on time according to the requirements prescribed by the Act. Mr. Zedner's motion was denied based, in part, on his waiver "for all time" and also due to the complexity of the case. After several months of hospitalization, Mr. Zedner was finally released with a determination that he was competent to stand trial, although still delusional. Seven years after the original indictment, the trial finally commenced on April 7, 2003. Mr. Zedner was found guilty and sentenced to 63 months in prison. He appealed based on violation of provisions of the Speedy Trial Act, but the court of appeals affirmed the district court's judgment. The Supreme Court of the United States granted *certiorari*.

Ruling and Reasoning

The Supreme Court held that Mr. Zedner's waiver of the Act's application "for all time" was ineffective, because a defendant may not validly waive the application of the Act prospectively.

The Speedy Trial Act of 1974 was designed to regulate the time in which a trial is to begin, to ensure that criminal prosecutions are not unduly delayed. Generally, the Act requires a trial to begin within 70 days of the filing of information or an indictment or the initial appearance of the defendant. The Act was designed to benefit defendants, but also to prevent extended delays from impairing the deterrent effects of punishment and ". . . to assist in reducing crime and the danger of recidivism by requiring speedy trials. . ." (H.R. Rep. No. 93-1021, pp 6–8). However, specific exclusions are delineated in the Act allowing pretrial delays during the 70-day period under certain circumstances. Such circumstances include, but are not limited to: the defendant's involvement in another proceeding, the unavailability of the defendant, or the mental or physical incompetence of the defendant to stand trial (18 U.S.C.S. §3161(h)(2005)).

The Act also includes a provision that allows courts discretion to make an "ends of justice continuance" to account for limited delays in complicated cases. The Act provides the court with flexibility within certain specific procedural boundaries. After considering certain factors, the court is allowed to grant a continuance if it weighs the need for the continuance against the public's and defendant's interests and does so on the record. A list of acceptable reasons is provided in the Act to satisfy the ends of justice threshold and include factors such as the defendant's need for

"reasonable time to obtain counsel," "continuity of counsel," and "effective preparation" of counsel (18 U.S.C.S. §3161(h)(8)(B)(iv)(2005)). If the court fails to follow these specific guidelines and the trial fails to begin on time, sanctions are contained in the Act allowing the defendant to move for a dismissal before the start of the trial or entry of a guilty plea. The district court by law must, in those circumstances, dismiss the charges, but has the discretion to dismiss the charges with or without prejudice.

In the case at bar, the Supreme Court concluded that a prospective waiver of the application of the Act is not permissible. In its reasoning, the Court looked to the plain language of the Act and to legislative history. The Court held that Congress has explicitly enumerated areas of exclusion in the Act and that there is no provision within these acceptable exclusions that allows a defendant to waive the application of the Act. The omission of this provision was considered by Congress, and thus a defendant cannot opt out of the Act. In addition, the court reasoned that § (h)(8) allows an "ends of justice continuance" for a defendant in certain circumstances but found this section to be of little importance if the defendant were allowed merely to waive the application of the Act. Moreover, the Court emphasized the dual purposes of the Act, not only to protect the defendant's rights to a speedy trial, but also to protect the "public interest." To allow a defendant the right to waive the Act when the right is not solely held by the defendant would not protect societal interests, as intended by the Congress.

The district court had justified a prospective waiver based on the requirement that "failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section" (18 U.S.C. § 3162 (a)(2)(2005)). The Supreme Court disagreed and held that the retrospective waiver of the Act did not produce the same potential dangers as a prospective waiver. With a retrospective waiver, incentives to begin a trial on time continued to exist because whether a defendant intended to exercise his right to move for a dismissal was not apparent until the right was exercised or the trial began. In contrast, a prospective waiver would undermine the intentions of the Act to begin a trial on time and provide no safeguards for the public interests just mentioned. The Supreme Court concluded that a defendant is not allowed to waive the application of the Act prospectively, and therefore Mr. Zedner's waiver "for all time" was ineffective.

Discussion

The Sixth Amendment right to a speedy trial is guaranteed by the United States Constitution. However, Congress enacted The Speedy Trial Act of 1974 to augment the rights of the defendant and include protections for societal interests in having a criminal defendant's trial begin on time. Among several specified acceptable exclusions to the Act, is incompetence to stand trial. It has been well established that it would be against public policy to have an incompetent defendant stand trial. Thus, by including incompetence as an exclusion, Congress has allowed the tolling of the speedy trial "clock" in cases in which a defendant is found to be incompetent. This specific exclusion reflects Congress' determination that having a competent defendant stand trial outweighs the interest of having a speedy trial.

In *Zedner*, the defendant was found to have delusions but was initially found competent to stand trial. Following his forensic evaluation he proceeded *pro se* and for the next year subpoenaed high-ranking officials without his competency being questioned until the first day of his jury trial. Although the decision in this case focused on whether a defendant could legally prospectively waive his or her rights to a speedy trial, the fact that Mr. Zedner was adjudicated incompetent to stand trial raises issue of defendants' competence to waive any of their rights. As in *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court held that the competency standard for pleading guilty or waiving the right to counsel is the same as the standard for competency to stand trial established in *Dusky v. United States*, 362 U.S. 402 (1960). Although the standard is the same for a defendant to waive his right or plead guilty, the court must find that he did so competently and intelligently (*Johnson* v. *Zerbst*, 304 U.S. 458 (1938)). While this question was not raised in *Zedner*, it may be relevant in future cases in which a defendant waives his rights to a speedy trial.