No. 08-1264

In the Supreme Court of the United States

TEJBIR S. OBEROI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether time granted at the request of a defendant to prepare pretrial motions qualifies as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), and is thus excludable from the time within which trial must commence under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq*.

2. Whether the time between the date on which a magistrate judge files a report and recommendation on pretrial motions and the date on which the parties must file objections to the report and recommendation is excludable under Section 3161(h).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 547 F.3d 436. The decision and order of the district court denying petitioner's motion to dismiss the indictment under the Speedy Trial Act (Pet. App. 51a-102a) is reported at 295 F. Supp. 2d 286.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2008. A petition for rehearing was denied on January 14, 2009 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on April 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of New York, petitioner was convicted of making false statements in connection with health care benefits, in violation of 18 U.S.C. 1035, and mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. Pet. App. 8a. The court of appeals affirmed. *Id.* at 1a-50a.

1. The Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to commence within 70 days of his indictment or his first appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70-day period are periods of delay "resulting from other proceedings concerning the defendant, including but not limited to * * * delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).[1] Also automatically excluded from the 70-day period is "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. 3161(h)(1)(J). Addi-

[1] On October 13, 2008, Congress enacted the Judicial Administration and Technical Amendments Act of 2008 (2008 Act), Pub. L. No. 110-406, 122 Stat. 4291, which makes certain technical changes to the STA. Among other things, the 2008 Act redesignates 18 U.S.C. 3161(h)(1)(F) as 18 U.S.C. 3161(h)(1)(D); 18 U.S.C. 3161(h)(1)(J) as 18 U.S.C. 3161(h)(1)(H); and 18 U.S.C. 3161(h)(8) as 18 U.S.C. 3161(h)(7). § 13, 122 Stat. 4294. All citations to the STA in this brief refer to the pre-2008 Act version of the statute, as codified in the 2006 edition of the United States Code.

tionally, a district court may exclude from the 70-day limit "[a]ny period of delay resulting from a continuance * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A). Such findings must be made at or before the time the Court rules on a motion to dismiss for an STA violation. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006). If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. Petitioner, a dentist in Buffalo, New York, defrauded insurance companies and dental benefit plans by filing reimbursement claims for procedures that he did not perform. Pet. App. 3a. In addition, to make his excessive billings appear legitimate, petitioner conducted unnecessary and invasive procedures, including root canals and osseous surgery, on unsuspecting healthy patients. Gov't C.A. Br. 1-2.

3. On October 14, 1999, a criminal complaint was filed charging petitioner with mail fraud, in violation of 18 U.S.C. 1341, and health care fraud, in violation of 18 U.S.C. 1347. Pet. App. 3a. On December 16, 1999, a grand jury indicted petitioner on 34 counts of mail fraud and 123 counts of making false statements in connection with health care benefits, in violation of 18 U.S.C. 1035. Pet. App. 3a-4a. On December 22, 1999, petitioner was arraigned. That day was also his first appearance before a judicial officer, which began the running of the

speedy trial clock. See *id.* at 38a; 18 U.S.C. 3161(c)(1). Thereafter commenced "unusually event-filled pretrial proceedings, including three interlocutory appeals, hearings concerning bail (26 days), competency proceedings, and several switches of defense counsel before [petitioner] elected to represent himself." Pet. App. 2a.

On June 20, 2003, petitioner, proceeding pro se, moved to dismiss the indictment because of an alleged violation of the STA. Pet. App. 52a. The district court denied the motion. *Id.* at 51a-102a.

The following time periods are relevant to petitioner's STA claim: On December 22, 1999, in response to a request by petitioner's counsel for "additional time to prepare and file his pretrial motions," Pet. App. 69a, a magistrate judge set a schedule for the filing of pretrial motions, with oral argument to be held on March 3, 2000, *id.* at 38a. The magistrate judge stated that the time until that date would not count towards the STA deadline, but the court did not further explain the exclusion of time. *Ibid.* On December 28, 1999, the magistrate judge entered a written order directing the parties to file pretrial motions by February 23, 2000, and scheduling oral argument for March 10, 2000. *Ibid.* Citing the Second Circuit's Speedy Trial Guidelines, as well as cases from the First and Seventh Circuits holding that pretrial motion preparation time is automatically excluded from the speedy trial clock, the magistrate judge ordered that "the period of time from the date of this order until the date of oral argument is excluded under 18 U.S.C. § 3161(h)(1)(F)." Pet. App. 39a (citation omitted).

On March 20, 2000, the magistrate judge entered a similar written order directing the parties to file pretrial motions by May 10, 2000, and expressly stopping the

speedy trial clock on that basis. Pet. App. 40a. No motions were filed by the May 10 deadline, but, at a conference on the following day, the magistrate judge orally granted petitioner's motion for a further extension of time to prepare motions. *Id.* at 41a. On May 12, 2000, the magistrate judge entered a third written scheduling order directing the parties to file pretrial motions by June 28, 2000, and setting oral argument for July 26, 2000. *Ibid.* The written order again excluded time pursuant to 18 U.S.C. 3161(h)(1)(F). Pet. App. 41a.

On June 28, 2000, petitioner's counsel by letter requested another extension of time to file pretrial motions. Pet. App. 41a. On June 30, 2000, a magistrate judge granted the request without referring to the STA. *Ibid.* On July 18, 2000, the magistrate judge issued a written order directing the parties to file pretrial motions by July 31, 2000, and scheduling oral argument for August 23, 2000. *Id.* at 41a-42a. Pursuant to 18 U.S.C. 3161(h)(1)(F), the order excluded from the STA deadline the time from the date of the order through the date for oral argument. Pet. App. 42a.

On July 31, 2000, petitioner filed pretrial motions. Pet. App. 42a. The magistrate judge held a hearing on those motions on October 18, 2000. *Ibid.* On November 27, 2000, the magistrate judge issued a written order excluding from the STA deadline the next 30 days (until December 18, 2000), pursuant to 18 U.S.C. 3161(h)(8)(A), and making the necessary finding that the delay furthered the ends of justice. Pet. App. 42a-43a.

On December 20, 2000, the magistrate judge issued his report and recommendation on the pretrial motions. Pet. App. 43a. Petitioner's counsel received the report and recommendation on December 27, 2000, which automatically triggered a 10-day period for filing objections

with the district court, pursuant to 28 U.S.C. 636(b)(1). Pet. App. 43a. The 10-day objections period, which excludes holidays and weekends, see Fed. R. Crim. P. 45(a)(2), expired on January 11, 2001. Pet. App. 43a. On that day, petitioner's counsel requested an extension of time within which to file objections. On January 12, 2001, the district court entered an order giving petitioner until February 8, 2001, to file objections. *Ibid.* Thereafter, the "filing of objections was overtaken by other procedural events," which independently tolled the speedy trial clock beginning on February 5, 2001. *Id.* at 44a.

In denying petitioner's motion to dismiss the indictment under the STA, the district court found that only 20 days of the 70-day statutory limit had elapsed. Pet. App. 102a. As relevant here, the district court concluded that the time necessary to prepare pretrial motions is "automatically excluded from the Speedy Trial clock under § 3161(h)(1)," *id.* at 70a, which excludes any period of delay resulting from "other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1). In addition, the district court held that the time for filing objections to a magistrate judge's report and recommendation on pretrial motions is also automatically excluded from the speedy trial clock. Pet. App. 86a. Relying on cases from the Sixth and Eighth Circuits, the court reasoned that the filing of the report and recommendation "in essence serves to re-file the motions, together with the magistrate's study of them, with the district court," and therefore "this filing tolls the 70-day count until the district court holds a hearing or has all the submissions it needs to rule on the motions." *Id.* at 86a-87a (quoting *United States* v. *Long*, 900 F.2d 1270, 1275 (8th Cir. 1990)).

Jury selection in petitioner's trial began on January 12, 2004. Pet. App. 7a. On January 15, 2004, pursuant to an agreement with the government, petitioner pleaded guilty to one count of making false statements in connection with a health care matter, in violation of 18 U.S.C. 1035, and one count of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 7a-8a. Petitioner reserved the right to appeal his STA claim. *Id.* at 7a. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-50a. As relevant here, the court held that the district court correctly denied petitioner's motion to dismiss the indictment for violation of the STA because fewer than 70 non-excludable days elapsed between petitioner's arraignment on December 22, 1999, and the start of petitioner's trial on January 12, 2004. *Id.* at 8a-46a.

First, the court of appeals rejected petitioner's argument that time requested by a defendant to prepare pretrial motions may not be automatically excluded from the 70-day limit under 18 U.S.C. 3161(h)(1). Pet. App. 20a-28a. The court noted that the courts of appeals disagree on whether motion preparation time is excludable under Section 3161(h)(1)'s general language tolling the speedy trial clock for "other proceedings concerning the defendant, including but not limited to" the proceedings specified in Subsections (h)(1)(A) through (J). *Id.* at 23a-27a. After analyzing the issue, the court "join[ed] the sound majority of circuits holding that the time needed for the preparation of pretrial motions can be excluded under § 3161(h)(1)." *Id.* at 27a.

The court reasoned that, although motion preparation time does not fall within Subsection (h)(1)(F)'s spe-

cific exclusion for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," 18 U.S.C. 3161(h)(1)(F), that provision is "but an illustration of the general language of § 3161(h)(1)." Pet. App. 25a (quoting *United States* v. *Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982) (Breyer, J.)). The court observed that "section 3161(h)(1) is explicit that the particular intervals in subsections A through J are illustrative rather than exhaustive" because Section 3161(h)(1) uses the phrase "including but not limited to." *Ibid.* (quoting *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985)). The court further reasoned that "subsection (h)(1)(F) automatically stops the clock for preparation of response papers" to pretrial motions and "[t]he same interests and considerations that militate in favor of allocating time for a party to respond to a motion (and for a court to decide it) justify the allocation of time to prepare the motion in the first place." *Id.* at 27a. The court, however, added a "caveat" to its holding: in order for pretrial motion preparation time to qualify for automatic tolling under Section 3161(h)(1), "the lower court must expressly stop the speedy trial clock, either on the record or in a written order." *Ibid.* The court reasoned that "[t]his condition is critical" to allow "the creation of a docket entry," which "facilitate[s] audits for compliance with the [STA] (in the trial court and on appeal)." *Id.* at 27a-28a.

Second, the court of appeals held that the time from a magistrate judge's issuance of a report and recommendation on pretrial motions through the deadline for filing objections to the report and recommendation is also excluded from the speedy trial clock under Section 3161(h)(1). Pet. App. 29a-34a. Like the district court,

the court of appeals agreed with cases from the Sixth and Eighth Circuits reasoning that the filing of the report and recommendation effectively "serves to re-file the motions" with the district court, thereby tolling the speedy trial clock "until the district court holds a hearing or has all the submissions it needs to rule on the motions." *Id.* at 31a-32a (quoting *Long*, 900 F.2d at 1275, and citing *United States* v. *Andress*, 943 F.2d 622, 626 (6th Cir. 1991), cert. denied, 502 U.S. 1103 (1992)).

The court of appeals noted that the Seventh and Eleventh Circuits "take a slightly different tack." Pet. App. 32a. In those circuits, the court explained, "the issuance of a report and recommendation starts the clock; but the filing of objection automatically stops it." *Ibid.* (citing *United States* v. *Thomas*, 788 F.2d 1250, 1257 (7th Cir.), cert. denied, 479 U.S. 853 (1986), and *United States* v. *Robinson*, 767 F.2d 765, 769 (11th Cir. 1985)). The court rejected that approach, reasoning that "[w]hile [it] speeds things along, it seems to assume that a report and recommendation is a final disposition of a motion, rather than a document that 'is automatically filed with the district court, which in turn is required to make a *de novo* determination on the issues to which a party objects.'" *Id.* at 33a (quoting *Long*, 900 F.2d at 1275 n.3). The court of appeals further observed that, "[e]ven if neither party files an objection to the report and recommendation, the motion itself is decided only after the district court rules." *Ibid.* Based on those considerations, the court of appeals ruled that "[t]he issuance of a report and recommendation automatically tolls the speedy trial clock under subsection (h)(1)(F) until ten days pass or objections are filed (whichever comes sooner)." *Id.* at 34a.

Applying these principles, the court of appeals excluded 154 days as time for the preparation of pretrial motions. See Pet. App. 38a-39a, 40a, 41a-42a. The court declined to exclude an additional 24 days based on its "caveat" that time granted to prepare pretrial motions is excluded only if the district court expressly stops the speedy trial clock for that purpose. See *id.* at 38a (refusing to exclude five days—December 23, 1999, through December 27, 1999); *id.* at 41a (refusing to exclude 19 days—May 11, 2000, and June 30, 2000, through July 17, 2000). The court also excluded 44 days based on its ruling that the time between the issuance of a magistrate's report and recommendation on the pretrial motions and the filing of any objections is also excluded. See *id.* at 43a-44a (excluding both the standard time for filing objections and the additional time that the district court granted in response to defense counsel's request). In total, the court concluded that only 45 days had elapsed on the speedy trial clock, well within the 70-day limit. See *id.* at 46a. Accordingly, the court affirmed the denial of petitioner's STA claim.[2]

DISCUSSION

1. Petitioner first contends (Pet. 11-17) that this Court should grant the petition for a writ of certiorari

[2] With respect to 12 additional days that petitioner challenged in the court of appeals but had failed to challenge in the district court, the court of appeals noted that "[t]he [STA] provides that '[f]ailure 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)." Pet. App. 46a. The court further observed that, "[e]ven if [petitioner] had raised these periods of delay, they would constitute only twelve additional days on the clock," resulting in a total of 57 nonexcludable days, "fewer than the 70 allowed by the [STA]." *Ibid.*

to decide whether time granted to a defendant to prepare pretrial motions may be excluded from the STA's 70-day time limit as a "period of delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1). This Court recently granted review to resolve that question in *Bloate* v. *United States*, cert. granted, No. 08-728 (Apr. 20, 2009). With respect to that question, the petition should therefore be held pending the Court's decision in *Bloate*.

2. Petitioner also contends (Pet. 17-26) that the Court should grant the petition for a writ of certiorari to decide whether the time for filing objections to a magistrate judge's report and recommendation on pretrial motions is excluded from the speedy trial clock under Section 3161(h)(1). The Court should hold the petition pending the decision in *Bloate* with respect to that question as well.

The Court's ruling in *Bloate* may render that issue irrelevant to the resolution of petitioner's STA claim. If this Court rules in *Bloate* that time granted for the preparation of pretrial motions is not excludable under Section 3161(h)(1), then petitioner will be able to establish an STA violation regardless of whether the court below correctly excluded time for filing objections to a magistrate's report and recommendation. Including the 154 days that the court below excluded as motion preparation time would bring the total number of days between petitioner's arraignment and the start of his trial to far more than the 70 days permitted under the STA, without taking into account the 44 days that the court below excluded as time for filing objections. Conversely, if this Court rules in *Bloate* that time granted for the preparation of pretrial motions is excludable under Section 3161(h)(1) (and the Court does not adopt the "ca-

veat" imposed by the court below that the trial court must "expressly stop the speedy trial clock," Pet. App. 27a), then petitioner will not be able to establish an STA violation even if the court below erred in excluding time for filing objections to a magistrate's report and recommendation. If all the time granted to prepare motions is excluded, only 65 days of nonexcludable time elapsed between petitioner's arraignment and the start of his trial, even if one includes the 44 days that the court below excluded as time for filing objections to the magistrate's report and recommendation—the 45 days calculated by the court below, minus the 24 days of preparation time included by the court below because of its caveat, plus the 44 days attributable to the objections period.

In addition, this Court's decision in *Bloate* is likely to provide guidance on the scope of both the general exclusion in Section 3161(h)(1) and the specific exclusion in Subsection (h)(1)(F). The Court's guidance on the scope of those provisions may well shed light on the correct resolution of the question whether the time for filing objections to a magistrate's report and recommendation on pretrial motions is properly excluded under the provisions. Accordingly, if this Court decides *Bloate* in a way that does not render that question irrelevant to the resolution of petitioner's STA claim, then the Court may wish to vacate the decision below with respect to that question and remand the case for further consideration in light of *Bloate*.[3]

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[3] Plenary review by this Court of the second question presented is not warranted. The ruling of the court below that the time for filing objections to a magistrate judge's report and recommendation is excluded under Section 3161(h)(1) is supported by this Court's decision in *Henderson* v. *United States*, 476 U.S. 321, 330 (1986), and consistent with

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Bloate* v. *United States*, cert. granted, No. 08-728 (Apr. 20, 2009), and then disposed of accordingly.

Respectfully submitted.

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JULY 2009

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the decision of every court of appeals that has resolved the question since *Henderson* was decided. See *United States* v. *Harris*, 566 F.3d 422, 430 (5th Cir. 2009); *United States* v. *Andress*, 943 F.2d 622, 626 (6th Cir. 1991), cert. denied, 502 U.S. 1103 (1992); *United States* v. *Long*, 900 F.2d 1270, 1275 (8th Cir. 1990). Contrary to petitioner's contention (Pet. 18), the Tenth Circuit in *United States* v. *Mora*, 135 F.3d 1351 (1998), did not resolve this issue. See *id.* at 1357 (holding that a magistrate judge "is subject to the thirty-day 'under advisement' period set forth in subsection (J)" and that the district judge is entitled to an "additional [30-day] excludable period in order to properly review the magistrate's report and recommendation," without specifically considering the question whether the ten-day period for filing objections is excludable). The two court of appeals decisions that have resolved the issue differently from the four courts of appeals that have held the ten-day period for filing objections is excludable time both predate *Henderson*. See *United States* v. *Thomas*, 788 F.2d 1250, 1257 (7th Cir.), cert. denied, 479 U.S. 853 (1986); *United States* v. *Robinson*, 767 F.2d 765, 769 (11th Cir. 1985). Confronted with the same question today, those courts of appeals might well resolve the question consistently with *Henderson* and with the courts of appeals that have addressed the question more recently. Accordingly, this Court's resolution of the question is not warranted at this time.