No. 09-1498

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

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

REPLY BRIEF FOR THE UNITED STATES

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In the decision below, the Sixth Circuit acknowledged that it was creating a circuit conflict on the scope of the exclusion for "delay resulting from any pretrial motion" from the deadline for commencing trial under the Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161(h)(1)(D). Pet. App. 16a. "[D]isagree[ing]" with the "consensus" of "[e]very circuit to have addressed the issue," the court "h[e]ld that a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." *Ibid.* As the petition for a writ of certiorari explains, this Court's review is needed to resolve the conflict and correct the Sixth Circuit's erroneous decision, which is already disrupting operation of the STA and threatens further disruption if uncorrected. Respondent's arguments against granting review are unpersuasive.

A. The Decision Below Creates A Circuit Conflict

Respondent attempts (Br. in Opp. 5-6, 9-11) to make the circuit conflict disappear by arguing that the Sixth Circuit held only that time is not excluded when "the parties know from the moment that pretrial motions are filed that they will not affect the scheduled trial date." *Id.* at 6. But respondent's characterization of the holding is not accurate. And even if it were, the decision below would still conflict with decisions of other circuits.

1. The court below clearly stated that it was "hold[ing] that a pretrial motion must actually cause a delay, or the expectation of a delay, of the trial in order to create excludable time." Pet. App. 16a. And that is how district courts in the Sixth Circuit are interpreting the decision, as the cases cited by respondent (Br. in Opp. 12) illustrate. See *United States* v. *Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *1 (E.D. Tenn. Dec. 22, 2009) (describing decision as "hold[ing] that a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time") (brackets in original); *United States* v. *Jerdine*, No. 1:08-CR-00481, 2009 WL 4906564, at *5 (N.D. Ohio Dec. 18, 2009) (same); *United States* v. *Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009) (same); *United States* v. *Abernathy*, No. 08-20103, 2009 WL 4506417, at *2 (E.D. Mich. Nov. 30, 2009) (same).

As the court below acknowledged, its holding conflicts with the decisions of the other circuits because they "have held that the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date." Pet. App. 16a. Indeed, the court spent several pages of its opinion attempting to refute the reasons advanced by other circuits for rejecting its position. *Id.* at 16a-19a.

Although the court below noted that the parties and the district court had an "understanding" that the motions in this case would not affect the trial schedule, Pet. App. 20a, it did not state that "the parties kn[e]w from the moment that [the] pretrial motions [were] filed" (Br. in Opp. 6) that they would not do so. Indeed, such a statement would not have been accurate. At the time the motions were filed, the parties could not have been certain that the district court would not need additional time to resolve the legal issues presented. In addition, one motion involved a request to depose a witness. Although the district court directed the parties to schedule the "deposition posthaste so as not to delay trial," Pet. App. 19a (citation omitted), neither the parties nor the court could have been certain from the outset that events beyond their control (such as the witness's unavailability) would not delay the deposition and require postponement of the trial.

2. Even if respondent's characterization of the Sixth Circuit's holding were accurate, the decision below would still conflict with decisions of other courts of appeals.

Other circuits have held that the filing of "any pretrial motion * * * tolls the speedy trial clock automatically," *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 128 S. Ct. 2871 (2008), "regardless of its type or its actual effect on the trial," *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006); see Pet. 9 (citing cases). Even under respondent's interpretation, the decision below conflicts with those decisions because it holds that certain pretrial motions—those that the parties know from the outset will not affect the trial date—do not create excludable time.

Respondent incorrectly contends (Br. in Opp. 9) that no other circuit has addressed a situation where it was clear from the outset that pretrial motions would not affect the trial schedule. At least two courts have addressed that situ-

ation and held that the time consumed by such motions was excludable. In *United States* v. *Wilson*, 835 F.2d 1440 (D.C. Cir. 1987), the district court had already postponed the trial until completion of a related trial, so the pretrial motions could not have affected the trial schedule. The D.C. Circuit nonetheless excluded the time the motions were pending. *Id.* at 1441-1443. And in *United States* v. *Stafford*, 697 F.2d 1368 (11th Cir. 1983), the trial court had determined that it would rule on two motions "just prior to commencement of the trial, whenever that is," so they would "cause[] no delay" of the trial. *Id.* at 1371. Nonetheless, the Eleventh Circuit excluded the time consumed by those motions. *Id.* at 1371-1372.

Respondent also incorrectly speculates (Br. in Opp. 9-11) that three other circuits would agree with the Sixth Circuit's decision on the facts of this case. That contention is based on cases addressing an entirely different situation. In *United States* v. *Clymer*, 25 F.3d 824 (1994), the district court continued a pretrial motion until after trial, and the Ninth Circuit concluded that the time between the continuance and the commencement of trial was not excludable. *Id.* at 829-830. "In effect," the court explained, "the district court denied the motion without prejudice to the filing of a renewed submission after the conclusion of the trial." *Id.* at 830. The Second Circuit reached the same result on the same facts in *United States* v. *Gambino*, 59 F.3d 353 (1995), cert. denied, 517 U.S. 1187 (1996). In *United States* v. *Salimonu*, 182 F.3d 63 (1999), the First Circuit explained that the rule in *Clymer* and *Gambino* applies only when "district courts explicitly continue[] the motions at issue until the end of trial." *Id.* at 68-69. The Ninth and Second Circuits have also limited *Clymer* and *Gambino* to that situation and held that when, as in this case, motions are decided before trial, the time they are pending is excluded

regardless of their impact on the trial's start date. *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 546 U.S. 1053 (2005); *United States* v. *Douglas*, 81 F.3d 324, 327 n.1 (2d Cir.), cert. denied, 517 U.S. 1251 (1996). Thus, respondent's cases in no way suggest that other circuits would agree with the Sixth Circuit's decision here.

B. The Decision Below Is Incorrect

Respondent's attempt (Br. in Opp. 6-7) to defend the merits of the decision below is also unpersuasive. Section 3161(h)(1)(D) excludes "[a]ny period" of "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)(D). Thus, "[t]he plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion" without further factual inquiry. *Henderson* v. *United States*, 476 U.S. 321, 326 (1986).

Like the court below, respondent mistakenly contends that a plain-language reading of the phrase "delay resulting from" requires a case-by-case inquiry into each motion's effect on the timing of trial. To the contrary, the remainder of Section 3161(h)(1)(D) categorically defines the excludable period of delay as the interval "from the filing of the motion through the conclusion of the hearing, or other prompt disposition of, [the] motion." 18 U.S.C. 3161(h)(1)(D). Read in its entirety, the plain language of Section 3161(h)(1)(D) thus contradicts rather than supports respondent's position.[1]

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[1] In addition, respondent's reading of the statute logically leads much farther than respondent acknowledges. If Section 3161(h)(1)(D) required a case-by-case inquiry into whether "delay" of the trial "result[ed] from" a motion, then the only question should be: "Did the motion *actually* delay the trial date?" Neither respondent nor the court below

Respondent's reading also conflicts with *Henderson*, which concluded that Section 3161(h)(1)(D) "is designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion," 476 U.S. at 331, and which excluded the time consumed in resolving pretrial motions without considering whether they caused or had the potential to cause postponement of the trial. Respondent erroneously asserts that the decision below can be reconciled with *Henderson* because the Court in *Henderson* purportedly "took it as a given that the pretrial motions had delayed trial." Br. in Opp. 8. On the contrary, the Court did not state that it was assuming that the motions had delayed the trial. Nor did the Court discuss whether a trial date had been set before the motions were filed or whether the district court rescheduled the trial because of the motions.

Respondent's assertion (Br. in Opp. 8) that *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), supports the decision below is also incorrect. In *Bloate*, the Court reiterated that Section 3161(h)(1)(D)'s exclusion is "automatic" and applies "regardless of the specifics of the case." *Id.* at 1349 n.1; see *id.* at 1351 (delays listed in Section 3161(h)(1) are "automatically excludable, *i.e.*, they may be excluded without district court findings"). *Bloate* held that time granted to prepare pretrial motions was not excluded by Section 3161(h)(1)(D) because that provision "renders automatically excludable only the delay that occurs *from the filing of* the motion through the conclusion of the hearing on, or other prompt disposition of[,] the motion." *Id.* at 1353. Contrary to respondent's implication, however, both the majority and the dissent agreed that the request for additional motions

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explains how, under their reading of the statutory language, time could be excluded based on the "potential" or "expectation" of delay of the trial if a motion does not actually cause such a delay.

preparation time had resulted in "delay"—even though the district court did not move the trial date when it granted the request. See *ibid.*; *id.* at 1360 (dissenting opinion); 4:06-cr-00518-SNL Docket entry No. 20 (E.D. Mo. Sept. 7, 2006). *Bloate* thus undermines, rather than supports, the Sixth Circuit's holding here.

Respondent also offers no meaningful response to the petition's description (Pet. 13-15) of how the Sixth Circuit's unworkable rule undermines the STA's purposes. Although respondent asserts that those purposes are disserved by excluding time consumed by "motions that everyone knew would not delay trial" (Br. in Opp. 7), he acknowledges that such motions are "quite unusual" (*id.* at 11). Congress therefore reasonably concluded that the cost of excluding the time such motions consume is outweighed by the benefits of an administrable exclusion. See Pet. 12-13. Respondent's suggestion that the Sixth Circuit's rule is necessary to deter the government from filing frivolous motions to evade the STA is also unfounded. The STA itself contains sanctions to deter such abuse, 18 U.S.C. 3162(b), which has not materialized in other circuits even though they have long rejected the Sixth Circuit's rule.

C. The Question Presented Warrants Immediate Review

As the petition explains (Pet. 16), the question presented is recurring and important, and it warrants this Court's immediate review. Pretrial motions are filed in nearly every federal criminal case, and the decision below needlessly complicates the administration of the STA when they are filed in the Sixth Circuit. Although respondent contends (Br. in Opp. 12) that the decision is not generating unnecessary litigation, the district court cases cited in his own brief show the contrary. Those cases demonstrate that district courts in the Sixth Circuit are now compelled to

make findings whether "motions are complex" and "cause[] a delay of the trial" before invoking the exclusion, *Jerdine*, 2009 WL 4906564, at *5, contrary to Congress's intent that it apply "automatically * * * without district court findings," *Bloate*, 130 S. Ct. at 1351. The cases also illustrate that, to avoid possible dismissal under the decision below, district courts are relying on ends-of-justice continuances under Section 3161(h)(7), in addition to Section 3161(h)(1)(D), when excluding pretrial motion delay. See *Sutton*, 2009 WL 5196592, at *2; *Mayes*, 2009 WL 478400, at *1. The decision below is thus frustrating the very purpose of Section 3161(h)(1)(D)'s automatic exclusion, which is designed to avoid the need for courts to devote time and resources to case-specific analyses of whether the benefits of delay from a particular motion outweigh the cost.

Contrary to respondent's contention (Br. in Opp. 11), allowing further "percolation" would serve no purpose. As the petition explains (Pet. 8-9), every other court of appeals with criminal jurisdiction has already held that Section 3161(h)(1)(D) automatically excludes the time consumed by "any" pretrial motion "regardless of whether the motion has any impact on the trial's start date." Pet. App. 16a. And, also contrary to respondent's contention (Br. in Opp. 13), this Court's recent decision in *Bloate* strongly suggests that those courts have correctly interpreted Section 3161(h)(1)(D).

D. This Case Is An Appropriate Vehicle

Respondent's arguments that this case is a "poor vehicle" to decide the question presented (Br. in Opp. 13) also lack merit. Respondent argues that the Court should wait for another case because "little additional punishment would [be] accomplished" by reversing the decision below. *Id.* at 11. Reversal would, however, reinstate respondent's

convictions and require him to serve 18 additional months of supervised release. In any event, the legal issue is important and warrants this Court's prompt resolution.

Respondent also contends (Br. in Opp. 13-16) that the Court should not grant review because the STA was violated for two other reasons even if the time consumed by the pretrial motions is excludable. But the court of appeals already correctly rejected respondent's alternative STA arguments, and this Court not need address them to resolve the question presented.

First, respondent argues (Br. in Opp. 13-15) that ten days of non-excludable delay elapsed during his transportation to a mental competency evaluation, because 18 U.S.C. 3161(h)(1)(F) permits exclusion of only "ten days" and his transportation took 20 calendar days. The court below, however, concluded that only two days of non-excludable delay elapsed because, under *United States* v. *Bond*, 956 F.2d 628 (6th Cir. 1992), weekends and holidays should be excluded in calculating the ten-day limit.

That conclusion was correct. Section 3161(h)(1)(F) does not specify whether the excludable period is ten calendar or ten business days. It is therefore reasonable to infer that Congress expected courts to use the same counting rules applicable in other criminal contexts. Accordingly, the Sixth Circuit correctly concluded, in accordance with the then-applicable version of Fed. R. Crim. P. 45(a), that weekends and holidays should be excluded.[2]

Every court of appeals that has addressed the issue has reached the same conclusion. See *United States* v. *McGhee*,

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[2] Rule 45(a) has since been amended, effective December 1, 2009, to "count every day, including intermediate Saturdays, Sundays, and legal holidays," for any "period * * * stated in days." Fed. R. Crim. P. 45(a). As respondent concedes (Br. in Opp. 15 n.9), the issue therefore does not warrant this Court's attention.

532 F.3d 733, 738 (8th Cir. 2008); *United States* v. *Garrett*, 45 F.3d 1135, 1140 n.6 (7th Cir.), cert. denied, 514 U.S. 1134 (1995); cf. *United States* v. *Skanes*, 17 F.3d 1352, 1354 (11th Cir. 1994) (citing decisions relying on Rule 45(a) in applying other STA time limits). The cases cited by respondent (Br. in Opp. 14) are not to the contrary. *United States* v. *Williamson*, 409 F. Supp. 2d 1105, 1107 n.1 (N.D. Iowa 2006), is a district court decision that was abrogated by the Eighth Circuit's decision in *McGhee*. The other cases did not address the issue but simply included weekends and holidays when calculating the ten-day period. See *United States* v. *Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States* v. *Noone*, 913 F.2d 20, 25-26 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Castle*, 906 F.2d 134, 137 (5th Cir. 1990). And *United States* v. *Daychild*, 357 F.3d 1082, 1093 & n.13 (9th Cir. 2004), merely concluded, based on the express language of Section 3161(h)(1)(D), that the excludable delay for pretrial motions includes the day on which a motion is filed, even though Rule 45(a)(1) generally does not count the day of a triggering event. The court below reached the same conclusion on that issue. Pet. App. 9a-10a.

Second, respondent claims that 18 U.S.C. 4247(b), which limits to 30 days the period during which a defendant may be committed for a competency evaluation under 18 U.S.C. 4241, should also limit the time excludable under the STA for competency evaluations. The court below correctly rejected that claim (Pet. App. 11a-12a), because it is contrary to the plain language of the STA, which excludes "[a]ny period of delay" resulting from competency examinations, 18 U.S.C. 3161(h)(1). Respondent cites no authority to support the claim and, as the court below noted, it has been rejected by every court that has considered it. Pet. App. 12a.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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