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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161(h)(1)(D) (Supp. II 2008), or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 579 F.3d 589. The orders of the district court denying respondent's motion to dismiss the indictment (App., *infra*, 29a-32a) and denying his motion to reconsider (App., *infra*, 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2009. A petition for rehearing was denied on January 12, 2010 (App., *infra*, 37a-38a). On March 31, 2010, Justice Stevens extended the time within which

to file a petition for a writ of certiorari to and including May 12, 2010. On April 27, 2010, Justice Stevens further extended the time to June 11, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this petition. App., *infra*, 39a-48a.

STATEMENT

This case involves a question about the interpretation of the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq.*, on which the courts of appeals are divided. Following a jury trial in the United States District Court for the Western District of Michigan, respondent was convicted of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Before trial, the district court had denied respondent's motion to dismiss the indictment for a violation of the STA. On appeal following respondent's conviction, the court of appeals reversed the district court's judgment and remanded with instructions to dismiss the indictment with prejudice. App., *infra*, 1a-20a.[1]

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[1] On October 13, 2008, after the district court's decision on the motion to dismiss but before the court of appeals' decision, Congress enacted the Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4294, which made technical changes to the STA. As most relevant here, Congress renumbered the exclusion for pretrial motions delay, which had previously been designated as 18 U.S.C. 3161(h)(1)(F), as 18 U.S.C. 3161(h)(1)(D). Except

1. The STA generally requires a defendant's trial to begin within 70 days of his indictment or his initial appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). To provide "sufficient flexibility" to make compliance with that deadline a realistic goal, the Act "automatically" excludes from the computation of the 70-day period certain "specific and recurring periods of time often found in criminal cases." S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979); see *Bloate* v. *United States*, 130 S. Ct. 1345, 1351-1352 (2010). Among those exclusions is "[a]ny period 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)(D).

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.*; see *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. In January 2005, a security guard at a store in Michigan notified police that respondent had purchased materials commonly used to cook methamphetamine. The guard provided a description of the camper that respondent was driving. Shortly thereafter, police officers observed respondent driving the camper and stopped him for driving with an open rear door and an

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where noted, all citations in this petition refer to the current version of the STA as codified in the 2008 Supplement to the United States Code.

expired registration tag. Respondent told the officers that he had a pistol next to the driver's seat, and the officers found a pistol there. The officers then searched the camper and found numerous Sudafed tablets, as well as other materials used to manufacture methamphetamine. Respondent also consented to a search of his residence, where officers found a shotgun. In a subsequent search of the residence pursuant to a warrant, officers found additional materials for manufacturing methamphetamine. Presentence Investigation Report (PSR) ¶¶ 5-6.

3. On October 20, 2005, a grand jury in the Western District of Michigan indicted respondent on charges of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). On October 31, 2005, respondent made his initial appearance before a judicial officer. App., *infra*, 1a-2a.

Two days later, on November 2, 2005, a magistrate judge granted respondent's request for a mental competency examination. Respondent was transported from Grand Rapids, Michigan, to the Metropolitan Correction Center in Chicago, Illinois, for the examination. On March 23, 2006, based on the results of the examination, the magistrate judge found respondent competent to stand trial. On March 29, 2006, however, respondent requested a second, independent competency evaluation, and the magistrate judge subsequently granted that request. On June 9, 2006, the magistrate judge again found respondent competent to stand trial. On July 25, 2006, the district court set a trial date of August 14, 2006. App., *infra*, 2a-4a.

Between July 25 and August 14, 2006, the parties filed, and the district court resolved, three pretrial motions. On August 1, the government filed a motion seeking permission to conduct a video deposition of a witness who was scheduled to be out of the country at the time of trial. On August 3, the district court granted the motion. On August 8, the government filed a motion seeking permission to bring the firearms possessed by respondent into the courtroom as evidence at trial. On August 10, the district court granted that motion. On August 11, respondent filed a motion to dismiss the indictment for a violation of the STA's 70-day time limit for commencing trial. On August 14, the district court denied that motion. Respondent's trial began that day and concluded two days later, with the jury finding respondent guilty of all charges. On December 13, 2006, the district court sentenced respondent to 33 months of imprisonment, to be followed by three years of supervised release. App., *infra*, 4a-5a.[2]

4. Respondent appealed, and the court of appeals reversed the district court's Speedy Trial Act ruling and remanded with instructions to dismiss the indictment with prejudice. App., *infra*, 1a-28a.

The court of appeals found that the speedy trial clock began to run on October 31, 2005, the date of respondent's initial appearance, App., *infra*, 7a-9a, and that the days on which a pretrial motion is filed and resolved are excluded from the speedy trial calculation, *id.* at 9a-11a. The court ruled that the periods of delay involving

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[2] On April 21, 2008, while respondent's appeal was pending, he was released from prison and began his supervised release. On May 30, 2008, the district court found that respondent had violated the terms of his supervised release and sentenced him to 14 additional months in prison. App., *infra*, 5a-6a.

the two mental competency examinations of respondent were generally excludable under 18 U.S.C. 3161(h)(1)(A), except that two of the 12 days that it took to transport respondent to the first mental competency examination were not excludable under 18 U.S.C. 3161(h)(1)(F). Accordingly, the court of appeals determined that only 60 non-excludable days had elapsed as of July 31, 2006. App., *infra*, 11a-15a.

The court of appeals held, however, that the nine days spent resolving pretrial motions between August 1, 2006, and the start of trial on August 14, 2006, were not excludable under 18 U.S.C. 3161(h)(1)(D). App., *infra*, 15a-20a. The court acknowledged that "[e]very circuit to have addressed the issue appears to 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." *Id.* at 16a (citing cases). Expressly "disagree[ing]" with that "consensus," however, the court held that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." *Ibid.* In the court's view, because Section 3161(h)(1)(D) refers to "delay resulting from" pretrial motions, "[t]here is no conceivable way to read" the statute except "as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of trial." *Id.* at 16a-19a. Because the district court did not postpone respondent's scheduled trial date after the filing of the three pretrial motions, and the court of appeals found no indication that the motions "threatened to delay the trial," the court of appeals concluded that the time consumed in resolving the motions was not excluded under Section 3161(h)(1)(D). *Id.* at 19a-20a.

Based on that holding, the court of appeals concluded that a total of 73 non-excludable days elapsed before respondent's trial began and therefore that the trial commenced three days after the expiration of the STA's deadline. App., *infra*, 20a. Rather than remand the case to the district court for a determination under 18 U.S.C. 3162(a)(2) whether to dismiss the indictment with or without prejudice, the court of appeals itself conducted that analysis and remanded with instructions to dismiss the indictment with prejudice. App., *infra*, 21a-22a. The court acknowledged that "the seriousness of the offense" and "the facts and circumstances" that "led to the dismissal," 18 U.S.C. 3162(a)(2), "point[ed] to dismissal without prejudice." App., *infra*, 21a. Nonetheless, the court concluded that dismissal with prejudice was required because respondent had already completed his term of imprisonment. *Id.* at 21a-22a.[3]

Judge Gibbons concurred. App., *infra*, 23a-28a. She disagreed with the majority's calculation of the excludable delay related to the transportation of respondent to and from the first mental competency examination. *Id.* at 17a-19a. Judge Gibbons also believed that respondent had not properly preserved a claim that the three pretrial motions resolved in August did not result in excludable delay, *id.* at 19a-20a, but she agreed with the

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[3] Respondent was released from prison on May 15, 2009. See http://www.bop.gov/iloc2/LocateInmate.jsp. He had not completed his term of supervised release at the time that the court of appeals ordered dismissal of the indictment. Based on the court of appeals' decision, however, the district court discharged respondent from supervised release before he completed that term. 1:05-CR-239 Docket entry No. 256 (W.D. Mich. Sept. 3, 2009). Accordingly, respondent would still have supervised release to serve if this Court were to reverse the court of appeals' judgment.

majority's reading of Section 3161(h)(1)(D) as a matter of statutory interpretation, and she agreed that dismissal with prejudice was warranted. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The court of appeals incorrectly interpreted a critically important provision of the Speedy Trial Act, 18 U.S.C. 3161(h)(1)(D), the plain text of which automatically excludes from the Act's deadline for commencing trial "delay resulting from any pretrial motion." According to the court, pretrial motion delay is excludable only if the motion actually causes a postponement, or the expectation of a postponement, of the trial. That interpretation conflicts with the interpretation adopted by all the other courts of appeals with criminal jurisdiction, which have uniformly held that Section 3161(h)(1)(D) automatically excludes all time "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," *ibid.*, whether or not the trial is postponed. The majority rule is correct and finds strong support in this Court's decision in *Henderson* v. *United States*, 476 U.S. 321 (1986). The issue also is an important and recurring one in the day-to-day administration of criminal justice in the federal district courts. Accordingly, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals

With its decision in this case, the Sixth Circuit stands alone among the courts of appeals in holding that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time" under Section 3161(h)(1)(D). App., *infra*, 16a. As the court acknowledged, the First, Third, Fourth, Sev-

enth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits 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." *Ibid*. (citing *United States* v. *Wilson*, 835 F.2d 1440, 1443 (D.C. Cir. 1987); *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *United States* v. *Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993); *United States* v. *Dorlouis*, 107 F.3d 248, 253-254 (4th Cir.), cert. denied, 521 U.S. 1126 (1997); *United States* v. *Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States* v. *Titlbach*, 339 F.3d 692, 698 (8th Cir. 2003); *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 546 U.S. 1053 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985 (10th Cir. 2004); *United States* v. *Miles*, 290 F.3d 1341, 1350 (11th Cir.), cert. denied, 537 U.S. 1089 (2002)). The Second and Fifth Circuits have reached the same conclusion. See *United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), abrogated on other grounds by *Henderson* v. *United States*, 476 U.S. 321 (1986); *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 128 S. Ct. 2871 (2008). The court below expressly "disagree[d]" with the "consensus" of the other courts of appeals, App., *infra*, 16a, and interpreted Section 3161(h)(1)(D) "as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of trial." *Id*. at 19a.

As a result of the decision below, the Act's requirements vary depending on where the defendant is tried. Time consumed by motions will uniformly constitute excludable delay outside the Sixth Circuit but may not stop the speedy trial clock within it. This Court should grant certiorari to ensure that defendants' rights to a speedy trial are the same no matter where the trial takes place.

B. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals concluded that the "clear" language of Section 3161(h)(1)(D) indicates that time consumed in resolving pretrial motions is excludable only when the motions caused, or threatened to cause, postponement of the trial. App., *infra*, 17a. That conclusion is incorrect. 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 any further factual inquiry. *Henderson*, 476 U.S. at 326. This Court's decisions as well as practical and policy considerations confirm that reading of the statute.

1. In *Henderson*, the Court granted review to resolve a conflict over whether Section 3161(h)(1)(D) excludes delay from a pretrial motion only if the delay was "reasonably necessary." 476 U.S. at 325 n.6. The Court rejected a reasonableness requirement, holding instead that "Congress intended [Section 3161(h)(1)(D)] to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Id.* at 330. The Court explained that the exclusion in Section 3161(h)(1)(D), like almost all the other exclusions in Section 3161(h), is "intended to be automatic." *Henderson*, 476 U.S. at 327 (citation omitted).

The Court's determination in *Henderson* that the defendant's pretrial motions gave rise to excludable delay stands in sharp contrast to the approach taken by the Sixth Circuit here. Applying its interpretation of Sec-

tion 3161(h)(1)(D), *Henderson* held that the time consumed in resolving the pretrial motions at issue was "automatically excludable," without considering whether the motions actually caused postponement, or the expectation of a postponement, of the trial. 476 U.S. at 331-332; cf. App., *infra*, 16a (Sixth Circuit rule requiring delay, or the expectation of delay, of trial). The Court's opinion does not discuss whether a trial date had been set before the motions were filed or whether the district court rescheduled the trial date to accommodate the proceedings on the motions.[4] Thus, the Court's application of Section 3161(h)(1)(D) in *Henderson* indicates that time consumed in resolving pretrial motions is automatically excluded regardless of whether it causes or threatens a postponement of the trial.[5]

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[4] In fact, the record indicates that the initially scheduled trial date had passed six weeks before the motions at issue were filed, and the district court therefore concluded that the trial date had been "vacated" "by inference." J.A. at 25, *Henderson* v. *United States*, 476 U.S. 321 (1986), No. 84-1744. The court did not set a new trial date until after the motions had been resolved. See *id.* at 25-32.

[5] More recently, in *Bloate*, the Court reiterated its conclusion in *Henderson* that Section 3161(h)(1)(D)'s exclusion is "automatic" and requires the exclusion of delay resulting from any pretrial motion "without any further analysis as to whether the benefit of the delay outweighs its costs" and "regardless of the specifics of the case." 130 S. Ct. at 1349 n.1. The Court held that time granted to prepare pretrial motions is not excluded by Section 3161(h)(1)(D), however, 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 (quoting 18 U.S.C. 3161(h)(1)(D)) (emphasis added by Court). Thus, like *Henderson*, *Bloate* strongly suggests that Section 3161(h)(1)(D) automatically excludes the time between the filing of any pretrial motion and its disposition regardless whether a court finds that the motion actually postponed the trial.

2. The court of appeals rejected that reading of Section 3161(h)(1)(D) because it believed that the phrase "delay resulting from" necessarily refers to delay in the commencement of the trial. But the statute's text does not refer to delay of the trial or a continuance of the trial date. And, in light of the STA's purpose, practical considerations in implementing the Act, and its legislative history, it is clear that "the 'delay' referred to is not of the trial itself, but instead of the final date on which the trial must commence." *Cobb*, 697 F.2d at 42. The "delay resulting from" a pretrial motion is thus the interval of time between the filing and resolution of the motion "during which the speedy trial clock [is] stopped and the expiration of the 70-day period thereby postponed." *Ibid.*

The STA's purpose is to afford a reasonably prompt trial, while providing the parties and the court sufficient time for fair and orderly preparation. See *Zedner* v. *United States*, 547 U.S. 489, 497 (2006); S. Rep. No. 212, 96th Cong., 1st Sess. 19-20, 26 (1979); S. Rep. No. 1021, 93d Cong., 2d Sess. 20-21 (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 8, 15, 21-22 (1974). As other courts of appeals have recognized, Congress provided for the automatic exclusion of all time consumed in resolving pretrial motions in order "to structure a method of calculating time which would be reasonably and practically, although not necessarily directly, related to the just needs for pretrial preparation in a particular case." *Cobb*, 697 F.2d at 42.

The automatic exclusion reflects the reality that "[p]retrial motions necessarily take the time of [the opposing party] to respond and courts to evaluate." *Wilson*, 835 F.2d at 1442. And it also accounts for the practical necessity that, in order to ensure that trial com-

mences within the STA's deadline in a particular case, the district court and the parties must know, as each day passes, whether or not that day counts towards the Act's 70-day limit. Thus, as soon as a pretrial motion has been filed, the court and the parties must be able to ascertain whether or not the motion has stopped the speedy trial clock. "[A] clear rule" that all time consumed in resolving any pretrial motion is automatically excluded "puts [the court and] counsel on notice from the outset as to what is excludable." *Vo*, 413 F.3d at 1015-1016. It thus facilitates compliance with the Act while advancing the Act's goal of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

In contrast, the Sixth Circuit's test for when pretrial motions delay is excluded is neither clear nor consonant with the Act's purpose. It is unclear from the court's opinion whether excludability turns on a fact-specific determination whether a particular motion actually necessitated or threatened postponement of the trial or turns instead on whether the trial court formally moved the trial date in response to the motion. In either case, the test does not provide a workable rule that furthers the goals of the Act.

If excludability turns on an individualized determination whether a particular motion actually caused or threatened postponement of the trial, the test will greatly complicate, and may frustrate altogether, the parties' and the court's ability to comply with the Act. Neither the court nor the parties will be able to determine at the time that a motion is filed whether that motion has stopped the speedy trial clock. That question could not be answered until it is possible to ascertain whether the

motion ultimately required or threatened putting off the trial.

Requiring individualized determinations whether a particular motion actually caused or threatened postponement of the trial would also "force courts to resolve intractable causation issues," *Wilson*, 835 F.2d at 1442, leading to extensive pretrial proceedings and even collateral litigation about whether time is excludable, *Dorlouis*, 107 F.3d at 254. For example, if the parties were also engaged in discovery activities while a pretrial motion was pending, the district court would have to determine which of the two activities was responsible for the postponement of the trial. Such "question[s] frequently would pose more difficult issues than the trial itself and in some cases would be simply impossible to determine." *Cobb*, 697 F.2d at 42 n.6.

If, on the other hand, excludability turns on whether the district court formally moves the trial date, the Sixth Circuit's test will lead to arbitrary results that bear no relation to the Act's purpose. For example, if a district court initially sets the trial date sufficiently far out to accommodate the resolution of anticipated pretrial motions, the time consumed in resolving those motions will not be excluded. If, however, the district court does not take the motions into account in setting the initial trial date and resets the date after the motions are filed, the time consumed in resolving them will be excluded. In addition, if a district court puts off other matters so it can resolve motions quickly and therefore does not need to reset the trial date, no time consumed in resolving the motions will be excluded. If, however, the court sets a more relaxed schedule for resolving the motions that enables it simultaneously to address other matters, and

the court therefore needs to reset the trial date, the entire time that the motions are pending will be excluded.

The Sixth Circuit's test would be equally problematic when, as in *Henderson* (see note 4, *supra*), the district court does not set the trial date until after motions are filed or resolved. In that situation, it is entirely unclear how the courts and the parties are to determine whether or not time consumed in resolving the motions is excludable. Since no trial date exists to be reset, courts and parties would have to guess at whether motions create either the reality or an "expectation" of delay of trial.

The Sixth Circuit's test is also inconsistent with the Act's legislative history. As numerous courts of appeals have noted, the legislative history confirms that Congress intended automatically to exclude all time from the filing of a pretrial motion through its disposition, without further inquiry or additional findings. See *Green*, 508 F.3d at 200; *Vogl*, 374 F.3d at 985-986; *Wilson*, 835 F.2d at 1443; *Montoya*, 827 F.2d at 151; *Cobb*, 697 F.2d at 42. See, *e.g.*, S. Rep. No. 212, at 9 (noting that "the Act excludes from [the] computation" of the 70-day time limit "periods consumed by * * * proceedings concerning the defendant, including * * * pretrial motions"); *id.* at 33 (observing that "periods of delay consumed by" motions are "automatically excluded"); *id.* at 34 (stating that Section 3161(h)(1)(D) "provides exclusion of time from filing to the conclusion of hearings on or 'other prompt disposition' of any motion"). At no point in the Act's legislative "history did anyone suggest that the period of delay 'resulting from' a proceeding might be something other than the duration of the proceeding itself." Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 26 (1980).

C. The Question Presented Is Of Substantial And Recurring Importance

The court of appeals' erroneous ruling presents an important and recurring issue in the day-to-day administration of criminal justice in the federal system. Pretrial motions are filed in nearly every federal criminal prosecution. The decision below needlessly complicates the calculation of the STA's 70-day time limit for commencing a defendant's trial when such motions are filed in prosecutions within the Sixth Circuit. As described above, if the Sixth Circuit's test requires an individualized determination that a particular motion actually postponed or threatened postponement of the trial, it will prevent district courts and the parties from calculating in advance the STA's deadline for commencing trial and enmesh courts and litigants in disputes over complicated causation issues, thereby adding to, rather than reducing, pretrial delay. If, on the other hand, the Sixth Circuit's test turns solely on whether the district court moves the trial date in response to a pretrial motion, the test will lead to formalistic and arbitrary results that do not advance the STA's purpose and will produce great uncertainty when a motion is filed before a trial date has been set.

The problems created by the court of appeals' ruling may well spread beyond the exclusion of time consumed by pretrial motions. Many other exclusions under the STA contain the same "delay resulting from" language on which the court below relied in imposing its novel requirement that delay from pretrial motions is excluded only if they actually cause or threaten to cause postponement of the trial. The same language appears in the provisions authorizing exclusion of delays associated with mental and physical competency examinations,

18 U.S.C. 3161(h)(1)(A); trial of the defendant on other charges, 18 U.S.C. 3161(h)(1)(B); interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); proceedings relating to the transfer of a case or the removal of any defendant from another district, 18 U.S.C. 3161(h)(1)(E); transportation of any defendant from another district or to and from places of examination or hospitalization, 18 U.S.C. 3161(h)(1)(F); consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3)(A); the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4); and ends-of-justice continuances under 18 U.S.C. 3161(h)(7)(A). The logic of the court of appeals' opinion could lead courts to adopt a proceeding-specific trial-postponement requirement for those exclusions as well. Cf. *Henderson*, 476 U.S. at 327 (construing the exclusion for pretrial-motion delay as similar to the "automatic" exclusion of time consumed by interlocutory appeals, competency examinations, and unavailability of the defendant). The decision below thus threatens serious disruption of the operation of the STA within the Sixth Circuit.

This Court's review is warranted to correct the court of appeals' misinterpretation of the STA, to resolve the disagreement among the courts of appeals, and to restore the smooth functioning of the Act within the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2646 & 08-1765

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JASON LOUIS TINKLENBERG, DEFENDANT-APPELLANT

Argued: June 19, 2009
Decided and Filed: September 3, 2009

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 05-00239-001—Richard A. Enslen, District Judge;
Paul Lewis Maloney, Chief District Judge

OPINION

Before: KEITH, CLAY, and GIBBONS, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which KEITH, J., joined. GIBBONS, J. delivered a separate concurring opinion.

CLAY, Circuit Judge. Defendant-Appellant Jason Louis Tinklenberg ("Tinklenberg") appeals his conviction and sentence after a jury found him guilty of one

count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and two counts of possessing material to manufacture methamphetamine, in violation of 21 U.S.C. § 843. On appeal, Tinklenberg contends that the district court improperly denied his motion to dismiss the indictment, because his trial began after the deadline imposed by the Speedy Trial Act. Tinklenberg also challenges the district court's subsequent finding that he violated the terms of his supervised release, as well as the reasonableness of his ensuing prison sentence. Because Tinklenberg's trial violated the Speedy Trial Act, we **REVERSE** Tinklenberg's conviction and **REMAND** with instructions to dismiss his indictment with prejudice.

BACKGROUND

On October 20, 2005, the government charged Tinklenberg in an indictment in the Western District of Michigan with one count of being a felon in possession of a firearm and two counts of possessing items used to manufacture methamphetamine. At Tinklenberg's initial appearance on October 31, 2005, a magistrate judge ordered him detained, and scheduled an arraignment hearing for November 2, 2005. On November 2, 2005, prior to his scheduled arraignment, Tinklenberg moved to receive a psychological evaluation for competency to stand trial. That day, instead of arraigning Tinklenberg, the magistrate judge granted Tinklenberg's motion, committing Tinklenberg "for a period not to exceed 30 days for placement in an appropriate facility" for psychological evaluation. (ROA at 4, 36.) Tinklenberg was transported to the Metropolitan Correctional Center in Chicago (the "MCC") for testing.

On December 16, 2005, the government requested a thirty day extension of time to complete Tinklenberg's psychological evaluation, stating in its motion that the prison psychiatrist responsible for evaluating Tinklenberg had reported that Tinklenberg "was not cooperating in the effort to evaluate him." (ROA at 38-39.) On December 20, 2005, the district court granted the government's request for an extension, and ordered that Tinklenberg's trial be held in abeyance until his psychological evaluation was completed. On December 28, 2005, the magistrate judge set a deadline of February 13, 2006, for completion of the testing. On February 10, 2006, the government requested a second extension of time, until March 13, 2006, for completion of Tinklenberg's evaluation. The government's request stated that the psychiatrist at the MCC had said that he needed an additional four weeks to complete the evaluation, but did not explain the cause of the further delay. On February 17, 2006, the magistrate judge granted the government's second request and set March 13, 2006 as the new deadline for completion of Tinklenberg's evaluation.

On March 20, 2006, the court received the MCC's psychiatric report on Tinklenberg. Enclosed with the MCC's evaluation was a cover letter from the warden of the MCC, which stated that Tinklenberg "was designated to the [MCC] on November 10, 2005, and arrived at the Institution on November 30, 2005." (ROA at 147.) On March 22, 2006, the magistrate judge held a competency hearing, and by order dated March 23, 2006, found Tinklenberg competent to stand trial. On March 23, 2006, the magistrate judge also arraigned Tinklenberg, who pled not guilty to all three counts against him. By order dated March 27, 2006, the district court set the case down for trial on May 30, 2006.

On March 29, 2006, Tinklenberg filed an *ex parte* petition to receive an independent competency evaluation. On April 17, 2006, the magistrate judge granted Tinklenberg's petition, ordered the independent evaluator to submit his report to the court by May 15, 2006, and stated that "the period of time until Defendant's competency is determined shall be excluded time for the purposes of the Speedy Trial Act[.]" (ROA at 53-54.)

On April 26, 2006, Tinklenberg filed a pro se motion for new counsel, and on May 9, 2006, Tinklenberg's counsel moved to withdraw as Tinklenberg's attorney. Counsel's motion indicated that Tinklenberg would not cooperate with the independent evaluator. The district court once again adjourned the trial date and referred the motions by Tinklenberg and his counsel to the magistrate judge to resolve. On June 7, 2006, the magistrate judge held a hearing on the motions, and, on June 9, 2006, ordered new counsel appointed. With respect to Tinklenberg's competency evaluation, though the magistrate judge's June 9, 2006 order is somewhat ambiguous, it appeared to find Tinklenberg competent, noting that the independent evaluator had concluded as much and that Tinklenberg now opposed the evaluation. The district court then scheduled Tinklenberg's trial for August 15, 2006. On July 25, 2006, the case was reassigned to a new district judge, and the new judge issued an order moving the trial date forward one day, to August 14, 2006.

On August 1, 2006, the government requested permission to conduct a video deposition of a witness. On August 3, 2006, the district court granted the government's motion, but ordered that "[t]he parties shall schedule said deposition posthaste so as not to delay

trial." (ROA at 115.) On August 8, 2006, the government filed a request to bring two guns into the courtroom during the trial as evidence, a request the court granted on August 10, 2006.

On August 11, 2006, Tinklenberg moved to dismiss his indictment, claiming that the time required for trying him pursuant to the Speedy Trial Act had lapsed. On August 14, 2006, the morning of trial, the district court denied Tinklenberg's motion, finding that only sixty-nine days had lapsed for the purposes of the Speedy Trial Act.

Tinklenberg's trial began on August 14, 2006, and on August 16, 2006, the jury convicted Tinklenberg on all three counts. On December 13, 2006, the district court sentenced Tinklenberg to thirty-three months of imprisonment, followed by three years of supervised release. On December 18, 2006, Tinklenberg filed a notice of appeal of his conviction and sentence.

On April 21, 2008, while the appeal of his conviction and sentence was still pending, Tinklenberg was released from prison. On April 28, 2008, Tinklenberg was re-arrested for violating the terms of his supervised release by testing positive for cocaine. On May 16, 2008, the district court held an evidentiary hearing, at which a probation officer testified that on April 23, 2008, he took a urine sample from Tinklenberg that tested positive for cocaine. The government introduced into evidence the lab report showing the test results and Tinklenberg's signed statement admitting to cocaine use. On May 30, 2008, the district court found that Tinklenberg had violated the terms of his supervised release by using cocaine, and sentenced Tinklenberg to fourteen addi-

tional months in prison. Tinklenberg timely appealed the additional sentence.

Tinklenberg's challenge to his initial conviction, and his appeals of the finding that he violated his supervised release and the ensuing sentence, were consolidated on appeal.

DISCUSSION

I. Speedy Trial Act Calculations

The Speedy Trial Act, 18 U.S.C. §§ 3161-74, mandates that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." § 3161(c)(1). The Speedy Trial Act allows exclusions of time from the seventy day rule, including, *inter alia*,

> [a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant; . . . (D) 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; . . . [and] (F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an

> order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable[.]

§ 3161(h)(1). The defendant bears the burden of proof to show a violation warranting dismissal. § 3162(a)(2). This Court "reviews the district court's interpretation of the Speedy Trial Act *de novo* and its factual findings for clear error." *United States v. Marks*, 209 F.3d 577, 586 (6th Cir. 2000).

Tinklenberg was indicted on October 20, 2005 and his trial began 287 days later, on August 14, 2006. The district court found that only sixty-nine non-excludable days lapsed during the interval.

A. The Start of the Speedy Trial Clock

The district court found that the Speedy Trial clock began to run on October 31, 2005, the date that Tinklenberg first appeared after his October 20, 2005 indictment. The government argues that in cases such as this one—where an indictment is filed and the defendant subsequently appears, but does not plead not guilty until a later date—the seventy day period does not begin until the not guilty plea. However, this Court has held that where the defendant's not guilty plea follows his indictment and initial appearance, whichever of the indictment or initial appearance that occurs last starts the seventy day period. *United States v. Mentz*, 840 F.2d 315, 325-26 (6th Cir. 1988).

Moreover, the plain language of the statute supports starting the clock from the date Tinklenberg initially appeared. "*In any case in which a plea of not guilty is entered*, the trial of a defendant . . . shall commence within seventy days from the filing date (and making

public) of the information or indictment, *or from the date the defendant has appeared* before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1) (emphasis added). Thus, the statute refers to the defendant's plea in setting forth the general *precondition* that the Speedy Trial Act's requirements are only relevant in cases in which the defendant proceeds to trial; otherwise, the statute make no reference to the not guilty plea. *See id*. However, the statute uses different language, *i.e.*, "the date the defendant has appeared," as the time the seventy day period begins, if the indictment has already been filed. *Id*. The well-established rule that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion[,]" *Russello v. United States*, 464 U.S. 16, 23 (1983), applies even more clearly where Congress uses contrasting language in the same sentence. Thus, under the plain language of the statute, "the date the defendant has appeared," and not the defendant's "plea of not guilty," begins the seventy day period.

The government cites *United States v. O'Dell*, 154 F.3d 358, 360-62 (6th Cir. 1998), to support its opposing position that if the initial appearance occurs before a defendant's not guilty plea, the date of the not guilty plea is the event that starts the clock. However, *O'Dell* is inapposite. In *O'Dell*, the defendant initially agreed to plead guilty to manufacturing marijuana pursuant to an information before an indictment was ever filed, and then subsequently withdrew his plea. 154 F.3d at 359. The government then indicted him for the first time, and he pled not guilty. *Id*. at 359-60. This Court held that

the defendant's indictment represented an entirely new case against the defendant, and that the defendant's initial appearance after that indictment, when he pled not guilty, triggered the Speedy Trial clock. *Id.* at 362. This Court found that the clock never started in the defendant's earlier case, because he never entered a not guilty plea in the earlier case. Thus, *O'Dell* stands only for the proposition that the Speedy Trial Act does not apply to a case in which the defendant never pleads not guilty. Although this Court opined that the Speedy Trial Act "requires a not guilty plea to begin the clock running," that statement was irrelevant to the outcome of the case and was therefore *dicta*. *See United States v. Lopez-Valenzuela*, 511 F.3d 487, 490 (5th Cir. 2007) (concluding that this Court's finding in *O'Dell* that a defendant's not guilty plea starts the seventy day period was *dicta*).

In short, although the Speedy Trial Act applies only to cases in which the defendant has entered a not guilty plea, the initial appearance after the indictment is the event that triggers the seventy day period. Accordingly, Tinklenberg's initial appearance on October 31, 2005 triggered the Speedy Trial Act's seventy day period. Following Tinklenberg's initial appearance, one day, November 1, 2005, lapsed before Tinklenberg moved for, and the court granted, a competency evaluation on November 2, 2005. The Speedy Trial clock thereby stopped after one day had lapsed.

B. Days Pretrial Motions are Filed and Decided

This Court has been somewhat inconsistent with respect to whether the day a pretrial motion is filed and the day the court disposes of it should be excluded from the Speedy Trial period. *See, e.g., United States v.*

Crawford, 982 F.2d 199, 203-04 (6th Cir. 1993) (days on which motion is filed and resolved are excluded); *United States v. Thomas*, 49 F.3d 253, 256 (6th Cir. 1995) (day on which motion is filed is excluded, but day on which motion is resolved is included). However, the plain language of the statute mandates excluding the days on which motions are filed and resolved. *See* § 3161(h)(1)(D) (excluding "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") (emphasis added). Moreover, the vast majority of appellate courts exclude the dates on which motions are filed and resolved. *See, e.g., United States v. Fonseca*, 435 F.3d 369, 372 (D.C. Cir. 2006); *United States v. Papaleo*, 853 F.2d 16, 21 (1st Cir. 1988); *United States v. Oberoi*, 547 F.3d 436, 454 (2d Cir. 2008); *Gov't of Virgin Islands v. Duberry*, 923 F.2d 317, 320 n.8 (3d Cir. 1991); *United States v. Stoudenmire*, 74 F.3d 60, 63 (4th Cir. 1996); *United States v. Johnson*, 29 F.3d 940, 943 n.4 (5th Cir. 1994); *United States v. Daychild*, 357 F.3d 1082, 1093 (9th Cir. 2004); *United States v. Yunis*, 723 F.2d 795, 797 (11th Cir. 1984).

Thus, we will exclude from the time computation the dates pretrial motions were filed and resolved. In this case, the only two pretrial motions relevant to the Speedy Trial Act were the two competency evaluations.[1]

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[1] Tinklenberg's motion for a new counsel and his counsel's motion to withdraw did not have any impact on the Speedy Trial clock because both were filed after Tinklenberg moved for an independent competency evaluation on March 29, 2006, and were resolved on June 9, 2006, the same day as the court ruled on the competency motion. The only other pretrial motions at issue are the three pretrial motions filed in August 2006, during the two weeks prior to trial, but those motions do

Under § 3161(h)(1)(A), delays caused by competency evaluations are treated as a special category of excluded time, which will be discussed in detail below. However, § 3161(h)(1)(A) does not specifically instruct whether to count the days on which motions for such evaluations are made and resolved. *See* § 3161(h)(1)(A) (stating only that "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant" is excluded). Because the two incompetency evaluations were commenced by way of pretrial motions raised by Tinklenberg, we will exclude the days those motions were raised and resolved from the seventy day period, just as we would in the case of any other pretrial motion.

C. Competency Evaluations

The district court excluded from the Speedy Trial clock all of the days from November 2, 2005 to March 23, 2006, and from March 29, 2006 to June 9, 2006, because Tinklenberg's two competency determinations were pending during those periods. On appeal, Tinklenberg argues that 18 U.S.C. § 4247(b), which generally sets the rules by which courts may commit defendants for psychiatric evaluations and limits the period a defendant may be committed for evaluation to thirty days, should be applied to limit the time excludable under the Speedy Trial Act to thirty days for Tinklenberg's competency evaluations. Pursuant to § 4247(b), "[f]or the purposes of an examination pursuant to [a court] order, . . . the court may commit the person to be examined for a reasonable period, but not to exceed thirty days[.]" However, this Court and "[e]very court that has decided this

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not create excludable time for the reasons discussed in Section I.D below.

issue ha[ve] concluded that § 4247(b) does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001). Accordingly, Tinklenberg's argument fails.

Of more substance is Tinklenberg's argument that the Speedy Trial Act limits to ten days the time excludable for the transportation of a defendant to and from the location of his competency evaluation. Although 18 U.S.C. § 3161(h)(1)(A) appears to exclude all time during which a defendant's competency evaluation and determination is pending, § 3161(h)(1)(F) provides that any delay caused by the transportation of a defendant "to and from places of examination or hospitalization" that is longer than ten days is "presumed to be unreasonable." Whether the ten day limit in § 3161(h)(1)(F) applies to the time in which a defendant is transported to a place of examination pursuant to a court's competency evaluation order appears to be a matter of first impression for this Court.[2] The few other appellate courts to have

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[2] The government and the concurring opinion both cite *Murphy*, arguing that this Court has already held that any delay in transporting a defendant for a mental competency examination is excludable, notwithstanding the ten day limit imposed by § 3161(h)(1)(F). However, the Court in *Murphy* did not address the interplay between § 3161(h)(1)(A) and § 3161(h)(1)(F), because the defendant's failure to submit any evidence of the duration of his transportation in support of his argument for a ten day limitation allowed this Court to reject the defendant's argument before reaching its merits. 241 F.3d at 455. After rejecting the claim for lack of evidence, we stated, "[w]e also conclude that Defendant's contention is without merit." *Id*. However, that statement was not necessary to the outcome, was not accompanied by any interpretation of the statute, and was followed by a citation to *Noone*, whose interpretation of the statutes we follow today. *Id*. at 455-56.

ruled on the issue are split: the First and Fifth Circuits have held that an unreasonable delay in the transportation of the defendant for a competency determination is not excludable, *see United States v. Noone*, 913 F.2d 20, 25-26 (1st Cir. 1990) and *United States v. Castle*, 906 F.2d 134, 137 (5th Cir. 1990), while the Second Circuit has held that *any* delay associated with a competency evaluation from the date of the order directing the evaluation until completion of the competency hearing, including delay from transporting a defendant for the evaluation, is excludable under § 3161(h)(1)(A), *see United States v. Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990).

We hold that a delay in transporting a defendant to a mental competency examination beyond the ten day limit imposed by § 3161(h)(1)(F) is presumptively unreasonable, and in the absence of rebutting evidence to explain the additional delay, this extra time is not excludable. Reading § 3161(h)(1)(A) to allow unlimited time for transporting a defendant to a place of examination, as the Second Circuit did in *Vasquez*, would create an internal conflict in the statute, since § 3161(h)(1)(F) expressly limits the reasonableness of the transportation period to ten days. *See Noone*, 913 F.2d at 25 n.5 (finding that allowing unlimited excluded time for transporting defendants to competency evaluation "would render mere surplusage the specific reference in [§ 3161(h)(1)(F)] to transportation 'to and from places of examination or hospitalization'"). The only way to avoid conflict between § 3161(h)(1)(A) and § 3161(h)(1)(F) is to read § 3161(h)(1)(F) as a specific exception to the general rule announced in § 3161(h)(1)(A): *i.e.*, all delays caused by proceedings to determine a defendant's competency are excluded, except for the time during which the defendant is supposed to be in transit, which

is presumptively unreasonable if longer than ten days. *See United Steelworkers of America, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 202 (6th Cir. 1988) ("[W]e are bound to construe statutes in such a way as to avoid internal conflicts whenever possible[.]").[3]

On November 10, 2005, Tinklenberg was designated to the MCC in Chicago, but did not arrive there until November 30, 2005. Under this Court's precedent, weekends and federal holidays are not included when calculating the ten day time period in which the transportation delays are excluded. *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992) (citing Federal Rule of Criminal Procedure 45(a)). Thus, although twenty calendar days passed until Tinklenberg arrived at the MCC on November 30, 2005, only two non-excludable days lapsed during that time: ten days were excludable under § 3161(h)(1)(F), six days were Saturdays or Sundays, and two days were federal holidays. Accordingly, by the time Tinklenberg arrived at MCC in Chicago, two more non-excludable days had lapsed, for a total of three non-excludable days to date.

The period from November 30, 2005 until March 23, 2006, the day the magistrate judge found Tinklenberg competent, was continuously excludable time, pursuant to § 3161(h)(1)(A). *See Murphy*, 241 F.3d at 456. The next five days were not excludable, bringing the total number of non-excludable days to eight. On March 29,

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[3] The concurring opinion states that the phrase "to or from places of examination" in §3161(h)(1)(F) "addresses more generally those situations in which a defendant may need to be transported to the hospital for testing," Concurring Op. at 19, but it is surely a leap to read "places of examination" to exclude competency evaluations—the very type of "examination" that a defendant most typically undergoes prior to trial.

2006, excludable time began again, because Tinklenberg filed a motion for an independent psychiatric evaluation on that day. *See* § 3161(h)(1)(A). On April 17, 2006, the magistrate judge granted Tinklenberg's motion and ordered the independent competency evaluation. Time was therefore excludable until June 9, 2006, when the court again found Tinklenberg competent. From June 10, 2006 through July 31, 2006, fifty-two nonexcludable days lapsed, bringing the total number of non-excludable days to sixty.

D. Motions That Do Not Delay Trial

Between August 1, 2006 and August 14, 2006, the date of trial, three motions were filed: on August 1, the government requested permission to conduct a video deposition of a witness, and the court granted the motion on August 3; on August 8, 2006, the government filed a request to bring two guns into the courtroom during the trial as evidence, a request the court granted on August 10, 2006; and on August 11, 2006, Tinklenberg moved to dismiss his indictment, with the district court denying the motion on August 14, prior to the commencement of trial. All of these motions were resolved without a hearing, and without any motion or order to delay the start of trial. Yet in its calculations, the district court excluded from the Speedy Trial period the days in which each motion was filed, pending and resolved.

As previously noted, any "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[]" is excluded from the seventy day Speedy Trial period. 18 U.S.C. § 3161(h)(1)(D). Thus, this Court has held that "[i]f a motion requires a

hearing, the entire time from the filing of the motion through the date of the hearing is excludable." *United States v. Gardner*, 488 F.3d 700, 717 (6th Cir. 2007).

However, this Court has not addressed whether a pretrial motion that does not delay trial, and does not have the potential to cause any such delay, is nevertheless excludable. Every circuit to have addressed the issue appears to 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. *See, e.g., United States v. Wilson*, 835 F.2d 1440, 1443 (D.C. Cir. 1987); *United States v. Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *United States v. Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993); *United States v. Dorlouis*, 107 F.3d 248, 253-54 (4th Cir. 1997); *United States v. Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States v. Titlbach*, 339 F.3d 692, 698 (8th Cir. 2003); *United States v. Vo*, 413 F.3d 1010, 1015 (9th Cir. 2008); *United States v. Vogl*, 374 F.3d 976, 985 (10th Cir. 2004); *United States v. Miles*, 290 F.3d 1341, 1350 (11th Cir. 2002). Citing this consensus, the government argues that nine days should be excluded in August as a result of the three pretrial motions filed. We disagree, and hold that a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time.

First, "the starting point in any case involving the meaning of a statute[] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). The statute provides that "*[t]he following periods of delay* shall be excluded[,]" and then includes among the list of periods of delay "[a]ny period of delay *resulting from* other proceedings

concerning the defendant, including but not limited to" eight different causes of "*delay*[.]" § 3161(h)(1) (emphasis added). One of these excluded delays is "delay *resulting from* any pretrial motion[.]" § 3161(h)(1)(D) (emphasis added). Thus, the statutory exclusion for pretrial motions contained in § 3161(h)(1)(D) and its two prefacatory clauses includes the word "delay" three different times, and twice states that the delay must "result from" the pretrial motion. There is no conceivable way to read this language other than to require a delay to *result* from any pretrial motion before excludable time occurs. Most of the courts that have read this delay requirement out of the statute have not examined the language of the statute closely, although the Eleventh Circuit attempted to explain the statutory basis for its interpretation as follows: "Although . . . [§ 3161(h)(1)(D)] reads 'delay resulting from,' the beginning of Section 3161(h) states that '[t]he following periods of delay shall be excluded . . .' The latter phrase clearly indicates that each period listed in Section 3161(h) automatically is a period of delay." *United States v. Stafford*, 697 F.2d 1368, 1371 (11th Cir. 1983). While the Eleventh Circuit was correct that "each period listed in Section 3161(h) automatically is a period of delay," the court failed to recognize that the "period" listed in § 3161(h)(1)(D) was not "any pretrial motion," but rather, "delay resulting from any pretrial motion[.]" In short, the argument set forth in *Stafford* simply reads words out of the statute to reach its holding. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) (noting that statutes are to be read so as to give each word a "particular, nonsuperfluous meaning").

Because the statute is clear, examining the legislative history is unnecessary. *See Conn. Nat'l Bank v.*

Germain, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (quotations and citations omitted). Nevertheless, it is noteworthy that the legislative history that our sister circuits have cited to support reading the delay requirement out of the statute does not actually support such a reading. Several of these courts have pointed to Congress' rejection of a proposed amendment in 1979 that would have eliminated the automatic exclusions of § 3161(h) in favor of giving judges the discretion to decide whether a particular proceeding warranted excluding time. *See, e.g., United States v. Novak*, 715 F.2d 810, 813 (3d Cir. 1983); *see also Stafford*, 697 F.2d at 1371; *Montoya*, 827 F.2d at 151. Yet Congress' rejection of judicial *discretion* in determining whether an exclusion should apply was not a rejection of the entire delay requirement connected to pretrial motions. Viewing Congress' rejection of a proposed amendment to statutory language as somehow showing an intent to move away from the plain meaning of the statute would be nonsensical; if anything, Congress' rejection of the amendment showed its contentment with the plain language itself. Since Congress left the myriad references to delay in the statute, its intent could only have been that where a pretrial motion or any of the other proceedings listed in § 3161(h) *causes delay*, an exclusion of time is automatic, regardless of the delay's length or reason.

Several courts have also cited the Supreme Court's decision in *Henderson v. United States*, 476 U.S. 321 (1986), as consistent with the proposition that all pre-

trial motions trigger excluded time, regardless of whether they actually cause delay. *See, e.g., United States v. Parker*, 30 F.3d 542, 549 (4th Cir. 1994); *Vogl*, 374 F.3d at 985. Yet *Henderson* held only that under the statute, the time between the filing of a motion and the conclusion of the hearing on that motion is excluded "whether or not a delay in holding that hearing is reasonably necessary." 476 U.S. at 330. In other words, any delay that occurs during the pendency of a pretrial motion, regardless of whether the delay could have been avoided or was due to the court's own inefficiency, is excluded. *Id.* at 326-27. *Henderson* did not address whether time is excluded when no delay occurs at all, and therefore, offers no support for the flawed consensus established by other appellate courts.

Thus, in the absence of any binding precedent to the contrary, this Court will remain faithful to the statutory language and interpret 18 U.S.C. § 3161(h)(1)(D) as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of trial. None of the August 2006 motions caused any delay of the trial, or even threatened to delay the trial. The trial began on August 14, 2006, the date that had been scheduled before the three August motions were filed. Neither the parties nor the district court expressed any intent to delay the trial in response to any of these three motions. Upon the government's filing of its motion on August 1, 2006 to depose a witness by video, the court even ordered that "[t]he parties shall schedule said deposition posthaste so as not to delay trial." (ROA at 115.) In fact, the trial actually began one day *earlier* than the August 15, 2006 trial date the court originally set at the time of its second competency determination.

Excluding time for mundane pretrial motions to allow a gun into the courtroom as evidence and depose a witness by video would frustrate the purpose of the Speedy Trial Act. In the days immediately prior to trial, a litany of evidentiary motions are filed; there is no evidence that Congress intended to eliminate those days from Speedy Trial Act calculations, or intended the government to be able to avoid its responsibility to conduct a timely prosecution simply by filing a flurry of evidentiary motions before trial. Tinklenberg's motion to dismiss, filed on the last business day before trial, did not cause or threaten to cause any delay either; the district court denied the motion the morning of the trial, and the parties proceeded immediately into *voir dire* that morning. In light of the obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule, we will include all thirteen days in August prior to trial in the Speedy Trial Act calculation.[4]

Including these thirteen days, a total of seventy-three non-excludable days lapsed prior to the start of Tinklenberg's trial on August 14, 2006. The Speedy Trial Act was therefore violated, and the district court's denial of Tinklenberg's motion to dismiss is reversed.

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[4] The concurring opinion argues that Tinklenberg did not raise this issue before the district court or on appeal. However, Tinklenberg unquestionably asked both this Court and the court below to count the number of days that had lapsed for the purposes of the Speedy Trial Act; therefore, Tinklenberg adequately preserved the overarching issue presented by this appeal.

II. Disposition

If a defendant is not tried within the required time limit, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). "The Speedy Trial Act does not specify whether dismissal should be with or without prejudice, nor does it contain a default presumption one way or the other." *United States v. Robinson*, 389 F.3d 582, 586 (6th Cir. 2004). However, the statute does mandate that, "[i]n determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." § 3162(a)(2).

An analysis of these factors leads us to conclude that Tinklenberg's case should be dismissed with prejudice. To be sure, the first two factors point to dismissal without prejudice. This Court has previously held that one of Tinklenberg's offenses, being a felon in possession of a firearm, is a serious offense favoring dismissal without prejudice. *United States v. Carnes*, 309 F.3d 950, 957 (6th Cir. 2002). There is no evidence that the delay was due to any bad faith on the part of the government, and the defendant's trial began just three days after the seventy day Speedy Trial period expired. *See United States v. Howard*, 218 F.3d 556, 561 (6th Cir. 2000) (finding that absence of prosecutorial bad faith, or of evidence that prosecutor tried to take advantage of delay, was factor supporting dismissal without prejudice); *Carnes*, 309 F.3d at 957 (exceeding of seventy day limit by only eight days supported dismissal without preju-

dice). However, a reprosecution in this case would nevertheless be contrary to the administration of justice because Tinklenberg has already served the entirety of his sentence, as well as his sentence for violating his supervised release, for which he should have been released in July 2009 at the latest.

"In cases where the district court fails to set forth any findings, the appropriate remedy would ordinarily be a remand to the court with instructions to provide findings that are adequate." *Robinson*, 389 F.3d at 588. Yet "'[w]hile the decision is generally the trial court's in the first instance, remand for a hearing is not required if the answer is so clear that no purpose would be served by a remand.'" *Id*. (quoting *United States v. Pasquale*, 25 F.3d 948, 952 (10th Cir. 1994)). This is just such a case. Because no purpose would be served by retrying Tinklenberg for the offenses for which he has already been punished in full, there is no reason to require the district court to hold a hearing on the issue. We will therefore remand, but with instructions that the district court dismiss the case with prejudice.

III. Violation of Supervised Release

Tinklenberg appeals the district court's finding that he violated his supervised release, and further appeals the reasonableness of his fourteen month sentence for the violation. Because his case will be dismissed with prejudice, we dismiss these issues as moot.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court's denial of Tinklenberg's motion to dismiss, and **REMAND** with instructions that the district court dismiss the indictment with prejudice. Tinklen-

berg's appeals of the finding that he violated his supervised release and his resulting sentence are **DISMISSED** as moot.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring. I agree that Jason Tinklenberg's trial violated the Speedy Trial Act and concur in all of the majority opinion except for Part I.C. I write separately to clarify my views on several of the difficult issues presented.

First, I agree with the majority that the plain language of § 3161(h)(1)(D) requires us to exclude from the Speedy Trial Act clock the day on which a motion is filed. *See* 18 U.S.C. § 3161(h)(1)(D) (excluding "delay resulting from any pretrial motion, *from* the filing of the motion" (emphasis added)). To the extent that our case law on this point conflicts, the earlier in time disposition controls because a published opinion of this court is binding on subsequent panels. *See United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008). The earliest case I have located, *United States v. Richmond*, 735 F.2d 208, 212 (6th Cir. 1984), held that the day on which a motion is made is "automatically excludable." *Richmond* is both consistent with the statutory language and, absent any prior published opinion of this court to the contrary, controlling. In light of *Richmond*, I concur in the majority's conclusion that the day on which a motion is filed is excludable.

I disagree, however, with the majority's conclusion regarding delays in transportation time to and from a mental competency examination. The Speedy Trial Act

requires that a defendant be brought to trial within seventy days, *see* 18 U.S.C. § 3161(c)(1), subject to certain excludable periods. One such excludable period is any period of "delay resulting from any proceeding, including any examinations, to determine the mental competency . . . of the defendant." 18 U.S.C. § 3161(h)(1)(A). Consequently, all "time associated with mental competency examinations [is] excluded from the Speedy Trial clock." *United States v. Murphy*, 241 F.3d 447, 455-56 (6th Cir. 2001); *see also Henderson v. United States*, 476 U.S. 321, 327 (1986). Here, the period from November 2, 2005, through March 23, 2006, was excludable pursuant to § 3161(h)(1)(A). Notwithstanding the plain language of § 3161(h)(1)(A), however, the majority concludes that § 3161(h)(1)(F) limits the amount of excludable time spent in transportation to a mental competency examination. (Maj. Op. at 9.) I respectfully disagree. Section 3161(h)(1)(F) provides that any "delay [in excess of ten days] resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization . . . shall be presumed to be unreasonable." As is clear from the language of § 3161(h)(1)(F), that provision does not speak to competency proceedings. Rather, it addresses more generally those situations in which a defendant may need to be transported to the hospital for testing. *See, e.g.*, *United States v. Garrett*, 45 F.3d 1135, 1137, 1139-40 (7th Cir. 1995) (defendant transported to hospital for pulmonary testing). Section 3161(h)(1)(A), by contrast, provides a specific exclusion for any time associated with mental competency proceedings. I see no reason why the specific provision of § 3161(h)(1)(A) should be qualified by the more general provision of § 3161(h)(1)(F). *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405

(6th Cir. 1998). In fact, we reached the same conclusion in *Murphy*. *See* 241 F.3d at 456; *see also United States v. Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990). The defendant in *Murphy* raised the same argument that Tinklenberg raises here, namely, that "a total of ten days can count as excludable time for transportation 'to and from' the place of examination and that any other delay is 'presumed to be unreasonable.'" *Murphy*, 241 F.3d at 455. We rejected this argument:

> We note that Defendant fails to point this Court to any evidence in the record demonstrating the dates upon which he was transported to and from the facility where the examination was conducted or the actual dates that Defendant was admitted or released from the facility. *We also conclude that Defendant's contention is without merit.*

Id. (emphasis added). The majority insists, however, that we did not decide the question in *Murphy* because "the defendant's failure to submit any evidence of the duration of his transportation in support of his argument for a ten-day limitation allowed this Court to reject the defendant's argument without reaching its merits." (Maj. Op. at 9 n.2.) This characterization of *Murphy* is refuted by the language quoted above.

Based on the plain language of the Speedy Trial Act and our prior decision in *Murphy*, I would find all time associated with Tinklenberg's mental competency examination, including transportation time, excludable pursuant to § 3161(h)(1)(A). Tinklenberg entered his initial appearance on October 31, 2005. One day elapsed before Tinklenberg filed a motion for a psychological evaluation to determine his competency to stand trial on November 2, 2005. The district court granted the motion and or-

dered psychological testing. After receiving a written evaluation and holding a competency hearing, the court found Tinklenberg to be competent in an order dated March 23, 2006.[1] Five days elapsed between the court's finding of competency on March 23, 2006, and March 29, 2006, when Tinklenberg filed a motion for an independent psychological examination. The court granted Tinklenberg's motion, received the second written evaluation on June 9, 2006, and made a second finding of competency. Sixty-five additional days elapsed between June 9, 2006, and the start of Tinklenberg's trial on August 14, 2006. By my calculations, a total of seventy-one non-excludable days elapsed between October 31, 2005, and August 14, 2006—one day beyond what the Speedy Trial Act allows. *See* 18 U.S.C. § 3161(c)(1).

As to motions that do not delay the start of trial, several prudential considerations would prevent me from reaching the issue. First, it appears to be waived. Tinklenberg has not raised it in his appellate brief, a fact that ordinarily precludes our review. *See Carter v. Univ. of Toledo*, 349 F.3d 269, 272 (6th Cir. 2003). Nor did he raise it in his August 11, 2006, Speedy Trial Act

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[1] Although not dispositive in this case, I note that the court actually concluded that Tinklenberg was competent at the hearing held on the previous day. We have held, albeit in an unpublished disposition, that the § 3161(h)(1)(A) proceeding to determine the mental competency of the defendant is complete"when, after a competency hearing[,] the court declare[s the defendant] competent to stand trial." *United States v. Moore*, 961 F.2d 1579 (table), 1992 WL 92740, at *5 (6th Cir. 1992) (per curiam). That is, the day on which the court makes a finding of competency, rather than the day on which the written order of competency is docketed, should control the Speedy Trial Act clock. Here, the difference of one day does not affect my conclusion that the Speedy Trial Act was violated.

motion to the district court. *See Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 662 (6th Cir. 2008). To the contrary, in his motion for reconsideration in the district court, Tinklenberg apparently accepted the proposition that certain days in August of 2006 were properly excluded pursuant to § 3161(h)(1)(D) although they did not delay trial. Second, I would not penalize the government and the district court for acting, in the absence of any controlling authority, upon the quite reasonable assumption that our circuit would align with the others to have considered the issue in finding those days to be excludable. Nevertheless, because the majority reaches the issue, I note my agreement with the majority's reading of § 3161(h)(1)(D) as a matter of statutory interpretation. After today, district courts should not exclude from the Speedy Trial clock days that are consumed by motion practice but that do not cause actual delay.

I agree, therefore, that the Speedy Trial Act was violated. Whether Tinklenberg's indictment should be dismissed with or without prejudice presents a closer question. As the majority acknowledges, several of the statutory factors point toward dismissal without prejudice. *See* 18 U.S.C. § 3162(a)(2). There is no suggestion of improper behavior on anyone's part. Rather, "the district court's error in this case was a good-faith misinterpretation of the Speedy Trial Act's requirements that resulted in a relatively short delay of the trial." *See United States v. Howard*, 218 F.3d 556, 561 (6th Cir. 2000). Neither the government nor the district court could have been expected to anticipate our disagreement with the other ten circuits to have considered the § 3161(h)(1)(D) issue. Moreover, a dismissal with prejudice may have a negative impact on the administration

of justice, *see* § 3162(a)(2), in that the instant offense will be erased from Tinklenberg's record. Should Tinklenberg be prosecuted again in the future, his record will not reflect the true extent of his criminal history. Despite these concerns, I agree that retrying Tinklenberg would be a poor use of government resources and serve no worthwhile purpose. I therefore join the majority in finding that dismissal with prejudice is warranted.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Aug. 14, 2006

ORDER

This matter is before the Court on Defendant Jason Louis Tinklenberg's Motion to Dismiss Based on Violation of the Speed Trial Act. Upon careful review, the Court will deny Defendant's Motion.

The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74, generally requires a federal criminal trial to begin 70 days after a defendant is charged with a crime or has made an initial appearance. *Id*. § 3161(c)(1). If the defendant's trial does not begin within the Act's 70-day window, he may move, before the start of the trial or entry of a guilty plea, to dismiss the charge against him. *Id*. § 3162(a)(2). If timely and in satisfaction of his burden of proof, the trial court must grant the defendant's motion. *Id*. The Act, however, recognizes that delay is

often the product of unavoidable events and allows for certain periods to be excepted from the 70-day trial clock. To that end, the Act embodies a long and detailed list of specific circumstances that are excluded from speedy trial computation.[2] *See id.* § 3161(h).

In this case, Defendant made his initial appearance before the Court on October 11, 2005. Defendant next appeared on November 2, 2005, at which time Defense counsel orally moved to compel Defendant to undergo a forensic psychiatric evaluation. Defendant's Motion was granted that day and Defendant's speedy trial clock stopped. 18 U.S.C. § 3161(h)(1)(A). Thus far, one speedy trial day had elapsed.

Defendant's speedy trial clock resumed on March 23, 2006, when the Court ordered Defendant competent to stand trial pursuant to 18 U.S.C. § 4241(d). On March 29, 2006, Defendant moved for an independent psychiatric evaluation and stopped his speedy trial clock. *Id.* § 3161(h)(1)(F). Thus far, six speedy trial days had elapsed. The Court granted Defendant's Motion for an independent psychiatric evaluation on April 17, 2006, at which time his speedy trial clock restarted. On April 26, 2006, Defendant moved to appoint new counsel and his speedy trial clock stopped. *Id.* Thus far, 14 days had elapsed off Defendant's speedy trial clock.

On May 9, 2006—and with his speedy trial clock still tolled—Defendant's counsel moved to withdraw. On June 9, 2006, the Court granted Defendant's Motion for New Counsel and permitted Defendant's existing coun-

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[2] In calculating periods of time under the Speedy Trial Act, "the day of the act or event from which the designated period of time begins to run shall not be included." FED. R. CRIM. P. 45(a).

sel to withdraw. Defendant's speedy trial clock resumed June 9, 2006. Defendant's clock did not stop again until August 1, 2006, when Plaintiff moved to take a video deposition of its witness. *Id*. Thus far, sixty-six speedy trial days had elapsed. Plaintiff's Motion to take a video deposition was granted on August 3, 2006, and Defendant's speedy trial clock restarted that day.

On August 8, 2006, Plaintiff moved for permission to store a firearm (evidence in this case) in a federal courthouse, which tolled Defendant's speedy trial clock. *Id*. Thus far, 69 days had elapsed from Defendant's speedy trial clock. The Court granted Plaintiff permission to store a firearm in the courthouse on August 10, 2006, and Defendant's speedy trial clock was poised to resume when Defendant filed the instant Motion to Dismiss Based on Violation of the Speed Trial Act on August 11, 2006, which tolled his speedy trial clock. *Id*. Thus, it appears by virtue of filing the instant Motion, Defendant has effectively denied himself the relief he sought under the Speedy Trial Act.[3]

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[3] Defendant's speedy trial calculations and belief that his 70-day period have expired fail to account for the excluded periods from August 1, 2006, to August 3, 2006, and August 8, 2006, to August 10, 2006. Any motion filed with the Court tolls Defendant's speedy trial clock. *United States v. Hohn*, 8 F.3d 1301, 1304-06 (8th Cir. 1993); *see also United States v. Levon*, 127 Fed. Appx. 865, 870 (6th Cir. 2005).

THEREFORE, IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg's Motion to Dismiss Based on Violation of the Speed Trial Act (Dkt. No. 74) is **DENIED**.

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
August 14, 2006

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:05-CR-239

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASON LOUIS TINKLENBERG, DEFENDANT

Aug. 15, 2006

ORDER

This matter is before the Court on Defendant Jason Louis Tinklenberg's Motion for Reconsideration of the Court's August 14, 2006 decision to deny his Motion to Dismiss Based on Violation of the Speed Trial Act. To prevail on the instant Motion, Defendant must not only demonstrate that the Court's decision suffers from a palpable defect, but must also show that a different result is manifest. W.D. Mich. LCrR 47.3(a). "[M]otions for reconsideration that merely present the same issues ruled upon by the Court shall not be granted." *Id*.

Defendant advances three grounds for reconsideration, the first being that the Court erroneously excluded the day on which motions were filed from his speedy trial calculus. In regard to whether a defendant's spee-

dy trial clock stops the day the motion is filed or the day after, there appears to be a split of authority amongst panels of the Sixth Circuit Court of Appeals. *Cf. Greenup v. United States*, 401 F.3d 758, 766 (6th Cir. 2005) (filing of a motion stops speedy trial clock that day); *United States v. Cope*, 312 F.3d 757, 777 (6th Cir. 2002) (same); *United States v. Tinson*, 23, F.3d 1010, 1012 (6th Cir. 1994) (same); *United States v. Moran*, 998 F.2d 1368, 1370 (6th Cir. 1993) (same) *United States v. Culpepper*, 898 F.2d 65, 67 (6th Cir. 1990) (citing *United States v. Papaleo*, 853 F.2d 16, 21 (1st Cir. 1988) ("both the date on which the motion is filed and the date on which the court disposes of the motion are part of this excludable period.")) *with United States v. Thomas*, 49 F.3d 253, 256 (6th Cir. 1995) (filing of motion does not stop speedy trial clock until the following day); *United States v. Bowers*, 834 F.2d 607, 609 (6th Cir. 1987) (same).

Given the Circuit split, the Court is left with the plain language of the Speedy Trial Act. Under 18 U.S.C. § 3161(h)(1)(F,) any "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" is excluded. (emphasis supplied). Given that the Act unambiguously provides that the moment a motion is filed a defendant's speedy trial clock stops, the Court discerns no reason to resort to the case law. Thus, the Court believes its exclusion of the days upon which motions were filed in this case was proper under the Speedy Trial Act and will deny Defendant's Motion for Reconsideration on that ground.

Defendant also contends the Court incorrectly tabulated his speedy trial clock concerning an August 3, 2006

Order, when it commented that "Defendant's speedy trial clock restarted that day." (Aug. 14, 2006 Order 2). Under Federal Rule of Criminal Procedure 45(a) "the day of the act or event from which the designated period of time begins to run shall not be included." The Court specifically noted this in its Order and calculated periods consistent with Rule 45(a). Accordingly—and to avoid injecting superfluous dates into an already confusing speedy trial calculus—August 3, 2006, was mentioned as the necessary triggering event, but not included against Defendant's speedy trial clock. Defendant's Motion for Reconsideration on this score will be denied.[1]

Finally, Defendant argues that the Court erred by failing to properly account for the time he spent in excess of ten days traveling en route to a psychological examination. On November 2, 2005, Defendant was ordered to undergo a forensic psychiatric evaluation and his speedy trial clock stopped. 18 U.S.C. § 3161(h)(1)(A). Defendant's speedy trial clock did not start again until March 23, 2006, when the Court ordered Defendant competent to stand trial. The travel periods from November 10, 2005, to November 30, 2005, are irrelevant because Defendant's clock was already stopped pursuant to section 3161(h)(1)(A). *See United State v. Murphy*, 241 F.3d 447, 455-56 (6th Cir. 2001) (citing other circuit courts of appeals that held that the

[1] Furthermore, even under Defendant's calculations, he arrives at the 70th day being August 11, 2006, and presumes the speedy trial clock to have expired. Defendant, however, filed his Motion to Dismiss based on speedy trial grounds on Friday, August 11, 2006, and tolled the speedy trial clock for the reasons articulated above. The Motion was not decided until Monday, August 14, 2006, at which time Defendant's trial had begun.

section 3161(h)(1)(A) exclusion begins when a motion to determine competency is filed and ends when competency hearing is concluded). Defendant's Motion for Reconsideration on this basis will be denied.

THEREFORE, IT IS HEREBY ORDERED that Defendant Jason Louis Tinklenberg's Motion for Reconsideration (Dkt. No. 79) is **DENIED**.

/s/ RICHARD ALAN ENSLEN
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

DATED in Kalamazoo, MI:
August 15, 2006

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2646 & 08-1765

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

JASON LOUIS TINKLENBERG, DEFENDANT-APPELLANT

[Filed: Jan. 12, 2010]

ORDER

Before: KEITH, CLAY, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk

APPENDIX E

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

CURRENT VERSION
EFFECTIVE OCTOBER 13, 2008

1. Section 3161(h) of Title 18 of the United States Code provides in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> > (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
> >
> > (B) delay resulting from trial with respect to other charges against the defendant;
> >
> > (C) delay resulting from any interlocutory appeal;
> >
> > (D) 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;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) 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.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are un-

known and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, 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. No such period of delay resulting from a continuance granted by the

court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

PRIOR VERSION
EFFECTIVE THROUGH OCTOBER 12, 2008

2. Until October 13, 2008, Section 3161(h) of Title 18 of the United States Code provided in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) 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;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) 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.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom

the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or for the Government, 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. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.