No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 534 F.3d 893. The opinion of the district court (Pet. App. 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. A petition for rehearing was denied on September 5, 2008 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on December 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of possessing a firearm following a felony

conviction, in violation of 18 U.S.C. 922(g)(1), and of possessing with the intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-19a.

1. The Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70-day period are periods of delay "resulting from other proceedings concerning the defendant, including but not limited to * * * delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).[1] A district court may also exclude from the 70-day limit "[a]ny period of delay resulting from a continuance * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8). Such findings must be made at or before the time the Court rules on a motion to dismiss for an STA violation. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006). If the defendant is not brought to trial within the 70-day period, "the informa-

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

tion or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal shall be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. On August 2, 2006, police officers saw petitioner and his girlfriend enter a car parked in front of an apartment building suspected of being a site of drug activity. The officers attempted to stop the vehicle after observing petitioner commit several traffic violations. Petitioner pulled to the side of the road but then drove off several times before finally stopping the car. When the officers approached, they saw two bags of crack cocaine in petitioner's lap. After receiving *Miranda* warnings, petitioner repeatedly stated that he was "done" and "going to the penitentiary." Pet. App. 2a.

Petitioner denied any association with the apartment building, but his girlfriend admitted living there and consented to a search. Officers found crack cocaine, three firearms, ammunition, a bulletproof vest, and a rental agreement, identification card, and other documents linking petitioner to the residence. Confronted with the search items, petitioner admitted they were his. Pet. App. 2a-3a.

On August 3, 2006, a criminal complaint was filed, and petitioner made his first appearance before a judicial officer. Pet. App. 20a; Pet. C.A. Br. 7. On August 24, 2006, a grand jury indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1), and one count of possessing with the intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a.

3. At petitioner's arraignment, a magistrate judge entered an order requiring that all pretrial motions be filed on or before September 13, 2006, with the trial to begin on November 13, 2006. See 4:06-cr-518 Docket entry No. 17 (Sept. 1, 2006). On September 7, 2006, an Assistant Federal Public Defender requested additional time for filing pretrial motions because petitioner's assigned counsel was out of the office until September 14. Pet. App. 3a, 21a; Docket entry No. 19, at 1. The magistrate judge extended the motions deadline to September 25, and set a hearing on any pretrial motions or waiver of motions for October 4. Pet. App. 3a; Docket entry No. 20, at 1-2. On September 25, petitioner filed a pleading notifying the court that he wished to waive his right to file pretrial motions. Pet. App. 3a; Docket entry No. 21. At the October 4 hearing, the magistrate judge found petitioner's waiver to be voluntary and intelligent, and he granted petitioner leave to waive the right to file pretrial motions. Pet. App. 3a; Docket entry No. 22; see 10/4/06 Tr. 4.

On November 8, 2006, petitioner moved to reset his trial date, and trial was reset for December 18, 2006. Pet. App. 3a-4a, 21a. In early December, petitioner informed the district court that he wished to plead guilty in accordance with a plea agreement, a copy of which he provided to the court, and the court scheduled the change-of-plea hearing for December 20, 2006. *Id.* at 22a. At the hearing, petitioner changed his mind and requested new counsel and a continuance. *Ibid*. The court granted both of petitioner's requests and reset the trial for February 26, 2007. *Id.* at 4a. Petitioner then sought to file a motion to suppress, but the court, citing petitioner's prior in-court waiver, denied the motion. *Ibid*.

4. On February 19, 2007, petitioner moved to dismiss the indictment for failure to comply with the STA. Pet. App. 4a. The district court denied petitioner's motion. *Id.* at 20a-24a. It concluded that the time period between September 7, 2006, through October 4, 2006, was excludable as "within the extension of time granted to file pretrial motions." *Id.* at 21a. The court also found that the time period from November 9, 2006, through February 26, 2007, was excludable under 18 U.S.C. 3161(h)(8) because the ends of justice served by granting the two trial continuances at petitioner's request outweighed the interest in a speedy trial. The district court therefore concluded that fewer than the 70 days allowable under the STA had elapsed. Pet. App. 21a-23a.

On February 23, 2007, the district court on its own motion continued petitioner's trial to March 5, 2007. Pet. App. 4a. On that same date the government filed a motion in limine regarding the admissibility of evidence under Federal Rule of Evidence 404(b). Docket entry No. 47 (Feb. 23, 2007). The district court granted the motion on the first day of trial. 3/5/2007 Tr. 7-13. After a two-day trial, the jury found petitioner guilty on both counts of the indictment. Pet. App. 4a-5a. Petitioner was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. *Id.* at 1a; Gov't C.A. Br. 1.

5. The court of appeals affirmed. Pet. App. 1a-19a. The court held, *inter alia*, that the district court correctly denied petitioner's motion to dismiss for violation of the STA, because fewer than 70 non-excludable days elapsed between petitioner's indictment on August 24, 2006, and the start of his trial on March 5, 2007. *Id.* at 5a-13a.

The court of appeals first concluded that the 28-day period between September 7, 2006, when the district court granted petitioner's request to extend the deadline for filing pretrial motions, and October 4, 2006, when petitioner formally waived his right to file pretrial motions, was excludable as "delay resulting from other proceedings concerning the defendant" under 18 U.S.C. 3161(h)(1). Pet. App. 6a-8a. Although the court acknowledged that there is a division of authority on the question, see *id.* at 8a, the court agreed with the majority of the courts of appeals that have held that time granted by a district court at a defendant's request for pretrial motion preparation is excludable under that provision, even though pretrial preparation time does not fall within the scope of Section 3161(h)(1)'s specific provision for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F). The court agreed with other courts that "the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through J are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" Pet. App. 7a (quoting *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992)). The court also agreed that "this construction eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." *Ibid.*

The court of appeals also held that the periods between November 9, 2006, and December 18, 2006, and December 20, 2006, and February 23, 2007, were excludable as periods of delay resulting from continuances

granted on the basis of the district court's findings that "the ends of justice served" by the continuances "outweigh[ed] the best interest of the public and the defendant in a speedy trial," 18 U.S.C. 3161(h)(8)(A). Pet. App. 9a-12a. The court declined to decide whether the nine-day period from February 23, 2006, to the start of trial on March 5 was excludable, noting that, "[e]ven if it is not, only 58 days passed between [petitioner's] indictment and trial, fewer than the 70 days allowed by the Speedy Trial Act." *Id.* at 12a.

ARGUMENT

Petitioner contends (Pet. 7-24) that the court of appeals erred in concluding that time granted to a defendant to prepare pretrial motions counts as a "period of delay resulting from other proceedings concerning the defendant" that is excludable from the STA's 70-day time limit under 18 U.S.C. 3161(h)(1). Although the courts of appeals have divided on that question, this Court's review is not warranted to resolve any difference in the courts' approaches. The issue is of limited practical significance, since even those courts that find such time non-excludable under Section 3161(h)(1) will exclude such time under other provisions, and it is unclear that any court would find a violation of the STA based on the facts of this case.

1. As petitioner correctly notes (Pet. 7-13), and as the court of appeals also acknowledged (Pet. App. 7a-8a), the courts of appeals have disagreed on whether time requested by a defendant for preparing pretrial motions is excludable under 18 U.S.C. 3161(h)(1).[2] Eight

[2] Because petitioner himself requested the extension of the pretrial motions deadline, this case does not present the question whether preparation time granted by a district court *sua sponte* or as part of a stan-

courts of appeals, including the court below, have answered the question in the affirmative. See Pet. App. 7a-8a; *United States* v. *Oberoi*, 547 F.3d 436, 450 (2d Cir. 2008); *United States* v. *Mejia*, 82 F.3d 1032, 1035-1036 (11th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985); *United States* v. *Jodoin*, 672 F.2d 232, 237-238 (1st Cir. 1982) (Breyer, J.).

The majority of courts of appeals, including the court below, have acknowledged that pretrial preparation time does not fall within those categories of excludable pretrial delays that are specifically enumerated in Section 3161(h)(1), such as "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F). See, *e.g.*, Pet. App. 6a-7a. But because Section 3161(h)(1) provides that excludable delays "includ[e] but [are] not limited to" the specifically enumerated periods of delay, courts have generally held that Section 3161(h)(1)(F) and the other listed exclusions are merely "representative of procedures of which a defendant might legitimately seek to take advantage for the purpose of pursuing his de-

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ding pretrial order, rather than at a defendant's request, is excludable under the STA. See Pet. 12 n.5. Compare *United States* v. *Montoya*, 827 F.2d 143, 153 (7th Cir. 1987) (finding such time excludable), with *United States* v. *Williams*, 197 F.3d 1091, 1094 (11th Cir. 1999) (finding only time specifically requested by defendants for filing motions excludable), and *United States* v. *Hoslett*, 998 F.2d 648, 657 (9th Cir. 1993) (same).

fense," rather than an exhaustive list of allowable exclusions; accordingly, they have excluded pretrial motion time specifically requested for such purposes by the defendant. *Jodoin*, 672 F.2d at 238 (quoting S. Rep. No. 212, 96th Cong., 1st Sess. 10 (1979)); see also *Tibboel*, 753 F.2d at 610 (periods listed in subsections of Section 3161(h)(1) are "illustrative rather than exhaustive"); Pet. App. 7a. Courts have further noted that a contrary construction would lead to the odd result that, while time granted to prepare a *response* to a pretrial motion is excludable under Section 3161(h)(1)(F), since the response necessarily follows the filing of the motion, time granted to prepare the motion itself would not be excludable. See *Oberoi*, 547 F.3d at 450-451 ("We see no reason Congress would accommodate the needs of one party but not the other.").

Disagreeing with the majority approach, the Fourth and Sixth Circuits have concluded that preparation time cannot be excluded under 18 U.S.C. 3161(h)(1). In *United States* v. *Moran*, 998 F.2d 1368 (6th Cir. 1993), the Sixth Circuit reasoned that "[t]he statute expressly excludes only the period 'from the filing of the [pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion,'" but "does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations." *Id.* at 1370-1371 (brackets in original) (quoting 18 U.S.C. 3161(h)(1)(F)); see *United States* v. *Dunbar*, 357 F.3d 582, 595 (6th Cir. 2004) (following *Moran* in case involving stipulated period of delay for preparation of pretrial motions), vacated, 543 U.S. 1099, reinstated in relevant part, 411 F.3d 668, 669 (6th Cir. 2005). In *United States* v. *Jarrell*, 147 F.3d 315, cert. denied, 525 U.S. 954 (1998),

the Fourth Circuit acknowledged that the list of excludable delays in Section 3161(h)(1) is merely illustrative, but similarly concluded that "Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)(F) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." *Id.* at 317. The court found support for its conclusion in the legislative history and purposes of the STA.

2. Any disagreement among the courts of appeals with respect to the question presented is, however, of limited significance. Even those courts that have held that a defendant's pretrial motion preparation time is not excludable under Section 3161(h)(1) have made clear that such time is nevertheless subject to exclusion under the "ends of justice" provision of Section 3161(h)(8). See *Dunbar*, 357 F.3d at 595 n.5, 597; *Jarrell*, 147 F.3d at 318; see also *United States* v. *Fields*, 39 F.3d 439, 443-444 & n.3 (3d Cir. 1994) (Alito, J.) (concluding that pretrial motion preparation time granted to defendant was excludable under 18 U.S.C. 3161(h)(8)(A), and reserving the question whether such time would also be excludable under Section 3161(h)(1)). Section 3161(h)(8) requires a district court to consider, among other things, whether failure to grant a continuance "would deny counsel for the defendant * * * the reasonable time necessary for effective preparation," and provides for the exclusion of time granted for that purpose. 18 U.S.C. 3161(h)(8)(B)(iv).

Petitioner cites no case, and we are aware of none, in which a court that follows the minority rule has found a violation of the STA, and thus dismissed an indictment, based on time the defendant himself requested to pre-

pare pretrial motions.[3] The difference between the majority and minority approaches is, in short, not of sufficient importance to warrant this Court's intervention.

3. This case is, in any event, not a suitable vehicle for resolution of the question presented. Even if the period of time granted for petitioner's preparation of pretrial motions counted in full against the 70-day STA time limit, petitioner would not be entitled to dismissal of his indictment.

Petitioner was indicted on August 24, 2006, and time ran for STA purposes until September 7, 2006, when petitioner filed a motion to extend the time to file pretrial motions, for a total of 13 days. Pet. App. 6a. September 7 itself is excluded under Section 3161(h)(1)(F) as a day on which a pretrial motion was filed and promptly disposed of. *Ibid.* Petitioner requested additional time to prepare any pretrial motions, and he received an additional 17 days for that purpose. *Id.* at 3a. Even assuming that the speedy-trial clock ran throughout that period, it stopped on September 25, when petitioner filed a pleading advising the court that he had decided not to raise any issues by pretrial motion. See *ibid.* Although not labeled a pretrial motion, that pleading required a hearing, see Docket entry No. 20, at 2 (Sept. 7, 2006), and served essentially as a motion

[3] The Sixth Circuit found an STA violation in *Moran* based in part on a delay resulting from schedule for filing pretrial motions set by the district court at the defendant's arraignment. *Moran*, 998 F.2d at 1370; see also *United States* v. *Martinez*, 47 F. Supp. 2d 906, 907, 910-911 (M.D. Tenn. 1999) (finding an STA violation based in part on time allowed under the court's standing discovery order, entered on the day of the defendant's arraignment). A routine scheduling order set by the court *sua sponte* presents a different question from the question presented here, which concerns a period of delay specifically requested by a defendant to prepare pretrial motions. See note 2, *supra*.

for leave to waive the right to file pretrial motions. See *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993) (delay resulting from the filing of the "functional equivalent of a motion" is excludable under Section 3161(h)(1)(F)); accord *United States* v. *Jorge*, 865 F.2d 6, 11-12 (1st Cir.), cert. denied, 490 U.S. 1027 (1989). The STA clock thus stopped again under 18 U.S.C. 3161(h)(1)(F) until the matter was heard by the court on October 4, 2006, the court conducted a colloquy with petitioner, and the court granted him leave to waive his right to file pretrial motions. 10/4/06 Tr. 4. By that date, 30 non-excludable days had passed since petitioner's indictment.

The days between October 5, 2006, and November 8, 2006, the date on which petitioner moved to continue his trial, count against the allowable period, adding another 34 days, for a total of 64. Pet. App. 3a, 8a.[4] The court of appeals found, and petitioner does not here dispute (see Pet. 5 n.3), that the periods from November 9, 2006, to December 18, 2006, and from December 20, 2006, to February 23, 2007, were excludable under Section 3161(h)(8). Pet. App. 9a-12a. That leaves only one non-excludable day, December 19, 2006, for a total of 65 days.

Finally, petitioner did not argue below that the period between February 23, 2007, and March 5, 2007, should count against the 70-day limit, see Pet. C.A. Br. 11-17, and the court of appeals did not decide the question, see Pet. App. 12a. But even if it were appropriate to consider that final period of pretrial delay, that period would be excludable under 18 U.S.C. 3161(h)(1)(F), as the period during which the government's motion in

[4] The court of appeals counted this period as 35 days, rather than 34. Pet. App. 8a. That discrepancy does not affect the overall calculation.

limine was pending. See p. 5, *supra*; see also, *e.g.*, *United States* v. *Jackson*, 544 F.3d 1176, 1186 n.15 (11th Cir. 2008). The total period of non-excludable delay in this case thus falls within the 70-day period prescribed by the STA.

Because it is not clear that any court would find a violation of the STA based on the facts of this case, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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