No. 17-270

In the Supreme Court of the United States

JIMMIE EUGENE WHITE, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in determining that a 14-day continuance to conduct plea negotiations was excludable from the time within which an indictment must be filed under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, where the parties stipulated that the period was both automatically excludable as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), and alternatively excludable because 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)(7)(A), and a judicial officer made a finding that the time was appropriately excluded.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Bloate v. *United States*, 559 U.S. 196 (2010) ..... *passim*
Breland v. *United States*, 565 U.S. 1153 (2012) 20
Expressions Hair Design v. *Schneiderman*, 137 S. Ct. 1144 (2017) 20
Hernandez v. *Mesa*, 137 S. Ct. 2003 (2017) 20
Hicks v. *United States*, 137 S. Ct. 2000 (2017) 20
Nautilus, Inc. v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014) 20
United States v. *Adams*, 625 F.3d 371 (7th Cir. 2010)..... 14
United States v. *Alvarez-Perez*, 629 F.3d 1053 (9th Cir. 2010)..... 14, 18
United States v. *Bowers*, 834 F.2d 607 (6th Cir. 1987) 7, 18
United States v. *Dixon*, 542 Fed. Appx. 273 (4th Cir. 2013), cert. denied, 134 S. Ct. 1559 (2014) 17, 18
United States v. *Dunbar*, 357 F.3d 582 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005).....6, 7, 10, 15, 16
United States v. *Elmardoudi*, 501 F.3d 935 (8th Cir. 2007), cert. denied, 552 U.S. 1120 (2008)..... 15
United States v. *Gamboa*, 439 F.3d 796 (8th Cir.), cert. denied, 549 U.S. 1042 (2006) 13
United States v. *Jean*, 25 F.3d 588 (7th Cir. 1994) 13

Cases—Continued: Page

United States v. *Keita*, 742 F.3d 184 (4th Cir. 2014) 17, 18
United States v. *Larson*, 627 F.3d 1198 (10th Cir. 2010) 13
United States v. *Leftenant*, 341 F.3d 338 (4th Cir. 2003), cert. denied, 540 U.S. 1166 (2004) 15
United States v. *Lucky*, 569 F.3d 101 (2d Cir. 2009), cert. denied, 559 U.S. 1031 (2010) 14, 18
United States v. *Mathurin*, 690 F.3d 1236 (11th Cir. 2012) 11, 14, 15, 20
United States v. *Montgomery*, 395 Fed. Appx. 177 (6th Cir. 2010), cert. denied, 562 U.S. 1245 (2011) 16
United States v. *Montoya*, 827 F.2d 143 (7th Cir. 1987) 15
United States v. *Napadow*, 596 F.3d 398 (7th Cir. 2010) 14
United States v. *Pakala*, 568 F.3d 47 (1st Cir. 2009), cert. denied, 558 U.S. 1132 (2010) 13
United States v. *Richardson*, 681 F.3d 736 (6th Cir.), cert. denied, 568 U.S. 1035 (2012) 14
United States v. *Robey*, 831 F.3d 857 (7th Cir. 2016), cert. denied, 137 S. Ct. 2214 (2017) 17, 18
United States v. *Van Someren*, 118 F.3d 1214 (8th Cir. 1997) 15, 18
United States v. *Velasquez*, 890 F.2d 717 (5th Cir. 1989) 14
Zedner v. *United States*, 547 U.S. 489 (2006) 13

Constitution, statutes, and rule:

U.S. Const. Amend. VI (Speedy Trial Clause) 6
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* 3
18 U.S.C. 3161(b) 4, 9
18 U.S.C. 3161(h)(1) ..... *passim*

Statutes and rule—Continued: Page

18 U.S.C. 3161(h)(1)(B) 15
18 U.S.C. 3161(h)(1)(D) 9, 10
18 U.S.C. 3161(h)(1)(G) 9, 10, 11
18 U.S.C. 3161(h)(7) ..... *passim*
18 U.S.C. 922(g)(1) 2, 6
18 U.S.C. 924(c) 6
18 U.S.C. 924(c)(1)(A) 2, 6
21 U.S.C. 841(a)(1) 2, 6
21 U.S.C. 846 ..... 2, 6
Fed. R. App. P. 28(a)(8)(A) 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is reprinted at 679 Fed. Appx. 426. The order of the district court (Pet. App. 19a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2017. A petition for rehearing was denied on March 20, 2017 (Pet. App. 18a). On June 7, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 17, 2017, and the petition was filed on that date. 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 Michigan, petitioner was convicted of conspiracy to distribute N-Benzylpiperazine

(BZP) and ecstasy or MDMA, in violation of 21 U.S.C. 846; possession of BZP with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 2. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-17a.

1. In May 2010, agents executed a search warrant for petitioner's home and recovered a locked safe from his bedroom. The safe contained over $25,000 in cash, 898 BZP pills, a handgun with an obliterated serial number, and an extended magazine with twenty-five rounds of ammunition for the handgun. Pet. App. 2a. Petitioner was arrested on an outstanding state warrant; after waiving his *Miranda* rights, he admitted to selling approximately 10,000 ecstasy pills the previous year. *Id.* at 4a. He also admitted that the safe, as well as the pills and cash located therein, were his. *Ibid.* He denied knowing about the gun and ammunition, however, speculating that someone else must have put them in the safe during a party the previous weekend. *Ibid.*

The federal government did not charge petitioner at the time, "in part because he promised to cooperate with" the Drug Enforcement Administration. Pet. App. 4a. Instead, he was extradited to Ohio on pending state charges, where he was convicted, sentenced, and released after serving his sentence. *Id.* at 4a-5a.

2. On April 29, 2013, the government filed a complaint against petitioner charging him with drug distribution and firearms crimes related to the May 14, 2010 search and seizure. Pet. App. 5a. On May 2, 2013, petitioner was arrested on those charges. *Ibid.* Petitioner

made his initial appearance the next day and was released on bond. *Ibid.*

On May 17, 2013, the parties filed a stipulation with the district court agreeing to adjourn petitioner's preliminary hearing and to exclude the 14-day period between May 23, 2013, and June 7, 2013, when computing the deadline for filing an indictment under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* Pet. App. 5a. The stipulation stated that the 14-day extension of time was "necessary to allow the parties to engage in plea negotiations," and that petitioner "concurs in this request and agrees that it is in his best interest." *Id.* at 30a. The stipulation further stated that this 14-day period "should be excluded from computing the time in which an information or indictment must be filed because the parties are engaged in plea negotiations, 18 U.S.C. § 3161(h)(1), and because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial. See 18 U.S.C. § 3161(h)(7)." *Id.* at 31a.

Later that day, a magistrate judge entered an order finding that "good cause exists to extend the complaint and preliminary hearing" to June 7, 2013, and ordering that the 14-day period "be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act." Pet. App. 32a-33a. The magistrate judge attached the stipulation to his order. See *id.* at 30a-31a.

3. The plea negotiations were unsuccessful, and a federal grand jury indicted petitioner on June 4, 2013. Pet. App. 5a.

a. Although represented by counsel, petitioner filed a pro se motion to dismiss the indictment. Pet. App. 22a. The motion argued that delay between petitioner's

initial arrest in 2010 and the filing of his indictment in 2013 violated 18 U.S.C. 3161(b), a provision of the Speedy Trial Act that generally requires an indictment to be filed within 30 days of a defendant's arrest. D. Ct. Doc. 23, at 1-3 (July 2, 2013). Petitioner did not assert a Speedy Trial Act violation based on the time between his second arrest (in 2013) and his indictment.

Petitioner's counsel requested to withdraw, in part because petitioner had filed pro se motions against counsel's advice. Pet. App. 22a-23a. The district court granted the motion and petitioner retained new counsel. *Id.* at 23a. The court then dismissed without prejudice petitioner's pending pro se Speedy Trial Act motion. *Ibid.* Petitioner's new counsel subsequently filed a motion to dismiss the indictment on the grounds that delay between petitioner's arrest in 2010 and his indictment in 2013 violated Section 3161(b). D. Ct. Doc. 35, at 10 (Sept. 24, 2013). Again, petitioner did not assert a Speedy Trial Act violation based on the time between his second arrest and his indictment.

b. At a hearing on his motion to dismiss, petitioner for the first time asserted that 33 non-excludable days had passed between his second arrest and his indictment because "he did not agree to" the stipulation excluding the two-week pre-indictment period. 12/3/13 Tr. (Tr.) 5. Petitioner's counsel stated, however, that prior counsel had apparent authority to enter into the stipulation on petitioner's behalf and that if the "waiver or extension was valid," then petitioner "loses that point" and there would be no Speedy Trial Act violation. See Tr. 5-6, 9-10. Petitioner relatedly argued that "it doesn't appear as though the Magistrate had a sufficient factual basis" for excluding the two-week period,

"other than the stipulation itself." Tr. 17. He acknowledged, however, that the district court was permitted to rely on the magistrate judge's finding that "the period from May 23 to June 7 should be excluded from computing time, the time within which an information or indictment must be filed, because the parties are engaged in plea negotiations" and "because the ends of justice served by the continuance outweigh the interest of the public and the Defendant in a speedy trial." Tr. 8-9. The district court subsequently observed that those are "the magic words" that courts are "familiar with." Tr. 9.

Following oral argument, the district court issued a written order denying petitioner's motion, noting that petitioner "conceded that no Speedy Trial Act violation occurred in this case." Pet. App. 19a. The court nonetheless addressed petitioner's argument on the merits, finding that the Speedy Trial Act clock did not begin to run until petitioner was arrested on May 2, 2013. *Id.* at 24a-25a. The court explained that petitioner's May 2010 arrest did not trigger the Speedy Trial Act clock because it was not accompanied by formal charges. *Id.* at 26a. Rather, formal charges were first filed on April 29, 2013, and petitioner was arrested on those charges on May 2, 2013. *Ibid.* The court then observed that, although petitioner was not indicted until 33 days later, petitioner and the government had agreed to exclude the period from May 23 to June 7, and a magistrate judge had ordered that time be excluded "because the parties are engaged in plea negotiations." *Id.* at 25a (citation omitted). The court accordingly determined that "only twenty days elapsed between the arrest and the indictment," and "no Speedy Trial Act violation" occurred. *Ibid.*

c. After a jury trial, petitioner was convicted of conspiracy to distribute BZP and ecstasy or MDMA, in violation of 21 U.S.C. 846; possession of BZP with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 2. He was sentenced to concurrent 24-month terms of imprisonment on the drug and felon-in-possession charges, and to a mandatory consecutive 60-month term of imprisonment on the Section 924(c) charge, to be followed by three years of supervised release. *Id.* at 3-4.

4. Petitioner appealed arguing *inter alia* that the three-year delay between his May 2010 arrest and his June 2013 indictment violated the Sixth Amendment's Speedy Trial Clause. Pet. App. 9a-12a; see Pet. C.A. Br. 37-43. He also challenged the stipulated two-week pre-indictment exclusion of time, arguing that the exclusion violated 18 U.S.C. 3161(h)(7) because "[t]here was no finding by the Magistrate Judge that the ends of justice outweighed the best interests of the public and the defendant in a speedy trial." Pet. C.A. Br. 35. In his reply brief, petitioner for the first time also argued that the time was not automatically excludable under 18 U.S.C. 3161(h)(1). Pet. C.A. Reply Br. vi; see *id.* at vii (citing *Bloate* v. *United States*, 559 U.S. 196 (2010)). Petitioner recognized, however, that circuit precedent was to the contrary. See *id.* at vi (citing *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005)).

In an unpublished opinion, the court of appeals affirmed. Pet. App. 1a-17a. Following circuit precedent predating this Court's decision in *Bloate* v. *United*

States, *supra*, the court of appeals applied the rule that "plea negotiations are 'period[s] of delay resulting from other proceedings concerning the defendant' automatically excludable under § 3161(h)(1)." Pet. App. 8a (brackets in original) (citing *Dunbar*, 357 F.3d at 593). The court reasoned that "[a]lthough the plea bargaining process is not expressly specified in § 3161(h)(1)" as an example of a proceeding that would trigger automatic exclusion, "the listed proceedings 'are only examples of delay 'resulting from other proceedings concerning the defendant' and are not intended to be exclusive.'" *Ibid.* (quoting *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987) (per curiam)). Accordingly, the court held, petitioner's rights under the Speedy Trial Act were not violated, regardless of whether the 14-day period was also excludable on other grounds.

The court of appeals further observed, however, that the parties had filed a stipulation "agree[ing] to exclude the two-week period under § 3161(h)(1), and also under § 3161(h)(7) because 'the ends of justice . . . outweigh the interests of the public and the defendant in a speedy trial.'" Pet. App. 7a. The court additionally observed that the magistrate judge had found that good cause existed to continue the hearing, ordered the two-week time period to be excluded under the Speedy Trial Act clock, and attached the parties' stipulation to his order. *Ibid.* The court stated that "[t]he district court judge upheld the order because it was premised 'in some measure on a stipulation,' but also on 'a finding by a judicial officer that the time was appropriately excluded based upon the fact that the parties were engaged in plea negotiations.'" *Id.* at 8a. The court of appeals also noted that petitioner did not dispute that the parties were engaged in plea negotiations, and that petitioner

had offered no evidence to rebut his prior stipulation that he concurred in the request for an exclusion of time as being in his best interest. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 18-25) that more than 30 non-excludable days elapsed between his arrest and indictment, in violation of the Speedy Trial Act. In particular, petitioner contends that the 14-day continuance he sought and obtained to engage in plea negotiations does not qualify as a "period of delay resulting from other proceedings concerning the defendant" that is automatically excludable under 18 U.S.C. 3161(h)(1). Petitioner is correct that this time is not automatically excludable under subsection (h)(1), and that the court of appeals erred in concluding to the contrary. Nonetheless, the indictment here was timely under the Speedy Trial Act because the district court did not abuse its discretion in excluding the same 14-day continuance under 18 U.S.C. 3161(h)(7), which permits exclusion of time when the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Ibid.* Indeed, when seeking that continuance, petitioner affirmatively agreed that this period should be excluded for purposes of the Speedy Trial Act and that subsection (h)(7)'s ends-of-justice requirement had been met. Pet. App. 31a. In addition, the question presented is of limited and diminishing significance, and this would be a poor vehicle for addressing it. Further review is unwarranted.

1. The court of appeals correctly affirmed the district court's denial of his motion to dismiss the indictment under the Speedy Trial Act, although its rationale was incorrect.

a. The Speedy Trial Act requires the government to file an information or indictment against a defendant within 30 days of his arrest, 18 U.S.C. 3161(b), but excludes from the 30-day period "days lost to certain types of delay," *Bloate* v. *United States*, 559 U.S. 196, 203 (2010). "Section 3161(h) specifies the types of delays that are excludable from the calculation." *Ibid.* Under subsection (h)(7), any period of delay resulting from a continuance is excludable if the court finds "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial" and sets forth its reasons for that finding. 18 U.S.C. 3161(h)(7). By contrast, delays covered by 18 U.S.C. 3161(h)(1) are "automatically excludable, *i.e.*, they may be excluded without district court findings." *Bloate*, 559 U.S. at 203. Specifically, subsection (h)(1) covers "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight enumerated subcategories of proceedings. 18 U.S.C. 3161(h)(1). Those subcategories include paragraph (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 paragraph (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." 18 U.S.C. 3161(h)(1)(D) and (G).

In *Bloate*, this Court held that time spent preparing pretrial motions is not automatically excludable under subsection (h)(1), and instead "may be excluded only when a district court enters appropriate findings under subsection (h)(7)." 559 U.S. at 204. The Court reasoned that delay relating to pretrial motions "is governed by"

paragraph (D), which specifically addresses "delay resulting from any pretrial motion." *Id.* at 205-206 (quoting 18 U.S.C. 3161(h)(1)(D)). Time preparing a motion, however, "precedes the first day upon which Congress specified that such delay may be automatically excluded." *Id.* at 207. Specifically, paragraph (D) "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 206 (quoting 18 U.S.C. 3161(h)(1)(D)). The Court explained that, in light of paragraph (D)'s specific language, a court could not rely on the "including but not limited to" clause in the general language of subsection (h)(1) to automatically exclude time preparing pretrial motions. *Id.* at 208; see *id.* at 207-215. The Court made clear, however, that such time could be excluded under subsection (h)(7)'s ends-of-justice exception. See, *e.g.*, *id.* at 214 (quoting 18 U.S.C. 3161(h)(7)).

b. The court of appeals' conclusion that the 14-day plea-negotiation continuance was automatically excludable under Section 3161(h)(1) cannot be squared with *Bloate*.[1] Delay relating to plea agreements is governed by paragraph (G), which specifically addresses "plea agreement[s] to be entered into by the defendant and the attorney for the Government." 18 U.S.C. 3161(h)(1)(G). Time negotiating or otherwise preparing a plea agreement, however, "precedes the first day upon which Congress specified that such delay may be automatically excluded." *Bloate*, 559 U.S. at 207. Para-

[1] The United States argued below that the time was properly excluded under both subsections (h)(1) and (h)(7). See Gov't C.A. Br. 17 (citing *United States* v. *Dunbar*, 357 F.3d 582 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005)).

graph (G) renders automatically excludable "consideration by the court of a proposed plea agreement," 18 U.S.C. 3161(h)(1)(G), which does not begin until the agreement is "proposed" and presented to "the court" for its "consideration," *ibid.* That does not occur until after negotiations are complete. And because plea-agreement proceedings are "conclusively" covered by paragraph (G), time spent during plea negotiations also is not automatically excludable under the "including but not limited to" clause of subsection (h)(1). *Bloate*, 559 U.S. at 209; see *United States* v. *Mathurin*, 690 F.3d 1236, 1241 (11th Cir. 2012) (holding that, under *Bloate*, time spent in plea negotiations is not automatically excludable under subsection (h)(1)).

c. The court of appeals' judgment affirming petitioner's conviction was correct, however, because the same 14-day period of time was properly excluded on a different basis. In particular, the district court did not abuse its discretion in excluding that period based on an ends-of-justice finding under subsection (h)(7).

When petitioner joined in requesting the 14-day continuance, he expressly stipulated that it was necessary and that this period should be excluded from the Speedy Trial Act calculation "because the parties are engaged in plea negotiations" and "because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial." Pet. App. 31a (citing 18 U.S.C. 3161(h)(7)). The magistrate judge in turn entered an order granting the continuance petitioner requested. The magistrate judge found "good cause" for the continuance, ordered that the two-week period "should be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act," and attached the parties' stipulation

in which the parties had agreed that "the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial." *Id.* at 32a-33a; see *id.* at 31a.

As the district court observed, the order used "the magic words" of an ends-of-justice finding, including by incorporating petitioner's stipulation. Tr. 9. Petitioner's counsel "agree[d]," conceding that nothing in the record provided any reason to "second guess" the magistrate judge's determination that plea negotiations were ongoing and that the ends of justice served by a continuance outweighed the public and petitioner's interest in a speedy trial. *Ibid.*; see Pet. App. 19a (noting that counsel conceded the absence of a Speedy Trial Act violation). The court relied on the magistrate judge's order excluding the two-week pre-indictment period to reject petitioner's Speedy Trial Act claim because the order "was premised 'in some measure on a stipulation,' but also on 'a finding by a judicial officer that the time was appropriately excluded based upon the fact that the parties were engaged in plea negotiations.'" Pet. App. 8a; see Tr. 16.

On appeal, petitioner did not "contest the district court's finding that the parties were engaged in plea negotiations during the period in question." Pet. App. 8a. Nor did he "offer any evidence indicating that he did not 'concur[] in this request [or] agree [] that it is in his best interest." *Ibid.* (brackets in original). The court of appeals thus reached the correct result in affirming the district court's order, which permissibly excluded the 14-day period under subsection (h)(7).

d. Petitioner errs in contending otherwise. In petitioner's view, the district court nonetheless abused its discretion because "'a defendant may not prospectively

waive the application'" of the Speedy Trial Act and because "[n]either the magistrate judge nor the district judge made the required findings." Pet. 33-34 (quoting *Zedner* v. *United States*, 547 U.S. 489 (2006)). Both arguments lack merit.

First, *Zedner* is inapposite. In *Zedner*, the defendant had agreed *ex ante* to an open-ended, "for all time" exclusion of any time from the Speedy Trial Act clock and waived his right to move to dismiss the indictment. 547 U.S. at 503. Here, by contrast, petitioner did not waive his right to move to dismiss and merely agreed that a specific 14-day exclusion was justified by the fact that the parties were in ongoing plea negotiations. Pet. App. 30a-31a. *Zedner* does not preclude a defendant from agreeing that grounds exist for an ends-of-justice exclusion for a specific and limited timeframe, or a court from agreeing with the parties' joint stipulation to that effect.

Second, the district court's ends-of-justice findings were sufficient. While *Zedner* held that the findings requirement was not satisfied by a "passing reference to the case's complexity," 547 U.S. at 507, the Court did not require a lengthy narrative to support an ends-of-justice continuance under subsection (h)(7). Since *Zedner*, the courts of appeals have held that a district court need not restate basic facts when those facts are obvious and set forth in the motion for continuance itself. See, *e.g.*, *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010); *United States* v. *Pakala*, 568 F.3d 47, 60 (1st Cir. 2009), cert. denied, 558 U.S. 1132 (2010); *United States* v. *Gamboa*, 439 F.3d 796, 803 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Jean*, 25 F.3d 588, 594 (7th Cir. 1994). And courts of appeals

have held that a district court need not recite the statutory factors or make findings on each of them on the record. See *United States* v. *Adams*, 625 F.3d 371, 380 (7th Cir. 2010). A judge's findings may be sufficient where the motion for continuance sets forth the reasons for an ends-of-justice continuance, the court grants the motion based on those representations, and the court later confirms its rationale in ruling on the motion to dismiss. See, *e.g.*, *United States* v. *Richardson*, 681 F.3d 736, 741 (6th Cir.), cert. denied, 568 U.S. 1035 (2012); *United States* v. *Napadow*, 596 F.3d 398, 405 (7th Cir. 2010). The district court thus did not abuse its discretion in excluding the 14-day period at petitioner's request, and the court of appeals correctly affirmed the district court's judgment.

2. Petitioner asserts (Pet. 9-18) that the courts of appeals have disagreed about whether time spent in unsuccessful plea negotiations is automatically excludable under subsection (h)(1). Although a circuit conflict exists, it is unclear to what extent it persists after *Bloate* or to what extent this Court's intervention is necessary to resolve that conflict.

a. Petitioner is correct that the circuits have been divided over this issue. Several circuits have held that time spent in plea negotiations is not automatically excludable under subsection (h)(1), and thus requires an ends-of-justice finding under subsection (h)(7). See *Mathurin*, 690 F.3d at 1241-1242; *United States* v. *Alvarez-Perez*, 629 F.3d 1053, 1058-1059 (9th Cir. 2010); *United States* v. *Velasquez*, 890 F.2d 717, 719-720 (5th Cir. 1989); see also *United States* v. *Lucky*, 569 F.3d 101, 107 (2d Cir. 2009) (suggesting in considered dicta that such time is not automatically excludable), cert. denied, 559 U.S. 1031 (2010). In contrast, several circuits

have concluded that this time is automatically excludable, and thus that an ends-of-justice finding is unnecessary. See *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005); *United States* v. *Van Someren*, 118 F.3d 1214, 1218-1219 (8th Cir. 1997); see also *United States* v. *Leftenant*, 341 F.3d 338, 344-345 (4th Cir. 2003) (time spent in plea negotiations on unrelated charges is automatically excludable as "delay resulting from trial with respect to other charges against the defendant," 18 U.S.C. 3161(h)(1)(B)), cert. denied, 540 U.S. 1166 (2004); *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987) (same).

It is unclear to what extent this conflict persists after *Bloate*, however, because no court of appeals has applied an automatic-exclusion rule in such a case after explicitly considering *Bloate*'s impact on the question. The Eleventh Circuit is the only circuit that has directly considered the issue, and it held that, in light of *Bloate*, time spent in plea negotiations is *not* automatically excludable. See *Mathurin*, 690 F.3d at 1240-1241 ("[U]nlike the [other] Circuits addressing this question," "we now have the benefit of the Supreme Court's recent decision in *Bloate*," which "sets limits to the seemingly expansive category of 'delay resulting from other proceedings concerning the defendant.'").

The Eighth Circuit has not applied an automatic-exclusion rule since *Bloate*. And even before *Bloate*, the Eighth Circuit called into question the implications of "a per se rule that all time periods in which there [are] any open plea negotiations [are] excludable.'" *United States* v. *Elmardoudi*, 501 F.3d 935, 942 (2007), cert. denied, 552 U.S. 1120 (2008). It is thus unclear whether

the Eighth Circuit would follow its pre-*Bloate* decision today if it were faced with the question.

The Sixth Circuit applied an automatic-exclusion rule in this case and in one other case since *Bloate*, but both decisions are unpublished and the court applied pre-*Bloate* circuit precedent without explicitly considering *Bloate*'s impact. In the other case, *United States* v. *Montgomery*, 395 Fed. Appx. 177 (6th Cir. 2010), cert. denied, 562 U.S. 1245 (2011), the defendant affirmatively "concede[d]" that the district court had correctly held that time spent during plea negotiations was automatically excludable, and challenged only the factual determination of whether plea negotiations were ongoing during the relevant period. *Id.* at 182. And here, petitioner did not even cite *Bloate* or subsection (h)(1) in his opening brief, and instead merely argued that the district court's findings were insufficient to support an ends-of-justice finding. See Pet. C.A. Br. 1-44; Fed. R. App. P. 28(a)(8)(A) (opening brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

Petitioner first addressed automatic exclusion in his reply brief, where he recognized that prior circuit precedent made exclusion automatic but suggested that *Bloate* was to the contrary. See Pet. C.A. Reply Br. vi-viii (citing *Dunbar*, *supra*). Petitioner did not directly ask the panel to revisit *Dunbar*, however, and the panel accordingly relied on *Dunbar* without any analysis of the issue. See Pet. App. 8a. Petitioner also did not thereafter seek rehearing en banc to ask the full court to overrule *Dunbar*. Rather, he sought rehearing en banc on a sufficiency-of-the-evidence question on which he does not seek certiorari. See Pet. for Reh'g 1-3. The

Sixth Circuit accordingly has not considered *Dunbar*'s validity in light of *Bloate*, and thus it is unclear how the Sixth Circuit would resolve that question.

The Fourth and Seventh Circuits have each applied an automatic-exclusion rule once since *Bloate*, in published decisions, but they similarly did so without analysis, in cases where the parties did not dispute the validity of that rule. See *United States* v. *Robey*, 831 F.3d 857, 863 (7th Cir. 2016), cert. denied, 137 S. Ct. 2214 (2017); *United States* v. *Keita*, 742 F.3d 184, 188 (4th Cir. 2014).[2] In *Keita*, the defendant affirmatively agreed that this time was automatically excludable. See Def. C.A. Br. at 11, *Keita*, *supra* (No. 12-4957). Moreover, the district court orders granting the continuances included ends-of-justice findings. See 742 F.3d at 188. Relying on pre-*Bloate* circuit precedent, the Fourth Circuit in turn found the time excludable under both subsections (h)(1) and (h)(7). *Ibid.* In *Robey*, the parties did not even mention an automatic-exclusion rule, much less dispute its validity. The district court had entered 11 ends-of-justice continuances spanning the entire relevant time period, see 831 F.3d at 863, and the parties disputed whether the court's findings were sufficient under subsection (h)(7). See Def. C.A. Br. at 15-24, *Robey*, *supra* (No. 15-2172); Gov't C.A. Br. at 11-16,

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[2] Petitioner cites *United States* v. *Dixon*, 542 Fed. Appx. 273 (4th Cir. 2013) (per curiam), cert. denied, 134 S. Ct. 1559 (2014), but the statements about automatic exclusion in that decision are dicta. The court did not exclude time spent during unsuccessful plea negotiations; it instead found no Speedy Trial Act violation due to the pendency of various motions. See *id.* at 278-279.

Robey, *supra* (No. 15-2172).[3] The Seventh Circuit asserted that "the period of time in which Robey was negotiating his withdrawn plea agreement is automatically excluded," before determining that each of the ends-of-justice findings was also sufficient and that the time was excludable under both subsections (h)(1) and (h)(7). 831 F.3d at 862. Neither *Robey* nor *Keita* considered *Bloate*, and as here subsection (h)(7) fully justified the results in both cases.

b. Even if the question presented were the subject of a clear post-*Bloate* circuit conflict, the issue has practical significance only in a subset of cases and that subset is diminishing.

First, in this case and many others, the validity of an automatic-exclusion rule lacks practical significance because the relevant period of time is also excludable on the basis of an ends-of-justice continuance under subsection (h)(7), or is automatically excludable on some independent basis. See Pet. App. 25a (based on an ends-of-justice finding); *Robey*, 831 F.3d at 864 (same); *Keita*, 742 F.3d at 188 (same); *Van Someren*, 118 F.3d at 1218-1219 (same); see also *Alvarez-Perez*, 629 F.3d at 1058 (automatically excludable on an independent basis); *Lucky*, 569 F.3d at 107 (same); *United States* v. *Bowers*, 834 F.2d 607, 609-610 (6th Cir. 1987) (per curiam) (same); *United States* v. *Dixon*, 542 Fed. Appx. 273, 278

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[3] The defendant in *Robey* argued in a footnote that time spent in plea negotiations could not even "serve as a basis for an ends-of-justice continuance" under subsection (h)(7). Def. C.A. Br. at 17 n.10, *Robey*, *supra* (No. 15-2172). *Bloate* does not support that argument, as *Bloate* explained that time spent preparing motions could be excluded with an ends-of-justice finding under subsection (h)(7), notwithstanding that the same period could not be automatically excluded under subsection (h)(1). See *Bloate*, 559 U.S. at 214.

(4th Cir. 2013) (per curiam) (same), cert. denied, 134 S. Ct. 1559 (2014).

Second, whatever importance this issue might have had, it is diminishing. Although the government relied on circuit precedent to press the automatic-exclusion rule in this case and the court of appeals applied it, Pet. App. 8a, the Department of Justice acknowledges that the argument is inconsistent with *Bloate* and does not intend in the future to press it. The Department has accordingly issued guidance to federal prosecutors instructing that they should not rely on the automatic exclusion of delay attributable to plea negotiations, and instead should seek ends-of-justice continuances under subsection (h)(7), as appropriate, when needed to meet the time limits of the Speedy Trial Act.

3. This case would also be a poor vehicle for review of the question presented.

First, for the reasons set forth above, see pp. 11-14, *supra*, the district court's judgment would be affirmed regardless of whether time spent in plea negotiations is automatically excludable, because the district court did not abuse its discretion in excluding the same period of time on the basis of an ends-of-justice finding under subsection (h)(7). Indeed, petitioner himself stipulated that the 14-day continuance "should be excluded" from the Speedy Trial Act calculation "because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial." Pet. App. 31a. Petitioner's counsel "agree[d]" that the magistrate judge had used the "magic words" of an ends-of-justice finding, Tr. 8-9, and conceded that nothing in the record provided any reason to "second guess" the magistrate judge's determination that plea negotiations were ongoing and that the ends of justice served

by a continuance outweighed the public and petitioner's interest in a speedy trial. *Ibid.*; see Pet. App. 19a (noting that petitioner's counsel conceded that there was no Speedy Trial Act violation).

Second, this Court is "a court of review, not of first view." *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (quoting *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014)). Accordingly, if this Court were ever going to decide whether time spent during plea negotiations is automatically excludable under subsection (h)(1), it should do so in a case where a court of appeals has had the opportunity to consider how *Bloate*'s reasoning and analysis bears on the question and has nonetheless held that the time is automatically excludable. Cf. *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2006 (2017) (per curiam). At this point, however, no court of appeals has done so. Rather, the only court of appeals that has squarely considered the question concluded that *Bloate* foreclosed automatic exclusion. See *Mathurin*, 690 F.3d at 1240-1241.

4. In light of a confession by the government that a federal court of appeals' decision is incorrect, this Court has at times granted a petition for a writ of certiorari, vacated, and remanded for further consideration. *E.g.*, *Hicks* v. *United States*, 137 S. Ct. 2000 (2017); *Breland* v. *United States*, 565 U.S. 1153 (2012). Such a remand is unnecessary here, however, because the decision below is not precedential and the court of appeals' judgment is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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