No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether additional 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 excluded 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 denying petitioner's motion to dismiss the indictment (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, and was granted on April 20, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Speedy Trial Act are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

After 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 possessing more than five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 1a, 5a. He was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. J.A. 9. Petitioner sought reversal of his convictions and dismissal of his indictment under the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq*. The court of appeals rejected that claim and affirmed his convictions, holding that time granted at a defendant's request to prepare pretrial motions is excluded from the STA's deadline for commencing trial as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1). Pet. App. 1a-19a.[1]

1. The STA generally requires a defendant's trial to begin within 70 days of his indictment or his appearance before a judicial officer, whichever occurs later. 18

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[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 made certain technical changes to the STA, including renumbering various provisions. Most relevant here, former Section 3161(h)(1)(F) was redesignated Section 3161(h)(1)(D), and former Section 3161(h)(8) was redesignated Section 3161(h)(7). 2008 Act § 13, 122 Stat. 4294. Except where noted, all citations in this brief refer to the current version as it will be codified in the 2008 Supplement to the United States Code.

U.S.C. 3161(c)(1). To provide the flexibility needed to accommodate pretrial proceedings that result in justifiable delay, however, the Act excludes from the 70-day period numerous categories of delay. 18 U.S.C. 3161(h); *Zedner* v. *United States*, 547 U.S. 489, 497 (2006).

Among those exclusions are "period[s] of delay resulting from other proceedings concerning the defendant." 18 U.S.C. 3161(h)(1). The periods of delay covered by that provision "includ[e] but [are] not limited to" eight listed subcategories. *Ibid.* Those subcategories are: delay resulting from proceedings to determine the defendant's mental competency or physical capacity, 18 U.S.C. 3161(h)(1)(A); delay resulting from trial on other charges against the defendant, 18 U.S.C. 3161(h)(1)(B); delay resulting from interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); delay resulting from proceedings to transfer the case or to remove the defendant from another district, 18 U.S.C. 3161(h)(1)(E); delay resulting from orders to transport the defendant from another district or to and from places of examination or hospitalization, 18 U.S.C. 3161(h)(1)(F); delay resulting from the court's consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); up to 30 days of delay attributable to time when proceedings concerning the defendant are under advisement, 18 U.S.C. 3161(h)(1)(H); and "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).

The exclusions under Section 3161(h)(1) are "automatic," in the sense that the delays are excluded in every case in which they arise. *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (citation omitted). The Act also automatically excludes five other categories of

delay, 18 U.S.C. 3161(h)(2)-(6), including, for example, delay resulting from the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3), and delay resulting from the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4).

In addition, the Act authorizes district court judges to 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)(7)(A). Findings justifying the continuance must be memorialized at or before the time the court rules on a motion to dismiss for an STA violation. *Zedner*, 547 U.S. at 507.

If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. 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. After observing petitioner commit several traffic violations, the officers attempted to stop the vehicle. Petitioner pulled to the side of the road but then drove off several times before finally stopping the car. When the officers approached the car, they saw two bags of crack cocaine in petitioner's lap. After receiving *Miranda* warnings, petitioner, who was carrying $1077 in cash, admitted that he knew the crack cocaine was in the

car and repeatedly stated that he was "done" and "going to the penitentiary." Pet. App. 2a-3a; 3/5/07 Tr. 61-62, 109-110.

Petitioner denied any association with the apartment building, but his girlfriend admitted living there and consented to a search of her apartment. Officers found 76 individually wrapped chunks of 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 items, petitioner admitted that they were his. In a later interview, petitioner also admitted to buying and reselling approximately four and a half ounces of crack cocaine each week from a supplier in Illinois. Pet. App. 2a-3a; 3/5/07 Tr. 90-91; 3/6/07 Tr. 213-214.

On August 3, 2006, a criminal complaint was filed, and petitioner made his first appearance before a judicial officer. J.A. 1 (4:06-cr-00518 Docket entry No. 5).[2] Assistant Federal Public Defender Thomas Flynn was appointed to represent petitioner. See Docket entry No. 9. 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 more than five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a; see *id.* at 1a; Pet. C.A. Br. 1. That event started the speedy trial clock. See 18 U.S.C. 3161(c)(1).

3. At petitioner's arraignment, a magistrate judge entered an order requiring that all pretrial motions be filed on or before September 13, with the trial to begin

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[2] All references to docket entries are to entries in the record of the proceedings in the district court.

on November 13. J.A. 3-4 (Docket entry No. 17); see Order Concerning Pretrial Motions 1-2 (Sept. 1, 2006). On September 7, Felicia Jones, a colleague of Flynn who was representing petitioner in Flynn's absence, requested that petitioner be granted additional time for filing pretrial motions because Flynn had been out of the office since the arraignment and was not scheduled to return until September 14. J.A. 4 (Docket entry No. 19); see Defendant's Request for Additional Time to File Pre-Trial Motions (Sept. 7, 2006). The magistrate judge granted the request that day, extending the motions deadline to September 25 and setting a hearing on any pretrial motions or a waiver of motions for October 4. J.A. 4 (Docket entry No. 20); see Amended Order Concerning Pretrial Motions 1-2 (Sept. 7, 2006). On September 25, petitioner filed a pleading notifying the court that he wished to waive his right to file pretrial motions. J.A. 5 (Docket entry No. 21); see Waiver of Pre-Trial Motions. At the October 4 hearing, the magistrate judge questioned petitioner, found his waiver to be voluntary and intelligent, and granted petitioner leave to waive his right to file pretrial motions. J.A. 5 (Docket entry No. 22); 10/4/06 Tr. 2-4.

On November 8, 2006, petitioner moved to reset his trial date, and trial was rescheduled for December 18. Pet. App. 3a-4a; J.A. 5 (Docket entries Nos. 24-25). 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 a change-of-plea hearing for December 20. Pet. App. 22a. At the hearing, petitioner changed his mind and requested new counsel and a continuance of the trial. *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 of his right to file pretrial motions, 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 the motion, concluding that fewer than the 70 days allowable under the Act had elapsed. *Id.* at 20a-24a. The court determined that the time period between petitioner's indictment on August 24, 2006, and Jones's motion for additional time on September 7, 2006, counted towards the 70-day period. *Id.* at 20a-21a. The court concluded, however, that the time period between September 7 and October 4, 2006, was excluded 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)(7), because the ends of justice served by granting the two trial continuances at petitioner's request outweighed the interest in a speedy trial, and that some of that time was also excluded under 18 U.S.C. 3161(h)(1)(G), because the court had been considering the contemplated plea agreement. Pet. App. 21a-23a.

On February 23, 2007, the district court, on its own motion, continued petitioner's trial to March 5. Pet. App. 4a. On the same day, the government filed a motion in limine on the admissibility of evidence under Federal Rule of Evidence 404(b). Docket entry No. 47. The district court granted the government's motion on March 5, and trial began that day. 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. He was

sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. J.A. 9.

5. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-19a. As relevant here, the court held that the district court correctly denied petitioner's motion to dismiss his indictment 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 for additional time to file 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. The court joined the majority of the federal circuits in holding that additional time granted by a district court at a defendant's request for pretrial motions preparation is excludable under that provision, even though pretrial preparation time does not fall within Section 3161(h)(1)(D)'s specific provision 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." *Ibid.* The court agreed with those other courts of appeals that "the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through [H] are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" *Id.* at 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 further held that the periods between November 9 and December 18, 2006, and between 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)(7)(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.

SUMMARY OF ARGUMENT

Additional time granted at a defendant's request to prepare pretrial motions is automatically excluded from the Speedy Trial Act's deadline for commencing trial.

A. Additional time granted for preparation of pretrial motions falls under 18 U.S.C. 3161(h)(1), which excludes "delay resulting from other proceedings concerning the defendant." The listed examples of delays excluded by Section 3161(h)(1) indicate that it excludes delays arising from proceedings aimed at advancing the defendant's case towards trial or other resolution, especially procedures of which the defendant might seek to take advantage in pursuing his defense. Courts have concluded that Section 3161(h)(1) excludes numerous delays resulting from unlisted proceedings that are ei-

ther analogous or ancillary to one or more of the listed proceedings.

A district court's grant of a defendant's request for additional motions preparation time is ancillary to pretrial motions themselves, which are one of the specifically listed proceedings. 18 U.S.C. 3161(h)(1)(D). In addition, the delay resulting from the grant of additional time to prepare motions is analogous to delay that is expressly excluded by Section 3161(h)(1)(D). That provision excludes all time from the "filing" of a motion through its hearing or other prompt disposition, including time that the court grants the non-moving party to prepare a response. It would make little sense to exclude the time granted to prepare a response to a motion but not the time granted for the specific purpose of preparing the motion itself.

B. Automatically excluding additional time granted at a defendant's request to prepare and file pretrial motions furthers the purposes of the Speedy Trial Act. Grants of additional preparation time, like the pretrial motions themselves, advance a defendant's case towards trial or other resolution and serve the defendant's interest in pursuing his defense. Additional preparation time facilitates fair and accurate resolution of the motions, which defendants may use to shape the course of trial in their favor or even to obtain dismissal of the charges against them. Neither the defendant nor the public has an interest in rushing to trial when a defendant's attorney has determined that more time is needed to consider whether to file and to prepare pretrial motions, and the district court has considered the issue and agreed.

C. Section 3161(h)(1)(D), which expressly excludes delay resulting from any pretrial motion, beginning with the "filing" of the motion, does not imply that

Section 3161(h)(1) cannot exclude delay resulting from additional time granted to prepare motions. Section 3161(h)(1) expressly states that the delays it excludes "includ[e] but [are] not limited to" the listed examples. It is therefore inappropriate to rely on canons of construction that would draw a negative inference from the examples' failure to expressly address motions preparation time. Nor does reading Section 3161(h)(1) to cover additional motions preparation time granted at a defendant's request render any language in Section 3161(h)(1)(D) superfluous. The language in Section 3161(h)(1)(D) stating that the excluded delay runs from the "filing" of a pretrial motion was added in 1979 to reverse judicial decisions that had limited the excluded delay to the time consumed in judicial hearings on the motion. The current language makes clear that all the time after a motion is filed, not just the hearing time, is excluded. And the language serves that function even though Section 3161(h)(1) excludes motions preparation time granted at a defendant's request.

D. A district court could exclude defense-requested motions preparation time by granting a continuance and making findings under 18 U.S.C. 3161(h)(7) that the "ends of justice served by" the continuance "outweigh the best interest of the public and the defendant in a speedy trial." But automatic exclusion of the time under Section 3161(h)(1) is more consistent with the structure and purposes of the Act. Section 3161(h)(1), like the other automatic exclusions in Section 3161(h)(2) through (h)(6), is designed to exclude delay from frequently recurring situations in which the ends of justice virtually always outweigh the interests of the defendant and society in proceeding more quickly to trial. Section 3161(h)(7), in contrast, is designed to cover more un-

usual situations in which it is important for the district court to make a specific determination whether delay of the trial is warranted. Delay of the trial is virtually always warranted when the district court has decided, based on a defendant's own request, that more time is needed to prepare and to resolve pretrial motions.

E. Excluding the delay at issue here under Section 3161(h)(1) does not undermine the scheme of the Act. The exclusion of additional time granted in response to a defendant's specific request does not extend the 70-day baseline time allotted by the STA for bringing cases to trial. Nor does it allow the courts and the parties to opt out of the Act. Delay may be excluded only if the court has granted a case-specific extension for the specific purpose of preparing pretrial motions (or preparing for another pretrial proceeding listed in Section 3161(h)(1)). That rule has been followed in numerous circuits for more than two decades without any evidence that it has led to abuse.

F. The legislative history is consistent with that approach. Although the Senate Judiciary Committee rejected exclusion under Section 3161(h)(1) of *all* time *routinely allotted* for motions preparation, the Committee did not address whether to exclude the narrower subset of additional preparation time granted at a defendant's specific request. The Committee's opposition to the exclusion of all motions preparation time in every case does not shed light on how it would have resolved that different question. Nor does the legislative history indicate that Congress intended any exclusion for additional motions preparation time to be accommodated under Section 3161(h)(7)'s ends-of-justice provision rather than Section 3161(h)(1). Because the legislative history does not address the specific question at issue here, the

Court should adhere to the interpretation of Section 3161(h)(1) adopted by the court below, which is supported by the text, structure, and purposes of the Speedy Trial Act.

ARGUMENT

ADDITIONAL TIME GRANTED AT A DEFENDANT'S REQUEST TO PREPARE PRETRIAL MOTIONS IS EXCLUDED UNDER 18 U.S.C. 3161(h)(1) FROM THE SPEEDY TRIAL ACT'S DEADLINE FOR COMMENCING TRIAL

Petitioner argues that the delay in his trial that resulted from the additional time to prepare and file motions that the district court provided at his request violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, and requires reversal of his convictions and dismissal of his indictment. The court of appeals rejected that argument, holding that time granted at a defendant's request to prepare pretrial motions is automatically excluded from the STA's deadline for commencing trial. That holding—which has been reached by eight courts of appeals—correctly reflects the text, purposes, and structure of the Act.[3]

[3] See Pet. App. 5a-13a; *United States* v. *Oberoi*, 547 F.3d 436, 448-451 (2d Cir. 2008), petition for cert. pending, No. 08-1264 (filed Apr. 14, 2009); *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, 912-915 (10th Cir.) (per curiam), opinion supplemented on other grounds on reh'g, 881 F.2d 866 (10th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Wilson*, 835 F.2d 1440, 1444-1445 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985) (Posner, J.); *United States* v. *Jodoin*, 672 F.2d 232, 237-238 (1st Cir. 1982) (Breyer, J.). Only two circuits have taken a contrary position. See *United States* v. *Dunbar*, 357 F.3d 582, 595 (6th Cir. 2004) (holding that Section

A. Time Granted At A Defendant's Request To File Pretrial Motions Falls Within Section 3161(h)(1)'s Exclusion Of "Delay Resulting From Other Proceedings Concerning The Defendant"

The STA seeks to promote speedy criminal trials without sacrificing time needed for pretrial proceedings that help ensure the accuracy and fairness of the trials. 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. 3, 21 (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 2, 15, 21 (1974). To that end, the Act generally requires every criminal trial to begin within 70 days of the indictment or the defendant's initial appearance, 18 U.S.C. 3161(c)(1), but also excludes numerous periods of delay from that 70-day period. See *Zedner*, 547 U.S. at 497. In particular, the Act lists several frequently recurring categories of delay that are automatically excluded whenever they occur in a particular case. 18 U.S.C. 3161(h)(1)-(6). One category is "delay resulting from other proceedings concerning the defendant." 18 U.S.C. 3161(h)(1). As the court below held, that category encompasses the delay at issue in this case.

1. Section 3161(h)(1) contains several subparagraphs that provide an illustrative list of "delay[s] resulting from other proceedings concerning the defendant." 18 U.S.C. 3161(h)(1)(A)-(H). At the same time, Section 3161(h)(1) makes clear that this list is not intended to be

3161(h)(1) did not exclude motions preparation time to which the parties had agreed by stipulation); *United States* v. *Jarrell*, 147 F.3d 315, 316-319 (4th Cir.) (rejecting STA claim but stating that defense-requested motions preparation time is not excluded under Section 3161(h)(1)), cert. denied, 525 U.S. 954 (1998).

comprehensive, stating that the excluded delays "includ[e] but [are] not limited to" the listed examples. 18 U.S.C. 3161(h)(1).

Although the examples are not intended to be exhaustive, they provide guidance on the kinds of "delay[s] resulting from other proceedings concerning the defendant" that Section 3161(h)(1) excludes. Under the interpretative canons of *noscitur a sociis* and *ejusdem generis*, when general words are accompanied by specific words in a statutory enumeration, the general words are often construed to embrace only objects similar in nature to the objects enumerated by the specific words. See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003); *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000).

Here, the listed examples indicate that Section 3161(h)(1) excludes delays arising from proceedings aimed at advancing the defendant's case towards trial or other resolution (or at resolving other charges against him). See, *e.g.*, 18 U.S.C. 3161(h)(1)(A) (excluding delay from "examinations" to determine the defendant's mental competency or physical capacity); 18 U.S.C. 3161(h)(1)(B) (excluding delay from "trial with respect to other charges against the defendant"); 18 U.S.C. 3161(h)(1)(D) (excluding delay from "any pretrial motion"); 18 U.S.C. 3161(h)(1)(F) (excluding delay from "an order directing [the] transportation" of the defendant from another district or to and from places of examination or hospitalization); 18 U.S.C. 3161(h)(1)(G) (excluding delay from "consideration by the court of a proposed plea agreement"). At the core of the listed proceedings are procedures, such as competency examinations and pretrial motions, "of which a defendant might l[e]gitimately seek to take advantage for the pur-

poses of pursuing his defense." S. Rep. No. 212, *supra*, at 10 (quoting S. Rep. No. 1021, *supra*, at 36).

Courts have identified numerous delays that are excluded by Section 3161(h)(1) because they arise from unlisted proceedings that share these characteristics. Those unlisted proceedings generally fall into two categories—proceedings analogous to listed proceedings and proceedings ancillary to listed proceedings.

Thus, courts have excluded delays resulting from proceedings—such as petitions by pretrial services officers to revoke pretrial release, requests for reconsideration of pretrial orders, and requests for discovery—that are the "functional equivalent" of pretrial motions, which are expressly covered by Section 3161(h)(1)(D). *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993); *United States* v. *Noone*, 913 F.2d 20, 27 n.12 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Jorge*, 865 F.2d 6, 11-12 (1st Cir.), cert. denied, 490 U.S. 1027 (1989). Courts have likewise excluded delays stemming from proceedings, such as writs of habeas corpus and petitions for mandamus, that are "analogous" to interlocutory appeals, which are expressly covered by Section 3161(h)(1)(C). *United States* v. *Davenport*, 935 F.2d 1223, 1233 (11th Cir. 1991); *United States* v. *Tyler*, 878 F.2d 753, 757 (3d Cir.), cert. denied, 493 U.S. 899 (1989). And courts have excluded delays arising from many other proceedings that the courts have found "similar to" listed proceedings. *United States* v. *Lucky*, 569 F.3d 101, 107 (2d Cir. 2009) (status conferences); *United States* v. *Salgado*, 250 F.3d 438, 454 n.2 (6th Cir.) (pretrial hearings and initial appearances), cert. denied, 534 U.S. 916, and 534 U.S. 936 (2001); *United States* v. *Garrett*, 720 F.2d 705, 710 (D.C. Cir. 1983) (bail revocation proceedings), cert. denied, 465 U.S. 1037 (1984);

United States v. *Lopez-Espindola*, 632 F.2d 107, 110-111 (9th Cir. 1980) (probation revocation proceedings on other charges).[4]

Courts have also excluded delays resulting from unenumerated proceedings that are ancillary to a listed proceeding. Thus, courts have excluded delays during plea negotiations, even though the express exclusion in Section 3161(h)(1)(G) "does not apply until the proposed plea agreement is finalized and submitted to the court." *United States* v. *Van Someren*, 118 F.3d 1214, 1218 (8th Cir. 1997); *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987). Similarly, courts have excluded delays arising from pretrial proceedings on other charges against the defendant, such as pretrial detention or plea negotiations, which are ancillary to "trial with respect to other charges against the defendant," 18 U.S.C. 3161(h)(1)(B). *United States* v. *Leftenant*, 341 F.3d 338, 344-345 (4th Cir. 2003), cert. denied, 540 U.S. 1166 (2004); *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987); *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir.), cert. denied, 446 U.S. 986 (1980).

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[4] Although courts have sometimes cited particular subparagraphs of Section 3161(h)(1) when excluding delays resulting from analogous proceedings, the courts' reasoning makes clear that they have found the proceedings covered under Section 3161(h)(1)'s general language. See, *e.g.*, *Davenport*, 935 F.2d at 1233 ("We hold that the petition for a writ of habeas corpus * * * is an 'other proceeding' analogous to an interlocutory appeal."); *Tyler*, 878 F.2d at 757 (agreeing with the district court that "a petition for writ of mandamus is excludable as 'another proceeding concerning the defendant,' analogous to an interlocutory appeal"); *Jorge*, 865 F.2d at 11-12 ("Even if the government's 'Request [for discovery]' is not a motion, it is sufficiently analogous to a motion to be considered at least an 'other proceeding' covered by the same section of the Speedy Trial Act.").

See also *United States* v. *Pete*, 525 F.3d 844, 849-850 (9th Cir.) (excluding delay resulting from a certiorari petition following an interlocutory appeal, stating that a certiorari petition "undoubtedly comes within § 3161(h)(1)'s catchall language," and, although it is not an appeal, "it is certainly part of the appellate process"), cert. denied, 129 S. Ct. 298 (2008); *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004) (excluding time during which the defendant was considering whether to file a motion for appointed counsel), vacated on other grounds, 543 U.S. 1099 (2005).[5]

2. Delay arising from a district court's grant of a defendant's request for additional time to prepare pretrial motions is one of the delays resulting from ancillary proceedings that are excluded by Section 3161(h)(1). That additional time is ancillary to pretrial motions themselves, which are one of the specifically listed proceedings. 18 U.S.C. 3161(h)(1)(D). The additional time for motions preparation "is directly related to," and facilitates, the motions proceeding (or the defendant's considered decision not to invoke that proceeding). *United States* v. *Jodoin*, 672 F.2d 232, 238 (1st Cir.) (Breyer, J.). Without sufficient time to determine whether to file and to prepare pretrial motions, a defendant may be unable to file a motion by the deadline, have to submit an inadequate filing, or make an uninformed decision about whether to file. Adequate preparation time is thus essential to the fair and accurate resolution of pretrial

[5] The numerous examples of exclusions under Section 3161(h)(1)'s general language contradict petitioner's contention that "exclusions under (h)(1)'s general standard are quite rare." Br. 24. On the contrary, exclusions under those general provisions are essential in enabling courts to comply with the STA's time limit.

motions, which, as Section 3161(h)(1)(D) indicates, warrants delay of the trial.

The delay resulting from the grant of a defendant's request for more time to prepare pretrial motions is also analogous to delay that is expressly excluded by Section 3161(h)(1)(D). In excluding all time "from the filing of the [pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion," 18 U.S.C. 3161(h)(1)(D), that provision excludes the time that the court grants the non-moving party to prepare a response. See *Henderson* v. *United States*, 476 U.S. 321, 330 (1986). It makes scant sense to exclude the time granted to prepare a response to a motion but not time granted for the specific purpose of preparing the motion. "The same interests and considerations that militate in favor of allocating time for a party to respond to a motion (and the court to decide it) justify the allocation of time to prepare the motion in the first place." *United States* v. *Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008), petition for cert. pending, No. 08-1264 (filed Apr. 14, 2009).

This Court relied on similar reasoning in *Henderson* in holding that Section 3161(h)(1)(D) excludes time after the hearing on a pretrial motion but before the court receives all the submissions necessary to decide the motion. The Court explained that "[i]t would not have been sensible for Congress to exclude automatically all the time prior to the hearing on a motion and 30 days after the motion is taken under advisement, but not the time during which the court remains unable to rule because it is awaiting the submission by counsel of additional materials." *Henderson*, 476 U.S. at 331. Likewise, it would not have been sensible for Congress to exclude automatically time granted to respond to a motion but

not time granted for the express purpose of preparing it. Thus, delay resulting from time granted to a defendant to prepare pretrial motions is "delay resulting from other proceedings concerning the defendant," excluded by Section 3161(h)(1).[6]

B. Excluding Additional Time Granted At A Defendant's Request To File Pretrial Motions Furthers The Purposes Of The Speedy Trial Act

Interpreting Section 3161(h)(1) to exclude additional time for filing pretrial motions granted at a defendant's request furthers the purposes of that provision and the Speedy Trial Act as a whole. As discussed above, Section 3161(h)(1) is designed to exclude delay arising from proceedings that advance the defendant's case towards trial or other resolution, particularly procedures of which the defendant might legitimately take advantage to pursue his defense. See *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 913 (10th Cir.) (per curiam), opinion supplemented on other grounds on reh'g, 881

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[6] Consistent with *United States* v. *Williams*, 197 F.3d 1091, 1093-1095 (11th Cir. 1999), *United States* v. *Hoslett*, 998 F.2d 648, 654-657 (9th Cir. 1993), and the STA's legislative history, see pp. 29-30, 33-35, *infra*; but see *Montoya*, 827 F.2d at 152-153, the court below did not interpret Section 3161(h)(1) to exclude from the speedy trial clock the routine time for filing pretrial motions allotted by the standard scheduling order that was entered at petitioner's arraignment. See Pet. App. 6a. The court interpreted the provision to exclude only the additional preparation time granted in response to petitioner's specific request for more time to file motions. See *id.* at 6a-8a. That interpretation follows from the listed examples, which indicate that Section 3161(h)(1) only excludes delay from *individualized* "proceedings concerning the defendant." Time granted by a local rule or a routine order entered at the outset of every case does not result from that kind of individualized proceeding.

F.2d 866 (10th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1043 (1990); *Jodoin*, 672 F.2d at 238. Grants of additional time to explore whether to file and to prepare pretrial motions, like pretrial motions themselves, serve those goals.

Pretrial motions—such as motions to suppress evidence or to dismiss the indictment—advance the case towards resolution because they shape the content or structure of the trial and may even eliminate the need for trial altogether. The same is true of additional time granted at a defendant's request to research, prepare, and file pretrial motions. Motions cannot be resolved fairly and accurately if a defendant has insufficient time to prepare them. And if the additional time leads a defendant to conclude that he should not file any motions, that result too promotes efficient resolution of the case.

Neither the defendant nor the public is well-served by rushing to trial when a defendant's attorney needs more time to consider or to prepare pretrial motions, and the district court has evaluated the issue and concurred. Defense counsel is "best acquainted with the defensive strategy opposing the government's case" and is thus best situated to determine whether the defendant's interest in additional time to prepare potential pretrial motions outweighs his interest in proceeding more quickly to trial. *Mobile Materials, Inc.*, 871 F.2d at 914. And the district court's concurrence in that determination, after the opportunity for an adversary presentation, shows that the public interest is also served by delaying trial.

C. The Express Exclusion Of Delay From Pretrial Motions Does Not Prevent The Exclusion Under Section 3161(h)(1) Of Delay From Additional Preparation Time

Petitioner does not dispute that "Section 3161(h)(1)'s general language," by its own terms, excludes delay resulting from the grant of a defendant's request for additional time to prepare pretrial motions. Br. 15. Instead, relying on various canons of statutory construction, petitioner argues that Section 3161(h)(1) cannot be given its ordinary meaning because "Section 3161(h)(1)(D) directly addresses delays resulting from pretrial motions," and it excludes only time beginning with the "filing" of the motion. *Id.* at 14-15; see *id.* at 16 (arguing that Section 3161(h)(1)(D) "controls over subsection (h)(1)"). That argument is mistaken.

1. Section 3161(h)(1)(D) does not address delay from the preparation of pretrial motions that occurs before pretrial motions are filed. But that omission hardly signifies that Congress intended to occupy the field of motions practice—and to preclude by implication the recognition of other proceedings connected to motions practice that produce excludable delay under Section 3161(h)(1). The language of the statute itself refutes any such negative implications: When listing examples of excludable delay in Section 3161(h)(1), Congress introduced the examples by the phrase "including but not limited to." 18 U.S.C. 3161(h)(1). Petitioner's use of the examples to preclude coverage of ancillary or analogous proceedings that generate delay attributes to the examples a limiting function that Congress cannot have intended. As Justice Frankfurter explained long ago, "[t]o attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application." *Phelps Dodge Corp.*

v. *NLRB*, 313 U.S. 177, 189 (1941) (declining to draw the negative implication, from Congress's grant of remedial authority to an agency "including *reinstatement* of employees," that the agency could not order the remedial *hiring* of employees) (emphasis added). The failure of Congress to expressly address delay from motions preparation in Section 3161(h)(1)(D) (or the other subparagraphs of Section 3161(h)(1)) thus does not indicate whether the delay is covered by Section 3161(h)(1)'s general language.

2. The canons of construction that petitioner invokes to support his contention are also not applicable here. Petitioner first relies on the canon that a "specific" statutory provision "controls over" a "more general" one. Br. 16 (quoting *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991)). But, as the cases cited by petitioner illustrate, that canon comes into play only when a court must reconcile conflicting statutes or two independent provisions of a single statute. See *Gozlon-Peretz*, 498 U.S. at 406-407; *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). Here, the specific provision, Section 3161(h)(1)(D), is a subparagraph of the more general provision, Section 3161(h)(1), and is intended to illustrate, but not to exhaust, the scope of the general provision. In that situation, the canon does not apply because "there is no conflict" between the two provisions. *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 336 (2002).

Petitioner also argues (Br. 16-18) that Congress's express delineation of starting and ending points for the delay excludable under Section 3161(h)(1)(D) implies that Congress did not intend for Section 3161(h)(1) to

exclude periods of delay outside those boundaries. See *id*. at 24-25 (arguing that the "comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial calculation") (quoting *United States* v. *Rojas-Contreras,* 474 U.S. 231, 239-240 (1985) (Blackmun, J., concurring in the judgment))). That argument—that "expressing one item of [an] associated group or series excludes another left unmentioned"—is an application of the canon *expressio unius est exclusio alterius*. *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (citation omitted; brackets in original). But, as discussed above, Congress's use of the phrase "including but not limited to" makes clear that Section 3161(h)(1)'s "general words are intended to include other matters besides such as are specifically mentioned" in its subparagraphs. *Ford* v. *United States*, 273 U.S. 593, 612 (1927) (citation omitted). Accordingly, the *expressio unius* canon does not apply here. See *Echazabal*, 536 U.S. at 80 (rejecting *expressio unius* canon where statute used the phrase "may include"); Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:23, at 417 (2007) (noting that it is generally improper to apply *expressio unius* where a statute uses the word "include").[7]

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[7] The inapplicability of *expressio unius* and the canon that specific provisions control over conflicting general provisions does not mean that the examples in Section 3161(h)(1) play no role in the interpretation of its general language. On the contrary, as discussed above, the examples inform the scope of the general language under the principles of *ejusdem generis* and *noscitur a sociis*. And, for the reasons discussed above, application of those principles supports the conclusion that Section 3161(h)(1) excludes delay

The final canon invoked by petitioner (Br. 18-19) is that statutes should not be interpreted in a manner that renders any of their provisions superfluous. That canon too is not relevant here. Petitioner contends that, if time granted at a defendant's request to prepare pretrial motions is automatically excluded under the general language of Section 3161(h)(1), then the language in Section 3161(h)(1)(D) stating that the excludable delay from a pretrial motion begins with the filing of the motion "would be meaningless." *Id.* at 19. But as petitioner himself acknowledges, Congress enacted the language in Section 3161(h)(1)(D) in 1979 to expand the previous exclusion for delay resulting from "hearings on pretrial motions," 18 U.S.C. 3161(h)(1)(E) (1976), to include "the entire period of time from the date of filing" through the hearings on or other disposition of the motions. Pet. Br. 31 (quoting S. Rep. No. 212, *supra*, at 33). By explicitly stating that the excludable delay begins with "the filing of the motion," 18 U.S.C. 3161(h)(1)(D), the new language "avoid[s] an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing." H.R. Rep. No. 390, 96th Cong., 1st Sess. 11 (1979). The language continues to serve that function even though Section 3161(h)(1) excludes time granted at a defendant's request to prepare pretrial motions.

D. The Availability Of An "Ends of Justice" Continuance Does Not Undermine The Exclusion Under Section 3161(h)(1) Of Additional Motions Preparation Time

A district court could, as petitioner notes (Br. 19), exclude defense-requested motions preparation time

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resulting from the grant of a defendant's request for additional time to prepare pretrial motions. See pp. 14-20, *supra*.

from the speedy trial clock by granting a continuance of the trial and making findings under 18 U.S.C. 3161(h)(7) that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Automatic exclusion of the time under Section 3161(h)(1) is, however, more consistent with the structure and purposes of the STA.

1. The exclusion in Section 3161(h)(1), like those in Section 3161(h)(2) through (h)(6), is designed to cover frequently recurring situations in which the ends of justice served by the delay will virtually always outweigh the interests of the defendant and society in proceeding more quickly to trial. Delay from additional time granted at a defendant's request to file pretrial motions should be excluded under Section 3161(h)(1) because, as discussed above, the defendant and society will almost never have an interest in going to trial without adequate time to prepare and to resolve pretrial motions. Section 3161(h)(7), in contrast, is designed to cover more unusual situations in which it is important for the district court to make a specific finding that delay of the trial is warranted. See S. Rep. No. 212, *supra*, at 9, 10-11; S. Rep. No. 1021, *supra*, at 21; H.R. Rep. No. 1508, *supra*, at 21-22.

2. Petitioner is mistaken in contending that excluding additional motions preparation time under Section 3161(h)(1) will "disrupt * * * the calibrated interplay between § 3161(h)(1) and § 3161(h)(7)" (Br. 21-22) by allowing "circumvent[ion]" of Section 3161(h)(7)'s "carefully prescribed limits" (*id.* at 24). On the contrary, no valid purpose is served by requiring district courts to make ends-of-justice findings when those findings are inherent in the grant of additional time to prepare motions.

The time and effort devoted to making explicit ends-of-justice findings would waste limited judicial resources and contribute to court congestion and delay. Even more problematic, if courts were required to undertake an ends-of-justice balancing before granting and excluding defense-requested time to prepare motions, some judges might inappropriately deny the requested time. At least in the early years of the STA, many judges were "loathe to grant 'ends of justice' continuances to permit adequate preparation time." S. Rep. No. 212, *supra*, at 26. Thus, relegating time needed for pretrial motions preparation to coverage under Section 3161(h)(7) would create a risk that courts would hasten cases to trial, without adequate opportunity for accurate resolution of pretrial motions that would have enhanced the fairness of the trial or obviated the need for trial altogether.

Another potential danger is that a court might grant the request for additional time but neglect to make the Section 3161(h)(7) findings, enabling the defendant later to seek dismissal of the indictment under the STA. In that circumstance, the defendant's STA claim would virtually always be a purely technical one, as is petitioner's claim here. Petitioner nowhere argues that it was not in the interests of justice for the district court to grant him additional time to allow his originally assigned attorney to review his case and decide what motions needed to be filed. Petitioner's only real dispute concerns under which provision of the STA, Section 3161(h)(1) or Section 3161(h)(7), the time should have been excluded. Reversing criminal convictions and dismissing indictments on such technicalities, even if the dismissals were without prejudice to reindictment and retrial, would frustrate, rather than advance, the public's interest in speedy trials. Cf. *Vermont* v. *Brillon*, 129 S. Ct. 1283,

1287 (2009) (holding that "delays sought by counsel are ordinarily attributable to the defendants they represent" and cannot violate the constitutional right to a speedy trial). And this approach would provide defendants with an opportunity to game the system. Cf. *United States* v. *Fields*, 39 F.3d 439, 443 (3d Cir. 1994) (Alito, J.) ("The defendant's arguments are disturbing because he would have us order the dismissal of his indictment based on continuances that his own attorney sought."). The STA "was not, after all, meant to provide defendants with tactics for ensnaring the courts into situations where charges will have to be dismissed on technicalities." *United States* v. *Bufalino*, 683 F.2d 639, 646 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

Petitioner claims that adopting his position would not risk dismissals based on technical STA violations because, if this Court holds that Section 3161(h)(7) findings are required, district courts "will adjust their behavior accordingly." Br. 21. But the busy and fast-paced nature of trial practice means that even careful district court judges will make mistakes. The STA should not be construed to provide defendants with a windfall when such inevitable mistakes occur.

3. Petitioner also errs in contending (Br. 20) that interpreting Section 3161(h)(1) to exclude additional time granted to prepare pretrial motions would render superfluous Section 3161(h)(7)(B)(iv). That provision permits district courts to grant an ends-of-justice continuance, in a case that as a whole is not unusual or complex, to provide the parties "reasonable time necessary for effective preparation." 18 U.S.C. 3161(h)(7)(B)(iv). Contrary to petitioner's assertion, the provision retains an important function even if additional time granted to prepare pretrial motions is automatically excluded un-

der Section 3161(h)(1). Although Section 3161(h)(1) excludes time granted to prepare for listed pretrial proceedings or other ancillary or analogous pretrial proceedings, it does not exclude time used to prepare for trial itself—*e.g.*, to interview witnesses, prepare exhibits, or obtain documents. That type of delay is excludable only if a court makes an ends-of-justice finding in accordance with Section 3161(h)(7)(B)(iv).[8]

E. Excluding Additional Motions Preparation Time Under Section 3161(h)(1) Does Not Undermine The Scheme Of The Act

Petitioner is also incorrect that excluding the delay at issue here under Section 3161(h)(1) "disrupts the Act's measured scheme" because it "effectively extends the baseline allotment of time for bringing the vast majority of cases to trial." Br. 14; see *id.* at 34. Although Section 3161(h)(1) excludes additional motions preparation time granted in response to a defendant's specific request, the court in this case appropriately did not rely on Section 3161(h)(1) to exclude the routine preparation time that is allotted by local rule or by a scheduling order entered by a district court as a matter of general practice. See note 6, *supra*. "An across-the-board exclusion for pretrial motion preparation that is based merely upon the entry of a standard scheduling order would sacrifice the [Act's] goal" of achieving speedy trials "without necessarily advancing the [Act's further]

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[8] Requiring an ends-of-justice finding for the exclusion of delay attributable to general trial preparation also furthers the STA's goal of achieving speedy trials. Because almost everything counsel does in advance of trial can be viewed as general trial preparation, automatic exclusion of that time would permit a significant extension of the Act's 70-day limit in virtually every case.

goal" of allowing "effective pretrial preparation." *United States* v. *Hoslett*, 998 F.2d 648, 656 (9th Cir. 1993). "Under such a rule defendants would be subject to an automatic extension of the seventy day statutory period in every case, whether or not they intended to file any motions or required any unusual grant of time for pretrial preparation." *Ibid.*; see also *United States* v. *Williams*, 197 F.3d 1091, 1095 n.6 (11th Cir. 1999) ("If the customary time allowances for the filing of motions resulted in excludable time, each judicial district, in effect, would be free to amend the Speedy Trial Act by local rule."). But interpreting Section 3161(h)(1) to exclude additional motions preparation time granted at a defendant's specific request, as the court below did here, does not extend "the baseline allotment of time" under the Act.

Petitioner is likewise mistaken in contending that automatically excluding motions preparation time granted at a defendant's request would, like the prospective waiver of the STA that this Court held unauthorized in *Zedner*, "allow the court and the parties effectively to opt out of the Act." Br. 35. The open-ended, prospective waiver at issue in *Zedner* was not authorized by the text of the STA and would have overridden all of the exclusions delineated in the Act. Here, in contrast, excluding the specific period of time requested by the defendant for the purpose of preparing pretrial motions falls within the STA's express exclusion for "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1).

Petitioner's contention that excluding the delay at issue here would allow evasion of the Act is based on the false premise that "[t]he trial court would need only designate a delay—whatever its duration, and whatever the

reason for it—as 'preparation time,' and it would be exempt from the strictures of the Act." Br. 35. Contrary to that assertion, the delay is excluded only if the court grants further time for the specific purpose of preparing pretrial motions (or preparing for another listed pretrial proceeding) based on a determination that additional time is needed in the defendant's specific case. Petitioner points to no evidence suggesting that defendants have been seeking, or courts have been granting, abusively long periods to prepare pretrial motions in order to circumvent the requirements of the STA. The absence of any evidence of abuse is telling since eight courts of appeals follow the rule that motions preparation time granted at the defendant's request is excluded under Section 3161(h)(1). And, in several circuits, that rule has been in place for more than two decades. See *Mobile Materials, Inc.*, 871 F.2d at 912-915 (10th Cir. 1989); *United States* v. *Wilson*, 835 F.2d 1440, 1444-1445 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985) (Posner, J.); *Jodoin*, 672 F.2d at 237-238 (1st Cir. 1982).

This Court rejected a loophole argument quite similar to the one petitioner advances in *Henderson*, 476 U.S. at 330, when the Court held that Section 3161(h)(1)(D) excludes all time between the filing of a motion and the conclusion of the hearing on the motion. As the dissent in *Henderson* noted, under the Court's interpretation, a trial judge could delay the hearing on pretrial motions for any reason—including his "decision to play golf"—without violating the STA. *Id.* at 334 (White, J., dissenting). And, because the Court also interpreted Section 3161(h)(1)(D) to exclude all time after the hearing until the district court receives all the submissions it needs to decide the motion, *id.* at 330-331,

the court and the parties could theoretically evade the STA's time limit further by delaying the date for post-hearing submissions, see *id.* at 334 (White, J. , dissenting). The Court nonetheless rejected those risks as a reason to constrain the time allowed by the STA for resolving pretrial motions. Just as the district courts and parties can be trusted to police themselves against the potential for abuse inherent in Section 3161(h)(1)(D), so too they can be trusted to refrain from abusing Section 3161(h)(1), interpreted to exclude time granted at the defendant's request to prepare pretrial motions.

Finally, the STA includes specific provisions to deter potential abuses. For example, if a court determines that an attorney has, solely for the purpose of delay, knowingly requested time not necessary for the preparation of pretrial motions, the court may impose a fine, report the attorney for disciplinary proceedings, or deny him the right to practice before the court for up to ninety days. See 18 U.S.C. 3162(b). In addition, courts have the authority to augment these explicit statutory remedies. When it enacted the STA, Congress directed the district courts to study the problem of court congestion and to implement speedy trial plans. 18 U.S.C. 3165. District courts were directed to impose "time limits, procedural techniques, innovations, systems or other methods" to expedite the disposition of criminal cases. 18 U.S.C. 3166(a). The judicial councils of each circuit were also encouraged to promulgate guidelines to effectuate the STA's purposes. 18 U.S.C. 3166(f). Congress thus "clearly envisioned" that the courts could set "guidelines, rules, or procedures relating to motions practice" to curb any abuses. *Henderson*, 476 U.S. at 328 (quoting H.R. Rep. No. 390, *supra*, at 10). Reliance on these remedies and procedures, rather than dismissal

of indictments on a technicality, would best advance the goals of the Act.

F. The Legislative History Does Not Support Petitioner's Reading Of The Act

1. Petitioner argues (Br. 25-32) that the legislative history of the 1979 amendments to the STA indicates that Congress rejected an exclusion under Section 3161(h)(1) for the type of delay at issue here. Petitioner misinterprets the legislative history.[9]

Following the STA's enactment in 1974, many courts read its exclusions narrowly, which resulted in numerous determinations that cases were not being tried within the mandated time limits. S. Rep. No. 212, *supra*, at 18-19; H.R. Rep. No. 390, *supra*, at 4. In 1979, in response to the problems with the Act's initial implementation, the Department of Justice and the Judicial Conference of the United States requested Congress to make various amendments. *Ibid.*; S. Rep. No. 212, *supra*, at 15. One area of particular concern was the express exclusion of all "delay resulting from hearings on pretrial motions," 18 U.S.C. 3161(h)(1)(E) (1976), which some courts had given a "restrictive interpretation * * * as extending only to the actual time consumed in

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[9] As the Court has recognized, the Act's legislative history, although comprehensive, is often contradictory and unhelpful. See *Henderson*, 476 U.S. at 329-330 (rejecting a portion of S. Rep. No. 212 as "at odds with the plain language of the statute" and "contrary to other passages contained in both the House and Senate Reports"); *United States* v. *Taylor*, 487 U.S. 326, 335 n.8 (1988) (finding portions of the STA's legislative history "largely unhelpful"); see also *Rojas-Contreras*, 474 U.S. at 237 (Blackmun, J., concurring in the judgment) (finding legislative history unhelpful); *Zedner*, 547 U.S. at 509-510 (Scalia, J., concurring in judgment) (criticizing use of legislative history in interpreting the STA).

a pretrial hearing." H.R. Rep. No. 390, *supra*, at 11. The Department of Justice proposed amending Section 3161(h)(1)(E) to provide for the exclusion of "delay resulting from the preparation and service of pretrial motions and responses and from hearings thereon." See Speedy Trial Amendments Act of 1979, S. 961, § 5(c), 96th Cong., 1st Sess. (Apr. 10, 1979) (as introduced) *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 & S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 6 (1979) (*Senate Hearings*). As Assistant Attorney General Philip B. Heymann explained, this amendment was intended to "provide for the exclusion of *all time* reasonably necessary and *routinely* required to make * * * pretrial motions." *Senate Hearings* 55 (emphasis added). The Senate Judiciary Committee Report criticized the Justice Department's proposal for excluding "all time consumed by motions practice." S. Rep. No. 212, *supra*, at 33-34. The Committee found that approach unreasonable, stating that "in routine cases, preparation time should not be excluded." *Id.* at 34.[10]

The Senate Report thus expressed opposition to the automatic exclusion of *all* time *routinely allotted* for

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[10] One of the Committee's concerns about excluding preparation time for pretrial motions was that "it will be quite difficult to determine a point at which preparation time actually begins." S. Rep. No. 212, *supra*, at 34. That concern is valid when a routine deadline for filing pretrial motions is set by local rule or standard order. But the concern disappears when the only time that is excluded is preparation time specifically granted in response to a defendant's representation that additional preparation time is needed. See *Mobile Materials, Inc.*, 871 F.2d at 914 ("Routine drafting of a motion, unknown to the court until the document is filed, simply does not toll the speedy trial period. Either the trial judge accedes to a specific request for preparation or the trial date moves inexorably closer.").

motions preparation. But neither the Justice Department bill nor any other bill or amendment proposed excluding the narrower subset of additional motions preparation time granted by the district court at the defendant's specific request. The Committee never considered that option, and its comments rejecting a separate, broader proposal shed no light on how it would have viewed the question. See, *e.g.*, *Kimbrough* v. *United States*, 128 S. Ct. 558, 572 (2007) (reasoning that Congress's explicit rejection of 1-to-1 sentencing ratio for crack vs. powder cocaine did not imply a rejection of any deviation from the 100-to-1 ratio specified in the Sentencing Guidelines); *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (declining to draw any inference from Congress's failure to enact proposed legislation where Congress did not consider the "*precise* issue" before the Court) (citation omitted).

2. Petitioner also errs in arguing (Br. 29, 32) that the legislative history shows that Congress intended any exclusion for pretrial motions preparation time to be accommodated under Section 3161(h)(7), rather than Section 3161(h)(1). The Committee Reports did suggest that additional time needed for preparation for pretrial proceedings in complex cases—including, among other things, additional time needed for preparation of pretrial motions in those cases—could be excluded under Section 3161(h)(7)(B)(ii). See S. Rep. No. 212, *supra*, at 33-34 (citing the "proposed change in clause (ii) of subsection (h)([7])(B) involving 'preparation' for 'pretrial proceedings'" and noting that the proposed amendments would permit "reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts"); *id.* at 34 ("Subsection (a) amends clause (ii) of existing section 3161(h)([7])(B) to address, in part,

the preparation time problem regarding pretrial motions, discussed above."); H.R. Rep. No. 390, *supra*, at 12 (noting that amendments would "[r]evise language relating to the grant of continuances based on the complexity or unusual nature of a case to clarify that such continuances can be granted on the basis of delays in preparation of the case in all phases of the case, including, for example, in the preparation of complex pretrial motions"). But the Reports did not address defense requests for additional time to prepare pretrial motions in non-complex cases, which raise a narrower set of issues in a different context.

Complex cases often involve "protracted" pretrial proceedings. Committee on the Admin. of the Crim. Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended*, 106 F.R.D. 271, 302 (1984) (*STA Guidelines*). Those pretrial proceedings may include not just "complex pretrial motions," H.R. Rep. No. 390, *supra*, at 12, but also "extensive discovery based on complex transactions," S. Rep. No. 212, *supra*, at 34, and other proceedings, including "a whole series of pretrial conferences," *STA Guidelines*, 106 F.R.D. at 302, designed to resolve disputes over expert witnesses, trial exhibits, jury instructions, and the like. Thus, in a complex case, the district court may wish to establish a comprehensive schedule for pretrial proceedings, including but not limited to pretrial motions, and the court could utilize Section 3161(h)(7)(B)(ii) to accommodate the delay associated with that schedule. But Section 3161(h)(7)(B)(ii) addresses complex cases only; it does not address the situation here, where case-specific factors in a non-complex case justify the grant of additional preparation time particularly for pretrial motions.

Petitioner implies (Br. 29) that the legislative history indicates that Congress intended courts to use Section 3161(h)(7)(B)(iv) to exclude delay associated with additional preparation time for pretrial motions in non-complex cases. But the legislative history of Section 3161(h)(7)(B)(iv) refers only to time for preparation for *trial*. See S. Rep. No. 212, *supra*, at 35 (noting that the amendment adding Section 3161(h)(7)(B)(iv) "provides the court a basis for a continuance when, after due diligence on the part of counsel for either party, there is simply not enough time to effectively prepare for *trial*") (emphasis added). The legislative history is silent on which provision of the STA most appropriately accommodates grants of additional motions preparation time in non-complex cases. And courts have relied on both Section 3161(h)(7)(B)(iv) and Section 3161(h)(1) to exclude those delays. Compare, *e.g.*, *Fields*, 39 F.3d at 444 (excluding delay under Section 3161(h)(7)(B)(iv)), with cases cited in note 3, *supra* (excluding delay under Section 3161(h)(1)).

3. Other portions of the Committee Reports forcefully disapproved of narrow and inflexible interpretations of the automatic exclusion provisions akin to the interpretation that petitioner proposes here. The Senate Report criticized government actors for interpreting the originally enacted STA "in an unnecessarily inflexible manner," noting that, in many cases, "allowable excludable time had not been computed or had been computed improperly." S. Rep. No. 212, *supra*, at 18; see *id.* at 21 (criticizing "the general reluctance of courts to interpret the exclusions flexibly"); *id.* at 26 (criticizing "judicial unwillingness to interpret the Act's exclusions flexibly to date"); *ibid.* (criticizing courts for "constru-[ing] automatically excludable delays with too much in-

flexibility"). The House Report likewise complained that "provisions of the [A]ct were not being fully implemented" and noted that "[t]his was particularly true of" the automatic exclusions. H.R. Rep. No. 390, *supra*, at 5; see *id*. at 3 (noting the "[n]umerous flexible exclusions of time" in the Act); *id*. at 11 (criticizing the "unduly restrictive interpretation of the exclusion" concerning pretrial motions).

The Senate Report explained that one reason for automatically excluding delay arising from other "proceedings concerning the defendant" was that "it would indeed be anomalous to permit the defendant to benefit from delay proper[l]y undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time." S. Rep. No. 212, *supra*, at 9. Yet that is precisely what petitioner seeks to do here. The district court properly granted petitioner additional time so that his counsel could protect his interests in a fair trial by investigating the propriety of filing pretrial motions. Petitioner now asks this Court to hold that this period of time, extended at his urging and solely for his benefit, was improperly excluded. The Court should refuse that request.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2009

APPENDIX

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.