No. 09-1498

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161(h)(1)(D) (Supp. III 2009), or is instead excluded only if the motion causes a postponement, or the expectation of a postponement, of the trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Rule—Continued: Page

Miscellaneous: Page

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2009. A petition for rehearing was denied on January 12, 2010 (Pet. App. 37a-38a). On March 31, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 12, 2010. On April 27, 2010, Justice Stevens further extended the time to June 11, 2010, and the petition was filed on June 8, 2010. The petition was granted on Sep-

tember 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, respondent was convicted of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). Before trial, the district court denied respondent's motion to dismiss the indictment based on an alleged violation of the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq*. On appeal following respondent's conviction, the United States Court of Appeals for the Sixth Circuit reversed the district court's judgment and remanded with instructions to dismiss the indictment with prejudice. In finding an STA violation, the court of appeals rejected the interpretation that every other circuit has given 18 U.S.C. 3161(h)(1)(D), which excludes from the STA's deadline for commencing trial "delay resulting from any pretrial motion." Contrary to the longstanding and uniform view of the other circuits that the exclusion applies automatically to any pretrial motion, the court of appeals held that the exclusion applies only if a motion actually causes a postponement or the expectation of a postponement of the trial. Pet. App. 1a-28a.[1]

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[1] On October 13, 2008, after the district court's decision on the motion to dismiss but before the court of appeals' decision, Congress enacted the Judicial Administration and Technical Amendments Act of 2008,

1. The STA generally requires a defendant's trial to begin within 70 days of his indictment or his initial appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). To provide "sufficient flexibility" to make compliance with that deadline a realistic goal, the Act "automatically" excludes from the computation of the 70-day period certain "specific and recurring periods of time often found in criminal cases." S. Rep. No. 212, 96th Cong., 1st Sess 9 (1979); see *Bloate* v. *United States*, 130 S. Ct. 1345, 1351-1352 (2010). Among those exclusions is "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight listed subcategories. 18 U.S.C. 3161(h)(1). Those subcategories include delays resulting from various frequent occurrences, such as proceedings to determine the defendant's mental competency or physical capacity, 18 U.S.C. 3161(h)(1)(A); trial on other charges against the defendant, 18 U.S.C. 3161(h)(1)(B); interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); proceedings to transfer the case or to remove the defendant from another district, 18 U.S.C. 3161(h)(1)(E); transportation of the defendant from another district or to or from places of examination and hospitalization, 18 U.S.C. 3161(h)(1)(F); and consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); as well as up to 30 days of delay attributable to any period during which any proceeding concern-

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Pub. L. No. 110-406, § 13, 122 Stat. 4294, which made technical changes to the STA. As relevant here, Congress renumbered the exclusion for pretrial motions delay, which had previously been designated as 18 U.S.C. 3161(h)(1)(F), as 18 U.S.C. 3161(h)(1)(D). Except where noted, all citations in this brief refer to the current version of the STA as codified in the 2006 edition of the United States Code and the 2009 Supplement.

ing the defendant is under advisement by the court, 18 U.S.C. 3161(h)(1)(H). One of the subcategories is the exclusion at issue in this case: "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 Act also automatically excludes several other frequently recurring periods, 18 U.S.C. 3161(h)(2)-(5), including, for example, any period of delay resulting from the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3)(A), or from the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4). See *Henderson* v. *United States*, 476 U.S. 321, 327 (1986).

In addition, the STA contains several exclusions that apply "only if the district court makes certain findings enumerated in the statute." *Bloate*, 130 S. Ct. at 1351; see 18 U.S.C. 3161(h)(6)-(8). For example, 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).

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

2. On January 14, 2005, a security guard at a Meijer store in Kalamazoo County, Michigan, notified the local

police that respondent had purchased materials commonly used to cook methamphetamine. The guard also provided a description of the camper that respondent was driving. Tr. 310-313; Dep. Tr. 6-7, 29-30.[2] Shortly thereafter, a police officer saw respondent driving the camper, which had an open rear door and an expired registration tag. The officer followed the camper into a parking lot, where respondent got out of the vehicle. Tr. 184-189; Dep. Tr. 11-12. Respondent consented to a pat-down, during which the officer recovered a knife and three Meijer receipts. Tr. 190-191, 194-196; Dep. Tr. 32. Another officer continued the pat-down and found a loaded magazine for a .22 caliber pistol in respondent's pocket. Respondent told the officers that the pistol was next to the driver's seat of the camper, and the officers found the pistol there. Tr. 191-194; Dep. Tr. 12-15, 32.

The officers searched the camper and found a plastic bag containing over 900 nasal decongestant tablets, as well as other materials commonly used to manufacture methamphetamine. Tr. 196-197, 270, 331-345, 349-354; Dep. Tr. 15-17. Respondent also consented to a search of his residence, where officers found a shotgun. Dep. Tr. 22-23. Several months later, in October 2005, police officers searched respondent's residence again pursuant to a warrant, and they found additional materials used to manufacture methamphetamine. Tr. 207, 210-211, 223-240, 255, 263, 269-270, 274-279, 285-289, 354-357.

3. On October 20, 2005, a grand jury in the Western District of Michigan indicted respondent on charges of possessing firearms after having been convicted of a

[2] "Tr." refers to the trial transcript. "Dep. Tr." refers to the transcript of the video deposition of Joshua Howk, one of the police officers who arrested respondent. Howk was deposed because he was unavailable to testify at trial. See Fed. R. Crim. P. 15; pp. 6-7, *infra*.

felony, in violation of 18 U.S.C. 922(g)(1), and possessing materials used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a). J.A. 6 (Docket entry No. 1); J.A. 96-99.[3] On October 31, 2005, respondent made his initial appearance before a judicial officer. J.A. 8-9 (Docket entry No. 10). That event started the speedy trial clock. See 18 U.S.C. 3161(c)(1); Pet. App. 7a-9a.

Two days later, on November 2, 2005, a magistrate judge granted respondent's request for a mental competency examination. J.A. 9-10 (Docket entry Nos. 12, 14). Respondent was subsequently transported from Grand Rapids, Michigan, to the Metropolitan Correction Center in Chicago, Illinois, for the examination. Pet. App. 2a. On March 23, 2006, based on the results of the examination, the magistrate judge issued an order finding respondent competent to stand trial. J.A. 15 (Docket entry No. 28). On March 29, 2006, respondent requested a second, independent competency evaluation, and the magistrate judge subsequently granted that request. J.A. 17 (Docket entry Nos. 34-36). On June 9, 2006, the magistrate judge again found respondent competent to stand trial. Pet. App. 4a. On July 25, 2006, the district court set a trial date of August 14, 2006. J.A. 25 (Docket entry No. 58); J.A. 134.

Between July 25 and August 14, 2006, the parties filed, and the district court resolved, three pretrial motions. On August 1, the government filed a motion seeking permission to conduct a video deposition of a witness who was scheduled to be out of the country at the time of trial. J.A. 26 (Docket entry No. 60); J.A. 139-140. On August 3, the district court granted the motion, but or-

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

dered that "[t]he parties shall schedule [the] deposition posthaste, so as not to delay trial." J.A. 145; see J.A. 27 (Docket entry No. 65). On August 8, the government requested permission to bring the firearms possessed by respondent into the courtroom as evidence at the trial. J.A. 28 (Docket entry No. 70); J.A. 147-148. On August 10, the district court granted that motion. J.A. 29 (Docket entry No. 73); J.A. 149. On August 11, respondent filed a motion to dismiss the indictment for a violation of the STA's 70-day time limit for commencing trial. J.A. 29 (Docket entry No. 74); J.A. 150-187. On August 14, the district court denied the motion. J.A. 30 (Docket entry No. 77); Pet. App. 29a-32a; see Tr. 2-23.

Respondent's trial began that same day, August 14, 2006. J.A. 30 (Docket entry No. 78). The next day, respondent filed a motion for reconsideration of the order denying his motion to dismiss on speedy trial grounds. *Ibid.* (Docket entry No. 79); J.A. 194-198. The district court denied the motion. J.A. 31 (Docket entry No. 81); Pet. App. 33a-36a; see Tr. 296.

Respondent's trial concluded on August 16, 2006, with the jury finding respondent guilty of all charges. J.A. 31 (Docket entry No. 82); Tr. 435-436. On December 13, 2006, the district court sentenced respondent to 33 months of imprisonment, to be followed by three years of supervised release. J.A. 47 (Docket entry No. 133); Pet. App. 5a.[4]

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[4] On April 21, 2008, while respondent's appeal of his conviction was pending, he was released from prison and began his supervised release. Pet. App. 5a. On May 30, 2008, the district court found that respondent had violated the terms of his supervised release and sentenced him to an additional 14 months in prison, to be followed by 22 months of supervised release. Pet. App. 5a-6a; J.A. 246-258.

4. The court of appeals reversed the district court's STA ruling and remanded with instructions to dismiss the indictment with prejudice. Based on its calculations, the court of appeals concluded that respondent's trial began three days after the STA's 70-day time limit had expired. Pet. App. 1a-28a.

The court of appeals found that the speedy trial clock began to run on October 31, 2005, the date of respondent's initial appearance, Pet. App. 7a-9a, and ruled that the days on which a pretrial motion is filed and resolved are excluded from the speedy trial calculation, *id.* at 9a-11a. The court further ruled that the periods consumed by respondent's two mental competency examinations were generally excludable under Section 3161(h)(1)(A), except that two of the 12 business days that it took to transport respondent to the first examination were not excludable under Section 3161(h)(1)(F), which provides that any transportation time in excess of ten days shall be presumed to be unreasonable. Pet. App. 11a-15a. Accordingly, the court of appeals determined that only 60 non-excludable days had elapsed as of July 31, 2006. *Id.* at 15a.

The court of appeals held, however, that the nine days spent resolving pretrial motions filed between August 1, 2006, and the start of trial on August 14, 2006, were not excludable under Section 3161(h)(1)(D). Pet. App. 15a-20a. The court noted that "[e]very circuit to have addressed the issue appears to have held the filing of any pretrial motion stops the Speedy Trial clock, regardless of whether the motion has any impact on the trial's start date." *Id.* at 16a (citing cases). "[D]isagree-[ing]" with that "consensus," however, the court held that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create

excludable time." *Ibid.* In the court's view, because Section 3161(h)(1)(D) repeatedly refers to "delay resulting from" pretrial motions, "[t]here is no conceivable way to read [the statute] other than to require a delay to *result* from any pretrial motion before excludable time occurs." *Id.* at 17a. Rejecting the view of the other circuits that the statutory text, the STA's legislative history, and this Court's cases all indicate that the exclusion applies automatically whenever a pretrial motion is filed, the court of appeals stated that it would "remain faithful to" its own reading of "the statutory language and interpret [Section 3161(h)(1)(D)] as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of the trial." *Id.* at 19a. Because the district court did not postpone respondent's scheduled trial date after the filing of the three pretrial motions, and the court of appeals found no indication that the motions "threatened to delay the trial," the court of appeals concluded that the time consumed in resolving the motions was not excluded under Section 3161(h)(1)(D). *Id.* at 19a-20a.[5]

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[5] In his brief in the court of appeals, respondent did not argue that the pretrial motion exclusion applies only if the motion at issue delayed or threatened to delay the trial. See Resp. C.A. Br. 7-12; Pet. App. 26a. Nor did respondent make that argument in either his motion to dismiss or his motion for reconsideration in the district court. See J.A. 150-160, 194-198; Pet. App. 26a-27a. Indeed, in his motion for reconsideration, respondent accepted that the August motions created excludable time and disagreed only about the amount of that time. See J.A. 195-197; Pet. App. 27a. Nonetheless, the court of appeals concluded that because respondent "unquestionably asked both [it] and the [district court] to count the number of days that had lapsed for the purposes of the Speedy Trial Act," he had "adequately preserved the overarching issue." *Id.* at 20a n.4. The government did not seek this Court's review of that case-specific ruling.

Based on that holding, the court of appeals concluded that 73 non-excludable days elapsed before respondent's trial began and therefore that the trial commenced three days after the expiration of the STA's deadline. Pet. App. 20a. Rather than remand the case to the district court for that court to make a determination under 18 U.S.C. 3162(a)(2) whether to dismiss the indictment with or without prejudice, the court of appeals itself conducted that analysis and remanded with instructions to dismiss the indictment with prejudice. Pet. App. 21a-22a. The court acknowledged that "the seriousness of the offense" and "the facts and circumstances" that "led to the dismissal," 18 U.S.C. 3162(a)(2), "point[ed] to dismissal without prejudice." Pet. App. 21a. Nonetheless, the court concluded that dismissal with prejudice was required because respondent had already completed his term of imprisonment. *Id.* at 21a-22a.[6]

Judge Gibbons concurred. Pet. App. 23a-28a. She disagreed with the majority's calculation of the excludable delay related to respondent's transportation to the first competency examination. *Id.* at 23a-26a. Judge Gibbons also believed that respondent had not properly preserved a claim that the three pretrial motions resolved in August did not result in excludable delay, *id.* at 26a-27a; see note 5, *supra*, but she agreed with the

[6] Respondent was released from prison on May 15, 2009. See Federal Bureau of Prisons, *Inmate Locator* (visited Nov. 30, 2010), http://www.bop.gov/iloc2/LocateInmate.jsp. As of September 3, 2009, the date that the court of appeals issued its opinion, respondent still had approximately 18 months of his 22-month term of supervised release left to serve. Based on the court of appeals' decision, however, the district court immediately discharged respondent from supervised release. J.A. 91 (Docket entry No. 256). Accordingly, respondent still is subject to a term of supervised release that could be reinstated if this Court reverses the court of appeals' judgment.

majority's reading of Section 3161(h)(1)(D) as a matter of statutory interpretation, and she agreed that dismissal with prejudice was warranted. Pet. App. 27a-28a.

SUMMARY OF ARGUMENT

Ever since the STA was enacted three dozen years ago, the courts of appeals have uniformly held that the pretrial motion exclusion applies automatically upon the filing of any motion, regardless of the motion's effect on the trial schedule, until the decision below. The court below departed from that well-established approach by holding that the exclusion applies only if a motion causes a postponement or the expectation of a postponement of the trial. That holding cannot be squared with the language of 18 U.S.C. 3161(h)(1)(D), this Court's cases, or the STA's structure, legislative history, and purposes.

A. Section 3161(h)(1)(D) excludes from the STA's 70-day time limit for commencing trial "[a]ny period" of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." "The plain terms of the statute" thus "exclude all time between the filing of and the hearing on a motion" without further factual inquiry. *Henderson* v. *United States*, 476 U.S. 321, 326 (1986). The court below rejected that interpretation of the statute because the court assumed that the phrase "delay resulting from" refers to postponement of the trial. But Section 3161(h)(1)(D) does not refer to delay of the trial or a continuance of the trial date. And the surrounding text makes clear that the "delay" to which Section 3161(h)(1)(D) refers is not postponement of the trial. The text specifies that the "delay" begins with "the filing of the motion" and ends with "the hearing on" or other "disposition" of the mo-

tion—starting and stopping points that bear no necessary relation to the time during which trial might be postponed as the result of a motion. The statutory context thus establishes that the "delay resulting from" a motion is not the time during which trial might be postponed but is instead the interval of time between the filing of the motion and its disposition "during which the speedy trial clock [is] stopped and the expiration of the 70-day period is thereby postponed." *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007) (citation omitted), cert. denied, 553 U.S. 1080 (2008).

B. This Court's cases confirm that interpretation of the statute. The Court has construed the pretrial motion exclusion in two cases—*Henderson* and *Bloate* v. *United States*, 130 S. Ct. 1345 (2010). Both cases make clear that Section 3161(h)(1)(D) is an "automatic" exclusion that applies "regardless of the specifics of the case" and "without district court findings." *Id.* at 1349 n.1, 1351; *Henderson*, 476 U.S. at 327. In *Bloate*, the Court stressed that Section 3161(h)(1)(D) "renders automatically excludable * * * delay that occurs '*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of,' the motion." 130 S. Ct. at 1353. In *Henderson*, the Court held that the time consumed in resolving the pretrial motions at issue was "automatically excludable," without considering whether the district court had rescheduled the trial date in response to the motions or whether the motions otherwise caused the postponement, or the expectation of any postponement, of the trial. 476 U.S. at 331-332.

C. The statutory structure also indicates that the applicability of the pretrial motion exclusion does not turn on a finding that the motion could have affected the trial schedule. The STA's exclusions fall into two cate-

gories. One category includes automatic exclusions, such as the pretrial motion exclusion and the other exclusions for "proceedings concerning the defendant" in 18 U.S.C. 3161(h)(1). The other category includes exclusions, such as the one in 18 U.S.C. 3161(h)(7) for continuances that serve the ends of justice, which apply "only if the district court makes certain findings enumerated in the statute." *Bloate*, 130 S. Ct. at 1351. The ruling of the court below that a pretrial motion triggers excludable time only if it caused an actual or expected postponement of the trial is inconsistent with that statutory structure, because the ruling makes the pretrial motion exclusion contingent on additional case-specific findings beyond the fact that a motion has been filed.

D. The interpretation of the exclusion adopted by the court below is also inconsistent with the STA's legislative history. The legislative record surrounding both the STA's original enactment in 1974 and its amendment in 1979 makes clear that Congress used the phrase "delay resulting from" to refer to the time consumed by a proceeding or an event that triggers an exclusion, not the time during which trial might be postponed. And the legislative history also establishes that Congress intended the exclusions in Section 3161(h)(1) for delays resulting from proceedings concerning the defendant, including pretrial motions, to apply automatically whenever a proceeding is pending, with no need for additional findings.

E. Automatically excluding the time between the filing of any pretrial motion and its disposition also furthers the STA's purposes. For the STA to operate efficiently and practicably, the district court and the parties must be able to know, as each day passes, whether that day counts towards the STA's deadline for commencing

trial. The established understanding of the pretrial motion exclusion comports with that practical necessity by providing a clear rule that the speedy clock stops whenever any pretrial motion is filed. This established approach thus both facilitates compliance with the Act and advances the Act's goals of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

The court of appeals' rule, in contrast, is not consonant with the STA's purposes. The court's opinion does not make clear if excludability turns on a fact-specific determination whether a particular motion actually caused a postponement or the expectation of a postponement of the trial or turns instead on whether the trial court formally moved the trial date in response to the motion. If a motion-specific causation determination is required, district courts and the parties will not be able to know at the time that a motion is filed whether the motion tolls the speedy trial clock, and courts are likely to become embroiled in complex collateral disputes over causation that add to, rather than reduce, pretrial delay. If excludability instead depends on the formality of whether the district court moves the trial date, the applicability of the exclusion will turn on arbitrary facts that bear no relation to the Act's purposes, such as whether or not the district court accounted for the time needed to resolve motions when it set the initial trial date. The STA's goal of providing a clear and administrable timetable for commencing criminal trials can be achieved only if this Court rejects the ruling of the court below and holds that the exclusion in Section 3161(h)(1)(D) applies automatically once any pretrial motion is filed, without regard to whether the motion affected or could have affected the trial schedule.

ARGUMENT

THE TIME BETWEEN THE FILING OF ANY PRETRIAL MOTION AND ITS DISPOSITION IS AUTOMATICALLY EXCLUDED FROM THE SPEEDY TRIAL ACT'S DEADLINE FOR COMMENCING TRIAL, WITHOUT A FINDING THAT THE MOTION AFFECTED THE TRIAL SCHEDULE

In 18 U.S.C. 3161(h), the Speedy Trial Act excludes various specified periods of delay from the computation of the 70-day limit for commencing trial. Some of those periods are excludable only if the district court makes findings delineated by the Act, while others are "automatically excludable." *Bloate* v. *United States*, 130 S. Ct. 1345, 1351 (2010). At issue in this case is 18 U.S.C. 3161(h)(1)(D), which excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including * * * 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."

This Court has construed that pretrial motion exclusion in two cases—*Bloate* and *Henderson* v. *United States*, 476 U.S. 321 (1986). In both cases, the Court made clear that Section 3161(h)(1)(D), like the other exclusions for "proceedings concerning the defendant" in Section 3161(h)(1), is an "automatic" exclusion, applicable "regardless of the specifics of the case" and "without district court findings." *Bloate*, 130 S. Ct. at 1349 n.1, 1351; *Henderson*, 476 U.S. at 327. And, in *Henderson*, the Court held that Section 3161(h)(1)(D) excludes "all time between the filing of a motion" and the point at which the court is "in a position to dispose of a motion." *Id.* at 330-331.

Consistent with those decisions, ever since the STA's enactment, the courts of appeals had uniformly held that the filing of any pretrial motion automatically stops the speedy trial clock, regardless of whether the motion had any impact on the trial's start date.[7] In this case, the Sixth Circuit broke with that longstanding consensus and held that "a pretrial motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." Pet. App. 16a. That holding is inconsistent with the language of the pretrial motion exclusion, this Court's cases, the STA's structure, the STA's legislative history, and practical and policy considerations underlying the Act.

A. The Text Of Section 3161(h)(1)(D) Automatically Excludes The Period From The Filing Of Any Pretrial Motion Through Its Disposition

1. Section 3161(h)(1)(D) excludes from the STA's time limit for commencing trial "[a]ny period" of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C.

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[7] See, *e.g.*, *United States* v. *Wilson*, 835 F.2d 1440, 1443 (D.C. Cir. 1987), abrogated on other grounds by *Bloate*, *supra*; *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), abrogated on other grounds by *Henderson*, *supra*; *United States* v. *Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993); *United States* v. *Dorlouis*, 107 F.3d 248, 253-254 (4th Cir.), cert. denied, 521 U.S. 1126 (1997); *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 553 U.S. 1080 (2008); *United States* v. *Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States* v. *Titlbach*, 339 F.3d 692, 698 (8th Cir. 2003); *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 546 U.S. 1053 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985 (10th Cir. 2004); *United States* v. *Miles*, 290 F.3d 1341, 1350 (11th Cir.), cert. denied, 537 U.S. 1089 (2002).

3161(h)(1)(D). Thus, as this Court observed in *Henderson*, "[t]he plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion" without further factual inquiry or findings. 476 U.S. at 326.

As numerous courts of appeals have concluded, in the context of Section 3161(h), the phrase "delay resulting from" refers to the interval of time during which the STA's deadline for commencing trial is postponed because of a specified proceeding or event. See *United States* v. *Green*, 508 F.3d 195, 200 (5th Cir. 2007), cert. denied, 553 U.S. 1080 (2008); *United States* v. *Vogl*, 374 F.3d 976, 986 (10th Cir. 2004); *United States* v. *Montoya*, 827 F.2d 143, 151 (7th Cir. 1987); *United States* v. *Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), abrogated on other grounds by *Henderson, supra.* That interpretation accords with one common meaning of the word "delay," which is "[t]he interval of time between two events," such as the stopping and restarting of the speedy trial clock. *The American Heritage Dictionary of the English Language* 480 (4th ed. 2006) (*American Heritage Dictionary)*; see *Webster's Third New International Dictionary of the English Language* 595 (1971) (defining "delay" as "the time during which something is delayed"). It also accords with the ordinary meaning of the phrase "resulting from," which is "as a consequence." See *Bloate*, 130 S. Ct. at 1353 n.9; *id.* at 1361 (Alito, J., dissenting) (quoting *Webster's Third* 1937); *American Heritage Dictionary* 1487.

The remaining language of Section 3161(h)(1)(D) precisely defines the starting and ending points of the excludable "delay resulting from" a pretrial motion—"the filing of the motion" and "the conclusion of the hearing on, or other prompt disposition of," the motion.

18 U.S.C. 3161(h)(1)(D). Thus, the excludable "delay resulting from" a pretrial motion is the "period of time" between the filing of the motion and its disposition "during which the speedy trial clock [is] stopped and the expiration of the 70-day period thereby postponed." *Cobb*, 697 F.2d at 42. And the statute excludes that period of time for "*any* pretrial motion," 18 U.S.C. 3161(h)(1)(D) (emphasis added), "regardless of its type or its actual effect on the trial," *United States* v. *Hood*, 469 F.3d 7, 10 (1st Cir. 2006).

2. The court below rejected that interpretation of Section 3161(h)(1)(D), which has been adopted by every other court of appeals, because it assumed that the phrase "delay resulting from" necessarily refers to a postponement of the commencement of the trial. Contrary to that assumption, however, neither Section 3161(h)(1)(D), nor Section 3161(h) more generally, mentions delay of the trial or a continuance of the trial date. Moreover, the other language in Section 3161(h)(1)(D) makes clear that the "delay" to which the provision refers is not postponement of the trial. The text indicates that the "delay" begins with "the filing of the motion" and ends with "the hearing on" or other "disposition" of the motion, but those starting and stopping points bear no necessary relation to the time during which trial might be postponed as the result of a motion. For example, a defendant might file a motion to exclude certain evidence 14 days before trial is scheduled to begin. If the briefing and the hearing on the motion take 16 days to complete, the trial may be postponed for only two days. Yet Section 3161(h)(1)(D) defines the excludable "delay" as the entire 16 days during which the motion was pending. Similarly, a defendant might file a motion to depose a witness who is hospitalized and is not ex-

pected to be well enough to appear at trial, which is scheduled to begin in a week. If the judge grants the motion the same day that it is filed, but the patient's medical condition makes it impossible for the deposition to occur for two weeks, Section 3161(h)(1)(D) provides for only one day of excludable "delay," even though the trial must be postponed for at least a week.

Furthermore, even if the term "delay" in Section 3161(h)(1)(D) meant postponement of the trial, the statutory language would still not support the court of appeals' interpretation of the pretrial motion exclusion. The court held that the exclusion applies not only when a motion "actually cause[s]" a delay of the trial but also whenever a motion causes "the expectation of a delay." Pet. App. 16a; see *id.* at 19a ("interpret[ing] [Section] 3161(h)(1)(D) as excluding the time in which pretrial motions are filed and pending only if they could possibly cause any delay of the trial"); *ibid.* (noting that the motions at issue in this case neither "caused any delay of the trial" nor "threatened to delay the trial"). But if the term "delay" in Section 3161(h)(1)(D) truly referred to postponement of the trial, then nothing in the statute would permit the application of the exclusion when a postponement did not actually occur but was only "expect[ed]," "possibl[e]," or "threatened."

In his brief in opposition to the petition for a writ of certiorari, respondent asserted that the court of appeals actually held only that the pretrial motion exclusion does not apply "[i]f the parties know from the moment that pretrial motions are filed that they will not affect the scheduled trial date." Br. in Opp. 6. As the government explained in its reply brief, that is not how the court of appeals described the rule that it adopted, nor

could that be what the court held. Gov't Cert. Reply 3.[8] In any event, respondent's reinterpretation of the court's holding is also unsupported by the statutory text. The exclusion applies to "*any* pretrial motion," 18 U.S.C. 3161(h)(1)(D) (emphasis added), not "*any* pretrial motion *except* a motion that the parties know will not affect the scheduled trial date."

B. This Court's Cases Establish That The Pretrial Motion Exclusion Applies Automatically Once A Motion Is Filed And Is Not Contingent On Additional Findings

The court of appeals' novel interpretation of the pretrial motion exclusion is also inconsistent with this Court's decisions. Those decisions instead support the settled view of the other courts of appeals that the exclusion applies automatically upon the filing of any pretrial motion, without the need for a finding that the motion affected or could have affected the trial schedule.

1. In *Henderson*, this Court granted review to resolve a conflict among the courts of appeals over whether Section 3161(h)(1)(D) excludes delay from a pretrial motion only if the delay was "reasonably necessary." 476 U.S. at 325 n.6. The Court rejected a reasonableness requirement, holding instead that "Congress intended [Section 3161(h)(1)(D)] to exclude from the

[8] At the time the motions in this case were filed, the parties could not have been certain how long the district court would need to resolve the legal issues presented and whether the court's consideration of those issues would require postponement of the scheduled trial date. In addition, one motion involved a request to depose a witness. Although the district court directed the parties to schedule the "deposition posthaste so as not to delay trial," J.A. 145, neither the parties nor the court could have been certain that events beyond their control (such as the unexpected unavailability of the witness) would not delay the deposition and require postponement of the trial.

[STA's] 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Id.* at 330.

In reaching that holding, the Court explained that the pretrial motion exclusion is "intended to be automatic." *Henderson*, 476 U.S. at 327 (citation omitted). The Court repeatedly observed that the plain terms of the exclusion "exclude all time between the filing of and the hearing on a motion" without qualification. *Id.* at 326; see *id.* at 329. And the Court concluded that Section 3161(h)(1)(D) is "designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion." *Id.* at 331.

Applying its interpretation of Section 3161(h)(1)(D), the Court in *Henderson* held that the time consumed in resolving the pretrial motions at issue was "automatically excludable," without considering whether the motions caused postponement, or the expectation of any postponement, of the trial. 476 U.S. at 331-332. The Court did not discuss whether a trial date had been set before the motions were filed or whether the district court had rescheduled the trial to accommodate the motions. Thus, the Court's application of Section 3161(h)(1)(D) in *Henderson* indicates that time consumed in resolving a pretrial motion is automatically excluded regardless of whether the motion causes or threatens a postponement of the trial.[9]

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[9] In fact, the record in *Henderson* indicates that the initially scheduled trial date had passed six weeks before the first of the motions at issue was filed, and the district court therefore concluded that the trial date had been "vacated" "by inference." J.A. at 25, *Henderson*, *supra* (No. 84-1744). The court did not set a new trial date until after the motions were resolved. See *id.* at 25-32.

Indeed, in light of *Henderson*'s holding that Congress did not restrict the pretrial motion exclusion to "reasonably necessary" delay, it would make little sense to conclude that Congress limited the exclusion to motions that cause or threaten postponement of the trial. That limitation would not ensure that trials occur more expeditiously, because, under *Henderson*, the STA deadline would be extended whenever a court put off trial in response to a motion, even if the postponement was unnecessary to resolve the motion.

Moreover, the practical reasons for rejecting a requirement that time excluded based on a pretrial motion be reasonably necessary also counsel against a limitation that time may be excluded only if a motion causes or threatens postponement of the trial. As the court of appeals in *Henderson* explained, it would be unworkable to require that delay based on the pretrial motion exclusion be reasonably necessary: In order to ensure compliance with the STA's deadlines, the court and the parties must know definitively when the speedy trial clock has stopped and when it has restarted. If time is excludable only when reasonably necessary, however, neither the court nor the parties could be certain of the date on which delay was no longer reasonable and the speedy trial clock had therefore restarted. *United States* v. *Henderson*, 746 F.2d 619, 623 (9th Cir. 1984), aff'd, 476 U.S. 321 (1986). A rule that the pretrial motion exclusion applies only to motions that cause or threaten postponement of the trial would be similarly unworkable, because the parties could not be certain at the time that a motion was filed whether it would meet that standard, and they therefore would not know whether the speedy trial clock had stopped. See pp. 36-38, *infra*.

2. Last Term, in *Bloate*, this Court reiterated its conclusion in *Henderson* that the pretrial motion exclusion is "automatic." *Bloate*, 130 S. Ct. at 1349 n.1; see *id.* at 1351-1353. And the Court explained that such automatic exclusions apply "regardless of the specifics of the case," *id.* at 1349 n.1, and "without district court findings," *id.* at 1351.

The Court held in *Bloate* that time granted to a party to prepare pretrial motions is not automatically excluded by Section 3161(h)(1)(D) but instead may be excluded only if a district court makes case-specific findings to justify an ends-of-justice continuance under 18 U.S.C. 3161(h)(7). 130 S. Ct. at 1351-1353. The Court reasoned that Section 3161(h)(1)(D) "does not subject all pretrial motion-related delay to automatic exclusion" but "renders automatically excludable only the delay that occurs '*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of,' the motion." *Id.* at 1353. The Court concluded that Section 3161(h)(1)(D) "communicates Congress' judgment that delay resulting from pretrial motions is automatically excludable, *i.e.* excludable without district court findings, *only* from the time a motion is filed through the hearing on or disposition point specified." *Ibid.* Thus, *Bloate* indicates that Section 3161(h)(1)(D) automatically excludes the time between the filing of any pretrial motion and its disposition without the need for additional findings.

Bloate also undermines the view of the court below that a proceeding results in "delay" only when it causes or threatens postponement of the trial. Although this Court concluded in *Bloate* that the delay resulting from the defendant's request for additional motions preparation time was not excluded under Section 3161(h)(1)(D)

because that delay occurred before any motion was filed, both the Court and the dissent agreed that the request had resulted in "delay." See 130 S. Ct. at 1352-1353; *id.* at 1360 (dissenting opinion). Furthermore, the Court understood the "delay at issue" to be the additional time allotted for motions preparation, not any actual or threatened postponement of the trial. See *id.* at 1352. Indeed, nothing in the record indicated that the additional preparation time threatened to postpone the trial, and the district court did not move the trial date when it granted the request for additional time. Docket entry No. 20, *United States* v. *Bloate*, 4:06-cr-00518-SNL, 2007 WL 551740 (E.D. Mo. Feb. 21, 2007). Thus, *Bloate*, like *Henderson*, strongly suggests that the court below erred in holding that a pretrial motion creates "delay" only if the motion causes postponement or the expectation of postponement of the trial.

C. The STA's Structure Indicates That The Pretrial Motion Exclusion Applies Automatically Regardless Of Whether The Motion Caused Or Might Have Caused Postponement Of The Trial

The structure of the STA also supports the established rule that the pretrial motion exclusion is not contingent on a finding that the motion could have affected the trial schedule. As this Court recognized in *Bloate*, the STA's exclusions fall into two distinct categories. One category of exclusions applies "only if the district court makes certain findings enumerated in the statute." *Bloate*, 130 S. Ct. at 1351. Most prominent among those exclusions is Section 3161(h)(7), which excludes delay resulting from a continuance when the trial court finds that the ends of justice served by granting the continuance outweigh the interests of society and the defendant

in a speedy trial. *See id.* at 1355. Another category of exclusions is automatic and applies "without district court findings." *Id.* at 1351. That category includes, for example, the exclusions in 18 U.S.C. 3161(h)(1) for delays resulting from "other proceedings concerning the defendant" and the exclusion in 18 U.S.C. 3161(h)(3)(A) for delay resulting from the unavailability of the defendant. See *ibid.*; *Henderson*, 476 U.S. at 327.

Congress distinguished between the two categories of exclusions for a reason. The automatic exclusions identify "specific and recurring periods of time often found in criminal cases," S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979) (*1979 Senate Report*), that are excluded from the speedy trial deadline to "permit normal pretrial preparation in the ordinary noncomplex cases which represent the bulk of business in the Federal courts," S. Rep. No. 1021, 93d Cong., 2d Sess 21 (1974) (*1974 Senate Report*); see H.R. Rep. No. 1508, 93d Cong., 2d Sess. 8, 15, 21 (1974) *(1974 House Report*). The other exclusions, particularly Section 3161(h)(7), provide flexibility to address less common situations in which Congress was not certain that the balance of interests would routinely justify extending the STA deadline. *1979 Senate Report* 7, 10-11; *1974 Senate Report* 3, 39-41; *1974 House Report* 21-22.

As this Court recognized in both *Henderson* and *Bloate*, the pretrial motion exclusion in Section 3161(h)(1)(D), along with the other exclusions in Section 3161(h)(1), falls in the category of automatic exclusions. See *Bloate*, 130 S. Ct. at 1349, 1351-1353; *Henderson*, 476 U.S. at 326-327. Pretrial motions, which are filed in almost every criminal case, frequently shape the content and structure of the trial, and they may even eliminate the need for trial altogether. Accordingly, their resolu-

tion is a necessary part of the pretrial process, and exclusion of the time consumed in resolving them is warranted without a case-by-case inquiry.

The ruling of the court below that a pretrial motion triggers excludable time only if it caused an actual or expected postponement of the trial is not consistent with the statutory structure because the ruling makes the pretrial motion exclusion contingent on case-specific findings. Already, district courts applying the Sixth Circuit's rule have been compelled to make findings whether "motions are complex" or otherwise "cause[] a delay of the trial" in order to invoke the exclusion. *United States* v. *Jerdine*, No. 1:08-CR-00481, 2009 WL 4906564, at *5 (N.D. Ohio Dec. 18, 2009); see *United States* v. *Ballato*, No. 09-3453, 2010 WL 3398474, at *4 (6th Cir. Aug. 26, 2010) (remanding for district court to "determine whether the motions at issue caused delay or the expectation of a delay" of the trial).[10]

Indeed, to avoid possible dismissals under the Sixth Circuit's rule, some district courts have been relying on ends-of-justice continuances under Section 3161(h)(7), in addition to Section 3161(h)(1)(D), when excluding pre-

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[10] See, *e.g.*, *United States* v. *Gump*, No. 3:10-CR-94, 2010 WL 3655981, at *2 (E.D. Tenn. Sept. 10, 2010) ("find[ing] that the Defendants' motion is of such a nature that the time required to determine the issues creates excludable time"); *United States* v. *Johnson*, No. 09-20264, 2010 WL 779284, at *6 (E.D. Mich. Mar. 8, 2010) (finding that the motion "delayed trial or had the potential to delay trial"); *United States* v. *Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *1 (E.D. Tenn. Dec. 22, 2009) ("find[ing] that the Defendant's motions are of such a nature that the time required to determine the issues creates excludable time"); *United States* v. *Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009) ("find[ing] that this motion is complex in nature and that the time required to hear and rule upon the suppression motion causes a delay of the trial and, thus, creates excludable time").

trial motion delay. See, *e.g.*, *United States* v. *Gump*, No. 3:10-CR-94, 2010 WL 3655981, at *2 (E.D. Tenn. Sept. 10, 2010); *United States* v. *Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *2 (E.D. Tenn. Dec. 22, 2009); *United States* v. *Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009). The rule adopted by the court below thus frustrates the very purpose of Section 3161(h)(1)(D)'s automatic exclusion, which is designed to avoid the need for courts to devote time and resources to case-specific analyses of whether the benefits of delay from a particular motion outweigh the costs.

If this Court were to endorse the court of appeals' construction of the pretrial motion exclusion, the disruption of the statutory scheme could spread to the other automatic exclusions as well. Many of those other exclusions contain the same phrase—"delay resulting from"—on which the court below relied in imposing its novel limitation on the applicability of the pretrial motion exclusion. The same language appears in the provisions authorizing exclusion of delays associated with mental and physical competency examinations, 18 U.S.C. 3161(h)(1)(A); trial of the defendant on other charges, 18 U.S.C. 3161(h)(1)(B); interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); proceedings relating to the transfer of a case or the removal of a defendant from another district, 18 U.S.C. 3161(h)(1)(E); transportation of a defendant from another district or to and from places of examination or hospitalization, 18 U.S.C. 3161(h)(1)(F); consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3)(A); and the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4). The courts of appeals have nonetheless consistently held that the

applicability of those other exclusions is not contingent on a finding that the triggering proceeding or event caused postponement of the trial (or of the indictment, where the relevant STA deadline is the requirement in 18 U.S.C. 3161(b) that the indictment be brought within 30 days of arrest).[11] Adopting the interpretation of the phrase "delay resulting from" advanced by the court below could call into question that well-established approach to those other exclusions.

Adopting the interpretation of the court below could also unsettle established methods for determining the amount of time excluded by other automatic exclusions. In calculating the excludable time attributable to other proceedings concerning the defendant, such as competency examinations and interlocutory appeals, the courts of appeals generally do not consider how long (if at all) trial was postponed as a result of the relevant proceeding. Instead, the courts generally calculate the excludable time based on the duration of the proceeding itself. See, *e.g.*, *United States* v. *Neal*, 27 F.3d 1035, 1042 (5th Cir.) (excluding the time between the defendant's request for a competency examination and the determination that he was competent), cert. denied, 513 U.S. 1008 (1994), and 513 U.S. 1179 (1995); *United States* v. *Long*, 900 F.2d 1270, 1276 (8th Cir. 1990) (excluding the time

[11] See, *e.g.*, *United States* v. *Pete*, 525 F.3d 844, 852 (9th Cir.) (interlocutory appeal), cert. denied, 129 S. Ct. 298 (2008); *United States* v. *Miles*, 290 F.3d 1341, 1350 (11th Cir.) (unavailability of essential witness), cert. denied, 537 U.S. 1089 (2002); *United States* v. *Davenport*, 935 F.2d 1223, 1233-1234 (11th Cir. 1991) (interlocutory appeal); *United States* v. *Robinson*, 887 F.2d 651, 656-658 (6th Cir. 1989) (trial on other charges); *Montoya*, 827 F.2d at 150 (same); *United States* v. *Shear*, 825 F.2d 783, 786 (4th Cir. 1987) (same), cert. denied, 489 U.S. 1087 (1989); *United States* v. *Pelfrey*, 822 F.2d 628, 635 (6th Cir. 1987) (interlocutory appeal).

between the filing of the notice of appeal and the district court's receipt of the appellate court's mandate). The current approach would be called into question if this Court adopted the view of the court below that the statutory term "delay" refers to postponement of the trial. Under that interpretation, the excludable "delay" resulting from a proceeding logically should be measured from the date that trial was otherwise scheduled to begin, rather than from the commencement of the proceeding that triggers the exclusion. Thus, if a defendant files notice of an interlocutory appeal a month before trial is scheduled to start, the excludable delay should begin only when that month has expired, not when the notice is filed. No court of appeals follows that approach. Thus, if this Court adopted the novel interpretation of the STA advanced by the court below, the current operation of the Act could be substantially disrupted.

D. The STA's Legislative History Confirms That The Pretrial Motion Exclusion Applies Automatically Upon The Filing Of Any Motion

The court of appeals' interpretation of the pretrial motion exclusion is also inconsistent with the STA's legislative history. The legislative record surrounding both the STA's original enactment in 1974 and the expansion of the pretrial motion exclusion in 1979 indicates that Congress used the phrase "delay resulting from" to refer to the time consumed by a proceeding or an event that triggers an exclusion, not the time during which trial might be postponed. And the history of the 1979 amendments leaves no doubt that Congress intended the exclusions in Section 3161(h)(1) for delays resulting from proceedings concerning the defendant, including pretrial motions, to apply automatically whenever a pro-

ceeding is pending, without the need for any additional findings.

The STA originated with S. 754, introduced in 1973 by Senator Ervin and reported to the full Senate in July 1974 by its Judiciary Committee. See Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 15 (1980) (Partridge). Like the current Act, S. 754 set a deadline for commencing trial, to be codified in 18 U.S.C. 3161(c), and provided various exclusions from that deadline, to be codified in 18 U.S.C. 3161(h). S. 754, § 101, 93d Cong., 2d Sess. (1974) (as passed by the Senate). Also like the current Act, Section 3161(h) described the exclusions as "periods of delay," and Section 3161(h)(1) excluded "[a]ny period of delay resulting from other proceedings concerning the defendant," including but not limited to various specified "delay[s]." *Ibid.* Those specified delays included "delay resulting from hearings on pretrial motions," as well as "delay resulting from" other listed proceedings, such as "any examination and hearing on competency." *Ibid.* The Senate Judiciary Committee Report explained that the exclusions for those proceedings were designed to "permit normal pre-trial preparation" in "ordinary noncomplex cases." *1974 Senate Report* 21. And the Senate Report repeatedly equated the statutory phrase "delay resulting from" with the time consumed by the proceedings themselves, rather than any time during which trial might be postponed.[12]

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[12] See, *e.g.*, *1974 Senate Report* 35 ("Subparagraph 3161(h)(1) allows the court to exempt from the time limits, time consumed by 'proceedings concerning the defendant.'"); *id.* at 37-38 (explaining that Section 3161(h)(1)(A) "provides for the exclusion of time consumed in competency hearings" and "days actually consumed by physicians in mental examination").

The Senate bill was reintroduced, after amendments, as a House bill, H.R. 17409, 93d Cong., 2d Sess. (1974), which was ultimately enacted into law. Partridge 15-16. Describing Section 3161(h)(1), the House Judiciary Committee Report explained that the bill "provides a number of exclusions from the running of the time limits to trial for proceedings concerning the defendant." *1974 House Report* 15. The House Report further stated that "[t]he time limits would be tolled by hearings, proceedings and necessary delay which normally occur prior to the trial of criminal cases." *Id.* at 21. Thus, like the Senate Report, the House Report indicates that the "delay resulting from" a specified proceeding or event is the duration of that proceeding or event, during which the speedy trial clock is stopped. See *Black's Law Dictionary* 1625 (9th ed. 2009) (defining to "toll" as "to stop the running of" "a time period, esp. a statutory one"); see also, *e.g.*, *1974 House Report* 33 (explaining that proposed Section 3161(h)(4), which excluded "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent," would exclude "the *period during which* a defendant is incompetent") (emphasis added).

Congress amended the STA in 1979 to address problems with its initial implementation. As described in the House and Senate Reports accompanying the 1979 amendments, one of Congress's concerns was that the Act's exclusions were being interpreted too restrictively. See *1979 Senate Report* 18, 21, 26; H.R. Rep. No. 390, 96th Cong., 1st Sess. 4, 11 (1979) (*1979 House Report*). Congress was particularly concerned about the exclusion for pretrial motions, which, under the STA as originally enacted, encompassed "delay resulting from hearings on pretrial motions," 18 U.S.C. 3161(h)(1)(E)

(1976). As the House Report explained, some courts had given that language "an unduly restrictive interpretation * * * as extending only to the actual time consumed in a pretrial hearing." *1979 House Report* 11. To correct the problem, Congress adopted the current language, which excludes "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 Senate Report explained that this change "enlarged" the provision "to include, as excludable time, the entire period of time from the date of the filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions." *1979 Senate Report* 33; accord *1979 House Report* 10. And the Senate Report made clear that "the section provides exclusion of time from the filing to the conclusion of hearings on or 'other prompt disposition' of *any* motion." *1979 Senate Report* 34 (emphasis added).

Like the 1974 reports, the 1979 Senate Report reveals that Congress equated the "delay resulting from" a proceeding with the period of time consumed by that proceeding, rather than the time during which trial might be postponed. The Report stated that the STA excludes from its deadlines "specific and recurring periods of time often found in criminal cases," "includ[ing] periods consumed by * * * proceedings concerning the defendant, including mental or physical examinations, other trials, interlocutory appeals and pretrial motions." *1979 Senate Report* 9. And the Report used interchangeably the terms "delay," "periods of delay," "periods of time," and "periods of excludable time" to de-

scribe the exclusions.[13] The Senate Report also stressed that time consumed by the "proceedings concerning the defendant" listed in Section 3161(h)(1), including pretrial motions, is "automatically exclud[ed]," without the need for findings like those required to exclude time under Section 3161(h)(7)'s ends-of-justice provision. *1979 Senate Report* 9-10.[14]

As the principal chronicler of the STA's legislative history has observed, at no point in the STA's development "did anyone suggest that the period of delay 'resulting from' a proceeding might be something other than the duration of the proceeding itself." Partridge 26. Likewise, nothing in the legislative record remotely suggests that the pretrial motion exclusion applies only if a motion delayed or was expected to delay the trial. On the contrary, the legislative history confirms the view—shared by leading commentators, as well as every

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[13] See, *e.g., 1979 Senate Report* 9-10 (referring to "automatically excludable delay," exclusions of "periods of time," "types of delay," and "delay automatically excluded"); *id.* at 20 (referring to "excludable time"); *id.* at 31 (referring to "periods of delay" that are "automatically excludable"); *id.* at 32 (referring to "event[s]" that "would automatically exclude time"); *id.* at 33 (referring to "specifically-enumerated periods of excludable time," "periods of delay" that "are to be automatically excluded," "excludable time" or "period[s] of time").

[14] See, *e.g.*, *1979 Senate Report* 9 (referring to the Section 3161(h)(1) provisions as "automatically excludable delay"); *id.* at 31 (stating that "periods of delay resulting from 'proceedings concerning the defendant'" are "automatically excludable"); *id.* at 32 (describing "a pretrial mental examination" as an example of "an event" that "would automatically exclude time"); *id.* at 33 (explaining that, under then existing law, "periods of delay consumed by" various proceedings, including "[h]earings on pretrial motions," were "automatically excluded"); *ibid.* (noting that the amendments would leave intact "the automatic application of exclusions as provided in existing law"); *id.* at 34 (referring to "the automatic exclusions for pretrial motions" under the amendments).

court of appeals other than the court below—that the pretrial motion exclusion is "automatic and no factual determination of whether the trial was actually delayed is necessary." 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.3(b) at 142 n.28 (3d ed. 2007); accord Robert L. Misner, *Speedy Trial: Federal and State Practice* 268 (1983).

E. Automatically Excluding The Time Between The Filing Of Any Pretrial Motion And Its Disposition Furthers The STA's Purposes

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); *1974 House Report* 8, 15, 21-22; *1974 Senate Report* 21; *1979 Senate Report* 19-20, 26. The STA therefore gives weight to interests other than expedition, and questions about the Act's application cannot be resolved simply by choosing the shortest time limits. See, *e.g.*, *id.* at 9 (noting that automatic exclusions for "specific and recurring periods of time often found in criminal cases" are necessary "to make compliance with" the Act's deadlines "a realistic goal"); *1974 House Report* 15 (explaining that "both delay and haste in the processing of criminal cases must be avoided" and that the STA seeks to promote "efficiency in the processing of cases commensurate with due process").

The STA cannot operate efficiently and practicably unless the rules governing its time limits are clear. The starting and stopping points of the speedy trial clock must be precisely defined and easily discernible. The government, the criminal defendant, and the district court must be able to know, as each day passes, whether

that day counts toward the 70-day deadline for commencing trial. Otherwise, they could not determine when they were approaching the date on which trial must begin. Without that information, neither counsel nor the court could establish realistic scheduling priorities that accommodate the competing demands on their time and resources. They would not know, for example, whether it was necessary to attempt to reschedule other less pressing matters or, if that was not possible, to seek an "ends-of-justice" continuance pursuant to Section 3161(h)(7). The inevitable result would be unwitting violations of the Act's 70-day limit and the unnecessary dismissal of indictments. See 18 U.S.C. 3162(a)(2).

Pretrial motions are routinely filed in nearly every federal criminal prosecution, and their resolution is an essential part of the pretrial process necessary to fair and accurate trials. As other courts of appeals have recognized, Congress accordingly provided in Section 3161(h)(1)(D) for the automatic exclusion of all time consumed in resolving pretrial motions, in order "to structure a method of calculating time which would be reasonably and practically, although not necessarily directly, related to the just needs for pretrial preparation in a particular case." *Cobb*, 697 F.2d at 42; see *Green*, 508 F.3d at 200; *Vogl*, 374 F.3d at 985-986; *Montoya*, 827 F.2d at 151.

The automatic exclusion reflects the reality that "[p]retrial motions necessarily take the time of [the opposing party] to respond and courts to evaluate." *United States* v. *Wilson*, 835 F.2d 1440, 1442 (D.C. Cir. 1987), abrogated on other grounds by *Bloate*, *supra*. And it also accounts for the practical necessity that, in order to ensure that trial commences within the STA's deadline in a particular case, the court and the parties

must be able to ascertain, as soon as a pretrial motion has been filed, whether or not the motion has stopped the speedy trial clock. "[A] clear rule" that all time consumed in resolving any pretrial motion is automatically excluded "puts [the court and] counsel on notice from the outset as to what is excludable." *United States* v. *Vo*, 413 F.3d 1010, 1015-1016 (9th Cir.), cert. denied, 546 U.S. 1053 (2005). It thus both facilitates compliance with the Act and advances the Act's goal of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

In contrast, the court of appeals' rule for the exclusion of pretrial motion delay is not consonant with the STA's purposes. The court's opinion does not make clear if excludability turns on a fact-specific determination whether a particular motion actually caused a postponement or the expectation of a postponement of the trial or turns instead on whether the trial court formally moved the trial date in response to the motion. Thus far, cases applying the decision generally appear to have interpreted it as requiring a fact-specific causation determination rather than a more formalistic inquiry into whether the scheduled trial date was postponed. See pp. 26-27 & note 10, *supra* (discussing cases). But however the decision is ultimately interpreted, it will not provide a workable rule that furthers the purposes of the Act.

If excludability turns on an individualized determination whether a particular motion causes an actual or expected postponement of the trial, the rule will greatly complicate, and could frustrate altogether, the parties' and the court's ability to comply with the Act. In many situations, neither the court nor the parties will be able to determine at the time that a motion is filed whether

the motion has stopped the speedy trial clock. The answer to that question will often not become apparent until later in the pretrial process when it becomes clear how much time will be needed to resolve the motion or what consequences will flow from granting the motion. The time needed for further briefing and resolution of any given motion will depend on the complexity of the legal issues involved, which often cannot be known until the parties and the court actually delve into those issues. Moreover, even when it is clear how much time will be needed to resolve a motion, it may often be unclear whether the disposition of the motion will ultimately require postponement of the trial. For example, if, as in this case, the court grants a motion to depose a witness, whether trial may or must be postponed will depend on the witness's availability for the deposition, a circumstance that may be both unpredictable and beyond the parties' and the court's control.

Requiring individualized determinations whether a particular motion actually caused or threatened postponement of the trial would also "force courts to resolve intractable causation issues," *Wilson*, 835 F.2d at 1442, possibly leading to extensive and collateral pretrial proceedings about whether time is excludable, *United States* v. *Dorlouis*, 107 F.3d 248, 254 (4th Cir.), cert. denied, 521 U.S. 1126 (1997). For example, if the parties were also engaged in discovery activities while a pretrial motion was pending, the district court would have to determine which of the two activities was responsible for the postponement of the trial. Or if the district court postponed trial both to permit the resolution of pretrial motions and because the court had a scheduling conflict, the court would have to answer the metaphysical question of which of the two reasons was the true cause of

the postponement. Such "question[s] frequently would pose more difficult issues than the trial itself and in some cases would be simply impossible to determine." *Cobb*, 697 F.2d at 42 n.6. Consequently, the court of appeals' rule would prevent district courts and the parties from calculating in advance the STA's deadline for commencing trial and enmesh courts and litigants in complex collateral disputes that might well add to, rather than reduce, pretrial delay.

If, on the other hand, excludability turns on whether the district court formally moves the trial date, the Sixth Circuit's rule will lead to arbitrary results that bear no relation to the Act's purposes. For example, if a district court initially set the trial date sufficiently far in advance to accommodate the resolution of anticipated pretrial motions, the time consumed in resolving those motions would not be excluded. If, however, the district court did not take the motions into account in setting the initial trial date (or miscalculated how much time they would consume), so that the court had to reset the trial date after the motions were filed, the time consumed in resolving the motions would be excluded. In addition, if a district court put off other matters so it could resolve motions quickly and therefore did not need to reset the trial date, no time consumed in resolving the motions would be excluded. If, however, the court set a more relaxed schedule for resolving the motions that enabled it simultaneously to address other matters, and the court therefore needed to reset the trial date, the entire time that the motions were pending would be excluded.

A rule that turned on whether the trial date was moved would be particularly problematic when, as in *Henderson* (see note 9, *supra*), the district court did not set the trial date until after motions were filed or re-

solved. In that situation, it is entirely unclear how the court and the parties would determine whether or not time consumed in resolving the motions was excludable. Because no trial date would exist to be reset, the court and the parties could only guess at whether the motions created an actual or expected postponement of a trial that had not even been scheduled.

Regardless of its precise contours, the interpretation of the pretrial motion exclusion adopted by the court below would disrupt the settled operation of the STA and undermine the Act's goal of providing a clear and administrable timetable for commencing criminal trials. In order for the STA to achieve that goal, the time from the filing of any pretrial motion through its disposition must be automatically excludable without regard to whether the particular motion actually causes a postponement, or the expectation of a postponement, of the trial.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

SPEEDY TRIAL ACT—RELEVANT PROVISIONS

CURRENT VERSION
EFFECTIVE OCTOBER 13, 2008

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

Time limits and exclusions

* * * * *

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. * * *

* * * * *

(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 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) 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.

* * * * *

2. Section 3162 of Title 18 of the United States Code provides in pertinent part:

Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion

but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the

compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

* * * * *

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

PRIOR VERSION
EFFECTIVE THROUGH OCTOBER 12, 2008

3. 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.