No.

In the Supreme Court of the United States

TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq*., requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (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" (emphasis added). The question presented here is:

> Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1).

As the Eighth Circuit explicitly acknowledged below, this question has divided the courts of appeals. The Fourth and Sixth Circuits have answered it in the negative; the Eighth Circuit and seven other circuits have answered it in the affirmative.

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The decision of the Eighth Circuit (App., *infra*, 1a-19a) is reported at 534 F.3d 893. The district court's decision (App., *infra*, 20a-24a) is available at 2007 WL 551740.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. Petitioner timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on September 5, 2008. App., *infra*, 25a-26a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> [T]he 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.

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

> The following periods of delay shall be excluded 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 * * * (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.[1]

STATEMENT

The Speedy Trial Act requires a defendant to be tried within 70 days of indictment or from the date a defendant has first appeared in court, whichever is later. 18 U.S.C. § 3161(c)(1). If a defendant is not tried within this 70-day period, upon his motion, the pending charges must be dismissed. See 18 U.S.C. § 3162(a)(2).

Section 3161(h) enumerates eight general categories of time that are automatically excluded in "computing the time within which the trial * * * must commence." This case concerns the first such category, 18 U.S.C. § 3161(h)(1), which requires the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight expressly enumerated

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[1] On October 13, 2008, Congress amended portions of 18 U.S.C. § 3161(h) to repeal obsolete statutory cross-references. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291. The amendments made no substantive changes to the statutory provisions at issue here, but several of the relevant subparagraphs were redesignated. As principally relevant here, § 3161(h)(1)**(F)** is now § 3161(h)(1)**(D)**, and § 3161(h)**(8)** is now § 3161(h)**(7)**. This petition uses the new designations; for clarity's sake, quotations referring to the prior designations have been altered (as indicated with bracketed text) to reflect the new designations. Both versions of the statute are reproduced in the appendix to this petition. See App., *infra*, 27a-48a.

subcategories of time. See 18 U.S.C. § 3161(h)(1)(A)-(H).[2] The basic question here is whether those specific illustrations inform what is *not* excludable under § 3161(h)(1). In other words, because Congress said that the list of illustrations in (h)(1)(A) through (h)(1)(H) is not *exhaustive*, does it follow that those illustrations express *no limitation of any kind* with respect to which periods are automatically excluded under § 3161(h)(1)?

More particularly, this case turns on whether the subcategory specifically addressing pretrial motions—§ 3161(h)(1)**(D)**—limits the exclusion of time relating to pretrial motions under the general standard articulated in § 3161(h)(1). Subparagraph (D) declares excludable "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) (emphasis added). Subparagraph (D) thus plainly does not render excludable delays

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[2] The other general categories of time excluded under § 3161(h) are delays caused by: (2) deferral of prosecution for the purpose of allowing the defendant to demonstrate his good conduct; (3) the absence or unavailability of the defendant or an essential witness; (4) the fact that the defendant is mentally incompetent or physically unable to stand trial; (5) dismissal and refiling of the information or indictment, from the date the charge was dismissed to the date the time limitation would begin to run as to the subsequent charge had there been no previous charge; (6) the joinder of a defendant for trial with a codefendant as to whom the time for trial has not run; (7) a continuance granted by a judge on the basis of 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; or (8) obtaining evidence in a foreign country. 18 U.S.C. § 3161(h)(2)-(8).

resulting from the ***preparation*** of pretrial motions. This case concerns whether—notwithstanding Congress's decision not to include pretrial motion preparation time within subparagraph (D)—such time is nonetheless automatically excludable under § 3161(h)(1)'s general standard.

As the Eighth Circuit expressly acknowledged below, the circuits are deeply divided on this issue. App., *infra*, 7a-8a. Two circuits have held that pretrial motion preparation time is not excludable under § 3161(h)(1), relying on the statute's plain language—most notably the specific treatment of pretrial motions in § 3161(h)(1)(D)—and Congress's rejection of a proposal to include pretrial motion preparation time within the scope of § 3161(h)(1). Eight other courts of appeals, including the Eighth Circuit below, have reached the opposite conclusion, holding that pretrial motion preparation time is a "delay resulting from other proceedings concerning the defendant." The split is stark, deeply entrenched, and important to the proper administration of the federal criminal justice system.

A. The District Court Proceedings

On August 2, 2006, police observed petitioner Taylor James Bloate driving erratically. After executing a traffic stop, the officers noticed two small bags of a white substance, later determined to be crack cocaine, in petitioner's car. App., *infra*, 2a. Petitioner was arrested. The car's passenger, petitioner's girlfriend, consented to a police search of her apartment, where police discovered drugs, a bulletproof vest, three firearms, and ammunition, as well as evidence suggesting that petitioner resided in the apartment. *Id.* at 2a-3a.

On August 24, 2006, petitioner was indicted for possession of a firearm by a felon and possession of crack cocaine with intent to distribute it. App., *infra*, 3a. The indictment triggered the start of the 70-day pretrial period mandated under the Speedy Trial Act. *Id.* at 6a. On September 7, 2006, petitioner moved for and was granted an extension of the deadline for filing pretrial motions. *Id.* at 3a. On October 4, 2006, a magistrate judge granted petitioner leave to waive the right to file pretrial motions. *Id.* at 3a.

On February 19, 2007,—two weeks before petitioner's trial was set to begin—petitioner filed a motion to dismiss the indictment under the Speedy Trial Act. App., *infra*, 4a. The district court denied the motion. It held that the Speedy Trial Act had not been violated because several periods of time were properly excludable from the 70-day period prescribed by the Act. *Id.* at 21a-24a. As particularly relevant here, the district court held that the 28 days allocated to the preparation of pretrial motions—from September 7, 2006, to October 4, 2006—were automatically excludable. *Id.* at 21a.

The district court also held excludable several other periods—none of which is at issue here—bringing the total excludable time to 134 days.[3] App., *infra*, 6a-13a, 21a-24a. It is undisputed that, had the district court not excluded the 28 days of pretrial

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[3] The district court excluded 40 days, from November 9, 2006, until December 18, 2006, because a plea agreement had been contemplated during that time. App., *infra*, 9a-11a, 22a-23a. The court also excluded the 66 days from December 20, 2006, to February 23, 2007, due to a continuance granted at the request of the defendant to resolve "severe" differences with counsel. *Id.* at 11a-13a, 23a.

motion preparation time, more than 70 non-excludable days would have elapsed between petitioner's indictment and the trial date, and the indictment therefore would have been dismissed.

Petitioner proceeded to trial on March 5, 2007. He was convicted and sentenced to 360 months' imprisonment. App., *infra*, 1a, 4a-5a.

B. The Court Of Appeals Decision

Petitioner appealed his conviction, arguing (among other things) that the district court had erred in excluding the 28 days of pretrial motion preparation time under § 3161(h)(1).

The Eighth Circuit affirmed. The court expressly recognized that the circuits are divided as to whether pretrial motion preparation time is excludable under § 3161(h)(1), announcing that it "join[ed] the majority of circuits in holding that pretrial motion preparation time may be excluded under § 3161(h)(1), if the court specifically grants time for that purpose." App., *infra*, 8a. The court stated its agreement with courts that have read the categories specifically enumerated in § 3161(h)(1)(A)-(H) to offer merely "an illustrative rather than an exhaustive enumeration of [excludable delays]." *Id.* at 7a. (citations and internal quotations omitted). The court reasoned that a contrary rule risked creating a "trap for trial judges," in which willingness to accommodate a defendant's request for extra time might result in dismissal of a case. *Id.* at 7a-8a.

The Eighth Circuit specifically acknowledged its disagreement with decisions of two other courts of appeals. Those courts, the Eighth Circuit noted, have relied on what they held to be "'strong[] indicat[ions]'"

in the text and legislative history of the Speedy Trial Act that Congress "'did not intend to exclude [pretrial motion preparation] time under § 3161(h)(1) at all.'" App., *infra*, 8a (quoting *United States* v. *Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998), and citing *United States* v. *Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993)).

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided As To Whether Pretrial Motion Preparation Time Is Excludable Under 18 U.S.C. § 3161(h)(1)

Section 3161(h)(1) of the Speedy Trial Act provides that delays "resulting from other proceedings concerning the defendant" do not count toward the Act's 70-day time limitation. The Act provides an illustrative list of such excludable time in eight subparagraphs, § 3161(h)(1)(A)-(H), including subparagraph (D), which addresses with precision the exclusion of time relating to pretrial motions. That provision declares excludable "delay resulting from any pretrial motion, from the ***filing*** of the motion through the * * * ***disposition*** of, such motion." 18 U.S.C. § 3161(h)(1)(D) (emphasis added). The question in this case is whether time granted for the ***preparation*** of pretrial motions is excludable under § 3161(h)(1), notwithstanding subparagraph (D)'s specific treatment of the exclusion of time relating to pretrial motions.

As the court below expressly acknowledged, the circuits are divided on this question. App., *infra*, 8a. Fully ten circuits have addressed the question and have reached diametrically opposite conclusions. The

Fourth and Sixth Circuits have held that pretrial motion preparation time is not excludable under § 3161(h)(1); the First, Second, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have, as did the Eighth Circuit here, held to the contrary.

A. The Decision Below Squarely Conflicts With Two Other Circuits' Construction Of § 3161(h)(1)

The Fourth and Sixth Circuits have squarely held that pretrial motion preparation time is not excludable under § 3161(h)(1). See *United States* v. *Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998); *United States* v. *Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993). In both cases—as here—that time (coupled with other nonexcludable delays) exceeded the 70-day statutory limit. *Jarrell*, 147 F.3d at 316-317; *Moran*, 998 F.2d at 1372. And in both cases—in stark contrast to the decision below—the courts concluded that the language and structure of the Act do not support placing such time "within the automatic exclusion of § 3161(h)(1)." *Jarrell*, 147 F.3d at 317; see also *Moran*, 998 F.2d at 1370-1371.

In evaluating whether Congress intended for pretrial motion preparation time to qualify as a "delay resulting from other proceedings concerning the defendant," 18 U.S.C. § 3161(h)(1), those courts relied heavily on the fact that subparagraph (D) specifically addresses delays attributable to pretrial motions. Those courts deemed it highly probative that subparagraph (D) precisely defines excludable time to include only the period ***from*** the "filing" of a pretrial motion through its "disposition"—with "[t]ime allotted for the *preparation* of a pretrial motion * * * 'conspicuously absent'" from the specific subpara-

graph addressing pretrial motions. *Jarrell*, 147 F.3d at 317 (quoting *United States* v. *Hoslett*, 998 F.2d 648, 655 (9th Cir. 1993) (emphasis added)); see also *Moran*, 998 F.2d at 1370-1371.

Those courts have recognized that § 3161(h)(1)'s subparagraphs—including subparagraph (D)—are "merely illustrative" of the delays that are excludable, but have treated Congress's evident decision "not to include [preparation] time within the scope of the delay excludable under § 3161(h)(1)([D])" as a strong "indicat[ion] that it did not intend to exclude such time under § 3161(h)(1) at all." *Jarrell*, 147 F.3d at 317; see also *Moran*, 998 F.2d at 1370-1371. As the Fourth Circuit put it, "the [Speedy Trial] Act's 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." *Jarrell,* 147 F.3d at 317 (quoting *United States* v. *Rojas-Contreras*, 474 U.S. 231, 239-240 (1985) (Blackmun, J., concurring in the judgment)).

The Fourth Circuit has further explained that the enactment history of § 3161(h)(1) confirms that "Congress made a deliberate decision not to include pretrial motion preparation time within the ambit [of mandatorily excluded time]." *Jarrell*, 147 F.3d at 317. When Congress enacted amendments to the Speedy Trial Act in 1979, that court observed, the Senate Judiciary Committee specifically considered exclusions for pretrial motion preparation time under § 3161(h)(1) but determined "that *excluding time for the preparation of motions would be 'unreasonable*.'" *Jarrell*, 147 F.3d at 317 (quoting S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979)) (emphasis added).

Indeed, the Fourth Circuit noted, Congress contemplated that *some* preparation time could be excluded—in a narrowly circumscribed set of circumstances and under a different (and significantly more restrictive) provision of the Act. *Jarrell*, 147 F.3d at 318 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979)) (noting that legislators intended that such exclusions would be permitted only if they satisfy the "ends of justice" standard established by § 3161(h)(7)).

Notably, the Fourth Circuit was not swayed by the fact that it was the defendant who sought the additional preparation time. That court specifically "recognize[d] that automatically excluding additional pretrial motion preparation time granted at a defendant's request has intuitive appeal in that the defendant has brought the delay upon himself." *Jarrell*, 147 F.3d at 318. But that court further recognized that, in addition to its incompatibility with the text and legislatively intended operation of the provision, "[s]uch an approach * * * denigrates the interest of the public by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Ibid.*; see also *Moran*, 998 F.2d at 1371 ("[T]he burden should not be on the defendant to take affirmative steps to keep the speedy-trial clock running.").

B. Eight Circuits Have Held That Pretrial Motion Preparation Time Is Excludable Under § 3161(h)(1)

With the decision below, eight courts of appeals have reached the opposite conclusion, holding that pretrial motion preparation time must be excluded under § 3161(h)(1). See *United States* v. *Oberoi*, No. 04-4545-cr, 2008 WL 4661454, at *10 (2d Cir. Oct. 23,

2008); *United States* v. *Mejia*, 82 F.3d 1032, 1035-1036 (11th Cir. 1996); *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir. 1989); *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); *United States* v. *Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982).

Those decisions rely principally on the appearance of the phrase "including but not limited to" before the list of examples of excludable time in § 3161(h)(1). *Bloate*, App., *infra*, 7a-8a; *Lewis*, 980 F.2d at 564; *Mobile Materials*, 871 F.2d at 913; *Jodoin*, 672 F.2d at 238. The "particular intervals [of time] in subsections A through [H]," those courts have emphasized, "are illustrative rather than exhaustive." *Tibboel*, 753 F.2d at 610. Accordingly, they reason, subsection (D)'s specific treatment of pretrial motions—and its exclusion of time only from "filing" through "disposition"—"is but an illustration" of what may be excluded under "the general language" of (h)(1), *Jodoin,* 672 F.2d at 238, and not a limitation on what is excludable.

In some instances, those courts have sought support from the legislative history of § 3161(h)(1). The First Circuit, for example, held it significant that Congress intended the statute "to cover more than the examples provided in clauses such as ([D])," as evidenced by "the Senate's Report[,] which states, 'the list of proceedings concerning the [defendant] is not intended to be exhaustive.'" *Jodoin*, 672 F.2d at 238 (quoting S. Rep. No. 212, *supra*, at 10 (alteration omitted)). Likewise, the Tenth Circuit saw this as an "invitation implicit in the legislative history" to

create "addition[s] to the list of proceedings that automatically toll the speedy trial clock." *Mobile Materials*, 871 F.2d at 913[4]; see also *Lewis*, 980 F.2d at 564.

Notably, the Ninth Circuit—even as it adhered to circuit precedent allowing the exclusion of pretrial motion preparation time under § 3161(h)(1)—has acknowledged the force of the contrary argument. It observed that, although § 3161(h)(1) excludes the time during which a pretrial motion is pending for decision, "a similar exclusion for delay caused by motion preparation time is conspicuously absent." *United States* v. *Hoslett*, 998 F.2d 648, 655 (9th Cir. 1993). "Had Congress intended the general pretrial motion preparation exclusion," the court recognized, it "would have included it expressly in the amendments relating to delays from pretrial motions." *Ibid.* But because *Lewis*, 998 F.2d at 564, had previously held that time the trial judge "expressly designate[d]" for the preparation of motions must be excluded under § 3161(h)(1), *Hoslett* held that only such time—*i.e.*, time granted beyond that allotted in a district court's standard scheduling order—is to be excluded. 998 F.2d at 657.[5]

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[4] The Tenth Circuit acknowledged that the legislative history also reflected the "Senate Judiciary Committee's reservations about enlarging the period automatically excluded by pretrial motions practice," particularly motion preparation time. *Mobile Materials*, 871 F.2d at 914.

[5] There is further confusion even among the courts of appeals that have held that pretrial motion time is excludable under § 3161(h)(1). At least one court applies a rule that excludes all pretrial motion preparation time from the speedy trial calculation as long as the judge specifically grants time for such

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The conflict on this issue is stark, widespread, and openly acknowledged among the lower courts.[6] This Court's review is necessary to resolve this division and to provide uniform guidance to the district judges, prosecutors, and defendants who confront this issue on a daily basis.

II. The Majority Rule Misreads The Speedy Trial Act And Ignores Congress's Intent

The Eighth Circuit's decision is plainly wrong. The rule adopted below violates the statute's plain text and reads the express limitation of § 3161(h)(1)(D) out of the statute altogether. It like-

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purpose, see *United States* v. *Montoya*, 827 F.2d 143, 153 (7th Cir. 1987), but others distinguish between preparation time granted at a defendant's request (excludable) and routine time granted *sua sponte* by the court (non-excludable), see, *e.g.*, *United States* v. *Williams*, 197 F.3d 1091, 1093-1095 (11th Cir. 1999) (holding that time granted *sua sponte* is not excludable because "such a routine time prescription is no 'delay' in bringing the defendant to trial," and "[t]o qualify as an excluded period under § 3161(h)(1), the period must constitute a 'delay'"); see also *Hoslett*, 998 F.2d at 657 ("Only where there is a specific request for more pretrial motion preparation time than is routinely established by the district court in its standard scheduling order may such preparation time be excluded."). Dissenting in *Hoslett*, Judge Kozinski argued that "nothing in the language or reasoning of [a prior opinion] supports any such distinction" and that, if the majority could resort to that distinction, "then there's no case we can't distinguish if we set our minds to it." 998 F.2d at 660 (Kozinski, J., dissenting in part).

[6] The Third Circuit, which has yet to resolve this issue, has correctly observed that the "Courts of Appeals have disagreed on whether delay attributable to the preparation of pretrial motions" must be excluded under § 3161(h)(1). *United States* v. *Fields*, 39 F.3d 439, 444 n.3 (1994).

wise ignores the fact that Congress specifically considered—but rejected—a proposal to exclude pretrial motion preparation time under § 3161(h)(1).

A. The Text And Structure Of § 3161(h)(1) Do Not Permit Exclusion Of Pretrial Motion Preparation Time

1. Section § 3161(h)(1) excludes "delay resulting from other proceedings concerning the defendant." 18 U.S.C. § 3161(h)(1). The statute does not define the term "other proceedings concerning the defendant"; instead, it offers an illustrative list of eight specific subcategories of such exclusions. See 18 U.S.C. § 3161(h)(1)(A)-(H).

In subparagraph (D) of § 3161(h)(1), Congress directly addressed delay associated with pretrial motions. That provision 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) (emphasis added). By its terms, subparagraph (D) does not exclude delay caused by the ***preparation*** of pretrial motions. On that much, the courts and the parties appear to agree.

The Eighth Circuit erred, however, in concluding that the specific guidance with respect to pretrial motions contained in subparagraph (D) exerts no interpretive influence on the general standard articulated in § 3161(h)(1). The Eighth Circuit reasoned that, because the list of examples in § 3161(h)(1)(A)-(H) is not exhaustive, pretrial motion preparation time is necessarily excludable under § 3161(h)(1). App., *infra*, 7a-8a. But that conclusion simply does not follow: The fact that Congress did not intend to

predict *every* application of § 3161(h)(1) does not answer whether *this* particular delay is excludable.

Moreover, the Eighth Circuit made *no* attempt to confront the contrary—and far more natural—reading of the statute adopted by the Fourth and Sixth Circuits. Those courts apply the venerable interpretive principle that "[a] specific provision controls over one of more general application." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991). Because § 3161(h)(1)(D) specifically addresses delays resulting from pretrial motions—declaring only the time from "filing" through "disposition" as excludable—the general standard in § 3161(h)(1) cannot circumvent that limitation. That is, subparagraph (D) provides an express and definitive specification of which pretrial motion delays are excludable under § 3161(h)(1). See *Jarrell*, 147 F.3d at 317 ("Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)([D]) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all."); *Moran*, 998 F.2d at 1370-1371 ("The statute expressly excludes only the period 'from the filing of the [pretrial] motion through the * * * disposition of * * * such motion.' The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations.") (internal citation omitted). In other words, if Congress intended preparation time to be encompassed within the § 3161(h)(1) exclusion, it would not have drafted subparagraph (D) in so restrictive a fashion.

The limitation expressed in subparagraph (D) is no accident. Whereas Congress specified a precise

starting and ending point for excludable time attributable to pretrial motions, the neighboring subparagraphs are written in far more capacious terms. Subparagraph (A), for example, excludes "delay resulting from any proceeding, *including* any examinations, to determine the mental competency or physical capacity of the defendant." 18 U.S.C. § 3161(h)(1)(A) (emphasis added). The word "including" makes clear Congress's intent that examinations not be the only type of competency proceeding excludable under § 3161(h)(1). Likewise, subparagraph (C) broadly excludes "delay resulting from any interlocutory appeal," without specifying any express or implicit limitation. 18 U.S.C. § 3161(h)(1)(C). Presumably, such permissive language renders excludable time spent preparing the appeal after the notice of appeal has been filed, not just the time between filing and disposition of the briefs.

Particularly when the provision is viewed in its statutory context, it is difficult to believe that Congress carefully calibrated the exclusion for pretrial motions under subparagraph (D) yet left the barn door open for other pretrial motion exclusions under the general standard articulated in § 3161(h)(1). Congress could have defined excludable time as "including" the time from filing to disposition. It did not. Rather, it carefully circumscribed the boundaries of subparagraph (D) to reach *only* time *after* such motions have been filed. The rule adopted by the court below renders superfluous all the language of subparagraph (D) that appears after the first comma—*i.e.*, it reads "delay resulting from any pretrial motion, from the filing of the motion * * * through * * * disposition" as if Congress had stopped after the first six words. Such an approach is

improper. See *United States* v. *Santos*, 128 S. Ct. 2020, 2028 n.6 (2008) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous."); *United States* v. *Menasche,* 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting *Inhabitants of Montclair Twp.* v. *Ramsdell,* 107 U.S. 147, 152 (1883)); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) ("[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows."); *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (interpreting the "residual clause" of 9 U.S.C. § 1 in light of its specific clauses).

2. The Eighth Circuit's decision misreads the text of the statute for yet another reason: Time spent preparing pretrial motions is not a delay "resulting from *other proceedings*" concerning the defendant. 18 U.S.C. § 3161(h)(1) (emphasis added). A "proceeding" regarding pretrial motions does not begin until—as the text of § 3161(h)(1)(D) envisions—the motion is actually filed.[7] Moreover, § 3161(h)(1) excludes only time "*resulting* from" such proceedings, which contemplates delays that *follow* from the commencement

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[7] Accordingly, the Second Circuit was misguided when it suggested in *Oberoi*, 2008 WL 4661454, at *10, that all pretrial motion preparation time is excludable under § 3161(h)(1) because the time necessary to prepare a *response* after filing is excludable under the express terms of subparagraph (D) (excluding time from "filing" through "disposition"). The "other proceeding" commences upon the filing of the motion.

of the "other proceeding," not those that *precede* or are merely associated with it.

Congress limited the reach of § 3161(h)(1) for good reason: Otherwise, virtually *all* pretrial delays would be excludable, eviscerating the statute. The principal argument advanced to support the Eighth Circuit's rule is that the examples of "other proceedings concerning the defendant" contained in § 3161(h)(1)(A)-(H) are merely illustrative. App., *infra*, 7a. That logic not only is flawed (see *supra* pp. 14-15), but also would apply with equal force to almost *any* time granted to prepare for trial. In other words, if pretrial motion preparation time is a delay "resulting from" a "proceeding," then so is time granted to "prepare" for any number of pretrial tasks.

Such an exception would swallow the rule. Most important, it would render superfluous significant portions of § 3161(h)(7). That section permits the exclusion of delays that result from a continuance that the judge grants to allow the defendant, among other things, "reasonable time necessary for *effective preparation*." 18 U.S.C. § 3161(h)(7)(B)(iv) (emphasis added). If such pretrial preparation time is automatically excluded under § 3161(h)(1), as the logic of the Eighth Circuit's rule requires, then § 3161(h)(7)(B)(iv) is unnecessary, because any pretrial preparation delay that comes within the ambit of § 3161(h)(7)(B)(iv) will already be excluded by § 3161(h)(1).

B. The Enactment History Forecloses The Eighth Circuit's Understanding Of § 3161(h)(1)

The text and structure of § 3161(h)(1) are in full accord with the drafters' stated intent. In 1979, Congress determined that the original version of Section 3161(h)(1)(D)—which at that time vaguely excluded "delay resulting from hearings on pretrial motions"—required "legislative clarification." S. Rep. No. 212, *supra*, at 20; see also Speedy Trial Act of 1974, Pub. L. No. 93-619, ch. 208 § 3161(h)(1)(E), 88 Stat. 2076, 2077-2078. An early re-draft supported by the Department of Justice excluded all "delay resulting from the *preparation* and service of pretrial motions and responses and from hearings thereon." H.R. 3630, 96th Cong., 1st Sess. § 5 (1979) (emphasis added). But the Senate Judiciary Committee struck that broad language in favor of the present formulation. See S. 961, 96th Cong., 1st Sess. (1979).

The Judiciary Committee's decision to eliminate preparation time was deliberate:

> Although some witnesses contended that all time consumed by motions practice, from *preparation* through their *disposition*, should be excluded, the Committee finds that approach *unreasonable*. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)[7](B) reasonable preparation time for pretrial motions in cases presenting *novel* questions of law or *complex* facts.

S. Rep. No. 212, *supra,* at 33-34 (emphasis added); see also *Henderson* v. *United States*, 476 U.S. 321, 336-337 (1986) (White, J., dissenting) (quoting this language from the Senate Report).

The House Judiciary Committee agreed to the Senate's exclusion of time only between filing and disposition. H.R. Rep. No. 390, 96th Cong., 1st Sess. 10 (1979). The amended version of the Act became law on August 2, 1979. See Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, § 4, 93 Stat. 328. As this Court has previously observed when considering a separate question regarding the application of § 3161(h)(1), that legislative history confirms that Congress specifically chose not to exclude pretrial motion preparation time under § 3161(h)(1). See *Henderson*, 476 U.S. at 327 n.8 (noting that Congress intended a broad exclusion for time "*after the submission of pretrial motions*," but not "time spent *preparing pretrial motions*") (quoting S. Rep. No. 212, *supra*, at 34).

This Court has previously recognized that the Speedy Trial Act's legislative history is a useful tool in interpreting its provisions. See, *e.g.*, *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235-236 (1985) (interpreting 18 U.S.C. § 3161(c)(2)). More particularly, the Court has relied upon congressional refusal to adopt a Department of Justice proposal as evidence of Section 3161(h)'s meaning. See *United States* v. *Taylor*, 487 U.S. 326, 339-340, 340 n.11 (1988) (noting relevance of Congress's rejection of the Department's "proposal to restart the 70-day period following recapture of a defendant who has fled prior to trial" in construing § 3161(h)(3)(A)); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few

principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quoting *Nachman Corp*. v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 392 -393 (1980) (Stewart, J., dissenting)). The history of § 3161(h)(1) is equally clear with respect to pretrial motion time. The Eighth Circuit's rule—which compels a result the drafters specifically deemed "unreasonable"—plainly violates Congress's stated intent.

III. This Case Presents A Recurring Issue Of National Importance

Whether § 3161(h)(1) requires the automatic exclusion of pretrial motion preparation time is a recurring and important question of federal law. As the many cases cited above make clear, this issue has arisen repeatedly and, indeed, has the potential to arise in almost every federal criminal prosecution. The Eighth Circuit's rule, moreover, undermines the important interests that the Speedy Trial Act protects.

A. This Issue Has Arisen Frequently And Can Arise In Virtually *Every* Federal Prosecution

The question presented here is no stranger to the federal courts. As explained above (*supra* pp. 7-13), ten federal courts of appeals have decided this question in recent years. Indeed, the Second Circuit decided this issue just several weeks ago. See *Oberoi*, 2008 WL 4661454 (2d Cir. Oct. 23, 2008).

The pervasiveness of this issue is no surprise. By its terms, the Speedy Trial Act applies in "*any* case

involving a defendant charged with an offense * * * in which a plea of not guilty is entered." 18 U.S.C. § 3161(a), (c) (emphasis added). Pretrial motions are themselves a feature of almost every case that goes to trial, and, consequently, whether such time is automatically excluded under § 3161(h)(1) is a question of great practical importance to the federal courts. More to the point, an area of the law so frequently applied and essential to the daily administration of criminal justice calls for the clarity and consistency that only this Court's review can provide.

B. The Eighth Circuit's Rule Undermines The Speedy Trial Act's Important Objectives

The Speedy Trial Act is no mere housekeeping statute; to the contrary, the Act safeguards important policies of our criminal justice system. By adding an automatic exclusion that Congress plainly did not intend, the rule adopted below distorts the Act's calibrated effort to advance crucial interests of the accused and the public.

1. Most important, the Act protects the defendant's ability to mount an effective defense. When trial is delayed, the likelihood increases that evidence will be lost or damaged and that witnesses will die, disappear, or forget events. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972); see also Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1898-1899 (2005). These are the "most serious" consequences of delay, "skew[ing] the fairness of the entire system." *Barker*, 407 U.S. at 532.

The Act also protects against excessive pretrial incarceration, the "core" of the right to a speedy trial. Brian P. Brooks, *A New Speedy Trial Standard for* Barker *v.* Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. Chi. L. Rev. 587, 596-597 (1994). Incarceration hinders a defendant's ability to mount a defense. It also can mean job loss, disruption of family life, and idle time spent without any recreation or rehabilitation. *Barker*, 407 U.S. at 532-533. "Imposing those consequences on anyone who has not yet been convicted is serious." *Ibid.* Even if an accused is not incarcerated during the period before trial, "he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Ibid.*

Legislators also recognized that some prosecutors will "rely upon delay as a tactic in the trial of criminal cases," H.R. Rep. No. 1508, 93d Cong. 7408 (1974), and the Act seeks to counter such abuses. To the same end, the Act discourages the bringing of hasty indictments. Because undue delay "could potentially result in [dismissal of the indictment with prejudice,] * * * the prosecution [has] a powerful incentive to be careful about compliance." *Zedner* v. *United States*, 547 U.S. 489, 499 (2006).

2. The Act was also designed "with the public interest firmly in mind." *Zedner*, 547 U.S. at 501. Speedy trials protect "confidence in the fairness and administration of criminal justice." S. Rep. No. 212, *supra*, at 6. This Court's recent holding in *Zedner* is instructive. In that case, the Court ruled that defendants may not prospectively waive their speedy trial rights. 547 U.S. at 500. The Court explained that "[a]llowing prospective waivers would seriously

undermine the Act because there are many cases * * * in which the prosecution, the defense, and the court would all be happy to opt out of the Act, *to the detriment of the public interest*." 547 U.S. at 502 (emphasis added). "Because defendants may be content to remain on pretrial release, and indeed may welcome delay," Congress chose not to empower them with the ability to circumvent the Act through waivers. *Id.* at 501-502 (citing S. Rep. No. 212, *supra*, at 29).

The Eighth Circuit's rule cannot be squared with the premises of *Zedner*. As the Fourth Circuit explained in rejecting an argument that delay attributable to a defendant's request should be excluded automatically, such an approach "denigrates the interest of the public" "by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Jarrell*, 147 F.3d at 318. The rule also pushes against "the legislative judgment that * * * the societal interest in prompt administration of justice * * * require[s], as a matter of law, that criminal cases be tried within a fixed period." S. Rep. No. 212, *supra*, at 6-7.[8]

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[8] This Court's recent grant of certiorari in *State* v. *Brillon*, 955 A.2d 1108 (Vt. 2008), cert. granted, 77 U.S.L.W. 3162 (U.S. Oct. 1, 2008) (No. 08-88), supplies no reason for refraining from resolving the statutory question here. The constitutional question presented in that case—whether delays attributable to a State-provided public defender are cognizable under the Speedy Trial Clause of the Sixth Amendment—is entirely distinct from the statutory question presented here, which has long divided the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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