No. 09-1498

IN THE
SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

Jason Louis Tinklenberg,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the time between the filing and disposition of pretrial motions that the parties and the court know from the time of filing "do[] not have the potential to cause any . . . delay," Pet. App. 16a, must be excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(D) (Supp. 2008).

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BRIEF IN OPPOSITION

Respondent Jason Tinklenberg respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. District Court Proceedings

In 2005, the government charged respondent Jason Tinklenberg in an indictment in the Western District of Michigan with one count of being a felon in possession of a firearm and two counts of possessing items used to manufacture methamphetamine. His initial appearance before a magistrate occurred on October 31, 2005.

After the initial appearance, the case did not move in a timely fashion, especially with respect to two competency evaluations that the district court ordered. Although the district court initially ordered the first evaluation to be completed within a period "not to exceed thirty days," CA6 ROA 36, it took several months to arrange and to be conducted. A second evaluation also took several weeks. Pet. App. 4a. The district court eventually found Tinklenberg competent to stand trial.

On July 25, 2006, the district court set the case for trial on August 14, 2006. Pet. App. 4a. In early August, the government made two "mundane," administrative motions – one to bring the gun it had seized into the courtroom as evidence at trial, and another to depose a witness who could not attend trial – that the parties and the court understood "would not affect the trial schedule." Pet. App. 20a. The district court quickly disposed of the motions, granting them both.

On Friday, August 11, the last business day before trial, Tinklenberg moved to have the indictment dismissed on the ground that the 70-day period under the Speedy Trial Act for commencing trial had expired (or would expire before trial). There is no dispute that from Tinklenberg's initial appearance through July 31, 2006, at least 60 non-excludable days expired. Pet. 6; Pet. App. 15a. Nor is there any dispute that 4 more days elapsed from August 4 through August 7, 2005, when no pretrial motions were pending and there was nothing else going on. *Id.*; *see also* Pet. App. 31a. Thus, a total of at least 64 non-excludable days unquestionably elapsed before Tinklenberg filed his motion.[1]

There are three independent reasons why at least seven more days should arguably be included in the calculation, thus causing a violation of the Act. First, nine days in August elapsed while the government's two pretrial motions and Tinklenberg's Speedy Trial motion – motions that the parties knew would not delay trial – were pending. Second, ten days in excess of the ten-day statutory allotment under § 3161(h)(1)(F)[2] for transporting defendants to and from examination elapsed while the government was transporting Tinklenberg for his competency evaluations. Third, several weeks in excess of the 30-day time period under 18 U.S.C. § 4247(b) for conducting competency evaluations elapsed before Tinklenberg was evaluated.

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[1] The trial court found the 69 days elapsed, Pet. App. 7a, 31a, during these periods, whereas the Sixth Circuit found that 64 days elapsed, Pet. App. 15a. This difference is immaterial because each of Tinklenberg's three arguments for adding additional time to the Speedy Trial clock would add more than seven days.

[2] Like the government, Tinklenberg will cite to the current version of the Act unless otherwise noted.

On August 14, 2005, the district court rejected Tinklenberg's Speedy Trial objection. Pet. App. 29a-32a; see also Pet. App. 33a-36a (denying Tinklenberg's motion for reconsideration on the issue).

Tinklenberg proceeded to trial on August 14, 2006. A jury convicted him of all three charges. The district court sentenced him to 33 months in prison, to be followed by three years of supervised release.

B. Court of Appeals Proceedings

The Sixth Circuit reversed the district court's Speedy Trial determination. The court found that time in which pretrial motions were pending in early August should not be excluded. The plain language of Section 3161(h)(1)(D), the court of appeals explained, excludes the time only during which those pretrial motions that cause, or at "have the potential to cause," delay are pending. Pet. App. 16a. "In light of the obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule," the nine days during which they were pending were properly includable under the Speedy Trial clock.

The Sixth Circuit partially rejected Tinklenberg's two alternative arguments. First, the Sixth Circuit agreed with Tinklenberg that under § 3161(h)(1)(F), time beyond ten days for transporting defendants to and from competency examinations is presumptively unreasonable. Pet. App. 13a. But, following circuit precedent, the Sixth Circuit further held that that ten-day period incorporated former Fed. R. Crim. P. 45(a), thereby excluding weekends and federal holidays from the period. Pet.

App. 14a (citing *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992)).[3] "Thus, although twenty calendar days passed" while Tinklenberg was being transported, the court of appeals held that "only two non-excludable days lapsed during that time: ten days were excludable under § 3161(h)(1)(F), six days were Saturdays or Sundays, and two days were federal holidays." Pet. App. 14a.

Second, the Sixth Circuit held, again following circuit precedent, that the 30-day limit under § 4247(b) for conducting competency evaluations "does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." Pet. App. 12a (quoting *United States v. Murphy*, 241 F.2d 447, 456 (6th Cir. 2001)).

The Sixth Circuit's ruling resulted in a finding that the statutory Speedy Trial Act had been violated. Because Tinklenberg had served his complete sentence, and had served the majority of his supervised release, the court ordered the case dismissed with prejudice. Pet. App. 21a-22a.

The government filed a petition seeking rehearing en banc. The Sixth Circuit denied the petition, without any judges requesting a vote on it. Pet. App. 37a.

[3] At relevant times, Rule 45(a) provided that weekends and federal holidays did not count when calculating a period of time of less than 11 days. The Rule was amended in 2009 to dispense with the exclusion of weekends and holidays. See *infra* at 15 n.5.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit's Holding Is Narrow and Correct.

The government claims that the Sixth Circuit held that "pretrial motion delay is excludable [under 18 U.S.C. § 3161(h)(1)(D) of the Speedy Trial Act] only if the motion actually causes a postponement, or the expectation of a postponement, of the trial." Pet. 8. But the court of appeals actual holding in this case was actually much narrower. The Sixth Circuit held that the time while pretrial motions were pending was non-excludable not simply because there was no actual postponement or "expectation of postponement" of trial, but rather because of the affirmative "understanding of the parties and the court that the motions . . . would not affect the trial schedule." Pet. App. 20a. Thus, the motions here did not even have "the potential to cause any such delay." Pet. App. 16a.

The specific facts of this case illuminate the narrowness of the Sixth Circuit's holding. On July 25, 2005, the trial court told the parties that the case would go to trial on August 14, 2006. Pet. App. 4a. When the three motions at issue were filed in early August, the trial court advised the parties to handle them "so as not to delay trial." Pet. App. 19a; *see also id.* ("Neither the parties nor the district court expressed any intent to delay the trial in response to any of these three motions."). Indeed, the whole point of the government's motion to depose an essential witness who would be unavailable for trial was to preserve testimony in light of the fact that the trial date was fixed. Tinklenberg agreed that "the trial should [not] be delayed due to lack of [the] witness." CA6 ROA 114. Thus, the parties knew from the outset

of this filing, as well as the other two motions, that trial was scheduled for August 14 and that the motions would have no effect whatsoever on that schedule. "In light of the obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule," the Sixth Circuit refused to exclude under Section 3161(h)(1)(D) the time during which they were pending. Pet. App. 20a.

This holding comports with the text and purpose of the Speedy Trial Act. Section 3161(h)(1)(D) 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 [its disposition]." As the Sixth Circuit explained, the plain language of this provision requires that the filing of a pretrial motion somehow cause some "delay," or at least "have the potential to cause . . . delay," in order to exclude the time while it is pending. Pet. App. 16a-17a. If the parties know from the moment that pretrial motions are filed that they will not affect the scheduled trial date, it is impossible to say that any delay "result[s] from" the motions.

The government protests that this outcome is "arbitrary," "formalistic," and contrary to "the Act's purpose." Pet. 14, 16. But "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly v. Dollar Park & Fly*, 469 U.S. 189, 194 (1985). And "[u]nder this Court's precedents," when the meaning of the statutory language is clear, that is also "the

end" of its analysis. *Zuni Public Sch. Dist. v. Dept. of Educ.*, 550 U.S. 81, 93 (2007). "It is not for [this Court] to rewrite the statute so that it covers only what [it] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010).

In any event, it is the government's position, not the Sixth Circuit's holding, that contravenes the goal of the Speedy Trial Act. The purpose of the Act purpose is to "vindicate the public interest in the swift administration of justice" by "ensuring speedy trials." *Bloate v. United States*, 130 S. Ct. 1345, 1355-56 (2010); *accord Zedner v. United States*, 547 U.S. 489, 502 (2006). Here, there is no question that if no pretrial motions had been filed in the days leading up to Tinklenberg's trial, the Act's clock would have expired before trial commenced. It is thus would be utterly arbitrary and formalistic to allow the mere filing of "mundane" motions that everyone knew would not delay trial to excuse an otherwise unquestionable Speedy Trial Act violation. Pet. App. 20a. Indeed, allowing such motions always to toll the Speedy Trial clock would encourage the government to file pre-trial motions to frustrate the purpose of the Act. *Cf.*, *United States v. Brown*, 285 F.3d 959, 962 (11th Cir. 2002) ("If the government could extend the seventy-day period merely by filing a request to set a trial date, or if the court could ignore its obligation to set a timely trial date, there would be nothing left of the requirements of § 3161(h)(8) and no teeth in the Speedy Trial Act as a whole.")

Nor, contrary to the government's contention, Pet. 10-11, does the Sixth Circuit's holding contravene this Court's decision in *Henderson v. United States*, 476 U.S. 321

(1986). *Henderson* held that any delay caused by pretrial motions must be excluded under Section 3161(h)(1)(D), regardless of whether the "delay . . . is reasonably necessary." 476 U.S. at 330. The Court in *Henderson*, in other words, took it as a given that the pretrial motions had delayed trial. Thus, as the Sixth Circuit recognized, "*Henderson* did not address whether time is excluded *when no delay occurs at all*" because the parties know from the outset that the motions will not affect the trial schedule. Pet. App. 19a (emphasis added).

To the extent that this Court has addressed *that* question, it strongly suggested just last Term in *Bloate v. United States*, 130 S. Ct. 1345 (2010), that such time should *not* be excluded. *Bloate* held that time that a district court grants to a party to prepare pretrial motions is not excludable under Section 3161(h)(1)(D). In the course of that holding, this Court instructed that Act's focus on "delay" means what its plain language says: "Section 3161(h) specifies the types of *delays* that are excludable." 130 S. Ct. at 1351 (emphasis added); *see also id.* at 1352 ("The eight subparagraphs in subsection (h)(1) address the automatic excludability of *delay generated* for certain enumerated purposes.") (emphasis added). Subparagraph (h)(1)(D) follows this mold: it "governs the automatic excludability of *delays 'resulting' from* . . . proceedings involving pretrial motions." 130 S. Ct. at 1352 (emphasis added). Thus, as both the majority and dissent in *Bloate* intonated, "delays" – not simply all periods of time while motions are pending – "are excludable" under subparagraph (h)(1)(D). 130 S. Ct. at 1351 (emphasis added); *see also id.* at 1361 (Alito, J., dissenting) ("delay 'resulting from' a pretrial motion is delay that

occurs as a consequence of such a motion"). A contrary rule, the Court suggested, would "threaten the Act's manifest purpose of ensuring speedy trials by construing the Act's automatic exclusion exceptions in a manner that could swallow the 70-day rule." 130 S. Ct. at 1355.

II. The Sixth Circuit's Holding On The Facts Of This Case Does Not Conflict With Any Decision From Any Other Court of Appeals.

The government claims that the Sixth Circuit's decision conflicts with decisions from all eleven other federal circuits that hear criminal cases. Stated at a high level of generality, is it true, as the Sixth Circuit acknowledged, that other circuits have held that "the filing of any pretrial motion stops the Speedy Trial clock," regardless of whether the motion turns out to affect the trial's start date. Pet. App. 16a. But none of those decisions addressed the particular situation at issue here, in which there was an "obvious understanding of the parties and the court that the motions filed just before trial would not affect the trial schedule." Pet. App. 20a. Even if a court holds that it will not conduct *post hoc* inquiries into whether motions actually delayed trial, there would be good reason to distinguish the general, typical situation in which the parties do not know whether a motion will delay trial (and thus must assume that it has the potential to do so) from the situation in which the parties know from the moment a motions is filed that it "does not have the potential to cause any such delay." Pet. App. 16a.

Indeed, three circuits have already suggested that they would distinguish between those situations and agree with the Sixth Circuit's holding here. In

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995), the Second Circuit confronted a case in which a district court had tabled a pretrial motion, allowing it to remain pending until trial was complete. Although the Second Circuit generally excludes time while pretrial motions are pending even when the motions do not cause actual delay, *see United States v. Cobb*, 697 F.2d 38, 42 (2d Cir. 1982), it refused to exclude the time during the motion's pendency under Section 3161(h)(1)(D). *Gambino*, 59 F.3d at 359. The Second Circuit explained that "Congress envisioned that the speedy trial clock be tolled when the expenditure of judicial resources to decide the motion would interfere with the case expeditiously proceeding to trial, and not tolled when the postponement of a pretrial motion until after trial does not affect a trial court's ability to proceed." *Id.* Because the motion did not "consume the court's time and attention," it did not give rise to excludable time. *Id.*

The Ninth Circuit reached the same conclusion on the same basic facts in *United States v. Clymer*, 25 F.3d 824, 830 (9th Cir. 1994). In words strongly resembling the Sixth Circuit's reasoning here, the Ninth Circuit held that time may be may be excluded under Section 3161(h)(1)(D) "only when [delay] in some way results from the pendency of the motion." *Id.* The Ninth Circuit has adhered to this holding, even while later adopting the same general rule that the Second Circuit has adopted. *See United States v. Vo*, 413 F.3d 1010, 1014-15 (9th Cir. 2005). The First Circuit has also recognized the distinction between motions that are capable of causing delay and those that are not, suggesting it might agree with the Second and Ninth Circuits. *See United States v. Salimonu*, 182 F.3d 63, 68-69 (1st Cir. 1999).

In short, it is not at all clear that any other circuit would reject the Sixth Circuit's holding on the facts here. Nor is it clear that the Sixth Circuit would reject the general rule followed by other circuits. Only by allowing further percolation will this Court be able to find out whether a conflict truly exists.[4]

III. There Is No Need To Address The Question Presented Now; Indeed it Would be Premature to Do So.

It appears to be quite unusual for the parties to have a clear understanding from the moment a pretrial motion is filed that the motion does not even have the potential to delay proceedings in any way. But even if the scenario did arise with sufficient frequency such that the question of whether apply Section 3161(h)(1)(D) in such circumstances were an issue of sufficient importance to warrant this Court's attention, there are three reasons why there would be no need to address the issue in this case. Indeed, it would be premature to consider the issue now.

First, Tinklenberg has already served "the entirety of his [prison] sentence" and a portion of the 3-year term of supervised release the district court imposed. Pet. App. 22a; *see also* Pet. 7 n.3. Thus, little additional punishment would accomplished by reinstating Tinklenberg's convictions.

Second, allowing further percolation would not appear to threaten any other pending prosecutions. The government asserts that review is necessary because the

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[4] A case is currently pending in the Seventh Circuit, for example, in which a defendant is asking the Court to adopt the reasoning of *Tinklenberg*. *See* Brief for Appellate Tylman at 17-19, *United States v. Hills et al.* (7th Cir. Nos. 09-2151, 09-2152, 09-2153), *available at* 2010 WL 541-13, *with* Brief for the United States at 19-21, *United States v. Hills et al.* (7th Cir. Nos. 09-2151, 09-2152, 09-2153) No. 09-2151 (7th Cir.), *available at* 2010 WL 2665103.

Sixth Circuit's decision "complicates" litigation concerning pretrial motions and will "produce great uncertainty" under the Act. Pet. 16. But the government does not cite any actual cases or empirical facts to support its claims; nor does it cite a single indictment that has been dismissed pursuant to *Tinklenberg*.

Indeed, the facts that are available suggest the opposite of what the government asserts. The Sixth Circuit's decision has been on the books for almost one year, and district courts in the Sixth Circuit appear to be administering *Tinklenberg* without any difficulty whatsoever. Several decisions are available that advise the parties after motions are filed whether the motions will delay trial and thus toll the Speedy Trial clock. *See United States v. Jerdine*, 2009 WL 4906964, at *5 (N.D. Ohio 2009) ("The Court finds that Mr. Jerdine's motions are complex in nature and that the time required to rule upon these motions causes a delay of the trial and, thus, creates excludable time."); *United States v. Sutton*, 2009 WL 5196592, at *1 (E.D. Tenn. 2009) (same) *United States v. Abernathy*, 2009 WL 4506417, at *3-4 (E.D. Mich. 2009) (same); *United States v. Mayes*, 2009 WL 4784000, at *1 (E.D. Tenn. 2009) (same).

To the extent that the government further urges review based on its speculation that the "logic" of the Sixth Circuit's decision "could" lead to other problematic holdings concerning other parts of the Act, Pet. 17, it suffices for now to say that no court has issued any such holdings. As with the government's other predictions, there is no reason not to wait and see what happens. *If* any problems arise down the

road, the government can seek review at that point and this Court can decide, based on actual case law, whether to grant review.

Third, it would be especially premature for this Court to step in now because the circuits here not yet have had an opportunity to reassess their Section 3161(h)(1)(D) jurisprudence in light of this Court's recent decision in *Bloate.* As explained above, *Bloate*'s reasoning strongly supports the Sixth Circuit's decision. *See supra* at 8-9. Indeed, *Bloate*'s insistence of giving effect to the plain language of the Act abrogated the law in eight circuits that, unlike the Sixth Circuit here, had departed from the statutory text. *See* 130 S. Ct. 1351 n.5, 1354. This Court's customary practice is to allow lower courts an opportunity to absorb its new decisions before sweeping in to revisit statutory subjects it has just addressed. There is every reason to follow that practice here.

IV. Even if this Court Reversed the Sixth Circuit's Holding Regarding The Pretrial Motions, It Would Still Be Required to Find a Speedy Trial Act Violation.

This case also presents a poor vehicle for addressing the pretrial-motion excludability rule in Section 3161(h)(1)(D) because regardless of whether any time during which the August motions were pending should be included in the Speedy Trial calculation, the Act was violated here for two other independent reasons.

First, all 10 days beyond the 10 *calendar* days that elapsed while the government was transporting Tinklenberg for competency determinations should have been included in Tinklenberg's Speedy Trial calculation. Section 3161(h)(1)(F) presumes that "any time consumed in excess of ten days from the date of . . . an order directing

transportation" to and from a place of "examination" is unreasonable and therefore non-excludable. 18 U.S.C. § 3161(h)(F); *see* Pet. App. 12a-13a. Relying on circuit precedent, the Sixth Circuit held that this ten-day period for transportation incorporated former Fed. R. Crim. P. 45(a), which provided that any time period "specified in [the Rules of Criminal Procedure, any local rule, or any court order" that was less than 11 days should exclude weekends and federal holidays. Pet. App. 14a (citing *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992)). Thus, the Sixth Circuit included only 2 of the excess 10 calendar days in Tinklenberg's calculation.

This was a legal error. As other courts have held, the "time exclusion [in former Rule 45(a)] for weekends and holidays applies to 'any period of time specified in these rules, any local rule, or any court order;' the Rule omits application of the exclusion of times specified by statute[]. Therefore, . . . [a] court [should] not exclude weekends and holidays in calculating the ten-day period to transport a defendant." *United States v. Williamson,* 409 F.Supp.2d 1105, 1107 n.1 (N.D. Iowa 2006); *see also United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996) (not excluding weekends or holidays under Section 3161(h)(1)(F)); *United States v. Noone*, 913 F.2d 20, 25 (1st Cir. 1990) (same); *United States v. Castle,* 906 F.2d 134, 137 (5th Cir. 1990) (same). Indeed, applying former Rule 45(a) to this situation would violate the Rules Enabling Act, 28 U.S.C. § 2072, which specifies that the Rules of Criminal Procedure may not "abridge . . . or modify any substantive right," including the right to speedy trial provided in

the Speedy Trial Act. *See United States v. Daychild*, 357 F.3d 1082, 1093 n.13 (9th Cir. 2004).[5]

Second, the Sixth Circuit should not have excluded the time beyond 30 days that elapsed with respect to respondent's competency evaluations. As the Sixth Circuit acknowledged, 18 U.S.C. § 4247(b) provides that competency examinations such as the ones at issue here must be completed within 30 days. Pet. App. 11a. Thus, in crafting the exclusion in Section 3161(h)(1)(A) of the Speedy Trial Act for competency examinations, Congress would have presumed that no delays respecting such examinations would, or could, run more than the 30 days allowed in 18 U.S.C. § 4247(b).

The Sixth Circuit and other courts have declined to incorporate this 30-day limit into the Act's excludable day rules. Pet. App. 12a. But either the Act incorporates counting mechanisms found in other statutes in rules or it does not. If it does, then the several weeks beyond the 30-day time period for conducting Tinklenberg's compentency examinations cannot be excluded. If, however, the Act does not incorporate outside statutes and rules, then former Rule 45(a) should not have applied here. Either way, the Sixth Circuit should have included more than seven

[5] Even though the Sixth Circuit's decision conflicts with these holdings, there would be nothing to gain by resolving this conflict. Rule 45(a) was amended in 2009 to dispense with the previous requirement of excluding Saturdays, Sundays, and holidays for time periods shorter than 11 days. *See* Fed. R. Crim. P. 45(a)(1)(B). Thus, it no longer matters whether Rule 45(a) applies to Section 3161(h)(1)(F)'s 10-day transportation rule.

additional days in Tinklenberg's Speedy Trial calculation. The Act was thus violated irrespective of the Sixth Circuit's pretrial motions holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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