No. 08-728

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

REPLY BRIEF FOR THE PETITIONER

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Respondent opposes certiorari but concedes the key factors supporting a grant, while offering only flimsy reasons to ignore them. Respondent concedes that the courts of appeals are deeply divided as to whether pretrial motion preparation time is automatically excludable under 18 U.S.C. § 3161(h)(1). Respondent makes no attempt to explain how § 3161(h)(1)(D)'s *specific* treatment of pretrial motions—excluding only the time from "filing" to "disposition"—can be squared with reading the *general* standard in § 3161(h)(1) to encompass preparation time.[1] Respondent also does not contest that § 3161(h)(1)'s drafters *rejected* a specific proposal to exclude pretrial motion preparation time automatically. Finally, respondent does not dispute that this issue arises virtually daily and is squarely presented here.

Respondent nevertheless suggests that this conflict is "of limited practical significance," Opp. 7, because a *separate* provision of the Speedy Trial Act—18 U.S.C. § 3161(h)(7)'s "ends-of-justice" exclusion—could conceivably apply. Remarkably, however, respondent never even tries to explain how stretching § 3161(h)(7) to exclude automatically pretrial motion preparation time can be squared with the statutory scheme. Respondent's theory would render § 3161(h)(1) superfluous when applied to routine pretrial motions. Respondent's theory also contravenes the unanimous decision in *Zedner* v. *United States*, 547 U.S. 489 (2006), which held that § 3161(h)(7) was "meant to give district judges a

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[1] Respondent has elected to refer to the Act's pre-2008 statutory designations. Opp. 2 n.1. We continue to use the *current* designations. The differences, both parties agree, are inconsequential.

measure of flexibility in accommodating *unusual, complex*, and *difficult* cases," but should not be read to "subvert the Act's detailed scheme." *Id.* at 508-509 (emphasis added).

Respondent attempts to manufacture a "vehicle" defect where none exists. Respondent concedes that petitioner is entitled to relief if the pretrial motion preparation time at issue here is not excludable under § 3161(h)(1). Respondent argues, however, that a portion of that time should be excludable because the "functional equivalent" of a motion was pending for several days. This is baseless. Respondent failed to raise this argument in the courts below and, in any event, points to no authority holding that the waiver in question represents the "functional equivalent" of a pretrial motion under § 3161(h)(1).

I. Respondent Concedes That The Courts Of Appeals Are Deeply Divided On The Question Squarely Presented Here

A. Respondent concedes that "the courts of appeals have divided" on the question presented here. Opp. 7. Respondent acknowledges that "the Fourth and Sixth Circuits have concluded that [pretrial motion] preparation time cannot be excluded under 18 U.S.C. 3161(h)(1)" because the specific sub-paragraph addressing the exclusion of pretrial motion preparation time declares excludable time only from the "filing" of the motion to its "disposition." Opp. 9 (citing *United States* v. *Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993)). Respondent also agrees that "[t]he majority of courts of appeals, including the court below," have reached the opposite conclusion,

Opp. 8, reasoning that preparation time is automatically excludable under § 3161(h)(1) because the list of specifically enumerated exclusions is "'illustrative rather than exhaustive,'" *id.* at 9 (quoting *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985)). This stark conflict warrants this Court's review.

Review is even more essential, however, because—as explained in the petition, Pet. 13-21—the majority rule is so clearly wrong. Respondent does not even attempt to explain how the decision below can be reconciled with § 3161(h)(1)'s plain text and manifest purpose. Most obviously, reading § 3161(h)(1) to render pretrial motion preparation time automatically excludable renders the specific limitation set forth in subparagraph (D) meaningless. Why would Congress have instructed that time relating to pretrial motions be excluded from the "filing" of the motion to the "disposition" of the motion if it intended that such preparation time be automatically excluded under the generic standard in § 3161(h)(1)? Such a reading violates settled canons of interpretation and the structure of the Act. See Pet. 14-18. Tellingly, respondent offers no answer.

Nor does respondent dispute that Congress considered—but *rejected*—a specific proposal to include pretrial motion preparation time within the automatic exclusion of § 3161(h)(1). See Pet. 19-21. The relevant committee indicated that it would be "unreasonable" to exclude "all time consumed by motions practice, from *preparation* through their *disposition*." S. Rep. No. 212, 96th Cong., 1st Sess. 33-34 (1979) (emphasis added). This Court has recognized repeatedly and recently that the Speedy Trial Act's legislative history is a useful interpretive

aid (*e.g.*, *Zedner*, 547 U.S. at 501-502 (2006); *United States* v. *Taylor*, 487 U.S. 326, 334-335, 340 n.11 (1988)), but respondent ignores it.

B. Respondent states that "this case does not present the question whether preparation time granted by a district court *sua sponte* or as part of a standing pretrial order, rather than at a defendant's request, is excludable" under § 3161(h)(1). Opp. 7-8 n.2; see *id.* at 11 n.3. But respondent (correctly) stops short of suggesting that this hypothetical distinction somehow bars review in this case. Even if it matters whether pretrial motion preparation time is *requested* or simply *granted*—and respondent points to no textual reason why it should—respondent concedes that the circuits are squarely divided when the defendant requests it.[2]

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[2] Respondent acknowledges that the Sixth Circuit found a speedy trial violation "based in part on a delay resulting from [a] schedule for filing pretrial motions set by the district court at the defendant's arraignment." Opp. 11 n.3 (citing *Moran*, 998 F.2d at 1370). It then tries to distinguish *Moran* by stating that "[a] routine scheduling order set by the court *sua sponte* presents a different questions from the question presented here." Opp. 11 n.3. That assertion is unexplained, and it is unclear whether the Sixth Circuit considered the time at issue to have been granted *sua sponte* or at least in part at the defendant's request. See *Moran*, 998 F.2d at 1369 ("The [district] court later granted a continuance to allow the defendants to file suppression motions and to avoid scheduling conflicts for Moran's counsel."). The Sixth Circuit never suggested, moreover, that its holding turned on how the time was granted. Rather, the court explicitly rejected the reasoning of courts that had drawn such distinctions. See *id.* at 1370-1371. And in *United States* v. *Dunbar*, 357 F.3d 582 (6th Cir. 2004), vacated, 543 U.S. 1099, reinstated in relevant part, 411 F.3d 668, 669 (6th Cir. 2005), the Sixth Circuit reaffirmed that *Moran* "held that time *requested* to

In any event, the question presented here—"[w]hether time granted to *prepare* pretrial motions is excludable under [18 U.S.C.] § 3161(h)(1)," Pet. i—encompasses either situation. The Court may elect to decide this case on the narrowest grounds possible (*i.e.*, deciding only the issue of time specifically requested by the defendant), but it is within the Court's power to offer more general guidance. Respondent does not suggest otherwise. And such guidance is needed because, as petitioner has explained, Pet. 12 n.5, and respondent concedes, Opp. 7 n.2, those courts that have held that defendant-requested time is excludable under § 3161(h)(1) are divided as to whether time granted *sua sponte* or as part of a scheduling order is likewise excludable. This further conflict underscores the need for certiorari.

II. The Significance Of The Issue Is Not Diminished By The Fact That *Some* Pretrial Motion Preparation Time May Be Excludable Under The Specific Conditions Prescribed By § 3161(h)(7)

Respondent claims that the deep division among the courts of appeals is of "limited significance" because "courts that have held that a defendant's pretrial motion preparation time is not excludable under Section 3161(h)(1) have made clear that such time is nevertheless subject to exclusion under the

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prepare pretrial motions may not be excluded" under § 3161(h)(1). 357 F.3d at 595 (emphasis added). Respondent notes that the request in *Dunbar* was mutual (*i.e.*, by stipulation) rather than unilateral, Opp. 9, but does not suggest that that distinction would make any difference.

'ends of justice' provision of Section 3161(h)[(7)]." Opp. 10. Not so. One glaring defect in respondent's theory that § 3161(h)(7) can be read to require the automatic exclusion of pretrial motion preparation time is that it renders § 3161(h)(1)'s specific treatment of such time superfluous. See *United States* v. *Santos*, 128 S. Ct. 2020, 2028 n.6 (2008) (plurality opinion) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous."). Moreover, respondent's assertion that courts in the Fourth and Sixth Circuits will resort to the ends-of-justice exclusion to exclude routine pretrial motion preparation time is plainly mistaken.

A. First, respondent ignores the elemental differences between § 3161(h)(1) and § 3161(h)(7). Section 3161(h)(1) operates as an *automatic exclusion*. That is, if a period of delay—in this case, time spent preparing pretrial motions—falls under § 3161(h)(1), a district court *must* exclude that time from the speedy trial calculation. See 18 U.S.C. § 3161(h)(1).

By contrast, the ends-of-justice exception set forth in § 3161(h)(7) is far from automatic. Time may be excluded under § 3161(h)(7) *only if* certain "detailed requirements" of the statute are met. *Zedner*, 547 U.S. at 508. Specifically, a district court must find 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). But even that is not enough. The district court must further "set[] forth, in the record of the case, either orally or in writing, its reasons." *Ibid.* And, as respondent acknowledges, "[s]uch findings must be made at or before the time the Court rules on a

motion to dismiss for an STA violation." Opp. 2 (citing *Zedner*, 547 U.S. at 507).

Congress's decision not to allow the automatic exclusion of pretrial motion preparation time—under § 3161(h)(1) ***or*** under § 3161(h)(7)—was a careful one. As the petition explained, automatic exclusion was deemed "unreasonable." Pet. 19 (quoting S. Rep. No. 212, *supra*, at 33-34 (1979)); see also *Jarrell*, 147 F.3d at 318. Instead, Congress decided that such time should be excluded only in certain specific circumstances, chief among them when "failure to grant [the] continuance * * * would * * * make * * * proceeding impossible, or result in a miscarriage of justice," 18 U.S.C. § 3161(h)(7)(B)(i), and when "the case is so unusual or so complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by [the Speedy Trial Act]," *id.* § 3161(h)(7)(B)(ii). Respondent disputes none of this.

Zedner confirms that the ends-of-justice exception is not the panacea respondent claims. In *Zedner*, the Court held that a district court that had issued a continuance in violation of § 3161(h)(7) could not correct its error retrospectively. 547 U.S. at 506-509. In so holding, the Court made clear that district courts may not rely on § 3161(h)(7) as a catch-all to exclude otherwise unexcludable time: "Congress clearly meant to give district judges a measure of flexibility in accommodating *unusual*, *complex*, and *difficult* cases. But it is equally clear that Congress * * * saw a danger that such [ends-of-justice] continuances could get out of hand and *subvert the Act's detailed scheme*." *Id.* at 508-509 (emphasis added). Respondent's claim that courts should evade the constraints of § 3161(h)(1) by resorting to

§ 3161(h)(7) is the sort of subversion unanimously rejected in *Zedner*.

B. Respondent's further claim that there is "no case * * * in which a court that follows the minority rule has found a violation of the STA, and thus dismissed an indictment, based on time the defendant himself requested to prepare pretrial motions," Opp. 10-11, is both beside the point and misleading.

First, the absence of scores of cases in which indictments have been dismissed under the minority rule does not indicate (as respondent claims) that the rule is easily evaded by distorting other provisions of the Speedy Trial Act. Rather, it suggests only that the relevant actors have conformed to the Act. That is, where routine pretrial motion preparation time is not automatically excludable, prosecutors and courts ensure that trials commence on time. The sanction for violating the Speedy Trial Act—*i.e.*, dismissal of the indictment—requires as much.

In any event, respondent's claim that courts will not actually dismiss an indictment on the basis of non-excludable pretrial motion preparation time is ill founded. As previously explained, that assertion rests largely on its reading of the Sixth Circuit's decision in *Moran*. See *supra*, pp. 4-5 n.2. And in respondent's other direct authority, *Jarrell*, the only reason the Fourth Circuit did not dismiss the indictment was because the court *retrospectively* examined whether the ends-of-justice exception could have applied. 147 F.3d at 319. As respondent admits, Opp. 2, this Court has since held that retrospective factfinding under § 3161(h)(7) is forbidden. See *Zedner*, 547 U.S. at 507.

Moreover, if respondent is correct that the Fourth and Sixth Circuits' reading of § 3161(h)(1) can be

avoided by pursuing an ends-of-justice exclusion, then one would expect to see numerous cases from these jurisdictions excluding routine periods of pretrial motion preparation time under § 3161(h)(7). Tellingly, respondent offers no such cases. To the contrary, these courts enforce that provision consistently with the strict limitations that its text requires. *E.g.*, *United States* v. *Pahutski*, No. 3:07cr211, 2008 WL 2372063, at *1 (W.D.N.C. June 6, 2008) (granting a continuance pursuant to § 3161(h)(7) for preparing pre-trial motions in light of the "extensiveness and complexity of * * * the issues); *United States* v. *Alkhallefa*, No. 3:07-CR-165, 2008 WL 703720, at *1 (E.D. Tenn. Mar. 13, 2008) (same in a "complex" case presenting "peculiar circumstances" and a "novel question of law"); *United States* v. *Harden*, 10 F. Supp. 2d 556, 558-559 (D.S.C. 1997) (continuance granted to prepare for trial not excludable under § 3161(h)(7) because request was impermissibly grounded in "general congestion of the court's calendar").

* * *

Respondent's claim that courts need only substitute § 3161(h)(7) for § 3161(h)(1) ignores the careful choice Congress made in enacting these as discrete provisions. Furthermore, respondent does not dispute that the Speedy Trial Act is applied daily throughout the federal courts. Accordingly, the Act's proper interpretation presents a recurring issue of national importance notwithstanding respondent's suggestion that there may be a clever—but legally unsound—way to evade the issue. See Pet. 21–22.

III. There Is No "Vehicle" Problem

It is uncontested that, if the entire time between September 7 and October 4 was not automatically excludable under § 3161(h)(1), then the district court violated the Speedy Trial Act's 70-day limit. Pet. App. 6a-8a. In a final bid to evade review, respondent suggests that this case is "not a suitable vehicle for resolution of the question presented" because a portion of the disputed pretrial motion preparation time could have been excluded anyway. Opp. 11-12. That is simply wishful thinking. Respondent forfeited any such argument by failing to present it to the Eighth Circuit, and, in any event, it is wrong.

Respondent contends that petitioner filed the "functional equivalent" of a pretrial motion on September 25 when he notified the district court of his intention to waive his right to file pretrial motions. Opp. 11-12 (quoting *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993)). Accordingly, respondent claims, the period of "preparation time" terminated, and the 10 days from September 25 to October 4 were time between "filing" and "disposition" of a pretrial motion—excludable under § 3161(h)(1)(D) because the matter was "pending" during that time. *Ibid.*

For starters, respondent never raised this argument in the Eighth Circuit or in the district court. In its brief to the Eighth Circuit, respondent characterized the entire "period from September 7, 2006 through October 4, 2006" as the time "when [petitioner] asked the district court for an extension of time to file pretrial motions." Gov't C.A. Br. 17. Respondent never even hinted that petitioner filed the "functional equivalent" of a pretrial motion on

September 25, terminating preparation time. Nor did respondent make that assertion to the district court. See Gov't Resp. ¶ 4. As this court has long recognized, arguments "not raised" or decided below are "waived" on review. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Accordingly, respondent is mistaken that reversal of the decision below will have no impact on petitioner's case.

What is more, respondent offers scant support for its assertion that the September 25 submission was the "functional equivalent" of a pretrial motion. Respondent avers only that the submission "required a hearing * * * and served essentially as a motion for leave to waive the right to file pretrial motions." Opp 11-12 (citations omitted). And it cites two cases standing only for the general proposition that time between filing and disposition of the functional equivalent of a pretrial motion is excludable under § 3161(h)(1)(D). *Id.* at 12. Neither case establishes, however, that waivers of the right to file pretrial motions are such functional equivalents. By contrast, the functional movant in *Hohn* asked the court to revoke Hohn's pretrial release from jail. 8 F.3d at 1304. Similarly, in *United States* v. *Jorge*, the functional movant filed a discovery request for laboratory reports. 865 F.2d 6, 11 (1st Cir. 1989). Here, petitioner did not "move" the court for any affirmative orders or relief against the respondent. He simply announced his willingness to waive his right to file pretrial motions at the pretrial motions hearing that, as respondent acknowledges (Opp. 4), had already been scheduled. It strains credulity to suggest that any court would treat that as the "functional equivalent" of a pretrial motion, and respondent has identified no decision suggesting otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2009