No.

In the Supreme Court of the United States

JIMMIE EUGENE WHITE, II, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH 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 information or indictment be filed within 30 days of a defendant's arrest, subject to certain excludable delays. *Bloate* v. *United States*, 559 U.S. 196, 203 (2010). In addition to certain enumerated automatic exclusions not at issue here, § 3161(h)(7) of the Act "permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes *on-the-record findings* that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Zedner* v. *United States*, 547 U.S. 489, 498–99 (2006) (emphasis added). "[W]ithout on-the-record findings" reflecting that the district court considered factors specified in the Act and articulating "*its reasons* for finding that the ends of justice are served and they outweigh other interests[,] * * * there can be no exclusion" under § 3161(h)(7). *Id.* at 506–07 (emphasis added).

The question presented is:

Whether, notwithstanding the plain language of § 3161(h)(7) of the Speedy Trial Act and this Court's decision in *Zedner*, a district court may exclude time pursuant to a stipulation between the parties without making its own "on-the-record findings" that the ends of justice served by a continuance outweigh the interests of the defendant and the public in a speedy trial.

PARTIES TO THE PROCEEDINGS

Jimmie Eugene White, II, was the appellant in the United States Court of Appeals for the Sixth Circuit. Respondent the United States of America was the appellee.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a–34a) is reported at 920 F.3d 1109. The district court's and magistrate judge's orders are unreported but are reproduced in the appendix. App.37a–38a; App.62a–71a.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2019. A timely petition for rehearing was denied on June 5, 2019. App.89a. On August 27, 2019, Justice Sotomayor extended the time to file this petition until November 1, 2019. *See* 19A219. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(b) of Title 18 of the United States Code provides in part:

> 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.

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

> 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:
>
> * * *
>
> (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.

Further statutory provisions are reproduced in the Appendix to this petition. App.90a–101a.[1]

STATEMENT

The Sixth Circuit's continued disregard for the Speedy Trial Act's plain language and this Court's precedent now brings petitioner's case before the Court for the second time. In 2017, the Sixth Circuit affirmed petitioner's conviction because, although he was not indicted within the 30-day period required by the Act, it concluded that a period of the intervening time during which the parties were engaged in plea bargaining was automatically excludable from the speedy trial calculation under § 3161(h)(1). App.77a–79a.[2] Petitioner sought review in

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[1] Before a recent amendment to the Speedy Trial Act, the ends-of-justice exception was codified at 18 U.S.C. § 3161(h)*(8)*. The recent amendment resulted in a renumbering of § 3161(h), but did not change the text of the ends-of-justice provision itself. Judicial Administration & Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291, 4294. For clarity, all citations in this petition are to the current version of the statute.

[2] References to § 3161, § 3162, and their respective subsections are to Title 18 of the United States Code.

this Court and the Government conceded that the Sixth Circuit's decision was inconsistent with this Court's decision in *Bloate* v. *United States*, 559 U.S. 196 (2010). The Court then granted the petition, vacated the Sixth Circuit's judgment, and remanded for further consideration. App.88a.

On remand, the same Sixth Circuit panel by a sharply divided vote again affirmed petitioner's conviction, this time holding that although *Bloate* abrogated its prior decision as to automatic exclusion under § 3161(h)(1), the same delay was excludable as an "ends-of-justice" continuance under § 3161(h)(7). App.11a–17a. That provision permits the exclusion of time only if "the court, after considering certain factors, makes *on-the-record findings* that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Zedner* v. *United States*, 547 U.S. 489, 498–99 (2006) (emphasis added). Regardless of the defendant's agreement to a delay, "without on-the-record findings, there can be no exclusion under [§ 3161(h)(7)]." *Id.* at 507. Notwithstanding this clear statutory instruction, the Sixth Circuit found delay excludable in the absence of such findings based solely on the parties' stipulation. This Sixth Circuit decision is plainly inconsistent with the Speedy Trial Act's text and this Court's precedent.

The Sixth Circuit, however, is not alone in its misapplication of the Act. The circuits are divided about whether a district court must strictly comply with the Speedy Trial Act's mandate to make express, on-the-record findings where the parties agree that time should be excluded. The Second, Ninth, Tenth, Eleventh, and D.C. Circuits have correctly applied the Act's plain language and *Zedner*, holding that neither the parties' agreement to exclude time nor the surrounding context

can substitute for a district court's express, on-the-record findings required by § 3161(h)(7). On the other hand, the Fourth and Seventh Circuits, joined now by the Sixth Circuit, have adopted a "flexible" application of § 3161(h)(7), holding that the district court itself need not make the required findings where the court accepts the parties' stipulation to exclude time or the reasons for the continuance can be inferred from context.

Further review is urgently warranted to enforce *Zedner* and conclusively resolve this split of authority on a commonly arising issue under the Speedy Trial Act. Granting an exclusion of time under § 3161(h)(7) based solely on the parties' stipulation permits a district court to abdicate responsibility for independently determining whether a continuance serves the ends of justice, in contravention of congressional intent and "to the detriment of the public interest." *Zedner*, 547 U.S. at 502.

A. The Speedy Trial Act

1. "[T]he Speedy Trial Act comprehensively regulates the time within which a trial must begin." *Zedner*, 547 U.S. at 500. The Act was designed to further "the speedy trial protections afforded both the individual and society by the Sixth Amendment" by setting "fixed time limits" for criminal cases. S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979).

The Act requires that an information or indictment be filed within 30 days of arrest, § 3161(b), and that trial commence within 70 days after the later of (1) the filing of the information or indictment, or (2) the first appearance on the charges, § 3161(c)(1). "Section 3161(h) specifies * * * delays that are excludable from the calculation." *Bloate*, 559 U.S. at 203. Some "delays are automatically excludable"—specifically, those expressly enumerated in eight exemptions set forth in § 3161(h)(1).

Id. Other delays "are excludable only if the district court makes certain findings enumerated in the statute." *Id.*

2. The Act's "ends-of-justice" exception, set forth in § 3161(h)(7), "permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes *on-the-record findings* that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Zedner*, 547 U.S. at 498–99 (emphasis added). "This provision gives the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs." *Id.* at 499. Although "Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases," "it is equally clear that Congress * * * saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme." *Id.* at 508–09. "The strategy of [the ends-of-justice exception], then, is to counteract substantive openendednesss with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings." *Id.* at 509; see § 3161(h)(7)(B) (factors include complexity of case, need for pretrial preparation, and effect of delay on defendant's representation, among others).

"[W]ithout on-the-record findings" reflecting that the district court considered these factors and articulating its "reasons for finding that the ends of justice are served and they outweigh other interests, * * * there can be no exclusion." *Zedner*, 547 U.S. at 506–07. "[P]assing reference to" factors supporting the exclusion is inadequate. *Id.* at 507.

3. The Act "entitles [a criminal defendant] to dismissal of the charges if [the relevant] deadline is not met."

Bloate, 559 U.S. at 199 (citing § 3162(a)(2)). The Act's mandatory dismissal sanction serves a deterrence function and "is binding on [courts] whatever [they] may think of its wisdom." *United States* v. *Janik*, 723 F.2d 537, 546 (7th Cir. 1983) (Posner, J.). "A judge may not forgive a violation merely because the sanction that the legislature has provided for the violation seems silly." *Id.* "Dismissal, however, need not represent a windfall. A district court may dismiss the charges *without prejudice*, thus allowing the Government to refile charges or reindict the defendant." *Bloate*, 559 U.S. at 214 (citing § 3162(a)(1)).

4. Because the Speedy Trial Act is designed to protect both the defendant and the public interest in the efficient administration of justice, a defendant cannot prospectively waive the Act's application, *Zedner*, 547 U.S. at 500–01, "even if he believes it would be in his interest." *Bloate*, 559 U.S. at 211; accord *Zedner*, 547 U.S. at 501 ("[T]he Act was designed not just to benefit defendants but also to serve the public interest by, among other things, reducing defendants' opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment." (citations omitted)). As this Court made clear in *Zedner*, "[a]llowing prospective waiver[s] 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. Accordingly, "the Act demands that defense continuance requests fit within one of the specific exclusions set out in [§ 3161](h)." *Id.* at 500.

B. Factual and Procedural Background

1. On May 2, 2013, petitioner was arrested more than two years after a search warrant had been executed at his home. Two weeks later, petitioner's then-counsel and the Government stipulated that the preliminary hearing scheduled for May 23, 2013 should be rescheduled for June 7, and the intervening 15-day period "should be excluded from computing the time within which an information or indictment must be filed because the parties are engaged in plea negotiations, 18 U.S.C. § 3161(h)(1), and because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial. See 18 U.S.C. § 3161(h)(7)." App.35a–36a.

In an order entered the following day that attached the parties' stipulation, the magistrate judge stated: "This matter coming before the court on the stipulation of the parties, it is hereby ORDERED that good cause exists to extend the complaint and preliminary hearing in this case" and the intervening time "should be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act. 18 U.S.C. § 3161." App.37a–38a. The order neither referenced automatic exclusion for plea-related delays under § 3161(h)(1), nor found under § 3161(h)(7) that the ends of justice served by the continuance outweighed the public's and petitioner's interests in a speedy trial, let alone discussed any of the factors set forth in § 3161(h)(7)(B) that courts are required to consider before excluding time under that provision. The Government did not indict petitioner within the statutorily-required 30-day period. See App.102a–108a.

Petitioner moved for appointment of new counsel, arguing that his lawyer had stopped returning phone calls after petitioner asked that counsel move to dismiss

the indictment for violation of the Speedy Trial Act. See R.20, R.31 (motion for new attorney for failure to contest Speedy Trial Act violations). Following appointment of new counsel, petitioner moved to dismiss the indictment. See R.35. The district court denied the motion, concluding that "[t]here was no Speedy Trial Act violation" because although White was not indicted within 30 days, 15 days within that period were excludable "because the parties [were] engaged in plea negotiations," App.68a, and "[petitioner] and the government agreed that the time period should be enlarged." App.67a. The district court did not make any findings justifying the exclusion of time, instead relying entirely on the magistrate judge's order. App.53a ("I don't have to [make a determination regarding the basis for an exclusion under the Speedy Trial Act]. The Magistrate Judge made a finding and I can rely on that.").

After a jury trial, petitioner was convicted on all counts.

2. On appeal, petitioner urged reversal of his conviction on several grounds, including that the district court erred in denying his motion to dismiss the indictment on the basis of a Speedy Trial Act violation. The Sixth Circuit unanimously affirmed petitioner's conviction. With respect to the Speedy Trial Act issue, the court held that under then-circuit precedent, plea bargaining time was automatically excludable under § 3161(h)(1). App.77a–79a. The court did not address whether the time was independently excludable under § 3161(h)(7).

Petitioner sought review in this Court. The Government conceded that the Sixth Circuit's holding concerning the automatic exclusion of plea bargaining time was inconsistent with this Court's decision in *Bloate*. U.S. Br. in Opp'n to Pet. for Writ of Cert. 10–11, *White* v. *United States*, No. 17-270 (Nov. 30, 2017). The Govern-

ment, however, urged the Court to deny review because the district court's judgment could be affirmed on the independent ground that the time was properly excluded as an ends of justice continuance under § 3161(h)(7). *Id.* at 19–20. On January 8, 2018, this Court granted the petition, vacated the Sixth Circuit's judgment, and remanded for further consideration. App.88a.

3. The parties submitted supplemental briefing on remand regarding the effect of *Bloate* and whether, alternatively, the time at issue was excludable under § 3161(h)(7).

4. On April 10, 2019, a sharply-divided panel of the Sixth Circuit again affirmed petitioner's conviction, with each judge writing separately.

a. The panel unanimously held that this Court's decision in *Bloate* abrogated prior circuit precedent regarding the automatic exclusion of plea bargaining time. App.6a–8a.[3]

b. The panel majority (Judges Griffin and Guy), however, held that the period of delay was nonetheless excludable under the ends-of-justice exception, § 3161(h)(7), and affirmed petitioner's conviction on that basis alone. App.11a–17a; App.20a (Guy, J., concurring in part and in the judgment). The majority reasoned that the magistrate judge's "succinct and plain" order attaching the parties' stipulation, together with the "sur-

[3] Two members of the panel (Judges Clay and Guy) held that petitioner preserved his argument that *Bloate* abrogated circuit precedent, and thus the time period between his arrest and indictment could not be excluded under § 3161(h)(1). App.18a–20a (Guy, J., concurring in part and in the judgment); App.25a–29a (Clay, J., concurring in part and dissenting in part). Judge Griffin would have held that petitioner forfeited his *Bloate* argument, despite the Government's confession of error and this Court's GVR. App.8a–11a.

rounding context," was "sufficient to support the continuance." App.17a.

According to the majority, the fact that the magistrate judge attached the parties' stipulation to its order was "sufficient" to satisfy the Speedy Trial Act's requirement that the judge "set[] forth, in the record of the case * * * its reasons for finding that the ends of justice [are] served by the granting of such continuance." App.15a–16a. The majority concluded that, under the circumstances, it could be inferred that the parties' proffered reasons for a continuance (which simply stated that "the parties are engaged in plea negotiations" and "the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial," App.36a) "found their way into the magistrate's determination." App.15a. The majority further distinguished *Zedner* on its facts, reasoning that *Zedner* was limited to "wide-ranging and open-ended" delays, while the exclusion at issue in this case was a "mere two week[s]." App.16a–17a.

c. Judge Clay dissented in relevant part, writing that "[t]he [magistrate judge's] order did not mention the ends of justice or the interest of the defendant and the public in a speedy trial, let alone any reasons for finding that one outweighed the other. Accordingly, the magistrate judge plainly did not comply with § 3161(h)(7), and that should be the end of the matter." App.32a (Clay, J., concurring in part and dissenting in part). Judge Clay wrote that "the majority['s] attempt[] to circumvent this conclusion by relying on the joint stipulation * * * is starkly inconsistent with the Supreme Court's * * * emphasis on the importance of complying with § 3161(h)(7)'s procedural strictness." App.32a–33a (citing *Zedner*, 547 U.S. at 508–09). Noting the conflicting decisions of several other circuits, Judge Clay concluded that "the mere agreement of the parties * * *

cannot substitute for the district court's own findings." App.33a (citing *United States* v. *Ammar*, 842 F.3d 1203, 1206–07 (11th Cir. 2016) and *Parisi* v. *United States*, 529 F.3d 134, 140 (2d Cir. 2008)). Again citing decisions of other circuits, Judge Clay further wrote that merely parroting the language of § 3161(h)(7) through a "short, conclusory statement[] lacking in detail" did not satisfy the Act's requirements. App.33a–34a (citing *United States* v. *Toombs*, 574 F.3d 1262, 1271 (10th Cir. 2009) and *United States* v. *Bryant*, 523 F.3d 349, 361 (D.C. Cir. 2008)). It instead was "a maneuver[] aimed at merely paying lip service to the Speedy Trial Act's requirements." App.34a (quoting *United States* v. *Brown*, 819 F.3d 800, 815 (6th Cir. 2016)).

d. The Sixth Circuit denied petitioner's timely petition for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This Court has squarely held that the Speedy Trial Act's ends-of-justice exception, § 3161(h)(7), requires "express findings," *Zedner*, 547 U.S. at 506, and "specifies in some detail certain factors that a judge must consider in making those findings." *Id.* at 509. Failure to make those findings is not "harmless error" and requires dismissal of criminal charges. *Id.* Yet, the Sixth Circuit majority's decision permitting the required "findings" to be established entirely by a conclusory stipulation of the parties, circumvents these fundamental Speedy Trial Act guarantees. If permitted to stand, this rule would allow parties to fashion their own open-ended Speedy Trial Act continuances essentially free from judicial supervision and without independent findings that delay is in the public interest. The Sixth Circuit's decision deepens an established split on an important and recurring issue. Its decision joins the Fourth and Seventh Circuits, which too decline to enforce *Zedner* where parties agree to

Speedy Trial Act continuances. But those courts sharply conflict with decisions of at least five circuits that have faithfully applied *Zedner*, strictly adhering to § 3161(h)(7)'s requirement of express, on-the-record judicial findings.

By holding that the magistrate judge properly excluded time under the ends-of-justice exception simply by accepting the parties' generic stipulation (which itself did not discuss the § 3161(h)(7) factors), the Sixth Circuit ignored both the plain meaning of § 3161(h)(7) and this Court's directive that "without on-the-record findings," "there can be no exclusion." *Zedner*, 547 U.S. at 507. This case presents an appropriate vehicle for this Court to resolve widespread confusion over this important issue and to ensure consistent, nationwide compliance with the requirements of a statute potentially at issue in every federal criminal prosecution.

I. There Is A Split Of Authority Over Whether District Courts Must Make Express Ends-Of-Justice Findings Where The Parties Agree To Exclude Time

Notwithstanding this Court's clear directive in *Zedner*, the circuits remain divided as to whether a district court must strictly comply with the Speedy Trial Act's mandate to make express, on-the-record findings where the parties agree that time should be excluded. The Second, Ninth, Tenth, Eleventh, and D.C. Circuits have given effect to the Act's plain language and *Zedner*, holding that neither the parties' agreement to exclude time nor the surrounding context can substitute for a judge's on-the-record findings that the ends-of-justice served by a continuance outweigh the defendant's and the public's interest in a speedy trial. On the other hand, the Fourth, Sixth, and Seventh Circuits have adopted a "flexible" application of § 3161(h)(7), holding that the *district court* itself need not make express, on-the-record findings where the court accepts the *parties'* stipulation to exclude time or the reasons for the continuance can be inferred from context.

Congress enacted the Speedy Trial Act to provide a uniform national rule to expedite federal criminal trials, with compliance ensured by the mandatory sanction of dismissal (with or without prejudice). Yet, because of the conflicting rulings of the various circuits, whether the important societal interests in a speedy trial are given effect "now depends almost as much on the happenstance of geography as it does on the will of the Legislative Branch." *Williford* v. *United States*, 469 U.S. 893, 894 (1984) (White, J., dissenting from denial of certiorari in Speedy Trial Act case). This Court should grant certiorari to ensure consistent nationwide application of the Speedy Trial Act.

A. At Least Five Circuits Have Held That Courts Must Make Express, On-The-Record Findings Notwithstanding A Defendant's Agreement To Exclude Time

The court below held that the parties' stipulation, coupled with the "surrounding context," satisfied the statutory requirement for *judicial* ends-of-justice findings. App.14a–17a. The Second, Ninth, Tenth, Eleventh, and D.C. Circuits rightly have disagreed.

1. In *United States* v. *Ammar*, 842 F.3d 1203, 1209, 1212 (11th Cir. 2016), the district court excluded time under the Speedy Trial Act based on the parties' agreement to a continuance and denied the defendant's subsequent motion to dismiss. The Eleventh Circuit held that the district court had violated the Act and reversed the defendant's conviction, reasoning that "an agreement by the parties does not eliminate the requirement that the court make a proper ends-of-justice finding. *Zedner* makes clear that the parties cannot waive the Speedy Trial Act's requirement. * * * The court must consider both the defendant's interest and the public's interest in a speedy trial." *Id.* at 1211. The Eleventh Circuit explained that "[t]he district court did not comply with this rule, as it based its decision to continue the case on the parties' agreement." *Id.* The "[district] court's finding that a continuance [was] justified solely because the parties agreed to the continuance is not a proper ends-of-justice finding." *Id.* at 1210.

2. The Tenth Circuit similarly gave force to *Zedner* in *United States* v. *Toombs*, 574 F.3d 1262 (2009). In that case, the parties filed a series of unopposed continuance requests, each setting forth various grounds for delay. *Id.* at 1265–66. The district court granted the requests, simply reciting the statutory language that the ends of justice outweighed the best interest of the public

and the defendant in a speedy trial. *Id.* The Tenth Circuit held that the district court's orders did not comply with § 3161(h)(7)'s requirements, emphasizing that the Speedy Trial Act requires a district court to "make clear on the record its reasons for granting an ends-of-justice continuance." *Id.* at 1269; see also *id.* at 1271–72 ("Simply identifying an event, and adding the conclusory statement that the event requires more time for counsel to prepare, is not enough."). The Tenth Circuit explained that the district court is "no less responsible" to comply with this requirement "merely because it is a defendant who requests a continuance." *Id.* at 1273 (citing *Zedner*, 547 U.S. at 493–95). "By failing to make a record upon which adequate findings could be based, the district court failed to protect the *public's* interest in a speedy trial." *Id.* at 1273–74 (emphasis added).

3. The Second Circuit has also expressed the clear view that the parties' stipulation to exclude time cannot substitute for the district court's own findings. In *Parisi* v. *United States*, 529 F.3d 134 (2008), the Second Circuit considered a Speedy Trial Act issue in the context of an ineffective assistance of counsel claim. There, the parties stipulated to exclude three separate time periods from speedy trial computations and briefly explained in each request why the continuance was necessary. *Id.* at 136–37. The first stipulation jointly requested a continuance "to allow defense counsel the opportunity to review evidence which is in the possession of the United States, to consider the charges herein, and to continue further discussions regarding a change of plea for his client." *Id.* at 136. The second and third stipulations each requested a continuance "to negotiate a disposition of the charges against the defendant." *Id.* at 136–37. Each stipulation also stated that "the ends of justice to be served by the granting of said continuance will outweigh the interest of the public and of the defendant in a speedy trial." *Id.* at

137. In all three instances, the district court approved the parties' stipulation with the notation "so-ordered." *Id.* at 136.

In a subsequent collateral attack on his conviction, the defendant argued that the district court's ends-of-justice continuances were invalid and his counsel was ineffective for not moving to dismiss on that basis. The Second Circuit ultimately rejected the ineffectiveness claim under the deferential *Strickland* v. *Washington*, 466 U.S. 668 (1984), standard, noting that "*Zedner*, with its reinforcement of the categorical nature of the ends-of-justice requirement," issued years after the defendant pled guilty. *Parisi*, 529 F.3d at 141. However, the court expressed grave concern that the stipulated continuances were inconsistent with *Zedner*. The court reasoned that "the mere agreement of the Government and the defendant to the continuance does not satisfy the requirements of the Act * * *. The ends-of-justice determination is * * * entrusted to the court, not the parties, and the parties cannot stipulate to its satisfaction as a substitute for the district court's own finding to that effect." *Id.* at 140; see also *United States* v. *Culbertson*, 598 F.3d 40, 47 (2d Cir. 2010) ("A prospective waiver of all rights under the Speedy Trial Act is not acceptable, nor is a defendant's acquiescence to a continuance sufficient compliance with the Act for an ends-of-justice exclusion in the absence of specific findings.") (citing *Zedner*, 547 U.S. at 501–03)). While dicta, the opinion's substantial discussion reflects the Second Circuit's authoritative interpretation of the Speedy Trial Act.

4. In enforcing the "procedural strictness" of § 3161(h)(7), several circuits have reaffirmed that the Speedy Trial Act requires express, on-the-record findings, rejecting arguments that a reviewing court can at-

tempt to divine such "findings" based on the circumstances under which the continuance was granted.

For example, the D.C. Circuit held in *United States* v. *Bryant*, 523 F.3d 349, 360 (2008), that "implicit" findings drawn from the record do not satisfy the Speedy Trial Act. There, the parties agreed to accommodate each other's schedules in setting a trial date and the district court set trial based on those discussions. *Id.* The district court did not make ends-of-justice findings. *Id.* The D.C. Circuit held that failure to be a violation of the Speedy Trial Act. "*Zedner* makes it plain that 'implicit' findings are insufficient to invoke the [ends-of-justice] exclusion. The *Zedner* Court held that before a judge could toll the speedy trial clock under § 3161(h)[7], the judge had to make 'express findings' about why the ends of justice were served by a continuance." *Id.* at 360. The D.C. Circuit found that the district court made "no express findings" supporting a continuance, noting that a "passing reference" to the "interest of justice" was insufficient, as it "does not indicate that the judge seriously considered the 'certain factors' that § 3161(h)[7] specifies." *Id.* at 361 (quoting *Zedner*, 547 U.S. at 507). The D.C. Circuit reversed the defendant's conviction and remanded for a determination as to whether the dismissal should be with or without prejudice. *Id.*

The Ninth Circuit took a similar approach in *United States* v. *Ramirez-Cortez*, 213 F.3d 1149 (2000), under circumstances strikingly similar to those presented here. In that case, the defendant requested a continuance to allow time for plea negotiations. *Id.* at 1152. The magistrate judge granted the continuance and the clerk filled out a pre-printed sheet listing § 3161(h)(7) as the basis for the exclusion of time. The district court later denied the defendant's motion to dismiss based on a Speedy Trial Act violation, reasoning that although the magis-

trate did not specify reasons for the exclusion, the court could infer the reasons from the record. *Id.* at 1153. The Ninth Circuit reversed, holding that the magistrate "failed to make any findings," let alone considered "the statutory factors underlying [its] conclusion" that time should be excluded. *Id.* at 1154–55. The court further made clear that the district court's attempt to infer findings from the context surrounding the continuance was improper. *Id.* at 1155; see also *United States* v. *Sierra-Penaloza*, 312 F. App'x 869, 870 (9th Cir. 2009) ("defendants' stipulation to a continuance cannot satisfy the statutorily required findings of the Speedy Trial Act").

B. Three Circuits Have Held That The Speedy Trial Act Does Not Require Express Findings Where The Parties Agree To A Continuance And The Basis For The Continuance Can Be Inferred From Context

By contrast, the Fourth and Seventh Circuits, joined now by the Sixth Circuit, have failed to give effect to the Speedy Trial Act's requirement that *the court* make *express* findings, on the record, to support an ends-of-justice continuance.

1. As noted by Judge Clay in dissent, the Sixth Circuit here paid lip service to *Zedner*, stating that § 3161(h)(7) requires a district court to "show its work" before granting an ends-of-justice continuance, App.14a, but then effectively creating an atextual exception to this rule where the parties stipulate to exclude time and the reasons for the continuance can be inferred from context. The majority held that the magistrate judge's "succinct and plain" order attaching the parties' stipulation, together with the "surrounding context," was "sufficient to support the continuance." App.14a–17a; see also App.15a ("we've upheld a continuance when the reasons for it are clear from the context or record" (citing

United States v. *Richardson*, 681 F.3d 736, 741 (6th Cir. 2012)); App.16a ("An ends-of-justice continuance can be found even when a delay is not designated as such by the court." (quoting *United States* v. *Stone*, 461 F. App'x 461, 466 (6th Cir. 2012)). The majority also distinguished *Zedner* on the ground that it was limited to "wide-ranging and open-ended" delays, and did not apply to time-limited continuances. See App.16a–17a.

2. Both before and after *Zedner*, the Seventh Circuit has similarly held that express findings are not always necessary. In the pre-*Zedner* case, *United States* v. *Baskin-Bey*, 45 F.3d 200, 203 (1995), the district court granted the defendant's request to delay trial to preserve continuity of counsel and excluded the resulting time under the Speedy Trial Act. The defendant later challenged the exclusion on the basis that the court failed to make sufficient ends-of-justice findings as required by the Act. *Id.* The Seventh Circuit held that although the district court made no express findings, there was no Speedy Trial Act violation because "the reasons for the exclusion are clear from the record—the judge acted in the interests of justice to allow [the defendant] to keep the same counsel." *Id.*

The Seventh Circuit reaffirmed that approach after *Zedner*. In *United States* v. *Napadow*, 596 F.3d 398 (2010), the district court asked counsel at a conference whether they would be ready for trial by the scheduled date. Counsel responded that they needed additional time and the district court subsequently entered an order stating, "Enter excludable delay in the interest of justice to begin 6/10/2008 and end 8/18/2008 pursuant to 18:3161(h)(8)(A)(B)." *Id.* at 400. In denying the defendant's subsequent motion to dismiss for violation of the Speedy Trial Act, the district court offered several reasons why it "probably" had excluded time. *Id.* at 405.

The Seventh Circuit held the district court had properly excluded time under § 3161(h)(7), reasoning that "[w]hen 'facts have been presented to the court and the court has acted on them, it is not necessary to articulate those same facts in a continuance order.'" *Id.* (quoting *United States* v. *Jean*, 25 F.3d 588, 594 (7th Cir. 1994)). The court concluded that the "sequence of events"—where counsel told the district court that more time was needed to prepare for trial, and the court granted the continuance—"makes it clear that the district court accepted counsel's representation that more time was needed" and "sufficiently identified the applicable [§ 3161(h)(7)] factor under the ends-of-justice exclusion." *Id.*

3. The Fourth Circuit has taken the same approach. In *United States* v. *Odman*, 47 F. App'x 221, 224–25 (2002), the court held that there was no Speedy Trial Act violation "[a]lthough the record [did] not contain an order of the district court performing the required balancing at the time the continuance was granted" because the reasons for the continuance were "clear from the record" and "the defendant agreed to it."

* * * * *

The courts of appeals are intractably split on the interpretation of a law Congress explicitly enacted to "introduce a measure of uniformity" to criminal pretrial practice. 120 Cong. Rec. 41,781 (1974). Only review by this Court can ensure uniform compliance with *Zedner*'s clear instructions.

II. The Decision Below Is Wrong

The Sixth Circuit's holding that an order accepting a stipulation is sufficient to satisfy the Act because the reasons for the continuance were "clear from the context," App.14a–17a, conflicts with the Speedy Trial Act's text and this Court's precedent in two important respects.

1. First, the parties' agreement to exclude time under the Speedy Trial Act cannot substitute for the judge's own findings. "Congress unequivocally imposed the procedural requirements of § 3161(h)(7) on *the district court*." App.33a (Clay, J., concurring in part and dissenting in part). "The Speedy Trial Act is plain-speaking," *United States* v. *Blackwell*, 12 F.3d 44, 46 (5th Cir. 1994), and the statutory text could not be clearer. The Act states that whether the continuance is initiated by the judge *sua sponte* or comes "at the request" of the parties, "[n]o * * * period of delay resulting from a continuance granted by the court * * * shall be excludable" 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 are served by the continuance. § 3161(h)(7)(A) (emphases added). The Sixth Circuit's holding that a district court need not make its own findings if it accepts the parties' stipulation to exclude time violates the "cardinal canon" of statutory construction that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992). Courts "are not free to rewrite the statute that Congress has enacted," no matter how much they may disapprove of the result. *Dodd* v. *United States*, 545 U.S. 353, 359 (2005); accord *Bloate*, 559 U.S. at 210 (approach to statutory construction that ignores statute's plain text is "not justified * * * by the prospect, however appealing, of reaching a different result in this case"); *Richards* v. *United States*, 369 U.S. 1, 10 (1962) (courts "are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction").

Were there any doubt that the statute means what it says, this Court made clear in *Zedner* that "defense continuance requests," by themselves, cannot support an ex-

clusion of time under the Speedy Trial Act. 547 U.S. at 500. "The ends-of-justice determination is * * * entrusted to the court, not the parties, and the parties cannot stipulate to its satisfaction as a substitute for the district court's finding to that effect." *Parisi*, 529 F.3d at 140; see *Ammar*, 842 F.3d at 1211 ("an agreement by the parties does not eliminate the requirement that the court make a proper ends-of-justice finding"); *Toombs*, 574 F.3d at 1273 (district court "no less responsible" to make ends-of-justice findings "merely because it is a defendant who requests a continuance"); *Sierra-Penaloza*, 312 F. App'x at 870 ("defendants' stipulation to a continuance cannot satisfy the statutorily required findings of the Speedy Trial Act").

The rationale for requiring a court to make its own independent evaluation of the § 3161(h)(7) factors is as plain at the statutory text itself. "If the Act were designed solely to protect a defendant's right to a speedy trial, it would make sense to allow a defendant to waive the application of the Act. But the Act was designed with the public interest firmly in mind." *Zedner*, 547 U.S. at 500–01. The public's interests are not necessarily vindicated by counsel for the various parties, requiring the court to exercise its own reasoned judgment, on the record, to ensure a valid rationale exists to deviate from the Act's otherwise-applicable timelines. As this Court explained in *Bloate*, "[i]n considering any request for delay, * * * trial judges *always have to devote time to assessing whether the reasons for the delay are justified*, given both the statutory and constitutional requirement of speedy trials." 559 U.S. at 214 (emphasis added). *Bloate* and *Zedner* together make clear that the district court must undertake a meaningful analysis, independent of the parties' agreement, to determine whether the exclusion satisfies the "ends-of-justice" requirements.

2. Second, the Speedy Trial Act's "procedural strictness," *Zedner*, 547 U.S. at 509, prohibits reviewing courts from attempting to infer a district court's or magistrate judge's "findings" based on "the surrounding context." App.16a. *Zedner* left no ambiguity: "[w]ithout *on-the-record* findings, there can be no exclusion." *Zedner*, 547 U.S. at 507. "*Zedner* makes it plain that 'implicit' findings are insufficient to invoke the [ends-of-justice] exclusion." *Bryant*, 523 F.3d at 360; see, *e.g.*, *Ramirez-Cortez*, 213 F.3d at 1154 (holding that magistrate judge's reasons for granting continuance could not be inferred from context, despite that form order was entered on docket checking § 3161(h)(7) as basis for continuance).

This bright-line rule results from Congress's recognition of the "danger that such continuances could get out of hand and subvert the Act's detailed scheme." *Zedner*, 547 U.S. at 508–09. While "Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases," it constrained the district court's discretion by imposing "limits" and "specific procedures" that must be followed to exclude time. *Id.* at 499, 508. The magistrate judge did not follow those procedures here and the Sixth Circuit accordingly erred in affirming petitioner's conviction.[4]

The posture of this case illustrates precisely why Congress required *express* findings. The parties' stipu-

[4] To be clear, petitioner is not arguing that a delay requested by the parties to enable them to complete plea discussions is never excludable under the ends-of-justice exception. Indeed, in many cases, the interests of justice may be well served by allowing additional time for plea bargaining. But that is not the issue here. Rather, the question presented by this case is whether, irrespective of the reason for the delay, the district court must follow the procedures clearly set out in § 3161(h)(7).

lation referenced *both* the automatic exclusion for plea-related delays, citing § 3161(h)(1), *and* the ends-of-justice exception, citing § 3161(h)(7). App.36a. The magistrate judge's order, however, cites neither provision, instead referring only to "§ 3161" as a whole and finding that "good cause" exists for an extension. App.37a.[5] If any inference were to be drawn from this "context," it would be that the magistrate judge did not make any ends-of-justice findings because the judge did not rely on the ends-of-justice exception at all, but on then-circuit precedent that plea bargaining time was automatically excludable. Because more than one inference can be drawn from the same "context," Congress required express, on-the-record, findings to ensure that meaningful consideration is given to the important public and private interests served by speedy trials. See *Zedner*, 547 U.S. at 498–99.

Indeed, the Sixth Circuit has essentially applied "harmless error" analysis to a district court's failure to make the required findings to justify an exclusion, substituting its own rationale—that plea negotiations serve the "ends of justice"—for the absence of a determination by the magistrate or the district court. See App.17a. Yet, this Court has already foreclosed applying the "harmless error" rule in this context. *Zedner*, 559 U.S. at 508–09 ("Excusing the failure to make these findings as harmless error would be inconsistent with the strategy embodied in § 3161(h). Such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of this sort is unlikely to affect the defendant's rights."). The Sixth Circuit has done indirectly what this Court has directly prohibited,

[5] The Government has conceded that "'good cause' is a different standard than in § 3161(h)(7)." Br. of United States at 51, *United States* v. *White*, No. 16-1009 (6th Cir. Aug. 31, 2016).

finding the magistrate judge's lack of findings essentially "harmless" in light of the parties' stipulation.

III. This Case Presents A Recurring Issue Of National Importance

The Speedy Trial Act safeguards important policies of the American criminal justice system. Congress carefully balanced the need for fixed time limits with narrowly tailored, judicially supervised exceptions. By ignoring the Act's plain language and excusing disregard for its strict procedures, the decision below distorts that balance.

1. The Speedy Trial Act "protect[s] and promote[s] speedy trial interests that go beyond the rights of the defendant." *Zedner*, 547 U.S. at 501. It was "designed with the public interest firmly in mind." *Id.* Lengthy pretrial delays reduce the "deterrent value resulting from punishment," increase "the danger of recidivism," and undermine "confidence in the fairness and administration of criminal justice." S. Rep. 212, 96th Cong., 1st Sess. 6 (1979); see also *Zedner*, 547 U.S. at 501 (identifying similar harms). The Act's imposition of firm arrest-to-trial deadlines reduces the risk of these societal harms and promotes "the public interest in the swift administration of justice." *Bloate*, 559 U.S. at 211.

"[I]ntolerable delays" in our criminal justice system threaten important interests. S. Rep. No. 212, 96th Cong., 1st Sess. 8 (1979) (statement of William H. Rehnquist, Assistant Attorney General, to the Committee on the Judiciary in 1971). The Speedy Trial Act thus mandates "fixed time limits" within which the defendant must be indicted and brought to trial. *Id.* at 9. Without such limits, "the speedy trial protections afforded both the individual and society by the Sixth Amendment [are] largely meaningless." *Id.*

Congress also recognized that some prosecutors may "rely upon delay as a tactic in the trial of criminal cases," H.R. Rep. No. 1508, 93rd Cong. 7408 (1974), and sought to counter such abuses through the Speedy Trial Act. To the same end, the Act discourages the bringing of hasty indictments. Because undue delay "could potentially result in the imposition of th[e] sanction [of dismissal of the indictment with prejudice], * * * the prosecution [has] a powerful incentive to be careful about compliance." *Zedner*, 547 U.S. at 499.

2. As the Sixth Circuit recognized below, the plea bargaining process plays a central role "in our modern system of justice—'it is not some adjunct to the criminal justice system; it *is* the criminal justice system." App.13a (quoting *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012)). "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012); see also U.S. Dep't of Justice, Bureau of Justice Statistics, *Plea and Charge Bargaining, Research Summary* 1 (2011), https://goo.gl/SG4af3 (90 to 95 percent of convictions arise from guilty pleas). Therefore, the issue presented in this case has the potential to arise in almost every federal criminal prosecution. As a result, whether and under what conditions plea bargaining time may be excluded under the Speedy Trial Act carries substantial implications for the criminal justice system as a whole.

IV. This Case Presents An Ideal Vehicle To Resolve The Circuit Split

This case presents a single question of federal law: whether a district court may exclude time under § 3161(h)(7) of the Speedy Trial Act simply by accepting the parties' stipulation to a continuance without making any on-the-record judicial findings that the ends of justice served by a continuance outweigh the interests of

the defendant and the public in a speedy trial or considering the factors that the Act requires judges to consider. Several circuits have weighed in on each side. This case presents a procedurally clean vehicle to resolve the circuit split. There is no dispute about the Court's jurisdiction. And as it comes to the Court, this case involves none of the factual disputes that often arise in calculating excludable time. There is no dispute that the parties were engaged in plea bargaining during the period in question, nor is there a question about whether ends-of-justice findings may have been made during conferences that were not transcribed. The parties' stipulation and the magistrate judge's order speak for themselves. The Sixth Circuit squarely reached the issue presented after briefing by the parties. Its judgment rests on no alternative ground. If petitioner prevails on the sole question presented, the judgment below necessarily will be invalid.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0070p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-1009

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIMMIE EUGENE WHITE, II,

Defendant-Appellant.

On Remand from the Supreme Court
of the United States.
United States District Court for the
Eastern District of Michigan at Detroit.
No. 2:13-cr-20423—David M. Lawson, District Judge.

Reargued: October 18, 2018
Decided and Filed: April 10, 2019
Before: GUY, CLAY, and GRIFFIN, Circuit Judges.

COUNSEL

REARGUED: Christian D. Sheehan, VINSON & ELKINS LLP, Washington, D.C., for Appellant. Andrew Goetz, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee. ON SUPPLEMENTAL BRIEF: Christian D. Sheehan, Jeremy C. Marwell, VINSON & ELKINS LLP, Washington, D.C., Kenneth P. Tableman, KENNETH P. TABLEMAN, P.C., Grand Rapids, Michigan, for Appellant. Andrew Goetz, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

GRIFFIN, J. delivered the opinion of the court except with regard to the issue discussed in Section III.B, and delivered a separate opinion with regard to the issue discussed in Section III.B. GUY, J. (pp. 13–14), delivered a separate opinion concurring in the majority opinion and in the judgment. CLAY, J. (pp. 15–23), delivered a separate opinion concurring in the majority opinion in part and dissenting in part.

OPINION

GRIFFIN, Circuit Judge.

Following our circuit's binding precedent, we previously held in this case that preindictment plea negotiations are "period[s] of delay resulting from other proceedings concerning the defendant" that are automatically excludable under 18 U.S.C. § 3161(h)(1) of the Speedy Trial Act. *United States v. White*, 679 F. App'x 426, 431 (6th Cir. 2017) (citing *United States v. Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004), *vacated and remanded on other grounds*, 543 U.S. 1099 (2005); *United States v. Bowers*, 834 F.2d 607, 609–10 (6th Cir. 1987) (per curiam)). Defendant challenged this precedent for the first time in his petition for a writ of certiorari as inconsistent with the Supreme Court's

intervening decision in *Bloate v. United States*, 559 U.S. 196 (2010). Petition for Writ of Certiorari at 22–23, *White v. United States*, 138 S. Ct. 641 (2018) (No. 17-270). The government then changed horses in midstream, conceding—also for the first time before the Supreme Court—that our circuit precedent was incorrect and inconsistent with *Bloate*, and that the roughly two-week continuance to engage in preindictment plea negotiations here did not qualify for automatic exclusion under § 3161(h)(1). Response to Petition for Writ of Certiorari at 8–11, *White v. United States*, 138 S. Ct. 641 (2018) (No. 17-270). The Supreme Court granted certiorari, vacated our judgment, and remanded the case back to us "for further consider ation in light of the confession of error by the Solicitor General." *White v. United States*, 138 S. Ct. 641, 641 (2018).

On remand, we now hold that *Bloate* abrogated *Dunbar* and *Bowers*. Nevertheless, we deny defendant relief for two independent reasons. First, he cannot overcome plain-error review of his *Bloate* argument. Second, and alternatively, the time for preindictment plea negotiations was properly excluded as an ends-of-justice continuance under § 3161(h)(7) of the Speedy Trial Act. Therefore, we again affirm the judgment of the district court.

I.

Our prior opinion sets forth the facts pertinent to this remand:

> On April 29, 2013, the government filed a complaint against White charging him with drug distribution and firearm crimes related to the May 14, 2010, search and seizure. White was arrested on those charges, and an

> order of temporary detention was entered, on May 2, 2013. He made his initial appearance the next day and was released on bond.
>
> After his arrest, the parties engaged in preindictment plea negotiations. To that end, they filed a stipulation with the district court on May 17, 2013, agreeing to adjourn White's preliminary hearing and exclude the time between May 23, 2013, and June 7, 2013, from White's Speedy Trial Act clock. Plea negotiations were not successful, and a grand jury indicted White on June 4, 2013.

White, 679 F. App'x at 429. Including those days expressly excluded by the court, thirty-three days passed between White's arrest and indictment.

While he filed a bevy of motions before the district court, pertinent to our inquiry is only White's pretrial motion to dismiss the indictment because the government violated his speedy trial rights. Defendant's motion simply announced that the government failed to indict him within thirty days of his arrest in violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq*., but substantively argued only his rights under the Speedy Trial Clause of the Sixth Amendment to the Constitution, U.S. CONST. amend. VI. The district court held a hearing on the motion to dismiss, denied it, a jury convicted White of multiple crimes, and the district court sentenced him to 84 months in prison. We affirmed his conviction and sentence, rejecting his claim the district court erred in denying his motion to dismiss the indictment for violations of the Speedy Trial Act and the Sixth Amendment's Speedy Trial Clause. *See White*, 679 F. App'x at 430–33. Following remand from the Supreme Court, we give a fresh look to this issue.

II.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI. The Speedy Trial Act strengthens this constitutional mandate by establishing time limits for completing the various stages of a federal criminal prosecution. 18 U.S.C. §§ 3161–3174. Among these limits is an obligation that the government file an indictment within thirty days of arresting a defendant, excepting the time spent on certain events that can be automatically excluded from that calculation and for other events if sufficient reasons are given by the district court. 18 U.S.C. § 3161(b), (h). We typically review de novo the district court's interpretation of the Speedy Trial Act and its factual findings for clear error. *United States v. Anderson*, 695 F.3d 390, 396 (6th Cir. 2012). And "[w]e review the district court's decision to grant an ends-of-justice continuance under an abuse-of-discretion standard." *United States v. Williams*, 753 F.3d 626, 635 (6th Cir. 2014).

The issue on remand is whether the fourteen days spent on preindictment plea negotiations are excludable under that Act. White argues that our precedent holding that preindictment plea negotiations are automatically excludable under § 3161(h)(1) no longer passes muster after the Supreme Court's *Bloate* decision. The government counters that this court should affirm the district court because (1) White forfeited the argument that *Bloate* precludes automatic exclusion of preindictment plea negotiations and cannot show plain error, and (2) even if preindictment plea negotiations are not automatically excludable under § 3161(h)(1), that time was excludable as an ends-of-

justice continuance pursuant to § 3161(h)(7). We address these arguments in turn.

III.

A.

We first hold that *Bloate* abrogated our prior decisions concluding that preindictment plea negotiations are automatically excludable under the Act.

Section 3161(h)(1) provides for the automatic exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight enumerated subcategories. One of those categories expressly excludes the time "resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government." § 3161(h)(1)(G). Based primarily on that subparagraph and the "including but not limited to" language, we have long held that time spent on preindictment plea negotiations between the parties is automatically excludable. *Dunbar*, 357 F.3d at 593; *Bowers*, 834 F.2d at 609–10. And yet, in *Bloate* the Supreme Court held that the time a court grants to a party to prepare pretrial motions was not automatically excludable under § 3161(h)(1), notwithstanding § 3161(h)(1)(D)'s express exclusion of the time attributable to "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." 559 U.S. at 203–07. The Court held that "because a specific provision . . . controls one of more general application," *id*. at 207 (cleaned up), Congress's express language in subparagraph (h)(1)(D) communicates the decision to make automatically excludable the time for pretrial motions "*only* from the time a motion is filed through the

hearing or disposition point specified in the subparagraph, and that other periods of pretrial motion-related delay are excludable only when accompanied by district court findings," *id*. at 206.

Given the above reasoning, the Solicitor General's concession of error in our precedent, and the Supreme Court's order vacating our prior decision and remanding for reconsideration in light of that concession of error, we take this opportunity to revisit our prior precedent. Although it is generally true that one panel cannot overrule the binding precedent of a prior panel, *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017), that rule yields when the prior panel's reasoning has been undercut or abrogated by a decision of the Supreme Court. *See Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720–21 (6th Cir. 2016). And, as we have held, such Supreme Court authority need not be exactly on point, so long as the legal reasoning is directly applicable to the issue at hand. *Id*. at 721; *see also Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008).

Just as the Supreme Court held that the time a court grants to a party to prepare pretrial motions is not automatically excludable, the same is true for preindictment plea negotiations. The parties now agree on this point. Subparagraph (h)(1)(G) expressly excludes the time attributable to "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." § 3161(h)(1)(G) (emphasis added). This specific provision caps the time to be excluded as beginning at the moment the proposed plea is given to the court for its consideration. Plea *negotiations*, which necessarily occur before a proposed plea agreement comes to fruition, are therefore outside the limited universe contemplated by this

subparagraph and may not be automatically excluded. *See United States v. Mathurin*, 690 F.3d 1236, 1241 (11th Cir. 2012) ("According to the Supreme Court, when the category of delay at issue is 'governed by' one of § 3161(h)(1)'s eight subparagraphs, a court must look only to that subparagraph to see if the delay is automatically excludable. In other words, the 'including but not limited to' clause of § 3161(h)(1) does not modify the contents of the enumerated subcategories themselves." (citations omitted)). Thus, applying *Bloate*'s reasoning to this analogous subparagraph, we now hold that (1) *Bloate* abrogated *Dunbar* and *Bowers*, and (2) the time spent on preindictment plea negotiations is not automatically excludable under § 3161(h)(1) of the Speedy Trial Act.

B.

This conclusion, however, does not end our consideration § 3161(h)(1)'s automatic exclusion in this appeal. The government, though accepting that *Bloate* abrogated our precedent, now argues that White has at a minimum forfeited the issue by not raising it before the district court.1[1] I agree.

---

[1] The government also argues waiver, which we need not address given our conclusion that White forfeited this issue. But even if we were so inclined to address the argument, it is unlikely that we could hold this issue completely waived in this context, given the Supreme Court's explicit direction that we "further consider[]" this issue "in light of the confession of error by the Solicitor General." *White*, 138 S. Ct. at 641; *see Clark v. Chrysler Corp.*, 436 F.3d 594, 600 (6th Cir. 2006) ("[E]ven though Chrysler initially waived its constitutional claim by failing to raise it in the district court, our earlier decision and the Supreme Court's GVR order indicates that the issue has been preserved, and should be considered further on remand"); *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) ("GVR orders are premised on matters that [the

Before the district court, White specifically challenged the excludability of the fifteen-day delay for plea negotiations, and the validity of the stipulation. However, he now presents a new reason why the district court erroneously concluded that the plea-negotiation time was excludable, arguing for the first time on appeal that *Bloate*'s reasoning applied to remove preindictment plea negotiations from the automatic excludability provisions of § 3161(h)(1). This is insufficient to preserve the issue for de novo review on appeal. *See United States v. Huntington Nat. Bank*, 574 F.3d 329, 332 (6th Cir. 2009) ("To preserve the argument, then, the litigant not only must identify the issue but also must provide some minimal level of argumentation in support of it."); *United States v. Seals*, 450 F. App'x 769, 771 (10th Cir. 2011) (Gorsuch, J.) (declining to review the defendant's new Speedy Trial Act argument because "not only must the defendant seek dismissal prior to trial, but he must do so *for the reasons* he seeks to press on appeal"); *see also United States v. Loughrin*, 710 F.3d 1111, 1121 (10th Cir. 2013) (citing *Seals* as "persuasive" and declining to consider the defendant's challenge on appeal to an order of continuance he did not challenge in the district court). And generally, an appellant's failure to raise an argument in his appellate brief forfeits that issue on appeal. *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 310–11 (6th Cir. 2005).

Although the Supreme Court's remand order requires this court to "further consider[]" the Speedy Trial Act issue, it does not similarly require us to engage in de novo review or to grant White relief. *Cf.*

Supreme Court] . . . believe[s] the court below did not fully consider, and . . . *require* only further consideration . . . ." (emphasis added)).

Bloate, 559 U.S. at 216 (Ginsburg, J., concurring) ("[N]othing in the [Supreme Court's] opinion bars the [circuit court] from considering, on remand, the Government's argument that the indictment, and convictions under it, remain effective"). As White himself acknowledges, forfeiture of a specific Speedy Trial Act claim of error can result in plain-error review, *see, e.g.*, *United States v. Montgomery*, 395 F. App'x 177, 181 n.4, 184 n.7 (6th Cir. 2010), and we see no reason why the Supreme Court's remand order would require otherwise. Thus, we are limited to plain-error consideration of the district court's determination that the preindictment plea-negotiation period was automatically excludable under § 3161(h)(1). *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court.").

Plain error is, as it should be, a difficult hurdle to clear. The burden is on White "to show (1) error that (2) was plain, (3) affected [his] substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Ushery*, 785 F.3d 210, 218 (6th Cir. 2015); *see also* Fed. R. Crim. P. 52(b). "An error is 'plain' when, at a minimum, it 'is clear under current law.'" *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (quoting *Olano*, 507 U.S. at 734).

We have noted that "[a] 'circuit split precludes a finding of plain error,' for the split is good evidence that the issue is 'subject to reasonable dispute.'" *Id.* (quoting *United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995); *Puckett v. United States*, 556 U.S. 129, 135 (2009)). And we have also explained that "[a] lack

of binding case law that answers the question presented will also preclude our finding of plain error." *Id*. Here, the district court could not have plainly erred because we are in a realm beyond either a circuit split or lack of binding caselaw—at the time of the district court's decision, the binding precedent of this circuit held that the time for preindictment plea negotiations was automatically excludable. *See Dunbar*, 357 F.3d at 593; *Bowers*, 834 F.2d at 609–10.

Although we now overrule those decisions in light of their abrogation by *Bloate*, the analysis supporting that conclusion shows that we had to extend *Bloate*'s reasoning to an analogous, but different, section of the Speedy Trial Act. *See, supra,* Section III.A. Our decision today shows that it took no great inferential leap to apply *Bloate* in this instance, but it still required both an extension of *Bloate*'s reasoning and the overruling of two of our published decisions. We cannot fault a district court for following our binding caselaw, as it was required to do. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Thus, White cannot show that the district court committed plain error in denying his motion to dismiss on Speedy Trial Act grounds.

IV.

Finally, we turn to the government's alternate argument—that the district court's order granting the parties' stipulation to exclude the preindictment-plea-negotiation period from Speedy Trial Act calculations satisfied the requirements for an ends-of-justice con-

tinuance under the Act. We agree and hold this to be adequate alternative grounds for affirmance.

Regardless of whether a period of time is automatically excludable, the Speedy Trial Act allows for a continuance whenever the judge finds "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). This is a common ground for excluding time and the Supreme Court has noted that ends-of-justice continuances furnish "[m]uch of the Act's flexibility." *Zedner v. United States*, 547 U.S. 489, 498 (2006).

To exclude time under this exception, the court must consider certain factors, such as whether the failure to grant the continuance would "result in a miscarriage of justice," § 3161(h)(7)(B)(i); whether due to the nature of the case (or other factors), the case is too complex to reasonably expect adequate preparation within the Act's time limits, § 3161(h)(7)(B)(ii); or whether a refusal to continue the case would deny the defendant "reasonable time to obtain counsel," or would unreasonably deny either party time for "effective preparation," § 3161(h)(7)(B)(iv). Notably, the list of enumerated factors is not exhaustive, § 3161(h)(7)(B) ("The factors, *among others*, which a judge shall consider . . . ." (emphasis added)), but preindictment plea negotiations are not expressly included. *See* § 3161(h)(7)(B)(i)– (iv).

The Supreme Court has held that other types of delay that are not excludable under subsection (h)(1) are excludable under the more flexible framework of subsection (h)(7). *See Bloate*, 559 U.S. at 214 (holding that the time spent to prepare pretrial motions, while not excludable under subsection (h)(1), is excludable under subsection (h)(7)). And a number of our sister

circuits have concluded that time spent negotiating preindictment plea agreements can be excluded under subsection (h)(7)'s ends-of-justice exclusion. *See Mathurin*, 690 F.3d at 1241–42; *United States v. Fields*, 39 F.3d 439, 445 (3d Cir. 1994) (Alito, J.); *United States v. Williams*, 12 F.3d 452, 460 (5th Cir. 1994), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482, 492 (1997). We agree, and hold that the time spent on preindictment plea negotiations may be excludable under subsection (h)(7).[2] A conclusion to the contrary would pervert the Speedy Trial Act and ignore the central importance that the plea bargaining process has in our modern system of criminal justice—"[i]t is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted); *see also Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

Therefore, because the time spent on pretrial plea negotiations may be excludable under subsection (h)(7), we must determine whether the magistrate judge's order provided sufficient explanation for the continu-

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[2] This conclusion does not suffer from the same defect that our prior caselaw on automatic exclusions did– there is no subpart of § 3161(h)(7) that speaks narrowly to plea agreements or plea negotiations, so we are not foreclosed from permitting plea negotiations as a reasonable basis for an ends-of-justice continuance. *Cf. Bloate*, 559 U.S. at 208–09 (holding that though "the list of categories [in § 3161(h)(1)] is illustrative rather than exhaustive in no way undermines our conclusion that a delay that falls *within* the category of delay addressed by [a] subparagraph . . . is governed by the limits in that subparagraph"). Because none of the subparagraphs of § 3161(h)(7) address pleas at all, we are not similarly constrained here.

ance, as required by the Act. Subsection 3161(h)(7) requires a district court to "show its work," before granting an ends-of-justice continuance:

> 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.

Id. "[T]he Act requires express findings" when granting an ends-of-justice continuance, and "without on-the-record findings, there can be no exclusion" pursuant to § 3161(h)(7). *See Zedner*, 547 U.S. at 506–07.[3] The public interest in a speedy trial is also protected by the Act, so a defendant's agreement to waive its protections cannot, by itself, justify an ends-of-justice continuance. *See id.* at 500–01 (finding that a defendant cannot prospectively waive or "opt out of the Act" meant to balance the defendant's and the government's interests against those of the public); *see also Bloate*, 559 U.S. at 211–12 (noting that a defendant may not opt out of the Act even if he believes it would be in his interest because the Act also "vindicate[s] the public interest in the swift administration of justice").

Given its unique structure and appearance, it is important to discuss exactly what the combined stipula-

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[3] The *Zedner* Court, interpreting an older version of the Act, refers to the pertinent section as § 3161(h)(8). In a 2008 amendment, this subsection was redesignated as (h)(7). Pub. L. No. 110–406 § 13(3) (2008). The text and substance of the statutory subsection did not change.

tion and order granting the continuance said in this case. The first two pages of the court's filed order was nothing more than the parties' stipulation. There, the parties provided that "the period from May 23, 2013, to June 7, 2013, should be excluded from computing the time within which an information or indictment must be filed because the parties are engaged in plea negotiations, 18 U.S.C. § 3161(h)(1), and because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(7)." The third page of the court's order began by noting that the "matter [came] before the court on the stipulation of the parties" and provided, simply, that "the period from May 23, 2013, to the new date of the preliminary hearing, June 7, 2013, should be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act. 18 U.S.C. § 3161."

This order sufficiently supports an ends-of-justice exclusion under § 3161(h)(7). First, the order clearly incorporates the parties' two-page stipulation, both by attachment and reference. In the past we've upheld a continuance when the reasons for it are clear from the context or record. *United States v. Richardson*, 681 F.3d 736, 741 (6th Cir. 2012) ("[G]iven the context, the record clearly establishes that a continuance serves the ends of justice."). That the magistrate attached the parties' stipulation to its order only bolsters the conclusion that the parties' proposed justifications for the continuance found their way into the magistrate's determination. Thus, we agree with the district court and the government that the magistrate adopted the parties' stipulation as part of its own reasoning in support of the roughly two-week continuance.

Second, the contents of the order are sufficient to support the continuance. We have previously affirmed a district court's ends-of-justice continuance when it simply held that "the ends of justice served outweigh the best interest of the public and the defendant in a speedy trial." *Anderson*, 695 F.3d at 397. Given the context surrounding the issue in *Anderson*—the judge was considering a motion to suppress for some, but not all, of the period for which the continuance was granted—this court held that the defendant's challenge to the district court's ends-of-justice continuance was meritless. *Id*. at 397–98. In a similar vein, here, the magistrate's order and the surrounding context support the continuance. As noted above, time for preindictment plea negotiations may be excluded under subsection (h)(7) as a valid ends-of-justice exception to the Act's strict deadlines. Given the relatively short continuance requested—only approximately two weeks' time—the magistrate did not err in concluding that the parties' efforts to come to a mutually agreeable plea agreement "outweigh[ed] the best interest of the public and the defendant in a speedy trial." § 3161(h)(7)(A). And the fact that the magistrate's order did not explicitly say "ends of justice" poses no alternate barrier to this conclusion. "An ends-of-justice continuance can be found even when a delay is not designated as such by the court." *United States v. Stone*, 461 F. App'x 461, 466 (6th Cir. 2012) (citing *United States v. Spring*, 80 F.3d 1450, 1457 (10th Cir. 1996)). The Act does not require such "magic words." *United States v. Breen*, 243 F.3d 591, 597 (2d Cir. 2001).

Finally, despite White's arguments to the contrary, this case is distinguishable from *Zedner* because it does not present the sort of wide-ranging and open-ended error that the *Zedner* Court sought to remedy.

There, the Court was faced with an open-ended stipulation, which prevented the defendant from raising any Speedy Trial Act issues "for all time." *Zedner*, 547 U.S. at 494. This universal Speedy Trial Act waiver ultimately led to *over seven years* passing from the defendant's indictment to his trial. *Id*. at 496. Unlike the "waiver for all time" and for all reasons in *Zedner*, *id*. at 493–94, here the magistrate accepted a mere two-week exclusion of time for the express purpose of preindictment plea negotiations.

Sure, an order more fully explaining the magistrate's reasoning would have been well taken by this court, but we cannot forget that the Act does not require a novella of explanation. *See Anderson*, 695 F.3d at 397. The magistrate's succinct and plain statement here, when combined with the parties' attached stipulation, granted a short and definite continuance (approximately two weeks), for a permissible reason (preindictment plea negotiations), after expressly considering the three-pronged interests relevant to the Act (the interests of defendant, the government, and the public). In short, we cannot, under these facts and given the surrounding context, find that the magistrate judge abused his discretion in granting an ends-of-justice continuance. *Williams*, 753 F.3d at 635.

V.

We affirm the judgment of the district court.

CONCURRING IN PART AND IN THE JUDGMENT

RALPH B. GUY, JR., Circuit Judge. I concur in the judgment and concur with Judge Griffin's opinion, except as to part III.B. In my view, White did not forfeit his argument about 18 U.S.C. § 3161(h)(1) because I fail to see when he was required to raise the argument.

Consider the order of events. Fourteen days after White was arrested, his court-appointed attorney signed the stipulation at issue in this case. The magistrate judge entered the order the next day. A few weeks later, White filed a pro se motion to dismiss the indictment due to a Speedy Trial Act violation and also moved for a new attorney. The court allowed White to hire a new attorney, denied the pro se motion without prejudice, and invited the new attorney to file a new motion. The new attorney did file a new motion under the Speedy Trial Act and the government filed a response. White declined to file a reply. The court held a hearing and ultimately denied the motion in a written order.

Then consider the content of the briefs. The pro se motion simply pointed out § 3161(b)'s 30-day deadline, while making no reference to the stipulation or the order finding excludable delay. The subsequent attorney-drafted motion was more specific, but it observed only that 33 calendar days elapsed and concluded that there was necessarily a violation of § 3161(b). It too failed to mention the stipulation and order. The government finally brought up the order in its response brief, but with little elaboration. The government merely observed that "the parties agreed, and the court ordered, that the period of delay from May 23, 2013, through June 4, 2013 (in fact June 7, 2013) was excludable delay under the [Speedy Trial Act]." It

did not, however, identify how the Speedy Trial Act enabled this exclusion—whether through § 3161(h)(1), (h)(7), or some other means. In all, no brief mentioned automatic exclusion or § 3161(h)(1).

Automatic exclusion never came up at the hearing either. The government never mentioned it and argument about the Speedy Trial Act focused exclusively on the validity of the stipulation. White's new attorney recounted how the old attorney had signed the stipulation and explained:

> If that extension is effective to the Defendant, then that would be credited against him; the issue would be moot, he would lose. His claim is that he did not agree to that, had no knowledge of it, that that extension was taking place. . . . Our argument is very simple: He didn't agree to it.

Ultimately, the district court found that the stipulation was valid and that finding has never been at issue on appeal.

White did not raise the automatic-exclusion issue, but it was not his issue to raise. White did what the Speedy Trial Act requires: he provided proof of a violation (a list of the dates) and moved for dismissal. *See* 18 U.S.C. § 3162(a)(1). The government was then required to prove, by a preponderance of the evidence, that sufficient time was excluded. *See United States v. Jenkins*, 92 F.3d 430, 438 (6th Cir. 1996). It did so by merely pointing to the magistrate judge's order. Notably, though, § 3161(h)(1)—when it does apply—does not require a judicial finding; it is automatic. *See Bloate v. United States*, 559 U.S. 196, 203 (2010); *Henderson v. United States*, 476 U.S. 321, 327, 332 (1986). If the government had argued that even

without the order, the time was automatically excluded under § 3161(h)(1), it would have behooved White to raise a *Bloate*-based challenge in a reply brief—but the government did not raise that argument. White therefore had no obligation to argue why the unmentioned provision did not apply to him.

Ultimately, the waiver of the § 3161(h)(1) argument—whether by White or the government—is inconsequential. All now agree that under *Bloate*, § 3161(h)(1) does not apply here, which leaves us with the matter actually considered and relied upon by the district court: exclusion under § 3161(h)(7). I agree that under the circumstances the magistrate judge's order, which was explicitly premised on the parties' stipulation, satisfied the requirement of an on-the-record finding for an ends-of-justice continuance. I therefore concur in the judgment.

CONCURRING IN PART AND DISSENTING IN PART

CLAY, Circuit Judge, concurring in part and dissenting in part. This case comes before us pursuant to a grant, vacate, and remand order ("GVW") from the Supreme Court. All that remains at issue is whether the district court properly excluded a period of two weeks when determining whether Defendant was indicted more than thirty days after his arrest, in violation of the Speedy Trial Act, 18 U.S.C. § 3161(b). During that two-week period, Defendant was engaged in plea negotiations with the government. The majority holds (1) that time spent in plea negotiations is not automatically excludable under 18 U.S.C. § 3161(h)(1), and (2) that Defendant nevertheless is not entitled to relief either because he forfeited that argument, or, alternatively, because his time spent in plea negotiations was properly excluded under 18 U.S.C. § 3161(h)(7). I concur in the majority's first holding, set out in Section III.A. However, I respectfully dissent from the majority's second holding because the majority's reasoning is inconsistent with Supreme Court and Sixth Circuit precedent.

I. Background

The relevant facts are straightforward. On May 14, 2010, federal law enforcement agents executed a search warrant at Defendant's home and found drugs and a firearm. *See United States v. White*, 679 F. App'x 426, 428–30 (6th Cir. 2017). On April 29, 2013, the government filed a criminal complaint against Defendant in connection with that search. *Id.* And on May 2, 2013, Defendant was arrested in connection with that complaint. *Id.*

After his arrest, Defendant engaged in plea negotiations with the government. *Id.* To that end, on May 16, 2013, Defendant and the government filed a joint stipulation with the district court, stating in part that:

> [T]he period from May 23, 2013 to June 7, 2013, should be excluded from computing the time within which an information or indictment must be filed because the parties are engaged in plea negotiations, 18 U.S.C. § 3161(h)(1), and because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(7).

(RE 12, PageID # 30–31.) On May 17, 2013, a magistrate judge issued an order stating in part that:

> This matter coming before the court on the stipulation of the parties, it is hereby . . . ORDERED that the period from May 23, 2013, to the new date of the preliminary hearing, June 7, 2013 should be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act. 18 U.S.C. § 3161.

(*Id.* at PageID # 32.) And on June 4, 2013, Defendant was indicted for various drug and firearm offenses, of which he was later convicted. *White*, 679 F. App'x at 428–30.

The relevant procedural history is less straightforward, but no less significant. As his case progressed, Defendant filed a motion to dismiss the indictment, alleging that the government had indicted him more than thirty days after his arrest, in violation of the Speedy Trial Act, 18 U.S.C. § 3161(b). In response, the government argued that Defendant had agreed that

the time Defendant spent in plea negotiations would be excluded, and that taking that excluded time into account, Defendant was permissibly indicted twenty days after his arrest. The district court agreed with the government and denied Defendant's motion, reasoning that the time Defendant spent in plea negotiations was excludable under 18 U.S.C. § 3161(h)(7) because Defendant and the government "agreed that the time period should be [excluded]." (RE 42, PageID # 143–44.)

Defendant appealed, arguing that neither the magistrate judge nor the district court had made the statutorily mandated findings necessary to exclude the time Defendant spent in plea negotiations under § 3161(h)(7). In response, the government argued both that the magistrate judge and the district court had made the statutorily mandated findings, *and*, for the first time, that Defendant's time spent in plea negotiations was *also* automatically excludable under 18 U.S.C. § 3161(h)(1). In reply, Defendant addressed the government's new argument, countering that "section 3161(h)(1) only mentions the exclusion of time for the *district court* to consider a plea agreement. It says nothing about *plea negotiations*. . . [and] it is consistent with the purposes of the [Speedy Trial] Act to interpret the exclusion of delay due to 'other proceedings' in section (h)(1) to apply only to other proceedings like those described in the section." (Initial Reply Brief for Appellant at 2–3) (emphasis added). We agreed with the government's new argument and affirmed the denial of Defendant's motion, reasoning that time spent in plea negotiations is "automatically excludable under § 3161(h)(1)" because "[a]lthough the plea bargaining process is not expressly specified in § 3161(h)(1)['s] [subparagraphs], the listed proceedings are only examples . . . and are not

intended to be exclusive." *White*, 679 F. App'x at 430–31.

Defendant filed a petition for certiorari with the Supreme Court. In his petition, Defendant maintained that time spent in plea negotiations is not automatically excludable under § 3161(h)(1), and cited the Supreme Court's decision in *Bloate v. United States*, 559 U.S. 196 (2010). The government then abandoned the position it had taken before this Court on direct appeal, and agreed with Defendant. Accordingly, the Supreme Court issued a GVR directing us to further consider this case in light of the government's confession of error. On remand, Defendant continues to argue that time spent in plea negotiations is not automatically excludable under § 3161(h)(1) pursuant to *Bloate*. The government continues to agree, but now argues that Defendant is nevertheless not entitled to relief because he waived and forfeited that argument, or, alternatively, because his time spent in plea negotiations was properly excluded under § 3161(h)(7).

II. 18 U.S.C. § 3161(h)(1)[1]

I concur in the majority's holding that time spent in plea negotiations is not automatically excludable under 18 U.S.C. § 3161(h)(1). The Supreme Court's decision in *Bloate* abrogated this Court's contrary decisions in *United States v. Dunbar*, 357 F.3d 582 (6th Cir. 2004)

[1] 18 U.S.C. § 3161(h)(1) provides, in relevant part: "The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed[:] . . . Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . 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 *United States v. Bowers*, 834 F.2d 607 (6th Cir. 1987).

III. Forfeiture

Judge Griffin, writing for himself, holds that Defendant is not entitled to relief because he forfeited his § 3161(h)(1) argument by failing to make it before the district court or in his initial opening brief to this Court, and that as a result, we are limited to plain error review. For several reasons, this holding is unpersuasive.

First, it is the government that forfeited *its* § 3161(h)(1) argument by failing to make it before the district court. This Court has held that once a defendant makes a "prima facie" showing of a violation—"a simple matter of producing a calendar" and showing that more than the allowed amount of time has passed, *United States v. Sherer*, 770 F.3d 407, 411 (6th Cir. 2014)—"the government bears the burden of proving sufficient excludable time by a preponderance of the evidence." *United States v. Sobh*, 571 F.3d 600, 602 (6th Cir. 2009); *see also United States v. Gardner*, 488 F.3d 700, 717 (6th Cir. 2007). Yet, faced with Defendant's showing that he was indicted more than thirty days after his arrest, the government never argued that the time Defendant spent in plea negotiations was automatically excludable under § 3161(h)(1). And the United States, like all litigants, forfeits arguments not raised before the district court. *Cradler v. United States*, 891 F.3d 659, 666 (6th Cir. 2018). I concur with Judge Guy's opinion on this point. *See* Con. Op. at 14 ("White did not raise the automatic-exclusion issue, but it was not his issue to raise.").

Second, and relatedly, even if the government did *not* bear the burden of proving sufficient excludable

time, because neither party argued that the time Defendant spent in plea negotiations was automatically excludable under § 3161(h)(1), the district court did not address or analyze § 3161(h)(1) in its denial of Defendant's motion. Rather, the district court addressed and analyzed only § 3161(h)(7).[2] Accordingly, when the government made its § 3161(h)(1) argument on appeal, it was as an alternative basis for affirmance. And this Court has held that in such situations, the appellant forfeits its argument in response only if it fails to make that argument in its reply brief. *See Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 729 (6th Cir. 2012) ("[The appellant] would not have been on notice that it needed to address in its

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[2] Though the district court's written denial of Defendant's motion cited neither § 3161(h)(1) nor § 3161(h)(7), the district court's statements at the hearing on Defendant's motion demonstrate that it denied Defendant's motion pursuant to § 3161(h)(7). The district court reasoned that the joint stipulation stated that "the ends of justice served by the continuance outweigh the interest of the public and the Defendant in a speedy trial, which [are] the magic words . . . that we're familiar with." (RE 88, PageID # 624.) The district court also reasoned that "[t]he [magistrate judge's] order was based in some measure on [the] stipulation, but [was] also based on the independent finding of a judicial officer, as it must be under the Speedy Trial Act. . . . The magistrate judge made a finding and I can rely on that. . . . So that's my ruling on that." (*Id.* at PageID # 631–33.) Such magic words and independent findings are relevant only to § 3161(h)(7). *Compare United States v. Brown*, 819 F.3d 800, 822 (6th Cir. 2016) ("[I]n order to grant an ends of justice continuance based on the considerations articulated under [§ 3161(h)(7)], the district court was required to set forth on-the-record findings, orally or in writing, that the ends of justice served by the continuance outweighed the interests of [the defendant] and society in a speedy trial.") *with United States v. Robinson*, 887 F.2d 651, 656 (6th Cir. 1989) ("The exclusion is automatic if it falls within one of the [§ 3161(h)(1)] exceptions.").

initial brief an issue not even discussed by the district court. Consequently, there is no [forfeiture], and we find that [the appellant] properly responded [in its reply brief] to the alternative basis for affirmance raised on appeal . . . ."); *see also Golden Living Center-Frankfort v. Sec'y of Health & Human Servs.*, 656 F.3d 421, 42 (6th Cir. 2011). In his initial reply brief, Defendant properly responded to the government's argument, countering that "section 3161(h)(1) only mentions the exclusion of time for the *district court* to consider a plea agreement. It says nothing about *plea negotiations*. . . [and] it is consistent with the purposes of the [Speedy Trial] Act to interpret the exclusion of delay due to 'other proceedings' in section (h)(1) to apply only to other proceedings like those described in the section." (Initial Reply Brief for Appellant at 2–3) (emphasis added).[3]

Third, even if Defendant *did* forfeit his § 3161(h)(1) argument, that forfeiture was cured by subsequent proceedings in this Court and the Supreme Court. This Court's decision in *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006) is instructive.[4] In *Clark*, the

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[3] *Accord* Maj. Op. at 5 ("Subparagraph (h)(1)(G) expressly excludes the time attributable to '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.' . . . Plea *negotiations*, which necessarily occur before a proposed plea agreement comes to fruition, are therefore outside the limited universe contemplated by this subparagraph and may not be automatically excluded.").

[4] Judge Griffin, writing for himself, acknowledges the persuasiveness of *Clark*, but erroneously limits its discussion of *Clark* to its analysis of waiver. "The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017). "Whereas forfeiture is the

defendant failed to argue before the district court that the verdict against it was unconstitutionally excessive. 436 F.3d at 599. Accordingly, Chrysler forfeited that argument. Yet despite that forfeiture, this Court addressed the issue on appeal and held that the ver dict was not unconstitutionally excessive. *Id.* Chrysler appealed, and the Supreme Court issued a GVR, instructing this Court to reconsider the case in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Id.* On remand, this Court held that its addressing the issue on direct appeal—despite the forfeiture—preserved the issue for Supreme Court review, and that the Supreme Court's GVR— despite the forfeiture—preserved the issue for reconsideration. *Id.* at 599–600. "[E]ven though [t]he defendant initially [forfeited] [its] challenge by failing to raise it

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failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 57 U.S. 725, 733 (1993); *see also Lucaj v. Fed. Bureau of Investigation*, 852 F.3d 541, 547 n.4 (6th Cir. 2017). Accordingly, a defendant *waives* an argument by, for instance, withdrawing a motion or objection, *see United States v. Collins*, 683 F.3d 697, 701 (6th Cir. 2012), stating that a proposition is not disputed, *see United States v. Walker*, 615 F.3d 728, 733 (6th Cir. 2010), or stating that they are not pressing an argument. *See United States v. Tasis*, 696 F.3d 623, 625–26 (6th Cir. 2012). In contrast, a defendant *forfeits* an argument by, for instance, failing to make it before the district court, *see Pittman v. Experian Information Sols, Inc.*, 901 F.3d 619, 630 n.6 (6th Cir. 2018), failing to make it in its opening appellate brief, *see Automated Sols. Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 521–22 (6th Cir. 2014), or identifying it without pressing it. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018). Significantly, in *Clark*, the defendant failed to raise the argument at issue in its post-trial motions before the district court. 436 F.3d at 598. Thus, while this Court used the term "waiver," it was more accurately referring to forfeiture, *see Pittman*, 901 F.3d at 630 n.6, and as a result, *Clark* is applicable to this forfeiture analysis.

in its post-trial motions before the district court, subsequent proceedings in the Sixth Circuit and the Supreme Court preserved the issue for review." *Id.* at 598.

The same is true in this case. Defendant allegedly forfeited his § 3161(h)(1) argument by not making it before the district court. Yet despite that alleged forfeiture, this Court addressed the issue on appeal and held that that time spent in plea negotiations is "automatically excludable under § 3161(h)(1)" because "[a]lthough the plea bargaining process is not expressly specified in § 3161(h)(1)['s] [subparagraphs], the listed proceedings are only examples . . . and are not intended to be exclusive." *White*, 679 F. App'x at 430–31. Defendant appealed, and the Supreme Court issued a GVR in light of the government's confession of error. Thus, as in *Clark*, subsequent proceedings before this Court and before the Supreme Court cured Defendant's forfeiture. *See Stutson v. United States*, 516 U.S. 193, 197 (1996) ("[A] GVR order promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.").[5]

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[5] Judge Griffin's holding on this issue eliminated any need for him to address waiver. However, because I disagree with that holding, I address waiver as well. The government argues that Defendant waived his § 3161(h)(1) argument pursuant to 18 U.S.C. § 3162(a), which provides that "[f]ailure 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." This argument is unpersuasive, as this Court has held that § 3162(a) is satisfied "so long as the defendant brings to the court's attention his belief that his [Speedy Trial Act] rights have been violated." *Brown*, 819 F.3d at 823. In this case, Defendant filed a motion to dismiss the indictment, alleging

IV. 18 U.S.C. § 3161(h)(7)[6]

The majority holds that the magistrate judge and the district court made the statutorily mandated findings necessary to exclude Defendant's time spent in plea negotiations under 18 U.S.C. § 3161(h)(7). This holding is also unpersuasive.

By its terms, 18 U.S.C. § 3161(h)(7)(A) permits a court to exclude a period of time by granting an ends-of-justice continuance only 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." The provision explains that "no such period of delay resulting from a continuance granted by the court . . . 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." *Id.* Section 3161(h)(7)(B) then lists "[t]he factors, among others, which a judge shall consider" in determining whether to grant an ends-of-justice continuance.

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that the government had indicted him more than thirty days after his arrest, in violation of the Speedy Trial Act, 18 U.S.C. § 3161(b). Thus, Defendant did not waive his § 3161(h)(1) argument.

[6] 18 U.S.C. § 3161(h)(7) provides, in relevant part: "The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed[:] . . . Any period of delay resulting from a continuance granted by the judge . . . 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."

Thus, § 3161(h)(7) "is explicit." *Zedner v. United States*, 547 U.S. 489, 507 (2006). "[W]ithout the on-the-record-findings, there can be no exclusion." *Id.* "[I]f a judge fails to make the requisite findings regarding the need for the ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed." *Id.* at 508. In this way, § 3161(h)(7) "gives the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs." *Id.* at 499. As the Supreme Court has explained:

> The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the [Speedy Trial] Act and, in allowing district courts to grant such continuances, 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, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of [§ 3161(h)(7)], then, is to counteract substantive openendedness with procedural strictness. The provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings.

Id. at 508–09.

"[T]he Sixth Circuit has placed great emphasis on the need for a district court to comply with this statu-

tory requirement." *Greenup v. United States*, 401 F.3d 758, 764 n.3 (6th Cir. 2005); *see, e.g.*, *United States v. Jordan*, 544 F.3d 656, 665 (6th Cir. 2008) ("We believe that in order to assure that the district court adequately considers whether the ends-of-justice outweigh the public's and defendant's interest in a speedy trial, the district court should also generally hold an adversarial hearing in which both sides participate."). "This Court will not countenance maneuvers aimed at merely paying lip service to the Speedy Trial Act's requirements." *Brown*, 819 F.3d at 815.

In this case, the magistrate judge issued an order stating only that "[t]his matter coming before the court on the stipulation of the parties, it is hereby . . . ORDERED that the period from May 23, 2013, to the new date of the preliminary hearing, June 7, 2013 should be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act. 18 U.S.C. § 3161." (RE 12, Page ID # 32.) The order did not mention the ends of justice or the interest of the defendant and the public in a speedy trial, let alone any reasons for finding that one outweighed the other. Accordingly, the magistrate judge plainly did not comply with § 3161(h)(7), and that should be the end of the matter. *See Zedner*, 547 U.S. at 507.

However, the majority attempts to circumvent this conclusion by relying on the joint stipulation, which the magistrate judge attached to its order. According to the majority, the order "incorporates" the joint stipulation, and thereby complies with § 3161(h)(7). Maj. Op. at 11. This holding is starkly inconsistent with the Supreme Court's and this Court's emphasis on the importance of complying with § 3161(h)(7)'s proce-

dural strictness. *Zedner*, 547 U.S. at 508–09; *Brown*, 819 F.3d at 822.

As an initial matter, it is doubtful that the order actually incorporated the joint stipulation, as the order lacks any "explicit language of incorporation." *See Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 264 (6th Cir. 2012). Moreover, the mere agreement of the parties that the ends of justice outweigh the interest of the defendant and the public in a speedy trial cannot substitute for the district court's own findings to that effect. *See United States v. Ammar*, 842 F.3d 1203, 1206–07 (11th Cir. 2016) ("The best interests of the parties—and even those of the court—cannot alone justify deviation from the [Speedy Trial] Act's requirements, absent the determination that those interests outweigh the public interest."); *Parisi v. United States*, 529 F.3d 134, 140 (2d Cir. 2008) ("The ends-of-justice determination is . . . entrusted to the court, not the parties, and the parties cannot stipulate to its satisfaction as a substitute for the district court's finding to that effect."). Congress unequivocally imposed the procedural requirements of § 3161(h)(7) on *the district court*. *See United States v. Richmond*, 735 F.2d 208, 216 (6th Cir. 1984).[7]

Regardless, even if the magistrate judge "adopted the parties' stipulation as part of its own reasoning," the joint stipulation stated only that the time Defendant spent in plea negotiations should be excluded "because the ends of justice served by such continuance outweigh the interests of the public and the

[7] Accordingly, this case is distinguishable from those relied upon by the majority. In none of those cases did the district court rely solely on the mere agreement of, or findings made by, the parties.

defendant in a speedy trial." Maj. Op. at 11. Such a conclusory statement does not comply with § 3161(h)(7). *See United States v. Toombs*, 574 F.3d 1262, 1271 (10th Cir. 2009) ("A record consisting of only short, conclusory statements lacking in detail is insufficient [to comply with § 3161(h)(7)]."); *United States v. Bryant*, 523 F.3d 349, 361 (D.C. Cir. 2008) ("The passing reference to the 'interest of justice' made by the trial judge . . . does not indicate that the judge seriously considered the [§ 3161(h)(7)(B) factors]. *Zedner* makes clear that trial judges are obligated to seriously weigh the benefits of granting the continuance against the strong public and private interests served by speedy trials. . . ."). Rather, it is a "maneuver[] aimed at merely paying lip service to the Speedy Trial Act's requirements." *Brown*, 819 F.3d at 815.

For all of the foregoing reasons, I concur in part and dissent in part.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.: 13-30265

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMIE EUGENE WHITE,

Defendant.

STIPULATION TO ADJOURN PRELIMINARY HEARING AND COMPLAINT AND FIND EXCLUDABLE DELAY UNDER THE SPEEDY TRIAL ACT

The above parties, by and through their respective counsel, stipulate and agree that there is good cause to adjourn the Preliminary Hearing and Complaint in this case until June 7, 2013. *See* Fed. R. Crim. P. 5.1(d). This extension of time is necessary to allow the parties to engage in plea negotiations. Defendant concurs in this request and agrees that it is in his best interest.

The parties stipulate and agree that this stipulation and any order resulting therefrom shall not affect the previous order setting conditions of release, dated May 3, 2013. The parties also stipulate and agree that the criminal complaint, dated April 29, 2013, shall remain in full force and effect until June 7, 2013.

The parties further stipulate that the period from May 23, 2013, to June 7, 2013, should be excluded from computing the time within which an information or indictment must be filed because the parties are engaged in plea negotiations, 18 U.S.C. § 3161(h)(1), and because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(7).

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Dated: May 16, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.: 13-30265

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMIE EUGENE WHITE,

Defendant.

ORDER ADJOURNING PRELIMINARY HEARING AND COMPLAINT

This matter coming before the court on the stipulation of the parties, it is hereby

ORDERED that good cause exists to extend the complaint and preliminary hearing in this case, scheduled for May 23, 2013, to June 7, 2013. Fed. R. Crim. P. 5.1(d);

ORDERED that the order setting conditions of release, dated May 3, 2013, remains in full force and effect, and that the complaint, dated April 29, 2013, remains in full force and effect through the new date of June 7, 2013; and

ORDERED that the period from May 23, 2013, to the new date of the preliminary hearing, June 7, 2013, should be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act. 18 U.S.C. § 3161.

IT IS SO ORDERED.

S/Mark A. Randon
MARK A. RANDON
United States Magistrate Judge

Entered: May 17, 2013

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 13-20423

UNITED STATES OF AMERICA,
Plaintiff,

v.

JIMMIE EUGENE WHITE,
Defendant.

MOTION TO DISMISS INDICTMENT

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
December 3, 2013

APPEARANCES:

FOR THE PLAINTIFF: KEVIN MULCAHY

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FOR THE DEFENDANT: MARVIN BARNETT

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[3] Detroit, Michigan December 3, 2013 2:27 p.m.

* * *

THE CLERK: All rise. The United States District Court for the Eastern District of Michigan is now in session. The Honorable David M. Lawson presiding.

THE COURT: You may be seated.

THE CLERK: Now calling the case of the United States of America versus Jimmie Eugene White, Case Number 13-20423.

THE COURT: Good afternoon, Counsel. May I have your appearances, please.

MR. MULCAHY: Yes. Good afternoon, your Honor. Kevin Mulcahy for the United States.

MR. BARNETT: Good afternoon, your Honor. Marvin Barnett on behalf of Jimmie Eugene White, II.

THE COURT: Mr. White, good afternoon.

THE DEFENDANT: Good afternoon, your Honor.

THE COURT: The matter is before the Court on the Defendant's motion to dismiss the indictment.

Mr. Barnett, I have looked through your motion, and for the purpose of clarifying, it appears to me that you believe or you are arguing that the period between the execution of the search warrant in 2010 and the – either the complaint or the indictment in this past spring is the [4] operative period that we have to focus on here, is that it, in terms of delay?

MR. BARNETT: In part, yes.

THE COURT: All right. Are you arguing that there is a violation of the Speedy Trial Act itself, or are you arguing that there is a constitutional violation, or both?

MR. BARNETT: Both, your Honor.

THE COURT: Okay. And are you relying on the Sixth Amendment right to a speedy trial, or are you relying on the Fifth Amendment due process claim because of pre-indictment delay, or both?

MR. BARNETT: Both. On the Sixth Amendment claim and the pre-indictment delay. And we have a more technical argument regarding when he was initially arrested, on pre-indictment delay when he was initially charged in the complaint.

THE COURT: Okay. I didn't understand all of that from your motion papers, but you can lay that out in your argument, then, and you may proceed.

MR. BARNETT: Thank you, your Honor.

Your Honor, I would like to address the second argument that we had raised regarding the Speedy Trial Act. It's a more simpler argument that we make.

The Defendant was ultimately, in this particular case, arrested and a complaint filed against him. Within a [5] period of about 37 days after his initial appearance before the Magistrate, he was indicted beyond the 30-day period.

THE COURT: I think it's 33 days.

MR. BARNETT: Well, okay, fine. There is a dispute between 33 and 37, but I'll accept 33. Depends on how you view it over the weekend or whatever.

THE COURT: Okay.

MR. BARNETT: Very simply, his attorney entered into an agreed stipulation with the United States Attorney to extend the period of time.

THE COURT: Right.

MR. BARNETT: If that extension is effective to the Defendant, then that would be credited against him; the issue would be moot, he would lose. His claim is that he did not agree to that, had no knowledge of it, that that extension was taking place. And quite frankly, I didn't know how to respond to it, because I couldn't come up with a reason why there would be such a stipulation entered.

Our argument is very simple: He didn't agree to it.

THE COURT: Who was his lawyer at the time?

MR. BARNETT: Gosh, he told me. One second. John McManus.

THE COURT: Was that Mr. McManus?

MR. BARNETT: John McManus. Now, as a practical matter, Judge, I think these things occur all of the time. [6] Unfortunately, in my practice, I make people sign things or make sure that they are in court with

me. It's a tough call, because normally we would anticipate that the lawyer would have – I'm not making any allegations, I'm simply saying that there was no record of it. It was an off-the-record matter.

If the Court finds, based on the records and files of the case, that the, in effect, waiver or extension was valid, the Defendant loses that point.

If, in the event, the Court finds that it is not sufficient, and that is, that's not effective to the Defendant, it didn't affect him and it's a nullity, then we simply have an indictment that's filed after 30 days.

THE COURT: What is your position as to what is necessary for that waiver to be effective?

I guess another way to say it is, what is your position as to what is necessary to provide the defense lawyer with the authority to make the stipulation?

MR. BARNETT: Two things, your Honor.

First, a signature by the Defendant would help, that's one.

THE COURT: Well, that would be proof.

MR. BARNETT: Well, okay, that would be proof.

THE COURT: Yeah. But that's not necessary, is it?
MR. BARNETT: No, it isn't, because we're dealing with an attorney.

[7] THE COURT: All right.

MR. BARNETT: I would think that if the attorney indicated that he did communicate with the Defendant, I think that as an Officer of the Court, if we compared that to what Mr. White said, that probably would lean in favor of the attorney, who has an obligation to make sure that he is being honest about it.

If the lawyer said that he didn't communicate with his client, your Honor, and there was a record of that, I guess we would need for him to admit or deny that. And if he admitted that, "I didn't communicate with my client in that regard," I think that would be sufficient evidence, coupled with the Defendant's affirmative statement that it didn't occur, for the Court to find that the waiver or the agreement was ineffective.

THE COURT: Well, let's talk about that for a minute.

MR. BARNETT: Yes, sir.

THE COURT: Does the attorney need the Defendant's permission to enter into a stipulation of this nature?

MR. BARNETT: Judge, we looked at that issue, and if I had to make the call, I'm not sure, because the rights under the Speedy Trial Act, are they – his constitutional rights, are they statutory? I don't know the answer to that question.

THE COURT: Well, plainly they are statutory, at least.

[8] MR. BARNETT: Well, I know that. But whether or not it reaches the level where one has to come before the Court to waive a right, a significant right, is a different question. I think it falls somewhere in between. Obviously, there are some things where it is necessary that there be a record made of the Defendant's concurrence with what the lawyer is doing, but I can't affirmatively say that there is a requirement, because as a practicing attorney if my client has confidence and tells me to do what I think is appropriate, then I might not inquire of him. It's not one of those

things I would necessarily say, as an Officer of the Court, that I would always speak to my client about.

THE COURT: I guess I'm wondering is whether – what I'm wondering is whether we are in the realm of the Speedy Trial Act question, whether rights can be waived, whether counsel can take steps, or whether we're talking about the Sixth Amendment right to counsel and effective assistance of counsel here. And if so, then would that decision be relegated to some sort of strategic decision for which there is some substantial deference that's allowed to counsel.

The reason I say that is because the court order, and I don't think I signed that order, I think the Magistrate Judge signed the order, it says that the period from May 23 to June 7 should be excluded from computing time, the time within which an information or indictment must be filed, because the [9] parties are engaged in plea negotiations, there is a cite to the statute, and because the ends of justice served by the continuance outweigh the interest of the public and the Defendant in a speedy trial, which is the magic words –

MR. BARNETT: I agree.

THE COURT: – that we're familiar with.

Now, that seems to say that there is some conversation going on and the time is being expanded to have a discussion, and if that's the case, where are we, especially on this record, to second guess on that point?

MR. BARNETT: I think that you couldn't. I think that your statement is a very fair and accurate statement; that if the attorney simply chose to not communicate with the client regarding that, but it was for the purpose of trial strategy and negotiating a resolution of the case solely in the best interest of the

Defendant, and if, in fact, the lawyer did not communicate that to him, but just proceeded based on his experience, you have an experienced attorney you're dealing with, and his purpose was, in fact, to obtain a benefit, I think that would indeed not be ineffective because of the fact that he is fighting for the interests of the Defendant.

And the fact that he did not communicate with the Defendant on this specific matter, I think in all fairness, would be a matter of apparent authority. You know, I'm the [10] lawyer. You hired me to do my job. I don't always communicate with you on certain matters that I'm not required as a matter of law to communicate with you. I presume that you expect that I would do everything I can.

In my practice I will adjourn a date because I'm communicating with the Government or something and I'm doing it for the interests of the Defendant.

Obviously, I know the attorney. I'm not trying to raise it in that kind of sense, but in a technical sense, I guess it would fall in that area. We don't make that claim today. But yes, if the lawyer said, "I didn't communicate with him, but I was doing it because of a matter of trial strategy, we were working with the Government, we were trying to resolve this and I thought it was appropriate for me to adjourn it for a couple of days," that would be – that would not be ineffective, that would be good lawyering.

THE COURT: May I ask, did you talk to Mr. McManus or attempt to obtain an affidavit from him?

MR. BARNETT: You know, Judge, I didn't. I thought about it.

THE COURT: You did or did not?

MR. BARNETT: I did not.

THE COURT: Did not. Okay.

MR. BARNETT: And the reason I didn't is, I didn't

know whether it was appropriate for me to do that. I just – [11] I didn't know how to deal with that. I told the Defendant that, you know, let me just wait, because frankly, that claim he's making was in that area I just didn't – I just did not, in anticipation of what the Court would need.

But I agree with the Court, it does seem – although what's difficult is that the cases that we have, somehow there is a case that I remember down south somewhere, but the real question is: Does the Sixth Amendment right of effective assistance of counsel arise prior to indictment.

Can you actually, you know, can you be effective – in other words, effective assistance of counsel, does it run from the time in which I become the attorney of record, and at which point strategy is there, do you really have an obligation to be effective before an indictment?

THE COURT: Well, I would think that it doesn't matter if it's a complaint or an indictment. There was a complaint filed, so the case is going.

MR. BARNETT: Well, your Honor, probably right, yeah, yeah, yes. There – I would think that would be effective. I just don't know the answers to the question. My gut would tell me that there probably wasn't a communication.

I was also concerned, I don't know what representations were made, but as a matter of course, Judge, I know these things happen routinely. We're busy

lawyers and we do these things. So there is nothing wrong, but that's –

[12] THE COURT: Do you have any further argument on this point?

MR. BARNETT: No, I don't.

THE COURT: Well, let me hear from Mr. Mulcahy on that, then.

MR. MULCAHY: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. MULCAHY: As it relates to the Speedy Trial Act itself, I'm not sure Mr. Barnett and I are too far apart. I think he is right that there is a court order here that excludes time, excludes enough time such that the indictment was returned consistently with the Speedy Trial Act, and so it's sort of – the argument is sort of over at that point.

Today is the first time I have heard that Mr. White apparently doesn't agree that he allowed his lawyer or agreed with his lawyer –

THE COURT: Authorized him.

MR. MULCAHY: – authorized him, thank you, to move that date.

In response to your Honor's question, I'm sure not sure that he has – that the lawyer is required to obtain the approval or authorization of his client to move a date like a PE date. I know the Supreme Court has said that a defendant cannot waive Speedy Trial Act rights in and of themselves, which makes me believe that the Speedy Trial Act is something [13] sort of different than some of the other requirements where the defendant is required to affirmatively, himself, waive a particular right.

THE COURT: Oh, right. But I think that's in the context of the reality that the Speedy Trial Act doesn't simply protect the rights of the Defendant.

MR. MULCAHY: Sure.

THE COURT: The right to a speedy trial enures to the Defendant and the Government and the public and so –

MR. MULCAHY: Absolutely.

THE COURT: – the Defendant is just one of – a leg of that three-legged stool, I guess, and so the Court has to make a finding, which was done here.

MR. MULCAHY: Correct, your Honor. And because that was done here, and we don't – there really is no evidence or, I guess, reason to suggest that Mr. McManus entered into that stipulation improperly or that the Court signed the order improperly, I think what the Court has before it is a timely indictment under the Speedy Trial Act.

THE COURT: All right. What's the upshot? If the indictment is untimely and we dismiss it, then I guess I have to make a decision as to whether it ought to be with or without prejudice, right?

MR. MULCAHY: Correct, your Honor.

THE COURT: And if I decided it – well, all right. [14] Fair enough.

MR. MULCAHY: Okay. On that point, if I could just say, add one more thought, if your Honor thought to dismiss the indictment because it believed Mr. White did not authorize this lawyer, I would suggest that it would be without prejudice, because obviously the Government could not possibly be aware of the communications or lack of communications between

Mr. White and his lawyer that would have led to the Speedy Trial Act violation, if that makes some sense.

THE COURT: Yeah, no, I understand. I hear your argument.

Anything else on this one, Mr. Barnett?

MR. BARNETT: Only that I'm sure the United States Attorney would agree that about a couple of days ago I did bring to his attention his claim that he was – that it was not communicated with, and that he may have forgotten, but I did – at least I thought I brought it to his attention.

THE COURT: You mean in conversation?

MR. BARNETT: A conversation.

THE COURT: Oh, sure. It's not a motion, though.

MR. BARNETT: No, no, but I did bring it to his attention.

I have nothing else, your Honor, on that second prong, that second argument, except that when you consider making your decision, your Honor, it is one thing that I [15] always depend on when I step into the United States Federal District Court, always depend on everything is correctly done, and if there is any possibility that there should have been notice or not, and if you find that there is nothing that necessarily guides us in that direction, and if it's just your discretion, I think consistent – it would be consistent for us to at least impose a rule that there ought be a communication with the Defendant regarding that matter, because of its seriousness.

And I would ask that the Court, if it's a close call and it's not clear, that the Court would find that it is appropriate for the Defendant to be informed. And it

would affect the juris – the federal juris prudence. It would be an important decision.

So I would ask if there is no clear evidence to suggest that he had no obligation, and if the Court is not clear, that it rule in favor of the Defendant. The Government is not prejudiced by such a ruling and so I would ask the Court to consider that.

THE COURT: All right.

MR. BARNETT: On the first argument –

THE COURT: Let me deal with that one first.

MR. BARNETT: Yes, sir.

THE COURT: And then we will go to the next argument.

I have some questions about that, of course.

[16] MR. BARNETT: Yes, your Honor.

THE COURT: On this point, what I have before me is a finding by a judicial officer that the time was appropriately excluded based upon the fact that the parties were engaged in plea negotiations. The order was based in some measure on a stipulation, but it is also based on the independent finding of a judicial officer, as it must be under the Speedy Trial Act.

I don't have enough of a record at this point to support a claim that there was some ultravirus action by the defense lawyer in the case. I have no testimony. I have no sworn statement by the Defendant. I have no testimony from the lawyer himself, and I'm not sure that I would need a – anything other than some sort of explicit instructions from the Defendant not to enter into such a stipulation to prevent the lawyer from doing so, because I think the lawyer, if, in fact, he intended to engage in plea negotiations and needed

some time to do that, would have exercised some measure of sound strategy to enter into the agreement. So I'm going to deny relief on that ground.

Where does that leave you? Well, I suppose it leaves you without a Speedy Trial Act argument on this ground, but somewhere down the line if there is a conviction and a sentence, it might leave you with the opportunity to file something under Section 2255 and make a record, because, [17] essentially, you would be claiming ineffective assistance of counsel and then you would have to show defective performance and prejudice that would result.

Now, your prejudice argument, I would think, not that I'm trying to spin this out, would have to take into account whether or not a dismissal here would be with or without prejudice, and I don't see any arguments for dismissing the case with prejudice based upon this sort of a delay.

MR. BARNETT: Actually, Judge, I actually agree with you. There's only one problem, however, with something that the Court stated. Yes, there was a stipulation, but it doesn't appear as though the Magistrate had a sufficient factual basis other than the stipulation itself.

In other words, from what I can tell, there was no determination made at all. I don't – I don't believe that they appeared before the Magistrate. I think that they just had a stipulation that the parties agreed. And then when they used the broad term, "the parties," the Magistrate may have assumed that that was the Defendant. I don't think that you have a strong enough record to make a determination as to what happened and would –

THE COURT: But I don't have to. The Magistrate Judge made a finding and I can rely on that.

MR. BARNETT: Well, yes, you can rely on the Court's finding, it's just something that it suggests to you that the [18] Court – that the Magistrate had a basis of making it other than the stipulation.

THE COURT: Well, I don't see anything here that would either compel me, or permit me, or suggest that I ought to go behind the Magistrate Judge's finding under the circumstances.

MR. BARNETT: Last – well, thank you, your Honor, and I'm very aware of your decision.

THE COURT: So that's my ruling on that.

But with respect to the next part of your motion, do you have any further arguments that are based upon the Speedy Trial Act?

MR. BARNETT: No.

THE COURT: All right. So then let's go to your constitutional arguments.

MR. BARNETT: Constitutional argument, your Honor, very interesting argument where the Defendant is arrested, search warrant executed. Government had enough information to charge the Defendant with the offenses. The Defendant was taken into custody.

He, according to the Government, waiting for paperwork, entered into an agreement to cooperate with them. And also, the Defendant for some reason signed an administrative forfeiture, which I thought was unusual, at that time. And then he was released into the custody of the [19] Wayne County Jail, because there was a warrant in October.

THE COURT: On something else.

MR. BARNETT: I'm sorry, a warrant in Ohio, excuse me.

THE COURT: For something else.

MR. BARNETT: For someone [sic] else. And he went to Ohio and he was down there for six months, served out a term, and in October of 2010, he is released. We clearly have –

THE COURT: What was administratively forfeited?

MR. BARNETT: $26,000.

THE COURT: Cash?

MR. BARNETT: Cash.

THE COURT: What about the gun?

MR. BARNETT: I don't know about the gun. I don't know if the gun was subject to forfeiture or not.

THE COURT: It might have just been seized.

MR. BARNETT: It was certainly – a weapon was seized, but the Defendant denied that the weapon was his at that time. But your Honor, if I may be perfectly frank, I think this was just a mistake. I mean, you're talking about three years from October of 2010 to 2013.

THE COURT: You mean the case just fell through the cracks?

MR. BARNETT: I think it just fell through the cracks.

THE COURT: Maybe so.

MR. BARNETT: It's their burden.

[20] THE COURT: So what's the consequence?

MR. BARNETT: The consequence is a dismissal with prejudice, and a prejudice argument can clearly be made.

THE COURT: Make it.

MR. BARNETT: Okay. If the Defendant had information at that time to cooperate and was willing to cooperate at that moment of time and they – if they had have indicted him, he could have exercised his right to allocute. He could have given substantial assistance to the United States Government. He could have affected himself.

The best way, I guess by way of analogy, and this is not technically correct, but years ago in that civil context I remember a concept of staleness and of – that my ability to help myself is gone. The witnesses I had, the people I knew are not available. So –

THE COURT: And you're saying that –

MR. BARNETT: He couldn't exercise his Fifth Amendment right as effectively as he could had that occurred.

THE COURT: You're saying he can't do that now –-

MR. BARNETT: No.

THE COURT: – because the information isn't current anymore.

MR. BARNETT: That's right. And right now –

THE COURT: If he had any.

MR. BARNETT: That's right. And right now they have [21] no use for it. That's – that's clear prejudice right there.

THE COURT: All right.

MR. BARNETT: Thank you. It's their burden on this one, I think, Judge.

MR. MULCAHY: As to the constitutional issue, your Honor.

THE COURT: Tell me why the case fell through the cracks.

MR. MULCAHY: I don't have a very good explanation for that. I think it actually did just fall through the cracks. There's –

(Phone interruption at 2:51 p.m.)

THE COURT: Just a minute. Let Mr. Barnett attend to that.

MR. BARNETT: Sorry, Judge. My staff bought me this new phone and I don't like it. Excuse me, your Honor. I'm sorry. It's off. Sorry. My apologies.

THE COURT: You know, when we have the video presentation for exhibits in the courtroom I have a rule that I don't let lawyers push buttons, because nothing good results from that.

MR. BARNETT: I agree, your Honor. My staff says the same thing.

MR. MULCAHY: As to the issue of sort of where the case went, there's a slight amount of time that can be [22] attributed, I think, to Mr. White, but the three-year delay, putting aside where the clock begins to run from a constitutional standpoint, just from real life, three years from the time they hit the door in May of 2010 versus the time a criminal complaint was filed about three years later.

Mr. White indicated the night that the search warrant was executed at his house that he would be willing to cooperate. He knew of an individual who was

providing him the pills; that this individual was from Canada. As I think the Court knows, it's very common for ecstasy or BZP, which is sort of an offshoot from ecstasy, to come from Canada. I think the agents were interested in working with him.

A few things happened, and I'm not sure all of which, the details of all that happened. I know part of the problem was that Mr. White did have a time in prison down in Ohio for a fraud-related charge, unrelated to drugs and this case here. He did that time there and whether or not the agents thought at that point too much time had gone by for Mr. White to be useful, or if Mr. White thought, "I'm not sure I really want to cooperate against these people in Canada," or perhaps both, I don't know. So there is that piece of time, I think, that could be attributable to Mr. White, or certainly his circumstance of being in prison.

Why the case took three years to go from an execution of a search warrant on a fairly straightforward case to [23] indictment, I don't frankly have a very good answer. The case was in our office. The case was under investigation. It eventually changed AUSA's, which led to the sort of resurrection of the case and moving the case along and resolving it.

THE COURT: This is a single-defendant case, isn't it?

MR. MULCAHY: Correct, your Honor.

THE COURT: So –

MR. MULCAHY: Now, in fairness, there was a Title III, and I think there were other folks, a Title III intercept of Mr. White's phone. It didn't last an incredibly long period of time, so I think there was potential –

THE COURT: Well, that led to the search warrant, right?

MR. MULCAHY: Correct, your Honor. And I think there was potential for other folks from the wire that perhaps could have been defendants here, but, right, as we stand here now it's a single-defendant case and there isn't any defendant who is a fugitive or died or anything like that, that I can point to. Whether or not the agents thought this could be a bigger case because of the wire, I don't know.

But I think what's important for where we're at now, in late 2013, is that for the constitutional violation to hold or to start, Mr. White needs to be an accused. The Sixth Amendment says that the speedy trial – the right to a speedy [24] trial is for an accused.

THE COURT: Right.

MR. MULCAHY: And he wasn't an accused until there was a criminal complaint or some type of process against him.

THE COURT: I understand that well.

MR. MULCAHY: Okay.

THE COURT: And frankly, I'm not particularly impressed with the Sixth Amendment argument, but there is a Fifth Amendment argument regarding pre-indictment delay, and he is entitled to avail himself of that if he can satisfy the standards. So that's really what we're dealing with here, in my view, with all due respect to Mr. Barnett.

Under the Six Amendment, the delay is not presumptively extraordinary, it's only six months. As we stand here now –

MR. MULCAHY: Correct.

THE COURT: – it's only six months. And that time, much of that time is excluded under the Speedy Trial Act. From the indictment first appearance time to now, unexcluded time amounts to about 20 days. But the three years, that's why I asked Mr. Barnett to begin with, what are we talking about here, and that's the period that he is focusing on.

MR. MULCAHY: And in that regard, I guess I would ask for the opportunity to brief that issue because it wasn't raised in the pleadings themselves, and so I didn't brief, and [25] frankly don't have the standard off my – rattled around in my brain today of what the Fifth Amendment due process analysis should be.

THE COURT: Well, Mr. Barnett might want an opportunity to address that, too, would you say, Mr. Barnett?

MR. BARNETT: Your Honor, I think it would – in all fairness, I would have no opposition if the Court wanted me to brief an additional issue. I would have no problem with that. We're trying to do the right thing here.

THE COURT: All right. How much time would you like?

Mr. Barnett, I think if you're going to raise a Fifth Amendment argument, which, fairly stated, is not included in your motion papers right now –

MR. BARNETT: I think that would be a fair statement.

THE COURT: – you should go first and Mr. Mulcahy should have an opportunity to respond to it.

MR. BARNETT: I agree. I have a 21-day default in my brain.

THE COURT: That's fine. That's fine.

MR. BARNETT: Thank you.

THE COURT: There is – this case has been around for more than three years, 21 days isn't going to hurt.

MR. BARNETT: Very well, your Honor.

THE COURT: And 21 days takes you right into the middle of Christmas season, as I calculate.

[26] MR. BARNETT: I think the 28th.

THE COURT: That would be the 24th. Would you like to file your brief on Christmas Eve?

MR. BARNETT: No, no, I don't, your Honor. I would like – I would like a little bit more time.

THE COURT: Because if so, we could have a couple of elves in the Clerk's Office receive it from you.

MR. BARNETT: Your Honor, at some point during -

in reflection, some point during the year 2014, other than January the 2nd would be fine.

THE COURT: How about the 6th? It's the first Monday in January.

MR. BARNETT: Very well, your Honor.

THE COURT: You want 21 days to respond, Mr. Mulcahy?

MR. MULCAHY: Yes, please, your Honor.

THE COURT: That would be the 27th of January.

MR. MULCAHY: Yes, your Honor.

THE COURT: You can submit supplemental briefs. Try to keep them down to ten pages or below, if you would.

MR. BARNETT: Thank you very much, your Honor.

THE COURT: All right. Anything further, then?

MR. BARNETT: Nothing else, your Honor.

MR. MULCAHY: Nothing.

THE COURT: All right. Thank you. This matter is in recess.

[27] May I see Counsel at the bench, please?

(Proceedings adjourned at 2:57 p.m.)

* * *

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Rene L. Twedt
RENE L. TWEDT,
CSR-2907, RPR, CRR, RMR
Federal Official Court Reporter

October 10, 2014
Date

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 13-20423

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMIE EUGENE WHITE II,

Defendant.

Honorable David M. Lawson

OPINION AND ORDER DENYING MOTION TO DISMISS INDICTMENT

Defendant Jimmie Eugene White II charged in a four-count indictment with drug and firearms crimes, filed the present motion to dismiss the case against him alleging that his right to a speedy trial has been abridged. He contends that the delay between his arrest (and brief detention) in May 2010 and his indictment in June 2013 violated his rights under the Sixth Amendment and the Speedy Trial Act. The government filed an answer in opposition to the motion. At oral argument held on December 3, 2013, counsel for the defendant conceded that no Speedy Trial Act violation occurred in this case. The Court suggested that pre-indictment delay, which was the

focus of the defendant's argument, does not implicate the speedy trial right found in the Sixth Amendment, although it may violate the Fifth Amendment in some cases. The defendant requested an opportunity to investigate that theory and file a supplemental brief, and the Court set a deadline of January 6, 2014. The parties later submitted a stipulation to enlarge that time, and the Court set a new deadline of January 20, 2014. That time has passed, no additional filings have been received from the defendant, and the Court finds that he has abandoned any claim of pre-indictment delay under the Fifth Amendment. The Court concludes that the defendant has not been denied his right to a speedy trial, and therefore will deny the motion to dismiss.

I.

According to the parties' statements in the motion papers, on February 4, 2010, the Drug Enforcement Administration (DEA) received authorization to intercept the defendant's cell phone calls. DEA agents learned from the intercepted phone calls that the defendant conspired to sell Ecstasy.

On May 14, 2010, DEA agents executed a federal search warrant at the defendant's home. Agents seized the following items inside a locked safe located in the master bedroom: (1) 898 pills of N-Benzylpiperazine Dihydrochloride (BZP); (2) $25,396 in United States Currency; (3) a Cobray PM-11 9 mm. pistol with an obliterated serial number; and (4) a magazine loaded with 25 rounds of 9 mm. ammunition. Agents also seized other items in the defendant's home, including $1,253 in United States Currency located in the defendant's pants pockets, two pistol magazines, one rifle magazine, and several identification cards, both real and fraudulent.

DEA agents detained and questioned the defendant that same day. During questioning, the defendant admitted selling Ecstasy for approximately one year (with sales surpassing 10,000 pills). He said that a Canadian man supplied him with the pills, but the seized drugs and money belonged to him. The defendant denied owning the gun, even though it was found in the safe with all of the pills and most of the money. The government did not charge the defendant with a crime at that time, in part, because the defendant promised to cooperate with the DEA. It appears that he was released from custody shortly thereafter. The defendant never cooperated, perhaps because he received a prison sentence in Ohio for fraudulent activity.

Nearly three years later, on April 29, 2013, the government filed a complaint against the defendant charging him with various crimes related to the May 14, 2010 search and seizure. On

May 2, 2013, an arrest warrant was issued for the defendant, the defendant appeared before Magistrate Judge Mona Majzoub for his initial appearance, and an order of temporary detention was entered. On May 17, 2013, the parties stipulated and the Court ordered that good cause existed to extend the complaint and the preliminary hearing in the case from May 23, 2013 to June 7, 2013. The Court excluded from the Speedy Trial Act's time limits the period from May 23, 2013 to the new date of the preliminary hearing.

On June 4, 2013, thirty-three days after the defendant's initial appearance, the grand jury indicted White for conspiracy to distribute Ecstasy and BZP, in violation of 21 U.S.C. § 846; possession of BZP with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A);

and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Counsel was appointed to represent him, and White was arraigned and entered a plea of not guilty on June 12, 2013. The Court entered a scheduling order on June 20, 2013 setting an August 6, 2013 trial date.

Since the defendant's indictment, the parties filed various motions in the case. On June 21, 2013, the defendant, acting on his own behalf, filed a motion to compel discovery. The Court denied the defendant's motion on July 1, 2013 because the Court's scheduling order included a requirement for consultation by defense counsel with the government concerning discovery, and the defendant did not act through his counsel. On July 2, 2013, the defendant filed more motions *pro se*, including a motion for new attorney, motion to unseal case number 10-50558, motion to suppress evidence, and motion to dismiss the case for violation of the Speedy Trial Act.

On July 11, 2013, the defendant's attorney, John McManus, filed a motion to withdraw alleging a break down in the attorney-client relationship because the defendant filed multiple *pro se* motions despite counsel's advice to the contrary and also sent a letter to the Court suggesting that counsel was not acting in his interests. The Court held a hearing on Mr. McManus's motion to withdraw on August 5, 2013, granted the motion, and allowed the defendant a week to find new counsel to retain (which was his desire) before appointing another attorney to represent him.

On August 9, 2013, attorney Marvin Barnett filed an appearance on behalf of the defendant. At a hearing held that day, the Court again approved Mr. Manus's withdrawal, dismissed without prejudice the defendant's *pro se* motions, and established new case dead-

lines, including a new trial date of October 8, 2013. The Court excluded the time between August 12, 2013 and September 23, 2013 from the Speedy Trial Act time limits to account for new defense counsel's trial preparation needs. The new scheduling order was entered on August 26, 2013.

On September 12, 2013, the parties filed a stipulation to enlarge the case deadlines and adjourn the trial. They agreed that the resulting delay should be excluded from the Speedy Trial Act time limits.

The defendant filed the present motion to dismiss on September 24, 2013. As mentioned above, the Court held a hearing on the motion on December 3, 2013, and thereafter granted the defendant's request to file supplemental briefs. That filing deadline, once extended, has passed, and because no new briefs have been filed, the Court proceeds to adjudicate the motion.

II.

The defendant argues that the government violated a provision of the Speedy Trial Act, 18 U.S.C. § 3161(b), when it failed to charge the defendant with the commission of an offense within thirty days from the date of his arrest. The defendant says that he was arrested on May 14, 2010 when DEA agents executed a search warrant at his home, but the complaint was not sworn until April 29, 2013 and the indictment was not returned until June 4, 2013. The defendant also argues that his Sixth Amendment right to a speedy trial was violated because there was a three-year delay between the authorization and execution of the federal search warrant and the date that the government filed the complaint. He contends that he was prejudiced by the speedy trial violation because he was denied an opportunity to cooperate with the government and possibly

avoid prosecution at all. The Court will address each argument in turn.

A. Speedy Trial Act

According to18 U.S.C. § 3161(b), "[a]ny information or indictment charging an individual with the commission of an offense [must] be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." The premise of the defendant's argument that the government violated this statute is that his "arrest" date was in May 2010. However, a "defendant is not 'arrested' for purposes of the Speedy Trial Act until formal federal charges are pending, that is, when a formal complaint or charge is issued." *United States v. Salgado*, 250 F.3d 438, 454 (6th Cir. 2001); *see also United States v. Graef*, 31 F.3d 362, 363-64 (6th Cir. 1994) ("[C]ourts [have] unanimously . . . conclude[d] that the arrest 'trigger' for § 3161(b) applies only to arrests made either on a complaint or which were immediately followed by a complaint."); *United States v. Blackmon*, 874 F.2d 378, 381 (6th Cir. 1989) ("A defendant is not 'arrested' for purposes of the Speedy Trial Act until formal federal charges are pending. An 'arrest' refers to the point at which a defendant is charged with the crime; therefore, a defendant is not 'arrested' until a formal complaint or formal charge is issued.") (internal citations omitted).

For Speedy Trial Act calculations, the "arrest" in this case took place on May 2, 2013, after the government swore out a complaint against White. Although White was not indicted until thirty-three days later, he and the government agreed that the time period should be enlarged. Based on that agreement, the magistrate judge ordered that "the period from May 23, 2013, to June 7, 2013, should be excluded from

computing the time within which an information or indictment must be filed because the parties are engaged in plea negotiations." Order Adj. Prelim. Exam. [dkt. #12]. When that exclusion is taken into account, only twenty days elapsed between the arrest and the indictment, and no violation of 18 U.S.C. § 3161(b) occurred. There was no Speedy Trial Act violation.

B. Sixth Amendment claim

The Sixth Amendment guarantees the defendant's "right to a speedy and public trial," U.S. Const. am. VI, but once again the defendant's argument falters when his measuring parameters are examined. The three years between his detention for questioning and his formal arrest on the complaint and warrant do not figure in analysis, at least under the Sixth Amendment.

"A criminal defendant's right to a speedy trial attaches only when a criminal proceeding has been initiated and the defendant 'faces a real and immediate threat of conviction.'" *United States v. Watford*, 468 F.3d 891, 901 (6th Cir. 2006) (quoting *United States v. Sanders*, 452 F.3d 572, 579 (6th Cir. 2006)). "Neither [Speedy Trial Act] nor the Sixth Amendment rights of appellants apply to the time between a criminal occurrence and a subsequent formal charge of wrongdoing." *United States v. Alfarano*, 706 F.2d 739, 741 (6th Cir. 1983) (citing *United States v. MacDonald*, 456 U.S. 1 (1982); *United States v. Marion*, 404 U.S. 307 (1971)).

The Sixth Amendment speedy trial right does not come into play until a formal charge is made. *United States v. Martin*, 543 F.2d 577, 579 (6th Cir. 1976); *see also United States v. Marion*, 404 U.S. 307, 313 (1971). The delay in actually bringing formal charges is not a concern addressed by the Sixth Amendment. *United*

States v. Loud Hawk, 474 U.S. 302, 311-12 (1986) (stating that "[t]he Speedy Trial Clause does not . . . limit the length of a preindictment criminal investigation even though 'the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.'" (quoting *MacDonald*, 456 U.S. at 9)).

Although the defendant was briefly detained for questioning on May 14, 2010, the government did not arrest him until May 2, 2013 (after filing a formal complaint on April 29, 2013) or indict him until June 4, 2013. Therefore, the Court must measure delay when evaluating the defendant's Sixth Amendment claim from his May 2, 2013 arrest. *See United States v. Bass*, 460 F.3d 830, 836 (6th Cir. 2006) ("The length of delay is measured from the earlier of the date of indictment or arrest to the defendant's trial."); *Watford*, 468 F.3d at 901 n.4 (stating that "in most cases, the triggering event [under the Sixth Amendment] will be the filing of an indictment"; although acknowledging that "arrest may also trigger an accused's Sixth Amendment speedy trial rights.") (citing *United States v. MacDonald*, 456 U.S. 1, 7 (1982)); *United States v. Gouveia*, 467 U.S. 180, 185-86 (1984) ("[T]he Sixth Amendment speedy trial right is triggered when an individual is arrested and held to answer criminal charges.").

The length of the dely is one of four factors to consider in determining whether a defendant has been denied a speedy trial in violation of the Sixth Amendment. *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (the others are (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant). "The first factor is a threshold requirement, and if the delay is not uncommonly long, judicial

examination ceases." *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006) (citing *United States v. Schreane*, 455 F.3d 602, 607 (6th Cir. 2006)); *see also Barker*, 407 U.S. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."); *United States v. Gardner*, 488 F.3d 700, 719 (6th Cir. 2007) ("The length of the delay is a threshold issue. That is, if there is no delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors.").

"[A] delay of one year is presumptively prejudicial and triggers application of the remaining three factors." *Bass*, 460 F.3d at 836. The delay between the defendant's formal arrest and the date he filed his motion to dismiss was less than six months, which is not "uncommonly long." *See United States v. Gardner*, 488 F.3d 700, 719 (6th Cir. 2007) (holding that delay of approximately nine months was not "uncommonly long"); *see also Randle v. Jackson*, 544 F. Supp. 2d 619, 632 (E.D. Mich. 2008) (approximately eleven month delay between arrest and trial on armed robbery and possession of a firearm in the commission of a felony charges was, "although substantial . . . not uncommonly long"). There is no Sixth Amendment violation.

C. Pre-indictment delay

As discussed at oral argument, the delay between arrest and filing the charging documents could implicate the Due Process Clause of the Fifth Amendment. *Marion*, 404 U.S. at 324. But the Supreme Court has observed that "no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so." *United States v. Lovasco*, 431 U.S. 783, 792 (1977). Proof of prejudice is a necessary element of a due process claim

for pre-indictment delay. *Lovasco*, 431 U.S. at 790. The Sixth Circuit has consistently read *Lovasco* to hold that dismissal for pre-indictment delay is warranted only when the defendant shows both substantial prejudice to his right to a fair trial and that the delay was intentionally imposed by the government to gain a tactical advantage. *See United States v. Brown*, 959 F.2d 63, 66 (6th Cir.1992).

Showing *both* prejudice *and* ill motive is not easy. The defendant was invited to file a supplemental brief if he desired to advance such a claim, but apparently he chooses not to do so. The Court concludes, therefore, that he has abandoned any claim that pre-indictment delay violated his rights under the Fifth Amendment. *See United States v. Graham*, 622 F.3d 445, 455 n.9 (6th Cir. 2010).

III.

The defendant's right to a speedy trial has not been violated. He has not established either a statutory or constitutional violation.

Accordingly, it is ORDERED that the defendant's motion to dismiss the indictment [dkt. #35] is DENIED.

It is further ORDERED that the parties appear for a jury trial on March 4, 2014 at 8:30 a.m.

It is further ORDERED that the parties appear for a final pretrial conference on February 18, 2014 at 2:00 p.m. The guilty plea deadline is adjourned to February 17, 2014.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: February 4, 2014

APPENDIX E

NOT RECOMMENDED FOR PUBLICATION
File Name: 17a0110n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed February 16, 2017]

No. 16-1009

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIMMIE EUGENE WHITE, II,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

BEFORE: GUY, CLAY, and GRIFFIN, Circuit Judges.

GRIFFIN, Circuit Judge.

In this direct criminal appeal, defendant Jimmie White, II, appeals his convictions for drug distribution and firearms crimes. He alleges violations of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq*., and the Sixth Amendment's Speedy Trial Clause. White also maintains the district court erred in failing to suppress the tracking information for his cell phone, and challenges the sufficiency of the evidence in support of his firearms convictions. We affirm the district court's judgment.

I.

After a months-long investigation into ecstasy trafficking in Detroit, Drug Enforcement Agency ("DEA") agents executed a search warrant at White's home on May 14, 2010. From a locked safe, they recovered over $25,000 in cash, 898 N–Benzylpiperazine Dihydrochloride ("BZP") pills, an unloaded Cobray 9 mm handgun with an obliterated serial number, and an extended magazine loaded with twenty-five rounds of ammunition for the handgun. The safe was divided into two immediately-accessible compartments with the gun and ammunition on one side, and the pills and cash on the other.

The investigation precipitating the search involved several investigation techniques, including a Title III wiretap interception of White's cell phone conversations, and state-issued search warrants to track the location of his cell phone. The Title III wiretap authorized agents to monitor White's calls from early February to early March 2010. During that time, the agents recorded White arranging a series of drug deals. For example, on February 17, 2010, White spoke with an unidentified male calling to "see what the play is," and then requesting "a nickel" of "the fine." White called back the next day, saying he had pills imprinted with airplanes. The client said he wanted "the chalky ones" and "some hitters" because he "d[id]n't want no more complaints[.]" White advised that the "airplanes" and "transformers" were a "good combo," and the two arranged to meet that Saturday.

The agents also obtained search warrants to track the location of White's cell phone.[1] A DEA agent signed

[1] White claims three such warrants were issued for his cell phone: on May 28, 2009, February 5, 2010, and April 10, 2010.

the affidavit presented in support of the May 28, 2009, warrant request. A Dearborn Heights, Michigan police officer assigned to the DEA as a task force officer signed the affidavit presented in support of the February 5, 2010, warrant request. To justify the request, the affiants each swore that:

> [I]n order to determine where the cellular phone is being used, it is necessary that the above stated records be furnished to your Affiant on a continuous basis until the account is closed, or until known are [White's] drug trafficking activities, his residence, his vehicles and his narcotics distribution associates.

A state magistrate judge issued these warrants for 30 days for the searching of

> [a]ny and all records relating to the location of cellular phone tower(s) including specific active GPS precision tracking of cellular phone number (313) 674-6225. Said records shall include the time period from [date], on a continuous basis until [date].

Based primarily on information obtained through calls intercepted under the Title III wiretap and physical surveillance, a magistrate judge issued a warrant to search White's home. When the search began, White's mother and brother were home. White was also home, asleep in the master bedroom with a female acquaintance. After White emerged from his bedroom undressed, the agents allowed him to return to get

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Only the May and February warrants are available in the record, however. Because White makes no argument particular to the April 10, 2010, warrant, we limit our discussion to the May and February warrants, as did the district court.

some clothing. In addition to White's clothes, the master bedroom contained many other personal items, including his bank statements, debit card, passport, social security card, two driver's licenses, and cell phone. The safe was also in White's bedroom, but the agents had to take it outside and pry it open because neither White nor anyone else in the home would surrender a key or divulge the combination.

While the search was ongoing, DEA agents arrested White and took him to their Detroit office to interview him. The arrest form states White was arrested for "probable cause" and on an outstanding Ohio warrant. White waived his *Miranda* rights at the DEA office and spoke with the agents. He admitted selling ecstasy for about one year and estimated that he had sold around 10,000 pills. He also admitted the safe was his, and volunteered that it contained about 900 pills and around $25,000 in cash. White denied knowing about the gun, however, and speculated that someone must have put it in the safe during a party he hosted the previous weekend.

The government did not formally charge White at that time, in part because he promised to cooperate with the DEA. Instead, White was released into state custody and held at the Wayne County jail on the Ohio warrant until he was extradited to Ohio to face state charges pending against him there. He was sentenced in Ohio on October 12, 2010, to time served and released.

On April 29, 2013, the government filed a complaint against White charging him with drug distribution and firearm crimes related to the May 14, 2010, search and seizure. White was arrested on those charges, and an order of temporary detention was entered, on May

2, 2013. He made his initial appearance the next day and was released on bond.

After his arrest, the parties engaged in pre-indictment plea negotiations. To that end, they filed a stipulation with the district court on May 17, 2013, agreeing to adjourn White's preliminary hearing and exclude the time between May 23, 2013, and June 7, 2013, from White's Speedy Trial Act clock. Plea negotiations were not successful, and a grand jury indicted White on June 4, 2013, on the following four counts:

> Count I: conspiracy to distribute BZP and ecstasy or MDMA, 21 U.S.C. § 846;
>
> Count II: possession of BZP with intent to distribute, 21 U.S.C. § 841(a)(1);
>
> Count III: possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A); and
>
> Count IV: possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1).

White was arraigned on June 12, 2013.

As his case progressed, White filed more than twenty motions, both pro se and through counsel. Among them was his motion through counsel to dismiss the indictment for violations of the Speedy Trial Act and the Sixth Amendment's Speedy Trial Clause, and his pro se motion to suppress the tracking information derived from the warrants issued for his cell phone. The district court held a hearing on each and denied both.

The district court held a three-day trial. White stipulated to having a prior felony conviction. The government played several of White's cell phone calls for the jury. The government also relied on evidence of

the contents of the safe and White's bedroom. Ultimately, a jury convicted White on all counts. The district court sentenced White to 84 months in prison: 24 months on Counts 1, 2, and 4, to run concurrently, and the mandatory minimum of 60 months on Count 3, to run consecutively. White timely appeals.

II.

On appeal, White contests the denial of his motion to dismiss the indictment for speedy trial violations and his motion to suppress evidence derived from the cell phone tracking warrants. In addition, he argues there was insufficient evidence to sustain his firearms convictions. We begin with his speedy trial challenges.

A.

First, White argues the government violated the Speedy Trial Act by failing to file an indictment against him within thirty days of his 2013 arrest. The government contends no violation occurred because the parties stipulated to exclude two weeks of pre-indictment plea negotiations under § 3161(h)(1). We agree with the government.

"We review *de novo* the district court's interpretation of the Speedy Trial Act and its factual findings for clear error." *United States v. Anderson*, 695 F.3d 390, 396 (6th Cir. 2012). The Speedy Trial Act obligates the government to file an indictment against a defendant within thirty days of his arrest. *See* 18 U.S.C. § 3161(b). Section 3161(h) specifies which types of delay are excludable. *See* § 3161(h). A delay under § 3161(h)(7) is excludable if the district court makes case-specific findings. "As relevant here, subsection (h)(1) requires the automatic exclusion of '[a]ny period of delay resulting from other proceedings concerning

the defendant, including but not limited to' periods of delay resulting from eight enumerated subcategories of proceedings." *Bloate v. United States*, 559 U.S. 196, 203 (2010) (quoting § 3161(h)(1) (footnote omitted)). These delays "may be excluded without district court findings." *Id.*

White was arrested on May 2, 2013, and indicted on June 4, 2013. The parties filed a stipulation with the district court on May 17, 2013, agreeing to exclude the time between May 23, 2013, and June 7, 2013, from White's Speedy Trial Act clock. In their stipulation, the parties agreed to exclude the two-week period under § 3161(h)(1), and also under § 3161(h)(7) because "the ends of justice . . . outweigh the interests of the public and the defendant in a speedy trial." The stipulation further stated that White "concurs in this request and agrees that it is in his best interest."

The magistrate judge found "that good cause exists to extend the complaint and preliminary hearing" to June 7, 2013, and ordered that the two-week period "be excluded in calculating the time within which the defendant shall be indicted under the Speedy Trial Act." He attached the parties' stipulation to his order. The district court judge upheld the order because it was premised "in some measure on a stipulation," but also on "a finding by a judicial officer that the time was appropriately excluded based upon the fact that the parties were engaged in plea negotiations."

White does not contest the district court's finding that the parties were engaged in plea negotiations during the period in question. Nor does he offer any evidence indicating that he did not "concur[] in this request [or] agree[] that it is in his best interest[.]" Instead, he argues the order is invalid because the magistrate judge did not make any of the findings

required for an ends-of-justice continuance under § 3161(h)(7). This argument, however, conflates the ends-of-justice requirements with the automatically-excludable periods of delay under § 3161(h)(1).

In this Circuit, plea negotiations are "period[s] of delay resulting from other proceedings concerning the defendant" automatically excludable under § 3161(h)(1). *See United States v. Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004) ("We have held that plea negotiations may be excluded as 'other proceedings' pursuant to § 3161(h)(1)."), vacated and remanded on other grounds by *Dunbar v. United States*, 543 U.S. 1099 (2005); *United States v. Bowers*, 834 F.2d 607, 609–10 (6th Cir. 1987) (per curiam) (" . . . the plea bargaining process can qualify as one of many 'other proceedings.'"). Although the plea bargaining process is not expressly specified in § 3161(h)(1), the listed proceedings "are only examples of delay 'resulting from other proceedings concerning the defendant' and are not intended to be exclusive." *Bowers*, 834 F.2d at 610.

White's indictment was delayed because he engaged, through counsel, in plea negotiations for a predetermined amount of time. This two-week period may be excluded without making separate findings as required for an ends-of-justice continuance. *See Dunbar*, 357 F.3d at 593, 597 n.7. White concedes the point. The district court thus did not clearly err in finding that the parties had engaged in two weeks of pre-indictment plea negotiations and properly concluded that these negotiations were excludable from the Speedy Trial Act calculation.

B.

Second, White contends that the three-year delay between his May 2010 arrest and his September 2013

motion to dismiss violated the Sixth Amendment's Speedy Trial Clause. The district court found no violation because the Speedy Trial Clause did not apply until White's May 2013 arrest and detention on a criminal complaint. We agree with the district court.

In determining whether a defendant's Sixth Amendment right to a speedy trial has been violated, this court reviews questions of law de novo and questions of fact for clear error. *United States v. Young*, 657 F.3d 408, 413–14 (6th Cir. 2011). The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court established four factors for evaluating a speedy-trial claim: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant. *Id.* at 530. "The first factor is a threshold requirement, and if the delay is not uncommonly long, judicial examination ceases. A delay approaching one year is presumptively prejudicial." *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006) (citation omitted).

White argues the delay in this case was over three years long, but he is calculating from the wrong date of arrest. Arrest can trigger an accused's Sixth Amendment speedy trial rights. *See United States v. MacDonald*, 456 U.S. 1, 6 (1982). But "when no indictment is outstanding, only the '*actual* restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment.'" *United States v. Loud Hawk*, 474 U.S. 302, 310 (1986) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)); *cf. Rashad*

v. Walsh, 300 F.3d 27, 36 (1st Cir. 2002) ("Although arrest may trigger the right to a speedy trial, it does not do so unless the arrest is the start of a continuous restraint on the defendant's liberty, imposed in connection with the same charge on which he is eventually put to trial."). This is because the Speedy Trial Clause reflects "the concern that a presumptively innocent person should not languish under an unresolved charge[.]"[2] *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016).

White did not languish for three years under unresolved charges in this case. Although DEA agents arrested White on May 14, 2010, they released him into state custody that same day on an outstanding Ohio warrant rather than charge him with federal crimes. Thus, White was not "arrested and held to answer criminal charges" in relation to this case until his May 2013 arrest on a criminal complaint filed days before. *See United States v. Gouveia*, 467 U.S. 180, 185–86 (1984) ("[T]he Sixth Amendment speedy trial right is triggered when an individual is arrested and held to answer criminal charges."). And without outstanding federal charges, White was, "at most, in the same position as any other subject of a criminal investigation." *See MacDonald*, 456 U.S. at 8–9. Therefore, until his arrest on such charges, White's "situa-

[2] The right to a speedy trial is "not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." *MacDonald*, 456 U.S. at 8. White's prosecution satisfied the applicable five-year statute of limitations. *See* 18 U.S.C. § 3282(a). And while the Fifth Amendment's Due Process Clause provides limited protection against "oppressive" pre-arrest or pre-indictment delay, *United States v. Lovasco*, 431 U.S. 783, 789 (1977), White does not raise a due process argument in the alternative on appeal.

tion [did] not compare with that of a defendant who ha[d] been arrested *and* held to answer." *See id.* at 9 (emphasis added) (quoting *Marion*, 404 U.S. at 321).

In short, White cannot satisfy the threshold *Baker* factor. The delay between White's 2013 arrest and his motion to dismiss was approximately five months. White does not explain how this five-month delay was presumptively or actually prejudicial. Although it is unclear why the government waited three years to charge and arrest White in this matter, the Speedy Trial Clause does not "limit the length of a preindictment criminal investigation even though 'the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.'" *Loud Hawk*, 474 U.S. at 312 (quoting *MacDonald*, 456 U.S. at 9). Nor would anyone's interests "be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so." *Lovasco*, 431 U.S. at 792 (footnote omitted). The district court thus did not err in concluding that the Speedy Trial Clause was not implicated until White's May 2013 arrest, and the five-month delay between this arrest and his motion to dismiss was not presumptively prejudicial.

C.

White also challenges the district court's denial of his motion to suppress evidence derived from tracking his cell phone. When reviewing the district court's ruling on a motion to suppress, this court reviews findings of fact for clear error and legal conclusions de novo. *United States v. Tackett*, 486 F.3d 230, 232 (6th Cir. 2007). "When the district court has denied the motion to suppress, we review all evidence in a light most favorable to the Government." *United States v. Galloway*, 316 F.3d 624, 628 (6th Cir. 2003).

In denying White relief, the district court held that, although the tracking warrants did not satisfy the Fourth Amendment's particularity requirement, the *Leon* good-faith exception to the exclusionary rule saved the evidence. White argues the district court erred because a reasonable officer would have recognized the warrants as invalid. We need not reach this argument, however, because White cannot show he was prejudiced by the district court's failure to suppress in the first instance.

Simply put, White does not point to any tracking evidence introduced against him at trial. And while the application in support of the warrant to search White's residence included some cell phone tracking information, it only referenced the locations of phones other than White's. White does not contest the district court's legal conclusion that he does not have a reasonable expectation of privacy in cell phones other than his own and therefore cannot challenge the seizure of that data. Moreover, White's theory that the tracking evidence for his phone might have tainted the Title III wiretap warrant is merely speculative. Since he did not challenge the validity of this warrant in district court, the record is devoid of relevant evidence, such as the warrant itself. And, in any case, White does not even assert plain error, let alone establish it.

Where resulting evidence has not affected a defendant's trial, any error would be harmless, and this court has declined to grant relief. *See, e.g.*, *United States v. Charles*, 138 F.3d 257, 264–65 (6th Cir. 1998) (failure to suppress cell phone did not harm defendant because government never introduced it at trial); *see also United States v. Davis*, 531 F. App'x 601, 605 (6th Cir. 2013) (suppression challenge moot because defendant's statement was not admitted at trial). Indeed,

"exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006). Since this is the only premise for exclusion White submits, his suppression challenge fails.

D.

Finally, White argues the evidence presented at trial was insufficient for conviction on either firearm possession charge. We review these claims de novo, assessing the evidence "in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Mack*, 808 F.3d 1074, 1080 (6th Cir. 2015). "This standard applies even if the evidence is purely circumstantial. Consequently, in raising a sufficiency of the evidence claim, a defendant 'bears a very heavy burden.'" *United States v. Geisin*, 612 F.3d 471, 489 (6th Cir. 2010) (citation omitted) (quoting *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999)).

To sustain a conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), the government must prove the defendant had previously been convicted of a felony, and he knowingly possessed a firearm that had traveled in interstate commerce. *United States v. Morrison*, 594 F.3d 543, 544 (6th Cir. 2010).

White challenges the sufficiency of the evidence regarding possession only. The government advanced its case against defendant based on a theory of constructive possession, which exists "when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise

dominion and control over an object, either directly or through others." *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973), *abrogated on other grounds by Scarborough v. United States*, 431 U.S. 563 (1977). Constructive possession may be proven by direct or circumstantial evidence, and "[i]t is not necessary that such evidence remove every reasonable hypothesis except that of guilt." *Id*. "Proof that 'the person has dominion over the premises where the firearm is located' is sufficient to establish constructive possession." *United States v. Kincaide*, 145 F.3d 771, 782 (6th Cir. 1998) (quoting *United States v. Clemis*, 11 F.3d 597, 601 (6th Cir. 1993) (per curiam)).

Even if White did not have exclusive possession of the entire home, the government presented credible evidence at trial that he had "dominion" over the master bedroom where the gun was found. When the search began, White emerged from the master bedroom where he had been sleeping. That is where he kept his clothes. Also in that bedroom were his bank statements, debit card, passport, social security card, driver's licenses, and cell phone. As there was no evidence of anyone else's personal possessions in the master bedroom, a rational juror could infer that White alone controlled that space. *See United States v. Lewis*, No. 15–2386, 2016 WL 5922615, at *2 (6th Cir. Oct. 12, 2016) (finding constructive possession where a gun was found in a bedroom containing men's clothing, mail addressed to defendant, his birth certificate, his resume, and other papers).

White's safe was also in the bedroom, in a closet. The safe was locked, further limiting access to its contents. But White must have known the combination, even if he would not volunteer it to law enforcement, because that is where he admittedly kept his drugs and his

proceeds from their sale. A rational juror could reasonably infer that White had accessed the safe recently, because he knew how many pills and how much cash it contained. The gun was kept right next to these items, immediately visible and accessible whenever the safe was opened. White suggested someone else must have put the gun in his safe during a party. A rational juror could easily disbelieve this explanation, however, and instead reasonably infer that White had knowledge of, and dominion over, the gun locked in his bedroom closet safe with his drugs and cash. *See United States v. Volkman*, 797 F.3d 377, 391 (6th Cir. 2015) (finding constructive possession where defendant had access to a workplace safe containing a gun). Drawing all reasonable inferences in the government's favor, the evidence is more than sufficient to lead a rational trier of fact to conclude that White constructively possessed the firearm.

White further argues there is no evidence establishing a nexus between the gun and his drug trafficking activities. Under 18 U.S.C. § 924(c)(1)(A), any person "who, in furtherance of [a drug trafficking] crime, possesses a firearm, shall, in addition to the punishment provided for . . . [the] drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years[.]" To prove that possession was "in furtherance of" the drug trafficking crime, the government must show a "specific nexus between the gun and the crime charged" and that the firearm was "strategically located so that it [was] quickly and easily available for use." *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001). Other factors to consider include:

(1) "whether the gun was loaded," (2) "the type of weapon," (3) "the legality of its possession," (4) "the type

of drug activity conducted," and (5) "the time and circumstances under which the firearm was found." *Id.*

The government argued at trial that White had strategically located his gun and ammunition with his drugs and drug proceeds so he could easily access it if he needed to protect his business. A rational juror could credit this theory and conclude, in light of the *Mackey* factors, that White possessed the gun in furtherance of his drug crimes. White stipulated to having a prior felony conviction and could not legally possess a gun. Moreover, the gun's serial number was obliterated, facilitating its illicit use because it could not easily be traced. Although the gun was not loaded, it would take little time to load it with the magazine kept directly underneath it. *See United States v. Sales*, 247 F. App'x 730, 736 (6th Cir. 2007) (finding sufficient evidence to support an "in furtherance" conviction where, in addition to loaded weapons, "[t]he .12 gauge shotgun, albeit unloaded, was in the kitchen near a bag of rifle ammunition and the refrigerator containing marijuana."). "When a weapon is found in a locked safe placed alongside contraband, there is sufficient evidence for a jury to determine that a defendant is in possession of a firearm in furtherance of a drug-trafficking crime." *Volkman*, 797 F.3d at 391. Drawing all inferences in support of the verdict, we conclude that a rational trier of fact could find that White possessed a gun in furtherance of his drug business.

III.

Finding no reversible error, we affirm the district court's judgment.

APPENDIX F

138 S.Ct. 641
SUPREME COURT OF THE UNITED STATES

No. 17–270.

JIMMIE EUGENE WHITE, II,

Petitioner,

v.

UNITED STATES.

Respondent.

Jan. 8, 2018.

Synopsis

Case below, 679 Fed.Appx. 426.

Opinion

On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of the confession of error by the Solicitor General in his brief for the United States filed on November 30, 2017.

All Citations

138 S.Ct. 641 (Mem), 199 L.Ed.2d 522, 86 USLW 3321, 86 USLW 3330, 18 Cal. Daily Op. Serv. 229

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-1009

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIMMIE EUGENE WHITE, II,

Defendant-Appellant

ORDER

BEFORE: GUY, CLAY, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Guy adheres to his concurrence. Judge Clay adheres to his concurrence and dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX H

United State Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 208. Speedy Trial (Refs & Annos)

18 U.S.C.A. § 3161
§ 3161. Time limits and exclusions

Effective: October 13, 2008
Currentness

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(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. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical.

The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth

in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(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 reasonable time to obtain counsel, would unreasonably 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.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly–

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to

demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

APPENDIX I

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 208. Speedy Trial (Refs & Annos)

18 U.S.C.A. § 3162

§ 3162.Sanctions

Currentness

(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.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VIO: 21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
18 U.S.C. § 924(c)(1)(A)
18 U.S.C. § 922(g)(1)

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMIE EUGENE WHITE II,

Defendant.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

21 U.S.C. § 846 – *Conspiracy to distribute N-Benzylpiperazine ("BZP") and 3,4-methylenedioxy-N-methylamphetamine ("ecstasy" or "MDMA")*

From in or about 2009 to on or about May 14, 2010, in the Eastern District of Michigan, Southern Division, Defendant, JIMMIE EUGENE WHITE II, did knowingly, intentionally, and unlawfully combine, conspire, confederate, and agree with others unknown to the Grand Jury to commit an offense against the United States, that is, to distribute controlled substances (to wit: N-Benzylpiperazine ("BZP") and 3,4-methylenedioxy-

N-methylamphetamine ("ecstasy" or "MDMA"), both of which are Schedule I controlled substances), in violation Title 21, United States Code, Section 841(a)(1), all of which constitutes a violation of Title 21, United States Code, Section 846.

COUNT TWO

21 U.S.C. § 841(a)(1) – *Possession of N-Benzylpiperazine ("BZP ") with intent to distribute*

On or about May 14, 2010, in the Eastern District of Michigan, Southern Division, Defendant, JIMMIE EUGENE WHITE II, did knowingly, intentionally, and unlawfully possess with intent to distribute a quantity of N-Benzylpiperazine ("BZP"), a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

18 U.S.C. § 924(c)(1)(A) – *Possession of a firearm in furtherance of a drug trafficking crime*

On or about May 14, 2010, in the Eastern District of Michigan, Southern Division, Defendant, JIMMIE EUGENE WHITE II, did knowingly possess a firearm (to wit: a Cobray PM-11 9 mm handgun, serial number obliterated) in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, specifically, possession of a controlled substance (to wit: N-Benzylpiperazine ("BZP")) with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1), all of which constitutes a violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT FOUR

18 U.S.C. § 922(g)(1) – *Possession of a firearm by a convicted felon*

On or about May 14, 2010, in the Eastern District of Michigan, Southern Division, Defendant, JIMMIE EUGENE WHITE II, previously having been convicted of at least one crime punishable by imprisonment for a term exceeding one year (felony offense), did knowingly possess a firearm (to wit: a Cobray PM-11 9 mm handgun, serial number obliterated), which had been manufactured outside of the State of Michigan and therefore had traveled in interstate or foreign commerce, all in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE ALLEGATIONS

18 U.S.C. § 924(d); 21 U.S.C. § 853 – *Criminal forfeiture*

1. The allegations contained in Counts One through Four of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 924(d) and Title 21, United States Code, Section 853.

2. Upon conviction of one or more of the offenses alleged in Counts One through Four of this Indictment, Defendant, JIMMIE EUGENE WHITE II, shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 21, United States Code, Section 853, any property constituting, or derived from, proceeds obtained, directly or indirectly, as a result of the said violations and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the said

violations, including one Cobray PM-11 9 mm handgun, serial number obliterated.

3. Such property includes, but is not limited to, a money judgment, and all traceable interest and proceeds. Such sum in aggregate is property representing the proceeds of the aforementioned offenses, or money that was involved in those offenses, or is traceable to such property, in violation of 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A) and/or 21 U.S.C. § 841(a)(1).

4. Pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b), if the property described above as being subject to forfeiture, as a result of any act or omission of the defendant:

i. cannot be located upon the exercise of due diligence;

ii. has been transferred or sold to, or deposited with, a third party;

iii. has been placed beyond the jurisdiction of the Court;

iv. has been substantially diminished in value; or

v. has been commingled with other property that cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), to seek to forfeit any other property of the defendant up to the listed value.

THIS IS A TRUE BILL.

/s/ Grand Jury Foreperson
GRAND JURY FOREPERSON

BARBARA L. McQUADE
United States Attorney

/s/ Kevin Mulcahy
KEVIN MULCAHY
Assistant United States Attorney
Chief, General Crimes Unit

/s/ Gabriel S. Mendlow
GABRIEL S. MENDLOW
Special Assistant United States Attorney
211 West Fort Street, Ste. 2001
Detroit, Michigan 48226-3220
(313) 226-9643
CT Juris No. 432916

Date: June 4, 2013

United States District Court Eastern District of Michigan

NOTE: It is the responsibility of the Assistant U.S. Attorney signing this form to c

Case: 2:13-cr-20423
Judge: Lawson, David M.
MJ: Whalen, R. Steven
Filed: 06-04-2013 At 03:51 PM
INDI USA V JIMMIE EUGENE WHITE II EB)

Companion Case Information
This may be a companion case based upon LCrR 57.10 (b)(4)[1]

☐Yes ☑No

Companion Case Number: N/A

Judge Assigned: N/A

AUSA's Initials: GSM

Case Title: USA v. JIMMIE EUGENE WHITE

County where offense occurred: Wayne

Check One: ☑Felony ☐Misdemeanor ☐Petty

_____Indictment/__Information--- no prior complaint

__✓__Indictment/__Information--- based upon prior complaint [Case number: 13-30265]

_____Indictment/__Information--- based upon LCrR 57.10(d) *[Complete Superseding section below]*

[1] Companion cases are matters in which it appears that (1) substantially similar evidence will be offered at trail, (2) the same or related parties are present, and the cases arise out of the same transaction or occurrence. Cases may be companion cases even though one of them may have already been terminated.

Superseding Case Information

Superseding Case No:_____ Judge:_____

- ☐ Original case was terminated; no additional charges or defendants
- ☐ Corrects errors; no additional charges or defendants
- ☐ Involves, for plea purposes, different charges or adds counts.
- ☐ Embraces same subject matter but adds the additional defendants or charges below:

Defendant name	Charges	Prior Complaint (if applicable)

Please take notice that the below listed Assistant United States Attorney is the attorney of record for the above captioned case

June 4, 2013
Date

/s/ Gabriel S. Mendlow
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