No. 17-270

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

REPLY BRIEF FOR THE PETITIONER

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The government's brief in opposition ("Opp.") is an extraordinary document. It concedes that "a circuit conflict exists" on the question presented, with appellate courts divided 4-4 about whether time spent in plea negotiations is automatically excludable under the Speedy Trial Act ("Act"), 18 U.S.C. § 3161(h)(1). Opp.14. Reversing its decades-old position, the government *also* concedes that holdings of the Fourth, Sixth, Seventh, and Eighth Circuits "cannot be squared with *Bloate* [v. *United States*, 559 U.S. 196, 207 (2010)]," Opp.10. The government is so certain—for now—that its long-held position is wrong that the government "does not intend in the future to press" it, and released (unspecified) guidance instructing (unspecified) federal prosecutors not to do so. Opp.19.

Yet, remarkably, the government counsels this Court to take no action—although the Sixth Circuit's sole basis for ruling "is incorrect," Opp.20; although this "issue * * * arises constantly" in a system in which 90-95% of convictions result from guilty pleas, Pet.26, 28; and although courts accounting for *more than a quarter* of federal prosecutions[1] concededly misapply a statute adopted to "introduce a measure of uniformity" to pretrial practices. 120 Cong. Rec. 41,781 (1974).

The opposition's welter of minor (and baseless) objections only reveals how determined the government is that the Department of Justice, and not this Court, control the pace at which courts correct this widespread legal error. The government offers three basic justifications. First, it suggests the four mistaken circuits might eventually correct themselves, Opp.15-18, 19, despite their intransigence for *eight*

[1] See Administrative Office of U.S. Courts, *Statistical Tables for the Federal Judiciary 2017*, Table D-3, https://goo.gl/vsrQx5.

years since *Bloate*, during which three *reaffirmed* their mistaken position. Opp.16-18. Second, reprising an argument this Court rejected in granting review in *Bloate*, see Br. in Opp. at 7, 10-11, *Bloate*, *supra* (No. 08-728), the government argues that the automatic-exclusion question "lacks practical significance" because the relevant periods also are excludable under the ends-of-justice provision, § 3161(h)(7). Opp.18. Third, despite identifying no barrier to this Court reaching the question presented, the government says this case would "be a poor vehicle." Opp.19-20.

Those arguments fail. This Court should grant review to correct a widespread legal error and protect the interests of criminal defendants and "the public interest in the swift administration of justice." *Bloate*, 559 U.S. at 211.

A. Only This Court's Review Will Resolve The Entrenched Split

Although the government suggests *Bloate* will persuade the four mistaken circuits in the conceded "circuit conflict" to change course, Opp.14, it cannot reasonably claim that a little more percolation will do the trick for courts that have overlooked or misinterpreted *Bloate* for *nearly eight years*. The most the government musters is that "it is *unclear* to what extent [the conflict] persists after *Bloate*." Opp.14 (emphasis added).

There is no realistic prospect that all four circuits will spontaneously reverse course before hundreds or thousands of defendants have been prejudiced, given the preeminence of negotiated guilty pleas. See Pet.28. As the government admits, Opp.16-17, three

circuits have *reaffirmed* the incorrect rule after *Bloate* (the Sixth Circuit twice). See *United States* v. *Robey*, 831 F.3d 857, 863 (7th Cir. 2016); *United States* v. *Keita*, 742 F.3d 184, 188 (4th Cir. 2016); *United States* v. *Montgomery,* 395 F. App'x 177 (6th Cir. 2010); Pet.App.8a. While the government strains to downplay those rulings by dissecting appellate briefs (see Opp.16-18), those courts were well aware of *Bloate*. The *Robey* defendants cited *Bloate* for the proposition that "it would be improper to automatically exclude time set aside for pretrial motions, when preparation time is specifically included as a factor," contrasting that rule with circuit precedent automatically excluding plea negotiations, *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987). Def. C.A. Br. 17 n.10, *Robey*, *supra* (No. 15-2172). That *Keita* and *Robey* also found time excludable under an ends-of-justice theory (Opp.17-18) does not deprive their post-*Bloate* automatic-exclusion holdings of binding effect. See *Gestamp South Carolina, LLC* v. *NLRB*, 769 F.3d 254, 262 n.4 (4th Cir. 2014) ("alternate holdings are not dicta"); *Whetsel* v. *Network Prop. Servs., LLC*, 246 F.3d 897, 903 (7th Cir. 2001) (same).

Contrary to the artfully phrased claim that "[p]etitioner did not *directly* ask the panel to revisit *Dunbar*," Opp.16 (emphasis added), petitioner's opening brief argued that negotiating time was not excludable because "the statute does not mention plea negotiations as a factor justifying a continuance," Pet. C.A. Br.37 (citing *United States* v. *Medina*, 524 F.3d 974, 986 (9th Cir. 2008)). Petitioner's reply brief argued "[t]he Ninth Circuit's reasoning is more in line with the Supreme Court's approach to the Act,"

quoting *Bloate* to support the argument that "[h]ad Congress wished courts to exclude" plea negotiation time "automatically it would have said so." Pet. C.A. Reply Br.vi-vii (quoting 559 U.S. at 201 n.13).[2] The Sixth Circuit quoted *Bloate* for the central thesis of its automatic-exclusion rule, see Pet.12, that § 3161(h)(1)'s specific exclusions are nonexclusive. See Pet.App.7a (subsection (h)(1)'s automatic exclusion "'includ[es] but [is] not limited to' periods * * * resulting from eight enumerated subcategories" (quoting 559 U.S. at 203)).[3]

The post-*Bloate* reaffirmances effectively foreclose defendants from challenging the automatic-exclusion rule in those circuits. All but the most well-funded defense lawyers would see a post-*Bloate* reaffirmance and conclude that no challenge to automatic exclusion for plea negotiations is reasonably available. Where circuit precedent is so firmly entrenched, defendants routinely do not contest automatic exclusion, and

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[2] The government faults petitioner for not seeking rehearing en banc to overrule *Dunbar*. Opp.16. But that step could not have restored uniformity, given the 4-4 split. The government has successfully opposed rehearing en banc on that basis. See Gov't Resp. to Reh'g Pet. at 10, *United States* v. *Quarles*, 850 F.3d 836 (6th Cir. 2017) (No. 16-1690) (given 4-2 split, if "correction is needed, it is needed elsewhere").

[3] The Eighth Circuit language the government quotes (Opp.15-16) involved a 267-day period where "plea negotiations were almost completely stalled," "with only one discussion between" parties. *United States* v. *Elmardoudi*, 501 F.3d 935, 942 (8th Cir. 2007). While the court found that "vexing," it emphasized that "a period of fourteen days" presented no similar concerns. *Ibid.*

courts reflexively apply the rule without considering *Bloate*.[4]

The government's hedging that it does not "intend" to press the argument, Opp.19, implicitly acknowledges that universal awareness of, and compliance with, the guidance is not assured. Even assuming the nonpublic guidance remains in effect, is distributed widely, given to future hires, and followed, it will do nothing to inform defense counsel and courts who continue to apply binding circuit precedent.

B. No Vehicle Problem Prevents Resolution Of This Issue

The government argues this case would "be a poor vehicle." Opp.19-20. But it does not contend that any supposed vehicle problem would prevent the Court from reaching the question presented.

1. While the government concedes the Sixth Circuit's sole *actual* grounds for rejecting petitioner's Speedy Trial Act claim was mistaken, it says the court *could have* affirmed on "a different basis." Opp.11. But this Court routinely reviews cases where there may be alternative bases to deny relief after a legal error is corrected. *E.g.*, *Rosemond* v. *United States*, 134 S. Ct. 1240, 1252 (2014); *Zivotofsky* v. *Clinton*, 566 U.S. 189, 200-202 (2012). Even when the petitioner loses on some alternative basis on remand, it in no way

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[4] See, *e.g.*, *United States* v. *Bell*, No. CRIM. JKB-16-485, 2017 WL 5495531, at *5 (D. Md. Nov. 15, 2017) (relying on *Keita* to uphold the automatic exclusion of plea negotiations); *Zundel* v. *United States*, No. 11-cr-20017, 2017 WL 712883, at *2 (E.D. Mich. Feb. 23, 2017) (similar).

undercuts the benefit of resolving circuit conflict. Indeed, the Solicitor General has repeatedly won review by noting that "the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to [this Court's] review." Gov't Cert. Reply Br. at 3, *United States* v. *Bean*, 2002 WL 32101203 (Jan. 2002) (No. 01-704) (collecting examples); Gov't Cert. Reply Br. at 9, *Comm'r* v. *Estate of Jelke,* 2008 WL 4066478 (Sept. 2008) (No. 07-1582) (same).

In any event, the Sixth Circuit's decision to avoid the ends-of-justice exception underscores both the weakness of the government's argument and the fact that the exception is no rubber stamp. The magistrate judge's finding states, *in its entirety*, "good cause exists to extend the complaint and preliminary hearing in this case." Pet.App.32a. It neither cites the stipulation nor references § 3161(h)(1) or (h)(7); indeed, as the government conceded, "'good cause' is a different standard than in § 3161(h)(7)." Gov't C.A. Br.51 ("order should have been phrased more artfully"). The district judge added nothing, beyond noting the government's agreement with former counsel and that "the parties [we]re engaged in plea negotiations." Pet.App.25a. But a district court must "se[t] forth, in the record of the case, * * * its *reasons* for finding that the ends of justice are served and they *outweigh other interests*." *Zedner* v. *United States*, 547 U.S. 489, 507 (2006) (quotation marks omitted; emphases added). "[P]assing reference to" factors supporting the extension is inadequate. *Ibid*.

The government's authorities confirm the point. *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir.

2010) (Opp.13), held that "a record consisting of only short, conclusory statements lacking in detail is insufficient." See also *United States* v. *Toombs*, 574 F.3d 1262, 1272 (10th Cir. 2009) (rejecting "ends of justice" findings resting on "conclusory statements lacking both detail and support"). And *United States* v. *Henry*, 538 F.3d 300, 305-306 (4th Cir. 2008), rejected reliance on the defendant's waiver instead of independent judicial findings. The government cites no case where a bare "'finding by a judicial officer * * * that the parties were engaged in plea negotiations,'" Opp.12 (quoting Pet.App.8a), supported an ends-of-justice exclusion.[5]

While petitioner's counsel "agree[d]" that the magistrate judge had recited certain "magic words," Opp.19 (quoting 12/3/2013 Tr.8-9),[6] counsel argued that the judge's conclusory recitation of "good cause," with "no determination made at all" about relevant factors did not create "a strong enough record" for exclusion. Tr.17. Counsel also explained petitioner had not authorized his former lawyer to agree to exclude that time, and noted that there was no record of peti-

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[5] *United States* v. *Richardson*, 681 F.3d 736, 741 (6th Cir. 2012), involved a lengthy statement of reasons for delay and explicitly weighed countervailing interests. *United States* v. *Napadow*, 596 F.3d 398, 405 (7th Cir. 2010), involved on-the-record findings that lawyers were not available earlier. In *United States* v. *Adams*, 625 F.3d 371, 379-380 (7th Cir. 2010), an order "se[t] forth [the court's] reasoning," including counsel's need to "adjust the defense strategy" for additional cooperating witnesses.

[6] Counsel did not say there was no reason to "second guess" the magistrate judge's relevant determinations. Cf. Opp.19. Instead, the discussion appeared to involve former counsel's interactions with petitioner. Tr.9.

tioner being informed of—or approving—the stipulation. Tr.5-7. The government does not engage that issue, much less explain its implications for the ends-of-justice exclusion.[7]

That the government and petitioner's former counsel agreed that the negotiating time was excludable is no barrier to this Court's review. That agreement played no role in the Sixth Circuit's affirmance, which relied exclusively on the now-disavowed automatic-exclusion rule. Pet.App.8a-9a. The government cites no authority for the proposition that lawyers can simply stipulate that the Act does not apply to a particular

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[7] The government *three times* quotes out of context the district court's statement that "[a]t oral argument * * *, counsel for [petitioner] conceded that no Speedy Trial Act violation occurred in this case," Opp.5, 12, 20 (quoting Pet.App.19a), without *ever arguing that counsel actually made any such concession*. The statement is more fairly understood as a reference to petitioner's legal claim being foreclosed by circuit precedent, or a recognition that petitioner could not prevail if the stipulation alone were sufficient, see Pet. C.A. Br.33. Counsel disputed that the ends-of-justice exclusion was adequately supported. Tr.17. Even the government does not really believe any concession was dispositive. It made no such argument below. See Gov't C.A. Br.44-52. If a concession governed, the district court would not have written a 9-page opinion—nor the government a 20-page opposition.

The government also suggests (without actually arguing) that petitioner failed to preserve his current claim. *E.g.*, Opp.4. But construed liberally, petitioner's pro se pleading did so. See D.Ct. Doc. 23 at 1 (noting petitioner was "indicted on June 4, 2013 after [he] was rearrested on May 2, 2013"). His lawyer raised the point at argument (Tr.4-5), and petitioner reprised it on appeal, Pet. C.A. Br.32. Although the government said *other* issues were forfeited, it did not for this claim. Gov't C.A. Br.44-52, 57. The Sixth Circuit did not suggest any forfeiture occurred.

period, even though it protects the rights of both the accused and society. See *Zedner*, 547 U.S. at 500-501 ("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."). Case law rejects that view. *E.g.*, *United States* v. *Mosteller*, 741 F.3d 503, 505, 507 (4th Cir. 2014) (defendant's agreement "purporting to waive" rights prospectively for 2-3 months "null and void" under *Zedner*); *United States* v. *Ferguson*, 574 F. Supp. 2d 111, 114 (D.D.C. 2008) (dismissing indictment and rejecting government's proposed "distinction between a prospective waiver of speedy trial rights and affirmatively requested continuances that a defendant later cites as violations of his speedy trial rights"). The Sixth Circuit can consider this argument in the first instance after this Court corrects the threshold statutory error.

2. The government also argues that the court below purportedly did not "ha[ve] the opportunity to consider how *Bloate*'s reasoning and analysis bears on the question." Opp.20. Nonsense; the opinion quotes the very section of *Bloate* analyzing the automatic-exclusion rule. See pp. 3-4, *supra*. Moreover, this Court need not await an instance where the court below has "squarely considered" (Opp.20) every available argument: "[T]his Court's traditional rule [is] that we may address a question * * * if it was 'pressed [in] or passed on' by the Court of Appeals," *United States* v. *Wells*, 519 U.S. 482, 488 (1997); accord *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995). The automatic-exclusion rule was pressed by the government and passed on below. Opp.10; Pet.App.8a.

Even if the Sixth Circuit had overlooked *Bloate*, this Court has repeatedly summarily reversed under such circumstances. See, *e.g.*, *Horn* v. *Banks*, 536 U.S. 266, 272 (2002) (per curiam) (summarily reversing where "Court of Appeals may have simply overlooked" inconsistent precedent); *Ohio* v. *Renier*, 532 U.S. 17, 21 (2001) (per curiam) (summarily reversing decision that "clearly conflicts with," but did not mention, relevant precedent). *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2006 (2017) (per curiam), involved an *intervening* decision—not a case decided years earlier, discussed in the briefing and the decision under review. Moreover, unlike here, "the parties [there] ha[d] not had the opportunity to brief and argue [the] significance" of the intervening decision. *Ibid.*

C. The Issue Is Important

The government contends automatic exclusion "lacks practical significance because the relevant period" is also potentially excludable under an ends-of-justice continuance or some other basis. Opp.18. But this Court rejected the *same argument* in granting certiorari in *Bloate*. See Br. in Opp. at 7, 10-11, *Bloate*, *supra* (No. 08-728).

For good reason. An automatic exclusion *requires* courts to exclude time. By contrast, time may be excluded under § 3161(h)(7) *only if* the provision's "detailed requirements" are met. *Zedner*, 547 U.S. at 508. The district court must "set[] forth, in the record * * *, its reasons" that "the ends of justice served" by taking such action "outweigh the best interests * * * in a speedy trial." § 3161(h)(7)(A). The court must make such findings when (or before) it rules on a motion to dismiss under the Act, and it cannot correct an error

retrospectively. *Zedner*, 547 U.S. at 506-509. "Congress clearly meant to give district judges a measure of flexibility in accommodating *unusual, complex,* and *difficult* cases. But it is equally clear that Congress * * * saw a danger that such [ends-of-justice] continuances could get out of hand and *subvert the Act's detailed scheme." Id.* at 508-509 (emphasis added). The government's suggestion that courts should evade § 3161(h)(1)'s constraints by ready resort to § 3161(h)(7) is the sort of subversion *Zedner* unanimously rejected.

Even if negotiation time may be excludable under the ends-of-justice exception in "many" cases, Opp.18, that falls far short of "most," much less "all." Apart from the fact that judges will reject or shorten some ends-of-justice continuance requests, requiring judicial approval imposes discipline and accountability, rather than giving parties a self-help continuance of any length desired. The government's suggestion that the ends-of-justice exclusion is an easy substitute is belied by how vigorously it has litigated the automatic-exclusion issue for decades, including nearly eight years since *Bloate*.

D. Only A Merits Ruling Will Protect The Act's Important Interests

The government suggests that this Court might grant the petition, vacate the judgment below, and remand for further consideration in light of the government's confession of error. Opp.20. But in both cases the government cites, the position adopted below was an outlier, and vacatur restored uniformity. See *Hicks* v. *United States*, 137 S. Ct. 2000 (2017); *Breland* v. *United States*, 565 U.S. 1153 (2012). Even if the Sixth

Circuit overruled *Dunbar*, that would leave three other circuits' precedents intact. The government has made no commitment to seek en banc review. If (as here) it asks the Sixth Circuit to affirm on an alternative basis, it will effectively perpetuate *Dunbar*.

The only appropriate summary action would be summary reversal on the merits, which would eliminate a construction that "cannot be squared with *Bloate*." Opp.10. See generally *Horn*, 536 U.S. at 272. That step would not prejudice the government, which "does not intend * * * to press" that position, Opp.19, and would guard against defense counsel and courts relying on recently reaffirmed precedent.

CONCLUSION

The petition should be granted. In light of the government's confession of error, the Court may wish to consider summary reversal.

Respectfully submitted.

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