No. 15-2172

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	) Appeal from the United States
	) District Court for the Southern District
Plaintiff–Appellee,	) of Indiana, Indianapolis Division
v.	)
	) Case No. 1:12-cr-00027-SEB-TAB-1
GEORGE ROBEY,	)
	)
Defendant–Appellant.	) Hon. Judge Sarah Evans Barker

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

BLUHM LEGAL CLINIC
Northwestern University Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
RICHARD CIPOLLA
MICHAEL MENEGHINI
Senior Law Students

Counsel for Defendant–Appellant
GEORGE ROBEY

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, George Robey, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
GEORGE ROBEY.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

Sarah O'Rourke Schrup (attorney of record) of the Bluhm Legal Clinic, Supreme Court Practicum at the Northwestern University Pritzker School of Law, 375 East Chicago Avenue, Chicago IL 60611.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear in this Court:

Larry Champion
251 E. Ohio Street, Suite 830
Indianapolis, Indiana 46204

Belle Choate
151 N. Delaware St., Suite 740
Indianapolis, IN 46204

Laura Paul
400 Wabash Ave., Suite 212
Terre Haute, IN 47807

Attorney's Signature: /s/ Sarah O. Schrup

Dated: September 9, 2016

Attorney's Printed Name: Sarah O'Rourke Schrup

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes

375 East Chicago Avenue
Chicago, Illinois 60611
Phone: (312) 503-0063
Fax: (312) 503-8977
E-mail Address: s-schrup@law.northwestern.edu

STATEMENT OF REASONS FOR REHEARING

Rehearing is warranted for three reasons. First, the panel's decision is contrary to the plain language of the Speedy Trial Act, 18 U.S.C. § 3161, and Supreme Court precedent. The Act requires on-the-record findings, and the district court below failed to provide case-specific, reasoned findings as required by *Zedner v. United States*, 547 U.S. 489 (2006)—a prerequisite that the panel omitted in reaching its decision. Second, the panel's decision is inconsistent with this Court's precedent because it inappropriately extends the "sequence of events" approach taken by this Court in *United States v. Napadow*, 596 F.3d 398 (7th Cir. 2010), and *United States v. Wasson*, 679 F.3d 938 (7th Cir. 2012), and now holds that a district court can satisfy the Act's on-the-record requirement without on-the-record fact-findings. Moreover, the panel's decision directly conflicts with this Court's opinion in *United States v. O'Connor*, 656 F.3d 630 (7th Cir. 2011), which requires a district court to make case-specific findings. Third, the panel's sequence of events approach conflicts with the approaches of the Ninth, Tenth, and D.C. Circuits. Robey therefore respectfully requests rehearing or rehearing en banc to maintain uniformity of this Court's decisions, to explicitly delineate its position within the circuit split, and to address this question of exceptional importance under Rule 35 of the Federal Rules of Appellate Procedure.

BACKGROUND

In exchange for leniency in his own case, a man named Jeffrey Jones, commonly believed to be "the mastermind behind a counterfeit check-cashing ring," identified persons he claimed to be involved in criminal activity to the Indiana State Police. (Trial Tr. I-50, II-146.) He accused George Robey of using counterfeit documents to sell stolen vehicles and arranged for a vehicle sale between Robey and an undercover Indiana State Detective on October 19, 2011. (Trial Tr. I-50–52.)

Several weeks after the transaction, in December 2011, the government filed a criminal complaint against Robey, charging that he: (1) knowingly possessed a counterfeit security of a state; (2) altered the vehicle identification number (VIN) of a 2005 Ford F-350; (3) bought, sold, or possessed a stolen motor vehicle (a 2005 Ford F-350) with an altered VIN; and (4) participated in a conspiracy stemming from the first three counts. (R.1.) The police executed a search warrant on Robey's residence and took him into custody, where he has since remained. (Trial Tr. II-150–51.) The first two months of his detention were spent awaiting an indictment from the government; a magistrate judge granted two uncontested government motions to extend the time for its filing. (R.19.) Robey then remained in custody for the next three years, over the course of eleven continuances, until finally proceeding to trial in 2015. (R.167.)

The district court granted all eleven continuances without holding a single status hearing. Although ten of these continuances were requested by defense counsel, (R.31; R.40; R.47; R.53; R.61; R.87; R.92; R.117), Robey was not consulted on any of them and he repeatedly expressed to the court his concerns over the pace of his case, *see, e.g.*, (R.57; R.88). In February 2014 Robey agreed to plead guilty to two counts, (R.95), but as negotiations continued over the ensuing months, Robey expressed concern about agreeing to a plea, (R.88). Robey eventually withdrew his plea, and the case went to trial after several more continuances. (R.115.)

On December 31, 2014, Robey moved to dismiss the case, asserting, among other violations, a violation of the Speedy Trial Act. (R.144.) Finding only twenty-eight days of the seventy-day limit had elapsed, the district court denied Robey's motion. (A24.) On January 28, 2015, Robey filed and the district court rejected a second motion to dismiss on constitutional speedy trial grounds. (R.154.) After a three-day trial, the jury found sixty-eight-year-old Robey guilty on the six remaining counts of the indictment. (A1.) Robey then filed a third motion to

dismiss for speedy trial violations, which the district court again denied. (R.181; R.187; R.192.) The district court subsequently sentenced Robey to 110 months' imprisonment, 36 months of supervised release, and $84,500.21 in restitution. (A1.)

A panel of this Court affirmed. *United States v. Robey*, No. 15-2172, slip op. at 2 (7th Cir. Aug. 3, 2016). The panel reasoned that the district court did not abuse its discretion because each decision was supported by orders articulating sufficient justification and "the relevant sequence of events." *Id.* at 8. The panel thus held that the district court did not violate Robey's speedy trial rights because its decisions to exclude the ends-of-justice continuances from the speedy trial clock were reasonable. *Id.* at 8–9. Importantly, the panel did not identify or discuss any case-specific findings made by the district court in evaluating the continuance motions. Had the panel found improper even one of the eleven continuances (or, put another way, had the panel found that twenty days out of the 488 that Robey claimed were improperly excluded by those continuances), Robey would have been entitled to a dismissal of this indictment for violation of the Speedy Trial Act.

DISCUSSION

I. The panel decision conflicts with the plain language of the Speedy Trial Act and Supreme Court precedent requiring specific on-the-record findings to accompany an ends-of-justice continuance.

The panel decision overlooks the strict procedural requirements of the Speedy Trial Act, and instead allows the district court's conclusory statements and rote recitations of ends-of-justice language to satisfy the Act's demand for case-specific factual findings. Before concluding that a district court's decision to exclude time was reasonable, an appellate court must first identify the case-specific findings made by the district court and used to justify the exclusion. The panel erred in failing to address and decide the threshold issue of whether the district court

findings were sufficient, especially when, as Appellant's briefs demonstrated, the district court's orders consisted of nothing more than rote recitation of the motions underlying it—without even an intervening status hearing to verify counsel's representations—or a passing reference to the ends-of-justice provision. (App. Br. at 15–19.)

The procedural requirements imposed by the Speedy Trial Act on district courts are as straightforward as they are rigid. A district court may only exclude from the speedy trial clock a continuance based on the ends of justice when it finds those interests outweigh the public's and defendant's interests in a speedy trial. 18 U.S.C. § 3161(h)(7)(A). The Act provides a non-exhaustive list of factors that the court *shall* consider. *Id.* § 3161(h)(7)(B) (emphasis added). However, for any continuance to be excludable, the court must "set[] 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.* (emphasis added).

The Supreme Court has made clear the Act demands "procedural strictness" from district courts when considering these continuances. *Zedner*, 547 U.S. at 509. The Act gives district courts limited discretion to accommodate case-specific needs, *id.* at 499, but ends-of-justice continuances nevertheless must be based on the court's findings, *id.* at 506–07. Without findings, there can be no ends-of-justice exclusion, and passing references to otherwise valid reasons are not enough. *Id.* at 507. "[T]rial 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." *Bloate v. United States*, 559 U.S. 196, 214 (2010). The Act's procedural strictness is necessary to promote its core purposes: "It both ensures the district court considers the

relevant factors and provides this court with an adequate record to review." *Napadow*, 596 F.3d at 405 (quoting *United States v. Toombs*, 574 F.3d 1262, 1269 (10th Cir. 2009)).

The panel erred in skipping over the important threshold issue of identifying findings by merely presuming that the district court's analysis satisfied the Act's strict procedural requirements. In fact, the district court's orders were terse boilerplate, vague, and often inaccurate, which simply did not create an adequate record for this Court's review. *See* (App. Br. at 16–19) (cataloguing the fact-finding deficiencies in the district court's continuance orders). The panel decision does not—because it cannot—identify a single, reasonable case-specific finding made by the district court justifying the delays. *See Robey*, slip op. at 8–9 (discussing orders without mention of any specific findings).

In some instances, the panel's review conflates the conditional excludability of ends-of-justice continuances with the automatic excludability of other delays. *Cf. United States v. Tinklenberg*, 563 U.S. 647, 665 (2011) (noting that certain specific delays named in the Act are automatically excludable). For example, the panel grouped the sixth, seventh, and eight continuances and deemed them all reasonable in light of Robey's psychological evaluation. *Robey*, slip op. at 9. While the time required for the evaluation was automatically excluded, the eighth continuance was granted months *after* the exam was completed without any explanation as to why additional delay was warranted. By presuming the district court made sufficient findings, the panel allowed the occurrence of a *potentially* legitimate ends-of-justice incident to trigger speedy trial clock exclusion without actual inquiry into the need for delay. In practice, there was no difference between the district court's treatment of the automatically and conditionally excludable delays. Yet, this is plainly contrary to the Speedy Trial Act's procedural commands. "An exclusion under subsection (h)(7) is not automatic," and "[a]llowing district

courts to exclude automatically such delays would redesign this statutory framework." *Bloate*, 559 U.S. at 213.

Thus, the panel's approach conflicts with Supreme Court precedent because it opted not to engage with the district court's failure to make a single, reasonable case-specific finding, the Act's first essential step in evaluating a speedy trial claim. Had the panel done so, it could only have concluded that the district court's on-the-record findings were facially insufficient.

II. The panel's decision is inconsistent with this Court's precedent.

The panel's decision to elide the required threshold analysis of the adequacy of the district court's fact-finding led it to endorse an analytical approach inconsistent with this Court's precedent. Specifically, the panel held that the Speedy Trial Act requirement that the trial court make a finding on the record for an end-of-justice continuance is satisfied where the "district court's decision was supported by an order articulating adequate justification, as well as by the relevant sequence of events." *Robey*, slip op. at 8. The panel's approach both inappropriately extends the sequence of events approach taken by this Court in *Wasson* and *Napadow* and directly conflicts with the case-specific finding requirement of *O'Connor*.

A. The panel inappropriately extended this Court's sequence of events approach, which permits consideration of the sequence of events only when coupled with the district court's explicit on-the-record findings.

On two occasions, the Seventh Circuit has used a sequence of events approach to supplement a district court's decision to grant an end-of-justice continuance under the Speedy Trial Act. *Wasson*, 679 F.3d at 946–48; *Napadow*, 596 F.3d at 405–06. Under this approach, to supplement the district court's on-the-record findings, the appellate court also can examine the sequence of events to determine whether the district court considered the requisite factors under the Act. In those prior cases, this Court defined the sequence of events by reference to status

hearing transcripts, which allowed it to confirm that adequate findings were made, and that they were accurate with respect to the proceedings as they actually unfolded, not merely as they were represented in the moving party's filing. *Cf. DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974) (noting that "factfinding is the basic responsibility of district courts, rather than appellate courts, and that the Court of Appeals should not have resolved in the first instance [a] factual dispute which had not been considered by the District Court").

As a result, in *Wasson* and *Napadow*, this Court did *not* eliminate the explicit, unambiguous statutory requirement that the district court "set[] 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." 18 U.S.C. § 3161(h)(7)(A); *see Wasson*, 679 F.3d at 946 (emphasis added) (noting that the appellate court could rely on the "sequence of events *coupled with [a] later explanation*" to determine the validity of an ends-of-justice continuance); *Napadow*, 596 F.3d at 405 (examining the "sequence of events, *followed by the court's later explanation*," to determine the validity of an ends-of-justice continuance (emphasis added)). Crucially, in *Wasson*, this Court relied on the record of two district court hearings and "extensive colloquy" which "satisfie[d] [the Court] that the court balanced the [Act's] factors." 679 F.3d at 947–48. Likewise, in *Napadow*, this Court relied explicitly on district court trial transcripts. 596 F.3d at 405.

The panel improperly expanded this approach beyond its original scope by affirming the district court's ends-of-justice continuances without analyzing the district court's on-the-record findings or, in this instance, lack thereof. Instead, unlike this Court's approach in *Wasson* and *Napadow*, which looked to status hearing transcripts to confirm the findings in the orders, there were no such status hearings in Robey's case. Here, the sequence of events upon which the panel

relied was nothing more than the motions themselves and the docket sheet, neither of which constitute on-the-record findings. *Robey*, slip op. at 8–9. Although the motions and docket sheets can be found in the record, they are not *court findings*. This distinction is especially important in the context of Speedy Trial Act review because the district court is statutorily obligated to weigh the relevant, opposing interests. Quite simply, not everything stated by counsel in a motion constitutes a court finding; the panel did not recognize this distinction.

The panel's expansion of the sequence of events approach to cases without actual findings or status hearings from which the district court's rationale could be gleaned has real consequences. First, it sanctions pure speculation. An appellate panel can simply reverse engineer possible explanations for the district court's decisions. Far from the on-the-record findings that the *district court* must make, the panel's assumption of that role eliminates the district court's burden entirely. Second, it insulates faulty findings from review. For example, the panel's decision to look only to the motions and the docket sheet meant that this Court would never know whether the district court actually granted the motion for an improper reason, such as calendar congestion. *See* 18 U.S.C. § 3161(h)(6)(C); *cf. United States v. Ramirez*, 788 F.3d 732, 735–36 (7th Cir. 2015), *rev'g* No. 12 CR-20068, 2014 WL 221280 (C.D. Ill. Jan. 21, 2014) (rejecting district court's use of a sequence of events approach to engage in post-hoc justification of an ends-of-justice continuance where the record only referred to calendar congestion and not permissible factors). Thus, the panel's new sequence of events approach conflicts with the very two purposes this Court has identified for the Act's on-the record requirement: to "[1] ensure[] the district court consider[] the relevant factors and [2] provide[] [the appellate court] with an adequate record to review. *Napadow*, 596 F.3d at 405 (quoting *Toombs*, 574 F.3d at 1269).

B. The panel's approach is directly contrary to this Court's precedent in *O'Connor* and *Ramirez* because it fails to require the district court to make case-specific findings in granting each continuance.

In *O'Connor*, this Court considered whether the district court appropriately excluded various time periods from the speedy trial clock under the ends-of-justice exception to the Speedy Trial Act. The court stressed that "continuances granted for this purpose must be supported by *case-specific findings that the benefits outweigh the costs*" made on the record. *O'Connor*, 656 F.3d at 638 (emphasis added). It relied on transcript hearings and a colloquy between counsel and the judge—on-the-record fact-finding—to determine that each one of the continuances were individually justified and appropriate. *Id*. at 639–40. While the court did consider docket entries, it noted that the docket entries were "considered together" with an on-the-record transcript. *Id.* at 640.

Unlike *O'Connor*, the panel here did not require that the district court make "case-specific findings" that balanced benefits versus costs for each individual continuance. The panel did not identify any district court findings specific to each ends-of-justice continuance. In fact, the panel consolidated the district court's first, second, and third continuances together, finding them all acceptable for the same general reason: to allow the defendant an opportunity to pursue a plea and prepare for trial. *Robey*, slip op. at 8. Likewise, the panel simultaneously held that the sixth, seventh, and eighth continuances were reasonable due to "delays in trial preparation arising from Robey's psychological evaluation." *Id.* at 9. In both instances, the panel adopted the district court's erroneous grouping mindset and failed to require individualized reasoning for each order. Thus, unlike the standard articulated by the Seventh Circuit in *O'Connor*, the panel did not require the district court to make case-specific findings.

The panel's decision also runs afoul of this Court's *Ramirez* decision. There, the district court considered in a subsequent hearing whether it appropriately excluded time under the ends-of-justice exception at a prior hearing. *United States v. Ramirez*, No. 12-CR-20068, 2014 WL 221280, at *7 (C.D. Ill. Jan. 21, 2014). The district court held that the "sequence of events leading up to the ends of justice finding [at the hearing several months earlier], combined with the reasons stated for the finding in [the current] order, suffice to support an ends of justice finding." *Id.* (first citing *Wasson*, 679 F.3d at 946–47; and then citing *Napadow*, 596 F.3d at 405–06). This Court reversed. *Ramirez*, 788 F.3d at 733. It stressed "[t]hat procedural strictness [of the Speedy Trial Act] requires on-the-record findings that sufficiently identify the factors that were considered in making an ends of justice continuance." *Id.* at 736. This Court held that there was no evidence in the hearing transcript that the permissible factors of case complexity or the addition of co-defendants motivated the district court's earlier decision. *Id.* Instead, this Court remarked that the original continuance appeared to have been based on the court's crowded calendar, an impermissible factor. *Id.* at 735.

The panel, like the *Ramirez* district court, relied on the sequence of events to offer post-hoc rationalizations for an earlier ends-of-justice continuance despite the trial court's lack of on-the-record explanation as to what factors motivated each continuance. That the panel's approach is directly at odds with prior precedent will inevitably confuse lower courts attempting to comply with the Act. *Wasson*, *O'Connor*, *Ramirez*, and *Napadow* require district courts to make explicit, on-the-record findings to justify each continuance, while the panel's decision permits mere docket sheet data to serve as a sufficient ends-of-justice rationale. This, in turn, will lead to additional litigation of the issue in this Court; defendants who believe that their Speedy Trial Act

rights were abridged by improper on-the-record fact-finding will continually flag the inconsistencies in this Court's contradictory approaches.

III. The panel's sequence of events approach is contrary to the approach of other circuits.

Not only does the panel's sequence of events approach conflict with this Court's own precedent, it is also at odds with the Ninth, Tenth, and D.C. Circuits' interpretation of the Speedy Trial Act's on-the-record requirement. Although these circuits each employ slightly different language in their tests, they are all fundamentally the same and all would reject the panel's sequence of events standard; according to these circuits, the Act requires explicit, individualized, and specific explanations on the record before an ends-of-justice continuance may stand.

Turning first to the Tenth Circuit, that court properly recognizes the unambiguous on-the-record requirement in the Act's ends-of-justice provision. Thus, it sets a clear standard: "the record . . . must contain an explanation of why the mere occurrence of the event identified by the party as necessitating the continuance results in the need for additional time." *Toombs*, 574 F.3d at 1271. "A record consisting of only short, conclusory statements lacking detail is insufficient." *Id.* Thus, for example, "[s]imply identifying an event, and adding the conclusory statement that the event requires more time for counsel to prepare, is not enough." *Id.* at 1271–72. Similarly, the mere statement in the record that "discovery was recently disclosed and counsel consequently needed additional time to prepare" does not suffice to meet the requirement that the court record its finding. *Id.* at 1272. Instead, the district court must, *on the record*, examine the nature of the discovery, why the discovery was important, why the discovery required a particular length continuance, and why the discovery required providing counsel more time to prepare for trial. *Id.*; *see also United States v. Williams*, 511 F.3d 1044, 1058 (10th Cir. 2007) (holding that where a party requested an ends-of-justice continuance so a new attorney could "become familiar with

the case," the district court must actually "comment on the issue of trial preparation time"); *United States v. Gonzales*, 137 F.3d 1431, 1434–35 (10th Cir. 1998) (holding that where a party requested an ends-of-justice continuance due to an absent prosecutor or witness, the district court must inquire as to why he or she was out of town and if the trips could be rescheduled).

There is a clear split between the Tenth Circuit's approach and the panel's approach here. The panel's sequence of events approach would not be permissible in the Tenth Circuit because it allows the district court to satisfy the Act's requirement with the precise types of conclusory statements that the *Toombs* court found insufficient. In the Tenth Circuit, the district court must actually inquire why more time is needed and then explain precisely why on the record. For example, under the Tenth Circuit's approach, the *Robey* district court would have been required to address why the psychological evaluation—completed months earlier—nonetheless required an additional ends-of-justice continuance. *See* Brief for Appellant at 18. The orders—approved by the panel—would have been subject to reversal in the Tenth Circuit. *See, e.g.*, A.17 (district court order granting an ends-of-justice continuance in Robey's case to avoid "unreasonably deny[ing] the defendant reasonable time to effectively prepare for trial").

Similarly, the panel's approach also at odds with the Ninth Circuit's practice, which like the Tenth Circuit, requires the district court to conduct a "particularized inquiry" as to the reasons for the continuance on the record; that inquiry must analyze the "'ends of justice' factors." *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (emphasis added) (stressing the statutory language of the Act—that the district court "*shall consider*" the nonexclusive factors). For example, in one case where the district court granted an ends-of-justice continuance based on a proponent's affidavit stating that attorneys were unavailable, the Ninth Circuit reversed, noting that to meet the on-the-record requirement, a district court cannot:

> simply credit the vague statements by one party's lawyer about possible scheduling conflicts or general desires for a continuance of the other parties or their attorneys; instead, it must conduct an appropriate inquiry to determine whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether grating the requested continuance "outweigh the best interest of the public and the defendant[s] in a speedy trial."

United States v. Lloyd, 125 F.3d 1263, 1267–69 (9th Cir. 2007) (quoting 18 U.S.C. § 3161 (h)(8)(A)).[1] Instead, the district court must conduct an independent inquiry on the record, and that inquiry must be individualized and specific to determine whether an ends-of-justice continuance is warranted. *Id.* The district court must examine the actual policy implications of granting each specific continuance and whether granting the continuance is in the best interest of the parties and the public. Unlike the Ninth Circuit, the panel's approach merely requires a district court to generally conclude, based on the request of a party and an undefined "sequence of events," that the ends of justice of a continuance outweighs the interest of a speedy trial.

The D.C. Circuit—like the Ninth and Tenth—also requires "express findings" in order to comply with the procedural strictness of the Act. *United States v. Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008) (quoting *Zedner*, 547 U.S. at 506). The record must demonstrate that the district court "seriously weigh[ed] the benefits of granting the continuance against the strong public and private interests served by speedy trials." *Id.* The "passing reference to the 'interest of justice'" does not suffice. *Id.*; *see also United States v. Sanders*, 485 F.3d 654, 659 (D.C. Cir. 2007) ("[I]nsofar as the district court made no mention of the countervailing interests, its . . . statement fails to meet the Act's requirement of on-the-record findings that a continuance 'outweigh[ed]

[1] The Speedy Trial Act was amended in 2008, and the ends-of-justice provision is currently 18 U.S.C. § 3161 (h)(7)(A).

the best interest of the public and the defendant in a speedy trial.'" (quoting 18 U.S.C. § 3161(h)(8)(A))). Unlike these circuits, the panel's approach does not require the district court to make express, individualized, and specific findings nor mention countervailing interests.

On the other hand, some circuits have less demanding requirements. These courts allow the appellate court to holistically examine the district court's record and do not require case-specific findings. *See, e.g.*, *United States v. Bazuaye*, 311 F. App'x 382, 384 (2d Cir. 2008) (holding that "[a]though it would have been preferable" for the district court to explicitly provide its ends-of-justice reasoning, "it [was] apparent from the record that [the judge] was weighing the pertinent factors in concluding that" a continuance was appropriate based on relevant factors); *United States v. Thomas*, 272 F. App'x 479, 482–84 (6th Cir. 2008) (holding, where the district court issued "laconic and formulaic orders" in granting continuances and "generally explain[ed]" that the case was "not a garden variety case" because witnesses were from several cities, one witness was pregnant, and the case was overall complex, that "[a]lthough a more detailed explanation developing the record would have been helpful, . . . the district judge technically complied" with the on-the-record requirement); *United States v. Whitfield*, 590 F.3d 325, 357–58 (5th Cir. 2009) (holding that the district court's finding that a case was "facially and actually complex" satisfies the Act's on-the-record requirement); *United States v. Lucas*, 499 F.3d 769, 782–83 (8th Cir. 2007) (en banc) (holding that while "there could have been more detailed findings," a district court order granting an ends-of-justice continuance "[c]onsidering all the relevant circumstances" without any more specific examination was sufficient to satisfy the on-the-record recruitment). Thus, the approaches taken by the Second, Fifth, Sixth, and Eighth Circuits appear akin to the panel's sequence of events approach, but contrary to this Court's prior articulation in *O'Connor*. Those courts allow the appellate court to examine the

record as a whole, relaxing the Act's requirement for on-the-record explicit findings, and apparently permit a continuance based on the general complex nature of the case without explaining *why* the ends of justice are best served by the continuance.

In effect, the panel shifted this Court from an interpretation of the on-the-record requirement aligned with the Ninth, Tenth, and D.C. Circuits to one aligned with the Second, Fifth, Sixth, and Eighth Circuits. *Compare O'Connor*, 656 F.3d at 638 (requiring "case-specific" findings on the record), *with Robey*, slip op. at 8–9 (holding the district court orders were sufficient though they did not mention any specific findings). Thus, the panel's opinion both overrode a prior decision of this Court and joined a conflict among the circuits. Under Circuit Rule 40(e), an opinion thus affecting a circuit split should be circulated to all active judges for en banc consideration prior to publication. This Court should accept rehearing en banc to assess the split and on which side it falls.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing or rehearing en banc in this case.

/s/ Sarah O. Schrup

BLUHM LEGAL CLINIC
Northwestern University Pritzker School of Law
375 East Chicago Avenue
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Phone: (312) 503-0063

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CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32(a) and 40 and SEVENTH CIRUCIT RULES 32 and 40

1. This petition complies with the type-volume limitations of Fed. R. App. 40(b) and Circuit Rule 40 because:

X this petition contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word, in 12-point Time New Roman font with footnotes in 11-point Times New Roman Font.

/s/ Sarah O. Schrup

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GEORGE ROBEY,	)
	)
Defendant–Appellant.	) Hon. Judge Sarah Evans Barker

CERTIFICATE OF SERVICE

I certify that I served electronically this petition for rehearing through the Court's electronic filing system on September 8, 2016, which will send notice to counsel of record.

/s/ Sarah O. Schrup

BLUHM LEGAL CLINIC
Northwestern University Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
Phone: (312) 503-0063

Dated: September 8, 2016

In the

United States Court of Appeals

For the Seventh Circuit

No. 15-2172

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE E. ROBEY,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 12 CR 00027-001 — **Sarah Evans Barker**, *Judge*.

ARGUED APRIL 7, 2016 — DECIDED AUGUST 3, 2016

Before EASTERBROOK, KANNE, and SYKES, *Circuit Judges*.

KANNE, *Circuit Judge*. Defendant George Robey operated a modern-day "chop shop"—he and his associates stole cars, altered their identities using office and computer equipment, and then sold them. He was convicted by a jury, and the district court sentenced him to 110 months' imprisonment and three years of supervised release.

Robey appeals his conviction and sentence on three grounds. First, he argues that he did not receive a speedy trial, in violation of the Speedy Trial Act and the Sixth Amendment. Second, Robey contends that the district court erred in allowing the government to amend the indictment by dropping nineteen of the twenty-five charges. Third, he argues that the district court erred at sentencing by finding that Robey's theft of ten vehicles, in addition to the four vehicles forming the basis of his conviction, constituted relevant conduct. We affirm.

I. BACKGROUND

A. Factual Background

From 2009 until 2011, Robey and his associates stole cars from lots around Indianapolis, altered the cars' identities, and then sold them. As part of this operation, Robey would change a stolen car's identity by giving it a new Vehicle Identification Number ("VIN"), a unique 17-digit identification code. Robey would also create counterfeit documents to support a stolen car's new identity, which included generating a title, insurance card, sales contract, and temporary license plate. Robey created these counterfeit VINs and documents using a computer, scanner, printer, and digital image editing software.

B. Procedural History

Robey was arrested on a criminal complaint on December 6, 2011. Between Robey's arrest and indictment, Robey and the government jointly requested and were granted two ends-of-justice continuances to extend the pre-indictment period.

On February 23, 2012, a grand jury returned a 25-count indictment against Robey, alleging conspiracy to identify, steal, and sell stolen vehicles for profit; trafficking in vehicles with altered VINs; making, uttering, and possessing counterfeit state securities; and identification document fraud.

Robey made an initial appearance on the indictment on March 1, 2012. Between Robey's initial appearance and trial start date of February 10, 2015, Robey requested and was granted ten ends-of-justice continuances. Additionally, he filed several pre-trial motions, requested and received new counsel twice, underwent a psychological examination, and entered and withdrew from a plea agreement. During this period, the government also was granted one ends-of-justice continuance.

On December 29, 2014, the government moved to dismiss nineteen of the twenty-five counts in the indictment, reducing the charges against Robey to six remaining counts—four counts of trafficking in vehicles with altered VINs, in violation of 18 U.S.C. § 2321; and two counts of making, uttering, and possessing counterfeit state securities, in violation of 18 U.S.C. § 513(a). The district court granted this motion.

Robey also filed two motions to dismiss. On December 31, 2014, Robey filed his first motion to dismiss, arguing that his speedy trial right had been violated, pursuant to 18 U.S.C. §§ 3161(c)(1), 3162, because his case had not been tried within 70 days of his initial appearance. The district court denied Robey's motion on January 5, 2015, finding that only 28 days had elapsed on Robey's pre-trial speedy trial clock. On January 28, 2015, Robey filed his second motion to dismiss, again alleging violation of his right to a speedy trial. The district court denied this motion on February 6, 2015.

Robey's three-day trial began on February 10, 2015. The jury saw and heard evidence that Robey had, for four stolen vehicles, altered the VINs, created counterfeit vehicle documents, and sold the vehicles, including one sale to an undercover agent. The jury convicted Robey of all six counts on February 12, 2015.

On May 20, 2015, the district court held Robey's sentencing hearing. The revised presentence investigation report ("PSR") concluded that, in addition to the four vehicles that were the focus of the trial, another ten stolen vehicles constituted "relevant conduct." The evidence found in Robey's home showed that, as with the four cars that made up his conviction, he had altered the VINs and created counterfeit documents for these other ten cars. The total value of the fourteen cars—four that constituted Robey's conviction and ten deemed relevant conduct—exceeded $400,000. This loss amount increased Robey's offense level by 14, pursuant to U.S.S.G. §§ 2B1.1(b)(1), (H) (2014).

At sentencing, Robey contested the total value of the cars, arguing that the ten uncharged cars should not be considered relevant conduct. The district court ruled that the evidence found during the search of Robey's home confirmed a pattern of common conduct sufficient to establish the ten additional vehicles as relevant conduct. Adopting the PSR, the district court determined Robey's guidelines range was 110 to 137 months' imprisonment, based on an adjusted offense level of 26 and criminal history category of V. After taking into account Robey's age and infirmity, the court imposed a within-guidelines sentence of 110 months' imprisonment and three years of supervised release, with the standard conditions and

some discretionary conditions. Judgment was entered against Robey on May 27, 2015. Robey appealed.

II. ANALYSIS

Robey appeals his conviction and sentence on three main grounds. First, he claims that he did not receive a speedy trial, in violation of the Speedy Trial Act and Sixth Amendment. Second, Robey contends that the district erred in allowing the government to amend the indictment by dropping nineteen of the twenty-five charges. Third, he argues that the district court erred at sentencing by ruling that Robey's theft of ten vehicles, in addition to the four vehicles that form the basis of his conviction, constituted relevant conduct.

A. Speedy Trial Violations

Robey claims that his right to a speedy trial was violated under the Speedy Trial Act and the Sixth Amendment. Robey first argues that his speedy trial right under the Speedy Trial Act was violated by: (1) the 79 days that elapsed between his arrest and indictment and (2) the 1076 days that elapsed between his initial appearance and trial commencement. Robey then contends his speedy trial right under the Sixth Amendment was violated by the 1076 days that elapsed between his initial appearance and trial commencement.

1. Speedy Trial Act

This court reviews "the district court's legal interpretation of the [Speedy Trial Act] *de novo*, and its decisions to exclude time for an abuse of discretion." *United States v. Ramirez*, 788 F.3d 732, 735 (7th Cir. 2015).

The Speedy Trial Act generally requires that a criminal indictment be filed within 30 days of a defendant's arrest. 18

U.S.C. § 3161(b). Furthermore, the Speedy Trial Act generally requires that a criminal trial begin within 70 days of an indictment or a defendant's initial appearance, whichever is later. *Id.* § 3161(c)(1). The Speedy Trial Act provides exceptions, however, which allow certain periods of delay to be "excluded" from the relevant speedy trial clock. *Id.* § 3161(h). Some of these exceptions, such as consideration of plea agreements, are automatically excludable. *Id.* § 3161(h)(1)(G); *see United States v. O'Connor*, 656 F.3d 630, 642 (7th Cir. 2011) (holding that "periods of delay excludable under § 3161(h)(1)–(6) may be *automatically* excluded if the specified conditions are present"). In addition to the enumerated automatic exclusions, a judge may exclude any period of delay resulting from a continuance if the judge finds "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) (emphasis added).

In granting an ends-of-justice continuance, the judge shall consider the factors listed in § 3161(h)(7)(B) and must "set[] forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice would be served." *Id.* § 3161(h)(7)(A). The district court's decision "need not be lengthy and need not track the statutory language," but it should provide this court with an adequate record to review the district court's consideration of the relevant factors. *O'Connor*, 656 F.3d at 643 (internal quotation marks omitted). In reviewing an ends-of-justice decision, this court examines not only the district court's order on a particular motion but also "the sequence of events leading up to the continuance followed by the court's later explanation." *United States v. Wasson*, 679 F.3d 938, 946 (7th Cir. 2012) (internal quotation marks omitted).

In the present case, we begin by addressing Robey's pre-indictment period of delay and then turn to his pre-trial period of delay.

Robey first argues that the 79 days that elapsed between his arrest on December 6, 2011, and his indictment on February 23, 2012, violated the Speedy Trial Act's 30-day pre-indictment requirement. However, during this period, Robey and the government jointly requested and were granted two ends-of-justice continuances. Excluding these periods of times leaves only 13 days on Robey's pre-indictment speedy trial clock.

In this case, Robey's pre-indictment delay argument fails because the district court did not abuse its discretion in granting the two ends-of-justice continuances. Both of the district court's decisions were supported by an order articulating adequate justification, as well as by the relevant sequence of events. The court granted the two ends-of-justice continuances because *both* Robey and the government needed additional time to attempt to negotiate a resolution to the matter without a trial. These were reasonable decisions because they allowed both parties, at an early stage in the case, to pursue the option of resolving the case without a trial.

Robey next argues that the 1076 days that elapsed between his initial appearance on March 1, 2012, and his trial commencement on February 10, 2015, violated the Speedy Trial Act's 70-day pre-trial requirement.

Again, most of this time is excludable. First, the period of time in which Robey was negotiating his withdrawn plea agreement is automatically excluded. § 3161(h)(1)(G); *O'Connor*, 656 F.3d at 642. Second, the district court granted ten

ends-of-justice continuances for Robey.[1] Excluding these time periods leaves only 60 days on Robey's pre-trial speedy trial clock. Third, the district court granted one ends-of-justice continuance for the government. Further excluding this time period leaves only 50 days on Robey's pre-trial speedy trial clock. Therefore, if the district court did not abuse its discretion in granting Robey's ten ends-of-justice continuances, his argument fails.

Here, the district court did not abuse its discretion in granting ten ends-of-justice continuances for Robey. Each of the district court's decisions was supported by an order articulating adequate justification, as well as by the relevant sequence of events. We discuss each briefly.

The court granted Robey's first, second, and third ends-of-justice continuances because Robey required additional time to evaluate discovery, explore the possibility of a plea agreement, and effectively prepare for trial if the plea negotiations proved unsuccessful. These were reasonable decisions because they allowed Robey, at an early stage in the case, to pursue the option of a plea agreement and still prepare for trial.

The court granted Robey's fourth ends-of-justice continuance because Robey required additional time to undergo a psychological evaluation, evaluate discovery, explore the possibility of a plea agreement, and effectively prepare for trial if the plea negotiations proved unsuccessful. This was a reasonable decision because Robey did eventually undergo a

[1] The district court granted ten ends-of-justice continuances for Robey on the following dates: (1) April 12, 2012, (2) June 12, 2012, (3) August 7, 2012, (4) November 28, 2012, (5) March 1, 2013, (6) May 1, 2013, (7) September 9, 2013, (8) November 21, 2013, (9) July 3, 2014, and (10) August 20, 2014.

psychological evaluation. This reasonable decision also allowed Robey to pursue the option of a plea agreement and still prepare for trial.

The court granted Robey's fifth ends-of-justice continuance to allow his new counsel to prepare for trial. This was a reasonable decision given that Robey had been appointed a new lawyer, at Robey's request, two weeks earlier.

The court granted Robey's sixth, seventh, and eighth ends-of-justice continuances because of delays in trial preparation arising from Robey's psychological evaluation. These were reasonable decisions in light of Robey's psychological evaluation.

The court granted Robey's ninth ends-of-justice continuance in order to prepare for trial. This was reasonable decision given that he had recently withdrawn from a plea agreement.

The court granted Robey's tenth ends-of-justice continuance to evaluate discovery, explore a plea agreement, and prepare for trial. This was a reasonable decision because Robey had been appointed new counsel again, at Robey's request, two weeks earlier.

For the sake of completeness, we also review the government's one ends-of-justice continuance, which the court granted because the government had recently changed counsel and the leading case agent was unavailable for the trial due to the expected birth of his child. This was a reasonable decision because, in fact, the government's new counsel was heavily involved in pending litigation and the leading case agent was unavailable for the trial because of paternity leave.

Accordingly, Robey did not suffer violation of his speedy trial right under the Speedy Trial Act.

2. Sixth Amendment

Robey also argues that the 1076 days that elapsed between his initial appearance and his trial violated his right to a speedy trial under the Sixth Amendment, which is related to but independent of his Speedy Trial Act claim. *O'Connor*, 656 F.3d at 643. Because Robey did not raise this argument below, we review for plain error. *Id.*

The Sixth Amendment guarantees an accused "the right to a speedy and public trial." U.S. Const. amend. VI. This court examines the following factors in assessing a speedy-trial claim under the Sixth Amendment: "'[W]hether [the] delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.'" *O'Connor*, 656 F.3d at 643 (alteration in original) (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)).

In the case at hand, the pretrial period did not violate the Sixth Amendment. On one hand, Robey did timely assert his right, and he is entitled to a presumption of prejudice. *See id.* ("Delays of more than one year are considered presumptively prejudicial."). On the other hand, Robey bears "primary responsibility" for the years of pretrial delay, and he was not actually prejudiced. *Id.* He filed a motion to suppress, sought ten ends-of-justice continuances, and entered and withdrew from a plea agreement. He underwent a psychological examination. He also changed lawyers twice. Furthermore, it appears that Robey was uncooperative with his appointed counsel, as indicated by his pro se letters to the court and change-of-counsel hearings. As a result, while the pretrial delay in

Robey's case was lengthy, there was no Sixth Amendment violation. *See id.* (holding no constitutional violation because defendant "bears primary responsibility for many of the pretrial delays and did not suffer actual prejudice").

B. Amending the Indictment

Robey next claims that the district erred in allowing the government to amend the indictment by dismissing nineteen of the twenty-five counts prior to trial. Specifically, Robey contends that "[b]ecause the modification was made without the oversight of a grand or petit jury, the amendment violated Robey's constitutional rights." (Appellant Br. 33–34.) Robey raises his claim under the Fifth Amendment, which provides, "[n]o person shall be held to answer for a … crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend V; *see also United States v. Soskin*, 100 F.3d 1377, 1380 (7th Cir. 1996) ("Under the Grand Jury Clause of the Fifth Amendment, the possible bases for conviction are limited to those contained in the indictment.") (internal quotation marks omitted).

Because Robey did not preserve this claim in district court, it is forfeited, and we review only for plain error. *United States v. Perez*, 673 F.3d 667, 669 (7th Cir. 2012). For plain error, a defendant must show the following: "(1) an error or defect (2) that is clear or obvious (3) affecting the defendant's substantial rights (4) and seriously impugning the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

Here, Robey cannot show error, plain or otherwise, because the district court's dismissal of nineteen of twenty-five

counts of the indictment prior to trial only narrowed the indictment against him, a practice that has been expressly upheld by the Supreme Court and this court.

In *United States v. Miller*, the Supreme Court held that "where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment." 471 U.S. 130, 145 (1985) (internal quotation marks omitted). In the same vein, this court has also explicitly stated, "[n]arrowing the indictment so that the trial jury deliberates on fewer offenses than the grand jury charged does not constitute amendment." *Soskin*, 100 F.3d at 1380 (alteration in original and internal quotation marks omitted). Thus, under the precedent of the Supreme Court and this court, the district court's dismissal of nineteen counts of Robey's indictment prior to trial was not a forbidden amendment.

In fact, Robey's argument is the same as the one expressly rejected by the *Miller* Court. Robey claims a constitutional violation because the court dismissed nineteen counts of the indictment prior to trial. In other words, Robey is contending "not that the indictment failed to charge the offense for which he was convicted, but that that the indictment charged more than was necessary." *Miller*, 471 U.S. at 140. The *Miller* Court rejected this argument, declaring that the defendant "was tried on an indictment that clearly set out the offense for which he was ultimately convicted," and consequently, there was "no deprivation of [the defendant's] substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Id.* (internal quotation marks omitted). The

Miller Court's response, which this court has applied consistently, defeats Robey's claim. *See e.g.*, *Perez*, 673 F.3d at 669 (citing *Miller*, 471 U.S. at 144).

Robey's attempts to distinguish *Miller* from the present case are unpersuasive. Robey argues that the entire indictment in *Miller* was sent to the petit jury and asks this court to "draw [a distinction] between indictment modifications that occur with jury oversight and those that occur without." (Appellant Reply. Br. 13.) Robey's argument is meritless and undermined by his own reply brief. As Robey concedes, this court has allowed modified indictments to be presented to a petit jury without resubmission to a grand jury. *See e.g., Perez*, 673 F.3d at 669; *United States v. Graffia*, 120 F.3d 706, 711 (7th Cir. 1997); *Soskin*, 100 F.3d at 1381.

Robey subsequently argues that this court allows presentation of a modified indictment to a petit jury without resubmission to a grand jury "*only* when the modifications do not materially affect the substance or scale of the charges alleged." (Appellant Reply Br. 13 (emphasis added).)

Robey misstates the law. Instead, this court has clearly articulated what does and does not constitute an impermissible amendment—"[n]arrowing the indictment so that the trial jury deliberates on fewer offenses than the grand jury charged does not constitute amendment. But the indictment may not be broadened so as to present the trial jury with more or different offenses than the grand jury charged." *United States v. Crockett*, 979 F.2d 1204, 1210 (7th Cir. 1992) (citations and internal quotation marks omitted). In the present case, the district court's dismissal of nineteen of twenty-five counts of the indictment prior to trial narrowed, rather than broadened, the

indictment such that the trial jury deliberated on fewer offenses than charged by the grand jury. Accordingly, the indictment was not impermissibly amended.

C. Relevant Conduct at Sentencing

Finally, Robey argues that the district court erred at sentencing by ruling that Robey's theft of ten uncharged vehicles, in addition to the four charged vehicles from his conviction, constituted relevant conduct.

A district court must find relevant conduct by a preponderance of the evidence. *United States v. Baines*, 777 F.3d 959, 963 (7th Cir. 2015). "Whether uncharged offenses amount to relevant conduct under the Sentencing Guidelines is a factual determination, which we review for clear error." *Id.* This court will not "second guess the district court unless, after reviewing the record as a whole, we are left with a definite and firm conviction that a mistake has been made." *Id.* (internal quotation marks omitted).

In assessing whether uncharged activities constitute relevant conduct, this court has applied the advisory sentencing guidelines. *E.g.*, *id*. Under the sentencing guidelines, in theft cases, a defendant's offense level is based in part on the "loss" caused by the defendant's conduct. U.S.S.G. § 2B1.1(b)(1); *see also United States v. Hill*, 683 F.3d 867, 869 (7th Cir. 2012). This includes the loss caused by the offenses of conviction, as well as "all acts and omissions … that were part of the *same course of conduct* or *common scheme or plan* as the offense of conviction." U.S.S.G. § 1B1.3(a)(2) (emphasis added); *see also Baines*, 777 F.3d at 963. A "common scheme or plan" requires that two or more offenses be "substantially connected to each other by

at least one common factor; such as common victims, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3 n.9(A); *see also Baines*, 777 F.3d at 963. Additionally, even if they do not meet the requirements of a common scheme or plan, offenses may still qualify as part of the "same course of conduct" if they are "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.3 n.9(B); *see also Baines*, 777 F.3d at 963.

In the present case, at sentencing, the district court did not commit clear error in finding that the ten uncharged vehicles constituted relevant conduct.

The evidence at trial and sentencing support a finding of a "common scheme or plan," § 1B1.3(a)(2) n.9(B), because there were multiple commonalities that substantially connected the charged and uncharged vehicles. There was a common purpose behind stealing and altering the identities of all fourteen vehicles—selling them. Furthermore, there was a common *modus operandi* applied to both the charged and uncharged vehicles. At trial, the jury heard how Robey altered the identities of the four charged vehicles with counterfeit VINs and supporting documents. The jury also was shown evidence that Robey created this false identity using computers, printers, a scanner, photo paper, vehicle title and license plate templates, carbon paper sales contracts, and a typewriter. In particular, the jury was shown typewriter ribbon from Robey's home that contained identifying information for the four charged vehicles, including make, model, year, color, mileage, and counterfeit VIN that matched stickers affixed to the stolen vehicles. At sentencing, the government

proffered evidence of the same *modus operandi* for the ten uncharged vehicles, including counterfeit documents and typewriter ribbon containing the make, model, year, color, mileage, and counterfeit VIN. As a result, at sentencing, the court confirmed that "all the 14 [charged and uncharged] vehicles … [were] identified by reviewing the documents and materials and the typewriter ribbon in Mr. Robey's possession pursuant to the search warrant[.]" (Sent. Tr. 19, May 20, 2015.)

The evidence presented at trial and sentencing is more than sufficient to support the district court's finding of a "pattern of relevant conduct that far exceeded in its details the four cars that were stolen that were before the jury." (*Id.* at 20.) As such, the district court did not commit clear error in finding that the ten uncharged vehicles constituted relevant conduct.

Robey's main argument against a "common scheme or plan," focuses on the temporal "gap" between the charged and uncharged vehicles. Robey's assertion is belied by the record—there was only a four-month "gap" between the latest uncharged vehicle stolen on December 16, 2010 and the earliest charged vehicle on April 17, 2011. (PSR ¶ 21.) Furthermore, the multiple commonalities discussed above "more than suffice" to overcome any alleged temporal "gap" and support the court's relevant conduct determination. *Baines*, 777 F.3d at 963–64 (rejecting defendant's temporal gap argument as "hollow" because the offenses were connected by "multiple common factors")

Robey's remaining arguments assert that the additional vehicles did not arise from "the same course of conduct," § 1B1.3(a)(2) n.9(B). However, we need not address these arguments because as discussed, the court's relevant conduct

determination was adequately based on a finding of a "common scheme or plan," § 1B1.3(a)(2) n.9(A). *See* § 1B1.3(a)(2) n.9(B) ("Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct.").

Therefore, the district court did not commit clear error.

III. CONCLUSION

For the foregoing reasons, Robey's conviction and sentence are AFFIRMED.