No. 15-2172

United States Court of Appeals
for the Seventh Circuit

United States of America,
Plaintiff–Appellee,

v.

George Robey,
Defendant–Appellant.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 1:12-cr-00027-SEB-TAB-1
The Honorable Sarah Evans Barker

Brief of Defendant–Appellant George Robey

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United States of America, Plaintiff–Appellee, v. George Robey, Defendant–Appellant.	Appeal from the United States District Court for the Southern District Of Indiana, Indianapolis Division Case No. 1:12-cr-00027-SEB-TAB-1 Hon. Sarah Evans Barker, Presiding Judge

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:

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JURISDICTIONAL STATEMENT

The government filed a twenty-five count indictment against George Robey on February 23, 2012, (R.19), charging him with violations of 18 U.S.C. § 2321 and 18 U.S.C. § 513(a). Thus, the district court had jurisdiction over Robey's case pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Three years later, after the government dismissed nineteen of the original twenty-five counts, Robey was tried before a jury on the remaining six counts. On February 17, 2015, the jury returned a guilty verdict on all six counts. (A1.)

On May 20, 2015, the district court sentenced Robey, and entered its judgment on May 27, 2015. (A1.) Robey filed his timely notice of appeal on June 1, 2015. (R.196.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction of "all final decisions of the district courts of the United States" to their courts of appeal, and 18 U.S.C. § 3742, which provides for review of the sentence imposed.

STATEMENT OF THE ISSUES

I. Whether the district court wrongly denied Robey's constitutional and statutory speedy trial claims by relying on unsubstantiated representations by counsel, which resulted in a three-year delay between indictment and trial.

II. Whether the district court infringed Robey's right to indictment by a grand jury when the court allowed the government to amend the indictment without jury oversight based on the government's characterization of nineteen of the twenty-five counts as "scrivener's errors."

III. Whether the district court erred at sentencing when it found relevant conduct based on ten vehicles stolen five to seventeen months before the conduct for which Robey was tried.

STATEMENT OF THE CASE

Investigation and Indictment

In August 2011 the Indiana State Police began investigating a missing car. (Trial Tr. I-39-40.)[1] The lead investigator, Detective Mitch Bloucher, had been simultaneously looking into the activities of a man named Jeffrey Jones,[2] whom he described as "the mastermind behind a counterfeit check-cashing ring." (Trial Tr. I-50.) Bloucher presented Jones with an opportunity. (Trial Tr. II-146–47.) He gave Jones the option of helping police in exchange for leniency in his own case, and Jones agreed. (Trial Tr. II-146.)

As part of this cooperation, Jones identified persons he claimed to be involved in criminal activity, including Appellant George Robey, who Jones accused of using counterfeit documents to sell stolen vehicles. (Trial Tr. I-50.) At the instruction of the police, Jones served as a middleman, setting up meetings between Bloucher and Robey. (Trial Tr. II-153–54.) Jones told Robey that a friend wanted to purchase a vehicle. (Trial Tr. I-50.) This "friend" was Bloucher, who arranged to purchase a Ford F-350 truck from Jones and Robey for $2500, a transaction that occurred on October 19, 2011. (Trial Tr. I-51–52.)

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[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. [Vol.]-__), references to the preliminary hearing transcript as (Prelim. Hr'g Tr. __), references to the detention hearing transcript as (Det. Hr'g Tr. __), references to the voir dire transcript as (Voir Dire Tr. __), and references to the sentencing hearing transcript as (Sentencing Hr'g Tr. __). All other references to the Record shall be denoted with the appropriate docket number as (R.__). References to the material in the short appendix shall be denoted as (A__).

[2] Jones had a long criminal record that included forgery-related convictions. (Trial Tr. II-146.)

On December 5, 2011, the government filed a 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 next day, Indianapolis police executed a search warrant at Robey's residence. (Trial Tr. III-402.) The sixty-four-year-old Robey, in failing health, had to be taken directly to the hospital after his arrest. (Trial Tr. II-150–51.) Robey's chest pains did not immediately improve. As a result, the magistrate judge and prosecutor decided to hold the preliminary hearing in Robey's hospital room on December 7, 2011. (Prelim. Hr'g Tr. 3.) Robey waived his detention hearing and was taken into custody. (Det. Hr'g Tr. 4.) He waited, in custody, for sixty days before he was indicted, because the magistrate judge permitted two uncontested government motions to extend the time for indictment. (R.19.) He remained in custody for the next three years, over the course of the eleven continuances, until he finally proceeded to trial in February 2015. (R.167.)

The initial four-charge complaint blossomed into a twenty-five count indictment in February 2012 (R.19),[3] which is how it would remain for the next 1041 days. The indictment covered almost twenty car thefts, which allegedly

[3] The indictment charged Robey with one count of conspiracy (18 U.S.C. § 371), fifteen counts of trafficking in vehicles with altered VINs (18 U.S.C. § 2321), five counts of making, uttering, or possessing counterfeit state securities (18 U.S.C. § 513(a)), and four counts of identification document fraud (18 U.S.C. § 1028). (R.19.)

occurred over the course of six years (from June 2006 to December 2011). (R.19.) Then, on December 29, 2014—only eight days before the scheduled trial date—the government *sua sponte* moved to dismiss nineteen of the original twenty-five counts of the indictment. (R.138.) It characterized these nineteen counts as "scrivener's errors." (R.138.) Two days later, the district court granted the motion to dismiss without briefing or holding a hearing. (A23.)

From Indictment to Trial

The three years between Robey's arrest and trial included eleven continuances,[4] all of which the court granted without status hearings. On average, continuances in Robey's case lasted nearly eighty days. The longest continuance was 112 days. (A14.) Many of the continuances ran uninterrupted by any intervening case-related business. *See, e.g.*, (A15; A16) (moving trial a total of 175 days between the two continuances, separated only by scheduling orders). In fact, over the course of those three years, the parties only appeared in front of the district court judge three times. (R.52; R.115; R.150.) None of those hearings even addressed the continuances.

Robey eventually became impatient with the delays and started weighing in with his own pro se motions. *See, e.g.*, (R.57) (Robey's January 28, 2013, letter to district court noting that his "trial date have[sic] come and gone" and that his

[4] 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 the filing on any of the continuances on his behalf. (R.144.) The last continuance was requested by the government (R.130) and objected to by the defendant (R.131).

"health problems are increasing"); (R.88) (Robey's September 9, 2013, letter to district court stating "no preparatory work have[sic] been done. . . . I'm in the same stage of my defense . . . as almost a year ago"). His concerns about the slow progress of his defense partly led him to request new counsel twice before trial.

On February 25, 2014, Robey agreed to plead guilty to Count 1 (conspiracy in violation of 18 U.S.C. § 371)[5] and Count 13 (trafficking vehicles with altered VINs in violation of 18 U.S.C. § 2321). (R.95.) Over the next few months, as negotiations continued, however, Robey expressed concern about agreeing to a plea. (R.88) (Robey's September 9, 2013, letter to district court stating, "[a]s days, weeks, and months passed [my attorney] . . . lay idle. . . . Now here I am 'in the eleventh hour' before the trial date, due to [my attorney] being ill-prepared for trial, she hurriedly comes to this jail and informs me that she had an epiphany, that is, for me to waive my trial by jury or plead guilty. At my first meeting [my attorney] . . . thoroughly understood that unless I received a time served agreement, I would stand trial by jury."). Robey eventually withdrew his plea, and the case continued to trial after a few more continuances. (R.115.)

On December 31, 2014, Robey moved to dismiss the case, asserting violations of his statutory and constitutional speedy trial rights. He explained that his counsel had failed to notify him of or obtain his consent to a number of the continuances. (R.144.) He also specified other distinct time periods that led to a seventy-day

[5] Although the government included Count 1 in this plea agreement, it later moved to dismiss it as a "scrivener's error." (R.138.)

violation under the Speedy Trial Act. (R.144.) The government maintained that only twenty-three non-excludable days had elapsed. (R.148.) Finding only twenty-eight days of the seventy days had elapsed, the district court denied Robey's motion. (A24.) Robey filed a second motion to dismiss on January 28, 2015, claiming a constitutional speedy trial violation. (R.154.) He argued that the repeated delays unfairly prejudiced him, as he was no longer able to locate two defense witnesses. (R.154.) He asserted that these witnesses would have testified about the true ownership of a computer seized at his house, a piece of evidence that constituted a key part of the government's case against him. (R.154.) The district court rejected his argument. (A31.) Voir dire for his trial began 1162 days after his arrest, on February 10, 2015. (Voir Dire Tr. 1.)

After a three-day trial, the jury found sixty-eight-year-old Robey guilty on the six counts of the indictment that remained after the court dismissed the other nineteen charges at the government's request. (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.)

Sentencing

Though Robey's conviction rested upon four vehicles, the Probation Office decided to consider fourteen vehicles for purposes of relevant-conduct and amount-of-loss calculations at sentencing. (A38.) However, the Probation Office provided no supporting documentation or factual analysis to support its calculations. (A38.) Robey objected to these conclusions, claiming that the ten uncharged vehicles

lacked temporal proximity to the conduct underlying his conviction. (R.180 at ¶13; A38–39.) In particular, Robey pointed out that six out of the ten uncharged vehicles were reported stolen more than a year prior to the conduct underlying the conviction, and the other four were reported stolen at least five months before. (R.184 at ¶21.)

Sentencing occurred on May 20, 2015. At the hearing, in response to Robey's sentencing objection, the government offered to call a witness to meet its burden of proof that the uncharged offenses were relevant conduct. (A40.) The district court, however, indicated it was already under the impression that the uncharged offenses were not disparate thefts, so the judge asked the government to simply proffer the testimony of its witness. (A41.)

After the proffer, the court accepted the government's contention that the uncharged offenses constituted relevant conduct because evidence of those offenses came from the same source as evidence associated with Robey's convictions—namely, from the execution of the search warrant.[6] (A45–46.) The court did not describe how the source of the information established sufficient similarity between

[6] The government only discussed two of the ten vehicles—the 2010 Ford Mustang and the 2010 Chevrolet Camaro—with any specificity in connection with the convicted offenses. For the Mustang, the government compared the key swap allegedly use for the theft of this vehicle with the key swap used for one of the convicted offenses. (A43–44.) For the Camaro, the government noted that there was a common victim with one of the convicted offenses. (A44.) Shortly after the government discussed these vehicles, the court interrupted, asking if the evidence connecting Robey to the uncharged vehicles was procured during the execution of the same search warrant used to procure evidence for the convicted offenses. (A45.) The government confirmed that it was, and thus concluded its proffer. (A45.)

the uncharged offenses and offenses of conviction to qualify the former as relevant conduct. The district court responded to Robey's objection by summarily concluding that "the date of the theft is not controlling." (A45.)

Ultimately, the district court accepted the Probation Office's inclusion of all fourteen vehicles for Robey's sentencing. (A45-46.) The Probation Office concluded that the total value of the fourteen vehicles was $443,812.16 (R.184 at ¶22), which resulted in a fourteen-point enhancement to Robey's base-offense level that raised his Guidelines range to 110–137 months (Sentencing Hr'g Tr. 29).

The district court sentenced Robey to 110 months' imprisonment and 36 months of supervised release on each of the six counts, to be served concurrently. (A1.) Additionally, Robey was ordered to pay $84,500.21 in restitution. (A1.)

SUMMARY OF THE ARGUMENT

Robey's conviction arose from speedy trial violations and an infringement of his right to indictment by grand jury; his sentence was inflated due to the inclusion of irrelevant conduct at sentencing. Thus, this Court should vacate Robey's conviction or, alternatively, remand for resentencing.

First, Robey's rights under the Speedy Trial Act and the Sixth Amendment were violated by 488 days of impermissible delay, which the district court erroneously excluded when calculating Robey's speedy trial clock. The district court misinterpreted the Speedy Trial Act when—contrary to Supreme Court precedent—it automatically excluded days for pretrial motions. The district court also regularly failed to make proper ends-of-justice findings to support the multiple continuances it granted, and its few actual findings were erroneous. Finally, the court granted two unsupported extensions to the government, extending the filing of the indictment. The three-year delay violated the Speedy Trial Act, and the prejudice stemming from the lengthy delay also abridged Robey's Sixth Amendment rights.

Second, the district court infringed Robey's Fifth Amendment right to indictment by a grand jury when it allowed the government to drop nineteen counts from a twenty-five count indictment eight days before trial, calling them "scrivener's errors." The deletion of these nineteen charges without oversight from either a grand or a petit jury constituted an improper amendment of the indictment.

Third, the district court clearly erred at sentencing when it included ten uncharged offenses as relevant conduct for the purpose of determining Robey's

Sentencing Guideline range. The district court summarily concluded that the uncharged offenses were a part of the same course of conduct as the offenses of conviction. *See* (A38.) The district court, however, erroneously considered dispositive to the relevant-conduct inquiry the fact that police found evidence related to all the vehicles during the same search. In truth, the uncharged conduct was neither temporally proximate nor sufficiently similar to the counts of conviction. This Court should reverse Robey's convictions and dismiss the case with prejudice, or, in the alternative, remand the case for resentencing.

ARGUMENT

I. This Court should vacate Robey's conviction due to violations of the Speedy Trial Act and Robey's constitutional right to a speedy trial.

Of the 1076 days that elapsed between Robey's arraignment and his trial, 488 days should have counted toward Robey's speedy trial clock, in gross excess of the statutorily permissible seventy days. The district court made multiple errors in its application of the Speedy Trial Act, which led the court to improperly exclude time. The extraordinary length of the delay, coupled with the court's lack of diligence, contravened Robey's and the public's interest in a speedy trial, and violated Robey's constitutional right to one. As a result, this Court should vacate Robey's conviction and instruct the lower court to dismiss the indictment with prejudice.

A. The indictment must be dismissed for violations of the Speedy Trial Act.

The district court erred in failing to dismiss the indictment despite a three-year delay between Robey's arraignment and his trial. The Speedy Trial Act requires the court to dismiss an indictment if more than seventy days pass between arraignment and the start of voir dire, subject to certain exclusions authorized by the statute. 18 U.S.C. §§ 3161(c)(1) and (h), 3162(a)(2). Even accounting for these exclusions, 488 nonexcludable days passed before Robey's trial began, far exceeding the seventy-day limit.

The district court made four types of errors that contributed to this lengthy delay. First, the district court misinterpreted the Speedy Trial Act in evaluating

time set aside for pretrial motions, contrary to Supreme Court precedent. *See Bloate v. United States*, 559 U.S. 196, 204 (2010). Second, the district court abused its discretion by failing to make on-the-record findings for eight continuances it granted, which moved trial an average of more than eighty days per continuance. *Zedner v. United States*, 547 U.S. 489, 509 (2006) (holding that a court must make on-the-record findings to support ends-of-justice exclusions). Third, in the one instance the court did make findings to support a continuance, its findings were unsubstantiated and erroneous. *See United States v. O'Connor*, 656 F.3d 630, 641 (7th Cir. 2011). Lastly, the court abused its discretion in granting the extensions leading up to Robey's indictment because the court did not adequately support its rulings.

Robey need only show a delay of more than seventy days to establish a violation of the Act. Of course, some of the pretrial delays are automatically excludable, even if the district court failed to recognize them.[7] Here, however, the total length of impermissible delay between arraignment and trial comprised 488 days. The district court initially found only twenty-eight days counted against

[7] Here, there are two types of automatic exclusions that were not applied below but are uncontested on appeal. First, the period between April 10, 2013 (R.70) to August 29, 2013 (R.87), during which Robey underwent a psychological evaluation, is automatically excluded under § 3161(h)(1)(A). Second, because pretrial motions are excludable under § 3161(h)(1)(D), *United States v. Napadow*, 596 F.3d 398, 403-04 (7th Cir. 2010), the first thirty days after final briefing on Robey's motion to suppress and request for a *Franks* hearing are automatically excluded, *United States v. Janik*, 723 F.2d 537, 544 (7th Cir. 1983). Similarly, so are the periods during the three review-of-counsel motions. Robey is not contesting the 264 days that fall under these exclusions.

Robey's clock (R.149 at 4), and the government conceded twenty-three days (R.148 at 4). In addition to these twenty-three days, the first twenty-seven days of the court's pretrial motions after arraignment also count against the seventy-day limit, given the Supreme Court's decision in *Bloate,* discussed below. *See infra* Section I.A.1. Thus, out of the gate a total of fifty non-excludable days elapsed, twenty-one short of a violation. Six of the eight contested continuances discussed below cover a period of twenty-two days or more, so if this Court finds any one of them contained unsubstantiated ends-of-justice rulings, dismissal is appropriate.

The table below summarizes the Speedy Trial violations in this case:

Time Period	**Source**	**Dates**	**Time**
Uncontested Time		03/28/2012 – 04/11/2012	+15 days
Uncontested Time		06/25/2014 – 07/02/2014	+8 days
Pretrial Motion Period		03/01/2012 – 03/27/2012	+27 days
Robey Motion to Continue	R.35	04/12/2012 – 05/30/2012	+49 days
Robey Motion to Continue	R.41	07/23/2012 – 08/06/2012	+15 days
Robey Motion to Continue	R.48	08/07/2012 – 11/27/2012	113 days
Robey Motion to Continue	R.54	11/28/2012 – 01/27/2013	+61 days
Robey Motion to Continue	R.54	02/07/2013 – 02/28/2013	+22 days
Robey Motion to Continue	R.76	08/29/2013 – 09/08/2013	+11 days
Robey Motion to Continue	R.89	10/19/2013 – 11/20/2013	+33 days
Robey Motion to Continue	R.93	11/21/2013 – 02/24/2014	+96 days
Robey Motion to Continue	R.118	07/03/2014 – 07/30/2014	+28 days
Government Motion to Continue	R.133	12/09/2014 – 12/18/2014	+10 days
Indictment to Trial		03/01/2012 – 02/09/2015	1076 days
Nonexcludable time			488 days

1. *The district court erroneously applied overruled case law to automatically exclude the first twenty-seven days set aside for pretrial motions after Robey's indictment.*

This Court reviews de novo legal interpretations of the Speedy Trial Act—here § 3161(h)(1)(D). *See United States v. Parker*, 716 F.3d 999, 1005 (7th Cir. 2013). The district court improperly relied upon *United States v. Garrett*, cited by the government, to automatically exclude thirty days set aside for pre-trial motions. 45 F.3d 1135, 1138 (7th Cir. 1995); (R.149 at 5.) Since *Garrett*, however, the Supreme Court has held these periods are not automatically excludable because they violate the public's interest in a speedy trial. *Bloate v. United States*, 559 U.S. 196, 212 (2010). Instead the court must make an ends-of-justice finding before setting such time periods aside. *Id.* at 214. Here, the district court made no ends-of-justice findings to support excluding the pretrial motion period, so it should not be excluded under the ends-of-justice provision. *Id.* Twenty-seven days under the Speedy Trial Act should have elapsed based on this violation, from March 1, 2012 to March 27, 2012.

2. *The district court abused its discretion in granting eight continuances because it failed to make any ends-of-justice findings, and the record cannot support such findings even on post-hoc review.*

The district court failed to make the necessary findings to justify hundreds of days of continuances. Neither the court's sparse, nearly identical continuance Orders nor the case record justified the court's decision to grant eight defense continuances. (A9; A11; A12; A13; A14; A15; A16; A17.) Decisions to exclude time

are reviewed for an abuse of discretion. *United States v. Wasson*, 679 F.3d 938, 943 (7th Cir. 2012).

The district court's Orders were improper for two reasons. First, they did not contain on-the-record findings detailing the factors the judge considered, which are required to support an ends-of-justice continuance. § 3161(h)(7); *Zedner,* 547 U.S. at 509. Second, the record shows no circumstances present at the time the trial court entertained these motions that would justify the continuances. *Parker*, 716 F.3d at 1007. Ends-of-justice findings are necessary in order to protect the public interest. *See* § 3161(h)(7)(A) (requiring a weighing of "the best interests of the public and the defendant in a speedy trial"); s*ee also Zedner*, 547 U.S. at 509 (considering the interest of the public in determining whether proper procedures were followed); *Bloate*, 559 U.S. at 211 (same).

Because the Orders did not contain the requisite ends-of-justice findings, the delay from the eight continuances granted to defense counsel must be counted on Robey's speedy trial clock. *United States v. Ramirez*, 788 F.3d 732, 736 (7th Cir. 2015).

i. The contents of the district court's Orders are insufficient to show that the delay served the ends of justice.

The district court's explanations for delaying trial months at a time with each continuance were unsatisfactory. Each Order was barely two pages long, and either rotely recited the basis provided in the motion or provided new reasons with no basis in the record, followed by a citation to the ends-of-justice provision. The

Orders failed to include the required on-the-record findings. *Zedner,* 547 U.S. at 509.

In the first continuance Order, the court moved trial over seventy-seven days,[8] forty-nine of which should not have counted.[9] (A1.) The court conclusorily stated in the Order that the "defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement."[10] (A1.) Such generalities do not suffice as the on-the-record findings required by the Speedy Trial Act. *Zedner,* 547 U.S. at 509; *see also O'Connor*, 656 F.3d at 638–39 (finding a minute entry insufficient that merely cited the ends-of-justice provision and "motions, trial preparations and plea negotiations"). In the absence of the requisite findings, forty-nine days of the clock should have run under the first continuance.

The next two Orders (A11; A12) are identical to the First Order, merely substituting new dates. These Orders also violated the requirement that a judge

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[8] In the eight contested continuances requested by the defendant, the court moved the trial date on average over eighty days. Only a single motion actually requested a specific date. (R.92.) Because of the lack of district court findings, the record does not reveal whether the lengths of these continuances might mask other improper reasons for delay, such as court congestion. *See* 18 U.S.C. § 3161(h)(7)(C).

[9] The other twenty-eight days were properly excludable for pretrial motions.

[10] Significantly, courts have recognized that plea negotiations should not serve as a basis for an ends-of-justice continuance, given that they are not one of the enumerated grounds listed in § 3161(h)(7)(B) and given that another provision of the Act is specifically devoted to exclusions stemming from proposed plea agreements. § 3161(h)(1)(G); *United States v. Medina*, 524 F.3d 974, 986 (9th Cir. 2008); *cf. Bloate*, 559 U.S. at 213 (noting it would be improper to automatically exclude time set aside for pretrial motions, when preparation time is specifically included as a factor). *Cf. United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987) (recognizing that a court may exclude delays resulting from plea negotiations in the defendant's *separate case* as a basis for an ends-of-justice exclusion).

make *specific* findings. *See United States v. Wasson*, 679 F.3d 938, 947 (7th Cir. 2012) (finding that the court did not rely on earlier findings but "in each instance" made the necessary justifications). These two Orders ran Robey's clock forty-one and 113 days, respectively.

The court slightly modified the Fourth Order. (A13.) In addition to the language copied from the prior three Orders, the judge added a single line permitting delay so that Robey could "undergo a psychiatric evaluation." (A13.) Yet Robey was not evaluated until five months later, once he was represented by new counsel. (R.70.) Order Four ran eighty-three days of Robey's clock. (A13.)

Order Five justified the delay based on the need for Robey's psychological examination and preparation time for his new counsel to review evidence—even though the defense motion made no mention of needing preparation time. (A14.) Although some of this time is properly excludable under § 3161(h)(1)(A), *see supra* 13, the clock started ticking again once counsel notified the court about the results of the exam, on August 29, 2013. (R.87.) As a result, eleven days should have counted towards Robey's seventy-day limit.

Orders Six and Seven (A15; A16) are identical to each other, and were also remarkably similar to Order Five, in that all three relied on Robey's psychological evaluation. *See* (A14.) But unlike Order Five, which was issued before that evaluation, Orders Six and Seven came afterwards. The court never explained how an already-complete psychological exam can serve as justification for additional delay. All three Orders also referred to Ms. Choate as replacement counsel, even

though by the time of Order Six she had been representing Robey for seven months. Thirty-three and ninety-six days of the clock should have run based on Order Six and Seven, respectively. (A15; A16.)

Finally, Order Eight (A17) most obviously ran afoul of the court's duty to make findings. The Order simply cited the ends-of justice provision and declared that the defendant needed more "time to effectively prepare for trial," notwithstanding the fact that Robey's current lawyer had been in place for almost seventeen months. (A17.) This Court has held that merely citing the ends-of-justice provision in exempting time is "clearly unsatisfactory." *United States v. Napadow*, 596 F.3d 398, 404 n.9, 405 (7th Cir. 2010). Twenty-eight days of the clock should have run as a result of this continuance.

ii. The record in this case does not support the court's findings in the Orders to Continue and, in fact, is inconsistent with the reasoning in the Orders.

When the district court fails to make the necessary findings in its Orders, this Court examines the record, including status hearing transcripts, to determine if the lower court properly considered factors from other parts of the record. *Parker*, 716 F.3d at 1007. Despite three years of delay, the record in this case is sparse—too sparse to support the lower court's conclusions. In fact, the district court did not hold a single status hearing in the three years leading up to trial. In all, counsel appeared in front of the district court just three times before trial. (R.52; R.115; R.150.) The court never once held a hearing to determine if a motion to continue was necessary, unlike other cases where this Court found continuances proper

based on justifications present in the oral record. *O'Connor*, 656 F.3d at 639 (upholding district court findings after judging the minute entry insufficient by examining the transcript of the status conference); *United States v. Hills*, 618 F.3d 619, 628 (7th Cir. 2010) (examining hearing transcripts to determine whether the district court properly granted defendant's motion); *United States v. Wasson*, 679 F.3d 938, 947 (7th Cir. 2012) (same).

Without hearings, the only justifications for the continuances were contained in the attorneys' motions, which, like the Orders, were sparse on reasoning. The motions simply made vague, one-sentence references to various justifications, such as: "[d]iscovery in this matter is still ongoing" (R.31; R.40); "[t]he parties are negotiating an agreement" (R.47; R.53); time for a psychological examination (R.74); "additional time is needed in order to adequately prepare" (R.87); and time "to complete the preparation process and to accommodate another matter"[11] (R.92; R.117.) In no instance did the court ever request more details on the nature of the preparation or discovery remaining or the schedule of the other apparently-pressing matter; nor did the court ever ask how much more time was needed.

Yet the record indicates that Robey did not acquiesce to this delay and inaction. Robey was so dissatisfied with his counsel's pace and performance that he penned multiple letters to the judge. He first noted that his case had "been pending

[11] Despite only asking for a "brief" continuance in November 2013 (R.92), the next motion for a continuance, filed in June 2014 (R.117), used the same exact reasoning, including the reference to "another matter that is scheduled at approximately the same time," despite seven months passing between motions.

now for thirteen and one-half months." (R.57 at 1.) As the delays continued, Robey kept writing letters to the court, determined to address the lack of progress. (R.64; R.65; R.66; R.78.) These pleas fell on deaf ears, as the district court simply granted the requested continuances. The court even granted a continuance motion—without making findings—the same day it entered one of Robey's letters requesting a review of counsel. (R.88; A15.) This letter emphasized that "no preparatory work have[sic] been done" and "I'm in the same stage of my defense." (R.88 at 2.)

Nothing in the record justified the repeated delays in Robey's case.

iii. That defense counsel filed these motions does not obviate the court's duty to make ends-of-justice findings, particularly when the court was aware that Robey harbored concern about delays.

The fact that Robey's counsel requested these eight continuances does not eliminate the statutory requirement that a judge make ends-of-justice findings. The Speedy Trial Act exists not only for the defendant's benefit, but also for the public's, *see Zedner*, 547 U.S. at 501, and both are undermined by excessive, unjustified delay. *See also Amended Speedy Trial Act Guidelines* (Aug. 1981) (stating that "the requirement of judicial findings is applicable even if the continuance is granted upon the request of the defendant or his counsel. . . . [T]he fact that the defendant has requested the continuance or consents to it is not in itself sufficient to toll the operation of the time limits."). Indeed the public interest is so important that a defendant cannot prospectively waive his right to a speedy trial. *Zedner*, 547 U.S. at 500–01.

Robey repeatedly noted with disapproval the pace of trial preparation, which should have triggered more searching inquiries into motions for continuances and more follow-up by the trial court. *Cf. United States v. Wasson*, 679 F.3d 938, 947 (7th Cir. 2012) (noting that trial counsel had conferred with the defendant to confirm whether "he had any objection to the motion to continue"). In his first request for a change of counsel in January 2013, Robey noted that counsel had accomplished little. (R.57 at 1.) He raised a similar complaint in September 2013, observing that "I'm in the same stage of my defense." (R.88 at 2.) In light of the fact that Robey was being deprived of his liberty during this multi-year period, the court was obligated to adhere to the Speedy Trial Act's findings requirement to avoid unnecessary delays by *any* party.

3. The district court erred in granting the government's requested continuance without substantiating its findings.

In contrast to its response to the defense continuances, the court went to great lengths to justify the government's continuance moving trial only a few weeks. On November 19, 2014, the court moved trial twenty-eight days, from December 8, 2014 to January 5, 2015, upon the government's motion and over Robey's objection. (R.131; A18.) In contrast to the many instances in which the district court moved the trial in increments that averaged seventy days based on one- or two-page Orders and motions, the court responded to the government's seven-page brief with

a five-page order that moved the trial twenty-eight days. (A18.) This relatively robust Order cited four separate cases and applied a seven-factor test.[12]

Still, even here the findings were erroneous and unsubstantiated by the record. This Court reviews these factual findings for clear error. *See O'Connor*, 656 F.3d at 643.

The government offered three reasons for its requested continuance, but the necessary findings would have required more evidence to justify it. The first and second reasons go together: the government cited the twenty-five count indictment as the reason the new government attorney needed extra time after another AUSA—Sharon Jackson—left the office. But after three years of preparation time, the length of the indictment itself was insufficient reason to further delay. Moreover, the government ended up dismissing nineteen of those counts forty-one days later, and had considered doing so for at least ten days prior to its motion to dismiss the counts. (R.137; R.138.) Although the record does not reflect the precise number of weeks that the government entertained such a streamlining of the case, to the extent that it was even a remote possibility, no continuance should have been sought on the basis of the lengthy indictment. To request such a drastic change to the case only thirty days after the extension, and eleven days before trial shows that either: (1) this continuance was unjustified based on complexity and the government should have known that; or (2) that the government had not properly

[12] This continuance moved trial less than half the number of days as the next-shortest delay: the July 3, 2014 Order (R.118) moved trial sixty-three days.

prepared despite these years—a burden that Robey should not be forced to assume when he was finally armed with counsel prepared for trial.

AUSA Jackson's replacement, Brad Shepard, joined the case on August 21, 2014, only two days after Robey's trial counsel Larry Champion's first appearance, and only one day after the court granted a continuance. (R.126; R.127.) Thus, the government would have had nearly the same amount of time as the defendant to prepare. Additionally, the government could have argued its need for more preparation time right after Ms. Jackson's departure rather than *three months later*, and mere weeks before trial.

The court also reached a clearly erroneous factual finding in agreeing with the government's third stated reason for a continuance, that the lead investigator was an unavailable essential witness. Courts may properly consider availability of essential witnesses as a factor in delay under § 3161(h)(3)(A). The government carries the burden of justifying the exclusion by proving both that the witness is essential to its case and that the essential witness is unavailable during the scheduled trial dates. *O'Connor*, 656 F.3d at 636, 642. The government did not satisfy this burden; its motion stated only that: (1) the agent would be "on paternity leave from November 23, 2014 through the second week of January" (R.130 at 2); and (2) the government would be "severely prejudiced . . . without adequate preparation time or its case agent" (R.130 at 4). The government did not specify how the case agent would assist with preparation, nor was there an opportunity to determine that because the court did not hold a status hearing before ruling. *See*

O'Connor at 642-43, 643 n.4 (upholding a finding that a witness was essential and unavailable under a clear error standard based on representations made at a status hearing). More importantly, the government contradicted itself about the witness's importance: despite describing the witness as essential, the government requested a start date—January 5, 2015—that was still *before* the case agent returned from leave. (R.130 at 2, 4) (noting that the agent's estimated return date was the second week of January 2015). Without making any findings or discussing why the government's reasoning was sufficient, the court only concluded that his wife was scheduled to deliver a baby and thus he was "unavailable." Every reason provided by the government was insufficient to justify the motion to continue, and the court clearly erred by not performing a more exacting analysis that would have identified these issues. Ten days of the twenty-eight should have counted toward Robey's clock, with the remaining time exempted due to the parties' final pretrial motions.

4. The indictment must be dismissed for violations of the Speedy Trial Act during the pre-indictment period.

The pre-indictment delay in Robey's case violated the Speedy Trial Act by improperly expanding the indictment period from thirty days to seventy-nine days. Although a trial court may extend the traditional thirty-day time period within which the government must indict a defendant, it may only do so when it makes proper ends-of-justice findings. § 3161(h)(7). This Court reviews pre-indictment exclusions of time for abuse of discretion. *United States v. Leiva*, 959 F.2d 637, 641 (7th Cir. 1992).

Although the lower court did not specifically address whether this time period violated the Act, Robey's two pretrial motions to dismiss should have put the court on notice of the potential violations—whether as a stand-alone Speedy Trial violation or as unexcluded time to be considered in light of the seventy-days-to-trial limit. *United States v. Mathurin*, 690 F.3d 1236, 1242 (11th Cir. 2012) (holding that the defendant need not make a motion to dismiss the indictment before the government returns the indictment); *but see O'Connor*, 656 F.3d at 637.

The same paucity of findings that, as discussed above, rendered the *post*-indictment continuances invalid also affected the two extensions granted during the *pre*-indictment period. Those two extensions resulted in a seventy-nine day period between Robey's arrest and his indictment, in violation of § 3161(b). On December 19, 2011, a magistrate judge issued a short order extending the indictment period by about two weeks, to January 31, 2012 (A7), based strictly on the parties' speculation that they might "reach a resolution" (R.14); the eight-line Order repeated the parties' justification, noting that "the government and defendant need additional time to prepare and negotiate a resolution of the matter." (A7.) As January 31, 2012, neared, the government moved again, and defense counsel concurred, to extend the indictment window; the court again granted an extension with a nearly identical Order until February 29, 2012. (A7; A8.) Both motions for extension were identical in substance. (R.14; R.17.)

Just like the unsupported Orders granting the post-indictment continuances, the court's improper agreement to the pre-indictment delays justifies a dismissal with prejudice.

5. The violation of Robey's statutory speedy trial rights requires reversal and dismissal of the indictment, even without a showing of prejudice.

Robey does not need to demonstrate prejudice in order to prove the underlying Speedy Trial Act violation. Dismissal is automatic once the seventy-day threshold is surpassed. *Zedner*, 547 U.S. at 507-08 (reading the Speedy Trial Act to require that "the indictment or information must be dismissed" when a judge fails to make the requisite ends-of-justice findings). Thus, prejudice factors into this Court's analysis only when deciding whether to dismiss an indictment with or without prejudice. *United States v. Taylor*, 487 U.S. 326, 341-42 (1988); *see also* 18 U.S.C. § 3162(a)(2) (statutory factors governing decision to dismiss with or without prejudice).

This Court has nonetheless incorporated a prejudice analysis into its threshold determination of whether a violation occurred under the Act in the first instance. *See Wasson*, 679 F.3d at 943–44 ("[W]e will reverse the district court's decision to exclude time only where the defendant can show both an abuse of discretion and actual prejudice."). This Court's approach, which suggests that Speedy Trial violations are only reversible if the defendant suffered actual prejudice from the delay, runs counter to the text of the Speedy Trial Act, which precisely defines how to resolve violations. It also contravenes other circuits, which examine

whether a defendant suffered actual prejudice only *after* determining whether a speedy trial violation has occurred, and only in the context of deciding whether to remedy the violation by a dismissal with or without prejudice. *See United States v. Worthy*, 772 F.3d 42, 47 (1st Cir. 2014); *United States v. Culbertson*, 598 F.3d 40, 47–48 (2d Cir. 2010) ("The harmless error rule can never be applied where the requirement for an ends-of-justice continuance are not met."); *United States v. Hamilton*, 46 F.3d 271, 275 (3d Cir. 1995); *United States v. Burrell*, 634 F.3d 284, 292 (5th Cir. 2011); *United States v. Medina*, 524 F.3d 974, 986 (9th Cir. 2008); *United States v. Margheim*, 770 F.3d 1312, 1318 (10th Cir. 2014) cert. denied, 135 S. Ct. 1514 (2015); *United States v. Bryant*, 523 F.3d 349, 361 (D.C. Cir. 2008).

Even this Court has occasionally set aside its apparent requirement that a defendant show actual prejudice before deciding to reverse. *See, e.g., United States v. Ramirez*, 788 F.3d at 736 (dismissing a case (with prejudice) without inquiring or noting how the defendant was prejudiced by the delay.). Requiring Robey to demonstrate prejudice merely to claim a speedy trial violation would render the dismissal-with-prejudice inquiry in *Taylor* redundant, and it would mean there could almost never be a dismissal without prejudice in cases concerning ends-of-justice violations.

Finally, although Robey need not demonstrate actual prejudice to show a statutory violation, Robey did suffer prejudice due to his health and inability to locate witnesses, among other factors, as demonstrated below, *infra* Section I.B.

6. This Court should dismiss the indictment with prejudice.

The remedy for a Speedy Trial Act violation is dismissal of the indictment, which the court has discretion to grant with or without prejudice. 18 U.S.C. § 3162(a)(2). In determining whether to dismiss with prejudice, courts consider, among other factors: (1) the seriousness of the offense; (2) the facts and circumstances that led to the dismissal; and (3) the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice. § 3162(a)(2); *Taylor*, 487 U.S. at 332–33. The Court recognizes that "dismissal with prejudice always sends a stronger message than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays." *Taylor,* 487 U.S. at 342. Further, "[t]he longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty[.]" *Id.* at 340. Although the dismissal-with-prejudice inquiry is typically undertaken in the district court, this Court may make the requisite findings if the answer is clear. *See Janik*, 723 F.2d at 546. Applying those factors in this case, especially in light of the long delay, shows that the indictment should be dismissed with prejudice.

First, all the offenses for which Robey was charged and convicted were nonviolent property offenses. Second, the fact that the court granted nearly three years of continuances without ever holding a status hearing to test the parties' requested delays shows a lack of attention to Robey's and the public's interest in a speedy trial. Further, the government protracted the proceedings with an

unnecessarily and erroneously high-count indictment, which it then failed to pursue in its entirety, instead dropping nineteen of twenty-five counts once trial approached. This was not merely a formalistic error that caused time to run out "inadvertently." *United States v. Smith*, 576 F.3d 681, 689 (7th Cir. 2009). Instead, the case was drawn out due to the government's characterization of it as a complex twenty-five-count case, when it actually ended up a far simpler six-count case.

The interests of justice also counsel against reprosecution. Because of the long delay, Robey has already served a significant portion of his sentence, nearly forty-eight months of one-hundred-ten months, without accounting for good-time credit. Imprisonment costs also correspond with an inmate's age, and Robey's health problems are well-documented and weigh against reprosecution. *Cf. United States v. Presley*, 790 F.3d 699, 702 (7th Cir. 2015) (noting the costs of aging prisoners in sentencing considerations). Lastly, the delays in this case total over 1000 days, with nearly two years of non-excludable delay.

B. This Court should vacate Robey's conviction because the government violated Robey's constitutional right to a speedy trial as guaranteed by the Sixth Amendment.

The more-than-three-year delay violated Robey's Sixth Amendment right to a speedy trial. To prevail on a constitutional speedy trial claim, Robey must demonstrate: (1) an uncommonly long delay; (2) the government is more responsible for the delay than the defense; (3) he asserted his right to a speedy trial; and (4) he was prejudiced from this delay. *United States v. Gearhart*, 576 F.3d 459, 463 (7th Cir. 2009); *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972).

First, Robey faced a three-year delay between his arraignment and trial. Delays in excess of one year are deemed presumptively prejudicial, *United States v. White*, 443 F.3d 582, 589–90 (7th Cir. 2006), so this Court considers the remaining three prongs.

Second, the government is more responsible for the delay than the defendant. By waiting to dismiss nineteen counts of a twenty-five count indictment that in the government's mind constituted nothing more than "scrivener's errors" until a week before the scheduled trial, the government bore primary responsibility for delaying the trial unnecessarily. Furthermore, the government moved to continue the trial shortly before it was set to begin, citing the need for more preparation time. (R.130.) *See United States v. Jackson*, 508 F.2d 1001, 1005 (7th Cir. 1975) (stating that the government is responsible for delays resulting from it not being prepared for trial). Similarly, by not alerting defense counsel in a timely manner that it would be pursuing a leaner indictment than originally charged, the government unduly prolonged the trial. Robey changed lawyers three times over the course of the trial, and in each instance the lawyers needed time to become familiar with twenty-five separate crimes. (R.62; R.126.) Had these lawyers been afforded the opportunity to zero in on just six counts, it would have significantly streamlined their preparation. Similarly, plea negotiations likely would have played out differently had the government not toyed with the terms of the indictment, especially given that the government attempted to get Robey to plead guilty to one of the nineteen counts it later dismissed. (R.95; R.138.)

Third, Robey consistently asserted his speedy trial rights, both in his pro se letters to the court and in a series of formal motions filed by counsel. Robey noted his concern in his May 1, 2015 letter. (R.190) (pointing out the "Six[sic] Amendment and []Speedy Trial Act violations"). He also asserted his right to a speedy trial in his Motion to Dismiss on December 31, 2014. (R.144.) Robey expressly referenced the speedy trial violations as well as his opposition to the government's request for a continuance. (R.144.) *See United States v. Brock*, 782 F.2d 1442, 1447 (7th Cir. 1986) (noting that a motion to dismiss asserting prosecutorial delay satisfies the third *Barker* prong).

Fourth, Robey was prejudiced as a result of the delay. In addition to the inherent prejudice of three years of pretrial confinement, *United States v. Oriedo*, 498 F.3d 593, 600 (7th Cir. 2007), Robey suffered other tangible prejudice as well. As noted above, the government's decisions to initially charge Robey with twenty-five counts and then dismiss nineteen of them shortly before trial carried profound implications for Robey's ability to prepare his defense. After all, the defense strategy for a case involving twenty-five counts is likely drastically different than the strategy for a case involving six counts, in both plea negotiations and at trial. While Robey's attorney had a great amount of time to prepare for a defense involving twenty-five counts, he had significantly less time to re-strategize for a defense involving only six counts. (A18; A23.) And counsel's inability to zero in on a discrete set of counts meant that witnesses and other evidence could not be marshalled in a timely manner. Had Robey's attorney not been preoccupied with

preparing a twenty-five count defense, he could have focused, for example, on an entrapment defense for the remaining counts. Additionally, two defense witnesses were unavailable by the time trial started, witnesses who would have testified that Robey did not own the computer and which was the primary source of evidence for Robey's conviction for some of the counts and in the court's relevant conduct findings at sentencing. (R.154.)

The extensive delays also took a toll on Robey's health, which was unstable from the beginning. (Trial Tr. II-150-51) (noting that Robey was hospitalized immediately upon his arrest). While waiting for trial, Robey suffered a heart attack (his second), had kidney cysts, and experienced prostate and urinary issues. (Sentencing Hr'g Tr. 32.) These issues persisted throughout the three years Robey awaited his trial.

This Court should therefore vacate Robey's convictions and remand to the district court with instructions to dismiss the indictment with prejudice.

II. The trial court impermissibly allowed the government to amend the indictment without returning to the grand jury, based on the government's misrepresentation that the indictment contained "scrivener's errors."

The district court improperly permitted the government to sidestep "the exclusive prerogative of the grand jury" to determine indictment charges, *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991), when the court agreed to dismiss nineteen counts of the grand jury's twenty-five count indictment as "scrivener's errors" (A23). Because the modification was made without the oversight

of a grand or petit jury, the amendment violated Robey's constitutional rights. Moreover, neither of the exceptions to the rule mandating indictment by grand jury apply to this case, because the amendment did not occur at trial and was not made to cure a typographical error. This Court reviews questions of constitutional violations de novo. *See United States v. Neighbors*, 590 F.3d 485, 492 (7th Cir. 2009); *see also United States v. Dowdell*, 595 F.3d 50, 66 (1st Cir. 2010) (indictment amendments are reviewed de novo). None of the exceptions to the rule mandating indictment by grand jury apply to the amendment that occurred here, so this Court should reverse.

A. Because the district court's amendment of Robey's indictment violated Robey's constitutional right to indictment by a grand jury, the amendment constitutes reversible error per se.

Indictment by grand jury is a hallmark of the American criminal justice system; a criminal defendant may not be held "to answer for a . . . crime, unless on a presentment or indictment of a grand jury." U.S. Const. amend. V; *Leichtnam*, 948 F.2d at 375. As a result, indictments may only be modified with jury oversight or to correct typographical errors. *Russell v. United States*, 369 U.S. 749, 770 (1962) (indictments may not be amended "except by resubmission to the grand jury, unless the change is merely a matter of form"); *Leichtnam*, 948 F.2d at 376.

Amendments include any change to the actual text of the indictment. *See United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007); *United States v. Castro*, 776 F.2d 1118, 1121 (3d Cir. 1985); *United States v. Van Stoll*, 726 F.2d 584, 586

(9th Cir. 1984); *see also United States v. Cina*, 699 F.2d 853, 858 (7th Cir. 1983) ("[A]n 'amendment' occurs when the basic 'charging terms' of the indictment are altered either literally [actual amendments] or in effect [constructive amendments].") (citations omitted). The government may only change the actual text of the indictment to correct typographical or clerical errors, *Leichtnam*, 948 F.2d at 376; all other changes to the text must be approved by the grand jury. *Id.* at 375. In the amendment cases this Court has thus far considered, it has conducted a "materiality" and "prejudice" analysis. *Cina*, 699 F.2d at 858. *But see* Section II.B, *infra* (suggesting that the amendment at issue here is per se reversible error).

In some cases, although the actual text of the indictment remains unaltered, the proof at trial acts to modify the indictment. For instance, the proof may cover fewer offenses than the indictment charged, or cover only "lesser included" offenses. *Leichtnam*, 948 F.2d at 377. In such cases, the court may invoke the "variance" exception to salvage defense challenges, effectively narrowing the indictment. *See Salinger v. United States*, 272 U.S. 542, 548 (1926) (acceding to the defense's request that part of the charge, which had no support in the evidence, be withdrawn from the jury). Notably, because variances necessarily occur only at trial, the petit jury is involved, thus providing some safeguard against arbitrary government action or over-reaching. *See United States v. Miller*, 471 U.S. 130, 139–40 (1985). Alternatively, the proof at trial may support a crime other than the crime charged. *United States v. Ratliff-White*, 493 F.3d 812, 820 (7th Cir. 2007). If so, the material

difference between the indicted charge and the charge proven at trial results in a constructive amendment, which is prejudicial per se and requires reversal. *Id*.

The strictness of the rule against the modification of indictments and the narrowness of the rule's exceptions reflects the intuition that "[i]f an indictment could be . . . lightly departed from, then 'the great importance which the common law attaches to an indictment by a grand jury' . . . [might] be frittered away until its value is almost destroyed.'" *Leichtnam*, 948 F.2d at 375–76 (citing *Ex parte Bain*, 121 U.S. 1, 10 (1887)). Yet in Robey's case, the district court permitted the government to depart—dramatically—from the indictment issued by the grand jury.

The amendment dropped nineteen counts—a full 76% of the indictment issued by the grand jury. (R.138.) The prosecutor and court, in making this change without returning to the grand jury, essentially guessed as to what was in the minds of the grand jury when it initially approved these charges. *See Russell*, 369 U.S. at 770. That guess deprived Robey of the "basic protection" secured by the "guaranty of the intervention of a grand jury." *See id*. Specifically, the guess assumed that the grand jury would have been as willing to indict Robey had it only been presented with evidence of the six counts that went to trial as it was to indict on the twenty-five counts that comprised his initial indictment. However, the grand jury may well have indicted Robey because the original twenty-five counts indicated involvement in an elaborate, long-term car-forgery scheme going back four years and covering five different counties. *See* (R.19.) It may have been willing to overlook weaknesses in individual counts when presented with a twenty-five-count scheme.

The grand jury may have more closely scrutinized the individual counts and would have perhaps been less willing to indict had it been presented with the amended indictment, which dropped the conspiracy charge and narrowed the indictment to a handful of counts connected to a criminal informant[13] and arising over a single year. In fact, the grand jury may have based its indictment upon individual counts that were later stricken by the amendment. *See United States v. Somers*, 496 F.2d 723, 743 (3d Cir. 1974) ("Since a grand jury might base its indictment upon terms stricken [by an amendment], the Supreme Court established a per se rule against . . . amendments to the terms of an indictment."). The trial court's and prosecutors' collective speculation that the grand jury would have approved the amendment fails to satisfy Robey's right to indictment by grand jury. *Russell*, 369 U.S. at 770. The amendment destroyed Robey's "basic right" to indictment on charges determined "by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). This Court should reverse.

B. The district court committed reversible error when it permitted amendment of Robey's indictment before trial, because the modification was not justified by any of the permissible exceptions to the rule against amendment.

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[13] The grand jury may have understood the conspiracy charge to explain criminal informant Jones's role in the car-forgery scheme in a way that made Robey criminally culpable. Absent the conspiracy charge, the grand jury may have been more skeptical of the other charges, which were closely connected to a criminal informant who had been recently arrested, was facing felony charges himself, and agreed to work as an informant in exchange for leniency in his own case. *See* Statement of the Case, *supra*.

Indictment modifications are permissible under three circumstances, none of which are present in this case. First, indictments may be amended with approval from a grand jury. *Leichtnam*, 948 F.2d at 376. Second, indictments may be effectively modified as "variances" if the proof presented at trial is narrower than the charges contained in the indictment. *Id*. Third, indictments may be amended to correct typographical errors. *Id.*

No one can claim that the first exception applies here, as a grand jury did not participate in the decision to amend the indictment. Regarding the variance exception, the amendment in this case does not qualify as a variance for two reasons: (1) variances do not actually change the text of the indictment, whereas the amendment here deleted more than three-quarters of the original indictment; and (2) variances are triggered only at the end of trial, after the government's evidence has failed to support parts of the indictment, whereas the amendment here took place before the trial had even begun.[14] *See Ratliff-White*, 493 F.3d at 820. Procedurally, the exceptions for amendment by grand jury and for variances make sense because they permit changes, in effect or in fact, only with oversight from a jury, grand or petit. But that oversight was not present here.

Thus only a single exception remained available to the government to justify its proposed amendment: correction of "scrivener's errors." *See Cina*, 699 F.2d at

[14] Additionally, the amendment is an actual amendment rather than a constructive amendment for similar reasons: (1) the text of the indictment changed; and (2) the amendment took place before trial, whereas constructive amendments arise only in the context of trial. *Ratliff-White*, 493 F.3d at 820.

858–59 (amendments that do not change the substance of an offense, such as an amendment to correct typographical errors, are permissible without resort to the grand jury); *United States v. Nicosia*, 638 F.2d 970, 976 (7th Cir. 1980). The government used this very justification to support its motion to dismiss nineteen counts (R.138), even though the amendment plainly does not qualify as a scrivener's error. Scrivener's errors are clerical, typographical errors "resulting from a minor mistake or inadvertence." *See Clerical Error, Black's Law Dictionary* 622 (9th ed. 2009). "Examples of clerical, or 'scrivener's,' errors include 'omitting an appendix from a document; typing an incorrect number; [or] mistranscribing a word[.]'" *United States v. Gibson*, 356 F.3d 761, 766 n.3 (7th Cir. 2004) (citing *Black's Law Dictionary* 563 (7th ed.1999)).

Scrivener's errors are apparent on their face. All parties reviewing a document with a scrivener's error can easily identify the error, so it poses no notice problem. *See, e.g., United States v. Meherg*, 714 F.3d 457, 460 (7th Cir. 2013) (citation to a nonexistent statute section was "at most" a scrivener's error when the defendant was clearly able to discern the offense to which his conviction documents referred). In contrast, mistakes that raise questions about intent or that evince mistakes in reasoning are not scrivener's errors. *See Black's Law Dictionary* 563 (7th ed. 1999); *see also United States v. Stein*, 756 F.3d 1027, 1030 (7th Cir. 2014); *Gibson*, 356 F.3d at 766.

The indictment modifications in this case bear none of the hallmarks of scrivener's errors. The purported error was not an accidental omission or

mistranscription, but rather the inclusion—at the grand jury's behest—of nineteen fully charged felony counts. (R.19; R.138.) Those nineteen "errors" were not unintentional mistakes. In fact, during plea negotiations, the government actually contemplated allowing Robey to plead guilty to one of the counts it later characterized as a "scrivener's error." *See* (R.95) (plea agreement includes a plea to a later-dropped conspiracy charge). Furthermore, the decision to delete nineteen counts from the indictment was a reasoned determination, not a simple correction of an obvious mistake; the government informed the court of its intent to delete these counts at least ten days before moving to amend the indictment. (R.137) (stating in December 19, 2014 pleading that it "plann[ed] to dismiss all but Counts 13, 14, 15, 16, 17, and 21."); (R.138) (December 29, 2014 motion to dismiss the counts). If the counts were truly a mistake, one would think the government would have corrected that mistake immediately, rather than contemplating the change for at least ten days before moving to amend the indictment. The government's contention that, "by virtue of [its] motion," the proposed deletions "are scrivener's errors" is simply not true. (R.138.) Thus, the amendment fits none of the exceptions to the rule against amending indictments.

C. The deletion of nineteen counts of the indictment constitutes prejudice per se, but Robey can also make a showing of actual prejudice to satisfy this Court's traditional "prejudice" analysis for amendments.

Robey's case lies in stark contrast to other cases of amended indictments that have come before this Court. This Court has never addressed the precise issue

present here—namely, whether deleting *entire counts of the indictment* before trial violates a defendant's Fifth Amendment right to indictment by a grand jury. *Cf. Cina*, 699 F.2d at 858 (7th Cir. 1983) (evaluating smaller amendments that change parts of individual counts based on whether they "affect a 'substantial' or 'material' element of the offense sufficiently to cause prejudice to the defendant."); *United States v. Spaeni*, 60 F.3d 313, 315–16 (7th Cir. 1995) (same in the context of constructive amendments). For this reason, this Court should not employ its traditional prejudice analysis and should, like a number of other circuits, find this error reversible per se. *See, e.g. United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007) (amendments, both actual and constructive, constitute reversible error per se), *United States v. Rodriguez,* 215 F.3d 110, 117 (1st Cir. 2000) (same), *and United States v. Koen*, 31 F.3d 722, 723–24 (8th Cir. 1994).

Here, the amendment did not change a letter, *United States v. Denny*, 165 F.2d 668, 670 (7th Cir. 1947), or a date, *Nicosia*, 638 F.2d at 976; *Cina*, 699 F.2d at 859. Instead, the district court excised more than three-quarters of the indicted charges, in their entirety, a week before the case was scheduled to go to trial, and after the government understood that Robey would not accept a plea deal. (R.138.) The government did not follow the constitutionally appropriate procedure—returning to the grand jury to approve the change—when it moved to amend. Nor did the government accept the risk of a variance at trial, where a petit jury could oversee the difference between the proof and the indictment. Instead, the government sidestepped the "exclusive prerogative of the grand jury," *Leichtnam*,

948 F.2d at 375, by characterizing the amendment as the only type of modification that does not require oversight of a jury—by calling the original counts "scrivener's errors" (R.138). Despite the government's obvious mischaracterization, the district court accepted that justification and the amendment.

Nevertheless, even if this Court applies its general test for amendments and variances, Robey can demonstrate prejudice from the amendment. Defendants have a constitutional right to have a jury of their peers oversee the charges and the evidence against them. U.S. Const. amend. V. Thus, Robey had a right to have either a grand jury review the amendment to the indictment before trial, *id*.; *see Stirone*, 361 U.S. at 217–19, or have a petit jury be made aware, through the variance doctrine, that the government's proof failed to support all of the counts in the indictment, *Leichtnam*, 948 F.2d at 376. When variances arise, the government must assume the risk of a petit jury drawing conclusions about the narrowing of the indictment. Here, Robey was not protected from the government's departure from the terms of the original indictment in the way a defendant facing a variance is protected; the amendment before trial meant that Robey could not signal to the petit jury that the government's proof did not support the full, original indictment.

Instead, the government, a mere week before trial was scheduled to begin, cherry-picked six counts to prove at trial, and eliminated its burden to prove the other nineteen counts. By striking nineteen of the counts, the government denied Robey the opportunity to counter or raise doubt about the stricken charges before a jury, and simultaneously preserved its own ability to use the offenses as "relevant

conduct" in sentencing. *Cf. United States v. Bacallao*, 149 F.3d 717, 721 (7th Cir. 1998) (discouraging prosecutors from indicting on minor offenses and then seeking enhancement sentences later by asserting that the defendant committed more serious crimes than those for which he was tried and convicted).

Additionally, the enormous difference between the original indictment and the amended indictment affected Robey's defense in that the length of the original indictment was used to justify more than three years worth of delays in Robey's case. *Cf. Ratliff-White*, 493 F.3d at 823–24 (variance between the indictment and the proof at trial was harmless where defense counsel could not show that she would have conducted the case any differently had the indictment been drafted differently). Unlike defense counsel in *Ratliff-White*, Robey's defense counsel likely would have conducted the case differently had the original indictment been shorter. With a shorter indictment, Robey's counsel may have felt less pressure to negotiate a plea deal. Also, a shorter indictment almost certainly would have resulted in an earlier trial for Robey. Had the government decided earlier not to proceed on the twenty-five-count indictment, Robey might have been spared at least a few of the eleven continuances. And, as discussed above, *see supra* Section I.B, without those delays, Robey would have been able to locate and present two defense witnesses at trial, an opportunity foreclosed to him because of the length of the delays. *See* (R.154.) This Court should reject the lower court's mischaracterization of the amendment and reverse.

III. The district court clearly erred at sentencing when it found relevant conduct based on ten vehicles stolen five to seventeen months before the conduct on which Robey was tried.

The district court clearly erred when it held that ten uncharged vehicle thefts constituted relevant conduct for purposes of determining Robey's Sentencing Guideline range. In finding that these vehicles constituted relevant conduct, the court neglected to adequately evaluate the similarity, regularity, or temporal proximity of these uncharged thefts to the offenses of which Robey was actually convicted.

Under the Sentencing Guidelines, damages from uncharged conduct may only be used to determine a defendant's applicable Guideline range if it constitutes relevant conduct. *U.S. Sentencing Guidelines Manual* § 1B1.3 (U.S. Sentencing Comm'n 2014). To prove relevant conduct, the government must show by a preponderance of the evidence that the uncharged offenses were either a part of the same scheme or the same course of conduct of the convicted counts. USSG § 1B1.3(a)(2); *United States v. Acosta*, 85 F.3d 275, 279 (7th Cir. 1996). At Robey's sentencing hearing, the district court held that the uncharged offenses were part of the same course of conduct. *See* (A38) (noting that the PSR stated the uncharged offenses were a part of the same course of conduct); *id.* at 29 (adopting the PSR's conclusions).

This Court reviews a district court's relevant-conduct determination for clear error. *United States v. Johnson*, 643 F.3d 545, 551 (7th Cir. 2011). Clear error occurs in the "absence of findings on key elements of the relevant conduct analysis."

United States v. Locke, 643 F.3d 235, 244 (7th Cir. 2011) (internal quotation marks omitted); *see also United States v. Fox*, 548 F.3d 523, 532 (7th Cir. 2008).

A. The evidence presented at sentencing does not support a finding of the key elements of this Court's same-course-of-conduct analysis.

This Court applies three elements when assessing whether uncharged conduct falls within the same course of conduct for sentencing purposes: (1) the similarity of the conduct; (2) the regularity of the conduct; and (3) the temporal proximity of the charged and uncharged acts. *Acosta*, 85 F.3d at 281 (noting that the government must demonstrate a "significant" presence of these elements). If one element is lacking, then there must be a stronger showing of at least one of the other elements. *See, e.g.*, *Acosta*, 85 F.3d at 281; *United States v. Delatorre*, 406 F.3d 863, 867 (7th Cir. 2005) (noting that substantial evidence concerning similarity in offenses overcomes a multi-year gap between them); s*ee also* USSG § 1B1.3(a)(2), cmt. 9(B).

With respect to temporal proximity, this Court has cautioned against district courts permitting "stale" offenses to be included as relevant conduct. *See, e.g.*, *United States v. Cedano-Rojas*, 999 F.2d 1175, 1180 (7th Cir. 1993). Accordingly, it has repeatedly found temporal proximity lacking when there is a several-month gap between the uncharged conduct and the conduct underlying the conviction. *See, e.g.*, *United States v. Ortiz*, 431 F.3d 1035, 1041 (7th Cir. 2005) (concluding that a ten-month gap between conduct "suggests the lack of a common plan or course of conduct"); *United States v. Bacallao*, 149 F.3d 717, 720 (7th Cir. 1998) (weighing a

gap of six to eighteen months between offenses against a finding of relevant conduct); *United States v. Sykes*, 7 F.3d 1331, 1337 (7th Cir. 1993) (concluding that a fourteen-month temporal gap "tends to indicate conduct that can easily be separated into 'discrete, identifiable units' rather than behavior that is part of the same course of conduct or common scheme or plan") (quoting USSG § 1B1.3, comment. (backg'd.) Other circuits have noted that temporal proximity is "extremely weak" when there is a gap of five or six months between the acts. *See United States v. Mullins*, 971 F.2d 1138, 1144 (4th Cir. 1992); *see also United States v. Hahn*, 960 F.2d 903, 911 (9th Cir. 1992).

Like *Ortiz* and *Bacallao*, Robey's uncharged conduct lacked temporal proximity to the conduct underlying his convictions. The majority of the uncharged conduct occurred more than twelve months prior to the conduct underlying Robey's conviction. (R.184, ¶21.) Further, the most recent uncharged conduct occurred more than five months prior to any of the conduct underlying Robey's convictions. (R.184, ¶21.) Gaps this extensive belie the notion that the uncharged conduct was a part of the same course of conduct. *See Ortiz*, 431 F.3d at 1041 (citing *Hahn*, 960 F.2d at 911). At sentencing, when Robey flagged the absence of temporal proximity, the court implicitly acknowledged it but then went on to hold that the date of the uncharged conduct was not controlling. (A45.) Given the absence of temporal proximity in Robey's case, the government was obligated to make a stronger showing of one of the other two elements. *See, e.g.*, *Acosta*, 85 F.3d at 281.

With respect to similarity, the district court must find that the charged conduct and the conduct the government seeks to attribute to the defendant as relevant conduct are sufficiently alike. *See, e.g.*, *Ortiz*, 431 F.3d at 1041. The similarity element is not satisfied by showing that the conduct involved the same kind of crime. *See United States v. Crockett*, 82 F.3d 722, 730 (7th Cir. 1996) ("The mere fact that the defendant has engaged in other drug transactions is not sufficient to justify treating those transactions as 'relevant conduct' for sentencing purposes."). Further, the presence of only one common element between the uncharged offenses and the offenses of conviction is insufficient evidence of similarity. *See Bacallao*, 149 F.3d at 720–21 (holding that one common element between two drug transactions—the relationship between two parties in the transaction—was not enough to find relevant conduct).

The only evidence of similarity in Robey's case was the mere fact that the government learned about all of the vehicles at the same time and place: during the December 6, 2011, search of Robey's residence. (A42.) Beyond this commonality, the government failed to establish similarity between each instance of uncharged conduct and the conduct underlying the convictions.

Like similarity and temporal proximity, the government failed to present evidence of regularity at sentencing. During the government's proffer, it failed to address the timing or frequency of the uncharged conduct. Further, the Probation Office's analysis of the dates of the uncharged conduct illustrated the absence of regularity. According to the Probation Office, there was a gap of over five months

between the uncharged conduct and the earliest convicted offense. (R.184, ¶21.) Moreover, there was another five-month gap between the uncharged offenses from March of 2010 to August of 2010. Although the Probation Office asserted that Robey produced counterfeit sales documents on a monthly basis, that claim is not supported by the dates of the uncharged offenses, which occurred over the course of more than seventeen months. Given the sporadic occurrences of the uncharged conduct, the regularity element is lacking in Robey's case. *See Sykes*, 7 F.3d at 1337 ("Repeated, regular acts or offenses occurring at fixed and certain intervals (*e.g.*, once a month or at a specific time each year) may suggest a plan . . . whereas sporadic acts over an extended time period generally do not permit the inference of a common scheme or plan[.]").

Because the government presented insufficient evidence of significant regularity, similarity, and temporal proximity, the government failed to meet its burden of proving by a preponderance of the evidence the key elements of this Court's same-course-of-conduct standard. As a result, the district court clearly erred in attributing those ten additional vehicles to Robey as relevant conduct.

B. The district court failed to make specific findings supporting its decision that the uncharged conduct was a part of the same course of conduct as the convicted offenses.

A district court commits clear error if it fails to include specific findings about the "similarity, regularity and temporal proximity of the offenses" in its determination that the uncharged offenses constitute relevant conduct. *United States v. Stephenson*, 557 F.3d 449, 456 (7th Cir. 2009) (internal quotation omitted);

see also Locke, 643 F.3d at 245 (noting that the court may not simply declare that offenses were relevant conduct without explaining what facts justify the finding). Further, the district court must "explicitly state which findings demonstrate the necessary relation [of the uncharged offenses] to the convicted offense." *Stephenson*, 557 F.3d at 456; *see also Ortiz*, 431 F.3d at 1042–43 (noting that explicit findings are necessary to ensure that the district court held the government to its burden of proof).

The district court's explicit statements must be sufficient to indicate that it considered and weighed the evidence before it. *Locke*, 643 F.3d at 243–44; *see also United States v. Schroeder*, 536 F.3d 746, 753 (7th Cir. 2008) (asserting that the district court's conclusive pronouncement of its relevant conduct findings at the beginning of the sentencing hearing indicated that the court did not fulfill its "responsibility to weigh the proffered evidence"). Alternatively, if the court, instead of explicitly stating its findings, adopts the PSR's findings concerning the relation of the conduct, then the PSR must contain sufficient information to establish the requisite nexus between the offenses. *See Bacallao*, 149 F.3d at 722.

At Robey's sentencing hearing, the district court failed to discuss similarity, regularity, or temporal proximity in any detail when it held that the uncharged conduct constituted relevant conduct. Rather, the court rested its decision on the arbitrary fact that evidence of Robey's alleged involvement in the uncharged conduct and evidence of his commission of the convicted offenses were procured from the execution of the same search warrant. (A45–46.) Yet the fact that the

evidence came from the same search does not speak to any of the factors relevant to this Court's same-course-of-conduct analysis. Permitting disparate conduct to be included as relevant conduct simply because evidence of the conduct came from the same police search would lead to absurd results. Under such a standard, a check forgery allegation, for which the defendant was never tried or convicted, could be factored into a sentence imposed for possession of a controlled substance as relevant conduct simply because evidence of both was discovered during the same search of the defendant's home.

And although the district court did state in a conclusory fashion that the uncharged conduct demonstrated the "same sort of pattern" as the convicted offenses, the court did not specify what facts, if any, supported this finding. (A46.) Thus, at the sentencing hearing, the district court failed to support its relevant-conduct determination with sufficiently specific findings to satisfy this Court's standard. *See Ortiz*, 431 F.3d at 1043 (holding that the district court's "terse findings" were clear error).

Further, the district court's statements at sentencing belie the notion that it adequately weighed the evidence. Most notably, even before the government's proffer, the court conclusively pronounced its belief that the uncharged offenses constituted relevant conduct because of the common source of evidence. (A41.) Additionally, shortly after the government began its proffer, the court cut the prosecutor off, stating that it wanted to "cut to the chase." (A45.) The court then asked the prosecutor the following, which demonstrated its preconceived conclusion

that the uncharged conduct was relevant conduct based on the source of the evidence: "Are all the 14 vehicles that are listed in this chart vehicles that you identified by reviewing the documents and materials and the typewriter ribbon in Mr. Robey's possession pursuant to the search warrant?" (A45.) In response to Robey's objection that the uncharged conduct lacked temporal proximity, the court tersely responded by stating that the temporal proximity was not controlling. (A45.) The district court, however, never explained how the presence of other factors overcame the absence of temporal proximity. (A45–46.)

The district court's approach effectively shifted the burden of proof from the government to Robey. Having presumed that relevant conduct existed, the court placed the onus on Robey to disprove it. As this Court has noted, such burden shifting supports the inference that the court was derelict in its obligations to adequately weigh the evidence. *Schroeder*, 536 F.3d at 753 (noting further that it offends the defendant's Due Process right to a fair sentencing hearing).

Finally, these deficiencies were not cured by the court's adoption of the PSR's findings as its own. Robey's PSR conclusorily asserted that the uncharged offenses were relevant conduct, primarily because those additional vehicles were discovered at the same time as the evidence of the charged conduct. The PSR, however, does not detail any similarity in how the offenses were committed. (R.184, ¶21.) Therefore, like the district court's comments at sentencing, the Probation Office's summary conclusion—and the district court's ready acceptance of that conclusion—

failed to establish the requisite nexus between the uncharged conduct and the conduct of conviction to support a finding of relevant conduct.

C. The district court did not hear sufficient evidence to support a finding that the uncharged conduct was a part of the same scheme or plan as the conduct of conviction.

As with the same-course-of-conduct analysis, the court heard insufficient evidence to support a finding that the uncharged conduct was part of a common scheme or plan. "Two or more offenses are part of a common scheme or plan if they are connected by *at least* one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." *Bacallao*, 149 F.3d at 719 (internal quotation omitted). However, "common scheme or plan" does not encompass uncharged conduct "that is similar in kind to the offense of conviction but that does not bear the required relationship to that offense." *Id.* at 719–20 (quoting *United States v. Patel*, 131 F.3d 1195, 1204 (7th Cir. 1997)).

The only factor presented at sentencing that encompassed all of the uncharged conduct was the source of the evidence for the uncharged conduct. Yet, the source of evidence does not speak to the commonality of victims, accomplices, purpose, or *modus operandi*. It does not indicate with whom or how Robey participated in the theft of the vehicles, nor does it indicate to whom or how the uncharged vehicles were disposed of.

During its proffer the government supplemented the Probation Office's bare-bones description of the uncharged conduct, discussing in any detail only two of the

ten vehicles in relation to the convicted offenses.[15] With respect to the 2010 Chevrolet Camaro, stolen more than seventeen months before the convicted offenses, the government noted the presence of a common victim with one of the offenses of conviction: Penske Chevrolet. (A43.) Although this does show one common factor, the seventeen-month gap between the incidents supports the inference that these were not a part of a common plan. *See, e.g.*, *Ortiz*, 431 F.3d at 1041 (determining that a ten-month gap between conduct "suggests the lack of a common plan").

With respect to the 2010 Ford Mustang, stolen more than fourteen months before the convicted offenses, the government mentioned the use of a "key swap" method to steal the vehicle, which does speak to a similar *modus operandi* as the convicted offenses. Again, however, the lengthy gap between the conduct suggests that it was not a common scheme or plan.

In short, the government failed to prove that the ten uncharged vehicles constituted relevant conduct. Robey's sentence was enhanced by fourteen points because the total damage from the charged and uncharged conduct was $443,812.16. (R.184, ¶21.) Based on this enhancement, Robey's total offense level was 26, resulting in a Guideline range of 110- to 137-months' imprisonment. With

[15] The government briefly mentioned a third car: a 2009 Nissan Sentra. Referencing a key cut, it nonetheless failed to connect the theft of this vehicle to the conduct underlying Robey's convictions. (A44.) Rather, the government's discussion of this vehicle amounted to no more than an indication that it was similar in kind to the offense of conviction. *See Bacallao*, 149 F.3d at 719-20 (rejecting similarity in kind of offense as evidence of relevant conduct).

the exclusion of nine vehicles, the total damage amount would be between $120,000 and $200,000, resulting in only a ten-point enhancement to Robey's base offense level. As a result, Robey's total offense level would be 22, with a Guideline range of 77- to 96-months' imprisonment.

Accordingly, this Court should remand this case to the district court for resentencing.

CONCLUSION

For the foregoing reasons, Appellant George Robey respectfully requests that the Court vacate his conviction and dismiss the indictment with prejudice or, in the alternative, remand his case to the district court for resentencing.

Dated: December 1, 2015

Respectfully submitted,

George Robey
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
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No. 15–2172

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE ROBEY,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, George Robey, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on December 1, 2015, which will send notice of the filing to counsel of record in the case.

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No. 15–2172

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE ROBEY,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,819 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in in 12-point Century Schoolbook font.

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Dated: December 1, 2015

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v.

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Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

I, the undersigned, counsel for the Defendant-Appellant, George Robey, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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No. 15–2172

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

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Defendant-Appellant.

ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT GEORGE ROBEY

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GEORGE ROBEY

RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

AO 245B (Rev. 09/13) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of Indiana

UNITED STATES OF AMERICA
v.
GEORGE E. ROBEY

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:12CR00027-001

USM Number: 10393-028

Larry R. Champion
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3, 4, 5, and 6 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2321	Trafficking in a Vehicle with an Altered Identification Number	4/17/2011	1
18 U.S.C. § 2321	Trafficking in a Vehicle with an Altered Identification Number	5/28/2011	2
18 U.S.C. § 2321	Trafficking in a Vehicle with an Altered Identification Number	7/29/2011	3
18 U.S.C. § 2321	Trafficking in a Vehicle with an Altered Identification Number	9/3/2011	4
18 U.S.C. § 513(a)	Making, Uttering, or Possessing Counterfeit State Securities	12/6/2011	5
18 U.S.C. § 513(a)	Making, Uttering, or Possessing Counterfeit State Securities	11/22/2011	6

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/20/2015
Date of Imposition of Judgment

5/27/2015

Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

A CERTIFIED TRUE COPY
Laura A. Briggs, Clerk
U.S. District Court
Southern District of Indiana
By Kelly Pate
Deputy Clerk

DEFENDANT: GEORGE E. ROBEY
CASE NUMBER: 1:12CR00027-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 110 months

110 months on each of Cts. 1-6, to be served concurrently

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be given credit for time served since December 6, 2011, and that he be designated to a medical facility, and be allowed to participate in available drug and alcohol treatment programs.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GEORGE E. ROBEY
CASE NUMBER: 1:12CR00027-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years
3 years on each of Cts.1-6, to be served concurrently

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below:

CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3) The defendant shall answer all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.
5) The defendant shall notify the probation officer prior to any change in residence or employer.
6) The defendant shall not meet, communicate, or otherwise interact with a person whom the defendant knows to be engaged, or planning to be engaged, in criminal activity, or whom the defendant knows to have been convicted of a felony, unless granted permission to do so by the probation officer.
7) The defendant shall permit a probation officer to visit him at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.
8) The defendant shall notify the probation officer within 72 hours of being arrested or having any official law enforcement contact.
9) As directed by the probation officer, the defendant shall notify third parties of the nature of the defendant's current offense conduct and conviction and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.
10) The defendant shall provide the probation officer access to any requested financial information.
11) The defendant shall submit to the search of his person, vehicle, office/business, residence and property, including computer systems and Internet-enabled devices, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving the defendant. Other law enforcement may assist as necessary. The defendant shall submit to the seizure of any contraband that is found, and should forewarn other occupants or users that the property may be subject to being searched.

DEFENDANT: GEORGE E. ROBEY
CASE NUMBER: 1:12CR00027-001

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant	Date
U.S. Probation Officer/Designated Witness	Date

DEFENDANT: GEORGE E. ROBEY
CASE NUMBER: 1:12CR00027-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$** 600.00	**$**	**$** 84,500.21

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
United Farm Family Mutual Insurance Company	$21,983.17	$21,983.17	2
Clinton Himsel	$100.00	$100.00	1
Motors Insurance	$24,545.00	$24,545.00	2
Penske Honda	$37,872.04	$37,872.04	2

TOTALS	$ 84,500.21	$ 84,500.21

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GEORGE E. ROBEY
CASE NUMBER: 1:12CR00027-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C ☐ D ☐ E, or ☐ G below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ G below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

G ☒ Special instructions regarding the payment of criminal monetary penalties:

Any unpaid restitution balance during the term of supervision shall be paid at a rate of not less than 10% of the defendant's gross monthly income. Restitution shall be paid first to Clinton Himsel, then divided proportionately among the remaining victims.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Defendant Name	Case Number	Joint & Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
all counterfeits of any securities of the United States or of any state; any articles, devices, or other things made, possessed, or used in violation of 18 U.S.C. §§ 511 and 513; and any material or apparatus used or fitted, or intended to be used, in the making of such counterfeits. This includes property constituting proceeds traceable to the offense or a sum of money equal to the total amount of the proceeds.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GEORGE ROBEY,	)	CAUSE NO. 1:11-mj-718
	)	
Defendant.	)	

ORDER

This matter is before the Court on the joint motion of the United States of America and the defendant, George Robey, to enlarge the time for the grand jury to return an Indictment. The Court, having read said Motion and being duly advised in the premises, now finds that granting said Motion out weighs the public interest in a speedy trial in that both the government and defendant need additional time to prepare and negotiate a resolution of the matter with trial per 18 U.S. C. § 316(h)(8)(A).

IT IS, THEREFORE, ORDERED that the time to indict in this cause be enlarged to and through January 31, 2012.

December 19, 2011

KENNARD P. FOSTER
United States Magistrate Judge
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GEORGE ROBEY,	)	**CAUSE NO. 1:11-mj-718**
	)	
Defendant.	)	

ORDER

This matter is before the Court on the motion of the United States of America, with the concurrence of the defendant, George Robey, to enlarge again the time for the grand jury to return an Indictment. The Court, having read said Motion and being duly advised in the premises, now finds that granting said Motion out weighs the public interest in a speedy trial per 18 U.S. C. § 3161(h)(8)(A) in that both the government and defendant need additional time to prepare and to attempt to negotiate a resolution of the matter without the necessity of a trial.

IT IS, THEREFORE, ORDERED that the time to indict in this cause be enlarged to and through February 29, 2012.

01/31/2012

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 31)

Defendant has moved for a continuance of the April 23, 2012, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the April 23, 2012, trial date is VACATED. This cause is REASSIGNED for trial on Monday, July 9, 2012, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(7)(A), that the ends of justice served by granting the continuance requested outweigh the best interest of the public and the defendant in a more speedy trial because the defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful. Accordingly, the period of delay from the date of this Order through and including July 9, 2012, shall be excluded in computing the time within which the trial of this action

must commence.

IT IS SO ORDERED.

Date: 04/12/2012

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Sharon M. Jackson
UNITED STATES ATTORNEY'S OFFICE
sharon.jackson@usdoj.gov

Laura Paul
LAURA PAUL, PC
laura@laurapaul.net

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 40)

Defendant has moved for a continuance of the July 9, 2012, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the July 9, 2012, trial date is VACATED. This cause is REASSIGNED for trial on Monday, September 24, 2012, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(7)(A), that the ends of justice served by granting the continuance requested outweigh the best interest of the public and the defendant in a more speedy trial because the defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful. Accordingly, the period of delay from the date of this Order through and including September 24, 2012, shall be excluded in computing the time within which the trial of this

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 47)

Defendant has moved for a continuance of the September 24, 2012, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the September 24, 2012, trial date is VACATED. This cause is REASSIGNED for trial on Monday, December 3, 2012, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(7)(A), that the ends of justice served by granting the continuance requested outweigh the best interest of the public and the defendant in a more speedy trial because the defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful. Accordingly, the period of delay from the date of this Order through and including December 3, 2012, shall be excluded in computing the time within which the trial of this

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 53)

Defendant has moved for a continuance of the December 3, 2012, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the December 3, 2012, trial date is VACATED. This cause is REASSIGNED for trial on Monday, March 4, 2013, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(1)(A) and (h)(7)(A), that the ends of justice served by granting the continuance requested outweigh the best interest of the public and the defendant in a more speedy trial because the defendant reasonably requires additional time to undergo a psychiatric evaluation, evaluate discovery, and explore the possibility of a plea agreement. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful. Accordingly, the period of delay from the date of this Order through and including March 4, 2013, shall be excluded in computing the time

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 74)

Defendant has moved for a continuance of the June 17, 2013, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the June 17, 2013, trial date is VACATED. This cause is REASSIGNED for trial on Monday, October 7, 2013, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(1)(A) and (h)(7)(A), that the ends of justice served by granting the continuance requested outweighs the best interest of both the public and the defendant in a more speedy trial because not only is defendant undergoing a psychological examination to determine his competency to stand trial, but his newly appointed lawyer also reasonably requires additional time to evaluate the evidence. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his newly appointed replacement counsel. Accordingly, the period of delay from the date of this Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 87)

Defendant has moved for a continuance of the October 7, 2013, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the October 7, 2013, trial date is VACATED. This cause is REASSIGNED for trial on Monday, January 13, 2014, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(1)(A) and (h)(7)(A), that the ends of justice served by granting the continuance requested outweighs the best interest of both the public and the defendant in a more speedy trial because replacement counsel's pretrial preparation was delayed pending the outcome of Defendant's psychological evaluation and replacement counsel reasonably requires additional time to further evaluate the evidence. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his replacement counsel. Accordingly, the period of delay from the date of this Order through and including January

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	1:12-cr-0027-01 SEB-TAB
vs.	)	
	)	
GEORGE E. ROBEY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO CONTINUE
(Docket No. 92)

Defendant has moved for a continuance of the January 13, 2014, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the January 13, 2014, trial date is VACATED. This cause is REASSIGNED for trial on Monday, March 31, 2014, at 9:30 a.m. in Room 216 of the United States Courthouse in Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(1)(A) and (h)(7)(A), that the ends of justice served by granting the continuance requested outweighs the best interest of both the public and the defendant in a more speedy trial because replacement counsel's pretrial preparation was delayed pending the outcome of Defendant's psychological evaluation and replacement counsel reasonably requires additional time to further evaluate the evidence. The Court also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his replacement counsel. Accordingly, the period of delay from the date of this Order through and including March

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:12-cr-00027-SEB-TAB
	)	
GEORGE E. ROBEY,	)	
	)	
	)	
Defendant.		

ORDER ON DEFENDANT'S MOTION FOR CONTINUANCE
(Docket No. 117)

Defendant has moved for a continuance of the July 28, 2014, trial date. The Court, having considered said motion and being duly advised in the premises, finds that said motion is meritorious and should be granted.

IT IS THEREFORE ORDERED that the July 28, 2014, trial date is VACATED. This action is REASSIGNED for trial on Monday, September 29, 2014, at 9:30 a.m. in Room 216, U.S. Courthouse, Indianapolis, Indiana.

Additionally, the Court finds, pursuant to 18 U.S.C. § 3161(h)(7)(A),that the ends of justice served by granting the continuance requested outweigh the best interest of the public and the defendant in a speedy trial and also finds, pursuant to 18 U.S.C. § 3161(h)(7)(B)(iv), that the failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial. Accordingly, the period of delay from the date of this Order through and including September 29, 2014, shall be excluded in computing the time within which the trial of this action must commence.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12-cr-00027-SEB-TAB
	)	
GEORGE ROBEY,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on the Government's motion to continue the jury trial, currently set for December 8, 2014, and the defendant's objection to the same. For the reasons set forth herein, the Court GRANTS the Government's motion and continues the trial setting, and resets the jury trial for January 5, 2015.

FINDINGS OF FACT

The defendant was arrested pursuant to criminal complaint on December 7, 2011. Defendant was ordered detained on December 13, 2011. Defendant consented to an extension for the time in which to file an Indictment twice, and was ultimately indicted on February 23, 2012.

Defendant moved to continue the trial in this cause on April 5, 2012. Defense again requested continuances on June 11, 2012, August 6, 2012, and November 27, 2012. On February 7, 2013, Defendant received his second appointed counsel and promptly filed another motion to continue the trial on February 25, 2013. Defendant filed a series of *pro se* motions in February and March of 2013, ultimately followed by another motion to continue the trial on

April 30, 2013. Defendant, by counsel, moved to continue the trial on August 29, 2013. On September 9, 2013, defendant filed a *pro se* motion for another attorney.

Another motion to continue was filed on November 19, 2013. A petition to enter plea of guilty and plea agreement were filed February 25, 2014. Defendant withdrew from his petition and plea agreement on June 24, 2014. The next day, Defendant filed another motion to continue the trial.

Defendant was appointed a third attorney on August 8, 2014, and a motion to continue the trial was filed August 19, 2014, which set the current trial date of December 8, 2014. In late August, AUSA Sharon Jackson took another position and left the United States Attorney's Office. AUSA Bradley Shepard filed an appearance on August 21, 2014.

Counsel for the Government tried a three day health care fraud jury trial in *United States v. Jones*, 1:12-cr-0072-TWP from October 27, 2014- October 30, 2014, and then prepared another health care fraud trial, *United States v. Reed*, 1:14-cr-00010-JMS until that defendant pled guilty on November 7, 2014, 10 days before that matter was to commence. The Government's case agent's wife is scheduled to deliver a baby via caesarian section on November 30, 2014, and would be unavailable for trial at the current setting.

CONCLUSIONS OF LAW

The Seventh Circuit has stated that in deciding whether to grant a motion to continue, a district court should consider several factors, including: (1) the amount of time available for preparation; (2) the likelihood of prejudice from denial of the continuance; (3) the defendant=s role in shortening the effective preparation time; (4) the degree of complexity of the case; (5) the availability of discovery from the prosecution; (6) the likelihood that a continuance will satisfy the movant=s needs; and (7) the inconvenience and burden to the district court and its pending

case load. *U.S. v. Miller*, 327 F.3rd 598, 601(7th Cir. 2003). A district court need not make rigid recitation and analysis of each of these points, but may place varying degrees of importance on each factor depending on the circumstances of the case. *U.S. v. Crowder*, 588 F.3rd 929, 936 (7th Cir. 2009).

Further, the Court will not run afoul of the Speedy Trial Act if it finds that the granting of a continuance at the request of the Government outweighs the interests of the public and the defendant in a Speedy Trial. 18 U.S.C. § 3161(h)(7)(A). In reaching this determination, the Court is directed to consider, *inter alia*, (i) whether the failure to grant the continuance would result in a miscarriage of justice; (ii) whether the case is so unusual or complex due to the number of defendants or novel issues of law; whether failure to grant such a continuance would deny the attorney for the Government the reasonable time necessary for effective preparation, taking into account due diligence. 18 U.S.C. § 3161(h)(7)(B).

Continuance

The Court has weighed the factors, and determines they weigh in favor of a continuance. The Government has recently changed counsel and new counsel was heavily involved in pending litigation. The Court feels that under the circumstances the Government has not had adequate time to prepare a 25-count Indictment for trial and additional time is warranted.

Most importantly, the Court finds that the defendant would suffer little prejudice in a continuance of 30 days as requested by the Government. Further, any prejudice is mostly self-inflicted as the defendant has continued this matter, unopposed, at least nine times over almost a three year period. Conversely, the Government would be significantly prejudiced by having to prepare and proceed to trial on this matter with a new counsel and the lead investigator in this matter unavailable for a significant portion of the trial preparation, and possibly the trial.

The Government has indicated that an additional 30 is all that is necessary to prepare this case for trial, and this Court believes such a request is reasonable after considering the above factors.

Speedy Trial

The Court finds that the failure to grant the requested continuance would result in a miscarriage of justice and thus orders the time excluded from December 8, 2014 through and including January 5, 2012 excluded from Speedy Trial Act computation pursuant to 18 U.S.C.§ 3161(h)(7)(A). In reaching this conclusion the Court is focused primarily on the absence of the lead investigator and case agent due to the delivery of the agent's child.

The Court notes that the case agent was available for all previous trial settings which were continued by motion of the defendant. The Court also notes that the case agent was present at a suppression hearing and an attempted change of plea. In short, but for the defendant continuing this trial until the time of the delivery, the Government would have had its agent available for trial preparation and trial. To deprive the Government under these circumstances would be a miscarriage of justice. *See*, 18 U.S.C. § 3161(h)(7)(B)(i). This Court finds that while the case is not particularly complex in terms of number of defendants or nature of the prosecution; nor do there appear to be novel issues of law. However, when taken as a whole, there has not been sufficient time for new Counsel for the Government to prepare for trial on a 25-count indictment without full access to the lead investigative agent. *See*, 18 U.S.C. § 3161(h)(7)(B)(ii)&(iv). Further, the Court finds that the Government has acted with due diligence in that its agent was available and ready at each previous trial setting, and that counsel for the Government conferred with defense counsel and attempted to resolve the matter while deeply involved in litigating other matters. *Id*.

CONCLUSION

For the reasons set forth above, the Government's motion is GRANTED. This matter is reset for trial by jury on January 5, 2015. Further, the time from the date of this order through and including January 5, 2015 is ordered excluded from Speedy Trial Act computation.

SO ORDERED

Date: 11/19/2014

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution:

All ECF-registered counsel of record via email generated by the court's ECF system

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
GEORGE E. ROBEY,	)	**Cause No. 1:12-cr-0027 SEB-TAB**
a/k/a Will S. Robey	)	
a/k/a George A. Robey	)	
a/k/a Noah Stone	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on the Government's Motion to Dismiss certain counts of the Indictment. After consideration of the same, the Court GRANTS the motion. Counts 1-12, 18-20, and 22-25 are dismissed.

So Ordered.

Date:12/31/2014

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Bradley P. Shepard
Nicholas J. Linder
AUSAs

Larry Champion
Counsel for Defense

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GEORGE E. ROBEY, a/k/a Will S. Robey a/k/a George A. Robey a/k/a Noah Stone Defendant.	)	1:12-cr-00027-SEB-TAB

Order Denying Defendant's Motion to Dismiss

This cause is before the Court on Defendant George E. Robey's Motion to Dismiss [Docket No. 144], filed on December 31, 2014 pursuant to the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.* For the reasons set forth below, Defendant's motion is DENIED.

Factual Background

Defendant George E. Robey was arrested on December 7, 2011 pursuant to a criminal complaint approved the previous day. On February 23, 2012, after extensions to which he consented, the grand jury indicted Defendant on charges of trafficking in vehicles with altered vehicle identification numbers and making, uttering, or possessing counterfeit motor vehicle titles. Docket No. 19. The following day, Defendant underwent his initial appearance before a judicial officer, and the court entered an automatic not-guilty plea and issued a pre-trial order specifying that, after Defendant's attorney entered an appearance, the parties would be granted 30 days in which to file pre-trial motions and a further 15 days after the expiration of that period to file responses. Docket No. 26 at 10. Attorney Laura Paul entered an appearance on

Defendant's behalf on February 27, 2012, thereby initiating the pre-trial motion period that continued until March 28, 2012.

Pursuant to motions filed by counsel on Defendant's behalf, the Court then granted continuances of the trial on April 12, 2012, June 16, 2012, August 7, 2012, November 28, 2012, March 1, 2013, May 1, 2013, September 9, 2013, and November 21, 2013. Docket Nos. 35, 41, 48, 54, 62, 76, 89, 93. In each of its orders granting Defendant's motions, the Court found, pursuant to 18 U.S.C. § 3161(h)(7), that the ends of justice served by granting the continuance outweighed the best interest of the public and the Defendant in a more speedy trial.[1] *Id.* Cumulatively, these continuance orders thus tolled the Speedy Trial Act clock for the period starting on April 12, 2012 and ending on March 31, 2014. *Id.*

On February 25, 2014—while the Speedy Trial Act clock was still tolled under the Court's Order of November 21, 2013—Defendant filed a plea agreement and a petition to enter a plea of guilty. Defendant then withdrew this guilty plea on June 24, 2014; his Speedy Trial Act clock accordingly ran for ten days, until July 3, 2014. On that date, the Court again granted Defendant's motion to continue. Docket No. 118. An additional continuance, granted at Defendant's request on August 20, 2014, pushed the trial date to December 8, 2014; the two orders cumulatively excluded all time elapsing between July 3 and December 8, 2014 from Speedy Trial Act reckoning. Docket No. 126. Before that trial date arrived, the Government moved for a continuance on grounds that a change of counsel warranted additional time for trial preparation—a motion the Court granted, over Defendant's objection, continuing to toll the clock and re-setting the trial date to January 5, 2015. Docket No. 133.

[1] Several of these orders cited additional provisions of 18 U.S.C. § 3161 in support of the Court's finding that tolling of the Speedy Trial Act time period was warranted.

On December 31, 2014, Defendant moved to dismiss the charges against him, claiming that the time elapsing between his initial appearance before the Court and the impending commencement of his trial exceeded the 70-day limit imposed by the Speedy Trial Act. Docket No. 144.

Legal Analysis

I. Legal Standard

Congress enacted the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, to give more concrete form to the constitutional guarantee of a speedy trial for criminal defendants, and the Act serves dual purposes: "to clarify the rights of defendants and to ensure that criminals are brought to justice promptly." *See United States v. Pollock,* 726 F.2d 1456, 1459–1460 (9th Cir. 1984) (citing *Barker v. Wingo,* 407 U.S. 514, 519–520 (1972)). The Act applies to all defendants facing federal charges, and it imposes two procedural time limits. A defendant must be indicted no later than 30 days after his arrest, and the trial of a defendant who has pleaded not guilty must commence no later than 70 days after his indictment or initial appearance in the court before which the charges have been brought, whichever comes later. 18 U.S.C. §§ 3161(b), 3161(c).

There are also certain exceptions to the general rule, under which the Act provides that some types of procedural delays toll the limitations period and are not charged to the Government. Delays resulting from proceedings to determine the defendant's competency, from the defendant's trial on other charges, from interlocutory appeal, from any pretrial appeal filed by the defendant, or from physical transportation of the defendant—among other enumerated causes—automatically toll the 30- or 70-day clock. 18 U.S.C. § 3161(h)(1); *see also United States v. O'Connor*, 656 F.3d 630, 642 (7th Cir. 2011) (affirming 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 under the Act any other period of delay if she 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).

When the time limitations imposed by the Speedy Trial Act have been exceeded, the charges against a defendant must be dismissed. 18 U.S.C. § 3162(b); *see, e.g., United States v. Fuller*, 86 F.3d 105 (7th Cir. 1996).

II. Application to Defendant

Defendant contends that, as of December 20, 2014, 70 non-excludable days have passed since his initial appearance, mandating the dismissal of all charges contained in the Indictment. He reaches this result by counting the following three discrete periods towards his Speedy Trial clock: (1) the 48 days between February 24 and April 11, 2012; (2) the 10 days between June 24 and July 3, 2014; and (3) the 12 days between December 8 and December 20, 2014.[2] The Government concedes that the period between June 24 and July 3, 2014 counts towards the Defendant's Speedy Trial clock. According to the Government, however, the clock was tolled for the entirety of the other two periods on which Defendant relies. By the Government's reckoning, then, a trial commenced on January 5, 2015—as currently scheduled—is well within the 70-day period countenanced by the Act. We agree, and accordingly deny Defendant's motion to dismiss.

A. The 48 days between February 24 and April 11, 2012

The Court's pre-trial order, issued after Defendant made his initial appearance on February 24, 2012, set aside a 30-day period, starting with the appearance of Defendant's counsel, for pre-trial motions; it also provided for an additional, consecutive 15 day period for

[2] According to Defendant's theory, the clock has continued to run from December 20, 2014 to the present moment. As of January 2, 2015, this represents an additional 13 days.

the filing of responses to any motions. Attorney Laura Paul entered an appearance on Defendant's behalf on February 27, 2012, which triggered a 30-day pre-trial motion period that lasted until March 28, 2012.

The Speedy Trial Act states that delay resulting from the consideration of a pre-trial motion is excluded from the 70-day calculations. *See* 18 U.S.C. § 3161(h)(1)(D). In *United States v. Garrett*, 45 F.3d 1135 (7th Cir. 1995), the Seventh Circuit held that periods set aside by court order for the filing of pre-trial motions are subject to exclusion even if no such motions are ultimately filed. 45 F.3d at 1138 (citing *United States v. Montoya*, 827 F.2d 143, 153 (7th Cir. 1987)). *See also United States v. Schwartz*, 2008 WL 4977333, *2 (N.D. Ind. Nov. 20, 2008). Defendant did not contemporaneously object that the pre-trial motion period established by the Court was unreasonable in light of Defendant's interest in a speedy trial, and he does not do so now. As such, he is not now entitled to assert that those 30 days should be counted under the Act. *See Garrett*, 45 F.3d at 1138. We therefore agree with the Government that the period between February 27 and March 28, 2012 was excluded; accordingly, only 15 days of Defendant's Speedy Trial clock elapsed between March 28 and April 12, 2012—when the Court granted the first of Defendant's motions for continuance, tolling the clock again.

B. The days elapsed since December 8, 2014

Defendant does not explain why he believes the time since December 8, 2014 should be included in his Speedy Trial calculations, but presumably he means to argue that the delay should not be excluded because it was occasioned by a continuance granted at the Government's request rather than his own.

As we have already noted, the district court may exclude any period of delay if it 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). In its November 19, 2014 order granting the Government's motion to continue, the Court made precisely such a finding. Docket No. 133 at 4. Defendant does not challenge the basis of this finding, which we therefore decline to disturb. His argument for the inclusion of the delay caused by the continuance of the trial from December 8, 2014 to January 5, 2015 is therefore baseless.

C. Defendant's lack of consent for counsel's continuance requests

Defendant also asserts in his motion that his counsel requested a number of the continuances granted by the Court without his consent. "George E. Robey maintains that at no time was he consulted by any of his attorneys prior to any motion for continuance that was filed in [sic] his behalf, nor did he subsequently approve or ratify that action by any of the attorneys who had previously represented him or is [sic] currently representing him in this matter." Docket No. 144 at ¶ 4 (citing Defendant's Affidavit at Ex. A). However, Defendant does not include any of the delays caused by his own counsels' motions for continuance in his reckoning of the 70 days he asserts should be counted towards his speedy trial clock. At any rate, we are aware of no cognizable basis for overriding a Court's finding that a continuance should be excluded under 18 U.S.C. § 3161(h)(7)(A) based on a Defendant's later assertion that he did not authorize his attorney to file the motion that prompted the Court's finding. *See Blake v. United States*, 723 F.3d 870, 886–887 (7th Cir. 2013) ("Defendant's motion to continue is an excludable pretrial motion, even though [Defendant] did not consent to its filing."). *See also United States v. Herbst*, 666 F.3d 504, 510 (8th Cir. 2012) ("We agree with the Sixth circuit that the plain language of Section 3161(h)(7)(A) 'does not require a defendant's consent to the continuance 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.'"); *United States v. Sobh*, 571 F.3d 600, 603 (6th Cir. 2009).

Conclusion

Since Defendant's initial appearance on February 24, 2012, only: (1) the three days between that date and February 27, 2012; (2) the 15 days between the end of the motion period and the April 12, 2012 continuance; and (3) the ten days between June 24 and July 3, 2014 have counted toward Defendant's Speedy Trial deadline. Accordingly, only 28 days of Defendant's Speedy Trial clock have elapsed. Because he has failed to show that a violation of the Act has occurred, his motion to dismiss on that basis is accordingly DENIED.

IT IS SO ORDERED.

Date: 1/5/2015

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution: All ECF counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:12-cr-00027-SEB-TAB
	)	
GEORGE E. ROBEY,	)	
a/k/a Will S. Robey	)	
a/k/a George A. Robey	)	
a/k/a Noah Stone	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This cause is before the Court on Defendant George E. Robey's Motion to Dismiss [Docket No. 154], filed on January 28, 2015 pursuant to the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, and the Sixth Amendment to the United States Constitution. For the reasons set forth below, Defendant's motion is DENIED.

Background

The underlying facts of Defendant's pending criminal case are not relevant to this motion; the case's procedural history is set forth in the Court's Order on Defendant's previous motion to dismiss on similar grounds [Docket No. 149], and we will not recapitulate that full history here.

In our January 5, 2015 order, we rejected Defendant's claim that his statutory right to a speedy trial within 70 days of his indictment or initial appearance, *see* 18 U.S.C. § 3161 *et seq.*, had been violated. Ultimately, we found that only 28 days of Defendant's speedy trial "clock"

had elapsed, in large part because the majority of the delay between his indictment and trial had been occasioned by continuances granted at Defendant's own request. Docket No. 149 at 4–6.[1]

Defendant's jury trial was scheduled to begin at last on January 5, 2015—the same day on which the Court denied his first motion to dismiss. Defendant was taken ill that morning, however, and his attorney therefore requested and received a further continuance. *See* Docket No. 150. Defendant filed this second motion to dismiss on January 28, 2015. Docket No. 154.

Legal Analysis

Defendant presents only the briefest and most cursory of arguments in favor of his motion to dismiss. He advances two theories, both of which we find to be without merit.

I. Court's failure to rule on Defendant's June 16, 2014 *pro se* motion

Defendant contends that his right to a speedy trial has been denied because the Court failed to rule on a *pro se* motion that he filed on June 16, 2014.[2] Docket No. 154 at 1. In that handwritten motion, Defendant expressed a number of grievances regarding the conduct of his then-counsel Belle T. Choate. Docket No. 116. Chief among these was the complaint that his plea agreement, which had been filed with the Court on February 25, 2014, contained factual inaccuracies and had been inappropriately back-dated. Docket No. 114 at 2–4. The motion was docketed as a "motion to change plea agreement," and Defendant did, in fact, withdraw his guilty plea at a hearing eight days later. *See* Docket No. 115. Although Defendant does not now explain how, precisely, the Court's failure to expressly consider this *pro se* motion constituted a violation

[1] We also noted that the time set aside by court order for the filing of pre-trial motions was also excludable from the speedy trial clock under the Act. Docket No. 149 at 5 (citing *United States v. Garrett*, 45 F.3d 1135, 1138 (7th Cir. 1995)).

[2] Defendant does not specify whether he is referring to his statutory or constitutional speedy trial rights in this respect. As we discuss below, however, we do not reach the question because our refusal to rule on the *pro se* motion was correct.

of his speedy trial right, he presumably believes that immediate consideration of the motion would have resulted in earlier (or retroactive) withdrawal of the plea agreement and thus an earlier re-start of his speedy trial clock. We need not parse his theory, however, because the Court was correct in disregarding a *pro se* motion filed by Defendant while represented by counsel.

As the Government has pointed out, a defendant in a criminal case has the right to represent himself or to be represented by counsel, but there is no right to both at the same time. *See McKaskle v. Wiggins*, 465 U.S. 168, 182–186 (1984); *United States v. Anderson*, 716 F.2d 446, 449 (7th Cir. 1983). Indeed, "the right to counsel and the right to self-representation are separate and independent guarantees under the Sixth Amendment." *Anderson,* 716 F.2d at 449 (citing *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 417–418 (1978)) (further citations omitted). It follows from this principle that a defendant does not have an affirmative right to submit a pro se filing when represented by counsel. *United States v. Gwiazdzinski*, 141 F.3d 784, 787 (7th Cir. 1998) (represented criminal defendant has no right to file a *pro se* brief before court of appeals); *United States v. Mosley*, 353 Fed. Appx. 49, 53–54 (7th Cir. 2009) (criminal defendant does not have the right to file *pro se* motion before trial court while represented by counsel). A court may properly disregard such motions. *See, e.g.*, *Resnover v. Pearson*, 754 F. Supp. 1374, 1386 (N.D. Ind. 1991); *United States v. Durden*, 673 F. Supp. 308, 309 (N.D. Ind. 1987).

Because our decision not to consider Defendant's *pro se* motion was appropriate, his contention that our doing so violated his right to a speedy trial is baseless.

II. Defendant's inability to locate two witnesses

Defendant also argues that he has "been denied his right to a speedy trial and suffered unreasonable prejudice because he can no longer locate two defense witnesses, Shirley Smith a/k/a Shirley Robey, and Glen Sanchez." Docket No. 154 at 1. Because Defendant has advanced no claim that our prior ruling regarding his statutory speedy trial rights [Docket No. 149] is in error, we presume that Defendant intends to argue that this prejudice violates his constitutional speedy trial right.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. While the Supreme Court has declined to crystallize this amorphous constitutional language into a *per se* rule, it has developed a four-part test to guide lower courts' resolution of speedy trial claims under the Sixth Amendment. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972). In *Doggett v. United States*, 505 U.S. 647 (1992)**,** the Court explained the purpose and structure of the governing standard as follows:

> On its face, the Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an "accused" for any reason at all. Our cases, however, have qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: [1] whether delay before trial was uncommonly long, [2] whether the government or the criminal defendant is more to blame for that delay, [3] whether, in due course, the defendant asserted his right to a speedy trial, and [4] whether he suffered prejudice as the delay's result.

505 U.S. at 651 (citing *Barker*, 407 U.S. at 530). Of these four "*Barker*" factors, the first—the length of delay—functions as a threshold inquiry. *See Barker*, 407 U.S. at 530 (describing length of delay as a "triggering mechanism"); *United States v. Loera*, 565 F.3d 406, 412 (7th Cir. 2009) ("the first factor is . . . a threshold requirement"). If the time elapsed between indictment and trial is so long as to be "presumptively prejudicial," then—and only then—will a court proceed to weigh the remaining criteria. *See, e.g., United States ex rel. Mitchell v. Fairman*, 750 F.2d 806,

808 (7th Cir. 1984) ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.") (quoting *Barker*, 407 U.S. at 530).

The "presumption" of unreasonableness created by an excessively lengthy delay, however, is no presumption in the formal sense; it does not relieve a defendant of his burden of establishing a Sixth Amendment violation based on a weighing of the four *Barker* factors as a whole. *See Danks v. Davis*, 355 F.3d 1005, 1008–1009 (7th Cir. 2004). If a court determines that the government has violated a defendant's constitutional speedy trial rights, dismissal of the charges is the only appropriate remedy. *Strunk v. United States*, 412 U.S. 434, 439–440 (1973). Such a remedy, especially where it could result in a guilty defendant escaping sanction, is often an "unsatisfactorily severe" one. *See Barker*, 407 U.S. at 522. Courts must therefore exercise caution, weighing the acute restraint demanded by the bluntness of the dismissal remedy against the sensitivity warranted by the fundamental place the speedy trial guarantee holds within the scheme of defendants' rights enshrined in the Constitution. *Id.* at 533.

Here, as the Government concedes, the delay of well more than two years between Defendant's indictment and the still-forthcoming commencement of his trial is sufficient to trigger further inquiry. *See Doggett*, 505 U.S. at 652 n.1; *Loera*, 565 F.3d at 412 ("[D]elay approaching one year is presumptively prejudicial."). However, as we have noted, Defendant himself bears the responsibility for the large preponderance of this delay. "[T]he right to a speedy trial essentially protects defendants against delays *caused by the government.*" *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002) (emphasis original). Accordingly, postponements attributable to the Defendant—or to the mistakes or inattention of defense counsel—do not weigh in favor of a speedy trial claim. *See Vermont v. Brillon*, 556 U.S. 81, 90–91 (2009). Here,

all but one of the continuances granted by the Court were at the request of Defendant himself. *See* Docket Nos. 31, 40, 43, 47, 53, 61, 74, 87, 92, 117, & 125. Only the 28-day postponement of the trial date from December 8, 2014 to January 5, 2015 is attributable to government action. Docket No. 133. A balance of responsibility tilting so heavily towards the Defendant counsels against any conclusion that Defendant's Sixth Amendment rights have been violated. *See United States v. Oriedo,* 498 F.3d 593, 597–599 (7th Cir. 2007).

Moreover, neither of the two remaining *Barker* factors weighs significantly in Defendant's favor. As for the third prong, the record does not reflect that Defendant promptly and diligently asserted his right to a speedy trial or voiced concerns about the delays of his trial. He never objected to any continuance until November 2014—more than two years after his indictment—and he first raised the issue of his speedy trial rights on December 31, 2014. *See* Docket No. 131 (Def.'s Resp. to Gov't Motion to Continue); Docket No. 144 (Def.'s Motion to Dismiss). Where a Defendant fails to assert his speedy trial rights until "after much of the alleged improper delay had occurred," the third *Barker* prong cannot "weigh strongly in [his] favor." *United States v. Ward*, 211 F.3d 356, 361 (7th Cir. 2000) (citing *United States v. Deleon*, 710 F.2d 1218, 1222 (7th Cir. 1983)).

Finally, Defendant's argument that postponement of the trial has prejudiced him by rendering two of his witnesses unavailable is unpersuasive. He asserts that these two witnesses, were they available, would testify that they "moved computers from the office of Larry Robey to the house where the computers were found during the search conducted by the Government agents on December 6, 2011. This evidence would prove that Defendant did not own the computers." Docket No. 154 at 1. To be sure, the loss of friendly witnesses over time may prejudice a defendant; as the Supreme Court has observed, unreasonable delay enhances "the

possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 653 (citations omitted). But here, Defendant has failed to demonstrate how his *ownership* of the computers is relevant to whether he *possessed* and *used* the computers in his home at the time of his alleged offenses. As the Government points out, Larry Robey died in 2008—some three years before the Government's seizure of the evidence from Defendant's home. The Government further asserts that the files in question were created after 2008, and that there is surveillance evidence of Defendant passing hard copies of fraudulent documents whose electronic versions were located on the seized computers. Docket No. 155 at 4. Without a stronger showing that the witnesses of whose absence he complains would have provided valuable testimony, we conclude that any possible prejudice is outweighed by the balance of the other factors that *Barker v. Wingo* instructs us to consider. *See United States v. White*, 443 F.3d 582, 591 (7th Cir. 2008) (holding that a showing of prejudice "unenhanced by tangible impairment of the defense function and unsupported by a better showing on the other factors than was made here, does not alone make out a deprivation of the right to a speedy trial") (quoting *United States v. Jackson*, 542 F.2d 403, 407 (7th Cir. 1976)) (additional citations omitted).

Conclusion

For the foregoing reasons, Defendant's second motion to dismiss on the basis of his right to a speedy trial is DENIED.

IT IS SO ORDERED.

Date: 2/6/2015

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

certain vehicles, and so including the value of those vehicles is not relevant; is that your position?

MR. CHAMPION: Yes, Judge, yes.

THE COURT: Okay. So the probation officer's response is pegged to sentencing guideline 1B1.3(a)2. And it references the offense conduct provisions and cites the authority within the guidelines for including in the offense conduct vehicles that the investigation uncovered as evidence that the defendant stole and retagged as outlined in paragraph 21 of the presentence report, and because those vehicles were part of the same course of conduct, and occurred around the same time as the offense of conviction, they constitute relevant conduct. That's the probation officer's response. Do you disagree with that analysis of the guideline?

MR. CHAMPION: Yes, Judge, and I could expand a little bit. I have no evidence to present on that, but I believe that five or six of the vehicles that were alleged as relevant conduct, those events or crimes occurred, according to the Government and according to this report, more than a year before the crime charged that Mr. Robey was convicted of.

I believe Count 1 of the indictment, which I have the indictment Mr. Shepard was referring to, where it's renumbered Counts 1 through 6. I believe Count 1 of that indictment refers to the date of offense of April 17th, 2011. And some of the vehicles listed as relevant conduct were

supposedly stolen more than a year before that date.

My argument is that those were too remote in time to include as relevant conduct in this offense. And as stated by the probation officer in paragraph 21 on page eight of the presentence report, I believe the first one, two, three, four, five, six vehicles were stolen over, according to the Government, one year before the offense that Mr. Robey was eventually charged with.

THE COURT: April 17th what year?

MR. CHAMPION: April 17th of 2011 was Count 1 of the indictment, which was presented to the jury. And these other first vehicles listed by the Government, by the probation officer, on page eight, paragraph 21, the first six of those vehicles the date of theft was more than one year before the date of the offense Mr. Robey was -- the earliest of the offense Mr. Robey was charged with. So my argument is those were just too remote to include as relevant conduct.

So we would object and argue that there were not ten victims, and I think it's -- well, I think on this objection that we are talking about, we're questioning the value of the vehicle in reference to Count 2 and Count -- in reference to Count 2 of the indictment for the reason that the value of that vehicle, there's been a claim made of something like $37,000 on that, and we're talking about the value of the loss here. And in fact, a claim, I guess, may have been made by

Penske, but the value of that claim has not been determined yet in that Mr. --

THE COURT: Well, that's another objection later on.

MR. CHAMPION: Okay.

THE COURT: I just want to go through them as you've got there here.

MR. CHAMPION: That's fine then. That's all I have to say on that, Your Honor.

THE COURT: Mr. Shepard, would you like to be heard on the matter?

MR. SHEPARD: Yes, Your Honor. As to the argument that it shouldn't be counted as relevant conduct because they are too remote, possibly if those six were in a vacuum with the four that were charged, there may be traction, but it's not. I think you have to look at all of the additional vehicles, and when you do that, you see an ongoing pattern that continues from 12/7/2009 all the way through and including repeatedly consistent criminal conduct that extends all the way into the time of the actual charged counts.

I have Special Agent DiRienzo here, and the Government would like to call him to put on some additional evidence that expounds upon what is in the evidence, which is contained in paragraph 21, which I think cements the fact that this is one ongoing criminal enterprise of an identical nature all tied to the exact type of conduct which was proved, and

beyond a reasonable doubt, to the jury as to the charged counts, and therefore relevant conduct under the guidelines.

THE COURT: I'm happy to have you call your witness. Before you do that, let me just point out that the probation officer in the report has preceded this list of 14 vehicles in the chart with the explanation that knowledge of these came from the execution of a search warrant at the defendant's residence, and that it was revealed in his electronic equipment, his computer printer and other documents that were seized, that this was a pattern of concoction of counterfeit documents on a variety of vehicles that were stolen and retagged and then sold.

So the relevant conduct description of these various vehicles comes out of the fact that it was information that came to the investigators through Mr. Robey's computer information when the search warrant was executed.

So it's not like they're disparate thefts. They are disparate thefts, but it all came together when the information was disclosed in the defendant's own computers and a printer and other documents.

So that casts a little bit different light on relevant conduct because it doesn't say that the investigation revealed that they went back and found all these other thefts and then just added them into the mix.

It was that the pattern became apparent when the

search warrant was executed that all of these vehicles had been part and parcel of his scheme or his method, his manner of stealing cars and so forth that is virtually identical to what was charged and what was proven up at trial. So you can call your witness, but that's how I'm viewing that particular information in paragraph 21.

Do you want to call your witness?

MR. SHEPARD: Your Honor, his testimony would just be duplicitous and more detail as to how specifically they were matched by way of --

THE COURT: Well, do you want to just make a proffer?

MR. SHEPARD: That would be the Government's preference, Your Honor.

THE COURT: All right. Summarize his testimony if he were called to testify.

MR. SHEPARD: As it relates to the second vehicle, the 2010 black/white Ford Mustang, the fourth vehicle, the 2010 black Chevrolet Malibu, and then the eighth, which is the 2010 red Dodge 1500, and every vehicle thereafter, each one of those vehicles was recovered eventually by law enforcement. And in addition to Special Agent DiRienzo and Detective Blocker, I believe if the Court will --

THE COURT: Let me ask: Were they recovered prior to the indictment in this case?

MR. SHEPARD: Most of them, yes, Your Honor.

THE COURT: Okay.

MR. SHEPARD: If you will recall, at trial, Special Agent DiRienzo and Detective Blocher discussed the typewriter ribbon and how they had analyzed the entirety of the unspooled ribbon. All of these cloned VINs, as well as sales contracts for these vehicles, were found at some point on that typewriter. In addition when these vehicles were located, the counterfeit VIN stickers were still on the vehicles, and they were directly matched back to counterfeit stickers, that typewriter footprint which was on the typewriter ribbon which was produced at trial.

As it relates to the other cars, the 2010 orange Chevrolet Camaro, that theft occurred 12/7/2009. On 12/9/2009, two days after, a sales contract bearing that cloned VIN was created on the typewriter ribbon with an identical vehicle, that being a 2010 orange Chevrolet Camaro. Also, Alma Shirley who was discussed some at trial, was interviewed at the time of the search warrant, and she stated that --

THE COURT: Known to be Mr. Robey's --

MR. SHEPARD: Then live-in girlfriend. And Miss Shirley stated that Mr. Robey had, in fact, stolen that vehicle. I would also note that Penske Chevrolet is a common victim, which was also to the charged counts, which were

convicted.

As it relates to the 2010 silver Ford Mustang, extremely similar facts. The date of the theft is 1/28/2010. A sales contract bearing that cloned VIN and a vehicle of identical description, that being a 2010 silver Ford Mustang was created on that typewriter ribbon, with a date of January 28, 2010, the same date of the theft. And again, Miss Shirley stated in some detail about how Mr. Robey did, if Your Honor recalls, the key swap, went in while that car was on the floor so the key had to be in the car, as Mr. Heath testified, because of fire regulations, he palmed the key and would continually drive around until that car was finally placed out on the lot and stolen the next day.

The 2009 silver Nissan Sentra, the true VIN of that one, the bar code that was contained upon the CTS registration, which was used for the key cut, the CTS which is the subject of Count 3, they actually scanned that bar code in evidence, and it returned to this Nissan Sentra.

In addition, there's a sales contract created on the typewriter ribbon beginning with the date 3/26/2010. So give or take, what is that, eight days after the theft, and again, matching the 2009 silver Nissan Sentra.

The 2010 Chevrolet Camaro which is next, the true VIN, a document with the true VIN was found in the office during the execution of the search warrant.

THE COURT: The defendant's office?

MR. SHEPARD: The defendant's office, yes, Your Honor. On the computer, there was an image of the tire pressure sticker containing that fake VIN, which is listed --

THE COURT: Let me cut to the chase here. Are all the 14 vehicles that are listed in this chart vehicles that you identified by reviewing the documents and materials and the typewriter ribbon in Mr. Robey's possession pursuant to the search warrant?

MR. SHEPARD: Yes, Your Honor.

THE COURT: Do you want to be heard on the matter further?

MR. CHAMPION: Pardon, Your Honor?

THE COURT: Do you want to be heard on the matter further, Mr. Champion?

MR. CHAMPION: Well, I would -- no, Your Honor.

THE COURT: This constitutes relevant conduct. First of all, the date of the theft of the vehicle is not controlling in this analysis. What's controlling is the source of this information to the Government, and that has been documented by the proffer from Mr. Shepard, and also as is reflected in the presentence report, that all of this information came out of the documents that were found in Mr. Robey's home, in his home office, in his possession, through his computer, printer and typewriter ribbon and other

documents that were seized.

So because all of them describe the same sort of pattern that was at issue before the jury in the trial, and reveal a pattern of relevant conduct that far exceeded in its details the four cars that were stolen that were before the jury, this qualifies as relevant conduct, and so I will overrule your objection on that, Mr. Champion.

Moving on, objections 11 and 15 are directed to paragraphs 24 and 40. That is 24 and 40. And that ties into the decision I just made with respect to the number of victims; is that right?

MR. CHAMPION: Yes, Judge.

THE COURT: Okay. So my prior ruling stands and that's an accurate tally of the number of victims as reflected in the relevant conduct, as well as the charges relating to the four vehicles that were before the jury.

The next objection is to the calculation of the loss on the black Ford 150. That's your claim that that one is the one that's been seized by the Government, and therefore there was no loss from that; is that right?

MR. CHAMPION: Yes, Judge.

THE COURT: As the probation officer explains, no doubt relying on the Government's information, that that vehicle has, in fact, been recovered by the investigators and remains in their custody, but after the final order of

Summary of Speedy Trial Violations and Exempted Time

Red: Uncontested Exempt Time
Black: Time When Robey's Clock Was Running

Time Period	Source	Dates	Time
Pretrial Motion Period		03/01/2012 – 03/27/2012	+27 days
Uncontested Time		03/28/2012 – 04/11/2012	+15 days
Robey Motion to Continue	R.35	04/12/2012 – 05/30/2012	+49 days
Robey Pretrial Motions	R.38, R.42, R.45, R.52	05/31/2012 – 07/22/2012	-53 days
Robey Motion to Continue	R.41	07/23/2012 – 08/06/2012	+15 days
Robey Motion to Continue	R.48	08/07/2012 – 11/27/2012	113 days
Robey Motion to Continue	R.54	11/28/2012 – 01/27/2013	+61 days
Robey Review of Counsel	R.57, R.60	01/28/2013 – 02/06/2013	-10 days
Robey Motion to Continue	R.54	02/07/2013 – 02/28/2013	+22 days
Robey Motion to Continue	R.61, R.62	03/01/2013 – 04/09/2013	-40 days
Robey Psychiatric Exam	R.70, R.71, R.87	04/10/2013 – 08/28/2013	-141 days
Robey Motion to Continue	R.76	08/29/2013 – 09/08/2013	+11 days
Robey Review of Counsel	R.88	09/09/2013 – 10/18/2013	-40 days
Robey Motion to Continue	R.89	10/19/2013 – 11/20/2013	+33 days
Robey Motion to Continue	R.93	11/21/2013 – 02/24/2014	+96 days
Plea Agreement Negotiations	R.95, R.115	02/25/2014 – 06/24/2014	-120 days
Uncontested Time		06/25/2014 – 07/02/2014	+8 days
Robey Motion to Continue	R.118	07/03/2014 – 07/30/2014	+28 days
Robey Review of Counsel	R.121, R.122	07/31/2014 – 08/19/2014	-20 days
Robey Motion to Continue	R.125, R.126	08/20/2014 – 12/08/2014	-111 days
Government Motion to Continue	R.133	12/09/2014 – 12/18/2014	+10 days
Various Robey and Government Pretrial Motions	R.137, R.144, R.150, R.152	12/19/2014 – 02/09/2015	-53 days
Indictment to Trial		03/01/2012 – 02/09/2015	1076 days
Nonexcludable time			488 days