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

Reply Brief of Defendant–Appellant George Robey

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I. The Speedy Trial Act requires on-the-record findings to exclude time based on the ends-of-justice provision.

The government now concedes that at least fifty days have elapsed on Robey's speedy trial clock, rather than the twenty-three it claimed before. *Compare* (Gov't Br. 9), *with* (R.148). And the government's undeveloped, single-sentence defense of its requested continuance for an unavailable witness (Gov't Br. 9), should be viewed as a tacit concession that those ten days likewise should have been included in the count, bringing the total days to sixty. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (arguments waived on appeal if they are "underdeveloped, conclusory or unsupported by law").[1] Because nearly every one of the challenged continuances covered a contested period greater than twenty days,[2] this Court need only find that one continuance bore insufficient on-the-record findings to support an ends-of-justice exclusion in order to find a speedy trial violation. As Robey demonstrated, many of the continuances met this description, and so dismissal is appropriate.

The government chooses not to defend any Order individually and instead combines them all together. But the ends-of-justice findings must be analyzed on an

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[1] The government repeatedly engages in this practice, either ignoring completely or devoting just a single line to many other arguments that Robey raised in his opening brief. For example, the government ignores the improper reliance on plea negotiations in the early motions, (Appellant Br. 17), responds in a single conclusory line to the delay caused by the pre-indictment continuances, (Appellant Br. 25), and ignores how the prejudice inquiry operates in the Speedy Trial Act, (Appellant Br. 27). Thus these issues should be deemed undisputed.

[2] Only two of the eight contested continuances would add less than twenty days to Robey's clock. (R.41; R.76.) These two continuances added fifteen and eleven days, respectively.

order-by-order basis. *See United States v. Wasson*, 679 F.3d 938, 945 (7th Cir. 2012) (examining the two contested continuances separately); *United States v. O'Connor*, 656 F.3d 630, 640 (7th Cir. 2011) (examining the seven contested continuances individually). Had the government engaged in this analysis it could not have ignored Orders Three and Nine, the most egregious continuances, which independently establish a speedy trial violation. (A12; A16.) The Third Order was identical, word-for-word, to the first two, despite the passage of four months. (A12.) The Ninth Order simply cited the ends-of-justice provision and declared that the attorney who had represented Robey for over seventeen months needed more "time to effectively prepare for trial." (A17.) This is the opposite of the precise fact-finding the government dresses it up to be—especially because the motion requesting the continuance also listed the need to accommodate "another matter" that the Order did not even address. (R.117.) With either of these two examples, Robey's trial clock exceeded seventy days and this Court need go no further to reverse.

Still, even under the government's consolidated approach, its reasoning does not hold up. It floats two legal tests that not only contravene established precedent, but also relieve the district court of its backstop function of prohibiting unfettered delay, which in turn undermines the protections the Speedy Trial Act provides to defendants and the public. First, the government suggests that a "sequence of events" approach is an appropriate substitute for an individualized analysis of the district court's (lack of) findings. (Gov't Br. 12.) Second, the government claims that Robey should be judicially estopped from raising a speedy trial claim on appeal.

(Gov't Br. 16.) Both approaches are inappropriate, as detailed below, and this Court should reject the government's attempts to carve out broad new rules that gut the Act of its effectiveness.

A. The "sequence of events" approach cannot justify the district court's actions when there are identical motions to continue, zero status hearings, and evidence that the defendant harbors concern about the pace of his case.

Apparently believing that the whole is greater than the sum of its parts, the government invokes a broad approach that this Court has employed only in certain circumstances. Specifically, this Court has utilized a "sequence of events" approach when the continuance request and order occur in phases; first, counsel orally moves on the record for a continuance, articulating her reasons, and later the district court grants the motion in a minute order. *United States v. Napadow*, 596 F.3d 398, 405 (7th Cir. 2010). Significantly, this two-step process allowing a justification based on a "sequence of events" still requires "the court's later explanation." *Id.* at 405–06. Thus, the standard does not allow this Court to invent reasons that could have been animating the district court judge's decision that have no basis in the record. Yet that is precisely what the government suggests this Court do here given the wholesale absence of status hearings or oral motions in this case. The only available justifications for the exclusions in this case come from the continuance motions themselves, but they cannot also serve as the district court's fact-finding "on the record." Such an approach would impede appellate review in circumstances where counsel articulated a completely false reason, which the district court's rote

adoption fails to uncover—in short, the exact opposite of "fact-finding." This is why the status hearing step of the *Napadow* sequence is critical—it ensures the district court will serve as a judicial backstop to permit only allowable delays, and enables reviewing courts to adequately evaluate those decisions.

The government pushes for a vast expansion of this rule to a situation where it simply cannot work. The government's proposal would write out the oral motion at a hearing, though that hearing is the step of the two-step process that ensures accurate judicial fact-finding. To allow otherwise would enable counsel to delay trial indefinitely as long as they provide a facially-plausible reason. For example, consider the "sequence of events" surrounding the Ninth Order. (A17.) Faced with an *identical* motion to the one filed eight months earlier, without a hearing, the district court gave a sixty-three day extension to counsel, who had by then been on the case for seventeen months. The government contends that plea agreements were part of this same sequence, (Gov't Br. 14–15), but no reference to plea agreements surfaces in the continuance Order, (A17), or in the later Order denying Robey's Motion to Dismiss on Speedy Trial grounds (A24).

Further indicating how much work it hopes to get out of its revised test, the government relies on many events that lead to already *automatically excludable* delay as part of the "sequence of events." (Gov't Br. 14.) Not only is this improper because the legislative scheme already prescribes how to exclude time in those circumstances, but the government ignores details such as the fact that the psychological evaluation partly justifying the Eighth Order had been completed

over five months before. *Id.* Similarly, Robey did not contest the fifth or tenth continuances when there was new counsel appointed, (R.62; R.126), so this "sequence of events" is irrelevant, and the government's defenses of those Orders sheds no light on the district court's lack of findings (Gov't Br. 13).

This Court can turn to the record when on-the-record findings are insufficient, but appellate review should be limited to the Court's present narrow approach of examining only transcript hearings and other near-contemporaneous records to ascertain the district court's reasoning. The method of review should not be used to allow post-hoc justifications by the government on appeal.

B. Judicial estoppel is inapplicable in this case and its application would be contrary to the Speedy Trial Act.

The government continues its campaign to broaden narrow rules by advocating for an automatic application of the judicial estoppel doctrine to the Speedy Trial Act whenever a defendant requests continuances. As a threshold matter, the government fundamentally misconstrues Robey's principal objection to the district court's actions: its lack of requisite findings. With the exception of the government's continuance for an unavailable witness, (Appellant Br. 22–25), Robey did not challenge the underlying merits of each Order. Nor could he, given the wholesale absence of findings. For example, Robey's counsel did not identify the "other matter" that served as the basis for two continuances, (A16; A17), and because the district court never held a hearing it was impossible to know whether that other matter justified what ending up being seventy-seven and sixty-three day

continuances, respectively. Likewise, this Court cannot discern whether the length of the continuance was animated by proper reasons or improper ones like court congestion. Because on appeal Robey primarily objects to the lack of findings rather than the underlying merits, there is no fundamental inconsistency between the position staked out below and that advocated here—an essential component of judicial estoppel.

Notwithstanding this mismatch, the government forges ahead with a rule that it claims to be nothing more than a logical extension of dicta in this Court's *Wasson* decision. (Gov't Br. 17.) But the government fails to grapple with this Court's actual practice of examining contested continuances, even those requested by defendants. *See United States v. Hills*, 618 F.3d 619, 628 (7th Cir. 2010). This Court recognizes that the requirements for ends-of-justice findings do not differ based on who brings the motion—the statute does not grant automatic continuances whenever a defendant requests one, nor does the statute lower the burden of proof for defense continuances. *See United States v. Blandina*, 895 F.2d 293, 297 (7th Cir. 1989) (upholding a district court's denial of a defendant's motion to continue).

The cases on which the government relies do not bolster its proposed expansion of the judicial estoppel doctrine to every continuance motion filed by the defense. As a threshold matter, in the few instances cited by the government where this Court has commented on a defendant's challenge to exclusions based on his own prior motion to continue, the Court nonetheless went on to consider the merits of the challenge; it did not find the defendant estopped from raising the issue.

Moreover, the government's cases are factually distinguishable from Robey's case. First, they all contain a significantly more developed record from which to discern the parties' and court's reasoning. Second, at least one of two other features was present: (1) the time period is discrete and definable, limited to at most a few continuances; (2) the defendant himself, not through counsel, acknowledged the request for the continuance. In *Wasson*, on which the government relies, there were only two continuances at issue, not eleven. 679 F.3d at 944–45. Moreover, during the status hearing, "the court asked Wasson directly if he had any objection to the motion to continue" and he said he had no objection. *Id.* at 948. The cases before *Wasson* also exhibit this pattern. *See United States v. Larson*, 417 F.3d 741, 746 (7th Cir. 2005) (excluding a single continuance where, representing himself pro se, the defendant requested a continuance at a hearing); *United States v. Kucik*, 909 F.2d 206, 211 (7th Cir. 1990) (excluding a small, discrete, two-week continuance which the defendant acquiesced to at a hearing); *see also United States v. Adams*, 625 F.3d 371, 376 (7th Cir. 2010) (excluding three continuances requested by the defendant because of specific representations made at status hearings).

Robey's continuances do not fit this bill. Consider, for example, the Seventh Order, which the district court granted without a hearing on the same day it entered a letter from Robey complaining about the delay. (A15; R.57.) Far from acceding to his lawyer's requested continuances, Robey actively disputed them. And the sheer number of continuances at issue in this case makes the case different from others where this Court opted to reject a single, discrete defense continuance. This

case is thus not the appropriate vehicle for a vast expansion of the judicial estoppel doctrine. Other circuits agree, finding judicial estoppel inapplicable in cases like this. *United States v. Zar*, 790 F.3d 1036, 1044 n.4 (10th Cir.), *cert. denied*, 136 S. Ct. 562 (2015); *United States v. Oberoi*, 547 F.3d 436, 445 (2d Cir. 2008), *vacated*, 559 U.S. 999 (2010), *abrogated on other grounds by Bloate v. United States*, 559 U.S. 196 (2010).

The government's judicial estoppel argument is also stymied by *Zedner v. United States* because applying the government's proposed approach would undercut the rule the Court established in that case: that defendants cannot prospectively waive the application of the Speedy Trial Act. 547 U.S. 489, 503 (2006). Anytime a defendant moved to continue, he would effectively be prospectively waiving his right to challenge that excluded time because it would be barred by judicial estoppel. But this runs against the requirements of the Speedy Trial Act. *Id.* at 500 ("If a defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put [the § 3161(h)(7)] considerations before the court under the rubric of an ends-of-justice exclusion.").

Finally, even if this Court were to examine the three elements of judicial estoppel, they still would not bar Robey's claim. First, Robey's position is not clearly inconsistent between trial and appeal. As noted above, Robey contests the district court's lack of findings in its Orders, not the underlying factual predicates. *Cf. Zedner*, 547 U.S. at 505 ("This would be a different case if petitioner had succeeded

in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds."); *see also Oberoi*, 547 F.3d at 445 ("As a result, Oberoi's earlier position (ignoring the Speedy Trial Act) is not 'clearly inconsistent' with his later position (invoking the Speedy Trial Act)."). Second, it is unclear if the court accepted Robey's position for many of the continuances because the reasoning between the Order and the Motion did not always match and there are no other independent findings. *Compare* (R.40), *with* (A11) (where the motion to continue only mentions discovery but the Order mentions a plea agreement). Additionally, the motions hardly provided any detail at all, certainly not enough to stake Robey to particular positions, especially because any judicial admission "must be deliberate, clear, and unambiguous." *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013) (citation omitted). Finally, Robey is not deriving an unfair advantage from this position, as he is merely seeking the review for ends-of-justice findings he was entitled to—but did not receive—from the district court.

C. The delay caused by the continuances prejudiced Robey, and should result in a dismissal with prejudice.

The government pronounces that Robey needs to show prejudice to prevail on appeal, (Gov't Br. 19), but it fails to answer *at all* Robey's argument that a prejudice inquiry should not be injected into the threshold consideration of whether a Speedy

Trial Act violation occurred, (Appellant Br. 27). Because the government has opted not to address this point, and because the plain language of the Act does not require a prejudice showing, this Court should apply the appellant's proposed framework. Indeed, it already has. *See United States v. Ramirez*, 788 F.3d 732, 736 (7th Cir. 2015). In any event, the prejudice language the government invokes originates from a series of this Court's early Speedy Trial Act decisions from the 1980s that inappropriately adopted inapposite language from a **non**-Speedy-Trial-Act case: *United States v. Aviles*, 623 F.2d 1192, 1197 (7th Cir. 1980).[3] In *Aviles* the defendant appealed the trial court's denial of his motion to continue trial, and the question was whether he was prejudiced by that denial, a routine harmlessness question where the question of prejudice is relevant. *Id.*

Nevertheless, Robey was actually prejudiced by the delay, and the government's reasoning does nothing to change that. First and foremost, Robey repeatedly noted his deteriorating health while awaiting trial. (Appellant Br. 30.) Second, the last-minute narrowing of the indictment dramatically affected Robey's preparation. Time and time again the government and defense counsel justified the delays based on the complexity of a case that ultimately involved only a handful of cars and a trial that lasted only three days. The long delay would have been avoided

[3] The government cites *United States v. Ramirez*, 788 F.3d 732, 736 (7th Cir. 2015), which ultimately leads back to *United States v. Scott*, 784 F.2d 787, 789 (7th Cir. 1986) ("Absent legal error, exclusions of time cannot be reversed except when there is an abuse of discretion by the court and a showing of actual prejudice."), which cites *United States v. Tedesco*, 726 F.2d 1216, 1221 (7th Cir. 1984), which, in turn, improperly relied on *Aviles*, 623 F.2d at 1196.

had the case been streamlined from the beginning. Despite the case's lack of real complexity, the government contends that Robey would not have prepared any differently because the district court admitted evidence of uncharged conduct at trial. But that ruling only came the day *after* trial began and the evidence was limited to only "10 examples of each counterfeit document" so as to avoid duplicative evidence. (R.166 at 4.) All of these show actual prejudice, as does Robey's inability to locate witnesses that would have testified about the computer evidence in the case.

D. Robey likewise suffered a constitutional speedy trial violation.

The government concedes that due to the enormous length of the delay, this Court must examine the other relevant factors to determine if there was impermissible delay. (Gov't Br. 21.) Because Robey timely asserted his right and was prejudiced by the delay as discussed above, this inquiry is resolved solely by the remaining factor: determining who is more to blame for the delay. *United States v. Gearhart*, 576 F.3d 459, 463 (7th Cir. 2009).

The primary factor that led to the delay in this case was the alleged complexity of a vast conspiracy that the government did not prove. The alleged complexity created ammunition for attorneys on both sides to seek delay even after months of preparation. *See* (A9; R.130 at 4.) But delay due to this alleged complexity was entirely unnecessary, as evidenced by the government's decision to drop the majority of counts—including the conspiracy charge itself—only weeks before trial, after it had finally prepared for the case. (A23.) The whole course of

Robey's pretrial period would have changed if the government had begun with the six-count indictment it took to trial, which demonstrates that the government bears most of the blame for the delay.

II. The pre-trial modification to the indictment constituted an impermissible amendment rather than a permissible variance, and, as a structural defect, is reversible per se.

The government declines to justify or explain its decision to amend Robey's indictment without jury oversight. Instead, the government hides behind a new standard of review to claim that no error occurred and that Robey suffered no prejudice from the amendment. That argument falls flat given that it never once addresses the fact that the amendment was a structural defect in Robey's trial, nor the fact that the government labeled its dismissed counts "scrivener's errors," which they plainly were not. The structural defect, based on a constitutional violation, requires automatic reversal. In any event, the amendment impermissibly departed from the indictment issued by the grand jury in a way that did prejudice Robey and impugned the integrity of his trial.

A. The government asks this Court to treat the amendment of the indictment as a variance, ignoring the critical distinction between modifications made with versus without jury oversight.

The government fails to even confront—let alone offer a viable alternative to—Robey's argument that amendments are only permissible with oversight from a jury, whether petit or grand. The government contends that *Miller* "makes clear that a person can be indicted on two charges and tried on only one of them" without returning to the grand jury. (Gov't Br. 24.) As a technical matter, the government

may be correct: the government can choose to present evidence on only a subset of the indicted charges at trial, and can even ask the jury to render a verdict on fewer charges than contained within the indictment. But that kind of narrowing at trial is termed a "variance," *see United States v. Miller*, 471 U.S. 130, 139–140 (1985); *United States v. Kuna*, 760 F.2d 813, 819 (7th Cir. 1985), and it is different from the actual (and constructive) amendments discussed in Robey's opening brief, (Appellant Br. 34–35).

The law on variances, and the precedent set out in *Miller*, does not give the government carte blanche to remove charges from the indictment without any jury oversight. In *Miller*, the entire indictment was sent to the petit jury, though the trial proof focused on a single part of the indictment. 471 U.S. at 133. Thus, *Miller* permits the exact, narrow distinction Robey asks this Court to draw between indictment modifications that occur with jury oversight and those that occur without.

To amend an indictment *without* the oversight of a jury is to take a procedural shortcut that jeopardizes a defendant's constitutional rights. The court permits modified indictments to be presented to a petit jury without receiving grand jury approval only when the modifications do not materially affect the substance or scale of the charges alleged. *See, e.g.*, *United States v. Perez*, 673 F.3d 667, 669 (7th Cir. 2012) (allowing the government to send a redacted, renumbered indictment to the petit jury because the original indictment, which referenced co-defendants not mentioned at trial, would confuse the jury); *United States v. Graffia*, 120 F.3d 706,

711 (7th Cir. 1997) (deleting several charges from an indictment in a trial in which several counts were severed and one co-defendant failed to appear at trial, when the deletions did not "alter any material element of any of the three fraudulent schemes presented to the trial jury"); *United States v. Soskin*, 100 F.3d 1377, 1381 (7th Cir. 1996) (permitting the lower court's excising a charge in the indictment because it described conduct that was not illegal). In contrast, the deletions in Robey's case substantially affected both the substance and the scale of the allegations against Robey; 76% of the charges against Robey were dismissed, including a "conspiracy" charge, (R.19), to which the government had earlier proposed that Robey enter a plea, (R.95). Moreover, unlike the cases the government cites, neither the government nor the court offered any reason to omit the nineteen deleted charges from jury review. Even now, the government offers no justification that warrants permitting the shortcut it took with Robey. The government does not once mention, much less explain, its decision at the trial court level to justify the modification of the indictment as the correction of a "scrivener's error."

B. Because the amendment was a structural defect, Robey's case is reversible per se.

The dismissal of nineteen of the charges against Robey without any jury oversight is a structural defect, which is reversible per se. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49 (2006) (holding that structural errors are not reviewed for harmlessness). Yet even under the government's proposed standard of review—plain error—the case should be overturned.

Plain error occurs when there is (1) "an error or defect"; (2) that is "clear or obvious"; (3) that "affected the outcome of the district court proceedings"; and (4) seriously impugns "the fairness, integrity, or public reputation of the judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009).

As described in Section II.A, the amendment was an error—a deviation from the legal rule requiring that indictment modifications be approved by a grand jury. *United States v. Leichtnam*, 948 F.2d 370, 375–76 (7th Cir. 1991). Moreover, the justification provided for that deviation—the government's claim that nineteen of the charges were scrivener's errors, (R.138)—was also erroneous. *See* (Appellant Br. 38–40.) Although Robey did not object, this failure can be explained at least in part by the fact that the district court afforded him no opportunity to respond before granting the motion a mere two days after the government filed it. (R.138) (motion to dismiss charges filed 12/29/14); (R.147) (order granting dismissal on 12/31/14). Thus, the government's implication that Robey strategically opted not to object due to some perceived benefit from the reduced number of charges is unsupported by the record. (Gov't Br. 22.)

As discussed at length in the opening brief, the court's error in permitting the amendment was obvious, and thus satisfies the second prong of the plain error test. The deletion of 76% of the indictment clearly was not a mere correction of a scrivener's error; the nineteen deleted charges were not unintentional mistakes in the original indictment. *See* (Appellant Br. 39–40.) The government does not challenge this on appeal; it fails to address its "scrivener's error" rationale at all.

Thus, the government had no means by which to justify its improper modification of the indictment without grand jury approval. *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").

The amendment in Robey's case amounted to a structural defect, which undermined his trial's fairness as a whole. *Cf. Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (error at the grand jury stage was a structural defect). The structural error justifies reversal without an inquiry into prejudice. *United States v. Noel*, 581 F.3d 490, 505 (7th Cir. 2009) (Easterbrook, J., concurring). Nevertheless, Robey can satisfy both the third and the fourth prongs of the government's plain error standard.

As for the third prong, the amendment prejudiced Robey. Although the government dismisses Robey's claims of prejudice, the government's own brief underscores the very concerns Robey raised about how the lengthy indictment and its last-minute amendment prejudiced him. For instance, the government makes light of the idea that the lengthy original indictment was used to justify three years of continuances, (Gov't Br. 26), but it nevertheless describes the case as "complex," (Gov't Br. 16, 18). *See also* (Gov't Br. 14) (describing the multitude of charges in the original indictment); (Gov't Br. 21) (noting that during the three years between indictment and trial, defense counsel needed time to prepare for the multitude of counts in the indictment). The government also claims that the dismissal may have "helped Robey in keeping from the jury's eyes the other ten stolen vehicles," (Gov't

Br. 26), despite the lower court's decision to allow the admission of such evidence as relevant conduct, (R.166), and the court's consideration of those vehicles at sentencing (Sentencing Hr'g Tr. 20, 29). Furthermore, Robey's arguments about the ways the alterations between the original and the amended indictment prejudiced his strategic decisions in preparation for trial stand undisputed. *See* (Appellant Br. 42–43.)

The deletion of nineteen counts, achieved under the guise of a "scrivener's error," seriously impugned the integrity of the trial, meeting the fourth prong of the plain error test. By amending the indictment without jury oversight, the government allowed its charging and trial decisions to take place behind a curtain, the very action that the Fifth Amendment aims to protect against. In doing so, the government forced the court to speculate about how a grand or petit jury would have regarded the amendment. The manner of the amendment—calling the deletion of nineteen fully charged counts a "scrivener's error"—also seriously undermined the integrity of the judicial proceedings. The supposed justification for the amendment conveyed an air of legitimacy to those modifications, though in fact the modifications were a far cry from the minute, unintentional mistakes that actually constitute scrivener's errors. The amendment was approved on the basis of a misrepresentation that the government is no longer even willing to defend, and thus would justify a plain error finding, should this Court entertain the government's proposed standard of review.

III. Under the common-scheme-or-plan test, there was insufficient evidence and insufficient court findings to include each of the uncharged vehicles as relevant conduct.

The government shifts, post hoc, to what it views as the more favorable common-scheme-or-plan test, one that the district court did not even apply. (Gov't Br. 32.) The district court, in adopting the PSR, (A.29), explicitly accepted the same-course-of-conduct test, (A.38), and it did so erroneously, as Robey discussed in his opening brief, (Appellant Br. 44). Even considering the government's tardy retreat to this alternate test, the record shows that the evidence cannot satisfy that test either. This Court should remand for resentencing.

The important temporal gaps between the uncharged conduct and the conduct that resulted in conviction should not be downplayed in this case. (Gov't Br. 32); *e.g.*, *United States v. Ortiz*, 431 F.3d 1035, 1041 (7th Cir. 2005); *United States v. Sykes*, 7 F.3d 1331, 1337 (7th Cir. 1993); *see also United States v. Watts*, 535 F.3d 650, 658 (7th Cir. 2008) (highlighting the temporal proximity of the dates of the uncharged check thefts and the convicted conduct in upholding the relevant conduct finding under the common-scheme-or-plan test). The nearest uncharged theft occurred more than four months before the crimes of conviction and six of the uncharged thefts occurred more than a year earlier. (R.184 at ¶ 21.) Such sizeable gaps between each incident of uncharged conduct and convicted conduct undermine the presence of any common plan or scheme. *Compare Ortiz*, 431 F.3d at 1041 (asserting that a ten-month gap between conduct is indicative of the absence of a "common plan"), *with Watts*, 535 F.3d at 658 (finding sufficient temporal proximity

when all of the uncharged stolen checks were dated within "a few months" of the convicted conduct).

The government glosses over this lack of temporal proximity by proclaiming that the ten uncharged thefts "are not bunched in groups but rather are spread relatively evenly" throughout a twenty-one-month period. (Gov't Br. 33.) In truth, though, during this twenty-one-month period, there were separate three-, four-, and five-month gaps where no thefts occurred, and half of the alleged thefts occurred in two out of the twenty-one months. (R.184 at ¶ 21.) Such infrequent and disparate episodes of conduct reflect the absence of a common scheme or plan. *See Sykes*, 7 F.3d at 1337 ("[S]poradic acts over an extended time period generally *do not permit* the inference of a common scheme or plan.") (emphasis added).

Beyond temporal proximity, the common-scheme-or-plan test requires each incident of uncharged conduct and the convicted offenses to be "*substantially* connected to each other by *at least* one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." USSG § 1B1.3 cmt. n.9(A) (2014) (emphasis added). The government spends most of its time arguing there was a common modus operandi, but it comes up short for two reasons: (1) the government substitutes commonality of the source of the evidence for a substantial connection via modus operandi; and (2) the government does not directly address each of the uncharged vehicles.

Following the same pattern as in the rest of its brief, the government simply lumps the vehicles together, noting only that they were identified by the same

typewriter ribbon found in Robey's house. (Gov't Br. 30.) Significantly, the government only discusses counterfeit VINs with respect to five of the relevant-conduct vehicles. Thus, even if similar modus operandi could be gleaned from some of the conduct, it cannot indiscriminately be attributed to all. And, although the vehicle identity evidence procured from the common source speaks to Robey having a connection to those vehicles, it neither establishes the requisite substantial connection nor the subset called modus operandi that can prove that substantial connection. That is, the evidence must provide more proof of the defendant's role and prominence in the scheme with respect to each uncharged vehicle. *Compare United States v. Petty*, 132 F.3d 373, 381 (7th Cir. 1997) (finding similar modus operandi because the uncharged and charged vehicles were fenced through the same individual); *with United States v. Johnson*, 324 F.3d 875, 879–80 (7th Cir. 2003) (upholding the district court's finding of an absence of similar *modus operandi* where the defendant acted alone in one instance and with coconspirators in the other).[4]

[4] The government also advances a new ground that it never explicitly raised at sentencing: that each vehicle is relevant conduct based on a common purpose. Yet again imputing evidence for only some of the vehicles onto all of them, this afterthought justification is not sufficient on its own to establish a common scheme or plan. *Cf.* USSG § 1B1.3 cmt. n.9(A) (noting that *at least* one common factor must be present). Akin to lumping uncharged drug transactions based on a broad common purpose of selling drugs for profit, virtually every vehicle-trafficking transaction has the broad purpose of selling the vehicle. Finding this broad purpose independently sufficient would improperly capture attenuated acts as relevant conduct at sentencing. *United States v. Purham*, 754 F.3d 411, 414–15 (7th Cir. 2014) (refusing to find the existence of a general common purpose of supplying drugs to a specific town sufficient to uphold the inclusion of uncharged drug transactions as relevant conduct).

As for the five vehicles the government actually references with some minimal detail, (Gov't Br. 28)—the presence of cloned VINs and altered tags—this evidence fails to speak to whether Robey ever possessed these vehicles, was in any way involved in their theft, or even whether he personally and knowingly altered the VINs on them. Most critically, this detail is unrelated to the core features of Robey's alleged scheme. *See* (R.184 at ¶ 8) (noting Robey's use of a "key cut" or "key swap" method as a part of the "offense conduct").[5] Ultimately, this evidence does not speak to a common modus operandi with respect to the procurement or disposal of the trafficked vehicles.

Finally, although the government also notes that there was a common victim for four of the uncharged vehicles—Penske Chevrolet—Robey pointed out in his opening brief that the lack of temporal proximity belies the notion that these uncharged vehicles were a part of a common scheme. (Appellant Br. 46.) Two of these vehicles were stolen more than seven months prior to the earliest charged vehicle from Penske, and the other two were stolen eleven and nineteen months before, respectively. (R.184 at ¶ 21.) The district court failed to appreciate this detail because it was focused almost exclusively on the source of evidence: "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 . . . ." (A45.)

[5] The only uncharged vehicle at sentencing that discussed this same modus operandi of using a "key cut" or "key swap" method was the 2010 Ford Mustang. The use of a forged document for a "key cut" was referenced in the discussion at sentencing of the 2009 Nissan Sentra, but the referenced key cut pertained not to the Sentra, but rather to a Cadillac CTS that served as the basis for one of the counts of conviction. (A44.)

Even if this Court finds that some of the vehicles are includable under the common-scheme-or-plan test, resentencing nevertheless is appropriate. Robey's sentence was enhanced by fourteen points based on a total damage value of $443,812.16. (R.184 at ¶ 21). If this Court finds that at least two of the uncharged vehicles were erroneously included as relevant conduct, the total damage value would be below $400,000,[6] resulting in a sentence enhancement of only twelve points.[7] To that end, the two vehicles that the government failed to address at all in its brief in its modus operandi or purpose discussion (as it likewise failed to do at sentencing)—the 2010 Silver Chevrolet Camaro and the 2010 Black Chevrolet Camaro—would be ideal candidates for this finding.

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: February 17, 2015

Respectfully submitted,

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[6] Because the record does not specify how much value was attributed to each vehicle, the assumed value of each vehicle is $31,700.87—the total damage divided by fourteen vehicles.
[7] Robey's total offense level would then be twenty-four, with a Guideline range of 92- to 115-months' imprisonment.

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v.

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Certificate of Compliance
With Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,057 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, George Robey, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on February 17, 2016, which will send notice of the filing to counsel of record in the case.

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