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 Judge Sarah Evans Barker

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Robey's Jurisdictional Statement is complete and nearly correct. The government merely notes for the record that the jury returned its verdict convicting Robey on February 12, 2015, not on February 17, 2015.

STATEMENT OF THE ISSUES

1. Did the district court properly grant Robey's ten motions for continuance consistent with the Speedy Trial Act and the Sixth Amendment?

2. Did the district court properly narrow the indictment by dismissing certain counts before trial?

3. Did the district court properly conclude that ten of the fourteen stolen vehicles referenced on items found at Robey's home constituted relevant conduct for sentencing purposes?

STATEMENT OF THE CASE

George Robey was a car thief who operated a 21st-century "chop shop." In 2009–2011, he and his compatriots stole cars from car lots in and around Indianapolis, Indiana, and sold them. To conceal the fact that a given vehicle was stolen, Robey used a computer, a scanner/printer, and digital image editing software to alter the stolen car's "identity."

Instead of physically chopping and changing the car's color or body style, like chop shops of old, Robey gave the cars new Vehicle Identification Numbers ("VINs"), unique 17-digit codes affixed to the dashboard of every vehicle in the United States. Then, Robey created a stack of counterfeit vehicle-related documents – title, insurance card, sales contract, temporary license plate – to further "prove" the car was clean.

For his crimes, Robey was indicted on February 23, 2012. (R. 19.)[1] The indictment contained 25 counts based on allegations that Robey ran a 21st-century chop shop by stealing cars, altering their VIN numbers, creating counterfeit vehicle titles for them, and selling them. Robey's initial appearance on the indictment—which was the start date for Speedy Trial Act purposes—was on March 1, 2012. (R. 30.)

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[1] Throughout this brief, the government will make the following references: (T. = Trial Transcript); (PSR = Presentence Investigation Report); (S. = Sentencing Hearing Transcript); (R. = District Court Docket Number); (A. Br. = Appellant's Brief).

Robey's trial commenced on February 10, 2015. The jury convicted him, (R. 171), and the district court sentenced him to 110 months' imprisonment, (R. 194).

Robey's Continuances and Related Pretrial Filings

In between Robey's initial appearance and his trial date, Robey requested and was granted ten continuances. (R. 31, 40, 47, 53, 61, 74, 87, 92, 117, 125.) He also requested and received new counsel twice, (R. 59, 123), entered and withdrew from a plea agreement, (R. 95, 115), underwent a psychiatric examination, (R. 71), and filed several pre-trial motions, including a motion to suppress, (R. 32, 38). During this time, he also sent numerous pro se letters to the district court. (R. 57, 64, 66, 67, 69, 78, 81, 83, 88, 119.) By and large, these pro se letters concerned his health, prison conditions, and disagreements with counsel as to strategy. (*See, e.g.*, R. 57; R. 88.) Some of these letters resulted in change-of-counsel hearings. (R. 57, 88, 119.)

Other Pretrial Proceedings

Throughout the time Robey was engaging in the above pretrial filings, the government requested and was granted a single continuance due to the lead prosecutor's trial calendar and the lead case agent's unavailability due to paternity leave. (R. 130.)

Shortly before trial, the government moved to dismiss 19 of the 25 counts in the indictment and all allegations relating to those 19 counts. (R.

138.) Robey did not object. The court granted the motion, narrowing the indictment to six counts and renumbering the indictment accordingly. (R. 147, 174.)

The six remaining counts related to four stolen vehicles. Four of the counts alleged that Robey, knowing the VIN numbers on the vehicles had been altered, possessed or obtained control of each of the vehicles with the intent to sell them. The other two counts alleged that Robey made or possessed counterfeit vehicle titles relating to two of the four vehicles.

Also before trial, Robey twice moved to dismiss the indictment on Speedy Trial Act grounds. In sparse filings, Robey claimed that his counsel did not consult him before seeking the continuances, (R. 144), and that because of the continuances, two witnesses could not be located, (R. 154). Robey had never subpoenaed the witnesses or even mentioned to the court that he could not locate the witnesses and intended on calling them to testify.

The district court denied these motions. The Court concluded that, in granting Robey's ten motions and the government's one motion, it had made sufficient ends-of-justice findings to exclude time from the Speedy Trial clock under 18 U.S.C. § 3161(h)(7). (R. 149, 161.) The district court also held, relying on precedent cited by the government, that a 27-day period during which parties could file pre-trial motions was automatically excludable. (R.

149 at 5.) As noted in the Argument, below, such a finding was error, but the added 27 days still does not violate the Speedy Trial Act.

A three-day trial began on February 10, 2015. (R. 167.) The jury saw and heard evidence that Robey had altered stolen vehicles' VIN numbers, created counterfeit vehicle titles, and then sold the vehicles, including one to an undercover agent who audio/video-recorded his interactions with Robey. (*E.g.*, T. 50:5–87:5.)

The evidence detailed Robey's methods. He created the fake VINs and titles using computers, a scanner, a laser printer, a typewriter, and a host of vehicle-related documents. (*Id.* at 298:13–306:20.) All of these items were found during a search of Robey's home. (*Id.* at 167:25–176:7.) Robey's computer, his related documents, and even the ribbon from his typewriter contained references to the stolen cars and the fake VIN numbers that were affixed to them. (*Id.* at 182:2–198:10, 210:7–232:19, 319:20–347:12.)

The jury convicted Robey on all six counts. (R. 171.)

Sentencing

The district court sentenced Robey on May 20, 2015. (S. 1.) The PSR concluded that, in addition to the four vehicles that were the focus of the trial, another ten stolen vehicles constituted "relevant conduct." (PSR ¶ 21.) The evidence found in Robey's home showed that, like the four cars from the trial, he had altered the VIN numbers and created counterfeit documents for

these ten other cars. The total value of the fourteen cars (the four from trial and the ten as "relevant conduct") was more than $400,000. That loss amount increased Robey's offense level under the Sentencing Guidelines by 14. U.S.S.G. § 2B1.1(b)(1)(H) (2014).

At sentencing, Robey contested the total value of the cars, arguing that the ten uncharged cars should not count as relevant conduct. (Def's Objs. to PSR Nos. 10 and 13; S. 11:24–14:8). The government proffered evidence to the contrary. (S. 14:11–15:2; 16:8–19:10.) The district court overruled Robey's objection and determined that the evidence found during the search of Robey's home established a pattern of common conduct sufficiently to render the ten vehicles relevant conduct. (*Id.* at 15:3–16:6; 19:17–20:7.)

The court's Sentencing Guidelines calculation resulted in an advisory guidelines range of 110–137 months' imprisonment. The court sentenced Robey to 110 months in prison. (R. 194.)

SUMMARY OF THE ARGUMENT

This Court should affirm Robey's conviction and sentence. None of Robey's three claims on appeal has merit. The district court (1) properly granted the ends-of-justice continuances Robey requested, (2) properly narrowed the charges in the indictment, and (3) properly found that ten uncharged stolen vehicles constituted relevant conduct at sentencing.

Regarding the continuances, the district court neither violated the Speedy Trial Act nor Robey's Sixth Amendment rights. Robey's own requests for continuance (plus other automatically excluded periods that are not contested on appeal) excluded all but 60 days, less than the 70 allowable under the Speedy Trial Act. On each continuance, the district court considered the relevant factors—especially those Robey presented in his requests—and appropriately exercised its discretion in concluding that the ends of justice were served by granting them. Moreover, the sequence of events leading to Robey's requests—two changes in defense counsel, a psychiatric evaluation, a plea agreement withdrawn—more than supported the district court's findings. Finally, Robey was not prejudiced by the delay he sought, and more to the point, this Court should find that Robey is judicially estopped from even challenging on appeal continuances he requested.

Second, the district court was correct to present a narrower indictment to the jury at trial. The Supreme Court in *United States v. Miller*, 471 U.S. 130 (1985), considered and rejected the exact argument Robey advances here. Dismissing counts from an indictment prior to trial is a "common practice," *id.* at 145, that the Supreme Court and this Court have repeatedly endorsed.

Finally, there was no error, clear or otherwise, in the district court's relevant conduct determinations at sentencing. The evidence showed that

Robey had engaged in a common scheme to re-tag stolen vehicles with altered VIN numbers and create counterfeit vehicle documentation to try to sell the vehicles. Specifically, the evidence found at Robey's home, especially the ribbon from his typewriter, linked him to fourteen vehicles that were stolen in less than a two-year period. That Robey was convicted on charges relating to only four of these vehicles does not so limit Robey's liability. Given the evidence, the district court correctly found that the other ten stolen vehicles constituted relevant conduct and properly included their value in its Sentencing Guidelines calculations.

ARGUMENT

I. The District Court Properly Granted Robey's Ten Continuances Consistent with the Speedy Trial Act and the Sixth Amendment

A. Standard of Review

This Court reviews "the district court's legal interpretation of the [Speedy Trial Act] de novo, and its decisions to exclude time for an abuse of discretion." *United States v. Ramirez*, 788 F.3d 732, 735 (7th Cir. 2015). Furthermore, this Court reviews an ends-of-justice decision, which is central to this appeal, for abuse of discretion. *United States v. Wasson,* 679 F.3d 938, 943 (7th Cir. 2012).

B. The Time that Lapsed Prior to Trial Did Not Exceed the Limits of the Speedy Trial Act Nor Run Afoul of the Sixth Amendment

Robey sought and was granted ten ends-of-justice continuances throughout the case. In total, when accounting for the automatically excludable (and uncontested) time when pre-trial motions were pending and when Robey had filed a plea agreement, Robey's continuances excluded all but 60 days that could even possibly count toward the Speedy Trial clock. These 60 days even include the 10 days attributable to the government's continuance—which the district court properly granted in light of new government counsel's need to prepare and the lead case agent's paternity leave (R. 133).

Thus, regardless of Robey's other arguments, this Court should affirm on this issue. The district court properly exercised its discretion in excluding delay caused by Robey's ends-of-justice continuances. *See Ramirez*, 788 F.3d at 735.

For reference, the table below shows this case's Speedy Trial Act timeline. The table notes the district court's (and government's) erroneous reliance on *Garrett*. As the table demonstrates, regardless of that misplaced reliance on *Garrett*, Robey's claim fails. Properly tallying all of the time periods in the case, only 50 days of Speedy Trial time elapsed, making Robey's claim meritless.

Dates	Description	Speedy Trial Clock
3/1/2012	Initial Appearance on Indictment (R. 30)	
3/1/2012 – 4/11/2012	**Not excludable** The government concedes that the district court erred in relying on *United States v. Garrett,* 45 F.3d 1135 (7th Cir. 1995), precedent that the government mistakenly supplied (R. 146), to automatically exclude March 1–27, 2012 from the Speedy Trial Act clock. (R. 147.) As Robey points out in his brief, *Bloate v. United States*, 559 U.S. 196 (2010), overruled *Garrett*'s holding that a period of pre-trial motion preparation is automatically excluded.	**42 days**
4/12/2012 – 2/24/2014	**Excludable** under § 3161(h)(7) resulting from orders granting eight of Robey's motions for continuance. (R. 35, 41, 48, 54, 62, 76, 89, 93)	0 days
2/25/2014 – 6/24/2014	**Excludable** under § 3161(h)(1)(G) resulting from the district court's consideration of Robey's plea agreement, which he later withdrew (R. 95, 115)	0 days
6/25/2014 – 7/2/2014	**Not excludable**	**8 days**
7/3/2014 – 12/8/2014	**Excludable** under § 3161(h)(7) resulting from orders granting two of Robey's motions for continuance (R. 118, 126)	0 days
12/9/2014 – 12/18/2014	**Excludable** under § 3161(h)(7) resulting from an order granting the government's motion for continuance (R. 133)	0 days
12/19/2014 – 2/10/2015	**Excludable** under §§ 3161(h)(1)(D) and (h)(4) resulting from pre-trial motions and Robey's hospitalization (R. 137, 144, 150–52, 154)	0 days
2/10/2015	Trial Commenced (R. 167)	
TOTAL		**50 days**

C. The Court Should Affirm Because the District Court Correctly Excluded Delay Caused by Robey's Continuances

The Speedy Trial Act generally requires that a criminal trial begin within 70 days of an indictment or a defendant's initial appearance, whichever is later. 18 U.S.C. § 3161(c). The Act provides exceptions, however, which allow certain periods of time to be "excluded" from the 70-day clock. *Id.* § 3161(h). Most relevant to this case is the so-called "ends-of-justice continuance," which "permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Zedner v. United States,* 547 U.S. 489, 498–99 (2006).

The Act contains a non-exhaustive list of factors for the district court to consider, such as the case's "complexity" and the time necessary for "effective preparation" and "continuity of counsel." 18 U.S.C. § 3161(h)(7)(B). The district court must explain on the record, "either orally or in writing," the factors that justify its conclusion that the "ends of justice" are served by continuing the trial date. *Id.* § 3161(h)(7)(A); *Zedner,* 547 U.S. at 507–08. The decision "need not be lengthy" but should provide this Court an adequate record to review the district court's consideration of the relevant factors. *United States v. O'Connor*, 656 F.3d 630, 643 (7th Cir. 2011).

In determining whether the district court abused its discretion in making this determination, this Court takes into account not only the district court's order on a particular motion to continue but also the record as whole, including the "sequence of events leading up to the continuance" and any "later explanation" by the district court for a series of continuances. *United Wasson,* 679 F.3d 946 (internal quotations omitted). Such a "sequence of events" includes the parties' reasons for seeking a continuance. *See, e.g.*, *id.* at 944 (citing defense counsel's motion, which noted the case's complexity, the extensiveness of discovery, and the death of a co-defendant); *United States v. Napadow*, 596 F.3d 398, 405 (7th Cir. 2010) (citing defense counsel's unavailability).

Here, the district court's decisions to exclude delay from each of Robey's ten continuances are both sufficient on their face and supported by the sequence of events leading up to them. Each of the district court's orders articulated well-recognized reasons for ends-of-justice continuances and each was tailored to the specific circumstances that Robey gave for seeking the continuances. For instance, Robey's first two motions state that "discovery in this matter is still ongoing." (R. 31, 40.) Having no reason to doubt defense counsel's statement, particularly given the early stages of the case, the district court granted these motions and stated that "the defendant reasonably requires additional time to evaluate discovery." (R. 35, 41.)

Similarly, Robey's fifth motion stated that Robey's new counsel was "recently appointed." (R. 61.) That was indeed true. New counsel had been appointed, at Robey's request, just two weeks earlier. (R. 59.) The district court order granted this motion and stated, "[T]he defendant, having been appointed a new CJA lawyer at his request, reasonably requires additional time to evaluate the evidence with his new attorney." (R. 62.)

Likewise, Robey's sixth and seventh motions noted that trial preparation was delayed due to Robey's psychological evaluation (itself a period of excludable delay, under 18 U.S.C. § 3161(h)(1)(A)). (R. 74, 87.) Granting these two motions, and the one after them, the district court expressly took account of the delay in pretrial preparation caused by the four-month psychological evaluation. (R. 76, 89, 93.) For ease of reference, the Supplemental Appendix to this brief contains a side-by-side comparison of the relevant portions of all of Robey's motions to the district court's orders granting them.

Indeed, each of the district court's ten orders shows that the court considered appropriate ends-of-justice factors, such as continuity of counsel and time needed by counsel to effectively prepare. (The same can be said of the district court's decision to grant the government's one motion to continue.) Moreover, the orders demonstrate that, contrary to Robey's claim on appeal, the district court considered carefully each of Robey's ten motions

and the specific circumstances giving rise to them. Because the orders are sufficient on their face, this Court should affirm.

The "sequence of events" leading to the continuances—as referenced in Robey's motions and the court's orders—only bolsters the district court's ends-of-justice decisions. The indictment alleged, among other things, that over a several-year period, Robey trafficked in more than a dozen stolen cars with altered vehicle identification numbers or counterfeit vehicle titles. As Robey's second counsel later noted during one of Robey's change-of-counsel hearings, a trial in this case would be "very, very complex." (Tr. Third Change of Counsel Hrg. 47:6, Aug. 6, 2014.) Thus, the first two continuances the court granted to allow for "additional time to evaluate discovery" hardly seem unjustified or unreasonable. Neither do the court's next two continuances, which followed Robey's motions that claimed that the parties were negotiating a plea agreement. These continuances occurred during and following the Court's consideration and denial of Robey's suppression and *Franks* motion.

The district court granted the remaining six continuances amid two changes in defense counsel, a four-month psychiatric examination that lasted four months, and another four months during which Robey entered and withdrew from a plea agreement. The district court was well aware of—and

in fact included in its orders—how this sequence of events supported the ends-of-justice continuances that Robey requested.

Indeed, Robey himself was well aware of the impact of this sequence of events too, particularly his decisions to change counsel:

> THE COURT: But the bottom line is you don't think that any potential delay in your case changes your mind that you want a new lawyer?
>
> THE DEFENDANT: No.
>
> THE COURT: And you recognize it may be, in fact, more delayed by getting a new lawyer?
>
> THE DEFENDANT: Yes.

(Tr. Ch. of Counsel Hrg. 8:23–9:4, Feb. 6, 2013; *see also* Tr. Ch. of Counsel Hrg. 49:4–9, Aug. 6, 2014.) (THE COURT: "I'm quite certain Mr. Robey is aware how [another change of counsel] is going to impact preparation for trial.").

That Robey claims he disagreed with the continuances that he or his counsel sought is no reason to overturn the district court's well-considered decisions. The decision to seek a continuance is one of trial tactics and thus is left to counsel's discretion. *United States v. Hills*, 618 F.3d 619, 628 (7th Cir. 2010).

Moreover, contrary to what Robey now claims on appeal, the record shows little disagreement on his part with continuing the trial date. Robey's

numerous letters to the court and statements during his change-of-counsel hearings focus on disagreements with counsel on trial strategy or on other issues such as Robey's health. (R. 57, 64, 66, 67, 69, 78, 81, 83, 88.) Indeed, much of the delay Robey now impugns resulted from his requests for new counsel and the need for two new lawyers to get up to speed on a complex case. (*See* Tr. Third Change-of-Counsel Hrg. 47:5–15 (August 6, 2014) (Robey's second lawyer stated both she and Robey's first lawyer "have done a great deal of work to get ready [for trial]," and that to appoint yet a third lawyer would be inefficient).)

As this Court has observed, the district court is in the best position "to assess the merits of [the defendant's] counsel's representations and to determine whether the ends of justice warranted a delay in the trial date." *United States v. Adams*, 625 F.3d 371, 380–81 (7th Cir. 2010). Nothing in the record suggests the district court abused its discretion.

D. Robey is Judicially Estopped from Challenging the District Court's Granting His Motions for Continuance

Not only does Robey's Speedy Trial argument fail on the merits, but he should be judicially estopped from making it at all because it is 180-degrees from the position he took in each of his ten motions for continuance. Judicial estoppel is an equitable doctrine that "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a

contradictory argument to prevail in another phase." *Zedner v. United States*, 547 U.S. at 504 (internal quotation omitted). That is precisely what Robey seeks to do here.

Anticipating this argument, Robey contends that judicial estoppel cannot apply to Speedy Trial Act issues because the Act "exists not only for the defendant's benefit but also for the public's [citing *Zedner*, 547 U.S. at 501]." (Robey Br. 21.) That is wrong.

This Court rejected that argument in *Wasson*:

> Although Wasson claims in his reply brief that *Zedner* precludes the government from making an argument based on judicial estoppel, that is not so. *Zedner* simply concluded that judicial estoppel did not apply when, among other reasons, the district court, not the defendant, had proposed that the defendant prospectively waive his rights under the Speedy Trial Act. *Zedner,* 547 U.S. at 505, 126 S.Ct. 1976. Indeed, the court in *Zedner* noted that "[t]his would be a different case if petitioner had succeeded in persuading the District Court . . . that the factual predicate for a statutorily authorized exclusion of delay could be established." *Id.*

679 F.3d at 948. Robey did not prospectively waive his Speedy Trial rights, like the defendant did in *Zedner*. Rather, as in *Wasson*, Robey succeeded in persuading the district court that the ends-of-justice continuances he sought were appropriate.

Courts consider three factors in determining whether a litigant should be judicially estopped: "(i) whether the party's positions in the two litigations are clearly inconsistent; (ii) whether the party successfully persuaded a court

to accept its earlier position; and (iii) whether the party would derive an unfair advantage if not judicially estopped." *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). Each factor is met here.

Robey's counsel sought additional time for a variety of strategic reasons—e.g., reviewing discovery, negotiating a plea agreement, getting up to speed after being newly appointed—and each time succeeded in persuading the court to accept those reasons. The district court relied on Robey's counsel's representations and the sequence of events in the case (e.g., Robey's psychiatric exam, two changes of counsel) to make its ends-of-justice determinations. Moreover, despite his claim on appeal that he disagreed with his continuances, he was warned at each of his change-of-counsel hearings about the delay that would result from new counsel having to get up to speed, develop rapport, and establish a trial strategy in a complex case. And now, despite having repeatedly delayed his own trial date for reasons advantageous to him, he seeks to overturn his conviction based on the very delay he caused. Such a result would indeed be an "unfair advantage." *See United States v. Pakala,* 568 F.3d 47, 60 (1st Cir. 2009).

In *Wasson*, this Court declined to decide whether the appellant was judicially estopped because the district court's ends-of-justice continuances were otherwise appropriate. The same can be said here. Nonetheless, to

make clear to litigants going forward, the government urges the Court to hold that those who succeed in persuading a district court to grant an ends-of-justice continuance are judicially estopped from challenging such continuances on appeal.

E. Robey's Continuances Did Not Prejudice Him

Robey also cannot show that the continuances prejudiced him, which he must do to prevail on appeal. *Ramirez*, 788 F.3d at 735. If anything, as noted above, Robey's continuances worked to his benefit. *See Wasson*, 679 F.3d at 949.

They provided sufficient time for three different lawyers to review discovery, negotiate a plea agreement, and prepare Robey's defense—which, the record shows, was made all the more difficult by Robey's consistent disagreements with his counsel on strategy. (*See, e.g.*, Tr. Change-of-Counsel Hrg. 46:3–47:15 (August 6, 2014) (Robey's second lawyer stated she had "in excess of 25 meetings with Mr. Robey," but she found herself with a client "complaining of essentially the same allegations" that he complained about with his first lawyer).)

Robey's claim that the continuances caused him to lose contact with two witnesses is unavailing. First, the veracity of this claim is suspect. Robey never issued trial subpoenas to these witnesses and did not raise this issue with the district court until just two weeks before trial in his second

motion to dismiss. (R. 154.) Second, the testimony of these witnesses would have been largely irrelevant. Robey claims that these witnesses would testify that Robey did not "own" computers that were found in his home during the search warrant because they had been moved there from his brother Larry's office. (Robey Br. 33; R. 154 ¶ 2.) As the district court found, however, whether Robey *owned* the computers is not relevant to the more salient point that he *possessed* and *used* them. (R. 161 at 6–7.) Indeed, Robey's brother Larry died in 2008, and the government's evidence showed that the computer had been accessed and used to create counterfeit vehicle documents long after 2008, even up to just days before the search of Robey's home. (*Id.*; *see also* Tr. Trial Vol. II 227:14–232:14 (Feb. 11, 2015).) This evidence, coupled with the video showing Robey giving counterfeit documents created on the computer to an undercover agent, among many other things, diminished any possible value of the two supposedly missing witnesses.

Additionally, Robey's claim on appeal that he was prejudiced by the dismissal of counts from the indictment before trial is equally baseless. Robey argues that had he known about a narrower indictment earlier, he would have prepared for trial differently by focusing his defense on the smaller number of counts. (Robey Br. 31–33.) Such hindsight is not only speculative, it does not make sense. Regardless of the number of counts submitted to the jury, the *evidence* that Robey engaged in modern-day chop

shop scheme related to all of the vehicles charged in the original indictment, whether counts were ultimately dismissed or not. The government's Motion in Limine under Federal Rule of Evidence 404(b), which the district court granted, made this clear. (R. 137, 166.) From indictment through trial, defense counsel needed to review discovery and be prepared on the evidence relating to each of the stolen vehicles that were part of Robey's common scheme to re-tag cars with altered VINs, create false vehicle documentation, and sell them.

Accordingly, Robey cannot point to any prejudice from the continuances he sought.

F. Robey's Sixth Amendment Claim is Meritless

Related to but independent of his Speedy Trial Act rights, Robey also had a constitutional right to a speedy trial. *See O'Connor*, 656 F.3d at 643. Where, as here, more than one year passed between arraignment and trial, this Court examines the following three factors to determine if there was a Sixth Amendment violation: (1) whether the defendant asserted his right to a speedy trial, (2) whether the government or the defendant is more responsible for the delay, and (3) whether the defendant suffered prejudice as a result of the delay. *Id.*

The delays here did not violate the Sixth Amendment. While Robey timely asserted his rights (R. 154), he was primarily responsible for the years

of delay that occurred. He sought ten continuances. He changed lawyers twice. He entered and withdrew from a plea agreement. He underwent a psychological examination. He filed a motion to suppress. And, as his letters to the district court and the change-of-counsel hearings demonstrate, he was uncooperative with his appointed counsel. *See O'Connor*, 656 F.3d at 643. Furthermore, his attempt to blame the continuances on the government for filing a 25-count indictment is groundless, and his claim to prejudice is very weak. Accordingly, this Court should affirm.

II. The District Court Properly Narrowed the Indictment

A. Standard of Review

Before trial, the government moved to dismiss counts from the indictment. Because Robey did not object (ostensibly because this motion reduced the number of the allegations against him) he forfeited this issue. Accordingly, this Court reviews the district court's dismissal of the counts only for plain error. *See United States v. Perez*, 673 F.3d 667, 669 (7th Cir. 2012). Robey must show: "(1) an error or defect (2) that is clear or obvious (3) affecting the defendant's substantial rights (4) and seriously impugning the fairness, integrity, or public reputation of judicial proceedings." *Id.*

B. Supreme Court Precedent Confirms There Was No Error

Robey cannot show any error, let alone a plain one, because the dismissal of counts only narrowed the indictment, something the Supreme Court and this Court have repeatedly approved.

The Supreme Court in *United States v. Miller*, 471 U.S. 130 (1985), considered and rejected the same argument Robey makes here. In *Miller*, the Court explained the fundamental difference between *adding* allegations to broaden an indictment, which requires the grand jury, and *removing* allegations to narrow an indictment, which does not. The indictment in *Miller* charged the defendant with an insurance fraud relating to a burglary at the defendant's business. It alleged that the defendant lied to the insurer about the value of his loss and, in fact, consented to the burglary. *Id.* at 131–32. At trial, the government's evidence focused only on the lie to the insurer, which itself was sufficient to sustain the fraud charge. *Id.* at 132–33. The defendant, noting the lack of proof on the consent-to-the-burglary allegation, moved to dismiss the indictment entirely. He argued that the constructive deletion of that allegation violated the Fifth Amendment because the grand jury may never have indicted the defendant on the loss issue alone. *Id.* at 134; *compare* Robey Br. at 36 ("The prosecutor and the court, in making this change without returning to the grand jury . . . . 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.").

The Supreme Court unanimously rejected the defendant's (and Robey's) argument. Explaining the difference between adding and removing allegations, the Court observed the straightforward principle that adding allegations to an indictment, often referred to as an "amendment," generally requires the imprimatur of the grand jury. *Miller*, 471 U.S. at 143; *see also United States v. Graffia*, 120 F.3d 706, 710–11 (7th Cir. 1997). The text of the Fifth Amendment shows why: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." U.S. CONST. amend V; *see also Stirone v. United States*, 361 U.S. 212 (1960).

Removing allegations from an indictment is different. *Miller* makes clear that a person can be indicted on two charges and tried on only one of them. *Miller*, 471 U.S. at 145. That is because the Fifth Amendment had been satisfied—all crimes to which a person might have to answer were presented to the grand jury. *See Miller*, 471 U.S. at 140. As this Court has explained, "[n]arrowing the indictment so that the trial jury deliberates on fewer offenses than the grand jury charged does not constitute amendment." *United States v. Soskin,* 100 F.3d 1377, 1380 (7th Cir. 1996).

The Court in *Miller* observed that, with one exception, its precedent faithfully adhered to this dichotomy between broadening and narrowing an indictment and the Fifth Amendment implications, or lack thereof, of each. The one exception (from 1887) had adopted the same reasoning that Robey urges this Court to apply here: "[T]he striking out of parts of an indictment invalidates the whole of the indictment, for a court cannot speculate as to whether the grand jury had meant for any remaining offense to stand independently, even if that remaining offense clearly was included in the original text." *Miller*, 471 U.S. at 141 (discussing *Ex Parte Bain*, 121 U.S. 1 (1887)). Recognizing that such reasoning had never been followed since *Bain*, the Court expressly overruled it. *Id.* at 144. In so doing, the Court observed approvingly the "common practice of withdrawing from the jury's consideration one count of an indictment while submitting others for its verdict." *Id.* at 145 (quoting *Ballard*, 322 U.S. 91 (Stone, C.J., dissenting)).

This Court has consistently applied *Miller* and rejected the type of argument Robey submits on appeal. *See, e.g.*, *Perez*, 673 F.3d at 669; *Graffia*, 120 F.3d at 710–11; *United States v. Kuna*, 760 F.2d 813, 817–18 (7th Cir. 1985). The Court should do the same here and affirm the district court's adherence to the "common practice" of dismissing counts and allegations from an indictment.

C. The Dismissal of Counts Was Not Plain Error

Likewise, Robey has failed to articulate how the narrowing of the indictment affected his substantial rights or "seriously impugn[ed] the fairness, integrity, or public reputation of judicial proceedings." *Perez*, 673 F.3d at 670. The reason Robey posits—that he would have requested fewer continuances—is speculative and largely belied by the record. As discussed above, Robey's plea negotiations, psychiatric evaluation, and two changes in appointed counsel were the primary drivers for his continuances. To the contrary, if anything, the dismissal helped Robey in keeping from the jury's eyes the other ten stolen vehicles with altered VIN numbers and counterfeit vehicle titles.

This Court should affirm on this issue because there was no error, let alone plain error.

III. The District Court Correctly Concluded that the Ten Uncharged Vehicles Referenced on Items Found in Robey's Home Were Relevant Conduct

A. Standard of Review

Robey's challenge to his sentence focuses on factual determinations that bore on the district court's Sentencing Guidelines calculations, namely what constituted "relevant conduct." Such determinations are made by the district court under a preponderance-of-the-evidence standard, *United States v. Pira*, 535 F.3d 724, 728 (7th Cir. 2008), and are reviewed on appeal only for

clear error, *United States v. Baines*, 777 F.3d 959, 963 (7th Cir. 2015). This Court "will not second guess the district court unless, after reviewing the record as a whole, we are left with a definite and firm conviction that a mistake has been made." *Baines*, 777 F.3d at 963. (internal quotation omitted).

B. The District Court's Inclusion of the Contested Vehicles As Relevant Conduct Was Appropriate

The record in this case definitely and firmly confirms that no mistake was made. The district court heard evidence that, like the offenses for which he was convicted, Robey was involved in possessing 10 other stolen vehicles, altering their VINs, and selling them. Indeed, the most important of this evidence came from the same place as the bulk of the evidence at trial – Robey's home, and the computers, documents, and typewriter ribbon that were found in it. The district court was correct to conclude that, even though not part of the jury's verdict, these 10 other stolen vehicles with altered VINs constituted "relevant conduct" and thus increased Robey's offense level.

In theft cases like this one, a defendant's offense level is based in part on the aggregate "loss" that the defendant's conduct caused. U.S.S.G. § 2B1.1(b)(1) (2014). That includes the loss caused by the offenses for which the defendant was convicted as well as other offenses that were part of the "same course of conduct" or "common scheme or plan" as the offenses of

conviction. *Id.* § 1B1.3(a)(2). A "common scheme or plan" requires that two or more offenses be "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." *Id.* § 1B1.3 cmt. n. 9(A).

Here, the evidence at trial and at sentencing showed multiple commonalities among the charged and uncharged stolen vehicles. First, four of the uncharged vehicles, including the first one stolen, were taken off the same car lot as two of the charged vehicles—Penske Chevrolet in Indianapolis, Indiana. (PSR ¶ 21.) Second, the evidence showed the purpose in stealing and altering the VINs of these vehicles was to sell them. At trial, the jury saw several counterfeit sales contracts, vehicle titles, and temporary license plates that Robey would give to buyers, including an undercover agent who posed as a buyer. (*See, e.g.*, Tr. Trial 52:11–53:7; 54:10–55:17; 63:3–66:8; 76:21–78:19; 84:1–87:5.) At sentencing, the district court heard that agents found at Robey's home the same sort of counterfeit sales documentation for several of the uncharged vehicles. (*See, e.g.*, S. 17:3–18:25.)

Perhaps most critically, the evidence of *modus operandi* was common among all of the stolen vehicles, charged or uncharged. At trial, the jury heard about not only the counterfeit documents but also how Robey made them. A search of Robey's home uncovered computers, printers, a scanner,

photo paper, templates for vehicle titles and temporary license plates, carbon-paper sales contracts, and a typewriter. (*See, e.g.*, Tr. Trial 166:9–171:12; 187:3–22.) The jury heard that the computers contained images of VIN numbers, including counterfeit VIN numbers that were found on stickers affixed to the stolen vehicles, along with Adobe Photoshop software, which is used to manipulate and edit image files. (*See, e.g.*, *id.* at 210:7–212:4; 214:16–217:9.) The jury also saw counterfeit sales contracts that appeared to be typed on with a typewriter, plus a stack of blank sales contracts. (*Id.* at 305:5–306:23.)

Finally, the jury saw yards and yards of unspooled ribbon that agents had removed from the typewriter found in Robey's house. The agents examined the ribbon and discovered that they could read what had been typed. With each typewriter keystroke, some of the ribbon's ink was transferred to the paper, leaving a blank space in the shape of the letter or number typed. (*Id.* at 306:24–308:19.) The agent testified that he had reviewed the entire typewriter ribbon. (*Id.* at 345:21–24.) In so doing, he found that it contained information for each of the charged vehicles—such as make, model, year, color, and mileage—as well as the counterfeit VIN number that was ultimately found on a sticker affixed to the vehicle. (*Id.* at 346:2–347:12.) Comparing what he saw on the ribbon to what was typed on

the counterfeit sales contracts, the agent again testified that he found a match. (*Id.* at 309:17–310:24.)

At sentencing, the government proffered evidence that Robey's home contained the same types of *modus operandi* evidence for each of the ten uncharged vehicles. In particular, the typewriter ribbon contained information relating to each of the ten vehicles. (S. 17:6–8.) In fact, the ribbon not only contained the make, model, and year of the vehicles, but also the 17-digit, counterfeit VIN number that was found affixed to those of the uncharged vehicles that were able to be recovered by law enforcement. (*Id.* at 17:8–12.) Additionally, Robey's house contained other evidence connected to the uncharged vehicles, such as vehicle registration bar code that, when scanned, showed one of the ten vehicles, (*id.* at 18:14–18), and a document containing the true (non-counterfeit) VIN for another of the ten vehicles, (*id.* at 18:23–25). Ultimately, the district court "cut to the chase" and confirmed that "all the 14 vehicles [charged and uncharged]" were "identified by reviewing the documents and materials and the typewriter ribbon in Mr. Robey's possession pursuant to the search warrant." (*Id.* at 19:5–9.) When asked if he wanted to follow up, Robey's counsel declined. (Thus, Robey forfeited any attack on the sufficiency of an attorney proffer, versus live agent testimony.)

These commonalities established that the uncharged vehicles constituted relevant conduct. *See United States v. Petty*, 132 F.3d 373, 381 (7th Cir. 1997). The district court's conclusion, clearly based on these considerations, was correct.

Robey's quibble with the district court's stated findings is baseless. The court described the Probation's view that the uncharged vehicles were relevant conduct: "[H]is electronic equipment, his computer printer and other documents that were seized" showed a "pattern of concoction of counterfeit documents on a variety of vehicles that were stolen and retagged and then sold." (S. 15:7–12.) Then, after hearing the government's proffer, which drew on the same evidence the district court heard at trial, the district court found that the information relating to the uncharged vehicles "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." (*Id.* at 19:17–20:1.) From this evidence, the court concluded that such evidence "describe[d] the same sort of pattern that was at issue before the jury in the trial, and reveal[ed] a pattern of relevant conduct that far exceeded in its details the four cars that were stolen that were before the jury." (*Id.* at 20:2–7.) Because "[t]his is not a case where the record is devoid of evidentiary support for the relevant conduct

determination" nor a case with "no findings at all," Robey can identify no error. *United States v. Burnett*, 805 F.3d 787, 793–94 (7th Cir. 2015).

Robey also focuses on what he calls a lack of "temporal proximity" between the "theft dates" of the charged and uncharged offenses. This claim is misplaced for at least three reasons. First, according to the PSR, the latest uncharged vehicle and earliest charged vehicle were stolen only four months apart (12/16/10 – 4/17/11). (PSR ¶ 21.) Such a span is hardly an obvious error. *See, e.g.*, *United States v. Watts*, 535 F.3d 650, 658 (7th Cir. 2008) (affirming inclusion of certain stolen checks in loss analysis "because they were dated only a few months after [the defendant] was supplying nearly identical stolen Treasury checks to the charged conspiracy"). Second, "temporal proximity" is somewhat inapposite to Robey's circumstances. That factor tends to be more relevant when considering whether a prior offense qualifies as the "same course of conduct," as opposed to a "common scheme or plan" as is the case here. *Compare* U.S.S.G. 1B1.3(a)(2) cmt. n. 9(A) *with* cmt. n. 9(B).

Finally, the numerous commonalities of the charged and uncharged offenses, discussed above, "more than suffice" to make up for any "gap" in conduct and establish that the charged and uncharged offense are part of a common scheme. *See Baines*, 777 F.3d at 964. So does the "regularity" of Robey's conduct. Robey stole and altered the VINs on 14 cars in 21 months.

(PSR ¶ 21.) The "theft dates" are not bunched in groups but rather are spread relatively evenly throughout the 21-month period. Such a steady rate of the same type of criminal behavior, often from the same victims, and using the same tools to perpetrate the criminal scheme (which is, of course, not *theft* at all but rather *selling* cars with altered VINs) is part of a common scheme or plan and constitutes relevant conduct under the Sentencing Guidelines.

Accordingly, this Court should affirm the district court's relevant conduct findings and Robey's sentence.

CONCLUSION

For the foregoing reasons, this Court should affirm Robey's conviction and sentence.

Respectfully submitted,

JOSH J. MINKLER
United States Attorney

By: s/ Nicholas J. Linder
Nicholas J. Linder
Assistant United States Attorney

STATEMENT CONCERNING ORAL ARGUMENT

The plaintiff-appellee believes that oral argument is necessary or would be useful in this appeal.

s/ Nicholas J. Linder
Nicholas J. Linder
Assistant United States Attorney

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

The foregoing BRIEF OF PLAINTIFF-APPELLEE complies with the type volume limitations required under Fed. R. App. P. 32(a)(7)(B)(i) in that there are not more than 14,000 words or 1,300 lines of text using monospaced type in the brief, that there are 9,110 words typed in Microsoft Word word-processing this 3rd day of February, 2016.

s/ Nicholas J. Linder
Nicholas J. Linder
Assistant United States Attorney

CIRCUIT RULE 31(e)(1) CERTIFICATION

Undersigned counsel hereby certifies that the material contained in the supplemental appendix is not available electronically.

s/ Nicholas J. Linder
Nicholas J. Linder
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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2016 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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SUPPLEMENTAL APPENDIX

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Robey's Ends-of-Justice Continuances 1-3

SUPPLEMENTAL APPENDIX
Robey's Ends-of-Justice Continuances

	Robey's Motion	District Court's Order	Time Excluded
1	Discovery in this matter is still ongoing.	[T]he defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful.	April 4, 2012 – July 9, 2012
2	Discovery in this matter is still ongoing.	[T]he defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful.	June 12, 2012 – September 24, 2012
3	The parties are negotiating an agreement which would resolve this case without the necessity of a trial.	[T]he defendant reasonably requires additional time to evaluate discovery and explore the possibility of a plea agreement. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful.	August 7, 2012 – December 3, 2012
4	The parties are negotiating an agreement which would resolve this case without the necessity of a trial.	[T]he defendant reasonably requires additional time to undergo a psychiatric evaluation, evaluate discovery, and explore the possibility of a plea agreement. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful.	November 28, 2012 – March 4, 2013

	Robey's Motion	District Court's Order	Time Excluded
5	That Counsel, Belle Choate, was recently appointed to represent Mr. Robey and traveled to Clay County Jail Facility to meet with him. That Counsel needs and requests additional time in order to adequately review the discovery materials, meet with Mr. Robey, and assess his defenses or other course of action.	[T]he defendant, having been appointed a new CJA lawyer at his request, reasonably requires additional time to evaluate the evidence with his new attorney. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his newly appointed replacement counsel.	March 1, 2013 – June 17, 2013
6	That a psychological evaluation which includes testing is scheduled for May 17, 2013. That the results of this evaluation will determine how Mr. Robey's defense will proceed, and Counsel does not believe that there will be sufficient time before the scheduled trial date to make all the necessary determination.	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. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his newly appointed replacement counsel.	May 1, 2013 – October 7, 2013
7	[I]t is Mr. Robey's belief, however, that trial preparation has been delayed in some respects to allow him the opportunity to have this evaluation and that it is further his belief that additional time is needed in order to adequately prepare his defense. That present Counsel is Mr. Robey's second appointed counsel, and she concurs with Mr. Robey's belief that additional time beyond the October date is needed.	[R]eplacement 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. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his replacement counsel.	September 9, 2013 – January 13, 2014

	Robey's Motion	District Court's Order	Time Excluded
8	Counsel for Mr. Robey is requesting a brief continuance of this trial date to allowed her to complete the preparation process and to accommodate another matter that is scheduled at approximately the same time.	[R]eplacement 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. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial with his replacement counsel.	November 21, 2013 – March 31, 2014
	Plea Agreement filed and withdrawn (automatically excludable under 18 U.S.C. § 3161(h)(1)(G)		February 25, 2014 – June 24, 2014
9	Counsel for Mr. Robey is requesting a brief continuance of this trial date to allowed her to complete the preparation process and to accommodate another matter that is scheduled at approximately the same time.	[T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial.	July 3, 2014 – September 29, 2013
10	On or about August 8, 2014, counsel, Larry R. Champion, was appointed to represent the Defendant, George E. Robey in reference to the above entitled matter. . . . Counsel has not yet had an opportunity to consult with the Defendant, and review the file, or obtain all discovery previously provided to former counsels for the defendant. Counsel believes it will be impossible for him to prepare for trial of this matter and adequately or ethically represent the defendant in a jury trial on September 29, 2014.	[T]he defendant reasonably requires more time to evaluate discovery and explore the possibility of a plea agreement. . . . [T]he failure to grant the continuance requested would unreasonably deny the defendant reasonable time to effectively prepare for trial, if plea negotiations prove unsuccessful.	August 20, 2014 – December 8, 2014