No. 12-635

In the Supreme Court of the United States

MARIO S. LEVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court made sufficient and timely findings to support its order granting an "ends of justice" continuance under the Speedy Trial Act, 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported, but is available at 488 Fed. Appx. 481. The relevant orders of the district court (Pet. App. 15a-20a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2012. A petition for rehearing was denied on August 20, 2012 (Pet. App. 59a). The petition for a writ of certiorari was filed on November 19, 2012 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of securities fraud, in viola-

tion of 15 U.S.C. 78j(b) and 78ff; and two counts of wire fraud, in violation of 18 U.S.C. 1343. The district court sentenced petitioner to concurrent terms of 60 months of imprisonment on each count of conviction, to be followed by three concurrent two-year terms of supervised release. The court also ordered petitioner to pay $1,894,261.80 in restitution. 1:08-cr-00101 Docket entry No. (Docket entry No.) 116 (S.D.N.Y. Mar. 2, 2011). The court of appeals affirmed the securities-fraud conviction and one wire-fraud conviction, but it vacated the other wire-fraud conviction and remanded for further proceedings. Pet. App. 1a-10a.

1. Petitioner was the senior executive vice president and treasurer of a Puerto Rico-based company called Doral Financial Corporation (Doral). His convictions stem from a wide-ranging scheme to conceal from investors, prospective investors, and market analysts the risks that rising interest rates posed to Doral's assets, thereby propping up the value of the company's stock. Gov't C.A. Br. 2-4.

Doral's primary business was originating mortgage loans in Puerto Rico. Doral assembled the mortgages into pools, which it then sold to banks. Doral retained a portion of the interest payments on the mortgages, called an interest-only strip (IO). Under many of the contracts with the purchaser banks, Doral's portion of the mortgage interest payments varied inversely with the London Interbank Offered Rate (LIBOR)—the interest rate at which banks lend to one another. Accordingly, as the LIBOR rose, the purchaser banks' share of the interest payments grew larger and Doral's portion grew smaller. Gov't C.A. Br. 4-5.

On January 18, 2005, as interest rates rose and were widely expected to continue rising, Doral announced a

substantial devaluation of its IO portfolio. The market reacted immediately. Doral's stock lost approximately ten percent of its value. In response to concerns that further increases in interest rates would precipitate additional losses in Doral's stock price, petitioner misled investors and financial analysts concerning the reasons for the devaluation. Those misrepresentations generally fell into two categories. Gov't C.A. Br. 11.

First, petitioner falsely told various analysts and investors that all of Doral's IO contracts included "caps" on the amount of interest payments that would be passed on to purchaser banks. He further misrepresented that interest rates were approaching these caps and, therefore, that Doral's IO portfolio would not suffer further devaluations from additional interest-rate increases. Those false representations induced analysts to issue favorable reports on Doral stock and persuaded investors to purchase additional stock. Gov't C.A. Br. 13-16.

Second, petitioner falsely stated that he had obtained two "independent" valuations of Doral's IOs. The supposedly independent valuations were not independent at all, but simply accepted figures and assumptions provided by petitioner, without verification. Doral made that representation in its annual report in 2005, and petitioner repeated the misrepresentation on several occasions thereafter. On March 18, 2005, petitioner falsely announced during a conference call with analysts and investors that two independent firms had valued Doral's IOs, one of which was a large New York firm and one of which was based in Puerto Rico, but that the firms' identities could not be disclosed because of confidentiality agreements. Gov't C.A. Br. 16-23.

Investors' fears about Doral ultimately came to pass. On April 19, 2005, Doral issued a press release announcing a decrease in the value of its floating-rate IOs of between $400 and $600 million as of December 31, 2004. Throughout early 2005, as concerns about Doral's IO portfolio grew, Doral's stock price fell dramatically. Shortly before its January 18, 2005 press release announcing the first devaluation, Doral's stock traded at approximately $49 per share. After the announcement, its stock price fell to approximately $44 per share. By March 9, 2005, the stock was trading at approximately $37 per share, and, by mid-March, it had fallen to approximately $21 per share. Gov't C.A. Br. 23-24.

2. On March 4, 2008, a federal grand jury in the Southern District of New York returned an indictment charging petitioner with one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and three counts of wire fraud, in violation of 18 U.S.C. 1343. Docket entry No. 1. On February 18, 2010, the grand jury returned a superseding indictment adding a fourth count of wire fraud. *Id*. No. 58.

a. After a series of continuances and adjournments not at issue here, trial was set for September 14, 2009.[1]

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[1] During petitioner's first appearance before the district court in March 2008, he indicated that he intended to seek a trial date some time in 2009. Gov't C.A. Br. 85. At a pretrial conference in May 2008, the government proposed a trial date in early 2009, but petitioner opposed the request, explaining that he needed additional time to review discovery materials. *Ibid.* Approximately five months later, during a pretrial conference in October 2008, the district court set a trial date of March 2, 2009, over petitioner's objection that he needed additional time. *Ibid.* Shortly thereafter, the trial date was adjourned to September 14, 2009, based on petitioner's claim that he would otherwise be unable to prepare for trial "in a constitutionally effective manner." Docket entry No. 50, at 1.

In May 2009, the government informed petitioner's counsel that it would be producing approximately 400,000 pages of additional discovery materials. Gov't C.A. Br. 85. On May 27, 2009, defense counsel submitted a letter to the district court requesting an unopposed adjournment until March 2010. Pet. App. 57a-58a. The letter stated that "[t]he basis for the adjournment is the expected production of additional discovery by the government" and requested an adjournment until March 2010 "[i]n order to allow sufficient time for this discovery and to accommodate other scheduling commitments." *Id.* at 57a. The letter further stated:

> The adjournment is needed in order for the defense to conduct a meaningful review of the estimated 400,000 pages of additional discovery. Towards this end, the parties have already started working together to have the additional data delivered and processed as quickly as possible. [Petitioner] agrees that the period of delay between September 14, 2009 and March 2010, is excludable time under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*

Id. at 58a.

Under the Speedy Trial Act, a defendant's trial must generally begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). As relevant here, however, Section 3161(h)(7)(A) of the Act excludes any period of delay resulting from a continuance granted by the district court "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and if the court "sets forth, in the record of the case, either orally

or in writing, its reasons for [that] finding."[2] In determining whether to grant an ends-of-justice continuance, a district court should consider several factors, including whether counsel for the defendant or the government need additional time to effectively prepare for the case. 18 U.S.C. 3161(h)(7)(B)(iv) (Supp. V 2011).

On May 29, 2009, the district court granted the requested adjournment by a handwritten endorsement on petitioner's letter, which stated: "Adjournment of 9/13 trial date granted. There will be a conference after 8/1 to schedule a trial date." Pet. App. 57a. The court conducted a telephone conference on August 18, 2009. *Id.* at 54a-56a. After asking whether it was "possible to try [the case] this fall" and being told by petitioner's counsel that he still had 250,000 pages of documents to review, the court set a new trial date of March 22, 2010. *Id.* at 55a-56a.

In addition to producing the anticipated documents, the government also notified petitioner that it had received from the Securities and Exchange Commission documents produced by two banks in connection with regulatory investigations of those banks that focused in part on how they had accounted for loans received from Doral. Docket entry No. 75-31, at 6-7. The government agreed to produce the bank records in response to a request from petitioner. *Id.* at 7. In January 2010, petitioner requested a further continuance, stating that it needed additional time to review the records. *Id.* at 1 & n.1. The government opposed the request on the

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[2] Section 3161(h)(7)(A) was initially codified at 18 U.S.C. 3161(h)(8)(A) but was renumbered in 2008. See Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13(3), 122 Stat. 4294. For clarity, this brief cites the current version of the statute, 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011).

grounds that the records were not relevant to the government's case. *Id.* at 7-10. The district court denied the continuance request. Pet. App. 52a-53a.

b. On March 11, 2010, petitioner filed a motion to dismiss the indictment under the Speedy Trial Act, contending that the adjournment of the trial date from September 14, 2009 to March 22, 2010, was not excludable time under the Act because the court had failed to make the required finding that the ends of justice outweighed the interests of the public and the defendant in a speedy trial. Docket entry No. 61.

At a hearing on March 24, 2010, the district court orally denied the motion. Pet. App. 11a-14a. The court stated that the adjournment had been granted in May 2009 at petitioner's request because petitioner intended to use the documents that the government was about to produce. *Id.* at 12a-14a. The court did not allow petitioner to present testimony in support of the motion, but it received petitioner's evidence for appellate purposes. *Id.* at 14a.

On the following day, March 25, 2010, the government submitted a letter to the district court "to confirm the Court's findings relating to the exclusion of time under the Speedy Trial Act from September 14, 2009 through March of 2010." Pet. App. 15a. The government's letter stated:

> On May 27, 2009, defense counsel wrote to Your Honor requesting an adjournment of the trial date until March 2010. * * * In the letter, defense counsel stated that the adjournment was necessary "to conduct a meaningful review" of additional discovery materials prior to trial and agreed that "the period of delay between September 14, 2009 and March 2010, is excludable time under the Speedy Trial Act, 18

> U.S.C. § 3161 *et seq.*" Defense counsel did not cite the applicable subsection of the Speedy Trial Act, but given the basis for the continuance request and the absence of any other potentially applicable provision, this could only be construed as agreement that the ends of justice served by granting a continuance outweighed the best interest of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(7)(A)-(B).
>
> By endorsement dated May 29, 2009, Your Honor granted defense counsel's request for an adjournment, and trial was subsequently scheduled for March 22, 2010. * * * Because of the nature of the defendant's request, the Government understood the Court to have made the requisite finding that the ends of justice warranted the continuance, and to have done so for the reasons stated in the defendant's letter, thus automatically excluding the time from September 14, 2009 through March 2010, pursuant to 18 U.S.C. § 3161(h). Nevertheless, in light of the defendant's recent motion seeking dismissal under the Speedy Trial Act (albeit on grounds unrelated to this letter), and mindful that the Act expressly requires the Court to set forth in the record "its reasons for finding that the ends of justice" warrant the granting of a continuance, *id.* § 3161(h)(7)(A), the Government respectfully asks the Court to confirm these findings by signing the order below.

Id. at 15a-16a. The district court signed the order on the same day. *Id.* at 17a. Also on the same day, the court issued a written order disposing of various pretrial motions filed by the parties. *Id.* at 18a-20a. With respect to petitioner's motion to dismiss the indictment on Speedy Trial Act grounds, the court stated: "The

motion is denied. Defendant's exhibits relating to this motion are received into the record." *Id.* at 18a.

c. A jury convicted petitioner on one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and two counts of wire fraud, in violation of 18 U.SC. 1343. The district court sentenced petitioner to concurrent terms of 60 months of imprisonment on each count of conviction, to be followed by three concurrent two-year terms of supervised release. The court also ordered restitution in the amount of $1,894,261.80. Docket entry No. 116.

3. The court of appeals affirmed petitioner's securities-fraud conviction and one of his wire-fraud convictions, but it reversed the other wire-fraud conviction and remanded for further proceedings. Pet. App. 1a-10a. The court of appeals rejected petitioner's contention that the district court had failed to make adequate findings in support of an ends-of-justice continuance when it granted petitioner's adjournment request. The court explained that "[t]he Speedy Trial Act requires that the findings necessary for the ends-of-justice exception 'be made, if only in the judge's mind, before granting the continuance,' and that those findings need only 'be put on the record by the time a district court rules on a defendant's motion to dismiss.'" *Id.* at 5a (quoting *Zedner* v. *United States*, 547 U.S. 489, 506-507 (2006)). The court concluded that "[t]here was no violation of the Speedy Trial Act because, before the district court formally denied [petitioner's] motion to dismiss, it ratified a letter lodged by the Government, confirming that the district court ha[d] made the requisite findings that the ends of justice warranted the continuance . . . for the reasons stated in [petitioner's] motion for adjournment."

Ibid. (internal quotation marks and citation omitted; third alteration in original).

ARGUMENT

Petitioner contends (Pet. 21-30) that the district court did not make sufficient findings in support of the ends-of-justice continuance that it granted rescheduling the trial date from September 14, 2009, to March 22, 2010. Petitioner further contends (Pet. 14-21) that the district court placed its ends-of-justice findings on the record too late by endorsing the government's letter confirming the court's ends-of-justice findings on the day after it orally denied petitioner's motion to dismiss the indictment for a Speedy Trial Act violation. Those contentions lack merit, and the court of appeals' unpublished decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. The Speedy Trial Act requires a criminal defendant's trial to commence within 70 days of his indictment or initial appearance, whichever occurs later, 18 U.S.C. 3161(c)(1), and entitles the defendant to dismissal of the charges if that deadline is not met, 18 U.S.C. 3162(a)(2). As relevant here, the Act excludes from the 70-day period "[a]ny period of delay resulting from a continuance granted by any judge * * * , if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and if the court "sets forth, in the record of the case, either orally or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(7)(A). In determining whether to grant an ends-of-justice continuance, a district court should consider several factors, including whether counsel for the defendant or the government

needs additional time to effectively prepare for the case. 18 U.S.C. 3161(h)(7)(B)(iv).

In *Zedner* v. *United States*, 547 U.S. 489 (2006), this Court held that a defendant cannot prospectively waive the application of the Speedy Trial Act, including the requirement that a district court make findings to support an ends-of-justice continuance under Section 3161(h)(7)(A). *Id.* at 500-503. The court further held that the findings requirement of the Act means that "the findings must be made, if only in the judge's mind, before granting the continuance" and that those findings must be placed on the record "by the time a district court rules on a defendant's motion to dismiss" under Section 3162(a)(2). *Id.* at 506-507. The findings requirement is not satisfied by a "passing reference to the case's complexity" in the district court's ruling on the motion to dismiss. *Ibid.*

The courts of appeals have held that the findings requirement of Section 3161(h)(7)(A) does not require a district court to articulate basic facts when those facts are obvious and set forth in the motion for continuance. *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010); *United States* v. *Pakala*, 568 F.3d 47, 60 (1st Cir. 2009), cert. denied, 130 S. Ct. 1105 (2010); *United States* v. *Gamboa*, 439 F.3d 796, 803 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Jean*, 25 F.3d 588, 594 (7th Cir. 1994). Moreover, a district court does not have to recite the statutory factors in Section 3161(h)(7)(B) or make findings on each of them on the record. *United States* v. *Adams*, 625 F.3d 371, 380 (7th Cir. 2010). A judge's findings may be sufficient where the motion for continuance sets forth the reasons for an ends-of-justice continuance, the court grants the motion based on those representations, and the court later confirms its ra-

tionale in ruling on the motion to dismiss. See, *e.g.*, *United States* v. *Napadow*, 596 F.3d 398, 405 (7th Cir. 2010).

b. Here, the district court made sufficient findings to support its ends-of-justice continuance under Section 3161(h)(7)(A). The facts supporting the continuance were obvious and clearly set forth in petitioner's continuance request, which stated that "[t]he basis for the adjournment is the expected production of additional discovery by the government" and that an adjournment was necessary "for the defense to conduct a meaningful review of the estimated 400,000 pages of additional discovery." Pet. App. 57a-58a. Petitioner agreed that the time would be excludable under the Speedy Trial Act, and although the continuance request did not cite a specific provision of the Act, consideration of whether failure to grant a continuance "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation" is a valid ends-of-justice consideration that is specifically authorized by the Act. 18 U.S.C. 3161(h)(7)(B)(iv).

Furthermore, the court granted the continuance by a handwritten endorsement on the very motion that contained petitioner's reasons for the request. The court later confirmed that rationale by explaining at a hearing that it had granted the continuance based on petitioner's representation that he planned to use documents that the government was about to produce. Pet. App. 12a. And when the court endorsed the government's March 25, 2010, letter, it confirmed that it had granted the motion "for the reasons stated in the defendant's letter" and because "the ends of justice warranted the continuance." *Id.* at 16a. Those findings are sufficient to support an ends-of-justice continuance under Section

3161(h)(7)(A). The court of appeals' fact-bound conclusion on that issue does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

c. Petitioner contends (Pet. 21-30) that the courts of appeals are in conflict on the question of whether a reviewing court may infer the district court's reason for granting an ends-of-justice continuance from the context. According to petitioner, the Fourth, Ninth, Tenth, and D.C. Circuits have refused to infer ends-of-justice findings. The cases petitioner cites do not demonstrate that the circuits are in conflict. Rather, those cases present specific factual scenarios where a court of appeals did not find sufficient evidence in the record to justify a district court's ends-of-justice continuance. The Court recently denied certiorari on this question. See *Wasson* v. *United States*, No. 12-546 (Mar. 18, 2013).

In *United States* v. *Henry*, 538 F.3d 300 (4th Cir. 2008), the defendant had executed a prospective waiver of his speedy trial rights, a practice that was declared invalid in *Zedner*. *Id.* at 302. The district court granted a continuance of the defendant's June 7, 2005, trial date because the parties explained that they were awaiting an appraisal of the defendant's property in connection with a potential plea agreement. *Id.* at 301-302. On March 24, 2006, the government informed the court at a status conference that there would be no plea agreement, and the court set a trial date for June 26, 2006, which was later moved to July 5, 2006. *Id.* at 302. This Court decided *Zedner* on June 5, 2006, and the district court considered before trial whether the continuances it had granted were valid in light of *Zedner*. *Ibid.* The court concluded that the first continuance had been

granted for a valid ends-of-justice reason, and it recalled that it had granted the second continuance to allow the defendant to prepare for trial. *Ibid.* The court of appeals concluded, however, that the record did not support the district court's recollection about its reason for granting the second continunace and that the court had instead relied only on the invalid waiver. *Id.* at 304-305. In petitioner's case, in contrast, it is clear from the record that the district court granted the continuance based on petitioner's representation that he needed additional time to review 400,000 pages of additional expected discovery, which is an explicit, valid consideration under the Act. 18 U.S.C. 3161(h)(7)(B)(iv).

In *United States* v. *Lloyd*, 125 F.3d 1263 (9th Cir. 1997), the district court granted a 112-day continuance based on counsel's unavailability on the specific date on which trial was scheduled to begin. *Id.* at 1269. Without conducting a hearing, the court explained in an order that it was granting a continuance because defense counsel had a conflict on that date and counsel for another defendant and the government "have scheduling conflicts with later dates." *Ibid.* The Ninth Circuit concluded that the district court's order was insufficient to support a 112-day ends-of-justice continuance. The court explained that a district court "may not simply credit the vague statements by one party's lawyer about the possible scheduling conflicts or general desires for a continuance of the other parties or their attorneys." *Ibid.* "[I]nstead, [the court] must conduct an appropriate inquiry to determine whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether granting the requested continuance would

'outweigh the best interest of the public and the defendant[s] in a speedy trial.'" *Ibid.* (quoting 18 U.S.C. 3161(h)(7)(A)). In petitioner's case, the continuance request was not based on a general scheduling conflict, but on petitioner's need to review a large volume of specific expected discovery, which he described to the district court. The district court granted the request for that reason by signing petitioner's continuance request and by later endorsing the government's letter confirming that the ends-of-justice continuance had been granted for the reasons stated in petitioner's letter. Pet. App. 15a-17a, 57a-58a. And at the August 18, 2009, phone conference, the court attempted to schedule the trial for the fall, but petitioner objected based on his description of 250,000 additional pages of discovery that he needed to review. *Id.* at 55a.[3]

In *United States* v. *Toombs*, 574 F.3d 1262 (10th Cir. 2009), the district court had granted seven continuances that resulted in a 22-month delay in the defendant's trial. *Id.* at 1265. The court concluded that two of the continuances were not supported by adequate findings, both of which granted defense motions representing

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[3] Petitioner points out (Pet. 6) that his May 27, 2009, letter requesting a continuance because of the government's production of additional documents also mentioned "other scheduling commitments" as an additional reason to adjourn the trial date until March 2010. But the second page of the letter clarified that the "adjournment is needed in order for the defense to conduct a meaningful review of the estimated 400,000 pages of additional discovery," and that the parties were "working together * * * as quickly as possible" to complete the delivery and review of those documents. Pet. App. 58a. At the telephone conference where the court set the March 22, 2010, trial date, the government urged and the trial court accepted the earliest possible trial date that petitioner would agree to, stating "[i]f you need the time, you need the time." *Id.* at 55a-56a.

that "additional discovery has recently been disclosed to Defendant requiring additional investigation." *Id.* at 1270. The court of appeals explained that ends-of-justice findings must be supported by the record, which includes "the oral and written statements of both the district court and the moving party," and that the district court had erred by relying on "conclusory statements lacking both detail and support." *Id.* at 1271-1272. In contrast to the continuance requests in *Toombs*, petitioner's request described the discovery it expected to receive from the government, specified that there would be 400,000 pages, and represented that it was already working with the government to process the information as quickly as possible.

Finally, in *United States* v. *Bryant*, 523 F.3d 349 (D.C. Cir. 2008), the district court continued a trial from October 28, 2005, to late February 2006, but the court "made no express findings supporting [an ends-of-justice] continuance" at that time. *Id.* at 361. When the defendant moved to dismiss the indictment for a Speedy Trial Act violation, the court stated that it "thought [it] had probably made a finding that the time period * * * was waived in the interest of justice to coordinate the schedules of the prosecutor, the two defense lawyers, and the Court." *Id.* at 360 (alterations, internal quotation marks and citation omitted). The D.C. Circuit stated that "[a]lthough *Zedner* permits trial judges to put their findings on record at the time they rule on a [Speedy Trial Act] motion to dismiss, rather than at the time when they grant the continuance, the passing reference to the 'interest of justice' made by the trial judge at the [Speedy Trial Act] hearing does not indicate that the judge seriously considered" the Section 3161(h)(7)(A) factors. *Id.* at 361. Again, the continuance

in petitioner's case was clearly granted to allow petitioner additional time to review discovery—a reason expressly authorized by the Speedy Trial Act, 18 U.S.C. 3161(h)(7)(B)(iv)—not simply to coordinate schedules.

In each of the cases petitioner cites, the court of appeals looked to the trial court record and found the record wanting. Those cases do not represent a categorically different method of reviewing a district court's ends-of-justice findings, and they do not forbid a court of appeals from looking to the trial court record to understand the context surrounding a district court's ends-of-justice ruling. No conflict among the courts of appeals exists in this context that warrants this Court's review.

2. Petitioner further contends (Pet. 14-21) that the district court recorded its reasons for the final ends-of-justice continuance too late when it endorsed the government's letter confirming the court's ends-of-justice findings on the same day the court issued a written order denying petitioner's motion to dismiss for a Speedy Trial Act violation, but one day after it had orally denied the motion. That contention lacks merit.

In *Zedner*, the Court stated that the required ends-of-justice findings must be made, "if only in the judge's mind, before granting the continuance" and that those findings must be placed on the record "by the time a district court rules on a defendant's motion to dismiss" on speedy trial grounds. 547 U.S. at 506-507. Applying that principle, the court of appeals concluded that "*before* the district court formally denied [petitioner's] motion to dismiss, it ratified a letter lodged by the Government, confirming that the district court had made the requisite finding that the ends of justice warranted the continuance . . . for the reasons stated in [petitioner's

May 27, 2009 letter]." Pet. App. 5a (alteration and internal quotation marks omitted).

In petitioner's view (Pet. 18), the district court did not record its ends-of-justice findings before it denied petitioner's motion to dismiss because the oral dismissal on March 24, 2010, was "valid and effective when rendered." But the court of appeals reasonably interpreted the factual record by concluding that the district court had endorsed the government's letter before it formally denied petitioner's motion in a written order. Even if the district court's statements at the March 24, 2010, hearing constituted a "valid and effective" ruling on petitioner's motion, that ruling could plausibly be seen as merging into the formal written entry of an order for purposes of any time limitation imposed by the Court's opinion in *Zedner*. Cf. Fed. R. App. P. 4(b)(1)(A)(i) (the time for filing a notice of appeal of a district court order in a criminal case is calculated from the time of "the entry of either the judgment or the order being appealed"). That highly fact-bound question, which was addressed in an unpublished, nonprecedential summary order of the court of appeals, does not warrant this Court's review.

b. Petitioner contends (Pet. 14-21) that the court of appeals' decision conflicts with decisions from other circuits holding that ends-of-justice findings must be placed on the record before the court rules on a motion to dismiss. As explained above, the court of appeals' decision creates no such conflict because the court concluded that the requisite findings were in fact made before the district court formally denied petitioner's motion to dismiss.

Moreover, none of the cases petitioner cites (Pet. 16) rejects a district court's ends-of-justice findings where

adequate reasons were recorded contemporaneously with a written order denying a motion to dismiss, entered one day after the motion was orally denied. See *Henry*, 538 F.3d at 304 (granting motion to dismiss where trial court's reason for granting a continuance, placed on the record when the court ruled on the motion to dismiss, was not supported by the record); *United States* v. *Hernandez-Mejia*, 406 Fed. Appx. 330, 338 (10th Cir. 2011) (recognizing that reasons supporting an ends-of-justice continuance may be recorded after a continuance is granted, but explaining that "the district court's later order * * * did not set forth any specific ends-of-justice findings"); *Bryant*, 523 F.3d at 360-361 (same). Further review of petitioner's timeliness claim is unwarranted.

3. Finally, this would be an inappropriate vehicle for review because petitioner's request for the adjournment of his trial date provides an alternative basis for affirming the judgment. See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Under the principle of judicial estoppel, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Zedner*, 547 U.S. at 504 (citation omitted). Petitioner requested the continuance that he claims was a violation of his speedy trial rights, and he is now taking a "clearly inconsistent" position in

asking that such time be counted under the Speedy Trial Act. *Ibid.*; see *id.* at 504-505 (rejecting judicial estoppel argument in the context of a defendant's prospective Speedy Trial Act waiver suggested by the district court, but noting that it "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"). Accordingly, petitioner is estopped from challenging the continuance on appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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