

No. 14-79

In the Supreme Court of the United States

SYED QADRI AND PATRICIA ROSZKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.

Solicitor General

Counsel of Record

LESLIE R. CALDWELL

Assistant Attorney General

JENNY C. ELLICKSON

Attorney

Department of Justice

Washington, D.C. 20530-0001

SupremeCtBriefs@usdoj.gov

(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court made sufficient findings to support its orders granting “ends of justice” continuances under 18 U.S.C. 3161(h)(7)(A).

2. Whether the government demonstrated a “lack of diligent preparation” within the meaning of 18 U.S.C. 3161(h)(7)(C) based on its handling of discovery and a superseding indictment.

TABLE OF CONTENTS

| | Page |
|----------------------|------|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement..... | 1 |
| Argument..... | 10 |
| Conclusion..... | 19 |

TABLE OF AUTHORITIES

Cases:

| | |
|---|--------|
| <i>Bennett v. Spear</i> , 520 U.S. 154 (1997)..... | 18 |
| <i>Ioane v. United States</i> , 134 S. Ct. 907 (2014) | 15 |
| <i>Levis v. United States</i> , 133 S. Ct. 2020 (2013) | 15 |
| <i>Schiro v. Farley</i> , 510 U.S. 222 (1994)..... | 18 |
| <i>United States v. Adams</i> , 625 F.3d 371 (7th Cir. 2010)..... | 12, 16 |
| <i>United States v. Gamboa</i> , 439 F.3d 796 (8th Cir.), cert. denied, 549 U.S. 1042 (2006)..... | 12 |
| <i>United States v. Jean</i> , 25 F.3d 588 (7th Cir. 1994) | 12 |
| <i>United States v. Johnston</i> , 268 U.S. 220 (1925) | 14, 17 |
| <i>United States v. Larson</i> , 627 F.3d 1198 (10th Cir. 2010) | 12 |
| <i>United States v. Napadow</i> , 596 F.3d 398 (7th Cir. 2010) | 12 |
| <i>United States v. Pakala</i> , 568 F.3d 47 (1st Cir. 2009), cert. denied, 558 U.S. 1132 (2010)..... | 12 |
| <i>United States v. Taylor</i> , 487 U.S. 326 (1988)..... | 16 |
| <i>United States v. Toombs</i> , 574 F.3d 1262 (10th Cir. 2009) | 14 |
| <i>United States v. Williams</i> , 504 U.S. 36 (1992) | 17 |
| <i>Washington v. Confederated Bands & Tribes of the Yakima Indian Nation</i> , 439 U.S. 463 (1979)..... | 18 |

IV

| Cases—Continued: | Page |
|---|------------------|
| <i>Wasson v. United States</i> , 133 S. Ct. 1581 (2013)..... | 5 |
| <i>Zedner v. United States</i> , 547 U.S. 489 (2006) | 12, 18 |
| Statutes: | |
| Speedy Trial Act of 1974, 18 U.S.C. 3161 <i>et seq.</i> | 2 |
| 18 U.S.C. 3161(c)(1)..... | 2, 11 |
| 18 U.S.C. 3161(h)(7)(A)..... | 3, 8, 11, 12, 16 |
| 18 U.S.C. 3161(h)(7)(B)..... | 15, 16 |
| 18 U.S.C. 3161(h)(7)(B)(ii)..... | 3, 11 |
| 18 U.S.C. 3161(h)(7)(B)(iv)..... | 3, 11, 13 |
| 18 U.S.C. 3161(h)(7)(C)..... | 9, 11, 17 |
| 18 U.S.C. 3162(a)(2) | 11, 12, 16 |
| 18 U.S.C. 2 | 2, 9 |
| 18 U.S.C. 1014 (2006) | 2, 6, 8, 9 |
| 18 U.S.C. 1343 (2006) | 2, 6, 8, 9 |
| 18 U.S.C. 1956(h) | 6 |
| 18 U.S.C. 1957 (2006) | 6, 8 |

In the Supreme Court of the United States

No. 14-79

SYED QADRI AND PATRICIA ROSZKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unreported but is reprinted in 562 Fed. Appx. 590. The opinion of the district court (Pet. App. 6-62) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2014. A petition for rehearing was denied on April 21, 2014 (Pet. App. 74). The petition for a writ of certiorari was filed on July 21, 2014 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following conditional guilty pleas in the United States District Court for the District of Hawaii, petitioner Qadri was convicted on one count of wire fraud,

in violation of 18 U.S.C. 1343 (2006) and 2, and petitioner Roszkowski was convicted on one count of willfully making materially false statements with the intent to influence a bank, in violation of 18 U.S.C. 1014 (2006). Qadri Presentence Investigation Report (PSR) paras. 5-7; Roszkowski PSR paras. 5-7. The district court sentenced Qadri to 51 months of imprisonment, to be followed by two years of supervised release. Qadri Judgment 2-3. The court sentenced Roszkowski to one month of imprisonment, to be followed by two years of supervised release. Roszkowski Judgment 2-3. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioners' convictions stem from their involvement in a high-yield investment scheme that was akin to a Ponzi scheme. From approximately 2004 through 2006, petitioners and others knowingly made numerous false statements to lure individuals to invest in the scheme. Qadri PSR paras. 15-71; Roszkowski PSR paras. 15-73. Because of the scheme, these would-be investors suffered losses of more than \$8 million. Qadri PSR Addendum No. 2, at A1-A2; Roszkowski PSR Addendum No. 2, at 1A-2A.

2. On August 31, 2006, a federal grand jury in the District of Hawaii indicted petitioners and others on four counts of wire fraud, in violation of 18 U.S.C. 1343 (2006). Pet. App. 7. Petitioners were arraigned the next day. 1:06-CR-469 Docket entry No. (Docket entry No.) 16.

a. Under the Speedy Trial Act of 1974 (Speedy Trial Act or the Act), 18 U.S.C. 3161 *et seq.*, a defendant's trial must generally begin within 70 days of his indictment or his appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). As rele-

vant here, however, Section 3161(h)(7)(A) of the Speedy Trial 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,” provided 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, the court should consider several factors, including whether the case is so complex that it is unreasonable to expect adequate preparation in the 70-day time period provided by the Act, and 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)(ii) and (iv).

b. Petitioners’ trial was originally set for October 31, 2006. Pet. App. 34. At a hearing on October 19, 2006, the government told the magistrate judge that the parties would agree to a six-month continuance. *Ibid.* Counsel for Ruben Gonzalez, a co-defendant of petitioners who had been arraigned eight days earlier, explained that this continuance would give him an opportunity to prepare for trial. *Id.* at 34-36. The magistrate judge noted that Gonzalez’s counsel “need[ed] more time, obviously to prepare.” *Id.* at 36. Gonzalez’s counsel also informed the magistrate judge that he had not yet received discovery from the government. *Ibid.* With the agreement of all counsel, the magistrate judge continued the trial date until May 1, 2007, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 36-38, 72-73. The magistrate judge issued an order stating that “the ends of justice

outweighed the best interest of the public and [Gonzalez] in a speedy trial” because the continuance allowed defense counsel “the reasonable time necessary for effective preparation.” *Id.* at 38, 72-73.

On March 14, 2007, Qadri filed a motion to continue the trial on the grounds that the government planned to file a superseding indictment, that counsel had encountered difficulties conducting discovery, and that counsel’s availability had created scheduling conflicts. Pet. App. 39, 85-86. Five days later, the government filed a motion to declare the case complex and continue the trial. *Id.* at 39. At a hearing on March 19, 2007, the district court declared the case complex and stated that “the factual research and the discovery issues that have been raised by defense counsel” and the complexity of the case were “sufficient reasons for a continuance.” *Ibid.* The court continued the trial date until November 6, 2007, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 39-40. The minutes of the hearing reflect the court’s finding that the continuance served the ends of justice because “a failure to grant the continuance would unreasonably deny counsel for [petitioner] reasonable time necessary for effective preparation.” *Id.* at 39-40.

On August 9, 2007, Qadri filed another motion for a continuance, which sought to continue the trial until May 2008, based on the likelihood of a superseding indictment, difficulties analyzing computer hard drives and servers, and the voluminous records to be produced by the government. Pet. App. 40, 81-84. At a hearing on August 29, 2007, with the agreement of all counsel, a magistrate judge continued the trial date until May 20, 2008, and excluded the time from the 70-

day Speedy Trial Act period. *Id.* at 67-68. The magistrate judge stated in an order that the continuance served the ends of justice because it allowed defense counsel “the reasonable time necessary for effective preparation.” *Id.* at 41-42, 67-68. The minutes for the hearing further noted that the case had previously been declared complex and that this continuance would be the final trial continuance allowed by the district court. *Id.* at 41, 69-70.

On January 15, 2008, Qadri filed his third motion for a continuance, again asserting that the government planned to file a superseding indictment, that two to three months were needed for computer analysis, and that voluminous records justified a six-month continuance. Pet. App. 42, 77-79. At a hearing on January 30, 2008, without objection from the parties, the magistrate judge continued the trial date until December 2, 2008, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 42-44, 64-65. The magistrate judge stated in an order that the continuance served the ends of justice because it allowed defense counsel “the reasonable time necessary for effective preparation.” *Id.* at 43-44, 64-65.

At a status conference before the magistrate judge on October 21, 2008, defense counsel made an oral motion to continue the trial again in light of a pending superseding indictment. Pet. App. 45. On October 24, 2008, with the agreement of all parties, the magistrate judge continued the trial date until June 23, 2009, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 45-46. The magistrate judge stated that the continuance served the ends of justice because it allowed defense counsel “the reasonable time necessary for effective preparation.” *Id.* at 46.

On May 13, 2009, the grand jury filed a superseding indictment, charging petitioners and others with 50 counts of wire fraud, in violation of 18 U.S.C. 1343 (2006); one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and 34 counts of engaging in monetary transactions in property derived from unlawful activity, in violation of 18 U.S.C. 1957 (2006). Superseding Indictment 1-28. The superseding indictment also charged Roszkowski with two counts of credit application fraud, in violation of 18 U.S.C. 1014 (2006). Superseding Indictment 28-29.

At a hearing before a magistrate judge on May 29, 2009, petitioners and a co-defendant were arraigned. Pet. App. 47, 49. During the same hearing, the parties discussed a motion to compel discovery that Qadri had filed the previous month. *Id.* at 47; see Docket entry No. 214 (Apr. 28, 2009). The government explained that it had produced more than 30,000 documents to the defendants, as well as government-prepared summaries of the voluminous financial documents in the case. Pet. App. 47. After the government asked for two more weeks in which to provide additional discovery, Qadri agreed to stay his motion to compel discovery pending the government's response. *Id.* at 48. The magistrate judge told the parties that, based on this discussion, it was inclined to continue the hearing for a month to give the government an opportunity to produce the discovery to defense counsel within two weeks and to ensure that defense counsel had an opportunity to begin reviewing the discovery. *Id.* at 48-49. The magistrate judge continued the trial date until November 3, 2009, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 49. The

order stated that the continuance served the ends of justice because it allowed defense counsel “the reasonable time necessary for effective preparation.” *Id.* at 49-50.

On September 1, 2009, Roszkowski requested a continuance on the ground that the parties would not be prepared for trial because of voluminous discovery and because other defendants might be raising a severance issue that needed to be resolved before trial. Pet. App. 50; see Docket entry No. 284. At a hearing on September 10, 2009, the district court discussed its own trial calendar, pending discovery issues, adversarial defenses, and the possibility of multiple juries. Pet. App. 50-52. The court explained that it was granting the continuance “for the reasons cited by the defense in their moving papers” and found that the continuance was in the interest of justice because it would “allow the defense in this very complex case to be adequately prepared.” *Id.* at 52. The court continued the trial date until March 16, 2010, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 53-54. The court stated that the continuance served the ends of justice because it allowed defense counsel “the reasonable time necessary for effective preparation.” *Ibid.*

On December 3, 2009, the district court convened a status conference to discuss discovery issues and the timing of the trial. Pet. App. 54-57. During the hearing, Qadri’s counsel told the court that the case would not be ready to go to trial in three months because defense counsel still needed to review “tens of thousands of documents.” *Id.* at 56. Qadri’s counsel stated that, in light of defense counsel’s need to prepare and the court’s schedule, a trial date in October would be

more “realistic.” *Id.* at 56-57. The court continued the trial date until October 13, 2010, and excluded the time from the 70-day Speedy Trial Act period. *Id.* at 58. The court stated that the continuance served the ends of justice because it allowed defense counsel “the reasonable time necessary for effective preparation.” *Ibid.*

On July 21, 2010, the grand jury filed a second superseding indictment, charging petitioners and others with eight counts of wire fraud, in violation of 18 U.S.C. 1343 (2006); and 12 counts of engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. 1957 (2006). Second Superseding Indictment 2-16. The superseding indictment also charged Roszkowski with two counts of credit application fraud, in violation of 18 U.S.C. 1014 (2006). Second Superseding Indictment 16-18.*

c. On March 10, 2011, Qadri filed a motion to dismiss the indictment for violation of the Speedy Trial Act, which Roszkowski joined. Pet. App. 6-7; Docket entry No. 480. Petitioners challenged the eight continuances described above, arguing that the district court had “consistently failed to set forth in the record the reasons for finding that the ends of justice served by the granting of the various continuances outweighed the best interest of the public and [petitioner] in a speedy trial as required by 18 U.S.C. [Section] 3161(h)(7)(A).” Docket entry No. 480-1, at 4 (Mar. 10, 2011). Petitioners further argued that the indictment

* After the second superseding indictment, the trial date was continued again at Qadri’s request after his counsel withdrew. Docket entry No. 455, at 2-3 (Oct. 13, 2010). Petitioners do not challenge that continuance.

should be dismissed with prejudice because “essentially every continuance in this case was a direct result of the [g]overnment’s failure to act in a timely fashion,” including with respect to discovery and the filing of superseding indictments. *Id.* at 32. Petitioners did not argue, however, that the government’s handling of discovery and filing of superseding indictments demonstrated a lack of due diligence that precluded the court from granting ends-of-justice continuances. See 18 U.S.C. 3161(h)(7)(C).

The district court denied petitioners’ motion to dismiss. Pet. App. 6-62. The court held that each of the eight continuances challenged by petitioners satisfied the requirements of the Speedy Trial Act. *Id.* at 34-61. The court further denied petitioners’ earlier motion to dismiss the indictment, which had sought dismissal based on alleged government delays in producing discovery. *Id.* at 10-15, 23-30. The court explained that “[t]he record before the [c]ourt * * * does not reveal that any delays in the production of discovery, or in the filing of the Second Superseding Indictment, were the result of reckless disregard of constitutional rights” or were “motivated by bad faith.” *Id.* at 27-28.

3. Petitioners entered conditional guilty pleas. Qadri pleaded guilty to one count of wire fraud, in violation of 18 U.S.C. 1343 (2006) and 2, and Roszkowski pleaded guilty to one count of willfully making materially false statements with the intent to influence a bank, in violation of 18 U.S.C. 1014 (2006). Qadri PSR paras. 5-7; Roszkowski PSR paras. 5-7. Petitioners reserved their right to appeal the district court’s denial of their March 10, 2011, motion to dismiss the indictment for violation of the Speedy Trial

Act. Qadri Plea Agreement paras. 4, 16(c); Roszkowski Plea Agreement paras. 4, 15(c).

4. The court of appeals affirmed. Pet. App. 1-5. The court held that petitioners' appeal was limited to their claims under the Speedy Trial Act because petitioners had reserved their right to appeal only the district court's denial of the March 10, 2011 motion to dismiss. Pet. App. 3. The court of appeals thus declined to address petitioners' challenge to the government's failure to provide speedy discovery. *Id.* at 3, 4-5. The court held that each of the eight challenged ends-of-justice continuances satisfied the requirements of the Speedy Trial Act because each was specifically limited in time and justified on the record by reference to the facts as of the time of the continuance. *Id.* at 4. The court rejected petitioners' claim that the district court's continuance orders were improper "form" orders, concluding instead that the orders satisfied the requirements of the Speedy Trial Act because each one stated that the court was granting the continuance so that petitioners would have sufficient time to prepare for trial. *Ibid.* The court of appeals further concluded that the district court had made findings that petitioners needed more time to prepare for trial and that failure to grant the continuance motions would have resulted in a miscarriage of justice. *Id.* at 4-5.

ARGUMENT

Petitioners contend (Pet. 14-31) that the district court did not make sufficient findings in support of the ends-of-justice continuances granted on October 19, 2006; March 19, 2007; August 29, 2007; January 30, 2008; October 24, 2008; May 29, 2009; September 10, 2009; and December 3, 2009. The court of appeals

correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioners further contend (Pet. 32-37) that ends-of-justice continuances were impermissible under 18 U.S.C. 3161(h)(7)(C) because the government did not act diligently in providing discovery and filing superseding indictments. The court of appeals properly declined to address that argument, and petitioners have identified no conflict in the lower courts on that fact-bound question in any event. Further review of petitioners' claims 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 before a judicial officer, 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 the case is so complex that it would be unreasonable to expect adequate preparation within the 70-day period provided by the Act, and 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)(ii) and (iv).

In *Zedner v. United States*, 547 U.S. 489 (2006), this Court held that the Speedy Trial Act requires that the findings in support of an ends-of-justice continuance “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 Court stated that the findings requirement was not satisfied by a mere “passing reference to the case’s complexity” in the district court’s ruling on the motion to dismiss. *Id.* at 507.

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. See, e.g., *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, 558 U.S. 1132 (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 factor 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 a continuance sets forth the reasons for an ends-of-justice continuance and the court grants the motion based on those representations. 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 the eight challenged ends-of-justice continuances under Section 3161(h)(7)(A). The record shows

that petitioners or their co-defendants asked for six of these continuances and explained each time why they needed more time to prepare for trial. See Pet. App. 34-36, 39, 40, 42, 50, 56-57, 77-79, 81-86. Giving defense counsel reasonable time “necessary for effective preparation” is a valid reason for granting an ends-of-justice continuance. 18 U.S.C. 3161(h)(7)(B)(iv). Thus, the findings requirement was satisfied because the motions by petitioners and their co-defendants asserted that defense counsel needed more preparation time and the district court’s orders and hearing minutes confirmed that the court granted the continuances for that reason. Pet. App. 37-44, 52-54, 58, 64-65, 67-68, 72-73. No more was required.

With respect to the continuance granted on October 24, 2008, the record is more limited because defense counsel made an oral motion for a continuance during a hearing for which there is no transcript. Pet. App. 45-46. The hearing minutes, however, state that counsel made the motion “in light of a pending superseding indictment,” and the magistrate judge’s subsequent written order explained that the continuance would allow defense counsel “the reasonable time necessary for effective preparation.” *Ibid.* That record is sufficient to satisfy the findings requirement because it shows that defense counsel needed more time to prepare for trial in light of the forthcoming superseding indictment.

The remaining continuance was granted on May 29, 2009, at petitioners’ arraignment on the superseding indictment. Pet. App. 47-49. During that hearing, the parties discussed outstanding discovery issues that would take at least a month to resolve. *Ibid.* At the time of that hearing, petitioners’ trial date was less

than four weeks away, and the magistrate judge's subsequent written order explained that the continuance would allow defense counsel "the reasonable time necessary for effective preparation." *Id.* at 49-50. This record is sufficient to satisfy the findings requirement because it shows that defense counsel needed more time to prepare for trial in light of the newly-filed superseding indictment and outstanding discovery issues.

The court of appeals correctly held that the district court did not clearly err in granting these continuances, and this fact-bound conclusion 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. Petitioners contend (Pet. 18-20) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *United States v. Toombs*, 574 F.3d 1262 (2009). That is incorrect. In *Toombs*, the district court had granted seven ends-of-justice continuances that resulted in a 22-month delay in the defendant's trial. *Id.* at 1265. The court of appeals concluded that two of the continuances were not supported by adequate findings, both of which granted defense motions representing that "additional discovery has recently been disclosed to [d]efendant requiring additional investigation." *Id.* at 1270. The court 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 continu-

ance requests in *Toombs*, the continuance requests and discussions in this case showed that defense counsel was awaiting additional discovery from the government, Pet. App. 36, 39, 79, 83, 85-86; that petitioners' case was complex, *id.* at 39, 41, 52; that defense counsel was anticipating the filing of a superseding indictment, *id.* at 45, 79, 83, 86; and that discovery in the case was voluminous and included over 30,000 documents, three computer servers, and 32 computer hard drives, *id.* at 40, 47, 54-56, 78-79, 82-84; Docket entry No. 284, at 4 (Sept. 1, 2009).

Toombs presents a specific factual scenario where a court of appeals did not find sufficient evidence in the record to justify a district court's ends-of-justice continuance; it does not represent a categorically different method of reviewing a district court's ends-of-justice findings. The Court has recently denied review of petitions for writs of certiorari raising the question of what findings are sufficient to justify an ends-of-justice continuance, see *Ioane v. United States*, 134 S. Ct. 907 (2014); *Levis v. United States*, 133 S. Ct. 2020 (2013); *Wasson v. United States*, 133 S. Ct. 1581 (2013), and the same result is warranted here.

d. Petitioners further contend (Pet. 20-23) that the lower courts have ignored this Court's precedent and the plain language of the Speedy Trial Act by upholding ends-of-justice continuances when the district court has not made findings on the record as to each of the statutory factors in Section 3161(h)(7)(B). Petitioners' claim collapses two separate requirements—that the district court (1) consider the factors set forth in Section 3161(h)(7)(B), and (2) set forth its reasons for finding that the continuance serves the ends of

justice, 18 U.S.C. 3161(h)(7)(A)—into a single requirement that the district court must set forth on the record its analysis of each factor. The Speedy Trial Act does not include such a requirement, and this Court’s decisions do not suggest that the district court must memorialize on the record its analysis of each Section 3161(h)(7)(B) factor. See p. 12, *supra*. Petitioners’ reliance (Pet. 21-22) on *United States v. Taylor*, 487 U.S. 326 (1988), is misplaced. *Taylor* explains that when a district court considers the Section 3162(a)(2) factors in deciding whether to dismiss a case with or without prejudice under the Speedy Trial Act, the court must “clearly articulate” the effect of the Section 3162(a)(2) factors on its decision. *Id.* at 336-337. *Taylor* does not hold that the court must discuss on the record its analysis of each Section 3161(h)(7)(B) factor. See *id.* at 336-337.

Petitioners identify no authority in support of their reading of the statute and they do not contend that the lower courts are in conflict on this question. See Pet. 20-23; see also *Adams*, 625 F.3d at 380 (rejecting petitioners’ reading). Further review of petitioners’ claim is unwarranted.

e. Petitioners further contend (Pet. 23-24) that the circuits are split on whether the district court must state on the record that it has balanced the need for a continuance against the interest of the defendant and the public in a speedy trial. 18 U.S.C. 3161(h)(7)(A). For two reasons, petitioners’ case presents a poor vehicle for resolving any such conflict. First, addressing this issue would have no effect on petitioners’ case because, for each of the continuances petitioners challenge, the district court made an on-the-record finding that the ends of justice outweighed the best interest of

the public and the defendant in a speedy trial. Pet. App. 38, 39, 41, 43, 46, 49, 53, 58. Second, petitioners did not raise this issue in the court of appeals, and this Court should not address it in the first instance. See, e.g., *United States v. Williams*, 504 U.S. 36, 41 (1992).

2. Petitioners further contend (Pet. 32-37) that the trial delays were caused by the government's lack of due diligence in providing discovery and filing the superseding indictment, which precluded the district court from granting ends-of-justice continuances. See 18 U.S.C. 3161(h)(7)(C). The court of appeals correctly declined to address this argument. Pet. App. 3, 5. In their plea agreements, petitioners reserved their right to appeal only the district court's denial of their motion to dismiss the indictment for violations of the Speedy Trial Act. *Id.* at 3; Qadri Plea Agreement paras. 4, 16(c); Roszkowski Plea Agreement paras. 4, 15(c). That motion did not contain the "due diligence" argument that petitioners now advance. Compare Pet. 32-37, with Docket entry No. 480-1, at 1-34 (Mar. 10, 2001).

Even if this question were properly before the Court, review would not be warranted. Petitioners ask the Court to address the proper interpretation of 18 U.S.C. 3161(h)(7)(C), which provides in relevant part that "[n]o [ends-of-justice continuance] shall be granted because of * * * lack of diligent preparation." Petitioners identify no conflict among the lower courts about the meaning of that statutory language, however. To the extent petitioners ask this Court to hold that the government was not sufficiently diligent in its handling of the case, Pet. 34-37, that fact-bound argument does not warrant this Court's review. See *Johnston*, 268 U.S. at 227.

3. Finally, this case would be an inappropriate vehicle for review of petitioners' Speedy Trial Act claims because petitioners' request for or agreement to the continuances they challenge 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, "where 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). Petitioners either requested or agreed to the continuances that they claim were a violation of their speedy trial rights, and they are now taking a "clearly inconsistent" position in asking that such time be counted under the Speedy Trial Act. *Ibid.*; see *id.* at 504-506 (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 [d]istrict [c]ourt * * * that the factual predicate for a statutorily authorized exclusion of delay could be established"). Accordingly, petitioners are estopped from challenging the continuances on appeal in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

SEPTEMBER 2014