No. 19-587

In the Supreme Court of the United States

JIMMIE EUGENE WHITE, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the magistrate judge made sufficient findings to support granting a two-week "ends of justice" continuance under 18 U.S.C. 3161(h)(7)(A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

United States v. *White*, No. 2:13-cr-20423 (Dec. 24, 2015)

United States Court of Appeals (6th Cir.):

United States v. *White*, No. 14-2605 (Mar. 31, 2015)

United States v. *White*, No. 15-1709 (Dec. 7, 2015)

United States v. *White*, No. 15-1769 (Sept. 15, 2015)

United States v. *White*, No. 15-1778 (July 27, 2015)

United States v. *White*, No. 16-1009 (Feb. 16, 2017, and Apr. 10, 2019)

Supreme Court of the United States:

In re White, No. 15-7517 (Mar. 7, 2016)

White v. *United States*, No. 17-270 (Jan. 8, 2018)

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 2
Argument ... 11
Conclusion ... 23

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997) ... 21
Bloate v. *United States*, 559 U.S. 196 (2010) ... 3, 4, 8, 9
Ioane v. *United States*, 571 U.S. 1134 (2014) ... 12
Levis v. *United States*, 569 U.S. 957 (2013) ... 12
Parisi v. *United States*, 529 F.3d 134 (2d Cir. 2008), cert. denied, 555 U.S. 1197 (2009) ... 17
Schiro v. *Farley*, 510 U.S. 222 (1994) ... 21
Qadri v. *United States*, 574 U.S. 974 (2014) ... 12
Robey v. *United States*, 137 S. Ct. 2214 (2017) ... 12
United States v. *Adams*, 625 F.3d 371 (7th Cir. 2010) ... 14
United States v. *Ammar*, 842 F.3d 1203 (11th Cir. 2016) ... 17, 18
United States v. *Bryant*, 523 F.3d 349 (D.C. Cir. 2008) ... 17, 19, 20
United States v. *Gamboa*, 439 F.3d 796 (8th Cir.), cert. denied, 549 U.S. 1042 (2006) ... 14
United States v. *Jean*, 25 F.3d 588 (7th Cir. 1994) ... 14
United States v. *Johnston*, 268 U.S. 220 (1925) ... 16
United States v. *Larson*, 627 F.3d 1198 (10th Cir. 2010) ... 13

Cases—Continued: Page

United States v. *Napadow*, 596 F.3d 398 (7th Cir. 2010) 14
United States v. *Pakala*, 568 F.3d 47 (1st Cir. 2009), cert. denied, 558 U.S. 1132 (2010) 14
United States v. *Ramirez-Cortez*, 213 F.3d 1149 (9th Cir. 2000) 17, 20
United States v. *Richardson*, 681 F.3d 736 (6th Cir.), cert. denied, 568 U.S. 1035 (2012) 14
United States v. *Toombs*, 574 F.3d 1262 (10th Cir. 2009) 17, 18, 19
Washington v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) 21
Wasson v. *United States*, 568 U.S. 1228 (2013) 12
Zedner v. *United States*, 547 U.S. 489 (2006) 4, 10, 13, 22

Statutes and rule:

Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* 3
18 U.S.C. 3161(b) 3, 12
18 U.S.C. 3161(h)(1) 3, 8, 11
18 U.S.C. 3161(h)(1)(D) 3
18 U.S.C. 3161(h)(1)(G) 3, 9
18 U.S.C. 3161(h)(7) .... *passim*
18 U.S.C. 3161(h)(7)(A) 4, 10, 13, 15, 16, 20
18 U.S.C. 3161(h)(7)(B) 14
18 U.S.C. 3161(h)(8) (2000) 13
18 U.S.C. 3162(a)(1) 12
18 U.S.C. 922(g)(1) 2
18 U.S.C. 924(c)(1)(A) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
Fed. R. Crim. P. 11(c)(1) 19

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 920 F.3d 1109. The orders of the district court (Pet. App. 62a-71a) and the magistrate judge (Pet. App. 35a-38a) are unreported. A prior opinion of the court of appeals (Pet. App. 72a-87a) is not published in the Federal Reporter but is reprinted at 679 Fed. Appx. 426.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2019. A petition for rehearing was denied on June 5, 2019 (Pet. App. 89a). On August 27, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 1, 2019, and the petition was filed on that date. 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 Eastern District of Michigan, petitioner was convicted of conspiring to distribute N-Benzylpiperazine (BZP) and 3,4-Methylenedioxymethamphetamine (ecstasy), in violation of 21 U.S.C. 846; possessing with intent to distribute BZP, in violation of 21 U.S.C. 841(a)(1); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Judgment 1-2. The district court sentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. After the court of appeals affirmed, Pet. App. 72a-87a, this Court granted certiorari, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of the Solicitor General's confession of error. *Id.* at 88a. The court of appeals again affirmed. *Id.* at 1a-34a.

1. In May 2010, as part of an investigation into drug trafficking in Detroit, agents executed a search warrant at petitioner's home. Pet. App. 63a, 73a. The agents recovered from within a locked safe in the home more than $25,000 in cash, 898 BZP pills, a handgun with an obliterated serial number, and an extended magazine with 25 rounds of ammunition for the handgun. *Ibid.*

Agents arrested petitioner on an outstanding state warrant. Pet. App. 75a. After waiving his *Miranda* rights, petitioner admitted that he had sold approximately 10,000 ecstasy pills over the previous year and that he owned the safe, volunteering that it contained about 900 pills and roughly $25,000 in cash. *Ibid.* Petitioner denied knowing about the gun, however, and he

speculated that someone must have put it in the safe during a party he had hosted. *Ibid.*

The federal government did not charge petitioner with a federal offense at that time, "in part because he [had] promised to cooperate with" the Drug Enforcement Administration. Pet. App. 75a. Petitioner was instead extradited to Ohio on pending state charges, where he was convicted, sentenced, and released after serving his sentence. *Ibid.*

2. On April 29, 2013, the government filed a criminal complaint charging petitioner with drug distribution and firearms crimes related to the May 2010 search and seizure. Pet. App. 64a, 75a. On May 2, 2013, petitioner was arrested on those federal charges and was subsequently released on bond. *Id.* at 69a, 75a-76a.

a. Under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, an information or indictment must generally be filed within 30 days of the defendant's arrest. 18 U.S.C. 3161(b). The Act, however, "excludes from the [30-day] period days lost to certain types of delay." *Bloate* v. *United States*, 559 U.S. 196, 203 (2010). For example, Section 3161(h)(1) excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight enumerated categories of proceedings, 18 U.S.C. 3161(h)(1), which include "any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," 18 U.S.C. 3161(h)(1)(D), and the "consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government," 18 U.S.C. 3161(h)(1)(G). Delays covered by Section 3161(h)(1) are "automatically excludable, *i.e.*, they may

be excluded without district court findings." *Bloate*, 559 U.S. at 203.

Section 3161(h)(7)(A) separately excludes "[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." 18 U.S.C. 3161(h)(7)(A). Under that provision, the relevant "findings must be made, if only in the judge's mind, before granting the continuance." *Zedner* v. *United States*, 547 U.S. 489, 506 (2006). Section 3161(h)(7)(A) further provides that the subsequent period of delay resulting from the continuance may be excluded only if "the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(7)(A). That separate requirement for exclusion "implies that th[e] findings must be put on the record by the time a district court rules on a defendant's motion to dismiss [on Speedy Trial Act grounds]." *Zedner*, 547 U.S. at 507.

b. In May 2013, the parties entered a stipulation (Pet. App. 35a-36a) to adjourn petitioner's preliminary hearing and to exclude the two-week period from May 23 to June 7, 2013, when computing the Speedy Trial Act's 30-day deadline for filing an indictment. *Ibid.* The parties represented in the stipulation that the extension of time was "necessary to allow the parties to engage in plea negotiations," and that petitioner "concurs in this request and agrees that it is in his best interest." *Id.* at 35a. The parties further represented that the period from May 23 to June 7, 2013, "should be excluded from

computing the time within which an information or indictment must be filed" on two independent grounds: "the parties [we]re engaged in plea negotiations, 18 U.S.C § 3161(h)(1)," and "the ends of justice served by such continuance outweigh[ed] the interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(7)." *Id.* at 36a.

On May 17, 2013, a magistrate judge entered an order in which he found that "good cause exists to extend the complaint and preliminary hearing" to June 7, 2013, and ordered that the period from May 23 to the June 7 hearing date "should be excluded in calculating the time within which [petitioner] shall be indicted under the Speedy Trial Act." Pet. App. 37a. The judge attached the parties' stipulation to his order. *Id.* at 15a, 17a.

The plea negotiations were unsuccessful. Pet. App. 76a. On June 4, 2013, 33 days after petitioner's arrest, a federal grand jury indicted petitioner on four counts. *Id.* at 64a-65a, 76a; see *id.* at 102a-108a (indictment).

3. a. Although represented by counsel, petitioner filed a pro se motion to dismiss the indictment. Pet. App. 65a. The motion argued that delay between petitioner's initial 2010 arrest (on a state warrant) and his 2013 federal indictment violated the Speedy Trial Act. D. Ct. Doc. 23, at 1 (July 2, 2013). Petitioner did not assert a Speedy Trial Act violation based on the time between his arrest on federal charges (on May 2, 2013) and his indictment (on June 4, 2013). See *id.* at 1-3.

Petitioner's counsel requested to withdraw, in part because petitioner had filed multiple pro se motions against counsel's advice. Pet. App. 65a. The district court granted the motion, and petitioner retained new counsel. *Ibid.* The court then dismissed without prejudice petitioner's pro se Speedy Trial Act motion. *Ibid.*;

8/12/13 D. Ct. Order. Petitioner's new counsel subsequently filed a motion to dismiss the indictment on the ground that delay between petitioner's 2010 arrest and his 2013 indictment violated the Speedy Trial Act. D. Ct. Doc. 35, at 8, 10 (Sept. 24, 2013). Again, petitioner did not assert a Speedy Trial Act violation based on the time between his May 2013 arrest on federal charges and his June 2013 indictment. See *id.* at 1-13.

b. At the hearing on his motion, petitioner for the first time argued that the 33-day period between his May 2013 arrest and June 2013 indictment was three days longer than the 30-day period allowed by statute because, he asserted, "he did not agree to" the stipulation to exclude the two-week preindictment period. Pet. App. 42a. Petitioner's counsel acknowledged that if the stipulated extension were valid, then petitioner "would lose." *Ibid.*; see *id*. at 43a. Petitioner's counsel later acknowledged in the hearing that petitioner's prior counsel had "apparent authority" to enter into the stipulation on petitioner's behalf. *Id*. at 46a.

The district court determined that the magistrate judge's order—to which the judge had attached the parties' stipulation—had stated that "the period from May 23 to June 7 should be excluded" because the parties were engaged in plea negotiations and because "the ends of justice served by the continuance outweigh the interest of the public and [petitioner] in a speedy trial." Pet. App. 45a. The district court noted that those are "the magic words * * * that we're familiar with" and asked petitioner's counsel on what basis it could properly "second guess" that determination. *Ibid*. Counsel replied that the court's statement was "very fair and accurate" and that, in counsel's view, "[the court] couldn't" second-guess the magistrate judge. *Ibid.*

The district court recognized that a defendant cannot himself waive application of the Speedy Trial Act, such that "the [c]ourt has to make a finding, which was done here." Pet. App. 49a. And it accordingly explained that "what [it] ha[d] before [it] is a finding by a judicial officer that the time was appropriately excluded based upon the fact that the parties were engaged in plea negotiations" and that the magistrate judge's order was "based on the independent finding of a judicial officer, as it must be under the Speedy Trial Act." *Id.* at 51a. Petitioner's counsel stated that he "agree[d] with [the court]." *Id.* at 52a.

Petitioner's counsel then argued that "it doesn't appear as though the Magistrate had a sufficient factual basis other than the stipulation itself," and that the record before the district court was not "strong enough * * * to make a determination as to what happened." Pet. App. 52a. The district court stated that "[t]he Magistrate Judge [had] made a finding" on which the district court could "rely," such that the court did not "have to" make its own finding. *Id.* at 53a. Petitioner's counsel agreed, stating, "[Y]es, you can rely on the Court's finding," which was something that "suggests * * * the Magistrate had a basis for making it other than the stipulation." *Ibid.*

Following oral argument, the district court issued a written order denying petitioner's motion. Pet. App. 62a-71. The court first determined that petitioner had "conceded that no Speedy Trial Act violation occurred in this case." *Id.* at 62a. The court nonetheless briefly discussed petitioner's statutory contention, *id.* at 67a-68a, and rejected the key "premise of [petitioner's] argument"—namely, that his May 2010 arrest triggered

the Speedy Trial Act clock, *id.* at 67a. The court explained that the statutory clock did not begin to run until petitioner was arrested on federal charges in May 2013. *Ibid.* The court also observed that although petitioner was not indicted until 33 days later, "only twenty days elapsed between the arrest and the indictment" and "no Speedy Trial Act violation" occurred, because the magistrate judge had ordered that time be excluded "'because the parties [we]re engaged in plea negotiations.'" *Id.* at 68a (citation omitted).

c. After the jury found petitioner guilty on all counts, the district court sentenced him to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 1-4; see Pet. App. 102a-104a.

4. Petitioner appealed. As relevant here, petitioner argued that the two-week preindictment period could not be excluded under the Speedy Trial Act because the magistrate judge did "no[t] find[] * * * that the ends of justice outweighed the best interests of the public and the defendant in a speedy trial" and, for that reason, "the district court deferred to non-existent findings." Pet. C.A. Br. 35; see *id.* at 30-37. Petitioner later argued in his reply brief, in response to the government's argument, that the two-week period was not automatically excludable under Section 3161(h)(1) and instead required "explicit findings" under Section 3161(h)(7). Pet. C.A. Reply Br. 1-vii (citing *Bloate*, 559 U.S. at 211 n.13).

The court of appeals affirmed. Pet. App. 72a-87a. As relevant here, the court relied on automatic exclusion under Section 3161(h)(1) to reject petitioner's Speedy Trial Act claim. *Id.* at 77a-79a. The court observed that the magistrate judge had "attached * * * to his order" the stipulation in which the parties had agreed that the

two-week period was properly excluded "under [Section] 3161(h)(1), and also under [Section] 3161(h)(7)." *Id.* at 78a. Focusing only on the former provision, the court of appeals followed precedents predating *Bloate* v. *United States*, *supra*, under which "plea negotiations" were deemed "'period[s] of delay resulting from other proceedings concerning the defendant' [that are] automatically excludable under [Section] 3161(h)(1)." Pet. App. 79a (citation omitted; brackets in original). The court thus concluded that, under its precedent, petitioner's Speedy Trial Act rights were not violated. *Ibid.*

Petitioner petitioned for a writ of certiorari. In response, the Solicitor General agreed with petitioner that the two-week period in which the parties had engaged in plea negotiations "is not automatically excludable under subsection (h)(1)" and that "the court of appeals erred in concluding to the contrary." 17-270 Br. in Opp. 8. The Solicitor General explained, however, that petitioner's indictment was nevertheless "timely under the Speedy Trial Act because the district court did not abuse its discretion in excluding the same 14-day continuance under 18 U.S.C. 3161(h)(7)." *Ibid.* The Court granted certiorari, vacated the judgment, and remanded the case to the court of appeals "for further consideration in light of the confession of error by the Solicitor General." Pet. App. 88a.

5. a. On remand, the court of appeals again affirmed. Pet. App. 1a-34a. The court agreed with the parties that the reasoning of this Court's 2010 decision in *Bloate* had abrogated the court of appeals' prior precedent interpreting Section 3161(h)(1)(G), such that "time spent on preindictment plea negotiations [now] is not automatically excludable under [Section] 3161(h)(1)." *Id.* at 7a-8a;

see *id.* at 6a-8a. The court determined, however, that the district court had properly excluded under Section 3161(h)(7) the two-week period in which the parties engaged in plea negotiations in this case. *Id.* at 11a-17a.

The court of appeals "agree[d]" with "a number of [its] sister circuits" that Section 3161(h)(7)'s ends-of-justice exclusion can apply where a trial court orders a continuance to facilitate "preindictment plea negotiations." Pet. App. 12a-13a. The court further determined that "the magistrate judge's order [in this case] provided sufficient explanation for the continuance" by making the requisite "'express findings'" on the record as "required by [Section 3161(h)(7)]." *Id.* at 13a-14a (quoting *Zedner*, 547 U.S. at 506); see *id.* at 13a-17a. The court based that determination on the "combined stipulation and order," which the court read as showing that "the magistrate [had] adopted the parties' stipulation as part of its own reasoning." *Id.* at 14a-15a. Such reasoning, the court continued, was "clear from the context" here, where the "order clearly incorporate[d] the parties' two-page stipulation, both by attachment and reference." *Id.* at 15a. Moreover, "[g]iven the context surrounding" the magistrate judge's order and the "relatively short continuance" in question, the court determined that the order sufficiently reflected the judge's determination that the "parties' efforts to come to a mutually agreeable plea agreement" outweighed the countervailing "'interest of the public and [petitioner] in a speedy trial,'" even though the order standing alone did not "explicitly say [the words] 'ends of justice.'" *Id.* at 16a (quoting 18 U.S.C. 3161(h)(7)(A)). And the court found that the decision to apply an ends-of-justice continuance was not an abuse of discretion. *Id.* at 17a.

b. In a portion of his opinion reflecting only his own views, Judge Griffin determined that the court of appeals could also affirm on the alternative ground that petitioner had forfeited his contention that Section 3161(h)(1) did not apply to his case and had failed to carry his burden of showing plain error on that point. Pet. App. 8a-11a.

c. Judge Guy concurred in part and concurred in the judgment. Pet. App. 18a-20a. Judge Guy stated his agreement with the court of appeals' analysis and determination that the magistrate judge's order had "satisfied the requirement of an on-the-record finding for an ends-of-justice continuance" under Section 3161(h)(7). *Id.* at 20a; see *id.* at 18a. He explained, however, that he disagreed with Judge Griffin's separate views regarding the application of plain-error review to petitioner's challenge to the independent application of Section 3161(h)(1). *Id.* at 18a-20a.

d. Judge Clay concurred in part and dissented in part. Pet. App. 21a-34a. Judge Clay agreed that *Bloate* had abrogated circuit precedent interpreting Section 3161(h)(1), but disagreed with Judge Griffin's view that plain-error review applied to that issue, *id.* at 24a-29a, as well as the majority's determination that the magistrate judge's order satisfied the requirements of Section 3161(h)(7), *id.* at 30a-34a.

ARGUMENT

Petitioner contends (Pet. 20-25) that the district court should have granted his motion to dismiss his indictment under the Speedy Trial Act, on the theory that the magistrate judge did not make sufficient findings to support a two-week ends-of-justice continuance under Section 3161(h)(7). Petitioner further contends (Pet. 13-20) that the courts of appeals have divided over what

findings are sufficient when the parties agree that a period of time should be excluded. The judgment of the court of appeals is correct, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied certiorari petitions seeking review on the question of what findings are sufficient to justify an ends-of-justice continuance under Section 3161(h)(7).[1] The same result is warranted here.

1. The court of appeals correctly determined that the magistrate judge made sufficient findings on the record to support an ends-of-justice continuance under Section 3161(h)(7).

a. The Speedy Trial Act generally requires the government to file an information or indictment against a defendant within 30 days of his arrest, 18 U.S.C. 3161(b), and entitles the defendant to dismissal of the charges if that deadline is not met, 18 U.S.C. 3162(a)(1). But the Act excludes from that 30-day period, as relevant here, "[a]ny period of delay resulting from a continuance granted by any judge" if two conditions are satisfied: first, "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, second, the court "sets forth, in the record of the case, either orally or in writing, its reasons for [that] finding" before "exclud[ing]" the relevant period from its computation

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[1] See, *e.g.*, *Robey* v. *United States*, 137 S. Ct. 2214 (2017) (No. 16-7725); *Qadri* v. *United States*, 574 U.S. 974 (2014) (No. 14-79); *Ioane* v. *United States*, 571 U.S. 1134 (2014) (No. 13-6849); *Levis* v. *United States*, 569 U.S. 957 (2013) (No. 12-635); *Wasson* v. *United States*, 568 U.S. 1228 (2013) (No. 12-546).

of the time within which an information or indictment must be filed. 18 U.S.C. 3161(h)(7)(A).

In *Zedner* v. *United States*, 547 U.S. 489 (2006), this Court addressed both requirements, which were then codified in Section 3161(h)(8), in a case in which the defendant—at the district court's request—had agreed to "'waive [the Speedy Trial Act's timing requirements] for all time,'" and the district court had then granted serial continuances resulting in more than a seven-year delay between the defendant's indictment and trial. *Id.* at 493-494, 496, 505 (citation omitted). The Court first held that the requisite findings for an ends-of-justice continuance "must be made, if only in the judge's mind, before granting the continuance." *Id.* at 506. The Court further determined that in order to satisfy the separate requirement that such findings be "'se[t] forth, in the record of the case,'" before excluding the resulting period of delay, those findings must at least be placed on the record "by the time a district court rules on a defendant's motion to dismiss" on Speedy Trial Act grounds. *Id.* at 507 (quoting predecessor to 18 U.S.C. 3161(h)(7)) (brackets in original). Although *Zedner* found that the requirement of on-the-record findings was not satisfied by a "passing reference to the case's complexity" in the district court's ruling on the motion to dismiss on Speedy Trial Act grounds, *ibid.*, the Court did not more generally require a lengthy narrative to support an ends-of-justice continuance under Section 1361(h)(7)'s predecessor.

Since *Zedner*, the courts of appeals have held that the findings requirement in Section 3161(h)(7)(A) does not require a judge to articulate basic facts when those facts are obvious and set forth in a 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). And courts have held that a judge need not necessarily "recite the statutory factors" in Section 3161(h)(7)(B) or "make findings as to each of them on the record." See, *e.g.*, *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 judge grants the motion based on those representations, and the district court later confirms that rationale in ruling on the motion to dismiss. See, *e.g.*, *United States* v. *Richardson*, 681 F.3d 736, 741 (6th Cir.), cert. denied, 568 U.S. 1035 (2012); *United States* v. *Napadow*, 596 F.3d 398, 405 (7th Cir. 2010).

b. Consistent with those decisions, the court of appeals here correctly determined that the magistrate judge made sufficient ends-of-justice findings to support a two-week continuance under Section 3161(h)(7). When petitioner joined in requesting the two-week continuance, petitioner expressly stipulated that it was necessary and that this period should be excluded from the Speedy Trial Act calculation "because the parties [we]re engaged in plea negotiations" and "the ends of justice served by such continuance outweigh[ed] the interests of the public and the defendant in a speedy trial." Pet. App. 36a (citing 18 U.S.C. 3161(h)(7)). The magistrate judge accordingly entered an order (*id.* at 35a-38a) granting the continuance as petitioner had himself requested. *Id.* at 37a. The magistrate judge found "good cause" for the continuance, ordered that the short, two-week period "should be excluded in calculating the time

within which the defendant shall be indicted under the Speedy Trial Act," and attached the parties' stipulation in which the parties had agreed that "the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial." *Id.* at 36a-37a.

Given that context, the court of appeals correctly determined that the magistrate judge "conclud[ed] that the parties' efforts to come to a mutually agreeable plea agreement 'outweigh[ed] the best interest of the public and the defendant in a speedy trial.'" Pet. App. 16a (quoting 18 U.S.C. 3161(h)(7)(A)) (second set of brackets in original). As the court of appeals explained, the magistrate judge's order "clearly incorporates the parties' two-page stipulation, both by attachment and reference," thus reflecting that the judge had "adopted the parties' stipulation as part of its own reasoning." *Id.* at 15a. The district court likewise found that the order had used "the magic words" of a statutory ends-of-justice finding by incorporating the stipulation, which explained why the "ends of justice" warranted a short delay. *Id.* at 45a. Even petitioner's counsel "agree[d]" that nothing in the record provided any reason to "second guess" the magistrate judge's finding that plea negotiations were ongoing and that the ends of justice served by a continuance outweighed the public and petitioner's interest in a speedy trial. *Ibid.*; see *id.* at 62a (noting, in denying petitioner's motion to dismiss, that counsel "conceded that no Speedy Trial Act violation occurred in this case"). Indeed, petitioner's counsel informed the district court that it "c[ould] rely on the [magistrate judge's] finding" without making a separate finding of its own. *Id.* at 53a; see also pp. 6-7, *supra* (discussing hearing).

c. Petitioner contends (Pet. 20-25) that the magistrate judge simply accepted the parties' stipulation without making his own ends-of-justice findings. The court of appeals correctly rejected that contention, finding that the record adequately reflected that the magistrate judge "expressly consider[ed] the three-pronged interests relevant to the [Speedy Trial] Act (the interests of defendant, the government, and the public)," Pet. App. 17a, and "conclud[ed] that the parties' efforts to come to a mutually agreeable plea agreement 'outweigh[ed] the best interest of the public and the defendant in a speedy trial,'" *id.* at 16a (quoting 18 U.S.C. 3161(h)(7)(A)) (second set of brackets in original). Petitioner's disagreement with that determination is simply a disagreement about how best to read the magistrate judge's Speedy Trial Act order in the context of the record in this case. That factbound issue does not warrant further review. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

Petitioner further contends (Pet. 24-25) that the court of appeals "essentially applied 'harmless error' analysis to a district court's failure to make the required findings to justify an exclusion," even though "this Court has already foreclosed applying the 'harmless error' rule in this context." That contention incorrectly describes the court of appeals' analysis. Because the court determined that the magistrate judge's order "sufficiently supports an ends-of-justice exclusion," Pet. App. 15a, the court did not address, and had no occasion to address, whether petitioner would have been entitled to dismissal if a judicial officer had not made the necessary ends-of-justice findings.

2. Petitioner contends (Pet. 13-20) that review is warranted to resolve a division of authority about whether a judicial officer must "make express, on-the-record findings" to memorialize his ends-of-justice rationale for a continuance, "where the parties [have] agree[d] that time should be excluded" on that ground, Pet. 13. Petitioner specifically invokes (Pet. 14-18) *United States* v. *Ammar*, 842 F.3d 1203 (11th Cir. 2016); *United States* v. *Toombs*, 574 F.3d 1262 (10th Cir. 2009); *United States* v. *Bryant*, 523 F.3d 349 (D.C. Cir. 2008); and *United States* v. *Ramirez-Cortez*, 213 F.3d 1149 (9th Cir. 2000), but none of those decisions conflicts with the court of appeals' decision here.[2] Moreover, even if the courts of appeals had issued divergent holdings as petitioner suggests, this case would present a poor vehicle for resolving any such disagreement because the magistrate judge's order, which incorporated the parties' stipulation, contained the "express, on-the record" ends-of-justice findings (Pet. 13) that petitioner contends are necessary. See pp. 14-15, *supra*.

Each of the decisions on which petitioner relies is consistent with the court of appeals' decision in this case. In *Ammar*, for example, the Eleventh Circuit made clear that it did not "opine as to precisely which or specifically how many words a district court must

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[2] Petitioner also invokes (Pet. 15-16) language in *Parisi* v. *United States*, 529 F.3d 134 (2d Cir. 2008), cert. denied, 555 U.S. 1197 (2009), but even petitioner acknowledges (Pet. 16) that *Parisi's* relevant discussion is "dicta." See also *Parisi*, 529 F.3d at 140 (declining to "resolve whether" certain "indications that the district court may not have made its own ends-of-justice determination" were "serious enough to constitute a violation of the [Speedy Trial] Act"). Such nonbinding dicta is plainly insufficient to reflect an actual conflict of authority warranting review.

place on the record before [Section 3161(h)(7)'s] findings requirement is met," because the "appeal [could not] be properly characterized as" presenting that issue. 842 F.3d at 1211-1212. And while emphasizing that it "need not opine" on what would be sufficient, *id.* at 1212, the court of appeals "recognize[d] the possibility that a finding that fails to recite properly the words called for in the statute might pass muster," *id.* at 1211 n.6.

The Eleventh Circuit had no occasion to resolve such issues because the district court in *Ammar* had justified its grant of a continuance "solely" on the fact of the "parties' [purported] agreement" and had "expressly declined" to make the ends-of-justice findings required by Section 3161(h)(7) "when confronted with the [government's repeated] request[s]" to do so, thus demonstrating that "the district court did not [actually] think that the ends of justice warranted [a one-year] continuance" of the trial. *Ammar*, 842 F.3d at 1211-1212; see *id.* at 1205, 1207, 1209-1210. In that context, including the district court's refusal to make any requisite "ends-of-justice findings," the court of appeals determined that the district court erroneously excluded the resulting period of delay based only on an erroneous "belief that the Speedy Trial Act could be waived" by the parties. *Id.* at 1210, 1212.

Toombs, in turn, involved a case in which seven continuances delayed the defendant's trial by 22 months. 574 F.3d at 1265. The Tenth Circuit determined that two of the continuances, which had granted defense motions asserting that "additional discovery had recently been disclosed to Defendant requiring additional investigation," were not supported by adequate findings. *Id.* at 1269-1270. The court emphasized that a "district court need not articulate facts that are obvious and set forth

in the motion to continue" and that its ends-of-justice finding must simply be supported by "the record, which includes the oral and written statements of *both* the district court and the moving party." *Id*. at 1271 (emphasis added). The court of appeals nevertheless determined that the specific findings before it were insufficient because neither the motions nor the trial court's orders revealed "the nature of the recently disclosed discovery, the relevance or importance of the discovery, or why the district court thought it proper to grant an approximately two-month continuance in each of the orders." *Id.* at 1272. Given that record and the particular justification for multi-month extensions, *Toombs* concluded that the district court had erred by relying on "conclusory statements lacking both detail and support." *Ibid*. Here, in contrast, the excluded time was short, specific, and reasonable, and no additional detail about the plea negotiations was necessary or advisable. Cf. Fed. R. Crim. P. 11(c)(1) ("The court must not participate in [plea] discussions.").

Bryant involved a nearly four-month continuance of trial for which the district court contemporaneously "made no express findings supporting [an ends-of-justice] continuance." 523 F.3d at 361. When the defendant later moved to dismiss the indictment on Speedy Trial Act grounds, the district court merely 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 (brackets, citation, and internal quotation marks omitted). The D.C. Circuit acknowledged that "*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," but concluded that the district court's "passing reference to the 'interest of justice' * * * at the [Speedy Trial Act] hearing" failed to "indicate that the judge seriously considered" the Section 3161(h)(7)(A) factors and "nothing [else] in the record" reflected such consideration. *Id.* at 361.

Finally, in *Ramirez-Cortez*, "the transcript reveal[ed] that the Magistrate Judge was granting blanket continuances" upon request, and had in that case granted a six-week continuance based solely on the defendant's statement that it would be for the purpose of working out a plea agreement, without making any ends-of-justice findings. 213 F.3d at 1154; see *id.* at 1152, 1154 n.5. The Ninth Circuit observed that the "record [contained no] indicat[ion]" that the magistrate judge undertook "any consideration of the 'ends of justice' factors." *Id.* at 1154. And given the absence of any basis in the record to support the conclusion that the magistrate had in fact made the requisite finding when he granted a continuance, the Ninth Circuit determined that the district court had erred in "'inferr[ing]' that the Magistrate Judge intended to make an 'ends of justice' finding." *Id.* at 1154-1155. In reaching that determination, the court of appeals indicated that its decision did not support limiting the relevant "record" to just the trial court's freestanding statements, but instead specifically recognized that "[d]istrict courts may fulfill their Speedy Trial Act responsibilities by adopting stipulated factual findings which establish valid bases for Speedy Trial Act continuances." *Id.* at 1157 n.9.

Each of the courts of appeals in *Ammar*, *Toombs*, *Bryant*, and *Ramirez-Cortez* examined the trial court record and found it insufficient to show that the trial

court had made the requisite ends-of-justice finding. Those decisions do not represent a method of reviewing a district court's ends-of-justice findings categorically different from the method employed by the court of appeals here. Nor do they forbid a court of appeals from considering the trial court record to understand the context surrounding a judicial officer's ends-of-justice determination. The analysis in *Ammar*, *Toombs*, *Bryant*, and *Ramirez-Cortez* likewise fails to demonstrate that any court of appeals would disagree with the Sixth Circuit's determination that the magistrate judge in petitioner's case weighed the Section 3161(h)(7) factors, concluded that the ends of justice warranted the two-week continuance, and made sufficient findings to exclude that time under the Speedy Trial Act. See Pet. App. 15a-16a. In short, no relevant conflict of authority exists that would warrant this Court's review.

3. Finally, this case would be a poor vehicle for reviewing petitioner's Speedy Trial Act claim because the judgment below should in any event be affirmed based on petitioner's stipulation to the very continuance he now challenges and his related representations in district court. 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 (citations omitted). Petitioner stipulated to the two-week continuance that he now contends was a violation of his speedy-trial rights, and he now has taken a "clearly inconsistent" position in asking that such time be counted (rather than excluded) under the Speedy Trial Act. *Ibid.* (citation omitted); 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").

Moreover, petitioner informed the district court both that it had "accurate[ly]" read the magistrate judge's order as reflecting a finding that "the ends of justice served by the continuance outweigh the interest of the public and [petitioner] in a speedy trial," Pet. App. 45a, and that it could "rely" on the magistrate judge's finding, *id*. at 53a. See pp. 6-7, *supra*. In light of those representations, no further attempt was made to clarify the record at the time by, for instance, obtaining clarification from the magistrate judge before the district court ruled on petitioner's motion to dismiss on Speedy Trial Act grounds. Allowing petitioner to change course now would prejudice the government if it would result in a reversal that vacates petitioner's conviction and dismisses petitioner's indictment. Petitioner is accordingly estopped from challenging the two-week continuance in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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