No. 19-8898

IN THE SUPREME COURT OF THE UNITED STATES

ANGELO PETER EFTHIMIATOS, 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 court of appeals erred in determining that the district court did not violate the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq., when it held jury selection within the 70-day period required by the Act and then recessed the trial before proceeding with the presentation of evidence, where both lower courts found the recess to be justified by petitioner's recently obtained counsel needing time to prepare for trial.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Iowa):

United States v. Efthimiatos, No. 13-cr-15 (June 19, 2014)

Efthimiatos v. United States, No. 15-cv-45 (June 25, 2015)

United States Court of Appeals (8th Cir.):

United States v. Efthimiatos, No. 14-2612 (Feb. 25, 2015)

Efthimiatos v. United States, No. 18-2276 (Nov. 8, 2018)

United States Supreme Court:

Efthimiatos v. United States, No. 16-5594 (Oct. 3, 2016)

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OPINION BELOW

The summary order of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 799 Fed. Appx. 75.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2020. The petition for a writ of certiorari was filed on June 29, 2020. 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 District of Vermont, petitioner was convicted on one count

of serving as an airman without an airman's certificate, in violation of 49 U.S.C. 46306(b)(7). Pet. App. 5a. The district court sentenced petitioner to 15 months of imprisonment, to be followed by one year of supervised release. Id. at 6a-7a. The court of appeals affirmed. Id. at 1a-4a.

1. In 2014, petitioner was convicted on federal drug charges in the Southern District of Iowa after he repeatedly piloted aircraft containing marijuana from California to Connecticut. Presentence Investigation Report (PSR) ¶¶ 10, 35. Shortly thereafter, the Federal Aviation Administration (FAA) issued an order revoking all of petitioner's FAA certificates, including his airline transport pilot certificate, based in part on petitioner's drug convictions. PSR ¶ 11. Among other things, the order stated that petitioner was subject to a "lifetime revocation for controlled substance violations" and that "[n]o application for a new airman certificate will be accepted at any time in the future." Ibid.

In April 2018, while petitioner was serving his term of federal supervised release for the 2014 drug conviction, investigators learned that petitioner might have been flying a single-engine aircraft between Vermont, where he was living, and Nantucket, Massachusetts, without an airman's license. PSR ¶¶ 12-13. Petitioner assured his probation officer that he had not engaged in any recent out-of-state travel, would not be flying,

and would be performing only airplane repairs and refurbishment at nearby Rutland Airport in Vermont. PSR ¶ 14. That same day, however, petitioner flew out of Rutland Airport in the single-engine aircraft. PSR ¶ 15. Shortly after midnight, petitioner piloted the airplane back to Rutland Airport, where investigators confronted him. Ibid. Petitioner provided the investigators with a pilot's license in his own name and falsely told them that the license was valid. Ibid.

2. Petitioner made his initial appearance in the case on April 10, 2018, and a magistrate judge ordered that petitioner be detained pending trial. See D. Ct. Doc. 6, at 1 (Apr. 10, 2018); Gov't C.A. Br. 7. On April 26, 2018, a grand jury in the District of Vermont charged petitioner with knowingly and willfully serving as an airman without an airman's certificate, in violation of 49 U.S.C. 46306(b)(7). C.A. App. 16-17.

a. Under the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq., a defendant's trial generally must "commence" within 70 days of his indictment or his appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). The Speedy Trial Act excludes various periods of delay. 18 U.S.C. 3161(h). Delay from a continuance granted by the district court is excluded "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,"

where 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). The Act further excludes various other periods of delay, including delay resulting from pretrial motions. 18 U.S.C. 3161(h)(1)(D).

b. On May 4, 2018, the district court set a deadline of July 11, 2018, for the filing of pretrial motions. D. Ct. Doc. 13; D. Ct. Doc. 14, at 3 (May 4, 2018). In so doing, it emphasized that the length of time was "necessary for the effective preparation of the case" by defense and government counsel given the "complexity of the case and the need for the defense to review discovery." D. Ct. Doc. 14, at 3-4. At a subsequent pretrial conference, the court scheduled petitioner's trial for September 11 to 14, 2018. C.A. App. 18. The court advised the parties that jury selection would occur on September 11, 2018, and that counsel "should be ready to do opening statements on the day of the voir dire." Id. at 18-19.

On August 15, 2018, petitioner filed an unopposed motion to continue the trial date, to set a new filing date for pretrial motions, and to exclude time under the Speedy Trial Act. C.A. App. 28. In the motion, petitioner requested that the district court continue the trial date until after September 11, 2018, asserting that petitioner would suffer prejudice if the trial went forward on "the anniversary of the deadliest terror attack on the

United States." Id. at 29. Petitioner also requested an extension of time for filing pretrial motions. Id. at 30. Petitioner further requested that the court exclude the time between August 15, 2018, and "the new trial date" under the Speedy Trial Act. Id. at 28. Petitioner stated that "[s]uch exclusion is warranted because the ends of justice outweigh the best interest of the public and the defendant in a speedy trial" and that excluding the time "would give counsel for the defendant the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." Id. at 30 (citing 18 U.S.C. 3161(h)(7)(A) and (B)(iv)).

On August 17, 2018, the district court granted petitioner's motion and directed petitioner's counsel to submit a proposed written order. Docket entry No. 22 (Aug. 17, 2018). Petitioner's counsel did not submit such an order. Pet. App. 13a.[1]

[1] On December 3, 2018, the district court issued a written order providing grounds for the August 17 ruling. Pet. App. 12a. The court explained that its delay in setting out its reasons was due to defense counsel's failure to comply with the local rules by submitting a proposed order, and it stated that, given that failure, the court "should have drafted its own [o]rder explaining its reasons for granting [petitioner's] unopposed requests." Id. at 13a. In the December 3 written order, the court adopted petitioner's own argument that "the ends of justice" would be served by granting the requests under 18 U.S.C. 3161(h)(7)(A) in light of defense counsel's need to prepare for trial, and excluded time from August 17 to the new trial date of October 3, 2018. Ibid. Before the court of appeals, petitioner acknowledged that, regardless of the exclusion of the period addressed in the order, the voir dire date of October 3 fell within the 70-day Speedy Trial Act window. Pet. C.A. Br. 19; see also id. at 1 (raising no issue with the August 17, 2018 order).

Instead, on August 21, 2018 petitioner's counsel filed a motion to withdraw from the case, explaining that petitioner had "expressed a lack of confidence in counsel's representation" and wished to proceed pro se. D. Ct. Doc. 23, at 1. At a hearing on the withdrawal motion on September 4, the district court announced that it was granting petitioner's request for new counsel and stated that it was "going to get this going as quickly as possible" so that petitioner would not be in pretrial detention "any longer than necessary." Pet. App. 54a. The court further stated that it would be setting petitioner's trial "promptly," observing that the case had "31 days on the speedy trial clock."[2] Ibid. Petitioner's outgoing counsel informed the court that petitioner "does not want the speedy trial clock tolled." Id. at 55a. The court told petitioner that if he "ask[s] for new counsel," "[t]here's no getting away" from need to toll the clock again. Ibid. And while the court nevertheless agreed that it would grant petitioner's request so that "the clock would begin ticking again today," it advised petitioner that his new attorney was "going to want time" to prepare for trial and would not "be doing [his] job if" he did not "ask for it." Ibid.

Later in the day on September 4, 2018, petitioner secured new counsel, who confirmed that he was available for jury selection in

[2] During the proceedings below, the government explained that the district court's calculation was off by three days and that 34 days had remained on the clock as of September 4. See Gov't C.A. Br. 9 & n.2.

the case on October 3. Pet. App. 59a. The district court's courtroom deputy told the parties' counsel that the court was prepared to hold jury selection on October 3 but could not proceed with the rest of the trial until November 26, "given another trial in October and the judge's schedule." Ibid. In response, petitioner's new counsel stated, "I suggest looking at dates beginning Dec. 5," explaining that he had another trial scheduled for the week of November 26. C.A. App. 214. The courtroom deputy proposed December 5 through 7, and petitioner's counsel replied, "Perfect for me." Id. at 213. Following those discussions, the court scheduled petitioner's case for jury selection on October 3, D. Ct. Doc. 26, at 1 (Sept. 4, 2018), and for presentation of evidence on December 5 through 7, D. Ct. Doc. 29 (Sept. 14, 2018).

On September 15, 2018, petitioner's counsel asked the government whether it would stipulate to a motion to continue jury selection to December 5 and to exclude time under the Speedy Trial Act. D. Ct. Doc. 57-2, at 2 (Nov. 28, 2018). Petitioner's counsel explained that, if petitioner consented, counsel "would like to defer the [jury] draw until December 5 (or a date much close[r] to December 5)" to allow petitioner and counsel "sufficient time to investigate potential motions, consider the government's [plea] offer and prepare [their] defense." Ibid.

On September 26, 2018, petitioner's counsel informed the government and the district court that he had spoken to petitioner

and expected "in the next day or two" to file a motion to continue the jury-selection date. D. Ct. Doc. 57-2, at 4. One day later, the government advised petitioner's counsel that if the court granted the continuance, the government would likely seek to supersede the indictment to add additional charges for flying without a valid airman's certificate on additional days. D. Ct. Doc. 57, at 4; Pet. App. 25a-26a. The next day, petitioner decided that he wished to proceed with jury selection as scheduled. D. Ct. Doc. 57-2, at 7.

On October 3, 2018, the district court held jury selection, seated twelve jurors and four alternates, and read the jury its preliminary instructions. Docket entry No. 32 (Oct. 3, 2018). After excusing the jury, the court reviewed the trial deadlines with counsel and confirmed that petitioner's trial would resume on December 5 through 7. Ibid.

On November 15, 2018, petitioner filed a motion for reconsideration of his pretrial detention. D. Ct. Doc. 42. In the motion, petitioner argued that the district court should order his pretrial release because, among other things, his trial had "been continued to December due to the withdrawal of" his original attorney. Id. at 3. The court granted the motion and ordered petitioner's pretrial release, subject to certain conditions. Docket entry No. 45 (Nov. 19, 2018); D. Ct. Doc. 46 (Nov. 19, 2018). The government filed a motion for reconsideration of the

pretrial-release order, explaining that federal prosecutors in the Southern District of Iowa intended to seek petitioner's detention based on his violation of the conditions of supervised release in his federal drug case. D. Ct. Doc. 47 (Nov. 20, 2018). The court granted the government's motion and issued a new pretrial detention order. Docket entry No. 51 (Nov. 21, 2018); D. Ct. Doc. 52 (Nov. 21, 2018).

The next day -- November 21, 2018 -- petitioner filed a motion to suppress certain statements he had made to federal officers, D. Ct. Doc. 54, and a motion in limine to exclude certain evidence, D. Ct. Doc. 55.

c. On that same day, petitioner filed a motion to dismiss the indictment with prejudice for a violation of the Speedy Trial Act, asserting that the jury selection on October 3, 2018, "did not constitute the commencement of trial under the Act because its scheduling more than two months prior to the swearing of the jury * * * constituted a 'start-and-stop plan' to impermissibly avoid the Act's 70-day clock." D. Ct. Doc. 53, at 1 (Nov. 21, 2018).

The district court denied the motion in an oral ruling. Pet. App. 50a. It found that the record "belied any suggestion that" the court either had "engaged in an impermissible start and stop" to petitioner's trial or that it had adopted the schedule "to give lip service to the Speedy Trial Act." Id. at 43a. The court explained that it had been "ready to try the case" on September

11, 2018, and had continued that trial date only because petitioner had requested a new date and had asked his original attorney to withdraw. Id. at 43a-45a; see id. at 48a-49a (explaining that petitioner was "provided a speedy trial" but asked that it be continued and asked for new counsel who "affirmatively asked to delay the presentation of evidence"). The court also observed that discussions between new defense counsel and the government in September indicated that petitioner's counsel wanted to continue jury selection until December, and that defense counsel ultimately decided to adhere to the earlier October jury-selection date not because he would be ready to proceed with the evidence, but "to forestal[l] a superseding indictment." Id. at 45a-47a. "Against this backdrop," the court found petitioner's counsel's subsequent "representation that he was ready for the presentation of evidence in October [to be] without merit." Id. at 46a.

The district court further explained that it had "set the presentation of evidence on the first date [petitioner's] counsel indicated he was available" and that counsel had "assured the Court that the dates were satisfactory." Pet. App. 47a. The court also emphasized that "[t]his is not a case where the Court's schedule has interfered with the [petitioner's] right to the Court's attention," and that, to the contrary, "[t]he [c]ourt has cleared its schedule several times and heard [petitioner's] motions on short notice." Id. at 48a-49a. The court further observed that,

during the period between jury selection and the presentation of evidence, petitioner had "not been idly waiting" for "the Court's convenience" and instead "had numerous court proceedings." Id. at 48a. The court emphasized that it "did not try to game the system," or "defeat the purpose of the [A]ct," and that petitioner "either consented to any delay or affirmatively caused it." Id. at 50a.

d. Petitioner's trial proceeded as scheduled on December 5, 2018, with the presentation of evidence, Docket entry No. 70 (Dec. 5, 2018), and the jury returned a guilty verdict the following day, D. Ct. Doc. 73 (Dec. 6, 2018). The district court later sentenced petitioner to 15 months of imprisonment, to be followed by one year of supervised release. Pet. App. 6a-7a.

3. The court of appeals affirmed in a nonprecedential summary order. Pet. App. 1a-4a.

As relevant here, the court of appeals rejected petitioner's contention that the period between jury selection and the presentation of evidence in his case violated the Speedy Trial Act. Pet. App. 2a-3a. The court accepted that a delay between jury selection and the rest of the trial can violate the Speedy Trial Act in some circumstances, but determined that "[h]ere, the record does not suggest that the district court's bifurcated scheduling was meant to evade the spirit of the Act." Id. at 2a.

The court of appeals observed that the length of time between "October 3, 2018 and November 26, 2018," the date the trial court

had suggested for the presentation of the evidence, was "not nearly as lengthy as the delays" the court had previously found impermissible. Pet. App. 2a. And it determined that the gap between jury selection and the presentation of evidence was justified, explaining that the district court had been "ready to proceed with trial on September 11, 2018," and that petitioner had moved to continue the trial from that date. Ibid. The court of appeals also observed that petitioner had "sought new defense counsel, who needed time to prepare," and that petitioner's new counsel "would not have been prepared for trial shortly after jury selection," an observation that was "reinforc[ed]" by the fact that new counsel "wanted to move the trial date from September," "asked the government to move jury selection from October to December in order to have more time to prepare," and "filed a number of pretrial motions" beginning on November 15, 2018. Id. at 2a-3a.

ARGUMENT

Petitioner contends (Pet. 14-32) that the court of appeals erred in determining that no Speedy Trial Act violation occurred in this case. The court appeals' determination was correct, and its factbound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The Speedy Trial Act generally 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). Petitioner acknowledges (Pet. 17), and does not challenge, the courts of appeals' uniform consensus that, for purposes of the Act, "trial generally commences when voir dire begins." United States v. Brown, 819 F.3d 800, 810 (6th Cir. 2016); see United States v. Rodriguez, 63 F.3d 1159, 1164 (1st Cir.), cert. denied, 516 U.S. 1032 (1995); United States v. Fox, 788 F.2d 905, 908 (2d Cir. 1986); Government of Virgin Islands v. Duberry, 923 F.2d 317, 320 (3d Cir. 1991); United States v. A-A-A Elec. Co., 788 F.2d 242, 246 (4th Cir. 1986); United States v. Lipscomb, 299 F.3d 303, 342 (5th Cir. 2002); United States v. Jones, 23 F.3d 1307, 1308 (8th Cir. 1994); United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1983); United States v. Arnold, 113 F.3d 1146, 1149 (10th Cir. 1997), overruled on other grounds by Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Isaacson, 752 F.3d 1291, 1300-1302 (11th Cir. 2014), cert. denied, 574 U.S. 1095 (2015); cf. Gomez v. United States, 490 U.S. 858, 873 n.26 (1989) (noting that "for Speedy Trial Act purposes, trial commences at voir dire").

The courts of appeals have, however, taken the view that even if a trial "commence[s]" within the statutory time limit, a delay between voir dire and the presentation of the evidence can violate

the Speedy Trial Act if the record indicates that the district court used the jury selection "merely [as] a pretext to toll the statutory 'clock,'" United States v. Zayas, 876 F.2d 1057, 1058-1059 (1st Cir. 1989), with an intent "to evade the spirit of the Act," Duberry, 923 F.2d at 321; see also Brown, 819 F.3d at 810 ("[A]ppellate courts have consistently condemned attempts by the district courts to evade the spirit of the Act by conducting voir dire within the statutory time limits and then ordering a prolonged recess with [the] intent to pay mere lip service to the Act's requirements.") (citations and internal quotation marks omitted; brackets in original). The court of appeals in this case accepted that approach. See Pet. App. 2a. "Normally," it explained, "the Act is not violated when the jury is selected within the 70-day period but a short recess places the swearing of the jury outside the statutory period." Ibid. (citation omitted). "But," it continued, "if a court impairs a defendant's ability to make a defense by arbitrarily and substantially delaying the trial, it abuses its discretion." Ibid. (citation omitted).

The court of appeals nevertheless determined that even under that approach, no Speedy Trial Act violation occurred here because "the record does not suggest that the district court's bifurcated scheduling was meant to evade the spirit of the Act." Pet. App. 2a. Petitioner's challenge to that determination in this Court is premised on his assertion that the district court actually delayed

the presentation of evidence in order "to accommodate [its own] calendar." Pet. i; see, e.g., Pet. 25-26, 32. Petitioner's disagreement with the court of appeals' interpretation of the record is a factbound issue that does not warrant further review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). It is, moreover, meritless, because the court's interpretation of the record was correct. As the court of appeals recognized, "the district court was ready to proceed with trial on September 11, 2018," and it was petitioner who moved to continue the trial. Pet. App. 2a. Petitioner also "sought new defense counsel, who needed time to prepare." Ibid. In particular, new counsel "wanted to move the trial date from September," had asked to push jury selection "to December" to have more preparation time, and filed several motions starting in mid-November. Ibid. The record fully supports those determinations. See pp. 4-11, supra; see also Pet. App. 45a-51a.

2. Petitioner contends (Pet. 18-22) that, although the circuits are uniform both in recognizing that trial commences when jury selection begins and in their view that a district court cannot evade the spirit of the Speedy Trial Act by ordering a prolonged recess after voir dire with the intent to evade the Act, the circuits nonetheless vary in how "they apply [the latter] principle." In particular, petitioner asserts (Pet. 22-26) that

the decision below conflicts with two decades-old cases, one from the Sixth Circuit and another from the Tenth Circuit. The cases petitioner cites do not demonstrate that the circuits are in conflict. Rather, those cases presented different factual scenarios that led to a contrary result.

In United States v. Crane, 776 F.2d 600 (1985), the Sixth Circuit found a Speedy Trial Act violation where a district court, surprised by an upcoming Speedy Trial Act deadline that conflicted with the judge's schedule, made a last-minute arrangement for a magistrate judge to start voir dire within the 70-day period, but not to proceed further with the trial. Id. at 602-603, 605-606. The defendant objected to the procedure as a "'false start'" and "an attempt to circumvent the Speedy Trial Act." Id. at 602. The district court subsequently acknowledged that it adopted the schedule in an "inappropriate effort" to evade the Act, and did not rely on the voir dire date as the commencement of the trial. Id. at 603. The district court nonetheless rejected the defendant's motion to dismiss on Speedy Trial Act grounds by retroactively characterizing the delay until the presentation of evidence as an ends-of-justice exclusion from the Act. Id. at 606-607 (citing 18 U.S.C. 3161(h)(8) (1984)). The Sixth Circuit reversed, rejecting the ends-of-justice exclusion based on its "reading of the record." Id. at 606. The Sixth Circuit's decision in Crane, which addressed the purported ends-of-justice exclusion

rather than the delay between voir dire and the evidentiary presentation, and which, in any event, was tied to the particular record in the case, does not suggest that the Sixth Circuit would have reversed petitioner's conviction on the record here.[3]

In United States v. Andrews, 790 F.2d 803 (1986), cert. denied, 481 U.S. 1018 (1987), the Tenth Circuit determined that the Speedy Trial Act was violated in the particular "circumstances of th[e] case," where the district court delayed the evidentiary presentation for two-and-a-half months after voir dire, explaining that "the delay was occasioned by a heavy criminal docket, several legal holidays, and [the judge's] attendance at a judicial seminar, which he mistakenly believed was mandatory." Id. at 808. Here, in contrast, the district court explained that it had been ready to proceed with trial well before the expiration of the Speedy

[3] Petitioner also suggests that the Sixth Circuit's decision in United States v. Brown, 819 F.3d 800 (2016), reflects a different "standard[]" from the one applied by the Second Circuit here. Pet. 20; see Pet. 20-22. But in Brown, the Sixth Circuit found the Speedy Trial Act to have been violated where "the district court sought to continue trial to a date beyond the 70-day limit from the outset," the district court admitted that it had failed to calculate the Speedy Trial Act deadline before granting the continuance, and the district court only subsequently set voir dire within the 70-day limit in an effort to avoid the Speedy Trial Act problem. Id. at 817. Notably, the Sixth Circuit emphasized that there was "no indication * * * that either defense or government counsel would not have had reasonable time to effectively prepare of trial" if trial had commenced within the 70-day period. Ibid. Because the district court in this case was prepared to proceed with trial before the expiration of the 70-day period, Pet. App. 2a, and because the postponement was occasioned by defense counsel's need to prepare, id. at 2a-3a, the court of appeals' decision here does not conflict with Brown.

Trial Act period, and that the delay was due to petitioner's request for a continuance and for new counsel, and to new counsel's need to prepare. See Pet. App. 46a-51a. The court of appeals found that determination to be supported by the record. See id. at 2a-3a.

Tellingly, none of the cases petitioner cites invalidated a conviction where the evidentiary presentation was postponed because of the withdrawal of defense counsel and the new defense counsel's need to prepare for trial, as the court of appeals determined to be the case here. Indeed, the Speedy Trial Act specifically recognizes that counsel's need for additional time to prepare effectively can justify delay. 18 U.S.C. 3161(h)(7)(B)(iv). The cases petitioner cites do not suggest that the Sixth or Tenth Circuit would reach a different result on the facts of this case, nor do they reflect a categorically different approach to the Speedy Trial Act analysis from the one the Second Circuit adopted in the non-precedential decision below.

3. Petitioner additionally contends (Pet. 29-32) that the court of appeals improperly relied on the district court's "post hoc rationalizations" for the trial recess reflected in a December 3, 2018 order, and that doing so contravened this Court's decision in Zedner v. United States, 547 U.S. 489 (2006). In Zedner, this Court explained that the findings for an ends-of-justice continuance under 18 U.S.C. 3161(h)(7)(A) of the Speedy Trial Act

(then codified in Section 3161(h)(8)) "must be made, if only in the judge's mind, before granting the continuance." 547 U.S. at 506. And while it did not decide whether the findings must also be placed on the record before continuance, it concluded that they must at least be placed on the record before a ruling on a motion to dismiss on Speedy Trial Act grounds. Id. at 506-507.

As discussed at note 1, supra, the district court on December 3, 2018, entered a written order relating to its oral grant of petitioner's mid-August motion for a continuance. While petitioner suggests (Pet. 29-30) that the December 3, 2018 order was improper under Zedner, that order did not purport to justify postponement of the presentation of the evidence after voir dire -- the period at issue now -- but rather the district court's separate ends-of-justice exclusion granted on August 17, 2018. See Pet. App. 12a-13a. Whether that exclusion was proper is outside the scope of the question presented, Pet. i, was not addressed by the court of appeals, Pet. App. 2a-3a, and would not make a difference to the application of the Speedy Trial Act in any event, see Pet. C.A. Br. 19 (acknowledging that October 3, 2018 was "still within the time permitted by the Speedy Trial Act" and that if the trial had begun shortly after the jury draw "there would have been no Speedy Trial Act violation"); see also p. 5 n.1, supra. In any event, the district court permissibly granted the ends-of-justice continuance based on the "[d]efendant's

unopposed request[]," Pet. App. 13a, adopting petitioner's own assertion in his motion that defense counsel's need to prepare justified the delay. See p. 5 & n.1, supra. And the absence of a written order contemporaneous with the grant of the continuance was caused by petitioner's own failure to comply with his obligation to provide a proposed order. See ibid.[4]

Nor is petitioner correct in asserting (Pet. 29-31) that the court of appeals improperly relied on the district court's explanations in the December 3 order in finding no Speedy Trial Act violation in the recess between voir dire and the presentation of the evidence. Even if Zedner applied in that distinct context -- and petitioner identifies no court that has so held -- the court of appeals did not cite the December 3 order; instead, it relied on record evidence that established defense counsel's need to prepare for trial. Pet. App. 2a-3a.

4. Finally, this case would be a poor vehicle for reviewing petitioner's Speedy Trial Act claim because the judgment below

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[4] Petitioner also errs in arguing that the district court's views about defense counsel's need to prepare in denying the motion to dismiss relied on "the benefit of hindsight." Pet. 30. The district court had confirmed with petitioner in early September that petitioner "understood that his new counsel would need time to prepare for trial" and would not "be doing [his] job if" he did not "ask for it," which would require delaying the trial. Pet. App. 45a, 55a-56a. The requests made in September by petitioner's new counsel, and the fact that he had not filed any pre-trial motions by the time voir dire commenced simply confirmed that defense counsel was not "ready for the presentation of evidence in October." Id. at 46a.

should in any event be affirmed based on petitioner's agreement to the very trial schedule that he now challenges. 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). And the Court has held open the possibility that the doctrine might apply in the Speedy Trial Act context where a defendant "ha[s] succeeded in persuading the [d]istrict [c]ourt * * * that the factual predicate for a statutorily authorized exclusion of delay could be established." Id. at 505.

Here, when the district court was ready to proceed with trial, petitioner moved for a continuance. Pet. App. 48a. He subsequently represented to the court that his trial had "been continued to December due to the withdrawal of" his original attorney. D. Ct. Doc. 42, at 3. And petitioner's new counsel agreed to the trial schedule that petitioner now challenges as a

violation of the Speedy Trial Act, informing the district court's courtroom deputy that proceeding with the presentation of evidence on December 5, 2018, was "[p]erfect" for him. C.A. App. 213. Petitioner now takes a "clearly inconsistent" position, Zedner, 547 U.S. at 504 (citation omitted), when he argues that the same trial schedule was adopted for the purpose of circumventing the Speedy Trial Act. See id. at 504-506. Petitioner is accordingly estopped from challenging the bifurcated schedule in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020