IN THE SUPREME COURT OF THE UNITED STATES

MARIA ANDREA GONZALEZ,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Does the Speedy Trial Act, 18 U.S.C. § 3161, require federal district courts to make specific findings of fact from those factors enumerated in § 3161(h)(7)(B) where the court relies on one such factor to justify excluding days from a criminal defendant's 70-day speedy trial clock when granting a continuance of the defendant's trial based on an ends-of-justice finding under § 3161(h)(7)(A)?

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No. _____

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

Petitioner, MARIA ANDREA GONZALEZ (hereinafter Gonzalez) respectfully prays that a writ of certiorari issue to review the unpublished memorandum from the United States Court of Appeals for the Ninth Circuit entered on September 22, 2021.

OPINION BELOW

On September 22, 2021, the Ninth Circuit Court of Appeals entered an unpublished memorandum affirming Petitioner's convictions on federal drug trafficking and firearm offenses The memorandum is attached in the Appendix (App.) at page 1-5. The Ninth Circuit denied a petition for rehearing and suggestion for a rehearing *en banc* on November 4, 2021. App. 23. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 18, United States Code, Section 3161. App. 24-29

Title 18, United States Code, Section 3162. App. 29-30.

STATEMENT OF THE CASE

1. Introduction.

The Speedy Trial Act (the Act) requires a criminal defendant's trial to commence no later than 70 days from the filing of a federal charge or from the date of the defendant's initial appearance on the charge, which ever event is later in time. *United States v. Bloate*, 559 U.S. 196, 198-99 (2010); and *Zedner v. United States*, 547 U.S. 489, 492, 498 (2006) (citing 18 U.S.C. § 3161(c)(1)); App. 24. A defendant's trial that commences beyond the Act's 70-day limitation must be dismissed. 18 U.S.C. § 3162(a)(2); App. 29-30.[1]

The Act contains a list of enumerated events that automatically excludes time when calculating whether the 70-day period has elapsed. *Bloate*, 559 U.S. at 199; and *Zedner*, 547 U.S. at 497 (citing 18 U.S.C. § 3161(h)(1));App. 25-26. Paragraph (7) of subsection (h) of § 3161 permits a trial court to exclude periods of time from the speedy trial calculation on a motion to continue the trial only if the court makes appropriate findings that the "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a

[1] A dismissal under the Act may be with or without prejudice depending the weight of certain factors set forth in § 3162(a)(2). App 29-30.

speedy trial." 18 U.S.C. § 3161(h)(7)(A); App. 27; *see also*, *Bloat*, 599 U.S. at 210-11; and *Zedner*, 547 U.S. at 498-99.[2]

Before granting an ends-of-justice continuance under subsection (A), the trial court must consider certain factors under subparagraph (B) that may justify excluding periods of delay in the Act's 70-day limit. 18 U.S.C. § 3161(h)(7)(B); App. (27-28). Subparagraph (B) states:

> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> > (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
> >
> > (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
> >
> > (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.
> >
> > (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the

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[2] *Zedner* referenced § 3161(h)(8) which is an identical predecessor provision now codified under § 3161(h)(7). *Zedner*, 547 U.S. at 498 n. 3.

> reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. § 3161(h)(7)(B); App 27-28; *see also*, *Zedner*, 547 U.S. at 498. The provision at issue in this case is § 3161(h)(7)(B)(iv); App. 28.

Subparagraph (B)(iv) provides that the trial court may excluded time in calculating the Act's 70-day limit and grant a continuance in cases that are not unusual or complex. An ends-of-justice continuance under subparagraph (B)(iv) must be supported by district court finding that "the failure to grant such a continuance ... would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, *taking into account the exercise of due diligence*." 18 U.S.C. § 3161(h)(7)(iv) (emphasis added) *Id.*.

2. Statement of Facts.

Gonzalez is currently serving a 20-year prison sentence after a jury convicted her on federal drug trafficking and firearm charges. The government obtained the first indictment in January 2018. The first indictment charged three offenses. App. 31-32

Count 1 charged possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1); Count 2 charged possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c); and Count 3 charged felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *Id.* Gonzalez was arraigned on the first indictment on January 24, 2018 (App. 34), thereby, commencing the 70-day speedy trial period for these three counts. 18 U.S.C. § 3161(c)(1); App 24.

On March 13, 2018, the government obtained a superceding indictment. App. 36. The superseding indictment added a new Count 2, possession with intent to distribute heroin; added

Count 5, possession with intent to distribute heroin; and added Count 6, possession with intent to distribute methamphetamine, all new counts alleged violations of 21 U.S.C. § 841(a)(1). App. 37-39. Gonzalez was arraigned on the superseding indictment on March 16, 2018 (App. 40), thus, commencing a different speedy trial calculation for the new counts added in the superseding indictment.[3]

The magistrate appointed CJA counsel (first counsel) to represent Gonzalez who appeared with Gonzalez at her arraignment on January 24, 2018. First counsel also represented Gonzalez at her arraignment on the superseding indictment. This petition challenges three of the four motions to continue Gonzalez's trial that were granted by the district court.

On March 16, 2019, first counsel filed the first of the four motions to continue Gonzalez's trial. App. 42. Trial was scheduled to commence on April 2, 2018. App. 67

First counsel maintained that a continuance was necessary for the following reasons:

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[3] Counts 2 and 3 of the first indictment were moved to Counts 3 and 4 of the superseding indictment. App. 31-32, and App. 37. Gonzalez was convicted of Counts 1, 3 and 4 of the superseding indictment. Counts 2 and 6 of the superseding indictment were new counts against Gonzalez which resulted in conviction. App. 37-38. Count 5 was eventually dismissed by the district court before trial.

The speedy trial calculation for the three counts in the first indictment is separate from the speedy trial calculation for the new counts added in the superseding indictment. All circuits that have addressed the speedy trial calculations for charges added in a superseding indictment, beyond those charged in previous indictments, require a separate speedy trial calculation for the new counts. *See*, *United States v. Thomas*, 726 F.3d 1086, 1091 (9th Cir. 2017) (listing cases). This petition includes a separate speedy trial calculation for Counts 1, 3 and 4 (charged in the first indictment) from Counts 2 and 6 (added in the superseding indictment) when necessary.

The government obtained a second superseding indictment. The second superseding indictment simply contained clerical changes and did not add counts nor make any substantive changes to the superseding indictment. Therefore, the relevant speedy trial period on the new counts commenced on March 16, 2018, the date of Gonzalez's arraignment on the superseding indictment.

> In meetings to discuss the case the defendant was resistive to joint review of the discovery, and to substantive discussions with counsel, focusing instead on detention review hearings and insisting on her own copy of discovery. A motion to disclose discovery to the defendant was filed on 2/26/18. ECF 27. This motion was heard and denied on March 7, 2018. ECF 32. Defense counsel was next able to meet with the defendant on March 13, 2018, and review discovery and discuss the case. At that time, areas of inquiry for a defense came into focus. Counsel met with Gary King, defense investigator, on 3/14/18. Mr. King will expedite his efforts, but will be unavailable from 3/24/18 to 4/20/18.
>
> Additional discovery in support of the superseding indictment was received on March 14, 2018. As noted in defendant's motion in limine (ECF 36) the discovery received to date includes a large number of phone records and "ping" locations. The additional discovery includes extraction data from an iPhone.
>
> Counsel discussed with the defendant the status of the case and the need for additional pre-trial preparation. The defendant disagrees with the motion. App. 44.

At a hearing on the first motion to continue held on March 21, 2018, first counsel detailed essentially the same reasons contained in the motion to continue. App. 48-51. First counsel explained his "inability to adequately prepare" was due to a conflict with Gonzalez about the case, and that Gonzalez was primarily focused on obtaining pretrial release. App. 48. First counsel had been unable to review discovery with Gonzalez until after the district court denied her request for disclosure of the discovery. App. 49. After a preliminary review of discovery with Gonzalez, defense counsel obtained services of an investigator to explore matters raised by Gonzalez. 49-50. First counsel asserted, "under the circumstances, as defense counsel, I've done what I could do up to his point to pursue this case and prepare it, given the difficulties in communicating with my client, and that to properly prepare this case for trial ... a continuance is

required." App. 51.

The district court noted that a recent superseding indictment had been obtained "in which three additional charges were added," and noted that this is not "the same case that it was two weeks ago." App. 51. The district court then inquired of first counsel how much time he needed to prepare for trial. App. 52.

First counsel explained that new discovery had just been received. He needed sufficient time to review and analyze that discovery. He also needed sufficient time to deal with the evidence gathered by the investigator. First counsel indicated that a continuance of 45 to 60 days would be sufficient. *Id.*

The government agreed "that there were valid grounds under the [Act] to exclude time from the 70 days from arraignment through trial, based on the new charges filed, [and] the provision of additional discovery." App. 53. The district court then inquired of Gonzalez if she agreed with her counsel's request for continuance. App. 56-58. She objected to a continuance. App. 58.

The district court granted the continuance, stating,

> Your attorney needs time. He can only provide effective assistance of counsel if he's given that time. He has engaged a private investigator to help investigate some of the facts that you've asked him to do. That investigator needs time to do that investigation, and then Mr. Lynch needs time to review it, and to decide how it fits into his strategy and tactics for trial. And I would be not ensuring that you are being represented effectively, and that your defense is not – being given an appropriate chance if I were to force this case to go to trial before it's ready, so I will grant that continuance, finding there's good cause to do so. App. 58-59.

This petition acknowledges that the record as a whole supports the district court's first continuance under § 3161(h)(7)(A) and (B)(iv). The district court continued the trial to May 29, 2018, just shy of 60 days from the April 2, 2018, trial date. App. 64.

On April 2, 2018, the district court permitted first counsel to withdraw. A new CJA counsel (second counsel) was appointed to represent Gonzalez. This petition focuses on whether the district court made sufficient findings to justify the ends-of-justice continuances under § 3161(h)(7)(A) in the second, third and fourth orders granting continuances of Gonzalez's trial, on motions to continue filed by second counsel.

On May 21, 2018, second counsel filed a second motion to continue Gonzalez's trial. App. The motion stated:

> On May 16, 2018, defense counsel received newly provided discovery. The new discovery contains information related to Ms. Gonzalez' Facebook account, search warrants and affidavits related to the Facebook account, Spillman reports and Cellbrite reports and extractions from iPhone A1428. The discovery is bates number 878-1159 and counsel has not been afforded an opportunity to review the discovery.
>
> Considering being recently appointed, the seriousness of the offense and the new discovery, Counsel for Ms. Gonzalez requests that this Court grant a continuance because additional time is necessary to provide counsel with sufficient time to conduct investigation for a thorough and effective defense. App. 69.

At a hearing on this motion, second counsel explained to the district court, "we haven't actually had the case that long." App. 76. He further explained, "[w]e did receive a little bit more discovery several days ago, and sounds like there's other discovery ... coming to us." App. 76-77. Counsel did not detail the length of time needed for review of the new discovery. *Id.* He did not explain how much more discovery he anticipated would be received. Counsel also stated

that Gonzalez wanted to pursue a motion for "violation of her speedy trial right," and was reserving that issue. App. 77.

Second counsel then informed the district court, 'I think it's appropriate to continue this case to September 17th [2018]." *Id.* The district court did not inquire why second counsel needed a four-month continuance tp review less than 300 pages of discovery. The district court simply observed "that's about 120 days from now." *Id.*

Defense counsel explained, "I know originally we were looking at August ... [but] [t]he government is gone in August, and, so, realistically, September." App. 78. The government informed the district court of an investigation of Gonzalez for "an incident from a couple days ago" that may be a state or federal matter "that would certainly warrant a continuance in this case as well." *Id.* No other details were outlined by the prosecutor. *Id.*

In response, the district court said, "I am inclined to grant the continuance." App. 79. Gonzalez again objected to a continuance. App. 80.

The district court granted the four-month continuance. App. 79 and 86. The district court's findings stated generally, second counsel "requests additional time to review discovery and prepare an adequate defense." App. 85. The order did not include any findings that addressed that a four-month continuance was reasonable, nor did the order make a finding on "the exercise of due diligence" of second counsel. *Id.* The order simply referenced § 3161(h)(7)(A) and (h)(7)(B)(iv) and stated, "[t]he Court finds the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial, and the failure to grant such a continuance would deny counsel for the defendant reasonable time necessary for effective preparation." *Id.*

Although the district court continued Gonzalez's trial to September 17, 2018, second counsel filed a third motion to continue trial on July 17, 2018, two months before the September 17 trial date. App. 88. In the third motion, second counsel wrote:

> Ms. Gonzalez was just indicted on new charges and alternative counsel was appointed. Defense counsel on this case requests a reset of the pretrial and trial dates to any convenient date for the Court in December of this year.
>
> This continuance would allow defense counsel an opportunity to discuss the new allegations with Ms. Gonzalez and her other court appointed attorney as well as any potential resolutions. As the Court is aware, if Ms. Gonzalez is convicted of this offense there is a mandatory life sentence and therefore this request is not unreasonable considering the possible sentence. App. 89.

The district court held a hearing on that motion on July 18, 2018. App. 91. At the hearing, second counsel reminded the district court that at the last hearing he "discussed potential filing a motion to dismiss based on speedy trial violations...." App. 94. Counsel informed the district court that he had "prepared the motion," but "holding off" filing the motion. *Id.* Counsel explained that the case did not involve "really cumbersome discovery," but involved a lot of recorded jail phone calls. App. 94-94. Counsel indicated he needed time to meet with the prosecution to determine which phone calls it would utilized at trial. App. 95.

Second counsel also informed the district court that the request for continuance "was primarily based" on Gonzalez's recent arraignment on "a new federal indictment." *Id.* Counsel indicated he needed time to confer with counsel on that case "and figuring out this case in conjunction with that case." *Id.* Counsel believed Gonzalez's potential life sentence in this case "definitely affect[ed] the other case and what's going to happen with the resolution of that case as

well." App. 95-96. Second counsel sought a continuance of Gonzalez's September 17 trial to December 2018. App.96-97.

The district court addressed second counsel - "one of the reasons you'd like to continue your case is because you'd like some time to find out more about this new case, discuss it with Mr. Hormel, and see how that factors into your plans to defend and advise your client." App. 97. Second counsel agreed. *Id.*

Gonzalez again objected to a continuance, stating, "[t]hey are two completely different cases ... the other case has nothing to do with my drug case." *Id.* The prosecutor indicated that the two cases were "separate cases." App. 100. And, the district court noted that "[t]hey seem completely unrelated." *Id.* The prosecutor reiterated that the cases were "unrelated." *Id.*

In the order granting the third motion to continue, the district court found that second counsel "requested additional time to discuss the new allegations against the Defendant with Mr. Hormel." App. 107. The district court noted that Gonzalez disagreed with a continuance. *Id.* The district court, however, found that "the ends of justice served by taking such action outweigh the interest of the public and the defendant in a speedy trial, and the failure to grant a continuance would deny counsel for the defendant reasonable time necessary for effective preparation." *Id.* The district court made no finding on "the exercise of due diligence" of second counsel. *Id.*

The district court continued Gonzalez's trial to December 10, 2018. App. 108. The district court's order did not make any findings that explained why second counsel's request to continue the September 17 trial to December 10 was "reasonably necessary for effective preparation," considering Gonzalez's trial was not scheduled until September 17, which was still two months away from the July 18 hearing. App. 107-08. Nothing in the record established why

second counsel needed an additional three months from the September 17 trial date to meet with the prosecutor to review jail calls, and to confer with counsel on the other federal case. *Id.*

On November 2, 2018, second counsel filed a fourth motion to continue Gonzalez's trial. App. 109. In this motion, second counsel stated:

> Counsel respectfully requests that the current trial date be stricken and reset into mid March of the 2019 calendar year. The basis for the continuance is that Ms. Gonzalez has been indicted with a new offense on July 10, 2018. 1-18-CR-02039-SAB. There is a current offer to settle which would resolve both cases. Ms. Gonzalez would like an opportunity to fully investigate her newer case with her counsel before agreeing to accept any offer to settle. Additionally, Ms. Gonzalez is considering hiring alternative counsel in this matter and the additional time requested would allow her an opportunity to do so. It is defense counsel's understanding that Ms. Gonzalez is not objecting to this requested continuance. App. 110.

The district court held a hearing on the fourth motion to continue App. 112. Second counsel explained to the district court why he sought a continuance:

> And the reason for that is this case, a resolution of this case, or if this case goes to trial, kind of effectively shuts down negotiations on the other case. And Mr. Hormel was in a position where he's still going over discovery, still talking to Ms. Gonzalez about that, and didn't want that to take place. App. 115.

Second counsel also discussed the absence of his associate in December when trial was currently set. *Id.* Second counsel indicated again the motion to dismiss for a speedy trial violation was prepared, but they had again held off filing the motion to prevent interference with plea negotiations. *Id.*

The district court responded, "[y]ou have a motion ready, but it hasn't been filed?" App 116. Second counsel said, "[r]ight" and explained, "[t]he filing will kind of trigger no more

negotiations" with the prosecutor *Id.*

The district court then addressed Gonzalez:

> we've gone through this before. You've had other attorneys, but now you have these two attorneys, who are doing their best to defend you, and to get ready to do that because of the nature of the charges and the consequences if you're found guilty. And they're very aware of that, and they want to do their best job to help you, not only to go trial, if that's what happens, but also to make some decisions about whether you should go to trial or not. And those are decisions that only you can make, with the assistance of your lawyers. But your lawyers need some more time to help you make those decisions. App. 122.

The then district court asked Gonzalez if she agreed with another continuance of her trial. She did not agree, and explained,

> I don't feel like he needs any more time in this case, because it's not too complicated, as Mr. Hormel's case. I understand why Mr. Hormel may need more time, because there's more evidence, or more co-defendants, or whatnot, you know, whatever he needs to look into. But this case is pretty simple. It's just me, myself. I don't understand why it's been taking so long for me to get, get sentenced, or whatever it is, you know.
> ....
> But I just want this done and over with. App. 123.[4]

The district court granted a continuance, stating

> Ms. Gonzalez, I understand the nature of your objection. You have consistently indicated that you object to continuances, and I respect

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[4] The facts underlying the charges both stem from law enforcement searches and seizures during arrests of Gonzalez on two different occasions. The facts underlying Counts 1, 2, 3 and 4 of the superseding indictment stemmed from law enforcement's seizure of methamphetamine, heroin and a firearm from a search of Gonzalez's purse during an arrest on November 21, 2017. Counts 5 and 6 stemmed from a law enforcement search of Gonzalez's person during her arrest on January 22, 2018, on an arrest warrant issued for the federal charges in first indictment that resulted in the seizure of methamphetamine and heroin. The facts for each counts are not complicated. They are included in the presentence investigation report filed under seal in the Ninth Circuit, DktEntry 18 at 8-12.

> your thoughts on that. However, I need to also consider the issues that your attorneys bring to me, and they have. They've made a good job. They need time. They can only do an effective job, which is what we want them to do, what you want them to do, and what the court wants them to do, they can only do that job if they have enough time to get it done. And your attorney here is asking for more time for various reasons which he's explained.
>
> So I will grant the motion over your objection. I don't need a speedy trial waiver, and, so, I won't ask for one, because you've indicated you wouldn't sign one. App 125-26.

The district court continued Gonzalez's trial to February 4, 2019, memorializing it in an order. App. 133. The district court again found "the ends of justice served by taking such action outweigh the interest of the public and the defendant in a speedy trial, and the failure to grant such a continuance would deny counsel for the defendant reasonable time necessary for effective preparation." App. 132-22. The district court did not make a finding on "the exercise of due diligence" of second counsel as required in § 3161(h)(7)(B)(iv). *Id.*

On December 7, 2018, second counsel filed a motion to dismiss for violation of Gonzalez's right to a speedy trial. District court held a hearing and orally denied the motion, stating,

> I'm going to deny the motion to dismiss. I think, frankly, the briefing from both parties was very good. But the prosecution, the Assistant U.S. Attorney, is right, at each stage when a continuance was granted, that it was either done automatically under the statute because of motions filed, or it was done by the court with its powers of ends of justice. And that's why I was always very careful, it's my practice to always be very careful when a continuance is requested to ask the defendant if they understand the request being made by their attorney, and if they agree with it. Most often they say they understand it, and they agree with it. I do know that in each case I asked those questions of Ms. Gonzalez, she said she understood the request, but she didn't agree with it. And that's fine. She has the right. But this court granted those

> motions because counsel needed the time, and those motions were granted with the ends of justice.
>
> So there's been no violation of the statutory right to speedy trial, and for the reasons as outlined by the government, I believe that the constitutional right has also not been violated. So this case will proceed. App. 144-45.

The district court entered an order denying the motion to dismiss for violation of speedy trial. App. 6-15. In the order, the district court outlined each of the four orders granting the motions to continue filed by first and second counsel. App. 10-12.

In each of the four orders the district court explained that the motions to continue were granted "pursuant to 18 U.S.C. § 3161(h)(7)(A) and (h)(7)(B)(iv), finding that "the ends of justice were served by granting the continuance, and that the failure to grant the continuance would deny counsel form Ms. Gonzalez reasonable time necessary for effective preparation." App. 66, 85, 107, and 132-33. In the last three orders, the district court's findings did not include any finding on "the exercise of due diligence" of second counsel.[5] App. 85-86, 107-08, and 132-33.

From the time of Gonzalez's first arraignment on January 24, 2018, to her trial on February 4, 2019, a total of 378 days had elapsed on the first three counts in the original indictment, which are Counts 1, 3 and 4 of the superseding indictment. From her arraignment on

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[5] The district court's grant of the first continuance is not challenged in this petition. The record as a whole contains first counsel's an explanation of work done, reasons for delays in completing his work, the fact that he contacted an investigator to explore matters after his review of the discovery with Gonzalez, and that after arraignment on the superseding indictment first counsel had received more discovery requiring review and discussion. App. 44 and 48-51. Thus, the district court in granting the first continuance clearly had before it facts that established first counsel's exercise of due diligence, facts that were absent from each of the last three continuances granted by the district court on second counsel's three motions to continue.

March 13, 2018, to her trial on February 4, 2019, a total of 328 days had elapsed on the new counts added in the superseding indictment, Counts 2 and 6.[6]

Gonzalez maintains the periods of delay of her trial occasioned by the last three continuances, that were not subject to automatic exclusion under § 3161(h)(1), were not properly excluded from the speedy trial calculation by the district court. Absent from the "record of the case, either orally or in writing," were findings by the district court that took into "account the

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[6] Before the Ninth Circuit, Gonzalez maintained that as many as 227 days should have been attributed to the speedy trial calculation, but, in any event, no fewer than 127 days for Counts 1, 3 and 4 of the superseding indictment, after accounting for the days automatically excluded for filing motions under § 3161(h)(1)(D). DktEntry 16 at 52-54. Gonzalez maintained that as many as 201 days had elapsed, and as few as 101 days had elapsed, in calculating speedy trial for Counts 2 and 6 of the superseding indictment, after accounting for the days automatically excluded for filing of motions under § 3161(h)(1)(D). *Id.* At Therefore, Gonzalez's 70-day statutory right to a speedy trial was violated. 18 U.S.C. § 3161(c).

The government's position is that only 22 days total were not excluded from the speedy trial calculation. DktEntry 28 at 25-37. The government maintained that the only days that were not excludedable from the speedy trial calculation were from January 27, 2018 through February 15, 2018, and from February 24, 2018 through February 25, 2018. *Id.* at 37. Thus, under the government's calculations, the only excludable days applied to Counts 1, 3 and 4 of the superseding indictment, and there were no excludable days relating to Counts 2 and 6 of the superseding indictment. *Id.*

This petition does not detail the parties' positions on what delay should be automatically excluded under § 3161(h)(7)(D) for the pretrial motions that were filed in this case. The Court is urged to resolve the question of whether the Act requires a federal district court to make specific findings on those factors in § 3161(h)(7)(B) before any days in the Act's 70-day speedy trial limit may be excluded when a trial court grants an ends-of-justice continuance under § 3161(h)(7)(A).

If the Court grants this petition and resolves the question in the affirmative, Gonzalez requests that this case be remanded to the Ninth Circuit to review what delay from pretrial motions is automatically excluded under § 3161(7)(1)(D) from the speedy trial calculations to determine if Gonzalez's speedy trial was violated and to determine the appropriate remedy for dismissal with or without prejudice under § 3162(a)(2). The Ninth Circuit did not reach this determination based on the conclusion that the second and third continuances were justified on the "ends of justice" findings by the district court. App. 3, n. 1.

exercise of due diligence" of second counsel in determining whether the additional time granted was "reasonably necessary for effective preparation." 18 U.S.C. § 3161(h)(A). Gonzalez maintains that such findings are necessary in order to justify an ends-of-justice continuance and to justify the excluding time from the 70-day calculation on the basis of § 3161(h)(7)(B)(iv).

The Ninth Circuit's memorandum does not address the issue of whether a finding on "the exercise of due diligence" is necessary to justify a continuance under § 3161(h)(7)(B)(iv) that allows time "reasonably necessary for effective preparation." The Ninth Circuit relied solely on the district court's finding that the continuances were supported by the district court's "ends of justice" findings under § 3161(h)(7)(A). The Ninth Circuit wrote:

> There were four total motions to continue, all made by defense counsel. Gonzalez does not challenge the propriety of the first continuance, made by her original counsel. With respect to the second and third continuances, her newly appointed counsel articulated legitimate reasons for needing additional time to prepare the defense, including the need to review recently provided discovery, prepare pretrial motions, and, when Gonzalez was charged with another federal crime while in custody, the need to coordinate with her other defense counsel and to deal with additional sentencing considerations. There was no clear error in determining that the ends of justice served by these continuances outweighed society and defendant's interest in a speedy trial ..., and the court sufficiently articulated its reasons for granting the exclusions. ... These two ends of justice exclusions, coupled with the automatic exclusions for pending motions, bring the trial well within the Speedy Trial Act's 70-day window. App. 2-3 (citations omitted).

This petition requests the Court to resolve the question of whether the Act requires federal district courts to make specific findings on each criterium set out in those factors delineated in § 3161(h)(7)(B) to justify an ends-of-justice continuance under § 3161(h)(7)(A) . The factor relevant to resolution of the question presented is § 3161(h)(7)(B)(iv).

In granting the last three continuances filed by second counsel, the district court excluded time from Act's 70-day speedy trial calculation on a single finding "that the ends of justice served by taking such action outweigh[ed] the best interest of the public and the defendant in a speedy trial" pursuant to § 3161 (h)(7)(A). When considering whether the exclusion of time in those continuances was justified, the district court failed to inquire of second counsel, or make specific findings, on "the exercise of due diligence" of second counsel to ensure that the time excluded was "reasonably necessary for effective preparation" under § 3161(h)(7)(B)(iv). As set forth below, this failure runs afoul of both the spirit and significant policy reasons that underlie the Act.

REASONS FOR GRANTING THE WRIT

Resolution of the question of whether federal district courts must make specific findings from the factors listed in the Speedy Trial Act under 18 U.S.C. § 3161(h)(7)(B) to justify an ends-of-justice continuance under 18 U.S.C. § 3161(h)(7)(A) is important for a uniform and consistent application of the Act by the lower federal courts, and to ensure that the public's interest in a speedy trial as set out in th Act is protected, as well as, protecting a defendant's right to a speedy trial. The Ninth Circuit entered a decision that conflicts with prior decisions of this Court and that conflicts specifically with Tenth Circuit decisions addressing therequirements necessary to exclude time resulting an ends-of-justice continuances in cases that are not unusual or complex under § 3161 (h)(7)(B)(iv). This case offers the Court an excellent opportunity to guide the lower federal courts on the correct application of the Act and to resolve a conflict among circuit courts.

In *Zedner*, the Court announced:

> The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act and, in allowing district courts to grant such continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases. But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of § 3161(h)(8), then, is to counteract substantive openendedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings. Excusing the failure to make these findings as harmless error would be inconsistent with the strategy embodied in § 3161(h). Such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of this sort is unlikely to affect the defendant's rights. We thus conclude that when a district court makes no findings on the record in support of § 3161(h)(8) continuance, harmless-error review is not appropriate.

Zedner, 547 U.S. 508–09, *see*, n. 3, *supra.*

What the Court teaches in *Zedner* is that when a district court grants an ends-of-justice continuance, the Act requires specific findings from the "factors that a judge must consider in making those finding." Without "on-the-record findings" relating to at least one of the factors listed in § 3161(h)(7)(B), then a district court errs in application of the Act, an error that cannot be considered harmless. *Id.*

Zedner resolved that questions of whether a defendant can prospectively waive a speedy trial under the Act "for all time;" whether judicial estoppel may be used to block a defendant's motion to dismiss for violation of speedy trial under the Act after a defendant executes waiver of speedy trial that includes a a waiver the right to file a motion to dismiss for violation of speedy

trial under the Act; and whether harmless error applies when a district court errs in excluding time from the speedy trial clock under the Act. *Id.* at 492.

The Court held that § 3162(a)(2) does not permit prospective waiver's of speedy trial under the Act. *Id.* at 503. The Court also held the judicial estoppel did not apply to the defendant's prospective wavier and waiver of the right to file a motion to dismiss for violation of speedy trial under the Act. *Id.* at 506.

Significantly, the Court held that a district court's error in the application of the Act cannot be harmless. *Id.* at 509. The Court stated that "[a] a straight forward reading of [the Act] leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result, the trial does not begin on time, the indictment or information must be dismissed." *Id.* at 508. Thus, "when a district court makes no findings on the record in support of a § 3161(h)[(7)] continuance, harmless error review is not appropriate." *Id.* at 509. The principles announced in *Zedner* are important to the question presented here.

Zedner establishes that a district court cannot fully determine "the need for an ends-of-justice continuance," as the *Zedner* requires, for cases that are not unusual or complex under § 3161(h)(7)(B)(iv), unless the records establishes that the failure to continue the case "would deny counsel for the defendant or the attorney for the Government the *reasonable time necessary for effective preparation, taking into account the exercise of diligence.*" *Zedner*, 547 U.S. at 508; 18 U.S.C. § 3161(h)(7)(B)(vi) (emphasis added). The record cannot establish such a need, and the district court is constrained in making appropriate findings, unless there is some inquiry of counsel about the amount of time that is "reaonably necessary for effective preparation" and

without inquiry into "the exercise of due diligence," i.e,. inquiries into what has counsel done to prepare for trial do date, and/or inquiry into what circumstances have interfered with, or will cause delay in, counsel's ability to effectively prepare for trial.

This is further supported the Court's subsequent decision in *Bloate v. United States*, 559 U.S. 196 (2010). In *Bloate*, the Court addressed the question of whether delay granted to a party to prepare pretrial motions is automatically excluded under § 3161(h)(1)(D) from the 70-day speedy trial limit in § 3161(c), or whether a district court must justify excluding time for preparation of pretrial motions "on case specific findings under subsection (h)(7)." *Id.* at 199.

Bloate held that a district court may exclude time for a party to prepare pretrial motions only if it makes case specific findings under § 3161(h)(7). *Id.* at 210-11. The Court's "determination that the delay at issue [] is not automatically excludable gives full effect to subsection (h)(7), and respects it provisions for excluding certain types of delay *only where a district court makes findings justifying the exclusion.*" *Id.* at 211 (emphasis added).

Bloate recognized a district court's ability to grant a continuance in a case that was neither unusual nor complex under § 3161(h)(7)B)(iv). *Id.* Such a continuance is justified only if the district court finds that "the failure to grant such a continuance ... would deny counsel for the defendant of the attorney for the Government the *reasonable time necessary for effective preparation, taking into account the exercise of due diligence*." *Id.* (emphasis in original and added) (quoting 18 U.S.C. § 3161(H)(7)(b)(IV)).

In *United States v. Toombs*, the Tenth Circuit addressed the sufficiency of a district's findings for excluding time on an ends-of-justice continuance under § 3161(h)(7)(B). 574 F.3d 1262 (10th Cir. 2009). In *Toombs*, the defendant was arraigned on federal drug and firearms

offenses on March 4, 2006. Twenty-two months later, the defendant's trial commenced. *Id.* at 1265.

The delay in trial resulted from nine motions to continue, the first two of which the defendant did not challenge on appeal. The defendant claimed the district court failed make appropriate findings to support the ends-of-justice continuance on seven of the orders granting continuances of his trial and excluding the period of delay. *Id.* at 1265, 1269.

The Tenth Circuit held,

> In order to exclude this time pursuant to the ends-of-justice provision, however, the Speedy Trial Act requires that "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." *Id.* In doing so, the judge must consider [the four non-exclusive factors in § 3161(h)(7)(B)(iv].

Toombs, 574 F.3d at 1268. The Tenth Circuit further explained,

> "Th[e] [ends-of-justice] exception to the otherwise precise requirements of the Act was meant to be a rarely used tool for those cases demanding more flexible treatment." *United States v. Doran*, 882 F.2d 1511, 1515 (10th Cir.1989) (quotation omitted). The requirement that the district court make clear on the record its reasons for granting an ends-of-justice continuance serves two core purposes. *Id.* It both ensures the district court considers the relevant factors and provides this court with an adequate record to review. *Id.* "Failure to address [the reasons] on the record creates the unnecessary risk of granting continuances for the wrong purposes, and encourages overuse of this narrow exception." *Id.* Thus, "*the record must clearly establish the district court considered the proper factors at the time such a continuance was granted.*" *Gonzales*, 137 F.3d at 1433.

Toombs, 574 F.3d at 1269 (emphasis added).

Toombs analyzed two prior decisions from the Tenth Circuit. The first was *United States v. Gonzalez*, 137 F.3d 1431 (10th Cir. 1998).

In *Gonzalez*, the Tenth Circuit reviewed "whether a district court made sufficient findings under the [Act] when it granted an ends-of-justice continuance for the prosecution." *Toombs*, 574 F.3d at 1270 (citing *Gonzalez*, 137 F.3d at 1434-35). At a hearing on the prosecution's motion, the district court suggested the dates of August 5 and August 19. *Id.* (citing *Gonzalez*, 137 F.3d at 1434. The prosecutor indicated that neither date worked due to an obligation out of town before August 19 that prevented trial preparation, and witnesses would be out of town prior to August 5 with the dates of their return unknown. *Id.*

The district court entered an order granting a continuance to August 26, and excluded the time from the speedy trial calculation. The order excluded the period of the continuance "because the interests of justice outweighed the interest of the public and the defendant in a speedy trial 'based upon the finding that [government] counsel ... would be denied the reasonable and necessary time to prepare for trial, taking into account due diligence, and risks which cause a potential miscarriage of justice and risk the continuity of [government] counsel.'" *Id.*

Gonzalez concluded that the district court's findings were inadequate to excluded the time under the Act. *Id.* (citing *Gonzalez*, 137 F.3d at 1434-35)). The district court made no inquiry on the complexity of the case "as required by § 3161(h)(7)(B)(ii) and (iv)." *Id.* (citing *Gonzalez*, 137 F.3d at 1434). Furthermore, "there was no mention of how much time the prosecutor *actually needed to prepare for trial or what preparations he had already made.*" *Id.* (citing *Gonzalez*, 137 F.3d at 1435) (emphasis added).

The second case analyzed in *Toombs* was *United States v. Williams*, 511 F.3d 1044 (10th Cir. 2007). There, the defendant sought "a continuance on the grounds that his new attorney needed additional time to become familiar with the case." *Id.* (citing *Williams*, 511 F.3d at 1057). *Williams* held that the district court's exclusion based solely on new counsel was "insufficient for purposes of the [Act]." *Id.* (citing *Williams*, 511 F.3d at 1058).

Based on the decisions in *Gonzalez* and *Williams*, the Tenth Circuit held:

> the record, which includes the oral and written statements of both the district court and the moving party, must contain an explanation of why the mere occurrence of the event identified by the party as necessitating the continuance results in the need for additional time. *Williams*, 511 F.3d at 1058; *Gonzales*, 137 F.3d at 1434-35. A record consisting of only short, conclusory statements lacking in detail is insufficient. For example, it is insufficient to merely state that counsel is new and thus needs more time to adequately prepare for trial or that counsel or witnesses will be out of town in the weeks preceding trial and therefore more time is needed to prepare for trial. *Williams*, 511 F.3d at 1058; *Gonzales*, 137 F.3d at 1434-35. Simply identifying an event, and adding the conclusory statement that the event requires more time for counsel to prepare, is not enough. *Williams*, 511 F.3d at 1058; *Gonzales*, 137 F.3d at 1434-35.

Toombs, 574 F.3d 1271–72.

The Ninth Circuit here countenanced the district court's last three continuances based on conclusory statements by second counsel that certain events required more preparation time. The Ninth Circuit affirmed the district court based on ends-of-justice findings that lacked adequate findings to support the exclusion of time in § 3161(h)(7)(B)(iv).

In none of the last three continuances did the district court inquire of second counsel what he had done to prepare Gonzalez's trial to support a finding on "the exercise of due diligence." In none of the last three continuances did the district court inquire as to why defense counsel

actually needed the length of time requested in the continuances.

Under the Court's teachings in both *Zedner* and *Bloate* the district court's finding were inadequate to exclude time under the Act. In addition, the Ninth Circuit's decision justifying the exclusion of time for the ends-of-justice were inadequate to fulfill the specific requirement in the Act that the district court make proper findings after consideration of the factors set out in § 3161(h)(7)(B) that are used to justify an ends-of-justice continuance.

This case presents the Court with an ideal vehicle to define for the lower federal courts the proper application of the Speedy Trial Act. This case brings into focus significant policy considerations underlying the Act, particularly the need to protect both the public's right to a speedy trial and to protect a defendant's right to a speedy trial under § 3161(h)(7)(A).

The Court has recognized that adherence to the requirements of the Act "serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate*, 559 U.S. at 212 (citing *Zedner*, 547 U.S. at 502). In this case, both the public's interest in the swift administration of justice, and Gonzalez's right to a speedy trial were affected. The district court's failure to develop and make sufficient findings to justify the delay in Gonzalez's trial interfered with a swift administration of justice, and were inadequate to override the repeated and strenuous objections to each of the continuances by Gonzalez.

The district court failed to ensure that second counsel actually needed the amount of time requested in the motions to continue. 18 U.S.C. § 3161(h)(7)(B)(iv). The district court did not ensure, nor making any findings, that second counsel exercised "due diligence" in preparing Gonzalez's trial prior to granting the last three continuances. *Id.*

In sum, the Ninth Circuit's decison conflicts with *Toombs*. The decision fails to meet the standards outlined by the Tenth Circuit that are required to support an ends-of-justice continuance under § 3161(h)(7)(A).

The Court demands that district courts "devote time to assess whether the reasons for the delay are justified" under the Act. *Bloate*, 559 U.S. at 214. "Placing these reasons in the record does not add an appreciable burden on these judges." *Id.*

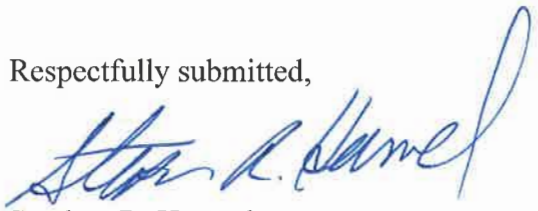
The facts of this case present the Court an excellent opportunity to resolve the conflict created by the Ninth Circuit decision with the Tenth Circuit's decision in *Toombs*. This case offers the Court an opportunity to define uniform standards consistent with the Act that will guide the lower federal courts in the requirements necessary to excluded time from the Act's speedy trial calculation based on an ends-of-justice in § 3161(h)(7)(A).

CONCLUSION

Based on the foregoing, it is requested that the Court grant this petition for writ of certiorari and resolve the question presented.

Dated this 31st day of March, 2022.

Respectfully submitted,



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