No.

IN THE

Supreme Court of the United States

RYAN BROWN,

Petitioner,

v.

KENNETH ROMANOWSKI, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

RAJIV MOHAN
Counsel of Record
MATT GREGORY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
rmohan@gibsondunn.com

Counsel for Petitioner

QUESTIONS PRESENTED

In *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), this Court specified four factors to determine whether a criminal defendant was deprived of his Sixth Amendment right to a speedy trial: the length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant.

In this case the government arrested Petitioner Ryan Brown for alleged drug crimes but then forgot about him—delaying the start of his trial by 25 months. During the delay, the government lost important, potentially exculpatory evidence. The Sixth Circuit concluded that Brown was not denied a speedy trial because he had not established prejudice. Specifically, the court held that the delay was too short to result in a presumption of prejudice, and that Brown had not shown actual prejudice since the lost evidence would not have changed the outcome at trial.

The questions presented are:

1. Whether a 25-month delay, during which the government negligently forgot about the defendant and lost important evidence, gives rise to a presumption of prejudice under *Doggett* v. *United States*, 505 U.S. 647 (1992).

2. Whether, to establish actual prejudice, a defendant must merely show that his defense was impaired as a result of the delay (as this Court, along with the Ninth, Tenth, and Eleventh Circuits have held), or whether he must effectively demonstrate a likelihood that the outcome at trial would have been different but for the delay (as the Fifth, Sixth, and Seventh Circuits have held).

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 845 F.3d 703. App. 1a. The court of appeals' order denying rehearing en banc is unreported. App. 63a. The district court's opinion is also unreported, but available at 2015 WL 4041300 (E.D. Mich. July 1, 2015). App. 29a. The relevant state-court order is unreported. App. 65a.

JURISDICTION

The court of appeals entered its judgment on January 9, 2017. A timely petition for rehearing en banc was filed on January 23, 2017, which the court of appeals denied on February 15, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

As relevant here, the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"

STATEMENT OF THE CASE

The Sixth Circuit's opinion in this case adds to the confusion, discord, and uncertainty that have plagued the lower courts in the 25 years since this Court last addressed the role of prejudice under the Sixth Amendment's right to a speedy trial.

In *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), this Court specified four factors to determine whether a defendant was deprived of the right: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." With regard to prejudice, the Court explained that the "most serious" form is "the possibility that the defense will be impaired." *Id.* at 532. When evidence goes missing, for example, "the prejudice is obvious." *Ibid*. Twenty years later, in *Doggett* v. *United States*, 505 U.S. 647, 655 (1992), the Court held that "affirmative proof of particularized prejudice is not essential." Rather, excessive delays owing to government negligence can "compromis[e] the reliability of a trial" and thus give rise to a presumption of evidentiary prejudice. *Ibid.*

As a practical matter, the lower courts have required a defendant to show some prejudice—presumed or actual—to prevail under the Speedy Trial Clause. When a defendant is not entitled to a presumption of prejudice, the lower courts have generally required him to present proof of actual prejudice. In the 25 years since *Doggett*, however, the lower courts have splintered on both forms of prejudice.

Start with the presumption of prejudice, which has confounded the lower courts so much that they have asked this Court for "more guidance than [they]

now have in applying it." *United States* v. *Ferreira*, 665 F.3d 701, 711 (6th Cir. 2011) (Kethledge, J., dissenting). Without this guidance, "the analysis in the lower courts … has devolved into a numbers game" marked by confusion and circuit splits. *Id.* at 710.

In the Eleventh Circuit, two years is sufficient to trigger the presumption. *United States* v. *Ingram*, 446 F.3d 1332, 1335 (11th Cir. 2006). In the Eighth and Third Circuits, three years is enough. *United States* v. *Erenas-Luna*, 560 F.3d 772, 777 (8th Cir. 2009); *United States* v. *Battis*, 589 F.3d 673, 683 (3d Cir. 2009). But not so in the Fifth and Ninth Circuits. *United States* v. *Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003); *United States* v. *Xue Cheng Dong*, 539 F. App'x 753, 754 (9th Cir. 2013). Instead, the Fifth Circuit has presumed prejudice "only in cases in which the post-indictment delay lasted at least five years." *Serna-Villarreal*, 352 F.3d at 232. Yet four years suffices in the Ninth Circuit. *United States* v. *Reynolds*, 231 F. App'x 629, 631 (9th Cir. 2007).

As for actual prejudice, some circuits have followed *Barker*'s lead and measured prejudice in terms of whether the defense was "impaired." 407 U.S. at 532. Any prejudice must then be balanced with the other relevant factors. As the Tenth Circuit has put it, prejudice exists when a defendant is "not able to defend the charges against him to the extent he desired." *United States* v. *Toombs*, 574 F.3d 1262, 1275 (10th Cir. 2009); *see also Parris* v. *Warden, Limestone Correctional Facility*, 542 F. App'x 850, 852 (11th Cir. 2013); *McNeely* v. *Blanas*, 336 F.3d 822, 832 (9th Cir. 2003).

Other circuits, however, have held that "a defendant must do more than show that … [a missing] witness' testimony would have helped the defense." *United States* v. *Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998). In these circuits, impairment to the defense is insufficient, and a defendant must instead show "a probability that the outcome of [ ] trial would have been different" but for the delay. *Cowart* v. *Hargett*, 16 F.3d 642, 648 (5th Cir. 1994).

Against this backdrop the Sixth Circuit issued the decision below: Petitioner Ryan Brown was convicted of dealing cocaine after a more-than two-year delay between his arrest and trial. During the delay, the government forgot about Brown, making no effort to prosecute him until he fortuitously fell into the government's custody by way of an unrelated arrest. Not only that, the government lost undeniably important, potentially exculpatory evidence along the way.

The Sixth Circuit held that Brown was not denied a speedy trial. Although the court found that the government's negligence caused the excessive and unjustified delay, it held that Brown was not entitled to a presumption of prejudice because the two-year delay here was shorter than the roughly three-year delays on which the court had previously presumed prejudice. Moreover, the court held, Brown could not demonstrate actual prejudice because (in the court's view) the lost evidence would not have made a difference at trial given other evidence against Brown.

The Sixth Circuit's decision creates a split with the Eleventh Circuit and deepens the confusion in the lower courts over when *Doggett*'s presumption applies. In some circuits, two years is enough to trigger

the presumption, in others three, still others four, and some five. With respect to actual prejudice, the decision below conflicts with *Barker* and deepens the existing split over whether a defendant need only show that his defense was impaired as a consequence of the delay, or whether he must bear the heavier burden to show that the outcome at trial would likely have been different without the delay. Certiorari is necessary to ensure that the right to a speedy trial does not turn on arbitrary distinctions, such as a few additional months of delay or what circuit the defendant is prosecuted in.

The consequences are significant: "[T]he only possible remedy" for a violation of the right is dismissal with prejudice. *Barker*, 407 U.S. at 522. For a defendant, that is the difference between freedom and incarceration. For society, that is the risk "a defendant who may be guilty of a serious crime will go free." *Ibid*. "[T]he law's clarity with respect to" these questions "is not nearly commensurate with its stakes." *Ferreira*, 655 F.3d at 709 (Kethledge, J., dissenting).

The petition should be granted.

1. In 2005, Ryan Brown became the subject of a police investigation spurred by an informant named Jawad Mirza, who offered to cooperate with the police in an effort to avoid jail time on drug and firearm charges. App. 2a-3a. To that end, Mirza told Detective Perry Dare that Brown was a drug dealer. App. 3a.

Mirza agreed to partake in four controlled purchases designed to nab Brown. App. 3a. Before each meeting, the police searched Mirza, gave him marked cash, and equipped him with a recording device.

App. 3a-4a. Although the police surveilled these encounters, and an undercover officer accompanied Mirza three times, no officer ever saw Brown in possession of cocaine or heard what transpired between Brown and Mirza. *See* R. 9-5 at 500. After the first three meetings, Mirza reported back to the police with cocaine. App. 3a.

For the last meeting—January 10, 2006—the police executed a "buy bust" operation and arrested Brown. App. 3a-4a. The police took Brown to jail, where Detective Dare obtained a statement from Brown that he "got the drugs" for Mirza. R. 9-5 at 483. Brown was then released. The government formally charged Brown and obtained a warrant for his arrest by the end of February 2006. App. 4a.

Then the government forgot about Brown. For the better part of two years it made no effort to locate, arrest, or bring him to trial. The only development in Brown's case was that the government lost the tapes from the recording device that Mirza had worn. App. 4a-5a. In late September 2007, Brown fell into the government's custody by fluke of an unrelated arrest on a child-support warrant. App. 4a. The government arraigned him on the then years-old drug charges. App. 4a.

In February 2008—now more than two years after his initial arrest—Brown's trial began. App. 4a. Mirza testified that he gave Brown money in exchange for cocaine four times. The police undisputedly did not search Brown's apartment, recover any of the marked bills that Mirza had allegedly exchanged for cocaine, or test for fingerprints the cocaine Mirza had given the police. R. 9-5 at 484, 498-500. The only person who

testified to what Brown said during the alleged purchases, and the only person who saw Brown with cocaine, was Mirza. Brown's defense was that Mirza was lying, so Brown attacked Mirza's credibility. R. 9-5 at 528. Nevertheless, the jury convicted Brown, and he received a sentence of up to 40 years in prison. App. 5a. Brown unsuccessfully appealed his convictions. App. 5a. On appeal, Brown tried to persuade his counsel to raise a speedy-trial argument, but counsel deemed the argument meritless. R. 9-11 at 793.

2. In 2011, Brown moved for post-conviction relief in Michigan Circuit Court. App. 5a. Brown amended the motion to add a speedy-trial claim (among others). App. 5a-6a. On July 25, 2011, the court denied relief in a reasoned opinion. App. 65a. The court ignored the claims Brown added in his amended motion, including the speedy-trial one. App. 6a. Both the Michigan Court of Appeals and Supreme Court denied appellate review in unexplained, form orders. App. 6a.

3. In 2013, Brown filed a federal habeas petition in which he reasserted his speedy-trial claim. App. 6a. The district court had jurisdiction under 28 U.S.C. § 2254. The court reviewed Brown's claim without deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA") because the state court had ignored the claim and thus had not "adjudicated [it] on the merits." 28 U.S.C. § 2254(d). Applying the *Barker* factors, the district court held that the length and reason for the delay favored Brown, and that his failure to assert the right should not count heavily against him, but that a supposed lack of prejudice doomed the claim. App. 53a-57a.

4. The Sixth Circuit affirmed. Like the district court, the court of appeals reviewed Brown's speedy-trial claim without AEDPA deference. App. 10a. The court held that the 25-month delay favored Brown. App. 14a. So did the reason for the delay, since the government offered "no reason" and "'made no serious effort to locate' Brown" even though it "had all the evidence it needed to prosecute him" and could have "easily locat[ed]" him. App. 17a-18a. The court then concluded that Brown's failure to assert the right should "not count [ ] against him" because he lacked knowledge of the charges for most of the delay and alleged that his trial counsel was constitutionally ineffective in failing to demand a speedy trial for the remainder. App. 19a.

The Sixth Circuit's decision therefore turned on prejudice. First, the court held that Brown "was not entitled to a presumption of prejudice" because the 25-month delay here was not "extreme" in comparison to the 35-month and 33-month delays on which the Sixth Circuit had previously presumed prejudice. App. 21a-22a (citing *Ferreira*, 665 F.3d at 707-08; *Dixon* v. *White*, 210 F. App'x 498, 502 (6th Cir. 2007)). The court also reasoned that *Doggett*'s presumption of evidentiary prejudice should not apply because "Brown actually pinpoint[ed] … missing evidence," and because he "was not incarcerated" during the delay nor suffered any anxiety. App. 22a.

Next, the court rejected Brown's argument that he suffered actual prejudice on account of the lost tapes. In so holding, the court looked to the other evidence against Brown (namely, his confession and the "control measures employed" by the police) to conclude

that the outcome at trial would not have been different had the tapes been available. App. 23a. In the court's view, the government "offered ample affirmative proof" to defeat any claim of prejudice. App. 25a. Thus, the court concluded, Brown had "not met his burden of establishing substantial prejudice." App. 25a.

REASONS FOR GRANTING THE PETITION

In *Barker*, this Court specified the factors to determine whether a defendant was denied a speedy trial: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice." 407 U.S. at 530. No factor is "necessary or sufficient"; they must be balanced together, with all other relevant circumstances. *Id.* at 533.

The Court has identified three types of prejudice: "oppressive pretrial incarceration"; "anxiety and concern of the accused"; and "the possibility that the defense will be impaired." *Barker* 407 U.S. at 532. In *Doggett*, the Court clarified that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." 505 U.S. at 655. Rather, when the government is negligent, an excessive delay can give rise to a presumption of evidentiary prejudice. *Ibid.*

This Court should grant certiorari because the lower courts are split and confused on when to presume prejudice and on the legal standard for determining actual prejudice.

I. THE DECISION BELOW ADDS TO THE DISCORD AND CONFUSION IN THE LOWER COURTS OVER WHEN TO PRESUME PREJUDICE.

In *Doggett*, this Court explained that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." 505 U.S. at 655. Thus, when the government is at fault, an excessive delay can give rise to a presumption of evidentiary prejudice. *Ibid.* "Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Id.* at 657.

Beyond its facts, however, *Doggett* offered little guidance on when the presumption applies. The six years of delay "attributable to the [g]overnment's negligence" sufficed there. 505 U.S. at 657-58. But otherwise the Court merely observed that "the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness." *Id.* at 657.

Because *Doggett* gave "the lower courts little more than a number to work with," "the analysis in the lower courts … has devolved into a numbers game." *Ferreira*, 665 F.3d at 710 (Kethledge, J., dissenting). And the lower courts are split and confused on the length of delay necessary to trigger the presumption.

In the Eleventh Circuit, a "two-year post-indictment delay" suffices. *United States* v. *Ingram*, 446 F.3d 1332, 1339 (11th Cir. 2006). But not in the Tenth Circuit. *United States* v. *Larsen*, 627 F.3d 1198, 1210

(10th Cir. 2010) ("The two-and-one-half year delay in this case is not sufficiently extreme to permit Mr. Larsen to rest on a presumption of prejudice.").

The Third Circuit has held "that prejudice will be presumed when there is a forty-five month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of that delay is attributable to the [g]overnment." *United States* v. *Battis*, 589 F.3d 673, 683 (3d Cir. 2009).

Likewise, the Eighth Circuit has presumed prejudice for a "three-year delay" "due to the serious negligence of the government." *United States* v. *Erenas-Luna*, 560 F.3d 772, 780 (8th Cir. 2009).

But the Ninth Circuit has held that three years is "not of such substantial length and severity" to presume prejudice. *United States* v. *Xue Cheng Dong*, 539 F. App'x 753, 754 (9th Cir. 2013). Instead, at least four years is needed. *United States* v. *Reynolds*, 231 F. App'x 629, 631 (9th Cir. 2007) ("[T]he district court should have presumed Reynolds suffered prejudice due to the fifty months of delay attributable to the government's negligence."); *see also United States* v. *Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992) (five years).

The Fifth Circuit has also refused to presume prejudice for a three-year delay, but unlike the Ninth Circuit, has "found presumed prejudice only in cases in which the post-indictment delay lasted at least five years." *United States* v. *Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003); *see also United States* v. *Bergfeld*, 280 F.3d 486, 491 (5th Cir. 2002) ("[U]nder a correct application of *Doggett*, the five-year delay in the present case caused by the government's negli-

gence entitles Bergfeld to a presumption of prejudice."); *United States* v. *Cardona*, 302 F.3d 494, 498-99 (5th Cir. 2002) (same).

The decision below puts the Sixth Circuit in line with the Eighth and Third Circuits, and in conflict with the Eleventh and Fifth Circuits. The court held that the 25-month delay here was "not extreme" in comparison to the 35-month and 33-month delays the court had previously found sufficient to trigger the presumption. App. 21a-22a (citing *Ferreira*, 665 F.3d at 707-08; *Dixon*, 210 F. App'x at 502).

Thus, the lower courts have taken at least four different positions (ranging from five years to two) on the length of delay necessary to presume prejudice, with uncertainty about the lower boundary. In that respect, application of *Doggett* has proved "arbitrary." *Ferreira*, 665 F.3d at 710 (Kethledge, J., dissenting). The "analysis in most cases … is, at bottom, simply a conclusion—that one number is enough and another is not." *Ibid.* To wit, 25 months is enough in the Eleventh Circuit, but not the Sixth Circuit, where 33 months is needed. The difference between liberty and incarceration, then, is eight months, or being prosecuted in Alabama rather than Michigan.

The point comes into sharper focus when comparing the facts here to those in *Ingram*. There, the Eleventh Circuit found a "two-year post indictment delay intolerable" given the lack of "any reasonable explanation" for the delay, not to mention the straightforward "crime for which [the defendant] was indicted, the state of the proof against him on the date of the indictment, and the [g]overnment's knowledge of [his] whereabouts." 446 F.3d at 1339. Here too, as the Sixth

Circuit recognized, the government "offered no reason" for the two-year delay even though Brown was "easily locatable," and the government "had all the evidence it needed to prosecute him in early 2006." App. 17a. Had Brown's case proceeded in the Eleventh Circuit he would likely be free today.

Similarly, both here and in *Erenas-Luna*, the government "made no serious effort" to locate the defendant, who was "unaware" of the charges against him. App. 18a (quoting *Erenas-Luna*, 560 F.3d at 777). Even so, the Sixth Circuit refused to presume prejudice because the delay here was "much shorter"—by a year. App. 18a.

Insofar as the lower courts look beyond the length of delay, they do not agree on what other facts are relevant to the presumption. The Eleventh Circuit noted in *Ingram*, for example, that lengthy pre-indictment delay (which did not count for speedy-trial purposes) further impaired the "reliability of [ ] trial," and thus bolstered the presumption. 446 F.3d at 1339.

Yet in the decision below the Sixth Circuit considered factors unrelated to the reliability of trial, reasoning that the presumption should not apply because "Brown was not incarcerated during the delay, and he did not suffer undue anxiety." App. 22a. The court further reasoned that Brown's ability to "pinpoin[t]" specific "missing evidence"—an indication that he suffered evidentiary prejudice—"lessen[ed] the need for the presumption." App. 22a. Thus, in the Sixth Circuit, a defendant is less likely to gain the benefit of *Doggett*'s presumption when the government loses evidence. That makes little sense, and illustrates the lower courts' confusion over the presumption.

In addition, despite *Doggett*'s concern with evidentiary prejudice, some lower courts have applied the presumption in cases where evidentiary prejudice is implausible. *See United States* v. *Mendoza*, 530 F.3d 758, 767 (9th Cir. 2008) (Bybee, J., concurring) (criticizing application of *Doggett* when "the facts strongly suggest [the defendant] suffered no impairment in his ability to marshal his defense"); *Ferreira*, 665 at 711 (Kethledge, J., dissenting) ("[T]here is not a whiff of actual prejudice in this case.").

In sum, the lower courts have no common principles for determining when *Doggett*'s presumption applies. As a practical matter, therefore, the length of delay resolves the question. Yet delays of the same length lead to different answers in different circuits. The lower courts have had 25 years to figure out how to apply *Doggett*, but they remain split and confused as ever.

This Court should grant certiorari to resolve these conflicts and reject the bright-line numbers game that has taken hold in the lower courts. *Doggett*'s presumption reflects the risk that delay "compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," along with the need to discourage "prolonged and unjustifiable delays." 505 U.S. at 655, 657. These two principles should determine when the presumption applies. Here, the government paid no attention to Brown's case for two years and lost crucial evidence. Those conditions are ripe for the sort of unidentifiable prejudice that underpins the presumption, and they exemplify the sort of "persistent neglect" that should not be tolerated. *Id.* at 657.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND THAT OF OTHER CIRCUITS REGARDING ACTUAL PREJUDICE.

The lower courts are also split on how to measure actual prejudice. In *Barker*, this Court explained that prejudice "should be assessed in light of the interests of defendants which the speedy trial right was designed to protect": "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532. "Of these," the Court explained, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Ibid.*

Thus, when evidence goes missing, or when "witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532. For example, this Court held in *Dickey* v. *Florida*, 398 U.S. 30, 36, 38 (1970), that the "loss of police records" of "possible relevance" constituted "evidence of actual prejudice."

Actual prejudice must then be considered with the remaining factors, none of which is "a necessary or sufficient condition to the finding of a deprivation of the right." *Barker*, 407 U.S. at 533. This Court has made clear that *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial," and that it is a "fundamental error" to conclude otherwise. *Moore* v. *Arizona*, 414 U.S. 25, 26 (1973) (per curiam).

Some lower courts have followed *Barker*, considering actual prejudice in terms of whether the defense

was impaired. For example, the Tenth Circuit has explained that actual prejudice exists when a defendant is "not able to defend the charges against him to the extent he desired." *United States* v. *Toombs*, 574 F.3d 1262, 1275 (10th Cir. 2009). That means the defense is "hindered in the sense envisioned by the *Barker* analysis" when, "as a result of the delay, the defense no longer had access to certain evidence." *Ibid.*

Similarly, the Ninth Circuit has held that actual prejudice exists when "the defense has been hindered by the passage of time." *McNeely* v. *Blanas*, 336 F.3d 822, 832 (9th Cir. 2003).

And the Eleventh Circuit has explained that, "'[w]hen a defendant asserts prejudice because of the loss of evidence, he must show that the loss impaired his ability to provide a meaningful defense.'" *Parris* v. *Warden, Limestone Correctional Facility*, 542 F. App'x 850, 852 (11th Cir. 2013) (citation omitted).

In these circuits, impairment to the defense is enough, and prejudice exists when a defendant is able to identify specific missing evidence and explain how that evidence would have helped his defense at trial. *See* 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 18.2(e) (4th ed.) ("[T]he defendant must show that the witness truly is now unavailable, that he would have been available for a timely trial, and that his testimony would have been of help to the defendant. A similar situation is where physical evidence important to the defense has disappeared in the interim."). These cases reflect *Barker*'s instruction that "courts should not be overly demanding with respect to proof of such prejudice." *Ibid.*

The Sixth Circuit took a different approach in the decision below. The court had previously required a showing that "the outcome of the trial would have been [ ] different" had missing evidence "been presented to the jury." *Wilson* v. *Mitchell*, 250 F.3d 388, 396 (6th Cir. 2001); *see also United States* v. *Jones*, 555 F. App'x 485, 490 (6th Cir. 2014) ("Given the totality of the evidence against Jones, he cannot establish … substantial prejudice."). The court applied this principle below in holding that Brown's argument that the missing tapes would have helped his defense could not "be squared with the overwhelming evidence that [Brown] was, in fact, guilty of selling drugs." App. 23a. Thus, the court concluded, Brown had "not met his burden of establishing substantial prejudice." App. 25a.

The Fifth Circuit has adopted a similar standard, requiring "a probability that the outcome of [ ] trial would have been different had [a missing witness] testified." *Cowart* v. *Hargett*, 16 F.3d 642, 648 (5th Cir. 1994).

And the Seventh Circuit, in conflict with the plain terms of *Barker*, has held that "a defendant must do more than show that a particular witness is unavailable and that the witness' testimony would have helped the defense. He must also show that the witness would have testified, withstood cross-examination, and that the jury would have found the witness credible." *United States* v. *Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998); *compare* 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 18.2(e) (4th ed.) (defendant need only show that "testimony would have been of help").

In these circuits, a defendant effectively has a "burden," App. 25a, to demonstrate a "probability that the outcome of [ ] trial would have been different," *Cowart*, 16 F.3d at 648. That prejudice standard is similar to the one that applies for purposes of ineffective assistance of counsel, under which a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984).

Yet nothing in *Barker* hints at a heightened prejudice standard of the sort *Strickland* adopted. In fact, that standard conflicts with *Barker* in multiple respects. For one thing, the defense can be "impaired" without necessarily resulting in any specific likelihood that the outcome at trial would have been different. For another, any burden to demonstrate that likelihood cannot be squared with the "difficult and sensitive balancing process" established in *Barker* and reaffirmed in *Moore*. 407 U.S. at 533.

Under the correct standard expressed in *Barker*, Brown established actual prejudice. There is no dispute that the tapes were lost as a result of the delay or that Brown offered evidentiary support (in the form of an affidavit) to support his assertions that the tapes would have aided his defense by showing that Mirza lied about the central issue at trial: whether Brown sold cocaine to Mirza. R. 9-11 at 760-61. That the tapes would have helped Brown was consistent with—and indeed inherent in—his defense. Brown argued that Mirza lied about what transpired between the two, and that "the key to this whole thing is Mirza's credibility." R. 9-5 at 528. Built into that defense is

the premise that the tapes of the conversations between the two would have helped prove as much. Without the tapes, Brown was "not able to defend the charges against him to the extent he desired," and was prejudiced as a result. *Toombs*, 574 F.3d at 1275.

What is more, any heightened standard for actual prejudice weakens the right to a speedy trial. Relief is limited to the rare case where a defendant can demonstrate that the outcome at trial would likely have been different—a difficult task under any circumstances, but especially after a delay measured in years. Under that standard, the Speedy Trial Clause would cover largely the same ground as the Due Process Clause, which already ensures fundamental fairness at trial and that jury verdicts rest on sufficient evidence. *Jackson* v. *Virginia*, 443 U.S. 307, 318 (1979). *Barker*, in contrast, recognized the independent significance of the Speedy Trial Clause in holding that courts must balance the relevant factors "with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." 407 U.S. at 533.

Barker also recognized that "society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." 407 U.S. at 527. For that to be true, however, society's representatives must face sufficient consequences when they fail to satisfy that duty. A heightened prejudice standard limits relief to defendants, minimizes the consequences of delay for the government, and "encourage[s] the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Doggett*, 505 U.S. at 657.

At bottom, the lower courts have reached two prejudice standards at odds with each other. One adheres to *Barker* and requires only that the defense be impaired as a result of the delay. The other wrenches a more demanding standard from an inapposite context and requires a likelihood that the outcome at trial would have been different but for the delay. Certiorari is necessary to resolve the split.

III. THESE IMPORTANT QUESTIONS WARRANT THIS COURT'S REVIEW.

This Court has recognized that the right to a speedy trial "is one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina*, 386 U.S. 213, 226 (1967). The right "has been traced back to the twelfth century," "was articulated in Magna Carta," and "acknowledged in the earliest days of this nation." 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 18.1(a) (4th ed.).

Yet because of the "limited clarification" of the Speedy Trial Clause "that has been attempted by [this] Court," *United States* v. *Richardson*, 780 F.3d 812, 818 (7th Cir. 2015) (Posner, J.), the lower courts have been left with inadequate guidance regarding the prejudice factor. With respect to *Doggett*'s presumption, for instance, the lower courts have explicitly called for "more guidance than [they] now have in applying it. What the lower courts need … is a rule of law." *Ferreira*, 665 F.3d at 711 (Kethledge, J., dissenting).

Moreover, because "the only possible remedy" is dismissal with prejudice, the consequences of this confusion are "serious": "[A] defendant who may be guilty of a serious crime will go free." *Barker*, 407 U.S. at

522. Or a defendant who is innocent of a serious crime, but hampered in his defense by a delay, may remain incarcerated. Resolution of the splits described above is necessary to ensure that defendants' fate is determined in a fair and consistent manner.

Of course, "*Barker*'s formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,' and the balance arrived at in close cases ordinarily would not prompt this Court's review." *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1291 (2009) (citation omitted). But the conflicts identified above do not involve mere disagreements about the balance struck in close cases; they involve disagreements about the meaning of the most important factor to be balanced—prejudice.

This petition offers the Court the opportunity to ensure that, before the lower courts balance *Barker*'s factors, they agree on what those factors mean.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RAJIV MOHAN
Counsel of Record
MATT GREGORY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
rmohan@gibsondunn.com

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