No. 04-806

IN THE

Supreme Court of the United States

State of Arkansas,

Petitioner,

v.

Michael Shane Jolly.

On Petition for a Writ of Certiorari
to the Supreme Court of Arkansas

BRIEF FOR THE RESPONDENT IN OPPOSITION

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February 14, 2005

QUESTION PRESENTED

Petitioner asks this Court to resolve an asserted lower-court conflict over whether the Sixth Amendment or the Fourteenth Amendment's Due Process Clause confers a conceded federal constitutional right to timely sentencing. In fact, the questions presented are:

1. Whether it is even necessary for this Court to determine which constitutional provision confers the speedy sentencing right, when the tests under the Sixth Amendment and Due Process Clause are very similar and even petitioner admits that the ruling below comports with the overwhelming weight of authority and every lower court ruling since at least 1987.

2. Whether this is an appropriate vehicle to decide the question raised by petitioner given that the Arkansas Supreme Court held that the scope of the Due Process Clause was not properly presented and that even the dissenting justices below concluded that the Due Process Clause was violated by petitioner's conduct.

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STATEMENT

The Arkansas Supreme Court – adopting the view of every federal court of appeals and the overwhelming majority of state supreme courts that have addressed the question – held that the Speedy Trial Clause of the Sixth Amendment applies to the sentencing phase of criminal trials. The majority did not decide whether the Fourteenth Amendment's Due Process Clause also proscribed sentencing delay, because the issue was not cleanly presented in the case. Two justices dissented. They agreed that petitioner's conduct violated the Constitution but would have relied solely on the Due Process Clause to reach that result.

1. On August 27, 1996, respondent, who was then nineteen years old, was charged in the Circuit Court of Saline County, Arkansas with statutory rape. (Record 2, 85) The government acknowledged that the sexual activity in question was part of a consensual relationship. (R.85) Respondent's trial was originally set for August 19, 1997 – almost one year later – but he was granted a continuance on that date after a new attorney was appointed for him. (R.28) On October 27, 1997, respondent pled guilty. (R.86) The court ordered a pre-sentence report and stated that a date for a pre-sentence hearing would be set when the report was received. *Id.* Respondent was allowed to remain out of jail on bond until his attorney notified him of the hearing. (R.87)

Although a probation officer subsequently completed the pre-sentence report, "there is no evidence of whether the report was actually received and/or reviewed by [the circuit court judge]." (R.91) A letter from the judge to the prosecutor and to respondent's attorney indicated that sentencing was scheduled for January 20, 1998 (R.29), but – for reasons not apparent in the record – respondent was not sentenced on that date.[1] And although the docket entry for

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[1] Petitioner's statement of the case relies on facts that are outside the record, see Pet. 3 (citations to "[t]endered" portions of a

January 20, 1998, indicates that the matter had been "continued to February 2 at 1:00 pm" (R.91) (internal quotation marks omitted), respondent was – again, for reasons not reflected in the record – not sentenced on that day either.

2. For over *five years*, petitioner took no further action on respondent's case. On February 18, 2003, a newly elected prosecuting attorney filed a motion asking the circuit court to order respondent to show cause why he should not be sentenced. (R.30-31) The court granted the motion and ordered respondent to appear in court on March 3, 2003 (R.32-33), but that order was later returned for failure of service. (R.36) The court's second show-cause order – issued on June 26, 2003 (R.37-38) – was properly served on respondent (R.39), who complied with the order and voluntarily appeared in court on July 14, 2003. (R.41) Respondent was then taken into custody, and his sentencing was scheduled for August 4, 2003. *Ibid.*

On August 1, 2003, petitioner filed its brief in support of sentencing. (R.42-48) It acknowledged that "the length of delay [was] admittedly long" (R.46), but it nonetheless contended that "there is no Federal Constitutional right which would be violated" if respondent were sentenced. (R.45) It also conceded that "[a]lthough sentencing has never been conclusively linked to trial for Sixth Amendment purposes, the Constitutional considerations of speedy trial are helpful in analyzing whether the Defendant has any remaining due process concerns." (R.46) Of note, petitioner failed to provide any explanation for why it had waited for over five years before seeking to have respondent sentenced.

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transcript that was not part of the record below). Petitioner filed a motion in the Arkansas Supreme Court to supplement the record to include the transcript on which it now relies, but that motion was denied. See Pet. App. 25a. Petitioner's reliance on these non-record materials is yet another reason why the case is an inappropriate vehicle to resolve the question presented.

Respondent countered with a motion to dismiss, alleging that petitioner had violated his constitutional rights to a speedy trial and due process. (R.51-52) In opposition to the motion, petitioner re-filed the same brief that it had filed in support of its motion to sentence respondent. (R.62-68)

On August 7, 2003, the Saline County Circuit Court held a hearing on respondent's motion to dismiss. Both parties stipulated that throughout the nearly six-year period in which respondent was awaiting sentencing, he had lived in the Saline County area (R.91) and that he had been arrested approximately six times on various misdemeanor charges in this time period. *Ibid.* The circuit court denied respondent's motion to dismiss. (R.93-94) Arguing that the circuit court lacked jurisdiction to sentence him, respondent then filed a petition for a writ of prohibition with the Arkansas Supreme Court (R.94), which denied the petition without prejudice. (R.72)

On August 11, 2003, the circuit court conducted a sentencing hearing. (R.97-98) Respondent testified that during the many years in which he had awaited sentencing, he had become the father of two children, gotten a good job, and was "trying to stay out of trouble." (R.99) He also noted that he had kept the same address and phone number for the past seven years. (R.100) Although respondent acknowledged that he had thought the statutory rape charge was behind him, he "still had thoughts about it" (R.101), and had been "looking over [his] back ever since [his plea], waiting for this to be over with." (R.99) The circuit court sentenced respondent to twenty-four years' imprisonment, with twelve of those years suspended. (R.105)

3. On appeal, the Arkansas Supreme Court reversed and vacated the sentence. The court first considered whether the Speedy Trial Clause guarantees a criminal defendant the right to speedy sentencing. Noting that in *Pollard* v. *United States*, 352 U.S. 354 (1957), this Court had assumed that sentencing is part of the trial for Sixth Amendment purposes, the court

also found persuasive that "all federal circuit courts of appeal that have addressed the issue have either treated the subject as established law or have perpetuated the Court's assumption in *Pollard*," *w*hile at least seventeen state courts have followed suit, *id.* 6a-7a. The court found this overwhelming weight of authority compelling: "As have so many of our sister states that have been confronted with this same constitutional issue, we conclude that the right to a speedy sentence is encompassed within the Sixth Amendment right to a speedy trial." *Id.* 7a.

The court then turned to whether respondent's speedy trial right had been violated by the delay in his sentencing. It applied the four-factor balancing test set out in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant had asserted his right to a speedy trial; and (4) whether the defendant had been prejudiced by the delay.

With respect to the first factor, petitioner had conceded – and the court agreed – that, at nearly six years, the length of the delay weighed in respondent's favor. Pet. App. 7a-8a.

The second factor – the reason for the delay – also weighed "heavily" in respondent's favor. The court concluded, relying on *Doggett* v. *United States*, 505 U.S. 647 (1992), that petitioner's "negligence [was] no excuse." Pet. App. 8a-9a.

The third factor similarly weighed "heavily" against petitioner, which was aware of respondent's whereabouts while he awaited sentencing. Pet. App. 10a. The court rejected the state's contention that respondent should have affirmatively sought to be sentenced, emphasizing that under *state law* "the speedy-trial period 'commences to run without demand by the defendant.'" *Id.* 9a (quoting Ark R. Crim. P. 28.3(a) (emphasis omitted) and citing *Burmingham* v. *State*, 57 S.W.3d 118 (2001)). Moreover, the court noted, respondent did not "actively [seek] to delay the imposition of

his sentence," nor did he "abscond[] from the jurisdiction in order to avoid being sentenced." Pet. App. 10a.

As to the fourth *Barker* factor, the court found that it weighed in respondent's favor, given two forms of prejudice from which he suffered. As an initial matter, respondent's right to gather and present evidence at sentencing was potentially impaired by the delay. Pet. App. 13a. This Court's decision in *Doggett* had directed courts to "presume that a defendant is prejudiced by such circumstances." *Ibid.* Respondent was also prejudiced, the court explained, by "the pending imposition of punishment that loomed [over him] for almost six years" – a prospect that "certainly would not be pleasant for anyone." "There is no question that this negligence by the State interfered with [respondent's] ability to live his life as he saw fit." *Ibid.* (quoting dissent). The court explained that "the particularly egregious fact situation" "compel[led] a conclusion that [respondent's] Sixth Amendment right to a speedy sentencing was violated by the State in this case." *Id.* 13a-14a.

With respect to remedy, the court vacated respondent's sentence, relying on this Court's holding in *Strunk* v. *United States*, 412 U.S. 434, 440 (1983), that "in light of the policies which underlie the right to a speedy trial, dismissal must remain * * * the only possible remedy." Pet. App. 14a-15a. Finally, the majority concluded that state law precluded it from considering whether the Fourteenth Amendment's Due Process Clause conferred a speedy sentencing right, as that issue was neither properly presented by the parties nor resolved by the trial court. See Pet. App. 7a n.2 (citing state cases).

4. Two justices dissented. Significantly, those justices agreed with the majority that petitioner had "an obligation to sentence [respondent] within a reasonable time after his conviction," and that petitioner had instead "failed in its duty" by subjecting respondent to a delay of nearly six years. Pet. App. 21a. Those justices, however, would have held that the

right to be free from such a delay was conferred not by the Sixth Amendment but instead by the Due Process Clause. *Id.* 20a. And instead of vacating respondent's sentence, the dissenting justices would have remedied the constitutional violation by reducing respondent's sentence by the length of the delay. *Id.* 24a.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied for three reasons. First, this case is an inappropriate vehicle in which to resolve the question presented. Even assuming that this Court's review of the question proffered by petitioner might someday be warranted, it should be deferred until this Court is presented with a case in which it can fairly be said that the sentencing delay violates the Sixth Amendment but does not violate the Due Process Clause. Only in such a case is the question presented outcome determinative. Here, by contrast, petitioner's outrageous delay in sentencing respondent violates both provisions of the Constitution.

Second, the choice between particular labels assigned to the Constitution's protection of the right to be free from unreasonable sentencing delays is in any event inconsequential, as the same standard is applied to assess sentencing violations under both the Due Process and Speedy Trial Clauses. Under either standard, courts rarely find a constitutional violation, thereby refuting petitioner's assertions (Pet. 8) that the choice between the two provisions makes a material difference and that courts are applying an "unduly strict standard (from the prosecution's perspective)" to speedy sentencing claims.

Finally, petitioner's contention (Pet. 7) that lower courts are "confused" and "deeply divided" over the question presented substantially overstates matters. In fact, *every* federal court of appeals and the overwhelming majority of state courts – including *every* state supreme court since 1982 and *every* intermediate state court since 1987 – that has decided the question has held that the Sixth Amendment

applies to sentencing delays. Of the handful of contrary decisions, several were intermediate state court rulings issued more than two decades ago; moreover, in light of the more recent consensus that the Speedy Trial Clause applies to sentencing delays, all of those courts would be likely to reconsider the issue were it to arise again.

In particular, petitioner presents no argument that would lead this Court to grant certiorari when it has previously declined to resolve the question presented.[2] Indeed, although it has been over a decade since the last petition for certiorari presenting this question was filed, since then the lower courts have *uniformly* held that speedy sentencing claims are governed by the Sixth Amendment. Petitioner's position has been rejected every time. It therefore cannot be said that certiorari is warranted now, when the Court has previously denied review on this precise issue.

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[2] See, *e.g.*, Pet. for Cert. i, *Burkett* v. *Fulcomer*, 951 F.2d 1431 (1991) (presenting the question: "Does the Sixth Amendment's Speedy Trial Clause apply not only to delay before a criminal trial, when the defendant is presumed innocent, but also to proceedings after he has been found guilty?"), cert. denied, 505 U.S. 1229 (1992); Pet. for Cert. 1, *State* v. *Blazak*, 643 P.2d 694, (Ariz. 1982) ("Does sentencing Petitioner more than five years after his conviction constitute a denial of his right to a speedy trial in violation of the Sixth Amendment and a denial of due process in violation of the Fifth and Fourteenth Amendments?), cert. denied, 459 U.S. 882 (1982). In *Burkett*, for example, the state (like petitioner here) alleged that *Pollard* v. *United States*, 352 U.S. 354 (1957), had created a "vacuum [that] has engendered an unsatisfactory conflict of results and default of analysis that should be addressed." *Burkett* Pet. for Cert. 19. Moreover, it devoted over forty pages of discussion to the speedy sentencing issue in its petition, reply, and supplemental briefs, and twenty-seven attorneys general jointly filed an amicus brief in support of the government's position. See Br. *Amici Curiae* of Mississippi et al., *Burkett*.

I. This Case Is An Inappropriate Vehicle For Resolving The Question Of Which Constitutional Provision Confers A Right To A Prompt Sentencing.

This case is an inappropriate vehicle for determining whether the Speedy Trial Clause or instead the Due Process Clause protects defendants against unreasonable delays in sentencing because the due process issue was never cleanly presented in the proceedings below. Although petitioner asks this Court to apply the Due Process Clause in this case (Pet. 8) – thereby waiving any argument that respondent has surrendered his due process claims – its current position is a complete reversal of its arguments in earlier proceedings, in which it mentioned the due process issue only three times. See R.46, 66; Pet. Ark. Sup. Ct. Br. 5 n.3. In fact, petitioner affirmatively argued below that the Arkansas Supreme Court (Pet. Ark. Sup. Ct. Br. 5 n.3) could "[]not consider that issue."[3] The majority of that court agreed, reasoning that because respondent had "never raised a due-process argument in his brief before this court," it would be "highly inappropriate to base this decision on a due process argument." Pet. App. 7a n.2. If this Court grants certiorari to decide whether the Due Process Clause applies to delays in sentencing in this case, it would thus face the difficult question – potentially governed by state law – of whether it could consider that issue at all.[4]

This is also a poor vehicle in which to resolve the question presented because, as reflected in the decision

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[3] The issue also arose when petitioner twice acknowledged (R.46, R.66) that the same considerations are used for evaluating both speedy trial claims and sentencing delays under the Due Process Clause. See *infra* at 10-11.

[4] Another state-law issue that this Court would confront is whether respondent was obliged to request a prompt sentencing. The state supreme court ruled in respondent's favor on this issue, relying on the Arkansas Rules of Criminal Procedure and its own state law precedent. Pet. App. 9a.

below, petitioner's conduct in this case is unconstitutional whether it is evaluated under the Sixth Amendment standard, see Pet. App. 14a (majority opinion), or instead the Due Process Clause standard, see *id.* 21a, 23a. As such, this case does not present the opportunity to choose between the two assertedly inconsistent legal standards.

Petitioner cannot resuscitate this case as an appropriate vehicle on the ground that the dissent invoked a different *remedy* than the majority – reducing respondent's sentence rather than invalidating it. The main point raised by the petition is, as petitioner contends (Pet. 8), whether the overwhelming majority rule that speedy sentencing delays are governed by the Sixth Amendment imposes an "unduly strict standard" because such claims should be resolved under a supposedly less rigorous due process standard. This case presents no opportunity to explore that question because both standards compel the conclusion on these facts that petitioner's delay was unconstitutional.

Moreover, the dissent's suggestion – echoed in passing at the very end of the petition without any citation to supporting authority (Pet. 14) – that the different constitutional provisions give rise to different remedies is unsound. In the very few cases in which courts have found that a sentencing delay has violated both the Speedy Trial and Due Process Clauses, the scope of the remedy under both provisions has been similar. See, *e.g.*, *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1449 (CA3 1991) (violation of the speedy sentencing right under both the Speedy Trial and Due Process Clauses led to remedy of shortened sentence), cert. denied, 505 U.S. 1229 (1992). In particular, for egregious sentencing violations like the nearly six-year delay at issue here, vacatur of the sentence is the remedy under either constitutional provision. In *Burkett* v. *Cunningham*, 826 F.2d 1208 (1987), the Third Circuit discharged a defendant from custody for sentencing delays ranging up to five-and-a-half years, see *id.* at 1228, because his speedy trial and due process rights to a prompt sentencing and a "reasonably speedy appeal," resepectively, had been

violated. See *id.* at 1219-21. The court reasoned that discharge was an appropriate remedy for both violations, explaining that when "delay is so extreme as to assume constitutional proportions, discharge [for a due process violation] becomes less of an unlikely remedy." *Id.* at 1222. See also *State* v. *Cunningham*, 405 A.2d 706, 715-16 (Del. Super. Ct. 1979) (three-year delay in sentencing led to vacatur of sentence on speedy trial and due process grounds), rev'd on other grounds, 414 A.2d 822 (Del. 1980); *People* v. *Harper*, 520 N.Y.S.2d 892, 902 (N.Y. Crim. Ct. 1987) (twelve-year delay in sentencing caused court to lose jurisdiction on speedy trial and due process grounds).

II. Any Disagreement In The Label Assigned To The Speedy Trial Right Does Not Warrant This Court's Review.

Although petitioner's assertion of a conflict in the lower courts is seriously overstated (see *infra* Part III), any disagreement that does exist does not warrant this Court's intervention.

1. Any disagreement over the particular provision of the Constitution that confers the speedy sentencing right is one of form, not substance. The petition fails to identify *any* ruling in which the choice between the two constitutional provisions caused the court to evaluate the claimed unconstitutional delay in sentencing under a different test. That is not surprising. Claims that sentencing delays violate the Sixth Amendment speedy trial right are governed by the four-factor test set forth by this Court in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972). The Due Process inquiry is essentially indistinguishable. That conclusion follows from decisions applying the Sixth Amendment to sentencing delays and applying the *same* factors to evaluate, under the rubric of the Due Process Clause, claims related to delays by the government in allowing the defendant to take an appeal. "[W]e do not discern a difference [in the test] whether we discuss speedy trial or due process. Under either

constitutional amendment, we analyze whether, after conducting the sensitive balancing test under *Barker* v. *Wingo*, the scales tip in favor of the [defendant] or of the government." *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1446 (CA3 1991), cert. denied, 505 U.S. 1229 (1992). See also, *e.g.*, *United States* v. *Peters*, 349 F.3d 842, 850 (CA5 2003) (applying *Barker* speedy trial test to claim alleging "due process right to a reasonably speedy appeal"); *Brown* v. *Donelly*, 258 F. Supp. 2d 178, 182 (E.D.N.Y. 2003); *Peterson* v. *Lacy*, No. 97 CIV 7795 (RPP) (KNF), 1998 U.S. Dist. LEXIS 19599, *23-*24 (S.D.N.Y. Dec. 17, 1998); *Commonwealth* v. *Glass*, 586 A.2d 369, 371-74 (Pa. 1991) (evaluating claim of due process right "to promptness in appeals" and noting that "the same considerations applicable in the context of a speedy trial claim are applicable to a claimed due process violation based on delays in proceedings" (quoting *Commonwealth* v. *Pounds*, 417 A.2d 597, 630 n.11 (Pa. 1980)) (internal quotation marks omitted)); cf. *Burkett* v. *Cunningham*, 826 F.2d 1208, 1222 (CA3 1987) (holding that "both the Due Process and Speedy Trial Clauses constrain post-verdict delay").

Indeed, petitioner in the proceedings below all but conceded that sentencing delays raise the same concerns and should be treated in the same way under either the Speedy Trial Clause or the Due Process Clause. Petitioner not only asserted below that any due process question was not properly presented by the case (see *supra* at 8), but it also never contended that the Due Process Clause imposes a different test than does the Sixth Amendment. To the contrary, petitioner conceded both in its Brief in Support of Sentencing (R.46) and its Response to Defendant's Motion to Dismiss (*id.* at 66) that "the Constitutional considerations of speedy trial are helpful in analyzing whether the Defendant has any remaining due process concerns." Petitioner then analyzed the case through a standard speedy trial analysis by applying the *Barker* factors to the facts of this case. *Id.* at 46-48; 66-68. Under Arkansas law, petitioner is judicially estopped

from reversing that position now. *Nat'l Enters., Inc.* v. *Lake Hamilton Resort, Inc.*, 142 S.W.3d 608, 614 (Ark. 2004).

2. The choice of a particular constitutional provision in which to locate the speedy sentencing right is particularly inconsequential given the actual outcomes of most litigated cases: courts almost never find constitutional violations under *either* provision. Given this fact, petitioner has failed to explain why it is important for this Court to answer the question presented.

So far as respondent can determine, courts have found the Speedy Trial Clause violated by undue sentencing delays in just eight cases, including this one.[5] Courts have found due process violations in only two other cases.[6] The question presented by petitioner therefore is not outcome determinative

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[5] See Pet. App. 13a-14a; *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1438 (CA3 1991), cert. denied, 505 U.S. 1229 (1992); *Burkett* v. *Cunningham*, 826 F.2d 1208, 1224 (CA3 1987); *Juarez-Casares* v. *United States*, 496 F.2d 190, 191 (CA5 1974); *State* v. *Cunningham*, 405 A.2d 706, 715 (Del. Super. Ct. 1979), rev'd on other grounds, 414 A.2d 822 (Del. 1980); *Trotter* v. *State*, 554 So. 2d 313, 318 (Miss. 1989); *People* v. *Harper*, 520 N.Y.S.2d 892, 902 (N.Y. Crim. Ct. 1987); *City of Euclid* v. *Brackis*, 735 N.E.2d 511, 512 (Ohio Ct. App. 1999).

In two of these eight cases, the court went on to consider the applicability of the Due Process Clause to sentencing delays and found it violated as well. See *State* v. *Cunningham*, 405 A.2d 706, 715-16 (Del. Super. Ct. 1979); *People* v. *Harper*, 520 N.Y.S.2d 892, 902 (N.Y. Crim. Ct. 1987). And in two other cases, *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1446 (1991), cert. denied, 505 U.S. 1229 (1992), and *Burkett* v. *Cunningham*, 826 F.2d 1208 (1987), the Third Circuit found that the defendant's due process right to a speedy appeal had been violated as well.

[6] See *Peterson* v. *Lacy*, No. 97 CIV 7795 (RPP) (KNF), 1998 U.S. Dist. LEXIS 19599, at *25-*31 (S.D.N.Y. Dec. 17, 1998); *People* v. *Levandoski*, 603 N.W.2d 831, 839-40 (Mich. 1999).

in a large enough body of cases to warrant this Court's attention.

III. Any Inconsistency In Lower Court Rulings Regarding The Applicability Of The Speedy Trial Clause To Undue Sentencing Delays Is Both Shallow And Dated.

1. Petitioner concedes (Pet. 7), as it must, that the federal courts have spoken with one voice in holding or assuming that the Speedy Trial Clause protects against undue sentencing delays. "No circuit has held that the [Sixth Amendment] right to a speedy trial does not apply at [the sentencing] phase." *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 60 (CA1), cert. denied, 539 U.S. 928 (2003). That is the position of every regional circuit (including the Eleventh Circuit, which petitioner omits). See, *e.g.*, *Nelson-Rodriguez*, 319 F.3d at 60 (CA1); *United States* v. *Bryce*, 287 F.3d 249, 256 (CA2), cert. denied, 537 U.S. 884 (2002); *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1438 (CA3 1991), cert. denied, 505 U.S. 1229 (1992); *Brady* v. *Superintendent*, 443 F.2d 1307, 1310 (CA4 1971); *United States* v. *Abou-Kassem*, 78 F.3d 161, 167 (CA5), cert. denied, 519 U.S. 818 (1996); *United States* v. *Thomas*, 167 F.3d 299, 303 (CA6 1999); *United States* v. *Rothrock*, 20 F.3d 709, 711 (CA7 1994); *Brooks* v. *United States*, 423 F.2d 1149, 1151 (CA8), cert. denied, 400 U.S. 872 (1970); *United States* v. *Martinez*, 837 F.2d 861, 866 (CA9 1988); *Perez* v. *Sullivan*, 793 F.2d 249, 253 (CA10), cert. denied, 479 U.S. 936 (1986); *Moore* v. *Zant*, 972 F.2d 318, 320 (CA11 1992) (per curiam), cert. denied, 507 U.S. 1007 (1993); *United States* v. *Gibson*, 353 F.3d 21, 26-27 (CADC 2003).

The federal district courts have followed the federal courts of appeals in uniformly recognizing or assuming the Sixth Amendment speedy sentencing right. See, *e.g.*, *United States* v. *Arbour*, 335 F. Supp. 2d 152, 154 (D. Me. 2004); *United States* v. *Croxford*, 324 F. Supp. 2d 1230, 1251 (D. Utah 2004); *United States* v. *Shah*, 263 F. Supp. 2d 10, 36 (D.D.C.), vacated in part and remanded on other grounds,

United States v. *Stover*, 329 F.3d 859 (CADC 2003); *Butti* v. *Giambruno*, No. 02 CIV. 3900 (DLC), 2003 U.S. Dist. LEXIS 21484, at *6 (S.D.N.Y. Nov. 26, 2003); *Brown* v. *Donelly*, 258 F. Supp. 2d 178, 181-82 (E.D.N.Y. 2003); *United States* v. *Flowers*, 983 F. Supp. 159, 171 (E.D.N.Y. 1997); *Hall* v. *Florida*, 678 F. Supp. 858, 862 (M.D. Fla. 1987); *Peoples* v. *Ryan*, No. 84-5262, 1985 U.S. Dist. LEXIS 21308, at *3 (E.D. Pa. Mar. 28, 1985); *United States* v. *De Luca*, 529 F. Supp. 351, 354 (S.D.N.Y. 1981); *White* v. *Henderson*, 467 F. Supp. 96, 98-99 (S.D.N.Y. 1979); *Doescher* v. *Estelle*, 454 F. Supp. 943, 949 (N.D. Tex. 1978); *United States* v. *Nunn*, 435 F. Supp. 294, 295 (N.D. Ind. 1977); *United States ex rel. Ford* v. *Yeager*, 287 F. Supp. 347, 350 (D.N.J. 1968).

The vast majority of state supreme courts that have addressed the issue have followed the federal courts' lead. Considering a speedy sentencing claim, the New Hampshire Supreme Court illustrated this position when it recognized that "the lower federal courts have * * * taken [*Pollard*] as 'strong indication' that the sixth amendment has application to the time between conviction and sentencing" before considering a speedy sentencing claim. *State ex rel. McLellan* v. *Cavanaugh*, 498 A.2d 735, 740 (N.H. 1985) (Souter, J.). At least eighteen other state supreme courts – including the Arkansas Supreme Court in this case – have either recognized or assumed a Sixth Amendment speedy sentencing right. See Pet. App. 7a; *Ex parte Apicella*, 809 So. 2d 865, 869 (Ala. 2001), cert. denied, 534 U.S. 1086 (2002); *Gonzales* v. *State*, 582 P.2d 630, 632 (Alaska 1978); *State* v. *Steelman*, 612 P.2d 475, 478 (Ariz.), cert. denied, 449 U.S. 913 (1980); *Moody* v. *Corsentino*, 843 P.2d 1355, 1363 (Colo. 1993); *Johnson* v. *State*, 305 A.2d 622, 623 (Del. 1973); *Moore* v. *State*, 436 S.E.2d 201, 202 (Ga. 1993), cert. denied, 511 U.S. 1074 (1994); *Perdue* v. *Commonwealth*, 82 S.W.3d 909, 911-12 (Ky. 2002), cert. denied, 537 U.S. 1203 (2003); *Erbe* v. *State*, 350 A.2d 640, 642 (Md. 1976); *Commonwealth* v. *McInerney*, 401 N.E.2d 821, 825 (Mass.

1980); *Trotter* v. *State*, 554 So. 2d 313, 318 (Miss. 1989); *Prince* v. *State*, 55 P.3d 947, 951 (Nev. 2002); *Commonwealth* v. *Pounds*, 417 A.2d 597, 599 (Pa. 1980); *Allen* v. *State*, 505 S.W.2d 715, 719 (Tenn. 1974);[7] *State* v. *Banks*, 720 P.2d 1380, 1385 (Utah 1986); *State* v. *Dean*, 536 A.2d 909, 912 (Vt. 1987); *State* v. *Johnson*, 674 P.2d 145, 158 (Wash. 1983); *DeSpain* v. *State*, 774 P.2d 77, 82 (Wyo. 1989).[8]

At least seven more states have recognized or assumed the existence of a Sixth Amendment speedy sentencing right through their intermediate courts. See *State* v. *Wall*, 673 A.2d 530, 540 (Conn. Ct. App. 1996); *People* v. *McIntosh*, 302 N.W.2d 321, 325-26 (Mich. Ct. App. 1981); *State* v. *Haslip*, 583 S.W.2d 225, 228-29 (Mo. Ct. App. 1979); *State* v. *Todisco*, 6 P.3d 1032, 1039 (N.M. Ct. App. 2000); *State* v. *Avery*, 383 S.E.2d 224, 225 (N.C. Ct. App. 1989); *State* v. *Long*, 550 N.E.2d 522, 524 (Ohio Ct. App. 1989); *State* v. *Allen*, 505 N.W.2d 801, 802-03 (Wis. Ct. App. 1993).[9]

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[7] Although *Allen* held that the Sixth Amendment speedy trial right applies to probation revocation hearings, the decision has also been understood to reach sentencing. See *State* v. *Hart*, No. 02C01-9902-CC-00075, 1999 Tenn. Crim. App. LEXIS 940, at *9 (Tenn. Crim. App. Sept. 20, 1999).

[8] Several state supreme courts have subsequently reaffirmed their respective rules. See *State* v. *Blazak*, 643 P.2d 694 (Ariz.), cert. denied, 459 U.S. 882 (1982); *Key* v. *State*, 463 A.2d 633, 636 (Del. 1983); *Commonwealth* v. *Bianco*, 454 N.E.2d 901, 904 (Mass. 1983); *Commonwealth* v. *Glass*, 586 A.2d 369, 371 (Pa. 1991); *Commonwealth* v. *Glover*, 458 A.2d 935, 937 (Pa. 1983); *State* v. *Rupe*, 743 P.2d 210, 216 (Wash. 1987). At least two state intermediate courts have extended the assumptions of their respective state supreme courts to squarely hold that the Sixth Amendment's speedy trial right applies to sentencing. See *State* v. *Burkett*, 876 P.2d 1144, 1149 (Ariz. Ct. App. 1993); *Commonwealth* v. *Greer*, 554 A.2d 980, 983 (Pa. Super. Ct. 1989).

[9] Three of these intermediate state courts have subsequently reaffirmed their respective rules. See *People* v. *Garvin*, 406

2. Arrayed against this wall of authority are, at most, the rulings of only three state supreme courts.[10] See *Ball* v. *Whyte*, 294 S.E.2d 270, 271-72 (W. Va. 1982); *State* v. *Johnson*, 363 So.2d 458, 460-61 (La. 1978); *State* v. *Drake*, 259 N.W.2d 862, 866 (Iowa 1977), overruled on other grounds, *State* v. *Kaster*, 469 N.W.2d 671, 673 (Iowa 1991).[11]

N.W.2d 469, 472 (Mich. Ct. App. 1987); *State* v. *Massengill*, 62 P.3d 354, 371 (N.M. Ct. App. 2002); *City of Euclid* v. *Brackis*, 735 N.E.2d 511, 512 (Ohio Ct. App. 1999); *Cleveland* v. *Anderson*, 611 N.E.2d 439, 442 (Ohio Ct. App. 1992).

[10] Although petitioner asserts that three intermediate state courts have also adopted its position (Pet. 8), any such disagreement does not merit review in this Court. Cf. SUP. CT. R. 10(b).

[11] Petitioner overstates the holdings of three other state supreme courts, none of which even cited *Pollard*. In *State* v. *Jameson*, 395 N.W.2d 744, 747 (Neb. 1986), and *State* v. *Freeman*, 689 P.2d 885, 891 (Kan. 1984), the courts addressed claims under state statutes – not the Sixth Amendment – when they concluded that the speedy trial right does not encompass sentencing. In *Jameson*, the court rejected the defendant's state-law claim and then continued, "Nor does a delay occasioned by the various requests made by the defendant constitute a violation of a defendant's [Sixth Amendment speedy trial right]." 395 N.W.2d at 747. If the court had intended to hold that the Sixth Amendment does not apply to sentencing delays, the specifics of the delay would have been irrelevant. Instead, the court assumed that the Sixth Amendment extends to sentencing delays before rejecting the claim based on the defendant's conduct. Indeed, just three years earlier, the court assumed that the Sixth Amendment speedy trial right extends to sentencing, *Kaba* v. *Fox*, 330 N.W.2d 749, 751 (Neb. 1983), and nothing in its opinion in *Jameson* questions that assumption.

In *State* v. *Custer*, 401 P.2d 402 (Or. 1965), the court considered a six-month delay between the imposition of the defendant's original sentence and the subsequent imposition of an enhanced sentence – based on his previous convictions – rather than a delay between conviction and sentencing. In the forty years

The development of the case law strongly suggests that the few states which have held that the Speedy Trial Clause does not confer a right to speedy sentencing would reverse course if given the chance to revisit the issue. The three state supreme court cases in the minority were decided during a narrow five-year window between 1977 and 1982. And the impact of these three cases on subsequent state court decisions has been minimal: since 1987, *no* state supreme court or intermediate court has adopted petitioner's position. Instead, as illustrated by the case law from 2000 until the present, the lower courts uniformly continue to adopt the overwhelming majority view.[12]

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since *Custer* was decided, its speedy sentencing holding has been cited in only two Oregon cases, both of which involved enhanced sentencing for habitual offenders. See *Long* v. *Cupp*, 487 P.2d 674 (Or. Ct. App. 1971); *State* v. *Holbert*, 464 P.2d 834 (Or. Ct. App. 1970). Thus, the case can at best be read as holding merely that the speedy trial right does not apply to the period between a prompt original sentence and a delayed enhanced sentence.

[12] See, *e.g.*, Pet. App. 1a-24a; *United States* v. *Gibson*, 353 F.3d 21, 26-27 (CADC 2003); *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 60 (CA1), cert. denied, 539 U.S. 928 (2003); *United States* v. *Bryce*, 287 F.3d 249, 256 (CA2), cert. denied, 537 U.S. 884 (2002); *United States* v. *Arbour*, 335 F. Supp. 2d 152, 154 (D. Me. 2004); *United States* v. *Croxford*, 324 F. Supp. 2d 1230, 1251 (D. Utah 2004); *United States* v. *Shah*, 263 F. Supp. 2d 10, 36 (D.D.C.), vacated in part and remanded on other grounds, *United States* v. *Stover*, 329 F.3d 859 (CADC 2003); *Butti* v. *Giambruno*, No. 02 CIV. 3900 (DLC), 2003 U.S. Dist. LEXIS 21484, at *6 (S.D.N.Y. Nov. 26, 2003); *Brown* v. *Donelly*, 258 F. Supp. 2d 178, 181-82 (E.D.N.Y. 2003); *Ex parte Apicella*, 809 So. 2d 865, 869 (Ala. 2001), cert. denied, 534 U.S. 1086 (2002); *Perdue* v. *Commonwealth*, 82 S.W.3d 909, 911-12 (Ky. 2002), cert. denied, 537 U.S. 1203 (2003); *Prince* v. *State*, 55 P.3d 947, 951 (Nev. 2002); *State* v. *Massengill*, 62 P.3d 354, 371 (N.M. Ct. App. 2002); *State* v. *Todisco*, 6 P.3d 1032, 1039 (N.M. Ct. App. 2000).

IV. The Arkansas Supreme Court Properly Held That The Sixth Amendment Guarantees A Speedy Sentencing.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial." The text of the Amendment, historical practices at the time of the Framing, and this Court's speedy trial jurisprudence all establish that the overwhelming majority view of the lower courts is correct that the Speedy Trial Clause protects criminal defendants from unreasonable delays in sentencing.

A. The Text and History of the Speedy Trial Clause Establish That It Confers a Right to a Speedy Sentencing.

Dictionaries from the time of the Founding establish that a "trial" was a term that could encompass sentencing. See, *e.g.*, GILES JACOB, A NEW LAW-DICTIONARY 936 (J. Morgan ed., 10th ed. 1782) (defining trial as "the examination of a cause, civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land"); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 447 (5th ed. 1773) (defining trial as a "judicial examination"). Modern definitions of "trial" are to the same effect. See BLACK'S LAW DICTIONARY 721 (Bryan A. Garner ed., 2d pocket ed. 2001) (defining trial as "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding").

Further, the history of criminal prosecutions in the eighteenth century establishes that the Speedy Trial Clause applies to sentencing. Unlike most criminal trials today, "at the time of the enactment of the Bill of Rights sentencing usually occurred simultaneously or almost simultaneously with the verdict." Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1830 n.266 (2003). In light of that practice, "to the extent provision of a 'speedy trial' was a de facto reality, speedy sentencing would also

have been." *Ibid.*; see also *id.* at 1831 (concluding that the Speedy Trial Clause applies at sentencing, based on an analysis of the interests protected by the provision); 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (1883) ("If a prisoner is convicted he is sentenced usually at once.").

Indeed, in many eighteenth-century criminal proceedings, sentencing was the main purpose of the trial. A noted legal historian who has researched English felony trials during this period has observed:

> Only a small fraction of [such] trials were genuinely contested inquiries into guilt or innocence. In most cases the accused had been caught in the act or otherwise possessed no credible defense. To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction. These trials were sentencing proceedings.

John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41 (1983); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 479 (2000) ("[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense." (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 36-37 (A. Schioppa ed., 1987)) (internal quotation marks omitted)); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302 (1992) ("Historically, sentencing developed as a truly distinct procedural phase only with the advent of the offender-oriented indeterminate sentence. At early common law, both in England and in the Colonies, sentences were usually

mandatory."); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 782 (1993) ("When the Founders provided for criminal jury trial in Article III and the Sixth Amendment, English juries played an active role in determining punishment."). Defendants generally only produced character witnesses in these proceedings, further illustrating that eighteenth-century trials focused primarily on sentencing. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 649 n.345 (1997) ("[T]he trial process of the 18th century 'was in fact more of a sentence hearing than a guilt-determining process.'" (internal quotations and citations omitted))).

The Framers – more than half of whom were lawyers, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 303 (2d ed. 1985) – undoubtedly were familiar with these aspects of criminal trials. Because the Framers believed that the speedy trial right was a fundamental protection for criminal defendants, history suggests that they intended it to apply in sentencing proceedings. See *Klopfer* v. *North Carolina*, 386 U.S. 213, 223-26 (1967) (discussing the venerable roots of the speedy trial right tracing back to the Assize of Clarendon (1166) and the Magna Carta (1215)); *id.* at 226 ("The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."); see also ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 159 (1992). Furthermore, given that "[o]ur modern expectation is that sentencing occurs in the postverdict phase, after a separate trial has determined guilt," John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1062 (1994), it is particularly odd that petitioner asserts that the Speedy Trial Clause does not apply to sentencing, because the possibility of delayed post-judgment proceedings is even greater today

than "[i]n former centuries, [when] this division between trial and post-trial * * * was less distinct." *Id.*

B. The Interests Protected by the Speedy Trial Clause, As Identified in This Court's Precedents, Are Equally Implicated by Sentencing Delays.

This Court has employed a case-by-case approach to determining whether the rights enumerated in the Sixth Amendment apply to sentencing. See, *e.g.*, *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984) (right to jury trial); *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984) (right to effective assistance of counsel); *Mempa* v. *Rhay*, 389 U.S. 128, 134-37 (1967) (right to an attorney); see also Michaels, *supra*, at 1862. Although this Court has not revisited the issue of whether the Sixth Amendment's speedy trial guarantee applies to sentencing since it so assumed in *Pollard* v. *United States*, 352 U.S. 354 (1957), its discussions of the interests underlying the speedy trial right illuminate the question. Contrary to petitioner's conclusory assertions, these interests are equally implicated by delays not only before and during trial but also between conviction and sentencing.

1. This Court has consistently identified three "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." *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972) (citing *Smith* v. *Hooey*, 393 U.S. 374, 377-78 (1969); *United States* v. *Ewell*, 383 U.S. 116, 120 (1966)); see also *Doggett* v. *United States*, 505 U.S. 647, 654 (1992). Of these three interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532; see also *Doggett*, 505 U.S. at 654. "If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the

record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532; see also *Smith*, 393 U.S. at 379-80.

"When a defendant's sentencing is delayed an unreasonable amount of time, * * * the defendant's ability to gather and present such evidence may be impaired." Pet. App. 13a. There is no reason to think that it is any *less* likely that key defense evidence will be lost during, for example, the nearly six-year delay between conviction and sentencing in this case than during an equally long delay before or during the trial's guilt phase. To the contrary, any impairment of the defense due to lost evidence is *more* likely to occur during long sentencing delays after trial than during delays earlier in the trial process. The additional passage of time also makes a witness more likely to be unavailable in other ways, such as moving out of state, and memories are more likely to fade.

A defendant's ability to prepare for his sentencing hearing is harmed even further if he is subjected to unreasonable delays while in prison. In *Smith* – in which a defendant was imprisoned in one jurisdiction while awaiting trial in another – this Court recognized the difficulties in preparing one's defense while incarcerated:

> Confined in a prison, * * * his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective," a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

393 U.S. at 379-80 (quoting Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767, 769 (1968)) (footnote omitted).

The potential loss of key defense evidence is just as important before sentencing as it is before the determination of guilt. Both phases implicate similar life, liberty, and property concerns. Of course, a defendant has an interest in

presenting evidence in his defense at trial because he may be fined, imprisoned, or executed based on a determination of guilt. But the type and extent of punishment hangs in the balance at sentencing as well, suggesting that the defendant has the same interest in presenting evidence in his defense during that phase of the trial. The consequences of the sentencing phase and the importance of presenting defense evidence is perhaps most striking in capital cases, in which such evidence may mean the difference between life and death. But even in noncapital cases, evidence presented at sentencing may decrease a prison term or a fine anywhere between the statutory maximum and minimum.[13]

2. Although the speedy trial interest in preventing oppressive pretrial incarceration may not be literally implicated in the sentencing context, the principal concerns underlying the interest are relevant to pre-*sentencing* incarceration as well. The *Barker* Court detailed the two important "societal disadvantages of lengthy pretrial incarceration": "It often means loss of a job; it disrupts family life; and it enforces idleness. * * * Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." 407 U.S. at 532-33.

The disruption to the defendant's life caused by incarceration can easily become oppressive. For example,

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[13] The breadth of evidence considered at sentencing also makes the potential loss of evidence an important concern. As illustrated by the Federal Sentencing Guidelines, the scope of evidence weighed at sentencing is as broad as that considered during the guilt phase. See, *e.g.*, U.S. SENTENCING GUIDELINES MANUAL 1B1.4 ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, *the court may consider, without limitation, any information concerning the background, character and conduct of the defendant*, unless otherwise prohibited by law." (emphasis added)).

"indefinite incarceration could exceed the length of a fair sentence." *McLellan*, 498 A.2d at 739 (Souter, J.). In such circumstances, the mere fact of delay forces the defendant to unjustly endure a longer disruption to his life than the rule of law allows (and longer than the length of time deemed necessary to repay his debt to society). A wrongly convicted defendant moreover must wait to be sentenced before attempting to have his conviction overturned on appeal. Of course, each day a wrongly convicted defendant spends in prison is an oppressive disruption to his life. An undue sentencing delay amplifies this oppression by unreasonably postponing the possibility of exoneration on appeal. See *Barker*, 407 U.S. at 533 ("It is especially unfortunate to impose [the consequences of incarceration] on those persons who are ultimately found to be innocent."); *Gonzales*, 582 P.2d at 633 ("Sentencing delays may cause undue and oppressive incarceration. Should the defendant be unable to make bail, prolonged imprisonment pending sentencing may be compensable by credit against time served; however, this remedy does little good to the person whose conviction is flatly overturned on appeal."). Finally, "[u]ntil sentence is imposed the defendant may not apply for pardon, commutation or reduction of sentence." *Id.*

In any event, this Court's precedent establishes that the Speedy Trial Clause applies regardless of whether a defendant is incarcerated or not.[14] In *Doggett* v. *United States*, 505 U.S.

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[14] The decisions cited by petitioner (Pet. 10) for the proposition that the Speedy Trial Clause does not apply to those "not actually facing * * * uncertainty or restraint on liberty" (*United States* v. *Loud Hawk*, 474 U.S. 302 (1986), *United States* v. *MacDonald*, 456 U.S. 1 (1982), and *United States* v. *Marion*, 404 U.S. 307 (1971)) merely hold that the speedy trial right "has no application beyond the confines of a formal criminal prosecution." *Doggett*, 505 U.S. at 654-55. While a person who has yet to be arrested or indicted is not within "the confines of a formal criminal

647 (1992), over eight years elapsed between the defendant's indictment and arrest. *Id.* at 650. Although the defendant was not subject to pretrial imprisonment, *id.* at 649-50, 654, this Court found a speedy trial violation, *id.* at 648, 658.

3. The speedy trial interest in reducing the defendant's anxiety also is implicated by sentencing delays. This Court has understood the anxiety interest to be distinct from anxiety that might arise from incarceration itself: "even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker*, 407 U.S. at 533; see also *Klopfer*, 386 U.S. at 222 (noting that a pending indictment "may subject [a free defendant] to public scorn"). Just as delays in the commencement of trial can create anxiety in a defendant over whether he will be convicted, "delays [in sentencing] potentially can create extreme anxiety for a convicted person waiting to learn how long he or she will be imprisoned." *State* v. *Allen*, 505 N.W.2d 801, 803 (Wis. Ct. App. 1993). The defendant's anxiety reaches beyond uncertainty over the length of the sentence to the fairness of the process itself: "extended and indefinite uncertainty about disposition could destroy the opportunity for a defendant to perceive a fair relationship between guilt and penalty." *McLellan*, 498 A.2d at 739 (Souter, J.). As the decision below emphasized, no matter what the precise nature of the anxiety, during a sentencing delay "the pending imposition of punishment that loom[s] [over the defendant's head] * * * interfere[s] with [his] ability to live his life." Pet. App. 13a.

In a related context, this Court has recognized the relevance of a defendant's anxiety caused by not knowing the precise length of his sentence. In *Strunk* v. *United States*, 412 U.S. 434 (1973), this Court addressed the delay in the commencement of trial faced by a defendant while serving a

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prosecution," the same cannot be said for a defendant awaiting sentence. See also *infra* Part IV.B.5.

sentence on an unrelated conviction. This Court noted that "[t]he speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress * * * from uncertainties in the prospect of facing public trial *or of receiving a sentence longer than, or consecutive to, the one he is presently serving*." *Id.* at 439 (emphasis added); see also *Hooey*, 393 U.S. at 378-79. If the anxiety caused by not knowing the length of one's sentence (the issue here) is different from the anxiety caused by not knowing whether one's imprisonment might be lengthened by the imposition of a consecutive rather than a concurrent sentence (the issue in *Strunk* and *Hooey*), surely it is merely a difference in kind and not a difference of constitutional significance.[15]

A final interest that this Court has recognized as being protected by the Speedy Trial Clause is that a prolonged delay "almost certainly will force curtailment of [the defendant's] speech, associations and participation in unpopular causes." *Klopfer*, 386 U.S. at 222. This interest is no less implicated by sentencing delays, as "prompt sentencing may reduce the opportunity for delays designed to chill the legitimate exercise of First Amendment freedoms by unpopular defendants." *Gonzales*, 582 P.2d at 633.

4. The analysis of the interests underlying the speedy trial right does not end with the defendant's interests; societal interests equally weigh in favor of subjecting sentencing delays to Sixth Amendment speedy trial analysis. "In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial * * *." *Barker*,

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[15] In any event, the speedy trial right would attach even if respondent faced no particular anxiety about the length of his sentence. In *Doggett*, there was no evidence that the defendant knew about his pending indictment, 505 U.S. at 653-54, but the Court nonetheless held that the speedy trial right had been violated, *id.* at 648, 658.

407 U.S. at 519. This Court elaborated several concerns underlying this societal speedy trial interest:

> [1] The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses * * *. [2] In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. * * * [3] Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. [4] Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.

Id. at 519-20 (footnotes omitted).

Each of the four concerns motivating the societal interest in speedy trials are squarely implicated in the sentencing context as well. First, defendants regularly plea bargain over their sentences, and delays in sentencing contribute to the "large backlog of cases." Second, both defendants awaiting the commencement of trial and defendants awaiting the imposition of sentence may be released on bond. Third, unreasonable delays in sentencing provide the latter group with the same opportunities to commit other crimes or to jump bail as unreasonable delays earlier in the trial process provide to the former group. See *Gonzales*, 582 P.2d at 633 ("[T]he public retains an interest in prompt and certain punishment for criminal offenses * * * to minimize the possibility of further criminal activity by the accused while released on bail pending sentence * * *."). Although the *Barker* Court mentioned only deterrence of the individual awaiting sentence, prompt sentencing also "aid[s] the deterrent effect of penal sanctions," *ibid.*, sending a message to other would-be criminals that they will be both convicted and sentenced with dispatch. Fourth and finally, defendants released on bond in any context, whether while waiting for

trial to begin or for sentence to be imposed, suffer from the same detrimental effect on rehabilitation.

5. Petitioner argues (Pet. 10-11) that sentencing delays should be governed by the Due Process Clause rather than the Speedy Trial Clause. It is unlikely that the Framers would have grounded constitutional limits on sentencing delays – limits that petitioner concedes exist (Pet. 11) – in a provision with language as vague as the Due Process Clause when the Speedy Trial Clause speaks directly to the issue. The cases that petitioner cites in support of its due process position are simply not on point, as they involved delays before arrest or indictment. See *supra* at 24 n.14. While a person who has yet to be arrested or indicted does not face a formal criminal prosecution and therefore might be entitled only to due process guarantees, a defendant awaiting sentence surely is within "the confines of a formal criminal prosecution," *Doggett*, 505 U.S. at 655, and therefore should be protected by the Speedy Trial Clause.[16]

C. Petitioner's Contrary Arguments Lack Merit.

Petitioner asserts that the overwhelming weight of federal and state court authority concluding that the Speedy Trial Clause applies to the sentencing phase of criminal trials is erroneous because the text of the Sixth Amendment indicates that it is "accusation-based" (see Pet. 9 (citing AKHIL R. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 103 (1997))), such that it "has no application until the putative defendant in some way becomes

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[16] Contrary to petitioner's contention (Pet. 11) that there is an informative similarity between the *Pollard* Court's analysis of whether the sentencing delay was purposeful or oppressive and the due process inquiry of *United States* v. *Lovasco*, 431 U.S. 783, 789-96 (1977), this Court has repeatedly recognized that *Pollard* evaluated the sentencing delay under the Sixth Amendment speedy trial right, see *Loud Hawk*, 474 U.S. at 322 n.5; *Barker*, 407 U.S. at 515; *Marion*, 404 U.S. at 315 n.7; *Ewell*, 383 U.S. at 120, rather than due process.

an 'accused'" (see Pet. 9 (citing *United States* v. *Marion*, 404 U.S. 307, 313 (1971)). That argument is misguided. The Sixth Amendment is accusation-based in the sense of determining "when the speedy trial clock *starts* ticking," not when it *stops*. AMAR, *supra*, at 102-03 (emphasis added and omitted). Put another way, the term "accused" relates to the question whether a person is charged, which respondent undoubtedly was.

Petitioner implies that because the Sixth Amendment right to *trial by jury* does not apply at sentencing, the Sixth Amendment speedy trial right should not apply either. See Pet. 9 (citing *Spaziano*, 468 U.S. at 459 (1984)). That argument ignores this Court's precedents holding that other Sixth Amendment rights *do* apply in the sentencing context. See, *e.g.*, *Strickland*, 466 U.S. at 686 (same test is used for evaluating Sixth Amendment ineffective assistance of counsel claims in capital sentencing proceedings as in guilt-phase proceedings); *Mempa*, 389 U.S. at 134-37 (establishing an indigent defendant's Sixth Amendment right to an attorney in sentencing proceedings); see also *Mitchell* v. *United States*, 526 U.S. 314, 326, 328 (1999) (defendant's Fifth Amendment right to remain silent applies at sentencing, and court cannot draw adverse inferences from this silence); Michaels, *supra*, at 1774 (indicating that "[m]ore trial rights apply at sentencing than many have supposed"); cf. *Spaziano*, 468 U.S. at 459 (noting that a capital sentencing may count as a "trial" for purposes of the Double Jeopardy Clause but not the Jury Trial Clause). For the reasons discussed in Part IV.B, *supra*, this Court's precedents indicate that the Sixth Amendment speedy trial right equally applies to sentencing.

Finally, petitioner asserts (Pet. 11) that practical considerations militate against subjecting sentencing delays to speedy trial analysis, as it may be "prudent" to wait for, say, the preparation of a presentence report or the resolution of other pending charges, before imposing sentence on a defendant. Petitioner argues (*id.* 12) that sentencing delays of up to one year in such circumstances should be excused, but

they are subject to constitutional scrutiny if the Speedy Trial Clause is applied to sentencing. This argument ignores the fact that "there are many reasons, often good," *id.* 11, to delay the commencement of trial, too. But the existence of prudential concerns is not enough to completely unmoor such delays from the constraints of the Sixth Amendment. Instead, courts can give adequate consideration to the reasons for sentencing delays under the second factor – "reason for delay" – of the *Barker* balancing test. Presumably, a genuinely prudent reason for a sentencing delay would be treated as a "more neutral reason" under the second factor and therefore "weighed less heavily" against the state than a "deliberate attempt to delay * * * in order to hamper the defense." *Barker*, 407 U.S. at 531; see also *Strunk*, 412 U.S. at 436.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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February 14, 2005[17]

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