No. _____

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095

WADE ZOLYNSKI
KOAN MERCER
OFFICE OF THE PUBLIC DEFENDER
139 Last Chance Gulch
P.O. Box 200145
Helena, MT 59620

FRED A. ROWLEY, JR.
Counsel of Record
DANIEL B. LEVIN
CATHLEEN H. HARTGE
GRACE R. DILAURA
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

CONSTITUTIONAL AUTHORITIES

FEDERAL STATUTES

STATUTES - OTHER

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Thomas Betterman respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a) is published at 342 P.3d 971. The relevant orders of the trial court are unpublished, but are available at Pet. App. 24a, 26a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on February 10, 2015. Pet. App. 1a. On April 23, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 10, 2015. *See* 14A1084. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

STATEMENT OF THE CASE

This case presents a recurring question of constitutional law that has divided federal and state courts: whether the Sixth Amendment's Speedy Trial Clause protects a defendant from inordinate sentencing delays. Nearly sixty years ago, this Court in *Pollard v. United States* "assume[d] *arguendo*" that it does. 352 U.S. 354, 361 (1957). This Court has never answered the question it left open in *Pollard*. But, in the inter-

vening decades, federal and state courts have split over whether criminal defendants are entitled to Speedy Trial Clause protections as to sentencing.[1]

Many courts have held the Sixth Amendment speedy trial right applies at sentencing, and others have assumed it does, as this Court did in *Pollard*. Multiple courts, however, have held the opposite and concluded that the Sixth Amendment does not protect criminal defendants from delays in criminal proceedings once they have been found guilty.

The Montana Supreme Court joined this side of the split in the decision below, overruling its own recent holding to the contrary. The fluctuating state of the law in Montana epitomizes the confusion among lower courts over Sixth Amendment rights at sentencing. This Court should intervene and make clear that protracted delays in sentencing violate the Speedy Trial Clause.

1. Petitioner Brandon Betterman pleaded guilty to bail jumping in April 2012. Pet. App. 2a-3a. The conviction was based on his failure to appear at a 2011 court appearance on a domestic assault, which he had missed because he lacked the money or transportation to travel more than two hundred miles to attend court. *Id.* at 2a. Betterman turned himself in two months after missing that court appearance, and was sentenced to five years in state prison on the domestic assault conviction. *Ibid.* But he was still charged separately with bail jumping, to which he

[1] This Court held that the Sixth Amendment's Speedy Trial Clause applies to the states through the Fourteenth Amendment in *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

pled guilty at his April 2012 arraignment. *Id*. at 2a-3a.

Betterman then waited more than fourteen months, until June 2013, to be sentenced on the bail jumping charge, spending all of that time in county jail. *Id.* at 2a, 4a. The delay began with a five-month wait for an "updated" pre-sentence investigation report and two months of subsequent silence from the district court. *Id.* at 3a. Finally, the court scheduled a sentencing hearing to be held nearly nine months after Betterman pled guilty to bail jumping. *Ibid.* At that sentencing hearing, in January 2013, Betterman filed a motion to dismiss the action, alleging an unconstitutional sentencing delay in violation of his right to a speedy trial under the Montana and United States Constitutions. *Id.* at 3a, 26a; Motion to Dismiss at 1, *Montana v. Betterman*, No. DC-12-45 (Jan. 17, 2013), Dkt. No. 22. The court declined to sentence Betterman at that time, continuing the sentencing hearing indefinitely. Pet. App. 3a-4a.

Betterman continued to press his right to a timely sentencing. In March 2013, both Betterman and the State requested that the court set a sentencing date. *Id.* at 3a. Even though nearly a year had passed since his guilty plea and Betterman was in local custody, the court responded that it would "not be able to 'fast track' [Betterman's] sentencing" due to pending civil matters. *Id.* at 3a-4a.

The following month, April 2013, the court denied Betterman's motion to dismiss on speedy trial grounds. *Id.* at 26a-27a. The court provided two reasons: (1) by pleading guilty, Betterman had waived his ability to raise a speedy trial claim; and (2) Bet-

terman's speedy trial claim failed on the merits. *Id.* at 31a, 37a.

Within a week, Betterman moved the court to reconsider its denial of his motion to dismiss, and filed an affidavit explaining to the court:

- "I have now spent approximately 442 or more days ... on [the domestic assault] sentence in the Butte Jail. In theory, I would be eligible for conditional release ... if I were in the Department of Corrections[']s actual system."
- "[D]ue to my incarceration in the Butte Jail as I am informed, I have a warrant out of Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County."
- "In DC-11-36 [the domestic assault case], I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail."

Id. at 3a-4a; Motion to Reconsider, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 27; Affidavit of Defendant at 1-2, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Betterman further explained that he had sought counseling due to the anxiety and depression caused by his uncertain fate, and that the county was refusing to provide medical attention for his health issues. Pet. App. at 4a; Affidavit of Defendant at 3, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. The court denied Betterman's motion for reconsideration the following month. Pet. App. at 24a-25a.

On June 27, 2013, more than fourteen months after Betterman pled guilty, the court finally sentenced Betterman to seven years in state prison, suspending a portion of that sentence. *Id.* at 4a.

2. Betterman appealed his sentence and conviction to the Montana Supreme Court, asserting that the fourteen-month delay between his guilty plea and sentencing violated his speedy trial rights under the Sixth Amendment and an analogous provision of the Montana Constitution. *Id.* at 1a-2a, 5a.

The Montana Supreme Court affirmed the trial court on different grounds, overturning its own precedent in the process. *Id.* at 2a, 15a. It first acknowledged its previous holding in *State v. Mooney*, 137 P.3d 532, 535 (Mont. 2006), "that the right to a speedy trial applies through sentencing." Pet. App. 7a (quoting *Mooney*, 137 P.3d at 535). But the court concluded that it needed to "reexamine" *Mooney*, noting it arrived at the holding there "without analysis or explanation and in apparent reliance on *Pollard*." *Id.* at 7a-8a.

After this "reexamin[ation]," the Montana Supreme Court determined that the Sixth Amendment's speedy trial right "cease[s] to apply when conviction becomes definitive." *Id.* at 7a-8a, 14a. The court rested its decision on three grounds.

First, the court concluded that the historical understanding of a criminal "trial" did not include sentencing. *See id.* at 8a-11a. The court interpreted passages from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to confirm that "[s]entencing ... *followed* the verdict," such that it was not part of a "trial" for con-

stitutional speedy trial purposes. Pet. App. 9a-11a (emphasis added).

Second, the court evaluated the Sixth Amendment interests identified by this Court and determined that "[a] delayed sentencing raises different concerns than [does] a delay in proceeding to trial." *Id.* at 11a-13a. While recognizing that sentencing delay can have harmful effects, the Court concluded that those harms are "nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a.

Lastly, the court expressed concern that the only remedy for a speedy trial violation is dismissal of the charges. *Id.* at 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). Dismissing the case on that ground, the court reasoned, would contravene the principle that a convicted defendant should not "escape punishment altogether" simply because a "court committed an error in passing sentence." *Ibid.* (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)).

After concluding that sentencing delays do not trigger the speedy trial right, the court examined whether Betterman's sentencing delay violated the Due Process Clause. The court concluded that the fourteen-month delay between Betterman's conviction and sentencing was "unacceptable," and without legitimate explanation. *Id.* at 20a. Despite this, the court denied relief because "any prejudice ... was not substantial and demonstrable." *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

"Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v.*

United States, 302 U.S. 211, 212 (1937). This Court has assumed, without deciding, "that sentence is part of the trial for purposes of the Sixth Amendment[']s Speedy Trial Clause]." *Pollard*, 352 U.S. at 361. The Montana Supreme Court nonetheless held that the Speedy Trial Clause does not apply to the sentencing phase of a criminal proceeding, deepening the split of authority among federal and state courts on this issue.

Five Circuits—the Third, Fifth, Sixth, Tenth, and Eleventh Circuits—all have recognized that inordinate sentencing delay may violate a defendant's speedy trial rights. These cases have reasoned that "the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution." *Burkett v. Cunningham* (*Burkett I*), 826 F.2d 1208, 1220 (3d Cir. 1987) (Becker, J.) (citation omitted). Six other Circuits—the First, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits—have assumed speedy trial protections attach at sentencing.

The Second Circuit has sharply disagreed, holding that "the Speedy Trial Clause of the Sixth Amendment, which governs the timing of trials, does *not* apply to sentencing proceedings." *United States v. Ray*, 578 F.3d 184, 198-99 (2d Cir. 2009) (Cabranes, J.) (emphasis added). In the Second Circuit's view, "sentencing proceedings and trials are separate and distinct phases of criminal proceedings," and speedy trial protections apply only to the latter. *Ibid.*

The division among the federal courts on this issue mirrors the disarray among state courts of last resort. Many of those state courts have recognized that the

Speedy Trial Clause, and analogous state constitutional protections, apply through the sentencing phase of a criminal prosecution. *E.g.*, *State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 740 (N.H. 1985) (Souter, J.). Others have assumed the existence of the right, without squarely so holding. *E.g.*, *People v. Sandoval-Candelaria*, 321 P.3d 487, 492 (Colo. 2014). And still others have taken the opposite side of the debate and rejected speedy trial challenges at sentencing. *E.g.*, *State v. Pressley*, 223 P.3d 299, 300 (Kan. 2010).

This Court should resolve the persistent split in authority and provide a clear answer to this important question. The Speedy Trial Clause's applicability to sentencing bears on every criminal case in which a conviction is obtained. The only alternative constitutional protection lies in the Due Process Clause, and the heavy burden criminal defendants face in mounting such a challenge makes it inadequate and poorly tailored to the speedy trial concerns arising from sentencing delays. What is more, the position that the Speedy Trial Clause does not protect against such delays is simply incorrect. Sentencing was inseparable from the conviction itself at common law. It would have been inconceivable to the Founders that the Speedy Trial Clause would protect a criminal defendant from unconstitutional delays in one but not the other.

This Court should heed the calls of lower courts to "directly examine[] and resolve[] the question" whether "Sixth Amendment speedy trial safeguards [apply] past the transition from accused to convict," and eliminate the decades-long confusion among lower courts that has been left in *Pollard*'s wake. *See*

United States v. Gould, 672 F.3d 930, 936 n.4 (10th Cir. 2012) (quoting *Perez v. Sullivan*, 793 F.2d 249, 253 n.2 (10th Cir. 1986)). This case is the ideal vehicle for deciding the applicability of the Speedy Trial Clause to sentencing. The question is cleanly presented, differentiating this case from others where this Court has denied review, and it comes to the Court in a situation where the state supreme court *reversed* its position on the matter.

I. The Decision Below Deepens A Longstanding Split Over Whether The Speedy Trial Clause Protects Against Inordinate Sentencing Delays.

A. Federal And State Courts Are Squarely Divided On The Question Presented.

1. The majority of the courts addressing the issue have applied the Sixth Amendment's Speedy Trial Clause to claims of unconstitutional sentencing delays.

a. The Third, Fifth, Sixth, Tenth and Eleventh Circuits have held that the Sixth Amendment's Speedy Trial Clause protects criminal defendants from inordinate delays in sentencing.

The Fifth Circuit, relying on *Pollard*, has held that "the imposition of sentence is part of the trial for the purposes of the Sixth Amendment speedy trial guarantee." *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (finding a violation and vacating sentence). The Fifth Circuit has consistently reaffirmed this holding. *See, e.g.*, *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996). The Eleventh Circuit has repeatedly followed

the Fifth Circuit's holding on that score. *See United States v. Danner*, 429 F. App'x 915, 917 (11th Cir. 2011) (explaining that "the protection of the Sixth Amendment right to a speedy trial extends to sentencing," citing and acknowledging that it is bound by *Juarez-Casares*); *accord United States v. Bordon*, 421 F.3d 1202, 1208 (11th Cir. 2005).

The Third Circuit has likewise held that the Speedy Trial Clause applies to sentencing delays. *Burkett I*, 826 F.2d at 1220. "We now make explicit," Judge Becker explained, "that the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution—in other words, *until one final, pre-appellate determination has been made*" as to a defendant's sentence. *Ibid.* (emphasis added and citations omitted). The court then determined that the defendant "ha[d] established a speedy trial violation." *Id.* at 1223-25.

Reviewing its Sixth Amendment precedents, the Sixth Circuit has recognized that it previously "held that a defendant is entitled to a speedy sentencing." *See, e.g.*, *United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999) (citing *United States v. Reese*, 568 F.2d 1246, 1252-53 (6th Cir. 1977)). And the Tenth Circuit has stated, in clear terms, that "[t]he Sixth Amendment guarantees all criminal defendants the right to a speedy trial; we have applied this right from arrest through sentencing." *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (citing *Perez*, 793 F.2d at 253).

A number of state courts of last resort agree that the Speedy Trial Clause applies through the sentenc-

ing phase of a criminal prosecution. *See, e.g.*, *McLellan*, 498 A.2d at 740; *Ex parte Apicella*, 809 So. 2d 865, 869 (Ala. 2001); *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978); *Jolly v. State*, 189 S.W.3d 40, 45 (Ark. 2004); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002); *Trotter v. State*, 554 So. 2d 313, 314, 319 (Miss. 1989), *superseded by statute on other grounds*, Laws 2008, Ch. 457, § 1, eff. July 1, 2008; *Commonwealth v. Glass*, 586 A.2d 369, 371 (Pa. 1991); *State v. Banks*, 720 P.2d 1380, 1385 (Utah 1986); *State v. Dean*, 536 A.2d 909, 912 (Vt. 1987).

b. Six federal courts of appeal and many other state supreme courts have, consistent with *Pollard*, assumed the applicability of the Speedy Trial Clause to sentencing without so deciding. *See, e.g.*, *United States v. Gibson*, 353 F.3d 21, 27 (D.C. Cir. 2003); *United States v. Carpenter*, 781 F.3d 599, 609-10 (1st Cir. 2015); *Brady v. Superintendent*, 443 F.2d 1307, 1310 (4th Cir. 1971); *United States v. Rothrock*, 20 F.3d 709, 711 (7th Cir. 1994); *Brooks v. United States*, 423 F.2d 1149, 1151 (8th Cir. 1970); *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988); *State v. Smith*, 159 P.3d 531, 544 (Ariz. 2007); *People v. Sandoval-Candelaria*, 321 P.3d 487, 492 (Colo. 2014); *Weber v. State*, 971 A.2d 135, 160-61 (Del. 2009); *Moore v. State*, 436 S.E.2d 201, 202 (Ga. 1993); *State v. Erbe*, 350 A.2d 640, 642 (Md. 1976); *Commonwealth v. McInerney*, 401 N.E.2d 821, 825 (Mass. 1980).

2. A growing minority of courts, however, has categorically rejected the majority view.

The Second Circuit has "h[e]ld that the Speedy Trial Clause of the Sixth Amendment, which governs

the timing of trials, does *not* apply to sentencing proceedings." *Ray*, 578 F.3d at 198-99 (emphasis added). In so holding, Judge Cabranes acknowledged the contrary holdings of other federal circuit courts, but reasoned that "trial" historically "would not have encompassed sentencing proceedings," and that "the harms arising from delayed sentencing" are "quite different from those animating the Speedy Trial Clause." *See id.* at 192 & n.11, 196, 198. The court then decided that the defendant's constitutional claim was actually a due process claim, granting relief on the merits. *See id.* at 199-202.

In holding that the Speedy Trial Clause does not protect a criminal defendant's right to a speedy final disposition, the Second Circuit joined several state supreme courts that reached the same result. *See, e.g.*, *State v. Drake*, 259 N.W.2d 862, 866 (Iowa 1977), *overruled on other grounds by State v. Kaster*, 469 N.W.2d 671, 673 (Iowa 1991); *State v. Pressley*, 223 P.3d 299, 300 (Kan. 2010); *State v. Johnson*, 363 So. 2d 458, 460 (La. 1978); *Ball v. Whyte*, 294 S.E.2d 270, 271 (W. Va. 1982); *accord Moore v. United States*, 359 A.2d 299, 302 n.7 (D.C. 1976).

The Montana Supreme Court's decision below adopted the Second Circuit's reasoning. *See* Pet App. 13a-14a. To arrive at that holding, the court *rejected* its *own* 2006 decision in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), which "'conclusively [held] that the right to a speedy trial applies through sentencing,'" *See* Pet. App. 7a, 15a (alteration in original) (quoting *Mooney*, 137 P.3d at 535).

B. The Split Is Intractable.

Without this Court's intervention, lower courts will remain divided on the existence *vel non* of a speedy trial right at sentencing.

Federal and state courts have regularly acknowledged the split in authority. *See, e.g.*, *Carpenter*, 781 F.3d at 609; *Ray*, 578 F.3d at 192 & n.11; *Perez v. Sullivan*, 793 F.2d 249, 253 n.3 (10th Cir. 1986); *Pressley*, 223 P.3d at 301; *Johnson*, 363 S.2d at 460; *Drake*, 259 N.W.2d at 865-66. Nor is this a disagreement that is likely to resolve itself. Many of the courts that have recognized Sixth Amendment protections at sentencing adhere to their precedent, rather than revisiting the issue, when the issue again arises. Earlier this year, for example, the First Circuit explicitly "decline[d] to adopt" the Second Circuit's reasoning in *Ray*. *Carpenter*, 781 F.3d at 609-10. In electing to continue to retain its precedent, the court explained that it saw "no reason to depart from the majority view that assumes that the Sixth Amendment also protects against post-trial delay." *Ibid.* This reflects the view taken by "the lower federal courts" that *Pollard* provides "'strong indication' that the sixth amendment has application to the time between conviction and sentencing." *McLellan*, 498 A.2d at 740 (Souter, J.).

Courts on the other side of the split have also dug in their heels. For example, in declining to revisit its holding that the Sixth Amendment does *not* protect against sentencing delays, the Kansas Supreme Court explained that "absent a ruling from the United States Supreme Court explicitly extending speedy

trial protections to sentencing, we see no reason to change course." *Pressley*, 223 P.3d at 302.

The persistence of the disagreement across state and federal jurisdictions shows the need for intervention by this Court. Nor does the fact that the court below switched sides and reversed itself offer hope that the lower courts will come to some consensus. The opposing sides of the debate have been joined, and their reasoning explicated: they simply disagree about whether "the harms arising from delayed sentencing" are or are not "different from those animating the Speedy Trial Clause." *Ray*, 578 F.3d at 198.

II. The Question Whether the Sixth Amendment Attaches Through Final Disposition Is Important.

The Sixth Amendment's right to a speedy trial "is one of the most basic rights preserved by our Constitution," with "its roots at the very foundation of our English law heritage." *Klopfer*, 386 U.S. at 223, 226. Resolving the split over the scope of the Speedy Trial Clause is crucial because (1) sentencing delays inflict the same kind of harm on defendants as delays before trial; and (2) relying on the Due Process Clause to protect defendants subjects defendants to a burdensome and unjustified prejudice requirement.

1. There is a pressing need to protect defendants' Sixth Amendment right to a speedy sentencing.

The speedy trial right serves three primary interests: "(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." *See Barker v. Wingo*, 407 U.S. 514, 532 (1972); *McLellan*, 498 A.2d at 739.

These interests remain after conviction, given "that indefinite incarceration could exceed the length of a fair sentence; that extended and indefinite uncertainty about disposition could destroy the opportunity for a defendant to perceive a fair relationship between guilt and penalty; and that delay in completing the trial process could prejudice both the State and the defendant if a retrial should be ordered on appeal." *McLellan*, 498 A.2d at 739; *see Carpenter*, 781 F.3d at 609-10. Indeed, without a sentence, the defendant remains in stasis and cannot appeal, seek clemency or commutation, or move the case forward in any way. *See Burkett v. Fulcomer* (*Burkett II*), 951 F.2d 1431, 1443 (3d Cir. 1991).

Furthermore, sentencing delays have damaging practical consequences. Defendants awaiting sentencing, like pretrial defendants, are often held in local jails. Compared to state prisons, jails are more dangerous, have fewer financial resources, are less able to care for inmates' physical and mental health, and provide limited educational or rehabilitative programming. *See* Cindy Chang, *Prison Re-Entry Programs Help Inmates Leave the Criminal Mindset Behind, but Few Have Access to the Classes*, The Times-Picayune, May 19, 2012, http://www.nola.com/crime/index.ssf/2012/05/prison_re-entry_programs_help.html (re-entry programs in Louisiana state prisons were unavailable for the majority of Louisiana inmates in local custody); Amanda Petteruti & Nastassia Walsh, Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies (Justice Policy Institute, April, 2008), 5, http://www.justicepolicy.org/images/upload/08-

04_REP_JailingCommunities_AC.pdf; Robert G. Lawson, *Turning Jails into Prisons—Collateral Damage from Kentucky's "War on Crime"*, 95 Ky. L.J. 1, 15-16 (2007); Human Rights Watch, Ill-Equipped: U.S. Prisons and Offenders with Mental Illness 16 (2003), http://www.hrw.org/reports/2003/usa1003/usa1003.pdf; Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1685-87 (2003).

This lack of educational and rehabilitative programs does not merely affect the conditions of confinement, but also can obstruct defendants' efforts to seek parole. In Kentucky, for example, educational and rehabilitative programs are far more accessible at state prisons than in local jails, and in 2007 "a state inmate in jail [was] three to four times more likely to get a serve-out order [to serve the entirety of a sentence] than [was] a state inmate in prison." Lawson, *Turning Jails into Prisons*, *supra*, at 42. This is logical; parole boards often consider involvement in programming and preparation for integration into the community. *See, e.g.*, N.Y. Exec. Law § 259-i(2)(c)(A)(i) (McKinney) (requiring New York's Board of Parole to consider institutional performance and academic, vocational, and therapy achievements). Betterman himself was required to complete specific programs that were not available at the local detention center in which he was held. Affidavit of Defendant at 2, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Defendants facing inordinate sentencing delays are therefore not subject to mere inconveniences, but are deprived of opportunities for rehabilitation and of resources that could enable them to reduce their time in custody.

2. When the Montana Supreme Court rejected the applicability of the Sixth Amendment to sentencing delays and instead analyzed the delay under the lens of due process, it saddled Betterman with the unjustified burden of proving actual prejudice.

The four-factor *Barker v. Wingo* balancing test for Sixth Amendment speedy trial claims requires courts to weigh the length of the delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and whether the defendant has been prejudiced by the delay. 407 U.S. at 530. Because these factors must be "considered together with such other circumstances as may be relevant," no one factor is dispositive, and a showing of prejudice is not a strict requirement. *Id.* at 533. The Montana Supreme Court, adopting the Second Circuit's approach, applied the two-pronged *Lovasco* due process test. That test assesses only: "[1] the reasons for the delay as well as [2] the prejudice to the accused." Pet. App. 17a (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)); *see also Ray*, 578 F.3d at 199.

The *Lovasco* test *requires* an affirmative showing of prejudice. *See Lovasco*, 431 U.S. at 790; *Ray*, 578 F.3d at 199. The Montana Supreme Court faithfully applied this test, denying Betterman relief from "unacceptable" delay because it found no "substantial and demonstrable" prejudice. Pet. App. 22a. But this squarely contradicts *Barker*. *Barker* made clear that no one factor is "a necessary or sufficient condition," and that evaluating the factors requires "a difficult and sensitive balancing process." 407 U.S. at 533.

Since *Barker*, this Court has repeatedly rejected an affirmative prejudice requirement for speedy trial claims. In *Moore v. Arizona*, this Court stated: "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." 414 U.S. 25, 26 (1973). This Court reinforced this understanding in *Doggett v. United States*, finding error where a court had rejected a speedy trial claim because the defendant made no affirmative showing of prejudice. 505 U.S. 647, 655 (1992). This Court emphasized that "consideration of prejudice is not limited to the specifically demonstrable," and "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Ibid.*; *see also Dickey v. Florida*, 398 U.S. 30, 40 (1970) (Brennan, J., concurring) ("I do not read the Court's opinion as deciding that in post-*Klopfer* cases ... [the defendant] must prove actual prejudice ....").

The Due Process Clause, with its concomitant requirement of proving actual prejudice, inadequately protects a defendant's constitutional right to a speedy disposition. An affirmative prejudice requirement hobbles any defendant challenging a sentencing delay, as the "burden to show actual prejudice is heavy and is rarely met." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (applying *Lovasco* to a pre-indictment delay). The burden is especially heavy because speedy trial prejudice "is not always readily identifiable." *Barker*, 407 U.S. at 531-32. The damage is worst where the prejudice suffered by a defendant is the impairment of evidence needed in later proceedings, which represents both the "most

serious" form of prejudice, *id.* at 532, and "the most difficult form of speedy trial prejudice to prove," *Doggett*, 505 U.S. at 655.

The disparate constitutional tests applied by the lower courts means similarly-situated defendants enjoy widely different protections against sentencing delay. As the law stands now, a defendant in federal court in New Jersey challenging the delay between conviction and sentencing need not necessarily make an affirmative showing of "substantial and demonstrable" prejudice to succeed, but a defendant in federal court in New York must. *See Ray*, 578 F.3d at 200; *see generally Burkett I*, 826 F.2d at 1219-21. Criminal defendants facing proceedings in Louisiana state court cannot rely on the more defendant-friendly *Barker* test to successfully challenge an unconstitutional sentencing delay, while defendants in Louisiana federal court can. *See Johnson*, 363 So. 2d at 460-61; *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976).

III. This Case Is An Ideal Vehicle For This Court To Resolve This Issue.

The Court denied certiorari on this question in *Ray v. United States*, 559 U.S. 1107 (2010) (No. 09-7778). But *Ray* was an extremely poor vehicle for addressing the question, because the defendant in *Ray* had already received relief under the Due Process Clause. *See* 578 F.3d at 202-03 (vacating the defendant's sentence). The decision below, by contrast, presents a good opportunity to address the question presented, because the question is outcome-determinative. The Montana Supreme Court held that Betterman cannot prevail under the *Lovasco* Due Process Clause test.

Pet App. 17a, 22a-23a. But Betterman *can* prevail under the *Barker* Speedy Trial Clause test.

The first *Barker* factor, the length of the delay, weighs heavily in Betterman's favor. Betterman experienced a fourteen-month delay between conviction and sentencing. A delay of one year is "presumptively prejudicial" and "unreasonable." *See Doggett*, 505 U.S. at 652 n.1. The court below acknowledged that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a.

The second *Barker* factor, the reason for the delay, also weighs heavily in Betterman's favor. The court below found that the delay was primarily "institutional," and that there was "no fault in Betterman for this delay, especially in light of his requests to be sentenced." *Id.* at 20a-21a. It took the government an inexplicable five months to prepare a presentence report. *Id.* at 3a. It took the sentencing court two months simply to schedule a hearing. *Ibid.* The Montana Supreme Court called this dual delay "inordinate." *Id.* at 20a. As the court recognized, "no legitimate reason has been set forth for such a delay." *Ibid.*

The third *Barker* factor, "[t]he defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." 407 U.S. at 531-32. This factor also weighs heavily in Betterman's favor. While waiting in jail for fourteen months, Betterman persistently asserted his right to be speedily sentenced. In January 2013, after waiting nearly nine months to be sentenced, Betterman

filed a motion to dismiss on speedy trial grounds. Pet. App. 3a. The court did not hold a hearing but nevertheless took three months to deny the motion. *Ibid.* In March 2013, Betterman asserted his right a second time by requesting a sentencing hearing. The court replied that it was too busy with civil matters and would not be able to "fast track" the sentencing. *Id.* at 3a-4a. In May 2013, more than a year after pleading guilty, Betterman filed a motion for reconsideration of the court's denial of his motion to dismiss, and an affidavit explaining exactly how the delay was prejudicing him. *Id.* at 4a; Motion to Reconsider, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 27. The court denied Betterman's motion to reconsider its prior decision. *See* Pet. App. 24a-25a. In short, Betterman did everything he possibly could to assert his right to speedy sentencing.

The fourth *Barker* factor is prejudice to the defendant. While the Montana Supreme Court rejected Betterman's showing of prejudice under the Due Process Clause's more demanding *Lovasco* standard, Betterman can easily show sufficient prejudice under *Barker*, particularly in light of how strongly the other three *Barker* factors weigh in his favor. As Betterman explained to the court, while waiting to be sentenced, he lost an opportunity for conditional release; an arrest warrant was issued in another county because of his inability to serve out that sentence; he was prevented from completing a court-ordered treatment program; and he was denied access to treatment for his medical issues, including his worsening degenerative disc disease in his back.

The choice of test—*Barker* or *Lovasco*—will determine the outcome of this case. The case is on direct

appeal, and the question is clearly preserved and cleanly presented. There could not be a better vehicle for addressing the question presented.

IV. The Montana Supreme Court's Decision Is Incorrect.

The Montana Supreme Court's opinion contravenes this Court's precedents. In refusing to apply speedy trial protections at sentencing, it misconstrues the right's history and grounding principles.

The Montana Supreme Court concluded that the Founders understood a "trial" to encompass only the jury's determination of guilt, while "judgment" or "sentence" would be the province of the judiciary and therefore separate from a "trial." *See* Pet. App. 8a-10a. But the Founders' understanding of the jury trial was characterized by the "invariable linkage of punishment with crime." *See Apprendi*, 530 U.S. at 478-79 (citing 4 Blackstone 369-370). "[S]entencing 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). Accordingly, trial *determined* sentence: for a defendant's purposes, the two were one and the same. Treating sentencing as wholly distinct from trial, and suspending a defendant's sentencing for months or years after a verdict, would have been entirely foreign to this system.

In deeming speedy trial concerns irrelevant at sentencing, the Montana Supreme Court fundamentally misunderstood the interests underlying that right. The court concluded that sentencing delay cannot impair an accused's defense

or ability to argue for leniency at sentencing. *See* Pet App. 12a. This overlooks the possibility that delay in sentencing may prejudice the defendant's ability to present evidence at retrial if a defendant's conviction is overturned—a process that itself cannot begin until the defendant is sentenced. *See Gonzales*, 582 P.2d at 633. Delay may also harm the defendant's ability to put on evidence at sentencing to prove mitigating factors or challenge the application of sentencing enhancements. *See ibid.*; *Jolly*, 189 S.W.3d at 48; *State v. Allen*, 505 N.W.2d 801, 803 (Wis. App. 1993).

Additionally, prolonged sentencing delays can cause significant anxiety on the part of a convicted defendant, especially when sentencing is potentially a life or death determination. *See Brady*, 443 F.2d at 1312 (recognizing that a portion of a sentencing delay "was a period of unjustified anxiety" regarding whether the defendant would receive a capital sentence); *Allen*, 505 N.W.2d at 803. As Betterman explained to the trial court, he had sought out counseling for "the anxiety and depression caused by the uncertainty" he faced from his sentencing delays. Affidavit of Defendant at 3, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Excluding sentencing from the speedy trial right fails to account for such harm to the defendant's mental well-being.

Finally, the Montana Supreme Court incorrectly relied on the assumption that the sole remedy for a speedy trial violation is dismissal of the charges. The court determined that applying this remedy for a sentencing delay "conflict[s]" with *Bozza*, which it interpreted to mean that a defendant should not go off scot-free due to a court's "error in passing sentence." Pet. App. 14a (quoting *Bozza*, 330 U.S. at 166-67).

But *Bozza* involved a double jeopardy claim, not a speedy trial right violation. *Bozza*, 330 U.S. at 166. Furthermore, it is far from clear that dismissal is the exclusive remedy for a speedy trial violation based on sentencing delay, and several courts have applied alternative remedies under the Sixth Amendment. *See Burkett II*, 951 F.2d at 1447-48 (reducing defendant's sentence); *Juarez-Casares*, 496 F.2d at 191 (vacating sentence); *Jolly*, 189 S.W.3d at 49 (same); *Trotter*, 554 So. 2d at 319 (same); *State v. Rich*, 248 P.3d 597, 601 (Wash. Ct. App. 2011) (remanding for imposition of the standard range to which defendant would have been entitled had he been sentenced before intervening change in the law).

CONCLUSION

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

Respectfully submitted,

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095

WADE ZOLYNSKI
KOAN MERCER
OFFICE OF THE PUBLIC DEFENDER
139 Last Chance Gulch
P.O. Box 200145
Helena, MT 59620

FRED A. ROWLEY, JR.
Counsel of Record
DANIEL B. LEVIN
CATHLEEN H. HARTGE
GRACE R. DILAURA
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

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