No. 16-1373

In the Supreme Court of the United States

RYAN BROWN, PETITIONER

v.

RANDALL HAAS, WARDEN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In the habeas context, if a state appellate court adjudicates a claim in an unexplained decision, does that decision fall outside the usual deference mandated by Congress in 28 U.S.C. § 2254 merely because the claim was not addressed first by a state trial court?

2. Has Brown shown that the starting date for the speedy-trial clock is actually January 2006, as both courts below assumed but neither court held?

3. Has Brown shown that the courts below erred in applying the fact-specific test found in *Doggett*?

4. Has Brown shown that he was denied relief because of an erroneous standard of actual prejudice?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Ryan Brown, a Michigan prisoner. The named respondent below was Kenneth Romanowski, Brown's former warden. Brown is now housed at Macomb Correctional Facility, where his warden is Randall Haas.

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The opinion of the Sixth Circuit affirming the district court's denial of habeas relief, Pet. App. 1a–28a, is reported at 845 F.3d 703. The order of the Sixth Circuit denying Brown's petition for rehearing en banc, Pet. App. 63a, is not reported. The opinion of the district court denying habeas relief, Pet. App. 29a–62a, is not reported but is available at 2015 WL 4041300.

The order of the Michigan Supreme Court denying Brown's application for leave to appeal, R. 9-10, Page ID 694, is reported at 829 N.W.2d 595. The order of the Michigan Court of Appeals denying Brown's delayed application for leave to appeal, R. 9-10, Page ID 695, is not reported. The opinion and order of the Oakland Circuit Court denying Brown's motion for relief from judgment, Pet. App. 65a–71a, is not reported.

JURISDICTION

The State accepts Brown's statement of jurisdiction as accurate and complete, and agrees that this Court has jurisdiction over the petition.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

INTRODUCTION

The petition asks this Court to resolve two supposed circuit splits governing the prejudice factor of a speedy-trial inquiry. But before these two questions could matter to the outcome of this case, two other questions must first be resolved.

First, what is the proper standard of review? Below, both parties and both courts agreed that, although this is a habeas case attacking a state-court conviction, AEDPA deference does not apply and that review is de novo. Both parties and both courts were mistaken: AEDPA deference applies to this claim. And the eight circuits that have considered the question all agree that parties cannot waive the congressionally mandated AEDPA standard by failing to raise it.

Second, when does the speedy-trial clock start? The courts below assumed for the sake of argument the date that favored Brown (because he was going to lose anyway). Unless this Court were to summarily affirm, it would need to address the question, because Brown needs to prevail on it, in addition to the questions he raises, to prevail in the case. If the State is right about when the clock starts, then Brown experienced only five months of delay. This is not long enough to trigger a need to examine the remaining factors. As the court below noted, "If the State is correct, the answer is easy": Brown did not suffer a speedy-trial violation, Pet. App. 13a, regardless of this Court's view on the two questions raised in the petition.

If this Court were to resolve the two threshold questions in Brown's favor and then reach the prejudice question, it should nonetheless deny certiorari because the questions presented do not actually show a split among the circuits. Further, with respect to the second question presented, even if there were a split, it would not affect Brown, as the court of appeals did not apply the holding he complains of against him.

STATEMENT OF THE CASE

This case arises from Ryan Brown's sale of cocaine to Jawad Mirza, a police informant.

Brown sold cocaine to Mirza on several different days, in controlled buys arranged by Detective Perry Dare and Officer Kenneth Spencer. Pet. App. 2a–3a. Mirza wanted to work with police to gather evidence against Brown, a drug dealer, "in exchange for sentencing consideration." *Id.* After a few controlled buys, Officer Spencer and Mirza arranged a "buy bust." Pet. App. 3a.

The buy bust took place January 10, 2006. Pet. App. 3a. After Brown sold cocaine to Mirza, officers who had been watching moved in and arrested Brown. Pet. App. 3a–4a. Brown was taken to jail, where he confessed to police that he sold cocaine to Mirza. Pet. App 4a. Brown also gave police the name of *his* drug supplier. *Id.* The police then released Brown. *Id.*

On January 27, 2006, a criminal complaint was filed against Brown, laying out four counts of cocaine delivery. Pet. App. 4a. On February 27, 2006, an arrest warrant issued. *Id.* Nothing else happened until almost 19 months later when, on September 24, 2007,

Brown was arrested on an unrelated warrant. *Id.* Brown was arraigned that day on the drug charges. *Id.*

Brown went to trial in February 2008. Pet. App. 4a. In his defense, he claimed that he did not sell any drugs to Mirza, but only let Mirza use his scale to weigh cocaine Mirza already had. *Id.* The jury found Brown guilty of all four counts, and he was sentenced to 15 to 40 years' imprisonment. Pet. App. 5a.

After his conviction, Brown appealed, raising challenges to the effectiveness of his counsel and the admissibility of his confession. Pet. App. 5a. On direct appeal, the Michigan Court of Appeals affirmed his convictions, *People* v. *Brown*, 2009 WL 1883978 (Mich. Ct. App. 2009), and the Michigan Supreme Court denied leave to appeal, *People* v. *Brown*, 777 N.W.2d 166 (Mich. 2010).

Almost a year later, Brown filed a motion for relief from judgment in the trial court under subchapter 6.500 of the Michigan Court Rules. Pet. App. 5a. That motion raised a claim of denial of due process, three claims of ineffective assistance of trial counsel, and a claim of ineffective assistance of appellate counsel. *Id.* The following month, apparently before the trial court had ruled on the motion for relief from judgment, Brown moved to amend the motion for relief from judgment, seeking to add three more claims to it. Pet. App. 5a–6a; R. 9-12, Page ID 794. One of the three claims was the speedy-trial claim. Pet. App. 6a.

The trial court never expressly ruled on the motion to amend, R. 9-1 (docket sheet showing the motion to amend was filed but not resolved), but denied

the original (i.e., unamended) motion for relief from judgment on procedural grounds. Pet. App. 6a.

Brown asserted his speedy-trial claim in the Michigan Court of Appeals as his primary argument, R. 9-9, Page IDs 676, 680, 683–87 (argument I), and again in the Michigan Supreme Court, R. 9-10, Page IDs 698, 701, 704–08 (argument I). Each appellate court denied Brown's applications for leave to appeal, citing Michigan Court Rule 6.508(D). Pet. App. 6a; R. 9-10, Page IDs 695, 694.

Brown then filed a petition for habeas relief under 28 U.S.C. § 2254. The petition raised several claims, including the speedy-trial claim Brown attempted to raise in his motion to amend his motion for relief from judgment. The district court denied relief on all claims, but granted a certificate of appealability on two claims, including the speedy-trial claim. Pet. App. 61a–62a.

With respect to the speedy-trial claim, the district court noted that the trial court "neither reached the merits of the claim nor enforced a procedural default." Pet. App. 53a. The district court therefore reviewed the claim de novo. *Id*. The district court did not address the fact that Brown raised his speedy-trial claim in the Michigan Court of Appeals and the Michigan Supreme Court or offer any reason to believe that either of those courts failed to examine the claim. *Id*.

Before proceeding to examine the claim, the district court noted that there were two possible dates that arguably started the speedy-trial clock: Brown's first arrest in January 2006, and his later arrest in September 2007. Pet. App. 53a n.4. The district court

did not analyze which date applied, or make a holding on the question, but used the earlier date more favorable to Brown, because "even when Petitioner is given that benefit, his Sixth Amendment claim still fails." *Id.*; see also Pet. App. 48a n.2 (applying more favorable *later* arrest date to Brown's claim of *pre*-arrest delay because the claim fails even with that benefit).

The court then examined the claim under the four-factor test laid down by this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972): "To determine whether a speedy trial violation has occurred, a reviewing court must consider the following four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial right, and (4) the prejudice to the defendant." Pet. App. 53a (citing *Barker*, 407 U.S. at 530).

With respect to the first factor, "a threshold requirement," the district court held that, because the delay between the assumed arrest date (January 2006, as opposed to September 2007) and the February 2008 trial exceeded one year, the "factor therefore favors Petitioner, and the Court proceeds to analyze the remaining *Barker* factors." Pet. App. 54a.

Moving to the second factor, the district court found that the delay was caused by negligence on the part of the State, which weighed in Brown's favor, but not substantially. Pet. App. 54a–55a.

As to the third factor, the district court noted that Brown never asserted his speedy trial right until he sought post-conviction relief, but found that this factor was mitigated somewhat by the fact that, between January 2006 and September 2007, Brown did not

know he had been charged with anything and could not demand a speedy trial. Pet. App. 55a. This period would not be counted against him, but the district court did count the period from September 2007 and February 2008 against Brown, though not heavily. *Id.*

Finally, the district court held that the fourth factor "weighs in favor of Respondent." Pet. App. 55a. The district court considered Brown's argument that he was prejudiced by the destruction of audio recordings of the controlled buys with Mirza, but held that he had not shown substantial prejudice in light of the overwhelming evidence against him. *Id.*

Brown appealed, and the court of appeals affirmed the district court. Pet. App. 28a. Believing that the state trial court had allowed Brown to amend his motion but then inadvertently overlooked the claims it raised, it assumed the trial court did not resolve the speedy-trial claim on the merits and so did not apply AEDPA deference. Pet. App. 9a–10. It did not address the fact that Brown's motion to amend was not granted, nor did it identify any reason to believe that the Michigan Court of Appeals and the Michigan Supreme Court overlooked Brown's speedy-trial claim when he presented the claim to those courts. Pet. App. 10a.

As the district court did, the court of appeals also acknowledged the disagreement regarding the start date of the relevant period. Pet. App. 13a. The court of appeals did not make a holding either way, but assumed that the earlier date was correct, and proceeded from there. Pet. App. 14a.

The court of appeals agreed with the district court on the first and second *Barker* factors, holding that both favored Brown, although the second factor did not heavily. Pet. App. 14a–18a. The court of appeals departed from the district court, not counting the third factor (Brown's failure to assert his speedy-trial right) against him. Pet. App. 18a–19a.

Examining the fourth factor, the court of appeals considered in turn Brown's arguments that he was entitled to a presumption of prejudice and that he had shown actual prejudice, and rejected both arguments. Pet. App. 19a–25a.

REASONS FOR DENYING THE PETITION

I. AEDPA deference applies to this claim, and because it would have been a reasonable application of *Barker* and *Doggett* to deny relief, the denial of habeas was proper.

The state trial court did not explicitly address Brown's speedy-trial claim, and the State agrees with the Sixth Circuit that it appears the state trial court did not consider the speedy-trial claim at all. But the reason the trial court did not address the claim was not, as the Sixth Circuit believed, that the trial court had "allowed [Brown] to amend his motion," Pet. App. 10a, but then had inadvertently overlooked his claim, *id*. at 9a. Rather, the reason the trial court did not address his claim was that it never granted his motion to amend, R. 9-1 (docket sheet showing that an amended motion was filed but not resolved), and so his claim was never properly before the court.

Brown nonetheless presented his speedy-trial claim to the state courts. He raised it as his primary

argument in his appeal to the Michigan Court of Appeals. R. 9-9, Page IDs 683–87. He also presented it to the Michigan Supreme Court, again as his primary argument. R. 9-10, Page IDs 704–08. And both of those courts adjudicated the claim, though without stating their reasons. Because these state courts adjudicated his claim in unexplained orders, those decisions are entitled to AEDPA deference. *Harrington* v. *Richter*, 562 U.S. 86, 98 (2011) ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."); *id.* at 99 ("When a federal claim has been presented to a state court and the state court denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

Normally, claims are presented first to the state trial court, and so when a state appellate court adjudicates a claim in the absence of an explanation, the habeas court "looks through" to the last reasoned decision of a state court, and presumes that the unexplained appellate order rests on the same ground as the last reasoned decision. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804 (1991). Here, the Sixth Circuit "looked through" and found reason to believe that the state trial court did not address the claim at all. This conclusion was correct. In fact, the Sixth Circuit's analysis could have been even simpler, had it realized that Brown's motion to amend was never granted in the first place: there is no reason to look through to a lower court's decision for its reasons for rejecting a claim when the claim was never before it.

The Sixth Circuit erred in then concluding that de novo review was warranted. While the presumption that a state court has reached the merits of a claim may be overcome "when there is reason to think some other explanation is more likely," *Richter*, 562 U.S. at 99, such as evidence that the court overlooked the claim "as a result of sheer inadvertence," *Johnson* v. *Williams*, 568 U.S. 289, 303 (2013), there is no evidence here that either the Michigan Court of Appeals or the Michigan Supreme Court overlooked the speedy-trial claim. Brown's claim was before each of those courts, and there is no reason to believe either—let alone both—overlooked his primary argument on appeal.

In short, AEDPA deference applies to the state appellate decisions in this case regardless of whether the state trial court overlooked the claim (as the Sixth Circuit believed) or whether the claim was never properly before it (as the record reflects). If Brown's speedy-trial claim was never before the state trial court (because he was not given leave to amend to add the claim), then it makes no sense to look through for that court's reasoning, and AEDPA deference applies to the state appellate courts unexplained orders. If, on the other hand, the reason the trial court rejected Brown's claim was sheer inadvertence, then the *Ylst* "look through" is still inapplicable because there is no reason to think inadvertence was the reason for the higher state courts' denials of relief. *Kernan* v. *Hinojosa*, 136 S. Ct. 1603 (2016) (per curiam) (*Ylst* "look through" inapplicable, and higher-court adjudication presumed to be merits adjudication, where the trial court's reason for denying relief "could not possibly

have been a ground for the high court's summary denial" of the claim.).

Admittedly, the State erroneously said below that the claim was subject to de novo review. But the Sixth Circuit did not rely on this concession, correctly observing that it "ha[d] an independent obligation to determine the proper standard of review[.]" Pet. App. 8a n.4. And every circuit court of appeals to address the question has held that § 2254(d)(1)'s deferential standard of review cannot be waived. *Gardner* v. *Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) ("It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose."); *Ward* v. *Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015); *Amado* v. *Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014) (en banc); *Pope* v. *Secretary for Dep't of Corr.*, 680 F.3d 1271, 1281–82 (11th Cir. 2012); *Brown* v. *Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008), overruled on other grounds by *Cullen* v. *Pinholster*, 563 U.S. 170 (2011); *Eze* v. *Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003); *Worth* v. *Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001); *Diaz* v. *Moore*, 139 F.3d 888, at *2 n.6 (4th Cir. 1998) (table decision).

If this Court were to grant certiorari, it would need to first address a question neither pressed nor passed on below—whether to apply AEDPA deference to the claim, or whether to overrule the law of eight circuits and consider the standard of review waived. Only after answering that question could this Court proceed to the two factbound claims presented in the petition itself.

Of the four federal judges and ten state judges and justices who have been presented with Brown's speedy-trial claim so far *without* AEDPA deference, not one has found a need to reverse his conviction. With AEDPA deference, his road is harder—much harder. Not only that, but with AEDPA deference, the splits he alleges become fatal to his claim. If a circuit split exists in the correct interpretation of *Doggett* to determine presumptive prejudice, that split is evidence that this Court has not spoken clearly on the subject. See, e.g., *Carey* v. *Musladin*, 549 U.S. 70, 76–77 (2006) (concluding that the fact "lower courts have diverged widely" on the question presented "[r]eflects the lack of guidance from this Court" and supports a finding that "the state court's decision was not contrary to or an unreasonable application of clearly established federal law"); *Kane* v. *Garcia Espitia*, 546 U.S. 9, 10 (2005) (per curiam) (in reversing a grant of habeas relief, remarking that "federal appellate courts have split on" the disputed question). This in turn means that a denial of relief based on one interpretation or the other cannot be contrary to or an unreasonable application of clearly established federal law.

Similarly, if there is a circuit split in the proper way to assess actual prejudice, then that too means that this Court has not spoken clearly on the point, and neither standard is contrary to or an unreasonable application of clearly established federal law.

For these reasons, this Court should deny certiorari.

II. Resolving this petition in Brown's favor would require addressing an additional question not passed upon below.

Muddying the questions raised in the petition is another question *not* raised in the petition (in addition to the question of AEDPA deference discussed above), which would require this Court's attention in the event of a grant of certiorari.

In the district court and the court of appeals, the parties disagreed about when the speedy-trial clock started. Neither court ruled on the question. Instead, both courts assumed for the sake of argument that the clock started at Brown's first arrest in January 2006, and then held that, even assuming that as the start date, Brown had not shown a speedy trial violation. Pet. App. 11a–14a; Pet. App. 53a n.4.

In order to show entitlement to relief, Brown must prevail on both points—he must show that the speedy-trial clock started in January 2006, and that he was prejudiced by the 25-month delay. But "[i]f the State is correct [that the clock did not start until September 2007], the answer is easy: a five month delay—from September 2007 to February 2008—is not 'uncommonly long' and would not trigger analysis of the remaining *Barker* factors." Pet. App. 13a) (citations omitted).

This Court has held that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, 404 U.S. 307, 320 (1971). But

this holding was based in part on the effects an indictment might have on a defendant, including "concern accompanying public accusation, . . . subject[ing the defendant] to public obloquy, and creat[ing] anxiety in him, his family and his friends." *Id*.

Here, Brown was not even aware of the existence of the complaint and warrant until he was arrested. He suffered no obloquy, no concern, no anxiety, based on the complaint. None of the reasons *Marion* held that indictment started the speedy-trial clock in that case are present here, and it would have been reasonable for the Michigan Court of Appeals or the Michigan Supreme Court to hold that September 2007 is the correct start date.

If this Court agrees with Brown that either of the splits he believes he has identified is worth resolving, it can do so in a cleaner case—one in which the parties agree on the starting date of the speedy-trial clock. In this case, Brown would have to prevail on the question of the starting date, which was not passed upon below, as well as both question he has raised in the petition, and he would have to do so under AEDPA's demanding standard. This petition is a poor vehicle to address the questions presented.

III. In *Doggett* this Court set forth a fact-specific test for presumptive prejudice that balances the facts and circumstances of each case.

In *Barker* v. *Wingo*, the seminal case on speedy-trial claims, this Court set out four factors that courts must examine and balance in resolving speedy-trial claims. 407 U.S. 514, 530–34 (1972). This case in-

volves the fourth and most important factor, prejudice. Although *Barker* appeared to suggest that a defendant hoping to prevail on the fourth factor must demonstrate prejudice, this Court in *Doggett* v. *United States* held that in some cases, prejudice could be presumed rather than shown. 505 U.S. 647, 655 (1992).

In *Doggett*, this Court recognized (and accepted the government's concession) that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." 505 U.S. at 655. In discussing "the role that presumptive prejudice should play" in the fourth factor, this Court examined the other three factors to see how heavily they weighed in the defendant's favor. *Id*. at 656–58. For example, because the length of the delay in Doggett's trial was "six times as long as that generally sufficient to trigger judicial review," that was a factor that weighed in favor of relieving Doggett of the burden of demonstrating prejudice. *Id*. at 658.

If the government had been diligent in trying to bring Doggett to trial, the Court opined, then he would be required to show specific prejudice in order to be entitled to relief, "however great the delay." *Id*. at 656. But if the government had acted in bad faith, the delay "would present an overwhelming case for dismissal," regardless of any showing of prejudice. *Id*. In *Doggett*, though, the government acted neither diligently nor in bad faith, but negligently, so this Court held that "such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows." *Id*. at 656.

Doggett also briefly addressed the third *Barker* factor as it related to presumptive prejudice, noting that "the presumption of prejudice, albeit unspecified," was not "extenuated, as by the defendant's acquiescence[.]" *Id.* at 657 (footnote omitted).

The takeaway from *Doggett* is that, if the defendant cannot show actual prejudice as a result of the delay, then the reviewing court may consider the length of the delay and the extent to which it exceeds the "triggering" length, the reason for the delay, and the defendant's assertion of his right (i.e., the first three *Barker* factors) and, if they weigh heavily enough in the defendant's favor, then prejudice will be presumed. See, e.g., *United States* v. *Ingram*, 446 F.3d 1332, 1338 (11th Cir. 2006) ("Because we find that all three of these *Barker* factors weigh against the Government, we proceed to determine whether they do so heavily. If they do not, then Ingram must demonstrate . . . actual prejudice[.]").

Brown accuses the courts of appeals of taking *Doggett*'s holding and playing a "bright-line numbers game" with it. Pet. 14. He cites various cases from various circuits involving various lengths of delay, with various results. Pet. 10–14. But this variation is exactly what is expected when courts are directed to conduct a fact-bound multifactor analysis.

For example, Brown cites *Ingram* as holding that, in the Eleventh Circuit, "a 'two-year post-indictment delay' suffices." Pet. 10 (quoting *Ingram*, 446 F.3d at 1339.) Not quite. *Ingram* held that a two-year post-indictment delay sufficed *in that case*, after "[c]onsidering the crime for which Ingram was indicted, the

state of the proof against him on the date of the indictment, and the Government's knowledge of Ingram's whereabouts," 446 F.3d at 1339, and taking into account the fact that "Ingram did everything he should to assert his right to a speedy trial," *id*. at 1340. In fact, the Eleventh Circuit even thought it "appropriate to consider inordinate *pre*-indictment delay" (two and one-half years) in its speedy-trial analysis, *id*. at 1339 (emphasis added), even though this Court has "held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant . . . ." *United States* v. *Lovasco*, 431 U.S. 783, 788 (1977).

If, as Brown claims, the Eleventh Circuit were playing a "bright-line numbers game" with two years as the threshold, it could not after *Ingram* have denied speedy-trial claims involving delays longer than two years. E.g., *United States* v. *Cruz*, 681 F. App'x 819, 823 (11th Cir. 2017) (over seven years); *United States* v. *Villarreal*, 613 F.3d 1344, 1350 (11th Cir. 2010) (ten years); *United States* v. *Spaulding*, 322 F. App'x 942, 945 (11th Cir. 2009) (four years and eight months).

Brown also notes that the Fifth Circuit has said that courts "generally have found presumed prejudice only in cases in which the post-indictment delay lasted at least five years." *United States* v. *Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003). While *Serna-Villareal* did make that observation, it was a descriptive claim based on prior cases, not a holding of Fifth Circuit law. And the Fifth Circuit does not treat five years as a bright line to decide cases. For example, in *United States* v. *Frye*, the Fifth Circuit

undertook a lengthy discussion to explain why the defendant was not entitled to a presumption of prejudice for his 16-month delay. 372 F.3d 729, 373–39 (5th Cir. 2004). And in *United States* v. *Molina-Solorio*, 577 F.3d 300, 307 (5th Cir. 2009), the court explained the multi-factor test it employed to find presumed prejudice on a 10-year delay. If the Fifth Circuit were playing a "numbers game" with a five-year cutoff, it would not need to consider all of the factors in making its decision.

Brown cites the Third Circuit's decision in *United States* v. *Battis*, which admittedly appears to establish a bright-line rule based on the length of delay, holding "that prejudice will be presumed when there is a forty-five-month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of that delay is attributable to the Government." 589 F.3d 673, 683 (3d Cir. 2009).

But despite this language, the Third Circuit has not treated this as a bright-line rule. In *United States* v. *Vasquez-Uribe*, for example, the court recognized that "a protracted delay does not, in and of itself, constitute a Sixth Amendment violation," and rejected a speedy-trial claim involving a delay of almost seven years (about twice as long as that in *Battis*), by considering the other factors and faithfully applying *Doggett*. 426 F. App'x 131, 137–39 (3d Cir. 2011). To the extent the Third Circuit did establish a bright-line rule in *Battis*, the State agrees that this was erroneous in light of *Doggett*, but that error does not justify a grant of certiorari in *this* case, in which the Sixth Circuit faithfully applied *Doggett*.

Brown has not shown a split that needs to be resolved by this case. (And for that matter, this Court has recognized that habeas cases are not the proper forum for making new constitutional law. E.g., *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (per curiam) (noting, in response to competing arguments about the merits of a constitutional claim, that "[t]hese arguments cannot be resolved on federal habeas review").) The circuits generally do not have a bright-line rule on presumed prejudice based on length of delay, but rather consider length of delay as one factor among three in deciding whether prejudice should be presumed, as *Doggett* requires. Because length of delay is a significant factor in the analysis, it is only natural that the cases in which the delays are longer tend to be the cases in which prejudice is presumed. And because the inquiry is a fact-specific, multi-factor one, it is only natural that different courts reach different results in different cases. It is not a sign of a split. Certiorari review is not warranted.

IV. Although Brown tries to demonstrate a split in measuring actual prejudice, any possible split has no bearing on this case, because Brown cannot show actual prejudice under any standard.

Brown asserts that there is a split in the circuits in analyzing actual prejudice under *Barker*, and that some circuits require a showing that the defense has been impaired, while others require a showing that the delay is outcome-determinative.

Near the beginning of his discussion, Brown cites *Dickey* v. *Florida* in a manner that suggests that this

Court has held that the loss of "[p]olice records of possible relevance" is sufficient, by itself, to show prejudice. 398 U.S. 30, 36 (1970). But in *Dickey*, the lost records were only one factor among many leading to the determination that the delay was prejudicial. In *Dickey*, this Court held that the petitioner was entitled to relief on his speedy-trial claim where some seven years passed between the lodging of the detainer and the eventual trial, and the petitioner "diligent[ly] and repeated[ly]" tried to obtain a speedy trial, "exerting every effort to require the State to try him," *id*. at 36, 38, and two witnesses died, and a defense witness became unavailable, *and* police records of possible relevance were lost.

Brown then cites two cases in which courts have ruled against defendants bringing speedy-trial claims and mentioned that they had not shown that the delay was outcome-determinative. Pet. App. 17 (citing *Wilson* v. *Mitchell*, 250 F.3d 388, 396 (6th Cir. 2014), and *Cowart* v. *Hargett*, 16 F.3d 642, 648 (5th Cir. 1994)). Neither of these cases squarely held that a defendant raising a speedy-trial claim must show that the delay was outcome-determinative. A fleeting reference to a different outcome at trial in the course of denying a claim does not suffice to create a circuit split.

Brown also attempts to bring the Seventh Circuit into the "outcome-determinative" side of the supposed split, by citing *United States* v. *Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998). Pet. App. 17. This attempt fails, because *Spears* did not involve a speedy-trial claim at all, but a claim of *pre*-indictment delay, which is judged according to an entirely different standard. A claim of pre-indictment delay, which is based on due

process, not the Speedy Trial Clause, does not depend on the length of delay, but on whether the defendant can show actual (as opposed to possible) prejudice to the defense, and a showing of bad faith by the government in delaying the indictment. *Lovasco*, 431 U.S. at 788–96. *Spears*, a pre-indictment delay case, cannot have been "in conflict with" *Barker*, a speedy-trial case, as Brown claims.

In any event, any discussion of a split is irrelevant because, even assuming the Sixth Circuit has held in prior cases that a delay must be outcome-determinative, the Sixth Circuit did not apply that standard in Brown's case. Rather, the court's prejudice analysis shows that Brown did not suffer any impairment to his defense *at all* from the delay—it is not a question of how much or how little. The lost recordings did not impair the defense at all because it is impossible to believe that the recordings would have exonerated Brown. And their loss "actually gave Brown the ability to attack an otherwise air-tight case." Pet. App. 23a. And the fact that two of the prosecution witnesses had memory troubles did not hurt the defense; rather, it hurt the prosecution, who bore the burden of proof. Pet. App. 24a–25a.

Ultimately, Brown's argument with respect to actual prejudice comes down to error correction. As the district court and court of appeals both held, there is no reason to believe—and every reason *not* to believe—that the missing tapes would have helped Brown at trial. The court of appeals in this case did not deny Brown habeas relief because he had failed to meet an improperly high level of actual prejudice. It denied relief because he had not shown *any* prejudice.

Brown concludes by warning this Court what is at stake in a speedy-trial case. " '[A] defendant who may be guilty of a serious crime will go free.' " Pet. 20 (quoting *Barker*, 407 U.S. at 522). That is indeed a serious risk in this and any speedy-trial case. "Or a defendant who is innocent of a serious crime, but hampered in his defense by a delay, may remain incarcerated." Pet. 21. But this latter risk is not present in this case: this case involves neither an innocent defendant nor one who was hampered in his defense by a delay. Indeed, as the court of appeals held, the delay inured to Brown's benefit, as "the lost tapes actually gave Brown the ability to attack an otherwise air-tight case." Pet. App. 23a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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