No.

In the Supreme Court of the United States

STATE OF TEXAS, PETITIONER

v.

JERRY HARTFIELD

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH COURT OF APPEALS DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Texas court of appeals erred in failing to apply standard waiver doctrine to respondent's claim for dismissal of his murder indictment under the Sixth Amendment's Speedy Trial Clause, in conflict with this Court's holding in *Barker v. Wingo*, 407 U.S. 514, 529 (1972), that standard waiver doctrine applies.

2. Whether, in finding the Speedy Trial Clause violated, the Texas court of appeals erred in weighing strongly against the government its litigation of a good-faith position on an unclear legal issue, in contravention of this Court's direction in *Barker*, 407 U.S. at 531; *United State v. Loud Hawk*, 474 U.S. 302, 316 (1986); and *United States v. Ewell*, 383 U.S. 116, 121 (1966).

3. Whether, in finding the Speedy Trial Clause violated, the Texas court of appeals erred in holding that Hartfield invoked his right to a speedy trial merely by seeking dismissal of the indictment after the period of delay complained of, thus creating a split with decisions of this Court and federal courts of appeals, *see Barker*, 407 U.S. at 534-35; *United States v. Gould*, 672 F.3d 930, 938 (10th Cir. 2012); *Divers v. Cain*, 698 F.3d 211, 219 (5th Cir. 2012); *United States v. Harris*, 566 F.3d 422, 432 (5th Cir. 2009); *United States v. Deleon*, 710 F.2d 1218, 1222 (7th Cir. 1983).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional provision, statutes, and rule:

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General of Texas, on behalf of the State of Texas, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Thirteenth Court of Appeals District of Texas ("Thirteenth Court of Appeals") in this case.

OPINIONS BELOW

The official notice of the Texas Court of Criminal Appeals denying the State's petition for discretionary review (Pet. App. 1a) is unreported. The opinion of the Thirteenth Court of Appeals (Pet. App. 2a-29a) is reported at 516 S.W.3d 57. The amended findings of fact and conclusions of law of the state trial court (Pet. App. 31a-81a) are unreported.

JURISDICTION

The Thirteenth Court of Appeals entered its judgment on January 19, 2017. Pet. App. 30a. The Texas Court of Criminal Appeals refused a petition for discretionary review on May 17, 2017. Pet. App. 1a. On July 26, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.

STATEMENT

In this criminal case, a Texas court of appeals reversed the trial court's ruling on a Speedy Trial Clause claim and ordered that a twice-convicted murderer be set free. The court of appeals did so despite the trial court's factual finding that defendant Hartfield, with the advice of competent counsel, strategically chose in the 1980s to accept the benefit of a purportedly commuted sentence of life imprisonment—rather than stand trial again for a death-eligible murder, to which he had already confessed. 2.Supp.CR.31.[1]

1. The State's prosecution of Hartfield began with an October 1976 capital indictment for murdering Eunice Lowe in September 1976 by striking her in the head with a mattock during a robbery. 1.CR.9-10. After the trial court appointed attorney Robert Scardino to represent him, Pet. App. 33a, Hartfield pleaded not guilty by reason of insanity and proceeded to a trial by jury in June 1977, *see* ECF No. 1-1 at 11, *Hartfield v. Osborne*, No. 4:14-cv-03210 (S.D. Tex. 2015) (trial transcript).

The evidence at trial showed that officers investigating the scene of Lowe's murder found her body in a storeroom of the bus station where she worked in Bay City, Texas. *Id.* at 20-24. She was nude from the waist down, *id.* at 24, 34-35, with her head bloodied and dis-

[1] "*v.*CR.*p*" cites the Clerk's Record. "*v.*Supp.CR.*p*" cites the Supplemental Clerk's Record. "*v.*RR.*p*" cites the Reporter's Record of the August 7-20, 2015 criminal trial. "*v.*Supp.RR.*p*" cites the First Supplemental Reporter's Record of the December 19, 2013 hearing.

torted, *id.* The evidence reflected that she had been beaten to death by a pick mattock, which was found at the scene. *Id.* at 40, 43-45, 46, 48.

The testimony further showed that police suspected Hartfield and shortly retrieved him from Wichita, Kansas, where he had been arrested. *Id.* at 52, 54-55. Hartfield told the two officers escorting him to Texas (Ranger Weathers and Sergeant Holland) that he wanted to confess. *Id.* at 64, 153-59. Over the course of an "hour and ten minutes[,] [Hartfield] related his story and [Ranger Weathers] typed it." *Id.* at 65. Another policeman, Officer Graves, also "witnessed the signing of the statement and notarized it." *Id.* at 68; *see id.* at 98, 209.

Hartfield's statement was admitted into evidence. *Id.* at 174-75. In it, he confessed to killing Lowe and engaging in sexual intercourse with her body:

> I saw that pick-ax thing and I picked it up and hit her with it. Then when she fell I drug her back into the back room and I was so mad I got a coke bottle and hit her on the head with it . . . . Then I got the pick-ax and hit her in the head three times with it. I laid the pick-ax down and then I left the room and then went back into the room and fucked the old lady and I shot off in her. Then I left the room and on the way out I got the money that I had seen her put in a bag and put it in my bag.

Id. at 174.

Lowe's car was not at the bus station, as it should have been, and police could not find it by themselves.

Id. at 50, 52. While being driven back to Texas from Kansas, Hartfield told the police that he stole Lowe's car and left it "on Post Oak Road, just off Loop 610 in Houston behind the Utotem store, near some apartments." *Id.* at 54; *accord id.* at 56, 109, 175. Hartfield confessed that he then made his way from Houston to Wichita, Kansas, where he was apprehended. *Id.* The police followed Hartfield's instructions and found the car exactly where Hartfield revealed he had left it in Houston. *Id.* at 66.

A pathologist testified that the cause of Lowe's death was traumatic brain injury. *Id.* at 142, 149-51. The pathologist also testified that semen and blood were found in Lowe's vagina. *Id.* at 146-47. Police obtained fingerprints from a Coke bottle that had been used to strike Lowe across the head, and they matched those prints with Hartfield's. *Id.* at 251.

The jury convicted Hartfield of capital murder and assessed the punishment of death. 1.CR.103. The trial court entered judgment in accord with that verdict. 1.CR.103.

2. In 1980, on direct appeal, the Texas Court of Criminal Appeals held that a member of the venire panel was improperly excluded from the jury based on her views about capital punishment. *Hartfield v. State*, 645 S.W.2d 436, 441 (Tex. Crim. App. 1980). Under state law at the time, the Court of Criminal Appeals issued a decision reversing Hartfield's conviction and remanding for a new trial. *Id.*

The State moved for leave to file a motion for rehearing and asked the Court of Criminal Appeals to address the violation by reforming Hartfield's sen-

tence to life in prison or allowing a reasonable time for the State to seek commutation of the sentence from the Governor. *Id.* at 441-42. While granting leave to file the rehearing motion, the Court of Criminal Appeals, in an opinion of January 26, 1983, also "reluctantly den[ied]" reformation of the sentence; the court stated that a reasonable time to seek commutation was 15 days from "'the ruling on the final motion for rehearing,'" after which that court's decision would become final. *Id.* at 442 (quoting then-existent appellate rule).

Responding to the new opinion, the State timely lodged a second rehearing motion and request for leave to file it. 3.CR.476. On March 1, 1983, the Court of Criminal Appeals denied this second request to file a rehearing motion. 3.CR.472. Its mandate issued three days later. 2.CR.191. On March 15, 1983—fifteen days after the Court of Criminal Appeals' ruling denying filing of the second rehearing motion—Governor Mark White issued a commutation of Hartfield's sentence from death to life in prison. 2.CR.192.

Several days later, the trial court sent a notice to the Court of Criminal Appeals stating that the mandate had been executed by Governor White and that Hartfield's death sentence had been commuted to life in prison. 3.CR.483. The Court of Criminal Appeals did not act on that notification.

3. For over 23 years, Hartfield silently carried out the sentence purportedly commuted to life in prison, rather than claiming that he should be retried on the death-eligible offense of capital murder. Pet. App. 5a-

6a. During that time, neither party filed anything in the case.

4. In late 2006, Hartfield filed in state trial court an application for a post-conviction writ of habeas corpus under article 11.07 of the Texas Code of Criminal Procedure, which provides for post-conviction habeas applications. 2.CR.193-98. A supplemental filing added a claim that the Governor's commutation was ineffective. *Ex parte Hartfield*, 442 S.W.3d 805, 809 (Tex. App.—Corpus Christi 2014, pet. ref'd). The trial court forwarded both filings to the Court of Criminal Appeals. *Id.* Hartfield also filed a petition for a writ of mandamus in the Court of Criminal Appeals, requesting a new trial. *Id.*

In 2007, the Court of Criminal Appeals denied Hartfield's article 11.07 habeas application, which seeks relief from a *conviction*. *Id.* (discussing application no. WR-66,609-01). Under that court's precedent at the time, a denial of the application—as opposed to a dismissal—signified a ruling on the merits. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits."). The Court of Criminal Appeals also denied Hartfield's mandamus request. *Ex parte Hartfield*, 442 S.W.3d at 809 (discussing application no. WR-66,609-02).

Hartfield filed in the Court of Criminal Appeals a second petition for a writ of habeas corpus, which that court dismissed as an improper subsequent petition. *Id.* Specifically, the Court of Criminal Appeals dis-

missed the second petition under Texas Code of Criminal Procedure article 11.07 § 4(a)-(c). *See* Order on Application No. WR-66,609-03 (Tex. Crim. App. May 30, 2007).[2] That provision requires dismissal of a subsequent habeas application filed after the disposition of an initial application "challenging the same conviction." Tex. Code Crim. Proc. art. 11.07 § 4(a). In other words, a dismissal under this section also recognizes the existence of a conviction.

5. Hartfield then filed a federal petition for a writ of habeas corpus, which was transferred to the district where Hartfield was confined. *Ex parte Hartfield*, 442 S.W.3d at 810. The federal district court stated that "it is not at all clear" whether "the Governor's commutation [was] legal and effective so as to leave Hartfield's conviction in place" and expressed "hope[]" that the Court of Criminal Appeals would resolve that uncertainty. *Hartfield v. Director*, No. 6:09-cv-98, 2011 WL 1630201, at *5 (E.D. Tex. Apr. 29, 2011).

The district court resolved the case, however, by adopting a magistrate's report concluding that, even accepting Hartfield's view that no conviction existed, Hartfield would have failed to exhaust his state-court avenues for review of what would be a *pretrial* speedy-trial claim. *Id.* at *1-2, *5 (adopting *Hartfield v. Director*, No. 6:09-cv-98, 2011 WL 1630346 (E.D. Tex. Jan. 10, 2011)). Accordingly, the federal district court dismissed the habeas petition. *Id.* at *5.

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[2] That order and the Court of Criminal Appeals' other 2007 rulings are reproduced at pages 2-4 of ECF No. 1-5, *Hartfield v. Osborne*, No. 4:14-cv-03120 (S.D. Tex. 2015).

6. On appeal, the Fifth Circuit certified to the Court of Criminal Appeals the question whether Hartfield's conviction was vacated or was intact with a commuted sentence. *Hartfield v. Thaler*, 498 F. App'x 440, 442 (5th Cir. 2012) (per curiam). The Fifth Circuit noted that this was a question "for which there is no controlling precedent." *Id.*

The Court of Criminal Appeals accepted the certified question. *Hartfield v. Thaler*, 403 S.W.3d 234, 238 (Tex. Crim. App. 2013). The State argued that the conviction was intact because the 15-day commutation window after a "ruling on" the final motion for rehearing ran from the denial of the State's timely motion for leave to file a second rehearing motion. Br. for the Director at 3, 16, 2013 WL 364744, *Hartfield v. Thaler*, *supra*. The State pointed out that the Court of Criminal Appeals had delayed its mandate when the State, on the fifteenth day following the denial of the State's first rehearing motion, lodged its second rehearing motion and motion for leave to file, and that the Court had taken no action when it received the trial court's notification that it considered the judgment to be valid as commuted. *Id.* at 16-19. Noting that all rehearing motions were accompanied by requests for leave to file, the State argued that a ruling on a request for leave to file a rehearing motion is a "ruling on" the motion within the meaning of the finality rule. *Id.* at 2-4, 16. Lastly, the State argued that, after receiving notice of the commutation, the Court of Criminal Appeals did nothing to suggest that the commutation was invalid, such that the judgment of conviction had been vacated. *Id.* at 18-19.

Hartfield argued that the commutation came too late to be effective, while expressly acknowledging the "complexity" of the issues. Petitioner-Appellee Cross-Appellant Hartfield's Br. at viii, 2013 WL 364742, *Hartfield v. Thaler*, *supra*.

This time around—in 2013, 30 years after Governor White issued a commutation—the Court of Criminal Appeals accepted Hartfield's position that his conviction had been vacated in 1983 because the commutation came too late. 403 S.W.3d at 240. The Court of Criminal Appeals acknowledged that it "denied" Hartfield's 2007 habeas application seeking relief from a conviction, *id.* at 239, but did not confront that court's own precedent stating that such a denial addresses a habeas claim on the merits rather than procedural propriety, *see id.* (failing to cite or address *Ex parte Torres*, 943 S.W.2d at 472).

As a result of the Court of Criminal Appeals' conclusion on the certified question, the Fifth Circuit affirmed the dismissal of Hartfield's federal habeas application under the body of law requiring exhaustion in state court of pre-conviction habeas claims (as opposed to the body of law governing post-conviction habeas claims). *Hartfield v. Stephens*, 536 F. App'x 455, 456 (5th Cir. 2013).

7. Given the Court of Criminal Appeals' June 2013 decision that Hartfield's conviction had been vacated, criminal proceedings resumed and a retrial was set for September 2014. 4.CR.856. Hartfield moved in state trial court to dismiss the indictment based on an alleged violation of his Sixth Amendment right to a speedy trial. 7.CR.1316-24. He raised the same claim in

three pretrial habeas petitions filed in trial court. *Ex parte Hartfield*, 442 S.W.3d at 807.

In December 2013, the trial court held a hearing on the speedy-trial issues, at which the State called Robert Scardino—Hartfield's attorney from his 1977 pretrial appointment until 2013. 2.Supp.RR.1, 30, 35, 54. Scardino testified to his belief, formed shortly after the Court of Criminal Appeals' 1983 decision, that a retrial was required because the Governor's commutation was ineffective. 2.Supp.RR.36-37. Scardino also testified that, "[a]t some point" after this Court's 1983 decision, he "learn[ed] that, in fact, [he] would not have to try this case again." 2.Supp.RR.36.

When the State questioned Scardino further about his conversations with Hartfield on the subject, Hartfield successfully raised a privilege objection. 2.Supp. RR.52. Based on that privilege objection, the trial court also concluded that it could not consider State's Exhibit 5, an affidavit by Scardino describing his communications with Hartfield. 2.Supp.CR.5; *see* 5.Supp.RR.7 (sealed exhibit).

In April 2014, the trial court issued findings of fact and conclusions of law denying Hartfield's motion and habeas petitions asserting a Speedy Trial Clause violation. 3.CR.616-50. The trial court balanced the well-known factors of *Barker v. Wingo*, 407 U.S. 514 (1972), holding that, "[i]n the final balance," they "weigh[] against finding a speedy trial violation." 3.CR.650.

First, although the trial court found that the State was "negligen[t]" and "ignoran[t] of the law" for interpreting the 1983 order differently than the Court of Criminal Appeals did in 2013 (although not in 2007),

the trial court found "no evidence to suggest the State's motive" was "to hamper [Hartfield's] defense," 3.CR.631, 633.

Second, the trial court found, even without considering the Scardino affidavit, that "Hartfield did not seek a new trial for strategic reasons." 3.CR.642. The court weighed "heavily against Hartfield" the fact that he did not actually want a retrial. 3.CR.644.

Lastly, the trial court reasoned that prejudice to the defense is "presumed" from the time at issue, 3.CR.646, but that "Hartfield's case has been possibly strengthened by the passage of time" due to intervening changes in capital-sentencing case law. 3.CR.646. The trial court found "no evidence that Hartfield has suffered any anxiety" from his confinement on a purportedly commuted sentence that spared his life from a possible death penalty upon retrial for capital murder. 3.CR.648.

8. Hartfield appealed from the trial court's denial of his pretrial habeas petitions. *Ex parte Hartfield*, 442 S.W.3d at 808. He also sought and received a stay pending appeal of his criminal trial proceedings. 4.CR.857-58. In August 2014, the state Thirteenth Court of Appeals held that a pretrial habeas petition is not a proper vehicle for seeking to avoid trial based on an alleged speedy-trial violation. *Ex parte Hartfield*, 442 S.W.3d at 808. The Thirteenth Court lifted its stay of trial proceedings, *id.*, and trial was reset for August 2015. 4.CR.859.

Hartfield also applied in federal court for habeas relief dismissing the pending criminal prosecution,

which was denied. *See Hartfield v. Osborne*, 808 F.3d 1066, 1070 (5th Cir. 2015).

9. Shortly before trial, Hartfield again moved for the court to preclude trial based on his right to a speedy trial. 7.CR.1316-26; *see* 7.CR.1276. The trial court denied the motion. 7.CR.1410. A retrial occurred in August 2015, with the prosecution again presenting evidence of Hartfield's confession to the brutal murder, including his pinpoint-accurate knowledge of where Lowe's stolen car was left in Houston during his getaway to Kansas. *See* 6.RR.36; 13.RR.61-62.

The State waived the death penalty in these proceedings, 7.CR.1392, and Hartfield was sentenced to life in prison, 8.CR.1589.

In January 2016, the trial court amended its speedy-trial findings and conclusions in light of the intervening trial. Pet. App. 31a-32a. The trial court's reasoning remained substantially the same. *See* Pet. App. 77a-78a (chart weighing the *Barker* factors the same way as in the trial court's original ruling, *see* 3.CR.649).

The trial court continued to find that Hartfield made a strategic choice not to pursue a retrial for capital murder but instead accept the Governor's commutation: "Hartfield was represented by competent counsel — the court considers the choice he made to be a strategic one guided by counsel's advice." Pet. App. 80a. And the trial court added that, despite finding that it needed to apply a "presumption" of prejudice, Hartfield "presented no evidence" of how the alleged unavailability of witnesses prejudiced his defense. Pet. App. 73a; *accord* Pet. App. 76a-77a ("Hartfield, despite

obtaining two speedy trial hearings, has produced scant evidence of actual prejudice."). Accordingly, the trial court remained convinced that, "[i]n the final balance," "the four *Barker v. Wingo* factors weigh against finding a speedy trial violation." Pet. App. 81a.

10. The Thirteenth Court of Appeals reversed the denial of Hartfield's motion to dismiss and rendered an order dismissing the murder indictment with prejudice under the Speedy Trial Clause. Pet. App. 29a. The instant certiorari petition seeks review of this decision.

a. The State argued that Hartfield's strategic choice in 1983 to accept the benefit of a commuted sentence "waived his speedy-trial rights." Pet. C.A. Br. 51. In response, the court of appeals cited *Barker*'s rejection of the demand-waiver doctrine. Pet. App. 23a (citing *Barker*, 407 U.S. at 528). But the court of appeals failed to cite *Barker*'s simultaneous holding that standard waiver principles still apply. *Barker*, 407 U.S. at 529 (holding that "we do not depart from our holdings in other cases concerning the waiver of fundamental rights" and, therefore, "waiver may be given effect under standard waiver doctrine, the demand rule aside"). The court of appeals thus failed to apply traditional waiver doctrine to the district court's factual finding that Hartfield—acting with advice of competent counsel in 1983 and facing the "risk that a second death sentence would result" from a retrial—strategically chose "the life sentence offered in commutation by the Governor." Pet. App. 80a.

Moreover, the court of appeals misdescribed the record, stating that Hartfield's failure to pursue a retrial was for "reasons not apparent in the record." Pet.

App. 25a. The court of appeals never cited the testimony of Hartfield's attorney on the issue, 2.Supp.RR.36-37, or the trial court's factual finding that Hartfield's choice was "a strategic one guided by counsel's advice." Pet. App. 80a; *accord* Pet. App. 67a ("This court concludes that Hartfield did not seek a new trial for strategic reasons.").

b. Finding no waiver, the court of appeals weighed the speedy-trial-violation factors outlined in *Barker* as if this were a standard pretrial-delay case. The court of appeals first held that speedy-trial scrutiny and a strong presumption of prejudice arises from a "delay" before retrial of 30 years. Pet. App. 14a-15a.

c. In assessing the reason for this delay, the court of appeals held that blame rested "solely on the State." Pet. App. 16a. The court reasoned that Hartfield shared no blame because he engaged only in "inaction," as opposed to "affirmative actions." Pet. App. 15a-16a.

In contrast, the court judged it highly blameworthy for the State to litigate the view held by the trial court in 1983 of the effectiveness of the Governor's commutation, rather than the view ultimately adopted by the Court of Criminal Appeals in 2013. Pet. App. 16a-17a. The court of appeals did not dispute the trial court's finding that the State had no motive to hamper the defense. Pet. App. 52a. Nonetheless, the court of appeals held that the lapse of 30 years before the Court of Criminal Appeals' 2013 ruling weighed "heavily against the State." Pet. App. 22a.

d. Next, whereas the trial court held that Hartfield's decades-long silence weighed "very heavily"

against him, Pet. App. 70a, the court of appeals held that this failure weighed against Hartfield "not as heavily" because he began filing habeas applications over two decades after the Governor's commutation. Pet. App. 26a-27a. The court did not explain how this could possibly be an effective assertion of the right to a *speedy* trial, especially where the filings sought not a retrial but *dismissal* of the charges.

e. Lastly, the court of appeals held that presumed prejudice to the defense "weighs against the State," Pet. App. 27a-28a, although it did not dispute the trial court's finding that any such prejudice was "[s]light." Pet. App. 78a.

f. Upon reviewing those considerations—and emphasizing the second and third *Barker* factors—the court of appeals held that Hartfield's murder indictment must be dismissed "based on the United States Constitution." Pet. App. 28a.

11. The State petitioned the Court of Criminal Appeals for discretionary review, which was refused. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, the court of appeals' decision on the State's waiver argument directly contradicts *Barker v. Wingo*, which held that standard waiver doctrine applies to Speedy Trial Clause claims. The court of appeals refused to apply that doctrine.

Instead, it cited only *Barker*'s holding that the "demand-waiver" doctrine does not apply to Speedy Trial Clause claims. But the State is not relying on

that doctrine, which *presumes* a waiver from the absence of a demand for a trial. Rather, the State put on evidence of Hartfield's affirmative election to forgo a retrial. The State is relying on the trial court's finding that Hartfield made a counseled, strategic choice to accept a commuted life sentence in lieu of facing a possible death penalty after a retrial. That deliberate election of the commutation surrenders any right to a retrial for capital murder. Because the lower court's failure to apply standard waiver doctrine conflicts with *Barker*, the Court should grant the petition and reject Hartfield's speedy-trial claim based on waiver alone. *See infra* Part I.

Second, even beyond the waiver issue, the court of appeals' holding of a Speedy Trial Clause violation contravenes multiple precedents of this Court. *See infra* Part II. As to assessing the reason for a delay, this Court directs that even negligence should not be counted against the government heavily and prohibits counting against the government the fact that it litigated a good-faith position about an unclear legal conclusion, even where the government did not prevail. *United States v. Loud Hawk*, 474 U.S. 302, 316 (1986); *Barker*, 407 U.S. at 527; *United States v. Ewell*, 383 U.S. 116, 121 (1966). And the court of appeals' refusal to weigh very heavily against Hartfield his decades-long strategic choice not to invoke his speedy-trial right is in conflict with decisions of this Court and federal courts of appeals. *See, e.g.*, *Barker*, 407 U.S. at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."); *United States v. Gould*, 672

F.3d 930, 938-39 (10th Cir. 2012) ("As a result of Gould's long delay in asserting his right, this factor weighs heavily against him.").

Hartfield no longer faces the death penalty, but his victim's family deserves the justice of seeing the confessed perpetrator adjudged guilty of his offense. The Speedy Trial Clause does not require setting free a twice-convicted murderer who strategically chose to accept a benefit that he now complains of.

I. The Court of Appeals' Refusal to Apply Standard Waiver Principles Conflicts with this Court's Decision in *Barker v. Wingo*.

The court of appeals misinterpreted *Barker v. Wingo* as allowing it to bypass the State's waiver argument, thus applying only *Barker*'s balancing test for a violation of the Speedy Trial Clause. The court of appeals pointed to *Barker*'s holding that a defendant's failure to demand a trial does not itself prove a waiver of the speedy-trial right. Pet. App. 23a (citing *Barker*, 407 U.S. at 528). But that holding concerns only the "demand-waiver rule." *Barker*, 407 U.S. at 528. *Barker* simultaneously refused to retreat from the traditional principle that constitutional rights can be waived. *Id.* at 529 ("we do not depart from our holdings in other cases concerning the waiver of fundamental rights"). Thus, the decision below contravenes *Barker* by failing to apply standard waiver doctrine to the trial court's factual findings. And those findings—that Hartfield made a counseled, strategic choice to avoid any retrial at all by accepting the life sentence offered by the

Governor in commutation, Pet. App. 80a—shows a waiver of any speedy-retrial right.

A. *Barker v. Wingo* addressed "the criteria by which the speedy trial right is to be judged." 407 U.S. at 516. The Court rejected "two rigid approaches" to determining a violation of the right. *Id.* at 522. First, the Court rejected the requirement of a trial within some fixed time from arrest or charging. *Id.* at 523-24 (finding "no constitutional basis" for such a rule).

Second, the Court rejected the "demand-waiver" rule, under which a defendant's waiver of the speedy-trial right was "presum[ed] . . . from inaction" in demanding a trial. *Id.* at 525. That approach was "inconsistent with this Court's pronouncements on waiver of constitutional rights," because the Court "has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Instead of justifying a presumption of waiver, the Court held that a defendant's failure to demand a prompt trial "is one of the factors to be considered in an inquiry into the deprivation of the right." *Id.* at 528.

While *Barker* thus foreclosed the ability to *presume* a waiver of the speedy-trial right from a defendant's inaction, the Court held that the government may still *prove* a defendant's waiver under standard waiver doctrine: "[W]e do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made." *Id.* at 529. Thus, if delay is attributable to the defendant's waiver, "then

his waiver may be given effect under standard waiver doctrine, the demand rule aside." *Id.*

Barker's holding comports with a broader principle. The Court has, "in the context of a broad array of constitutional and statutory provisions, articulated a general rule that presumes the availability of waiver, and [has] recognized that the most basic rights of criminal defendants are subject to waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (quotation, ellipsis, and alteration marks omitted) (quoting *United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995), and *Peretz v. United States*, 501 U.S. 923, 936 (1991)). *Barker* simply confirms that this overarching principle applies to claims under the Speedy Trial Clause.

B. The decision below defies *Barker*'s holding by refusing to apply standard waiver doctrine. The State argued that Hartfield "waived his speedy-trial rights" by his choices in 1983 to accept the Governor's commutation rather than subject himself to a second trial where the death penalty was a possible sentence. Pet. C.A. Br. 51. In response, the court of appeals cited only *Barker*'s rejection of the demand-waiver rule. Pet. App. 23a. The court failed to apply standard waiver doctrine and did not even *acknowledge* the trial court's finding, based on record evidence, that Hartfield made a counseled, strategic choice to accept the commuted life sentence in lieu of a retrial for capital murder. *See* Pet. App. 67a & n.24, 80a.

The court of appeals' failure to apply standard waiver doctrine justifies this Court's review. *See* Sup. Ct. R. 10(a). Review is important not merely to achieve justice in this case, but to provide needed guidance in

this area. This Court has not applied standard waiver doctrine in a Speedy Trial Clause case since *Barker* set out the governing framework over 45 years ago. The lower courts would benefit from this Court's elucidation of the waiver doctrine's applicability in speedy-trial cases.

C. Application of standard waiver doctrine to the record here requires denial of Hartfield's Speedy Trial Clause claim. The State accepted its burden of proof and introduced testimony from Hartfield's attorney at the time, Robert Scardino, about the events in 1983. *See* 2.Supp.RR.36-37 (testifying that he believed the Governor's commutation was invalid but "learn[ed] that, in fact, [he] would not have to try this case again").

The trial court thus made a factual finding that Hartfield, with the advice of competent counsel, strategically chose to accept the benefits of the Governor's commutation of his sentence to life in prison rather than to face retrial for a death-eligible murder (of which no court has ever argued Hartfield is innocent). Pet. App. 67a ("Hartfield did not seek a new trial for strategic reasons."); Pet. App. 67a n.24 ("Hartfield sought" the result of a "life sentence"); Pet. App. 80a ("Hartfield faced a choice between a new trial and a chance for acquittal (carrying the attendant risk that a second death sentence would result) and the life sentence offered in commutation by the Governor. Hartfield was represented by competent counsel—the court considers the choice he made to be a strategic one guided by counsel's advice.").

This knowing, voluntary choice to forgo any murder retrial necessarily relinquished the right for such a retrial to be speedy. Waiver is shown by an intentional relinquishment or abandonment of a known right—here the right to a retrial under the Court of Criminal Appeals' decision. *Johnson*, 304 U.S. at 464. As the trial court found, Hartfield's attorney at the time "*knew then* [that] the Governor's post-mandate commutation was ineffective" yet "took no action to secure a new trial for Hartfield after mandate issued *because Hartfield did not want one.*" Pet. App. 67a (emphases added).

Although Hartfield may not have signed a written form, voluntarily choosing a substantial benefit that is inconsistent with a known right is more than ambiguous inaction; it is a waiver of that right. *E.g.*, *United States v. Sandoval*, 900 F.3d 481, 484 (9th Cir. 1993) (finding waiver from conduct: although "an accused does not waive her Sixth Amendment speedy trial right by failing to assert it," an "accused might intentionally relinquish her speedy trial right . . . as a by-product of attempting to avoid prosecution altogether."). The distinction between the demand-waiver *presumption* and actual waiver is a difference in proof: between mere inaction, which is alone ambiguous, and a proven election to voluntarily abandon a known right.

Thus, in *New York v. Hill*, this Court rejected a defendant's argument that "waiver of [an interstate compact's] time limits" on trial "can be effected only by affirmative conduct not present here," such as an "affirmative request" for particular treatment. 528 U.S.

at 118. The Court rejected that notion as resting on a "hypertechnical distinction that should play no part" in the waiver determination. *Id.* "[S]uch an approach," noted the Court, "would enable defendants to escape justice by willingly accepting treatment inconsistent with [the compact's] time limits, and then recanting later on." *Id.*

Yet that is just what the court of appeals' decision here allows. Hartfield "willingly accept[ed]" the benefits of a commuted sentence of life imprisonment—a benefit inconsistent with retrial for capital murder—and only now, after more than two decades, is attempting to "recant" his acceptance. *Id.* As in *New York v. Hill*, the waiver must be enforced, especially "given the harsh remedy of dismissal with prejudice." *Id.*[3]

II. The Court of Appeals' Application of the *Barker* Factors Conflicts with Decisions of this Court and of Multiple Federal Courts of Appeals.

The court of appeals' application of the *Barker* factors to determine the existence of a Speedy Trial

[3] *Zedner v. United States*, 547 U.S. 489 (2006), is not to the contrary. *Zedner* held that prospective waivers of Speedy Trial *Act* rights are implicitly foreclosed by that Act's comprehensive trial-timing scheme, which "specifies in detail numerous categories of delay that are not counted in applying the Act's deadlines" and which provides for retrospective waivers without providing for prospective waivers. *Id.* at 500-03. *New York v. Hill* expressly distinguished this statutory question due to the specific features of the Speedy Trial Act. 528 U.S. at 117 n.2.

Clause violation also conflicts with decisions of this Court and numerous other courts.

Because the speedy-trial right "is necessarily relative," it is "consistent with delays" and "necessitates a functional analysis of the right in the particular context of the case." *Barker*, 407 U.S. at 522. In this analysis, "[t]he essential ingredient is orderly expedition, not mere speed." *Ewell*, 383 U.S. at 120. That essential ingredient is present here: Hartfield was promptly tried and convicted in 1977 following his 1976 murder of Eunice Lowe. 1.CR.9, 103. That conviction's validity in light of the 1983 commutation was then unquestioned in court by either side until at least 2006 and was not decided until the Court of Criminal Appeals' 2013 decision. And between 2013 and the 2015 retrial, Hartfield himself sought and obtained a delay of the criminal proceedings; there is no suggestion that those proceedings were not "orderly expedition" of the retrial.

Barker rejected "inflexible approaches" to determining a violation of the Speedy Trial Clause and established "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. at 529-30. "[S]ome of the factors" that "the trial court" should weigh include "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 528-30. Both this Court and federal courts of appeals have directed how those factors are to be applied. The Texas court of appeals' opinion conflicts with those decisions and warrants review.

A. There is no factual dispute over the length of time between the events at issue here. But the Texas

court of appeals contravened this Court's precedent in applying the "[c]losely related" second *Barker* factor—"the reason for the delay." *Id.* at 530-31.

Barker directed that the reason for a trial delay may be "weighted heavily against the government" if there is "[a] deliberate attempt to delay the trial in order to hamper the defense." *Id.* at 531. But *Barker* held that a more neutral reason, "such as negligence," should be "weighted less heavily." *Id.*

Here, Hartfield raises no complaint about the period between his 1976 murder of Eunice Lowe and the 1977 trial, or between his 1977 conviction and the Court of Criminal Appeals' 1983 decision on rehearing. Hartfield also raises no complaint about the period between the Court of Criminal Appeals 2013 ruling and his 2015 retrial—time during which Hartfield himself sought and obtained a stay of the criminal proceedings.

As for the time between 1983 and 2013, the trial court expressly found that the State did not "delay" Hartfield's retrial in order to hamper the defense. Pet. App. 52a; *accord* Pet. App. 54a n.14 (finding no evidence of bad faith). Even the trial court in 1983 concluded that the Court of Criminal Appeals' mandate was satisfied by the Governor's commutation of Hartfield's sentence. 3.CR.483 (trial court's notice so stating).

Despite those facts, the court of appeals found "negligence" by the State and weighed it "heavily against the State." Pet. App. 22a. That assignment of heavy weight conflicts with *Barker*, which directed that "negligence" must be given less than the

"heav[y]" weight that attaches to bad faith. 407 U.S. at 531; *accord, e.g.*, *United States v. Palmer*, 537 F.2d 1287, 1288 (5th Cir. 1976) (noting that a reason like negligence "must be weighed less heavily than deliberate prosecutorial delay").

Moreover, counting against the State its litigation of a good-faith belief about an unclear legal conclusion contravenes this Court's decision in *Loud Hawk*. There, the Court held that a delay in trial resulting from the government's interlocutory appeal, where the government's position was reasonable and there was no showing of bad faith or dilatory purpose by the government, should be assigned no "effective weight" towards a speedy-trial claim. *Loud Hawk*, 474 U.S. at 316. That principle applies even if the government's good-faith litigation is ultimately unsuccessful. *E.g.*, *United States v. Herman*, 576 F.2d 1139, 1147 (5th Cir. 1978) (even though government lost on an appeal that delayed trial, government was justified in litigating issue); *cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) (adopting similar principle in reviewing decisions of defense counsel and thus directing that "every effort be made to eliminate the distorting effects of hindsight" when a legal argument "has proved unsuccessful").

The court of appeals never disputed that the State's litigation of the validity of Hartfield's conviction in light of the commutation was in good faith, even if ultimately unsuccessful in 2013. *See* Pet. App. 54a n.14 (trial court finding of no evidence of bad faith). And the *ex ante* reasonableness of the State's position is supported by ample evidence:

- The trial court in 1983 believed that the Court of Criminal Appeals' mandate was satisfied by the Governor's commutation of Hartfield's death sentence to life in prison. 3.CR.483 (notice to Court of Criminal Appeals so stating).
- For decades, Hartfield accepted the benefit of the commutation rather than taking any action suggesting that it was ineffective. Pet. App. 56a.
- After Hartfield began filing habeas applications, the Court of Criminal Appeals in 2007 resolved them in a way indicating the *existence* of a criminal conviction. *See supra* pp. 6-7.
- A federal district court held that the status of the conviction was "not at all clear." *See supra* p. 7.
- The Fifth Circuit found "no controlling precedent" on the conviction's status. *See supra* p. 8.
- Hartfield himself acknowledged the "complexity" of the legal issues in the 2013 Court of Criminal Appeals proceedings. *See supra* p. 9.

Under those circumstances, *Loud Hawk* requires giving the period from 1983 to 2013 no "effective weight" under *Barker*'s second factor, 474 U.S. at 316, as opposed to the heavy weight against the State imposed by the court of appeals below.

That is how this Court treated an equivalent period of time in *Ewell*, which preceded and laid the foundation for *Barker*'s multifactor test. Indeed, *Ewell* has numerous similarities to this case. Whereas most speedy-trial cases involve a period of delay between a

defendant's arrest or charging and initial trial, *Ewell* involved a prompt trial following arrest, a resulting conviction that was executed for a substantial period but subsequently held to have been invalid from its inception, and then a prompt retrial. 383 U.S. at 120-21. Those are also the facts here. *Ewell* thus represents how the *Barker* factors should be applied in this context.

Ewell held that, where the results of the post-conviction litigation prompted new indictments and trials, "the substantial interval between the original and subsequent indictments does not in itself violate the speedy trial provision of the Constitution"—at least where the retrial occurred "within the applicable statute of limitations, which is usually considered the primary guarantee against bringing overly stale criminal charges." *Id.* at 121, 122. That predicate is likewise true here. *See* Tex. Code Crim. Proc. art. 12.01(1)(A) (murder may be prosecuted at any time).

Ewell thus provides highly relevant confirmation that the time period before the Court of Criminal Appeals' June 2013 decision cannot show a violation of the Speedy Trial Clause. *See also Pollard v. United States*, 352 U.S. 354, 362 (1957) (finding no speedy-trial violation in similar circumstances: "we do not view the lapse of time before correction of the error as a violation of the Sixth Amendment"). The court of appeals' contrary conclusion under *Barker*'s second factor contravenes these decisions of the Court.

B. The court of appeals' holding under *Barker*'s third factor also creates a conflict meriting review. The third *Barker* factor is "the defendant's assertion of or

failure to assert his right to a speedy trial" before seeking dismissal of the charges. 407 U.S. at 528; *accord id.* at 531-32. *Barker* held that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532. Thus, "[t]he defendant's assertion of his right is perhaps the most important of the four *Barker* factors." *Gould*, 672 F.3d at 938 (quotation and alteration marks omitted).

The court of appeals recognized Hartfield's decades-long failure to demand a retrial. Pet. App. 25a. But the court refused to hold this failure "very heavily" against Hartfield, Pet. App. 70a (trial court's findings), because Hartfield made the State aware of his *dismissal* claim "[b]eginning in at least late 2007." Pet. App. 26a.

That holding fundamentally misunderstands what it means for a defendant to assert his right to a speedy *trial*. The court of appeals did not dispute that Hartfield took no action at all through 2006. It did not dispute that Hartfield's filings from 2006 through April 2007 never properly demanded a retrial. *See* Pet. App. 57a-63a (so explaining). And Hartfield's filings starting in late 2007 did not demand a retrial for capital murder; they sought *dismissal* of the criminal case. Pet. App. 64a-65a.

The court of appeals' decision conflicts with *Barker* by treating its important third factor as favoring the defendant based on prolonged silence followed by a dismissal claim. *Barker* squarely held that this does not show that the defendant "want[ed] a speedy trial." 407 U.S. at 534. In *Barker*, the defendant had notice of several continuance motions and was silent for over

three years, after which he moved only to dismiss the case. *Id.* at 534-35 (noting that the dismissal motion included "no alternative motion . . . for an immediate trial"). In other words, while the defendant "hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." *Id.* at 535. The Court held this to be the most "important" fact weighing against the speedy-trial claim, *id.* at 534, which the Court rejected.

Numerous courts of appeals agree that "the defendant's burden of showing he desired a speedy trial 'is not satisfied merely by moving to dismiss after the delay has already occurred.'" *Gould*, 672 F.3d at 938 (quoting *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006)); *accord, e.g.*, *Divers v. Cain*, 698 F.3d 211, 219 (5th Cir. 2012) ("The fact that Divers delayed his [motion to quash his indictment] for 17 months after remand until April 24, 1998, significantly impairs his claim."); *United States v. Harris*, 566 F.3d 422, 432 (5th Cir. 2009) ("A motion to dismiss the indictment, particularly when, as here, it is filed over two years after the indictment, is not evidence of such a desire."); *United States v. Deleon*, 710 F.2d 1218, 1222 (7th Cir. 1983) (finding no assertion of the right to a speedy trial where "Deleon asserted his right on March 11, 1982," in a motion to dismiss "after the alleged period of improper delay").

If this case had been heard in those federal courts of appeals, the third *Barker* factor would have weighed "very heavily" against Hartfield, as the trial court held. Pet. App. 70a; *see, e.g.*, *Gould*, 672 F.3d at 938-39

("[I]f the defendant fails to demand a speedy trial, moves for many continuances, or otherwise indicates that he is not pursuing a swift resolution of his case, this factor weighs heavily against the defendant."). But the Texas court of appeals here adopted a conflicting approach, reducing the trial court's heavy weight because of Hartfield's assertion—after waiting more than two decades—of a right to dismissal of the charges. That conflict with *Barker* and the decisions cited above warrants review.

C. The final *Barker* factor does not overcome the court of appeals' errors on the second and third factors.

The trial court found that Hartfield produced "scant evidence of actual prejudice," "no evidence that Hartfield suffered any special anxiety and concern," and even that "there have been changes in the law favorable to Hartfield." Pet. App. 71a, 76a-77a. After reviewing the trial record, the court of appeals did not dispute those findings or the trial court's final conclusion that any "[p]resumed prejudice" is "[s]light." Pet. App. 78a; *see* Pet. App. 27a-28a.[4] Hence, this final *Barker* factor does not significantly affect the analysis.

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[4] Although not disagreeing with the trial court's ruling on this factor, the court of appeals did presume "oppressive" incarceration and "anxiety and concern" merely from the length of time at issue. Pet. App. 27a. To the extent that Hartfield relies on such a presumption, it is unsupportable. It fails to recognize that delay after an initial conviction may well benefit the defendant. *See, e.g.*, *Divers*, 698 F.3d at 218 (refusing to consider time that benefitted the defendant: "Divers benefitted from the five years of appeal," as "[l]ater a fairly consti-

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The court of appeals' departures from this Court's holdings on the second and third *Barker* factors were dispositive in its decision reversing the trial court. The court of appeals' order terminates the litigation under the Speedy Trial Clause and thus presents no barriers to this Court's review of the question presented. This Court's review is important to provide needed guidance to the lower courts on the Speedy Trial Clause, resolve the conflicts created by the Texas court of appeals' decision below, and ensure that the Clause is not transformed into a bait-and-switch tool for criminal defendants. *See, e.g.*, *Johnson*, 905 S.W.2d at 530 ("The constitutional right to a speedy trial exists to ensure speedy trials, not to create an opportunity for a criminal defendant to have his case dismissed by voluntarily accepting delay and then strategically asserting the right and relying on the very delay he purposefully endured.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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tuted jury would convict him of a lesser degree of murder."); *see also, e.g.*, *State v. Dodson*, 360 P.2d 782, 786 (Or. 1961) (holding that a defendant who "has been accorded a speedy trial . . . and has been convicted and appeals" is "not in the same position as one brought into . . . court in the first instance by the State to answer to a charge."), *cited in Barker*, 407 U.S. at 524 n.21.

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