No. _____

IN THE
Supreme Court of the United States

JAMES BAILEY-SNYDER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Gouveia*, this Court left open the question whether transferring a prisoner to solitary confinement for purposes of "detention" while police and prosecutors investigate and consider new criminal charges amounts to an arrest that activates speedy trial rights. 467 U.S. 180, 189–90 & n.6 (1984). Since that time, this Court has recognized that prolonged solitary confinement often constitutes an "atypical and significant" additional restriction on liberty because it deprives prisoners of "almost any environmental or sensory stimuli and of almost all human contact." *Wilkinson v. Austin*, 545 U.S. 209, 214, 224 (2005).

The question presented is:

Does imposing solitary confinement on a prisoner while police and prosecutors investigate and consider new criminal charges amount to an "arrest" giving rise to speedy trial protections?

PARTIES TO THE PROCEEDING

Petitioner James Bailey-Snyder was the Appellant in the Third Circuit. Respondent United States of America was the Appellee in the Third Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Bailey-Snyder respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION AND ORDER BELOW

The Third Circuit's opinion (Pet. App. 3a–14a) is published at 923 F.3d 289. The memorandum of the Middle District of Pennsylvania (Pet. App. 15a–23a) is unpublished, but is available at 2017 WL 6055344.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 3, 2019. Petitioner timely filed a petition for rehearing, which the court of appeals denied on July 10, 2019. On September 26, 2019, Justice Alito granted an extension of time to file a petition for a writ of certiorari to December 7, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides:

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

The Speedy Trial Act, 18 U.S.C. § 3161(b), provides:

> Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such

individual was arrested or served with a summons in connection with such charges . . .

Federal Rules of Criminal Procedure 48(b) provides:

The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial.

STATEMENT OF THE CASE

James Bailey-Snyder was serving a federal sentence when prison officials purportedly discovered that he was holding a plastic weapon fashioned from a toilet-paper dispenser. Pet. App. 4a; Pet. App. 15a; Tr. 100. Suspecting criminal conduct, prison officials transferred him from general population to solitary confinement while they awaited "further investigation by the FBI."[1] Pet. App. 5a.

Because prison officials are required to suspend internal administrative procedures until the FBI concludes its investigation, Mr. Bailey-Snyder could not invoke such remedies to challenge his solitary confinement unless and until the government declined to press charges. ECF No. 50-2 at 3; ECF No. 51 at 5–7; 28 CFR § 541.5; 28 CFR § 541.8. His

[1] Mr. Bailey-Snyder's isolation was referred to as "administrative segregation" below. *E.g.*, Pet. App. 5a. That condition, as Justice Sotomayor has explained, "is also fairly known by its less euphemistic name: solitary confinement." *Apodaca, et al., v. Raemisch, et al.*, 139 S. Ct. 5, 6 (2018) (Sotomayor, J., respecting denial of certiorari); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring) ("administrative segregation" is "better known" as "solitary confinement").

isolation was typical of the modern solitary confinement regime. For 23 hours each weekday, he was confined to a single-person cell. ECF No. 50-2 at 1. There, he endured social and environmental isolation. *See id.* Still, the government did not move quickly.

In February 2016, approximately six months after Mr. Bailey-Snyder was thrown in solitary confinement, an FBI agent interviewed him and delivered a "target letter." ECF No. 56 at 2. He was appointed counsel shortly thereafter. *Id.* On June 28, 2016, more than four months after Mr. Bailey-Snyder received the target letter, a grand jury returned a single-count indictment for possession of a shank. Pet. App. 5a. All told, Mr. Bailey-Snyder was subjected to nearly eleven months in solitary confinement before the government indicted him. *Id.*

Mr. Bailey-Snyder moved to dismiss the charges on speedy trial grounds. *Id.* He argued that he was transferred to solitary confinement for purposes of an "FBI investigation" and that the isolation, which "substantially diminished" his "freedom," amounted to an "arrest" triggering speedy trial protections. ECF No. 51 at 7. At minimum, he argued, speedy trial protections attached when the FBI interviewed him and delivered a target letter. *Id.* at 5.

Judged against the four-prong metric set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the delay between arrest and indictment violated his speedy trial rights, Mr. Bailey-Snyder argued. ECF No. 51 at 8. First, his pre-indictment solitary confinement was lengthy. *Id.* at 7–8. Second, the government could not justify that delay because it developed no new evidence during its protracted investigation. *Id.* at 8.

Third, Mr. Bailey-Snyder asserted his speedy trial rights as soon as practical. *Id*. Fourth, the delay was prejudicial because it was oppressive, anxiety-inducing, and impaired his defense. *Id*. at 8–9.

The district court denied the motion without an evidentiary hearing. Pet. App. 5a. Guided predominately by decades-old case law, the district court (erroneously) found that "[a]n inmate's placement into administrative segregation . . . is 'in no way related to or dependent on prosecution by the federal government' and is instead 'a method of disciplining or investigating inmates who break prison regulations . . . .'" Pet. App. 18a–19a (quoting *United States v. Wearing*, 837 F.3d 905, 909 (8th Cir. 2016) (quoting *United States v. Duke*, 527 F.2d 386, 390 (5th Cir. 1976))). Further, the district court concluded that the prison's "disciplinary procedures 'did not focus public obloquy upon [the defendant], did not disrupt [his] employment or drain [his] financial resources.'" Pet. App. 19a (quoting *United States v. Mills*, 641 F.2d 785, 787 (9th Cir. 1981) (quoting *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir. 1976))).

Although the district court recognized that Mr. Bailey-Snyder's "[a]ctual physical restraint may have increased and [his] free association [may have] diminished," it ultimately reasoned that "these criteria bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception." Pet. App. 19a (quoting *Mills*, 641 F.2d at 787 (quoting *Clardy*, 540 F.2d at 441)). For these reasons, the district court held that Mr. Bailey-Snyder's eleven-month solitary

confinement did not amount an arrest entitling him to speedy trial protections. *Id.*

At trial, the prison officials who discovered the shank on Mr. Bailey-Snyder recounted their search and seizure. Pet. App. 5a–6a. And the FBI agent to whom the case was immediately referred described the scope of his investigation, which primarily consisted of reviewing the prison officials' report and attempting to interview Mr. Bailey-Snyder. Tr. 140–41. At the close of evidence, Mr. Bailey-Snyder was convicted. Pet. App. 7a. He was sentenced to thirty months' imprisonment to run consecutively to his pre-existing seven-year term. *Id.*

Mr. Bailey-Snyder timely appealed to the Third Circuit. *Id.* A matter of first impression, the Third Circuit held that solitary confinement imposed to permit the FBI and prosecutors to investigate and consider new criminal charges did not amount to an arrest that entitled a prisoner to invoke speedy trial rights. *Id.* at 7a–10a. The court's conclusion rested on four bases. First, solitary confinement imposed for this purpose occurs in "the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception." Pet. App. 9a (quoting *United States v. Daniels*, 698 F.2d 221, 223 n.1 (4th Cir. 1983)). Second, prison officials may transfer prisoners to solitary confinement for non-prosecutorial reasons, a fact that militates against characterizing it as an arrest for any purpose. Pet. App. 8a–10a. Third, other circuits had previously held that solitary confinement could not amount to an arrest. *Id.* Like the district court, the Third Circuit also placed significant weight on an (erroneous) belief that Mr. Bailey-Snyder could administratively

challenge his solitary confinement during the pendency of the FBI referral. *Id*. at 10a.[2]

REASONS FOR GRANTING THE PETITION

This case lies at the crossroads of two issues of longstanding concern: the entitlement to a speedy trial, which "is one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967), and "the clear constitutional problems raised by keeping prisoners . . . in near-total isolation from the living world, in what comes perilously close to a penal tomb." *Apodaca, et al., v. Raemisch, et al.*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of certiorari) (internal quotations and citations omitted).

It has been almost one hundred and thirty years since this Court first catalogued the harrowing effects of solitary confinement:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental

[2] Neither the district court nor the Third Circuit considered whether Mr. Bailey-Snyder's speedy trial rights would have been violated had his solitary confinement amounted to an arrest.

> activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890).

Since that time, more evidence of the devastating effects of solitary confinement has been amassed. Responding to this data, members of this Court have repeatedly emphasized the dangers of solitary confinement. Justice Kennedy called attention to the "human toll" of a condition that drives humans "to the edge of madness" and beyond. *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). Justice Breyer catalogued the scientific consensus and described the "numerous deleterious harms" inflicted by the practice. *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting). And Justice Sotomayor warned that society can no longer plead ignorance of the reality that "solitary confinement imprints on those that it clutches a wide range of psychological scars." *Apodaca*, 139 S. Ct. at 9 (Sotomayor, J., respecting denial of certiorari).

Centuries before this Court first turned its attention to solitary confinement, the speedy trial right was enshrined in the Magna Carta. *Klopfer*, 386 U.S. at 223–26. Its foundational nature was reaffirmed by the Colonists, and today it is considered just "as fundamental as any of the rights secured by the Sixth Amendment." *Id.* The speedy trial right guards against government overreach by imposing costs on police and prosecutors who might otherwise subject a criminal target to "undue delay and oppressive incarceration" while also "impair[ing] the[ir] ability" to mount a defense. *United States v. Marion*, 404 U.S. 307, 330 (1971) (Douglas, J., concurring).

Here, solitary confinement was imposed while police and prosecutors dawdled. For those eleven months, Mr. Bailey-Snyder endured restraints considered to administer devastation. Yet Mr. Bailey-Snyder could not contest those oppressive and injurious conditions unless and until the government indicted him. While the government was maximizing Mr. Bailey-Snyder's suffering it was minimizing his ability to marshal exculpatory evidence. This state of affairs implicates the precise concerns that motivated this Court to characterize speedy trial rights as essential.

More than three decades ago, this Court left unanswered the question whether imposing solitary confinement as a means of "detention pending investigation" implicates a criminal defendant's speedy trial rights. *United States v. Gouveia*, 467 U.S. 180, 189–90 & n.6 (1984). In light of what is now known about the modern solitary confinement regime, it is time to resolve the issue.

The stakes are high and this case is an ideal vehicle to settle them because the record is straightforward and the decisions below reasoned. Further, the question presented is exceptionally important. The court of appeals' decision entrenches a fatally flawed approach to an issue impacting our nation's 1.5 million prisoners. Without this Court's intervention, each remains at risk of languishing in a penal tomb so long as police and prosecutors can plausibly claim to be considering new charges, a circumstance that disregards the vital nature of the speedy trial right. This Court should grant certiorari.

I. The Court Should Grant Review to Decide The Question Presented.

A. The Lower Courts Have Incorrectly Answered A Critical Question This Court Left Open.

In *Marion*, this Court described the adverse effects of an arrest, which "may seriously interfere with the defendant's liberty, whether he is free on bail or not . . ., may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." 404 U.S. at 320. In light of those consequences, this Court held "[i]nvocation of the speedy trial provision . . . need not await indictment, information, or other formal charge." *Id.* at 321. Instead, speedy trial rights are trigged by the "restraints imposed by arrest." *Id.* at 320.

In the decades since *Marion* was decided, a majority of the federal courts of appeals have held that solitary confinement, including when it is introduced to incapacitate a prisoner while police and prosecutors build a criminal case, does not amount to an arrest implicating the right to a speedy trial.

In *United States v. Clardy*, two prisoners were placed in solitary confinement after stabbing a third. 540 F.2d 439, 441 (9th Cir. 1976). They were not indicted for five months, and asserted that the delay was impermissible because solitary confinement constituted a "de facto arrest." *Id.* The Ninth Circuit disagreed. Solitary confinement, the court concluded, "did not focus public obloquy" upon the prisoners, "disrupt their 'employment' or drain [their] financial resources." *Id.* The court acknowledged that the

prisoners' "[a]ctual physical restraint may have increased and free association diminished," but reasoned that "unless we were to say that imprisonment ipso facto is a continuing arrest, these criteria bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule not the exception." *Id.*

The Fifth Circuit reached the same conclusion in *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976). After a prisoner was suspected of possessing contraband, he was placed in solitary confinement for 35 days. *Id.* at 387–88. He subsequently attempted to invoke his speedy trial rights, claiming that the short-term solitary confinement amounted to an arrest. *Id.* at 389. The Fifth Circuit held that it did not for two reasons. First, the court concluded that solitary confinement did not "curtail his associations," "disrupt his employment," or impose "anxiety and concern"—*i.e.*, "those incidents associated in *Marion* with arrest." *Id.* Second, and "[m]ore importantly," the court reasoned that solitary confinement is an "internal disciplinary" mechanism "in no way related to or dependent on prosecution by the federal government." *Id.* at 390.

In *United States v. Mills*, one prisoner was held in solitary confinement after he murdered another prisoner. 704 F.2d 1553, 1555–56 (11th Cir. 1983). Nineteen months later, he was indicted. *Id.* at 1556. Mills argued that solitary confinement "marked the beginning of the accusatory phase of the trial." *Id.* The Eleventh Circuit disputed that. Relying principally on the Fifth Circuit's decision in *Duke*, the court reasoned that "segregation within a prison is . . . an internal disciplinary measure that is totally

independent from the criminal process of arrest and prosecution." *Id.* at 1556–57 (quoting *Duke*, 527 F.2d at 390).

In *United States v. Harris*, a prisoner was "kept in segregation until the government decided whether to prosecute him criminally" for possessing contraband. 12 F.3d 735, 735 (7th Cir. 1994). When his indictment followed two months later, he alleged a violation of the Speedy Trial Act. *Id.* at 736. Noting that other circuits had "uniformly declined" to hold that solitary confinement could amount to an arrest, the Seventh Circuit refused the invitation, too. *Id.* Although the court recognized that "being locked in one's cell 23 hours of the day is qualitatively different from having . . . the run of the prison," it ultimately was persuaded that prisoners subjected to solitary confinement pending criminal investigation did not require speedy trial protections because they could avail themselves of the habeas statutes. *Id.*

In *United States v. Wearing*, a prisoner was held in solitary confinement after he was found with a shank. 837 F.3d 905, 907 (8th Cir. 2016) (per curiam). He was indicted a year later, and claimed that his speedy trial rights attached when he was held in solitary confinement. *Id.* at 908–09. The Eighth Circuit disagreed. Relying principally on the Fifth Circuit's decision in *Duke*, it reasoned that solitary confinement is "in no way related to or dependent on prosecution by the federal government." *Id.* at 909 (quoting *Duke*, 527 F.2d at 390). Judge Kelly, however, "would leave for another day, in a case in which the issue is fully presented for our review, the question of whether being placed in administrative segregation may under any circumstances qualify for

an arrest" invoking speedy trial rights. *Id.* at 911 (Kelly, J., concurring).[3]

Unanimity does not guarantee accuracy. That is particularly so in light of the fact that the dangerous impact of solitary confinement was not a pressing concern when the bulk of this precedent issued. Pleading ignorance is no longer tenable, yet the Third Circuit grounded its holding in stale decisions that predate the scientific consensus. Pet. App. 8a–10a. In a bygone era, solitary confinement was hardly differentiated from the ordinary incidents of prison life. No longer.

The dated rationales put forth by the federal courts of appeals wholly disregard that the "terrible price" imposed by solitary confinement, *Davis*, 135 S. Ct. at 2210 (Kennedy, J., concurring), is not borne by prisoners in general population. Rather, research consistently demonstrates that solitary confinement causes damage that is extreme compared to the harms experienced by prisoners in general population. Indeed, "[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies." Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish*

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[3] The Tenth and Fourth Circuits have also held that solitary confinement cannot amount to an arrest for speedy trial purposes, although without significant analysis. *See United States v. Bambulas*, 571 F.2d 525, 527 (10th Cir. 1978) (per curiam); *United States v. Daniels*, 698 F.2d 221, 223 (4th Cir. 1983).

Solitary Confinement, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 410 (2015) (quoting David H. Cloud, et al., *Public Health and Solitary Confinement in the United States*, 105(1) AM. J. PUBLIC HEALTH 18, 21 (2015)). In fact, a recent study of 230,000 former prisoners found that survivors of solitary confinement were at a disproportionate risk of premature death when compared to prisoners generally. Lauren Brinkley-Rubinstein, et al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, 2(10) JAMA NETWORK OPEN, 1, 5–6, 9 (Oct. 2019).[4]

The Third Circuit itself has recognized as much in recent years, calling attention to the "unmistakable conclusion" that solitary confinement "is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term . . . damage." *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (quoting Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 500 (1997)). This conclusion is supported by a "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement." *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017). Indeed, "[t]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological

[4] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350.

effects." *Williams*, 848 F.3d at 566 (quoting Haney & Lynch, *supra*, at 531).

"Solitary confinement is 'strikingly toxic to mental functioning.'" *Id.* at 567 (quoting Haney & Lynch, *supra*, at 354). The condition to which Mr. Bailey-Snyder was subjected "can cause severe and traumatic psychological damage, including anxiety, panic, paranoia, depression, post-traumatic stress disorder, psychosis, and even a disintegration of the basic sense of self-identity." *Palakovic*, 854 F.3d at 225. Indeed, "even a short time in solitary confinement is associated with drastic cognitive changes." *Williams*, 848 F.3d at 567.

But "the damage does not stop at mental harm." *Palakovic*, 854 F.3d at 226. Solitary confinement consistently results in physical harm as well. For example, isolation often precipitates a decline in neural activity and shrinks the hippocampus and amygdala, structures critical to decision-making, memory, and emotional regulation. *E.g.*, Dana G. Smith, *Neuroscientists Make a Case Against Solitary Confinement*, SCIENTIFIC AMERICAN, Nov. 2018;[5] Bruce S. McEwen, et al., *Stress Effects on Neuronal Structure: Hippocampus, Amygdala, and Prefrontal Cortex*, 41(1) NEUROPSYCHOPHARMACOLOGY 3 (2016). "[T]he lack of opportunity for free movement" in solitary is also "associated with more general physical deterioration. The constellations of symptoms include dangerous weight loss, hypertension, and heart abnormalities, as well as the aggravation of pre-existing medical problems." *Williams*, 848 F.3d at 568.

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[5] https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement.

What's more, it is now clear that solitary confinement's adverse effects do not stop once a prisoner is removed from its harsh conditions. Rather, exposure to solitary confinement may continue to impact prisoners even decades after they are released into a less restrictive environment such as general population or the community. Terry A. Kupers, *The SHU Post-Release Syndrome: A Preliminary Report*, 17 CORR. MENTAL HEALTH REP. 81, 92 (Mar./Apr. 2016). In summary, solitary confinement is destructive—even deadly—in a way that general population is not.

Prison authorities held Mr. Bailey-Snyder in unchallengeable solitary confinement "pending further investigation by the FBI." Pet. App. 5a. During that time, his confinement was characterized by restraints far more severe and injurious than those imposed by a traditional arrest. In fact, short of execution, our penal system knows no more extreme, oppressive, and anxiety-inducing liberty restriction than solitary confinement. The Third Circuit's analysis—justified by outdated logic—is incompatible with the realities of modern solitary confinement.

In holding that solitary confinement is categorically not an arrest, the court also reasoned that isolation differs from arrest because it is not always imposed pursuant to criminal prosecution. "Prison officials instead segregate inmates for myriad reasons, including: investigation, discipline, protection, prevention, and transition." Pet. App. 8a (citing FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT CPD/CSB 5270.10 (effective Aug. 1, 2011)). According to the Third Circuit, solitary confinement imposed for purposes of restraint while a

new crime is investigated cannot be an arrest for speedy trial purposes, because the same type of confinement is permitted for other purposes.

But other uses of solitary confinement are entirely beside the point. This Court has held confinement to trigger speedy trial rights, or not, depending on the type of proceeding at issue. For example, speedy trial rights are triggered when the government holds someone in jail to await trial, but not when it holds the same person in jail to await sentencing. *Betterman v. Montana*, 136 S. Ct. 1609, 1617 & n.9 (2016) (holding that speedy trial rights do not apply to sentencing even though "during this period the defendant is often incarcerated.").

Likewise, if prison officials were to throw a prisoner in solitary confinement for some purpose other than to detain him pursuant to a criminal investigation, speedy trial rights would not attach. Instead, the prisoner could avail himself of the administrative remedies denied Mr. Bailey-Snyder. The habeas and civil rights statutes are no substitute for speedy trial rights—litigating such claims takes years, and prisoners rarely prevail. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 CORR. LAW REP. 69, 84 (Feb./Mar. 2017). For prisoners detained in solitary confinement to permit police and prosecutors to build a criminal case, therefore, it is effectively the speedy trial right or nothing that stands in the way of government overreach.

B. Mr. Bailey-Snyder's Speedy Trial Rights Were Violated.

If speedy trial rights attached at the time of Mr. Bailey-Snyder's placement in solitary, which they must under this Court's *Marion* analysis, then the *Barker* test determines whether the nearly eleven-month delay between placement in solitary confinement and indictment constitutes a violation of those rights. This requires an assessment of "prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). Prejudice may stem from "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the defense will be impaired." *Id.* Mr. Bailey-Snyder's pretrial solitary confinement was prejudicial in each of these ways. The oppressive nature and anxiety inherent in solitary confinement, detailed above, are quite clearly prejudicial.

Equally clear is the detrimental impact of solitary on Mr. Bailey-Snyder's ability to present a defense. The *Barker* Court explained that "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533. Of course, this is also true when the alleged crime took place in general population and the defendant is locked up in solitary confinement—away from the witnesses and evidence relevant to his case. This is not a hypothetical concern. In this case, Mr. Bailey-Snyder explained that "he was unable to locate and interview witnesses to the search or to request that the videos at the prison be preserved in the area where he was initially confronted by the guards." App. Br. at 17. This Court has plainly explained that "[i]f witnesses die or disappear during

a delay, the prejudice is obvious" and "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532. But under the prevailing rule, the government could hold a prisoner in dangerous isolation indefinitely, enabling it to gradually build a case while the prisoner's ability to do the same diminishes with each passing day.

C. This Case Is The Ideal Vehicle To Decide The Question Presented.

This case is ideally suited to resolving whether speedy trial rights are invoked when a prisoner is detained in solitary confinement while police and prosecutors investigate and consider new charges.

The decision below squarely presents the issue raised by this petition. The determination that solitary confinement cannot amount to an arrest *as a matter of law* was the sole reason that the courts below held that Mr. Bailey-Snyder could not invoke his speedy trial rights. Both the district court and the court of appeals examined the question in substantial, reasoned decisions.

In addition, the record below is straightforward. To the extent any particular evidence concerning the nature or duration of Mr. Bailey-Snyder's solitary confinement is pertinent to the question presented, the relevant facts are effectively undisputed.

D. Resolving The Question Presented Is Exceptionally Important.

Approximately 1.5 million people are incarcerated in federal and state prisons today. BUREAU OF JUSTICE

STATISTICS, PRISONERS IN 2017, SUMMARY.[6] State and federal laws give the government the power to criminally prosecute misconduct in prisons, sometimes resulting in decades-long sentences. *See*, *e.g.*, 18 U.S.C. § 1791(b)(1) (providing punishment of up to 20 years' incarceration for possession of certain narcotics in prison); 18 U.S.C. § 1791(b)(4) (providing punishment of up to one year's incarceration for possession of a phone or U.S. currency while in prison).

Under the prevailing doctrine, the government can hold an incarcerated person in isolation indefinitely—or at least until the statute of limitations runs—while it builds a criminal case against him and his ability to marshal a defense dwindles. This is permissible, the cases hold, because a radical additional deprivation of liberty is of no significance when a person is already locked away, and solitary confinement may be imposed for reasons unrelated to investigation and prosecution.

This rule disregards both the foundational nature of the speedy trial right, *Klopfer v. North Carolina*, 386 U.S. 213, 223–26 (1967), and our present understanding of the threat of the modern solitary confinement regime. The time has come for this Court to resolve the question it left unanswered decades before the true cost of solitary confinement became known.

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[6] https://www.bjs.gov/content/pub/pdf/p17_sum.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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