No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CLARK MILTON HYDEN,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari *to the Georgia Supreme Court*

(Ga. Sup. Ct. No. S19A1496)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

This Court has not previously decided when inordinate delay in criminal appeals violates the Due Process Clause. In the absence of guidance from this Court, two approaches have developed among the lower courts. *E.g.*, *Chatman v. Mancill*, 626 S.E.2d 102, 107 (Ga. 2006) (cataloging the split). One group of courts applies the speedy trial framework set forth in *Barker v. Wingo*, 407 U. S. 514 (1972), balancing four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. The other group of courts, however, reject the *Barker* framework and consider only "fairness and prejudice," *Lopez v. State*, 769 P.2d 1276, 1288 (Nev. 1989) (collecting cases).

This case—involving almost 15-year delay caused by a failure to appoint appellate counsel for the indigent Petitioner—presents this Court with the opportunity to resolve that split of authority. The question presented here is, therefore, the following:

1. Did the delay in Petitioner's first appeal as of right from his criminal conviction violate the Due Process Clause?

LIST OF PARTIES

All parties to this Petition appear on the cover.

LIST OF RELATED PROCEEDINGS

Trial Court Judgment:

State v. Hyden, No. 03FR00014 (Franklin County, GA, Sup. Ct.). Judgment Entered April 14, 2004. Motion for new trial denied April 29, 2019.

Appellate Judgment:

Hyden v. State, No. S19A1496 (GA Supreme Court). Judgment entered February 28, 2020. Motion for reconsideration denied March 13, 2020.

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Clark Milton Hyden respectfully petitions for a *writ of certiorari* to review the judgment of the Georgia Supreme Court.

OPINIONS BELOW

The decision of the Georgia Supreme Court is designated for publication but not yet published. It can be found electronically at 2020 Ga. LEXIS 131, 2020 WL 966559. It is also found in the Appendix. [App. 1-22].

The decision of the trial court is unreported but is included in the Appendix. [App. 23].

JURISDICTION

This Court has jurisdiction to review the judgment of the Georgia Supreme Court. 28 U.S.C. § 1257. Judgment below was entered on February 28, 2020. [App. 1]. A timely motion for reconsideration was denied on March 13, 2020. [App. 24].

CONSTITUTIONAL PROVISIONS INVOLVED

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

I. The Proceedings in the Trial Court.

Following his indictment for murder, felony murder, kidnapping, assault, and aggravated assault, all arising out of the events of November 6-7, 2002, Clark Milton Hyden was tried before a jury in Franklin County, Georgia, in April 2004.

A. Mr. Hyden Is Convicted in April 2004.

On November 6, 2002, Tommy Ray Crabb, Sr., the decedent, told his wife that he was going to Mr. Hyden's house to help Mr. Hyden fix a kitchen light. Mr. Hyden had been a casual laborer for the Crabbs for several weeks. When Mr. Crabb did not return that morning, his wife became concerned and, along with her children, began to drive around town looking for him.

In response to a request from Mrs. Crabb, some individuals drove over to Mr. Hyden's house to try and find Mr. Crabb the evening of the 6th. They found Mr. Hyden sitting on the stoop of his house. He reported that someone had hit him over the head and that he did not know where Mr. Crabb was. He reported that he had been unconscious for several hours.

Because of Mr. Hyden's physical condition, EMS was called to the scene. EMS determined that Mr. Hyden had a small red knot on the side of his head. The wound looked fresh but not sufficiently serious to have rendered him unconscious for many hours.

At his home, Mr. Hyden spoke to law enforcement and repeated his report of having been attacked.

Eventually, Mr. Crabb's daughter, who was retracing her father's potential steps, came to a spot behind Mr. Hyden's house, saw her father's truck, and found her father dead in the back of the truck.

Blood was discovered inside Mr. Hyden's house, which matched that of Mr. Crabb. A rubber mallet was also recovered from the trash.

According to a jailhouse informant, Mr. Hyden admitted to killing Mr. Crabb with a rubber mallet, following a dispute over money. The informant also said that Mr. Hyden admitted to having dragged the body out-side the house "after he had killed him." The jailhouse informant had the conversation while awaiting trial on several felony charges, including kidnaping, aggravated assault, and attempt to commit arson.

Another inmate at the jail testified that Mr. Hyden confessed to feeling sorry for having killed Mr. Crabb inside his house with a mallet after they had argued. The informant also relayed that Mr. Hyden had said that he had taken several drops of LSD and had been drinking heavily before the argument.

At the trial, the State played a recording of an interrogation of Mr. Hyden. The actual recording was lost sometime in the years since the trial and thus does not appear in the record on appeal. The record only contains the State's

transcript, which the trial judge informed the jury was "not evidence" but rather an aide to understand the official evidence, the recording itself. According to the State's transcript, Mr. Hyden said that someone had broken into his house, hit both Mr. Hyden and Mr. Crabb, and then forced Mr. Hyden to drag Mr. Crabb outside, who was "gasping for air, groaning and moaning." Thereafter, Mr. Hyden had to clean up the bloody mess.

The medical examiner testified that Mr. Crabb died from blunt force trauma, consistent with having been hit with a rubber mallet. He also opined that when the body was dragged across the ground, the heart "was either at the point of ceasing to beat effectively or had ceased to beat effectively." In other words, that the body could have already dead when it was moved.

The jury convicted on all counts. In April 2004, Mr. Hyden was sentenced to life imprisonment for the murder. All the other counts merged into that conviction, except the kidnapping count. The trial judge sentenced Mr. Hyden to a consecutive life sentence for the kidnapping.

B. Mr. Hyden's Appointed Lawyer Timely Filed a Motion for New Trial in April 2004 that Was Not Heard Until March 2019 Due to Delays in Appointing New Counsel for Mr. Hyden.

As is typical in Georgia, trial counsel, who had been appointed, filed a motion for new trial following the imposition of sentence, a motion that must be adjudicated before the direct appeal can proceed.

Undersigned counsel entered an appearance in the superior court in December 2018, and a hearing was held on Mr. Hyden's motion for new trial in March 2019. A successor judge had to preside as the trial judge had passed away in the years since the trial. As is relevant to the claim that Mr. Hyden had been subject to unconstitutional delay in his appeal, the testimony at the hearing included the following:

1. Trial Counsel

Trial counsel testified that this trial was his first in Georgia. Although he could not remember exactly what the State argued in the closing argument (which was not transcribed), due to the passage of time, he did remember being particularly surprised by the argument that the State offered as to the kidnapping.

As for the almost 15-year delay in having a hearing on a motion for new trial, trial counsel testified that the now deceased trial judge decided when approving counsel's bill that a new attorney would be appointed. At that point, trial counsel "stopped working" on the case. For 10 years or more, he did not take any steps to follow up on whether the court had appointed a new attorney—but conceded that he should have. Nor did he ever inform Mr. Hyden that a new lawyer would be handling his case. Trial counsel, subsequently appointed as the Chief Public Defender, only realized in 2018 that the case had never been reassigned when he was doing a survey of pending motions for new trial.

Trial counsel testified that Mr. Hyden had clearly indicated to counsel his desire to appeal following the sentence.

2. Petitioner

Mr. Hyden testified that he recalled being surprised during closing argument that the State advanced a theory that Mr. Crabb was killed in the yard with a block, rather than inside.

Mr. Hyden thought that trial counsel was going to appeal for him, although he did not specifically understand the process.

Mr. Hyden did not hear from trial counsel again following the sentencing. Although he tried to write about three times, he does not know whether his letters went through. The prison would not allow him to call trial counsel because the trial had finished and thus Mr. Hyden supposedly had no need to talk to trial counsel.

C. The Trial Court Denied the Motion for New Trial Without Specific Findings of Fact.

Approximately a month after the hearing on the motion for new trial, the successor trial judge issued a short order denying the motion for new trial. It did not set forth any findings of fact or conclusions of law. [App. 23]. Rather, the trial court simply ordered that the motion be denied. [*Id.*].

II. The Georgia Supreme Court Affirmed.

On his direct appeal as of right to the Georgia Supreme Court, the Georgia Supreme Court affirmed. [App. 1-22].

Although it would have been a complete defense to the kidnapping if Mr. Crabb had already died by the time the body was moved, the Georgia Supreme Court held that legally sufficient evidence existed for the jury to believe that Mr. Crabb was still alive at the time of movement. It so held "because, in one of the stories that Hyden told the police, he admitted that Crabb was still alive and gasping for air when Hyden moved him from the mobile home." [App. 11].

The Georgia Supreme Court also held that, while due process does protect against inordinate appellate delay, the balancing of the four factors under *Barker v. Wingo*, 407 U.S. 514 (1972), did not establish entitlement to relief here. [App. 13].

As to the first factor, the length of delay, the court held that the "significant delay" counted in Mr. Hyden's favor. [App. at 14].

As to the second factor, the reason for the delay, the court held that that factor also counted in Mr. Hyden's favor. But because the delay stemmed from the trial judge's negligence in appointing appellate counsel, rather than intentional misconduct, that factor would be "weighted less heavily." [*Id.* at 15 (quotation and citations omitted].

As to the third factor, assertion of rights, the Georgia Supreme Court found that this factor weighed "heavily" against Mr. Hyden. [App. at 17]. Even though the trial judge had made no findings of fact on that point (or any other with respect to the constitutional claim), the Georgia Supreme Court held that Mr. Hyden had never "clearly asserted his right to appeal." [App. 16-17].

Finally, again without any findings of fact from the trial court, the Georgia Supreme Court held that Mr. Hyden had suffered no prejudice from the delay. [*Id.* at 20]. Presumed prejudice is not available for claims of appellate delay. [App. 17]. The fact that Mr. Hyden was without counsel for almost 15 years was not prejudicial because "an absence of counsel alone does not equate to prejudice." [App. 20]. Further, no prejudice could be established because all of Mr. Hyden's other appellate issues were resolved against him, and "there can be no prejudice in delaying a meritless appeal." [App. 20 (quotation omitted)].

The Georgia Supreme Court denied Mr. Hyden's timely motion for reconsideration on March 13, 2020. [App. 24].

III. Mr. Hyden Raised the Federal Question Presented Below.

Mr. Hyden complained that the delay had violated his federal due process rights in his motion for new trial before the trial court and again in his Opening Brief with the Georgia Supreme Court. The Georgia Supreme Court issued a decision on the merits of that federal constitutional issue. [App. 12-20].

REASONS FOR GRANTING THE PETITION

This Court has previously declared that "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 388 (1985) (recognizing right to effective assistance of counsel on appeal) (quoting *Griffin v. Illinois*, 351 U.S. 12 (1956) (guaranteeing indigent the right to a transcript required to appeal their conviction)). And "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin*, 351 U.S. at 19.

Relatedly, while this Court has held that the Sixth Amendment's Speedy Trial Clause provides no protection after a finding of guilt, the Court has nonetheless affirmed that, at least between the time of conviction and imposition of sentence, "due process serves as a backstop against inordinate delay." *Betterman v. Montana*, __ U.S. __, 136 S. Ct. 1609, 1617 (2016) (citation omitted). In that case, however, the Court did not have the opportunity to decide an appropriate test for due process because the petitioner there presented no claim under the Due Process Clause, *id.* at 1618—unlike here.

Even absent a specific holding from this Court that inordinate delay in the criminal appeal can violate due process, "all courts of appeals addressing the issue have reached the same basic conclusion: An appeal that is inordinately

delayed is as much a meaningless ritual as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings," which this Court has already held unconstitutional. *United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996) (quotation omitted). *See, e.g.*, *Diaz v. JAG of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003) ("Petitioner has a constitutional right to a timely review guaranteed him under the Due Process Clause." (citations omitted)); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984) (same); *Campiti v. Matesanz*, 186 F. Supp. 2d 29, 43 (D. Mass. 2002) (same) (collecting cases from the 1st, 2nd, 3rd, 5th 8th, 9th, and 10th Circuits). State supreme courts also agree that due process protects against inordinate appellate delay. *See, e.g.*, *Hoang v. People*, 323 P.3d 780, 789 (Colo. 2014) (surveying cases and holding that inordinate appellate delay can give rise to a violation of due process).

That unanimous conclusion that due process protects against inordinate appellate delay, however, breaks down among the lower courts when trying to decide the appropriate test to decide when delay is too long. As explained below, a pervasive split exists about the appropriate test. Because this case is a good vehicle to decide the appropriate test, this Court should grant *certiorari* and provide the lower courts with much-needed guidance on the appropriate test to use.

I. A Pervasive Split Exists Among the Lower Courts About How to Decide When Appellate Delay in Criminal Convictions Violates Due Process.

Despite a clear consensus that due process protects against inordinate appellate delay, the lower courts are divided on the analysis that should govern whether a constitutional violation has occurred. On the one hand, most courts have decided that the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), which governs speedy trial claims under the Sixth Amendment, also provide the appropriate framework for due process violations from appellate delay. Yet even there, conflicts exist about the contours of those factors. On the other hand, a minority of courts reject the *Barker* framework and focus only on fairness and prejudice.

A. Most Courts Use the *Barker* Speedy Trial Factors to Evaluate Due Process Claims of Appellate Delay but Are Divided as to the Proper Way to Analyze the Factors.

The majority rule looks to *Barker*, but the rule's adherents are internally and irreconcilably conflicted.

1. The Importation of Barker *to Appellate Delay.*

"[M]ost courts have adopted a modified version" of the four factors set forth in *Barker*, 407 U.S. 514, to decide whether appellate delay rises to the level of a due process violation. *Daniel v. State*, 78 P.3d 205, 218 (Wyo. 2003) (collecting cases). *See also State v. Berryman*, 624 S.E.2d 350, 357 (N.C. 2006) (collecting cases and explaining that "federal and state courts of this and other jurisdictions have almost uniformly applied the *Barker* test in considering appellate

proceedings").[1] This group of courts thus balance "the length of the delay, the reason for the delay, the defendant's diligence in pursuing the right to appeal, and the prejudice to the defendant. *Daniel*, 78 P.3d at 218.

As the Fifth Circuit has explained, using the *Barker* factors makes conceptual sense because minimizing appellate delay promotes essentially the same interests as minimizing trial delay:

> Criminal appellants often languish in prison or jail, "vegetating" while they await the outcome of their appeals. If fortunate enough to be on bail while their cases are appealed, the truly guilty walk the streets of our communities months and even years after their convictions free to commit other crimes. Moreover, if an appeal is not frivolous, a person convicted of a crime may be receiving punishment the effects of which can never be completely reversed or living under the opprobrium of guilt when he or she has not been properly proven guilty and may indeed be innocent under the law.

Rheuark v. Shaw, 628 F.2d 297, 304 (5th Cir. 1980) (citations omitted).

2. Conflict About How to Translate Barker *to Appellate Delay*

Even while most courts use the modified *Barker* test to evaluate appellate delay under the Due Process Clause, disagreement exists still exist among them as to the proper application of the test.

Conflicts in the majority-rule jurisdictions exist about what a defendant must do to be deemed to have asserted his rights to a speedy appeal. Some courts say that a defendant does so merely by complying with the appellate

[1] The *Barker* factors are: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 at 530 (footnote omitted).

deadlines and raising the issue in the opening brief. *See Hoang*, 323 P.3d at 790 (finding assertion-of-right factor favored defendant where the defendant "promptly filed his notice of appeal following his trial and raised the issue of appellate delay in his opening brief with the court of appeals"). Other courts—including the judgment below—say that the defendant must affirmatively invoke the court's aid before complaining of delay. *See, e.g.*, [App. at 16 (finding Hyden did not invoke his right to a speedy appeal because he did not personally contact the trial court to inquire about the delay)]; *Berryman*, 624 S.E.2d at 359 (involving a case of a transcript that took six years to prepare but finding that defendant had not asserted his right to a speedy appeal because neither he nor his counsel ever tried to invoke the court's aid). Yet at least some courts, however, will excuse the defendant from seeking the court's aid when the problem has been with appointed counsel or lack thereof—as happened here. *Gaines v. Manson*, 481 A.2d 1084, 1093 (Conn. 1984) ("The petitioners have been handicapped in asserting rights through their counsel when it is the counsel itself that has been the source of the challenged delays.").

Conflicts also exist as to who bears the burden of proving the reason for the appellate delay. Some courts say the defendant must establish the reason. *Berryman*, 624 S.E.2d at 358 ("[T]he burden is on the defendant to show the delay resulted from intentional conduct or neglect by the State." (citations omitted)). Other courts do not count a silent record against the defendant. *See Johnson*, 732 F.2d at 382 (4th Cir. 1984) (finding due process-violation from two-year

delay in preparation of transcript and counting the reason for the delay against the Government even though the record was "silent" as to the reason for the delayed transcript).

As for the prejudice factor under *Barker*, conflicts exist there, too. Some courts hold actual prejudice a precondition regardless as to whether all the other factors favor the defendant. *E.g.*, *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990) ("[A] due process violation cannot be established absent a showing of prejudice to the appellant."); *Lord v. State*, 820 S.E.2d 16, 26 (Ga. 2018) (holding that although the length of delay, reason of delay, and diligence all favored the defendant, the defendant had not shown a due process violation from the "inordinate" appellate delay because he had proven to no actual prejudice). Yet other courts will substitute presumptive prejudice for actual prejudice, depending on the application of the other *Barker* factors, drawing upon *Doggett v. United States*, 505 U.S. 647 (1992), a case arising under the Sixth Amendment's Speedy Trial Clause. *E.g.*, *Smith*, 94 F.3d at 212 ("[T]he circuits have sent conflicting signals as to whether *Doggett* should even be deemed pertinent to the sphere of appellate delay…. In our view, there is no reason why *Barker's* speedy-trial analysis should apply to cases of appellate delay but *Doggett's* speedy-trial presumption of prejudice should not." (citations omitted)). *See also Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991) ("[A] due process violation may occur—and did occur here—as a direct consequence of undue appellate delay, regardless of whether the victim of that delay subsequently

receives a fair appellate review."). And Connecticut has said that if the reason for the delay is due to understaffing of public defenders, those "institutionally engendered appellate delays" merit relief even "without a specific showing of actual prejudice." *Gaines*, 481 A.2d at 1094.

For those courts that require actual prejudice, there is still conflict about what categories of prejudice count. In *Barker*, this Court identified three types of cognizable prejudice in the speedy-trial context: (1) prevention of oppressive incarceration, (2) minimizing anxiety for the defendant, and (3) impairing the defense to the charges. *Barker*, 407 at 533. Some courts say that oppressive conditions of incarceration and anxiety are likewise valid types of prejudice in the delayed appeal context. *E.g.*, *United States v. Moreno*, 63 M.J. 129, 140 (C.A.A.F. 2006) (explaining that prejudice will result if the appellant establishes "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision" and explaining that "[a] appellant may suffer constitutionally cognizable anxiety regardless of the outcome of his appeal."). Other courts say no; oppressive incarceration and anxiety do not count if the appeal is not ultimately meritorious. *Hoang*, 323 P.3d at 790 ("[I]f an appellate court concludes that a defendant's substantive contentions have merit, the defendant will be entitled to relief because the underlying conviction is invalid—not because the defendant's incarceration was oppressive or caused him undue anxiety." (citation omitted)). Those courts necessarily reject the view of some, that society as a whole has in

interest in efficient progression of criminal appeals. *See Gaines*, 481 A.2d at 1093 ("To be considered, too, is the interest of the legal system and the society at large in the expedition of appeals, especially criminal appeals." (quotation omitted)).

A conflict also exists about whether the relevant impairment for prejudice purposes is just to the appeal or to a potential retrial, too. Georgia, for example, professes to accept both types. *Chatman*, 626 S.E.2d at 109-10 (holding that cognizable prejudice is "prejudice to the ability of the defendant to assert his arguments on appeal and, should it be established that the appeal was prejudiced, whether the delay prejudiced the defendant's defenses in the event of retrial or resentencing" (footnote and citations omitted)). But only prejudice to the appeal matters in California. Thus there, even if the defendant has become incompetent during the delayed appeal—and could not thus be lawfully retried, thereby setting up a complete defense—no prejudice exists if the appeal itself is not prejudiced. *People v. Blair*, 115 P.3d 1145, 1190-91 (Calif. 2005) (rejecting as valid prejudice defendant's claim that he had deteriorated to the point of incompetence during the appellate delay because his lawyer did not require his assistance to prepare the appeal).

In short, numerous conflicts exist even among those jurisdictions subscribing to the majority rule.

B. Other Courts Look Only to Fairness and Prejudice.

In contrast to the majority rule, some courts specifically reject the *Barker* factors when deciding whether appellate delay rises to the level of a violation of due process. *E.g.*, *State v. Garcia*, 450 P.3d 418, 435 (N.M. Ct. App. 2019) ("Defendant urges us to analyze his due process rights using the *Barker* factors. We decline to do so and, instead, join those jurisdictions that evaluate a defendant's due process rights in the context of a delayed appeal based on considerations of fairness and prejudice."). *Accord State v. Chapple*, 660 P.2d 1208, 1225 (Ariz. 1983); *United States v. Alston*, 412 A.2d 351, 357 (D.C. 1980) (*en banc*); *State v. Black*, 798 P.2d 530, 535 (Mont. 1990); *Lopez v. State*, 769 P.2d 1276, 1289 (Nev. 1989); *State v. Hall*, 487 A.2d 166, 171 (Vt. 1984). *Cf. also Commonwealth v. Weichel*, 526 N.E.2d 760, 764 (Mass. 1988) (explaining that a constitutional will occur if the state either deliberately blocks the appeal or inordinate and prejudicial delay has occurred, otherwise there is "no injustice to the defendant").

This group of courts thus disagree with the Fifth Circuit's conclusion in *Rheuark*, 628 F.2d 297, that similar considerations undergird the Sixth Amendment's Speedy Trial Clause and generalized due process concerns after conviction. *E.g.*, *Lopez*, 769 P.2d at 1289 ("The Sixth Amendment was adopted to assure that one accused of a crime is promptly brought to trial. The purposes of the Sixth Amendment, however, do not apply in the context of an appellate

proceeding where the accused has already been convicted of an offense." (citation omitted)). Some also suggest that this test "provide[s] courts with flexibility to fashion a remedy for violations of what has been recognized [i.e. due process] as a flexible right." *Garcia*, 450 P.3d at 436.

II. This Case Is a Good Vehicle.

This case, for several reasons, presents the Court with a good vehicle to provide the lower courts with much-needed guidance about how to evaluate claims of inordinate appellate delay.

First, the delay here—15 years to appoint appellate counsel—is inordinately long, as even the State below conceded. [App. 14]. Whatever period is required for a constitutional inquiry, this case has already passed it, ensuring the constitutional issue is at play.

Second, if the Court adopts a *Barker* analysis, such a lengthy period of appellate delay means that the Court will be able to decide whether the presumption of prejudice available under *Doggett*, 505 U.S. 647—which involved an 8.5 year delay between indictment and arrest—also applies to claims of appellate delay. Alternatively, given the actual abandonment of counsel, structural error might apply, as Mr. Hyden argued below. *Cf. United States v. Cronic*, 466 U.S. 648, 654 (1984) ("If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee [in the Sixth Amendment] has been violated.").

Third, no procedural hurdles exist. The case arises on direct appeal, and the constitutional issue was raised and ruled upon on the merits at the trial court and in the Georgia Supreme Court.

Fourth, regardless as to which test the Court adopts, this case presents compelling circumstances to find prejudice. The trial judge died during the delay, thereby narrowing Mr. Hyden's chances of having the successor judge act as a thirteenth juror as a matter of law. *White v. Stat*e, 753 S.E.2d 115, 117 n.4 (Ga. 2013) ("Where, as in this case, the judge who hears the motion for a new trial is not the same judge as the one who presided over the original trial, the discretion of the successor judge is narrower in scope." (quotation omitted)). Having an unfettered right to thirteenth-juror review on the kidnapping claim was especially important because a complete defense exists if the victim were already dead before being moved, as even the medical examiner believed. The judge who presided over the trial—and heard all the evidence, including the recording of the missing interrogation—might have credited the scientific testimony over Mr. Hyden's conflicting interrogations. *See* [App. 10 (finding legally sufficient evidence of kidnapping because the jury could have chosen to believe "one of the stories that Hyden told that Crabb was still alive and grasping for air when Hyden moved him from the mobile home")].

Fifth, the Georgia Supreme Court specifically relied on the State's transcript of the recording—lost during the 15-year delay—in denying Mr. Hyden's

insufficiency-of-the-evidence argument. [App. 11]. Thus, the delay directly impacted appellate review.

Sixth, ordering a retrial here would provide a ready remedy for the prejudice from the delay. A retrial would grant Mr. Hyden the right to full thirteenth-juror review that otherwise exists under Georgia law. A judge who heard and saw the trial evidence—rather than a cold record, as the successor judge below faced—would then decide whether to sustain the verdict on a post-trial motion for new trial, "an important vehicle" in Georgia. *Hous. Auth. of Atlanta v. Geter*, 312 S.E.2d 309, 311 (Ga. 1984). *See also Walters v. State*, 65 S.E. 357, 357-58 (Ga. Ct. App. 1909) ("Until all thirteen, the twelve jurors and the judge, agree upon the prisoner's guilt, his conviction is not legally final…. [The trial judge] is authorized to set [the verdict] aside, and indeed is under the duty of doing so if he does not approve it as a finding of fact."). Because only the trial judge can correct errors of fact, a verdict supported by legally sufficient evidence, no matter if barely, is unimpeachable by the higher courts in Georgia. *See, e.g.*, *Rogers v. State*, 28 S.E. 978, 979 (Ga. 1897) ("[W]e cannot overrule a trial judge, who, fresh from the atmosphere of the trial, sends to us a record in which he endorses the finding of the jury which tried the case in his

presence. This is true even in cases where the evidence might be described as weak…").[2]

CONCLUSION

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted). By the time that Georgia appointed Mr. Hyden appellate counsel, 15 years had passed, the trial judge had died, and evidence had been lost. Given the deep split concerning the proper application of due process to appellate delays of criminal convictions, this Court should grant this petition and hold that Mr. Hyden's appeal came too late to be meaningful.

Dated: April 10, 2020

Respectfully submitted,

CLARK MILTON HYDEN

Howard W. Anderson III

[2] Because Mr. Hyden challenged the sufficiency of the evidence on appeal and because the delay here was extraordinary, an acquittal could be a potential remedy, too. *See generally State v. Files*, 441 A.2d 27, 30 (Conn. 1981) ("Because the matters raised by [the defendant's appellate] brief would not, had he prevailed, have warranted our rendition of a judgment of acquittal but would rather have required us to order a new trial, we return the case to the trial court with the direction that a new trial be commenced immediately."); *Guam v. Olsen*, 462 F. Supp. 608, 614 (Guam App. Div. 1978) ("The prospect of freeing a Defendant adjudged guilty of serious crimes concerns us greatly. But in our view, there is no other reasonably appropriate sanction for the kind of delay that has been experienced in this case." (footnote omitted)).

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