No. 19-8300

In the
Supreme Court of the United States

Clark Milton Hyden,
Petitioner,

v.

State of Georgia,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Georgia Supreme Court correctly applied the standard set out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), in determining that the delay between petitioner's conviction and the ruling on his motion for a new trial did not violate due process on the facts of this case.

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The opinion of the Georgia Supreme Court affirming denial of the motion for new trial (Pet. App. 1–22) is reported at 839 S.E.2d 506 (Ga. 2020). The superior court's order denying the motion for a new trial (Pet. App. 23) is not published.

JURISDICTION

The decision below was entered on February 28, 2020. The petition for certiorari was filed on April 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states that "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution states that "No state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

1. On November 6, 2002, Tommy Crabb, Sr., an electrician, went to petitioner Clark Miller Hyden's home to show Hyden how to fix a kitchen light. Pet. App. 3. Crabb did not return home, prompting a search by friends and family. *Id.* at 3–4. Crabb was found dead early the next morning in his

truck behind Hyden's home. *Id.* at 4. During their investigation, the police found Crabb's blood on the kitchen floor, on a cinder block between the house and truck, and a "drag trail" of blood between the two. *Id.* at 5. Crabb died of blunt force trauma consistent with being hit in the head. *Id.* at 5–6. Hyden changed his story several times, but while awaiting trial he told another inmate that he killed Crabb in a dispute over money. *Id.* at 6–7.

2. On February 10, 2003, Hyden was indicted for, among other things, malice murder and kidnapping with bodily injury. *Id.* at 1 n.1. He was tried in March 2004, found guilty on all counts, and sentenced to two consecutive life sentences. *Id.* Hyden filed a motion for new trial on May 13, 2004. *Id.* After filing this motion, Hyden's trial counsel discussed the possibility of an ineffective-assistance claim on appeal with the trial judge, at which time the trial judge suggested it would be appropriate for new counsel to be appointed. *Id.* at 12 n.3. In the intervening years, Hyden's trial counsel stopped working on the case, the trial judge passed away, and trial counsel did not follow up to see if the court had appointed new counsel. *Id.* In 2018, trial counsel learned while preparing an outstanding motions list that the case had never been reassigned, and the trial court then discovered that the motion had never been ruled on. *Id.*

The court appointed new counsel, who amended the motion for new trial. *Id.* at 1 n.1. During the hearing on the motion, Hyden complained that the court reporter lost the original recording of his custodial interview; the court reporter did, however, produce a transcript of the interview. *Id.* at 19. Hyden also claimed that he contacted his trial counsel via letter three times since 2004, but trial counsel testified that he never received any letters or phone calls from Hyden. *Id.* at 16. Hyden also admitted that he never

contacted the trial court. *Id.* The trial court denied the motion for new trial on April 26, 2019. *Id.* at 1a n.1.

3. Hyden appealed his convictions to the Georgia Supreme Court. *Id.* at 1–22. As relevant here, Hyden argued that he was denied a speedy appeal in violation of his due process rights. Appellant's Br. 15–18, 2019 WL 3948322 (Aug. 19, 2019) (citing *Chatman v. Mancill*, 626 S.E.2d 102, 107 (Ga. 2006) (adopting the *Barker* speedy-trial analysis on appeal)); *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972). The court held that Hyden's right to a speedy appeal was not violated by the delay. Pet. App. at 20. Applying the four elements from *Barker*, the court recognized that the length of delay weighed in Hyden's favor, *id.* at 14; that the delay was caused by the State, meaning it weighed in Hyden's favor, albeit "less heavily" because it was due to negligence, *id.* at 15 (citation omitted); that Hyden did not assert his right to appeal, which weighed "heavily against" him, *id.* at 15–17; and that Hyden failed to make "the requisite showing of prejudice," *id.* at 18. The court found no prejudice in having the motion heard by a new judge, *id.* at 18–19, in having his original custodial interview read by the judge through the transcript rather then heard via the recording, *id.* at 19, or in lacking counsel, which "alone does not equate to prejudice" on appeal, *id.* at 20. Moreover, the court concluded that because Hyden's "other enumerations of error [were] meritless," he failed to establish that "but for the delay, the result of his appeal would have been different." *Id.* (citation omitted). The court denied Hyden's motion for reconsideration on March 13, 2020. *Id.* at 24.

REASONS FOR DENYING THE PETITION

In *Betterman v. Montana*, this Court held that the Sixth Amendment right to a speedy trial "is not engaged" post-conviction. 136 S.Ct. 1609, 1617 (2016). Rather, the "primary safeguards" for defendants against delay come from "statutes and rules," as well as a "diminished" due process right to liberty. *Id.* at 1617–18. *Betterman* did not announce a formal test for applying this "more pliable" due process standard, *id.* at 1618, but the Court suggested that relevant factors may include "the length of and reasons for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice." *Id.* at 1618 n.12. Both before and after *Betterman,* lower courts have almost uniformly considered these factors in assessing post-conviction delay challenges, with the vast majority of courts doing so through a modified version of the standard for assessing speedy-trial claims announced in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Here, the Georgia Supreme Court applied that standard to hold that the roughly 15-year delay between Hyden's murder conviction and the ruling on his motion for new trial did not violate due process under the facts of this case.

That decision does not warrant further review.

First, the petition seeks factbound error correction. Although Hyden alleges numerous conflicts of authority, he never argues that the court below applied the wrong legal standard. In fact, he acknowledges the utility of the *Barker* factors used by that court to reject his delay challenge. His petition thus reduces to a disagreement with the Georgia Supreme Court's application of the established legal standard to the facts of his case, which is not a sufficient basis for certiorari.

Second, Hyden's alleged conflicts of authority do not warrant review. The lower courts are not divided over the standard for assessing due process claims of appellate delay. The vast majority of courts apply the *Barker* factors. A handful of courts apply the pre-indictment delay test from *United States v. Lavasco*, 431 U.S. 783 (1977), but those standards are substantively identical, and both account for the types of factors discussed in *Betterman*: length and reason for delay, the defendant's diligence in seeking review, and prejudice. Thus, the choice between these standards would not be outcome determinative here or elsewhere. Moreover, Hyden's alleged conflicts among courts applying *Barker* are either illusory or not implicated in this case. In any event, this court has suggested the post-conviction-delay test is flexible and factbound, and it has routinely denied petitions seeking to standardize this analysis.

Third, this case is a poor vehicle for deciding the question presented. This Court does not review issues not pressed and passed upon below, and Hyden never asked the Georgia Supreme Court to apply any of the various standards implicated in his alleged splits. Regardless, Hyden would be denied relief under either the *Barker* or *Lavasco* standards because he made no attempt to advance his motion during the delay and he could not show that delay prejudiced his ability to assert his arguments for a new trial, which lacked merit.

I. The petition seeks mere factbound error correction.

Although Hyden alleges various conflicts of authority, Pet. 13–17, 18–19, he does not actually argue anywhere in his petition that the Georgia Supreme Court applied the incorrect legal standard. To the contrary, he

states, for instance, that use of "the *Barker* factors makes conceptual sense because minimizing appellate delay promotes essentially the same interests as minimizing trial delay." *Id.* at 13. The Georgia Supreme Court, of course, applied the *Barker* factors. Pet. App. 13. Thus, the petition reduces to a request for correction of the Georgia Supreme Court's application of law to the facts of this case. This Court's review of that factbound issue is not warranted. *See* Sup. Ct. R. 10.

II. This Court has routinely denied petitions addressing the standard for assessing due process claims based on post-conviction delay.

This Court has often denied review of petitions seeking review of lower courts' application of the *Barker* standard to claims of post-conviction delay. *See e.g.*, *United States v. Antoine*, 906 F.2d 1379 (9th Cir. 1990), *cert. denied*, 498 U.S. 963 (1990) (adopting *Barker*); *Elcock v. Henderson*, 28 F.3d 276 (2d Cir. 1994), *cert. denied sub nom. Elcock v. Walker*, 513 U.S. 977 (1994) (same); *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995), *cert. denied*, 516 U.S. 905 (1995) (same). More recently, this Court has denied petitions applying that standard. *See e.g.*, *Hoang v. People*, 323 P.3d 780 (Colo. 2014), *cert. denied sub nom. Hoang v. Colorado*, 574 U.S. 894 (2014); *Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009), *cert. denied*, 562 U.S. 827 (2010) (denying petition asking whether it was error not to apply presumption of prejudice to a decade-long post-conviction delay). And after *Betterman*, this Court has continued to deny similar petitions. *See e.g.*, *United States v. Brown*, 709 Fed. App'x 103 (2d Cir. 2018), *cert. denied*, 139 S.Ct. 411 (2018) (applying *Lovasco* to deny challenge to decade-plus sentencing delay after original judge's death); *Lee v. State*, 2019 WL 290027 (Fla. 2019), *cert. denied sub. nom. Lee v.*

Florida, 140 S. Ct. 960 (2020) (no due process violation where 20-plus year sentencing delay was caused by defendant's own actions). This petition does not warrant a different result.

III. The alleged conflicts of authority do not warrant review.

A. The lower courts are not divided over the standard for assessing due process claims of appellate delay.

This Court has provided relevant considerations for assessing due process claims of appellate delay: "the length of and reasons for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice." *Betterman*, 136 S.Ct. at 1618 n.12. The lower courts have long incorporated these considerations into their analysis by adopting and modifying one of two substantively similar standards: *Barker*'s four-factor speedy-trial balancing test and *Lovasco*'s pre-indictment due-process analysis.

The *Barker* factors mirror this Court's recommended considerations in *Betterman*: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. The length of delay is the "triggering mechanism" for the analysis, the reason for the delay determines whether it was an "appropriate delay," and whether a defendant asserts his right evidences the seriousness of the deprivation. *Id.* at 530–32. Should the first three factors warrant consideration of prejudice, a court then asks if the incarceration was oppressive, caused great anxiety or concern, and, most importantly, whether the delay impaired the defense. *Id.* at 532. As Hyden admits, Pet. 12, the vast majority of courts that have evaluated a due process claim for post-conviction delay have adopted this *Barker* standard. *See, e.g.*, *Elcock,* 28 F.3d at 279;

Simmons, 44 F.3d at 1169–71; *United States v. Johnson*, 732 F.2d 379, 381–82 (4th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297, 303–04 (5th Cir. 1980); *United States. v. Smith*, 94 F.3d 204, 206–08 (6th Cir. 1996); *United States v. Smith*, 576 F.3d 681, 689–90 (7th Cir. 2009); *United States v. Hawkins*, 78 F.3d 348, 350–51 (8th Cir. 1996); *United States v. Mohawk*, 20 F.3d 1480, 1485–86 (9th Cir. 1994); *Harris v. Champion*, 15 F.3d 1538, 1546–47 (10th Cir. 1994). The Georgia Supreme Court applied *Barker* in denying Hyden's delay claim below. Pet. App. 13–20.

The *Lovasco* standard overlaps substantially with *Barker*: in the case of a "lengthy … delay," "prejudice is a necessary but not sufficient element of a due process claim, and … the due process inquiry must [also] consider the reasons for the delay." 431 U.S. at 789–90. Although the few courts that apply this standard in the post-conviction context emphasize prejudice, they consider the other *Barker* factors relevant for assessing whether the demonstrated prejudice rendered the proceedings "fundamentally unfair," *United States v. DeLeon*, 444 F.3d 41, 57 (1st Cir. 2006) (quoting *Lovasco,* 431 U.S. at 796). *See United States v. Alston*, 412 A.2d 351, 360 (D.C. 1980) (en banc) ("[I]f the trial court finds prejudice during the appeal period sufficient to trigger an inquiry as to whether government 'delay' is responsible, the nature of that inquiry will depend on the type of government delay alleged."); *United States v. Ray*, 578 F.3d 184, 200–01 (2nd Cir. 2009) (weighing length of delay and failure to assert right in prejudice analysis).

In short, there is no meaningful split about which test to apply to post-conviction due process challenges. The *Barker* factors track this Court's recommendations for analyzing post-conviction due process challenges in *Betterman*, 431 U.S. at 1618 n.12, while the *Lovasco* test explicitly

incorporates two of the *Barker* factors, and courts applying it have considered the other two factors when applying it. It is thus hard to conceive of a case in which the choice of test would be outcome determinative, and Hyden offers no such examples.

B. Hyden's alleged conflicts among courts that apply the *Barker* factors are either illusory, not implicated in this case, or both.

Hyden also alleges various additional conflicts among courts that apply the *Barker* factors. None of them support granting review here.

First, Hyden claims that courts disagree over what a defendant must do to assert his right to a speedy appeal. Pet. 13–14. The cases cited in the petition do not bear this out. In *Hoang v. People*, 323 P.3d at 790 (Colo. 2014), the state conceded that defendant asserted his right by promptly appealing and raising the issue of appellate delay in his brief, and the court accepted the concession without further analysis. In *State v. Berryman*, 624 S.E.2d 350 (N.C. 2006), by contrast, appointed defense counsel made only half-hearted attempts a handful of times over six years to move the appeal along, the defendant never raised the issue, and neither complied with the court's rules. *Id.* at 358–59. The state supreme court thus weighed this factor against the defendant. *Id.* at 359. *Gains v. Manson*, 481 A.2d 1084 (Conn. 1984), was a consolidated habeas challenge by several convicted prisoners who claimed that their appeals were unjustly delayed by an overburdened public defender's office. *Id.* at 1087. Although only one of the petitioners had made any inquiry about the status of his appeal, the state supreme court excused the petitioners' failure to assert their rights because "counsel itself … has been the source of the challenged delays" and complaints to counsel would

have been futile given the restraints on the public defender. *Id.* at 1092–93. The court weighed this factor in favor of the petitioners, "albeit to a lesser degree." *Id.* at 1095. Finally, in this case, the Georgia Supreme Court held that the trial court was entitled to credit counsel's testimony that Hyden had never contacted him regarding the delay. Pet. App. 16. *Id.* Hyden, moreover, admitted he never contacted the trial court. *Id.* The court below thus weighed against Hyden his failure to assert his right even once over a 15-year period. *Id.* at 16–17. None of these decisions purport to establish a standard for demonstrating assertion of the right to appeal—let alone *conflicting* standards on that point. Rather, they agree on the general principle that a defendant must assert the right, and they apply the rule to the particular facts of each case.

Other courts applying *Barker* routinely make the same factbound determinations whether defendants have adequately asserted their appeal rights. *See e.g.*, *Ray*, 578 F.3d at 202 (failure to request resentencing weighed against defendant); *Simmons*, 44 F.3d at 1170 (even when appointed counsel caused the delay, court credited that the defendant "himself timely requested and diligently sought appellate review"); *Johnson*, 732 F.2d at 382 (defendant clearly asserted right who filed all forms, pressed his court-appointed attorney to act, and filed a *pro se* petition); *Smith*, 94 F.3d at 210 (failure of defendant out on temporary release pending appeal to assert the right does not weigh in favor of defendant); *Hawkins*, 78 F.3d at 351 (defendant asserted right so it weighed in defendant's favor); *Mohawk*, 20 F.3d at 1485 (given circumstances, defendant did his best to press forward with appeal); *Harris*, 15 F.3d at 1563 (the filing of a federal habeas petition is a sufficient assertion of the right to weigh in defendant's favor). In short, any difference

in the outcome of these cases turns on their particular facts rather than application of a different standard.

Second, Hyden alleges a conflict among courts over who bears the burden in proving the reason for the appellate delay—the defendant or the state. Pet. 14–15. Once again, there is no conflict. It may be the defendant's burden to demonstrate the reason for the delay, *see Berryman*, 624 S.E.2d at 358 (no evidence on the record to show the state was at fault), but the courts have agreed that the state's obvious failures should not be overlooked in weighing this factor, *Simmons*, 44 F.3d at 1170 (delay caused by ineffective assistance of appointed counsel); *Johnson*, 732 F.2d at 382 (court took notice of significant delays in preparation of transcripts by reporters and did not hold that against defendant); *Hawkins*, 78 F.3d at 351 (the clerk's office misplaced the appeal and did not locate it until the defendant inquired); *Mohawk*, 20 F.3d at 1485 (court reporter to blame for delay); *Harris*, 15 F.3d at 1562 (delay caused by ineffectiveness of appointed counsel). This is exactly what occurred below: the court's failure to appoint new counsel was weighed in Hyden's favor. Pet. App. 14–15.

For this reason, even if this alleged conflict were real, it would not be not implicated in this case. The court below laid the responsibility for the government's negligence at its feet, weighing the factor in Hyden's favor, *id.*, and he neither argues that this decision was wrong nor suggests that it would come out differently under any other court's standard.

Third, despite Hyden's claims to the contrary, *see* Pet. 15–16, courts generally agree that the defendant must show actual prejudice to succeed on a post-conviction-delay due process claim. *See Ray*, 578 F.3d at 200 (prejudice must be "substantial and demonstrable"); *Simmons*, 44 F.3d at 1170 (found

actual prejudice); *Johnson*, 732 F.2d at 382–83 (possibility of theoretical prejudice not sufficient to substantiate claim in light of meritless appeal); *Hawkins*, 78 F.3d at 350 (defendant "must … show prejudice from the delay to establish a due process violation"); *Mohawk*, 20 F.3d at 1487 (defendant failed to make "an affirmative showing of particularized … prejudice from the … appellate delay"); *Harris*, 15 F.3d at 1564 (defendant must "make a particularized showing of prejudice"); *Hoang*, 323 P.3d at 790 (must demonstrate prejudice because no longer protected by presumption of innocence); *Berryman*, 624 S.E.2d at 359–60 (claim failed when defendant failed to provide evidence of prejudice). In fact, some courts have explicitly rejected arguments that they should presume prejudice based on *Doggett v. United States*, 505 U.S. 647 (1992). *See e.g.*, *Elcok*, 28 F.3d at 279 (presumed prejudice is not "concerned with the problems attendant upon the delay of an appeal"), *Mohawk*, 20 F.3d at 1488 (rejected presumed prejudice as "inapposite" and "inappropriate" in appellate delay cases), *Hoang*, 323 P.3d at 791 ("Only the defendant can demonstrate how the passage of time has eroded his ability to pursue his appeal …. Requiring the prosecution to somehow prove [otherwise] is unwarranted and would be almost paradoxical.").

And even for courts that do apply *Doggett,* the presumption is still rebuttable. *See, e.g., Harris*, 15 F.3d at 1560–62, 1564–65 (adopting a sliding scale rebuttable presumption of prejudice that grows with the length of delay); *Gaines*, 481 A.2d at 1094 (finding claims "uniquely compelling even without a specific showing of actual prejudice" because they "combine[d] aspects of rights to due process and to equal protection"). Once again, what Hyden calls a conflict amounts to no more than courts applying an accepted

standard to the specific facts of the case at hand; even courts that contemplate presumed prejudice do so on a case-by-case basis.

Moreover, even if these factbound determinations rise to the level of a conflict, Hyden never suggests applying one standard or another would make a difference in his case. Even if a presumption-of-prejudice standard applied, the lower court's determinations that the delay in deciding his motion for new trial did not deprive Hyden of any evidence necessary to make his claims of error, Pet. App. 17–20, and that those same claims were meritless, *id.* at 20, would easily rebut such a presumption. This case therefore does not offer an opportunity to resolve any conflict with respect to application of the prejudice factor.

Fourth, Hyden alleges a conflict about which categories of prejudice identified in *Barker* are relevant on appeal. Pet. 16–17. *Barker* identifies three types of prejudice in the speedy-trial context: (1) prevention of oppressive incarceration, (2) minimizing anxiety and concern of the accused, and (3) impairing defense to the charges. 407 U.S. at 531. According to Hyden, courts are split over whether the first two factors are relevant. Pet. 16–17. But even if such a conflict were to exist, it is not implicated here. Hyden never claimed either of the first two types of prejudice below, Appellant's Br. at 17–18, and the court below assessed prejudice on the final factor. Pet. App. 17–20. Moreover, Hyden never claims that the first two types of prejudice should be relevant, that he suffered either of those harms, or that the court below erred in not evaluating what he never asked them to consider in the first place. Pet. 16–17, 20.

Fifth, Hyden alleges a conflict over whether courts consider impairment to the appeal only, or to the retrial as well, in determining prejudice. Pet. 17.

The one opinion Hyden cites as demonstrating a split is unclear on this point. *See id.* (citing *People v. Blair*, 115 P.3d 1145, 1191 (Cal. 2005)). *Blair* seems to state on one hand that claimants must demonstrate prejudice to the appeal, *id.* at 1190 (noting that a court must determine impact of delay on efforts to overturn conviction or sentence), but also suggests that prejudice to retrial may be evaluated in some later proceeding, *id.* at 1191 (characterizing the appeal as "the only proceeding that concerns us *at this juncture*" (emphasis added)). In any event, even if there is a split, Hyden admits that his claim was evaluated under the more inclusive and defendant-friendly standard that evaluates impairment to both the appeal and possible retrial. Pet. 17. Further, Hyden never complained about the scope of impairment below, Appellant's Br. at 17–18, or in the petition to this Court, Pet. 19–22.

In sum, Hyden's numerous purported conflicts are either illusory or not implicated by this case, and his petition takes no position on how they should be resolved or how any such resolution would change the outcome of this case. These alleged conflicts therefore do not present a basis for further review.

IV. This case is a poor vehicle to address the proper standard for post-conviction due process claims.

Several aspects of this case make it a poor vehicle for addressing the question presented. *First*, Hyden did not ask the Georgia Supreme Court to apply any of the various standards implicated in his alleged splits in the application of the *Barker* factors, to apply a test other than *Barker*, or to presume prejudice and apply *Doggett* on appeal. Appellant's Br. at 15–18. The Georgia Supreme Court therefore did not have occasion to address or rule on any of the issues Hyden now raises in his petition. Pet. App. 12–20.

This Court does not review issues not pressed and passed upon below. *See* Sup. Ct. R. 10 (certiorari granted when a state court "has *decided* an important federal question" (emphasis added)); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) ("[T]he Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."); *Howell v. Mississippi*, 543 U.S. 440, 446 (2005) (dismissing writ as improvidently granted because specific claim was not raised below).

Second, Hyden would not be entitled to relief under either the *Barker* or *Lovasco* standards. The Georgia Supreme Court correctly applied *Barker* to this case. As that court recognized, the fifteen-year delay was "significant" and weighed in Hyden's favor. Pet. App. 14. The reason for the delay also weighed in Hyden's favor, albeit "less heavily," because it was a result of the State unintentionally leaving him without counsel, *id.* at 15 (citation omitted). *See, e.g.*, *Mohawk*, 20 F.3d at 1485 (delay in transcript was the State's fault). However, Hyden wholly failed to assert his right to appeal, which the court rightly found weighed "heavily against" him. *Id.* at 16–17. *See, e.g., Berryman*, 624 S.E.2d at 358–59 (defendant never raised the issue with the court, weighing against him); *compare Simmons*, 44 F.3d at 1170 (weighing for defendant when he "himself timely requested and diligently sought appellate review"); *Johnson*, 732 F.2d at 382 (defendant clearly asserted right when he filed all forms, pressed his court-appointed attorney to act, and filed a *pro se* petition).

Finally, the lack of prejudice was dispositive. *See Hawkins*, 78 F.3d at 350 (defendant "must … show prejudice from the delay to establish a due process violation"); *Mohawk*, 20 F.3d 1486–88 (defendant failed to make "an affirmative showing of particularized … prejudice from the … appellate

delay"). *Barker* suggests consideration of three types of prejudice in this context: oppressive incarceration pending post-trial motion or appeal, the anxiety and concern of the convicted party awaiting the ruling, and impairment of the defense. *Mohawk,* 20 F.3d at 1485–86 (adapting *Barker* factors to appellate context); *see also* 407 U.S. at 532. Hyden never claimed either of the first two types of prejudice below, Appellant's Brief at 17–18, and does not ask this Court to consider them either, Pet. 16–17. That leaves only impairment to his defense, on which Hyden made three arguments: that (a) he was prejudiced because the trial judge who presided over his trial died before ruling on his motion for new trial; (b) the original recording of his custodial interview was lost, depriving the new judge of the ability to hear it; and (c) he was without counsel for the delay. *Id.* at 20. As the court below noted, however, a successor judge is still permitted "significant discretion" to decide whether to grant a new trial on general grounds. Pet. App. at 18. (quoting *White v. State*, 753 S.E.2d. 115, 11 n.4 (2013)). Nor does Hyden explain how the official transcript, whose accuracy he does not dispute, was insufficient to allow the trial court to assess the voluntariness of his statement. *Id*. Further, he gave no reason why being without counsel during the pendency of his new trial motion independently prejudiced his defense on appeal. The court below weighed the *delay* caused by Hyden's lack of counsel in his favor under *Barker*. But Hyden offers no authority for the proposition that absence of counsel, standing alone, constitutes evidence for a finding of prejudice.

Finally, the court correctly decided that there can be no prejudice by delay to an otherwise meritless appeal. Pet. App. 20; *see also Johnson*, 732 F.2d at 382–83 (possibility of theoretical prejudice not sufficient to

substantiate claim in light of meritless appeal). Hyden has had the opportunity to raise every enumeration of error to which he was entitled, and none were impaired by the delay. Specifically, Hyden claimed both that there was insufficient evidence to substantiate the asportation element of his kidnapping charge, Pet. App. 8–11, and that the State was wrongly permitted to waive its opening argument and present its entire argument after Hyden's closing statement in violation of a state statute, *id.* at 11–12. But the evidence showed that Hyden beat the victim in the house, dragged him out to the victim's truck while he was still alive, and then moved the truck to behind the house where he would be harder to find. Pet. App. at 9-11; *see also Garza v. State*, 670 S.E.2d 73 (2008) (describing the applicable elements of kidnapping). The court below rightly found that there was sufficient evidence that he moved the victim while he was still alive and independent of the assault from which he later died. Pet. App. at 11. As for the closing argument, Hyden himself admitted his interpretation of the state statute had been consistently rejected by Georgia courts. Pet. App. 11–12. His arguments for retrial thus lack merit, and he pointed to no other factors—such as lost witnesses, evidence that was not replaced, or other claims that were barred because of the delay—to support a finding of prejudice. Thus, despite the delay, the Georgia Supreme Court correctly held that Hyden had not shown prejudice.

The result would have been the same under the *Lovasco* standard. As adapted to this context, *Lovasco* requires a threshold showing of prejudicial delay significant enough to render the proceedings "fundamentally unfair." 431 U.S. at 796, 789–90 (explaining that "prejudice is … a necessary but not sufficient element of a due process claim"); *DeLeon*, 444 F.3d at 57 ("The

showing of prejudice is … a threshold requirement."); *Alston*, 412 A.2d at 359 (prejudice must be established prior to considering other factors). Hyden's inability to show prejudice would end the *Lovasco* analysis at the first step. The ruling below was thus correct under either test.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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