No. 19-8300

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)

Reply in Support of Petition for *Writ of Certiorari*

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Petitioner Clark Milton Hyden respectfully submits this Reply in support of his Petition for Certiorari.

ARGUMENT

Nothing in the Brief in Opposition obviates the need to grant certiorari here. The courts below are deeply split on a constitutional question that this Court has not resolved—that is, how to decide when, for the purposes of due process, delay in a criminal appeal becomes too much? Mr. Hyden's case is an ideal vehicle for deciding that question.

I. The Constitutional Question Merits This Court's Review.

The constitutional question presented in this Petition is an open one. As the Brief in Opposition concedes, this Court has never "announce[d] a formal test for applying…due process…" to claims of excessive appellate delay in criminal cases. [Opp. at 4 (citation omitted)]. As the Brief in Opposition also does not dispute, the Court was deprived of the opportunity to determine the appropriate due-process framework in *Betterman v. Montana*, because the petitioner there "advanced no due process claim," __ U.S. __, 136 S. Ct. 1609, 1618 (2016) (footnote omitted), unlike Mr. Hyden here.

A long-standing split on the correct test for due process has percolated in the lower courts. The Brief in Opposition agrees that the majority of courts explicitly apply the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), while a minority of courts apply the factors set forth in *United States v. Lavasco*, 431 U.S. 783 (1977). [Opp. at 7-8]. The Brief in Opposition's claim

that, despite the different formal analysis, the two tests overlap such that "the choice of test would [not] be outcome determinative," in the majority of cases does not withstand scrutiny. [Opp. at 9]. After all, the Brief in Opposition explicitly concedes that the *Barker* test is "more inclusive and defendant friendly," [Opp. at 14], than the *Lavasco* test. If the tests were the same, one would not be more defendant friendly than the other. And the Opposition has been unable to cite any court opinion that suggests, as claimed, that determining the correct test for appellate delay does not matter. In fact, courts deciding between the two tests sometimes criticize the test that was not selected. *See, e.g.*, *United States v. Alston*, 412 A.2d 351, 363 (D.C. 1980) (Mack, J., dissenting) ("[O]ur decision today creates simply too much confusion in requiring our courts to meet speedy trial challenges by separate evaluations, under separate standards, using separate dates, for trial and appellate purposes."). *See also Chatman v. Mancill*, 626 S.E.2d 102, 107 (Ga. 2006) ("Both…approaches [to claims of appellate delay] have been criticized.") (citing Marc M. Arkin, *Speedy Criminal Appeal: A Right Without A Remedy*, 74 Minn. L. Rev. 437 (1990)).

Given the open question and the longstanding split, it is not surprising, as the Brief in Opposition notes, that the Court has received many petitions asking the Court to definitively answer the question that has vexed the lower courts. *See* [Opp. at 6-7]. This Court will continue to receive more petitions until this Court tells the lower courts how to decide how much appellate delay is too much.

II. This Case Is a Good Vehicle.

Contrary to the claims in the Opposition, this case is an ideal vehicle for deciding the Question Presented.

First, while the Brief in Opposition notes that, post *Betterman,* this Court has denied certiorari in two cases, *see* [Opp. at 6-7], this case does not suffer from the flaws present in those cases. In *Brown v. United States*, No. 17-1604 (U.S.), the Solicitor General's opposition noted that the petitioner had "received a sentence of time served" and sought to shoehorn alleged prejudice from the fact of conviction into prejudice from delay. Brief in Opposition, *Brown v. United States*, No. 17-1604 (U.S.), 8. And in *Lee v. Florida*, No. 19-5638 (U.S.), the state Solicitor General noted jurisdictional problems with the issue. Brief in Opposition, *Lee v. Florida*, No. 19-5638 (U.S.), 1. By contrast here, the Brief in Opposition does not dispute that Mr. Hyden remains in prison, has complained that inordinate delay has prejudiced him on appeal, and has presented the Court with a Petition free of jurisdictional questions.

Second, the Brief in Opposition is wrong to suggest that answering the Question Presented will not resolve the splits of authority below. *See* [Opp. at 14-15]. If the Court agrees with Mr. Hyden that the *Barker* factors apply, then the split as to the appropriate test will be resolved. And with respect to those *Barker* factors upon which Mr. Hyden prevailed upon below, the Court's discussion of those factors will necessarily provide guidance to the lower courts.

Third, as for prejudice from the delay—a factor under both the *Barker* line of cases and the *Lavasco* cases—the Brief in Opposition concedes that any actual prejudice to the merits should have entitled Mr. Hyden to relief. See [Opp. at 15 ("[T]he lack of prejudice was dispositive.") (citation omitted)]. In that regard, the Brief in Opposition does not dispute that Georgia law provides for a narrower range of discretion for a successor trial judge to rule upon a motion for new trial than the original trial judge would have, even though a successor judge may still exercise discretion in that regard. *See* [Opp. at 16]. *See also generally State v. Harris*, 734 S.E.2d 357, 359 (Ga. 2012) ("It is certainly true that 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 [to grant a new trial] is narrower in scope." (citation omitted)). In contrast to the Brief in Opposition's claims of a supposed fact-bound error, [Opp. at 5-6], that change in the applicable standard of review for the successor judge was prejudice as a matter of law.

Further, beyond the change in the legal standard for his discretionary motion for new trial, Mr. Hyden argued below[1] that the loss of the recordings of

[1] In his Opening Brief to the Georgia Supreme Court, he argued three points of prejudice: a successor judge's reduced discretion to grant a new trial, the loss of the recording of the interrogation, and the structural error from 15 years without action from trial counsel. As for the recording issue, Mr. Hyden argued:

> [B]ecause of the delay, the court reporter lost the recording of Mr. Hyden's interrogation (State's Ex. 64) that was played at trial. [R. 135]. Although the court reporter did reproduce the unofficial transcript that "is not evidence," [T. 272], Mr. Hyden was deprived of the opportunity to

his interrogation during the more than 15 years the appeal sat dormant was another source of error. The Brief in Opposition seeks to place the burden of establishing inaccuracies in the demonstrative transcript upon Mr. Hyden, despite the passage of almost 20 years from the date of the interrogation (not to mention the right to remain silent). [Opp. at 16]. That recording was the critical piece of evidence with respect to the kidnapping; the Brief in Opposition does not dispute that its alleged statements (despite the testimony of the medical examiner to the contrary) were held sufficient below to establish the asportation element of kidnapping. [App. 10]. If the Court were to hold that, in the face of such inordinate delay, a presumption of prejudice exists, the silent record as to the demonstrative transcript would be resolved against the prosecution. *Cf. Doggett v. United States*, 505 U.S. 647, 655-56 (1992) ("[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone [establish a speedy-trial violation]…, it is part of the mix of relevant facts, and its importance increases with the length of delay." (citations omitted)). Indeed, this Court may even wish to take up the suggestion of scholars by eliminating the need to ever show actual prejudice. *See* Arkin, *Speedy Criminal Appeal: A Right Without A Remedy*, 74 Minn. L. Rev. at 482 (arguing for a standard of constitutional reasonableness and pointing out the curious

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> have the judge decide for himself the accuracy of that recording (and listen to tone of voice etc.).

fact that "to the extent that courts follow *Barker*, … the defendant must prove that delay has prejudiced his appeal in order to receive as relief the very appeal on whose efficacy he has cast doubt.").

CONCLUSION

Accordingly, this Court should grant this Petition and hold that Mr. Hyden's appeal was unconstitutionally late.

Dated: August 27, 2020

Respectfully submitted,

CLARK MILTON HYDEN

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