

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER AUNDRE FAULKNER,
also known as Christopher A. Faulkner
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- (1) **Whether a prolonged length of pretrial detention violates the Due Process Clause of the Fifth Amendment because the government has failed to exercise due diligence in timely providing the defendant with discovery to prepare a defense?**

PARTIES TO THE PROCEEDINGS

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Christopher Aundre Faulkner,
Petitioner

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**UNITED STATES OF AMERICA,
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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. Christopher Aundre Faulkner*, 801 Fed.Appx. 322 (5th Cir., April 16, 2020) (No. 20-10128).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is cited as *United States v. Christopher Aundre Faulkner*, 801 Fed.Appx. 322 (5th Cir., April 16, 2020) (No. 20-10128). A copy of the unpublished opinion is attached as Appendix A.

JURISDICTION

The judgment and opinion of the Fifth Circuit Court of Appeals was filed on April 16, 2020. *See* Appendix A. This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

The United States District Court, Northern District of Texas, Dallas Division, had jurisdiction pursuant to Title 18, United States Code, § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to Title 28, United States Code, § 1291.

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. AMEND. V:

No person shall be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Background:

In December 2012, the Securities and Exchange Commission (“SEC”) began a civil investigation into the activities of Faulkner and his entities. In July 2015, the Internal Revenue Service – Criminal Investigation (“IRS-CI”) and the Federal Bureau of Investigations (“FBI”) initiated a criminal investigation into Faulkner and his business dealings. On April 28, 2016, the IRS-CI and FBI executed search warrants and seized a substantial amount of documents and electronically stored data from business offices located in Dallas, Texas.

On June 15, 2018, a federal criminal complaint was filed against Faulkner alleging Securities

Fraud, a violation of 15 U.S.C. §77(q)(a) and 77x,; Mail Fraud (Aiding and Abetting), a violation of 18 U.S.C. §§1341 and 2; and Money Laundering (Aiding and Abetting), a violation of 18 U.S.C. §§1957 and 2. (Doc. 1). Faulkner was arrested on June 18, 2018 and has been detained since his arrest.

B. Pending Indictment:

Faulkner was charged in a twenty-one count superseding indictment charging six counts of securities fraud, in violation of 15 U.S.C. §§77(q)(a) and 77x; seven counts of mail fraud, in violation of 18 U.S.C. §1341; six counts of engaging in illegal monetary transactions, in violation of 18 U.S.C. §1957; and two counts of attempting to evade and defeat tax, in violation of 26 U.S.C. §7201. Doc.72.

C. Faulkner detained and first appeal of detention order

On June 18, 2018, Faulkner was arrested on a criminal complaint at the Los Angeles International Airport as he was attempting to board a flight to London Heathrow. Doc. 20, Detention order, 4. The government moved to detain Faulkner based on him being a serious risk of flight. Doc.7. On July 12 and 16, 2018, a detention hearing was held and Faulkner was ordered detained. Doc.20, Detention Order, 2. Faulkner moved to revoke the order of detention under 18 U.S.C. §3145(b) and to be released on conditions while awaiting trial. Doc. 18, Mot. to Revoke. The district court conducted a de novo review of the evidence presented at the detention hearing and denied Faulkner's motion finding that the "totality of the §3142(g) factors demonstrates that Faulkner is a flight risk." Doc. 20, Detention Order, 1. Faulkner appealed the district court's order and the Fifth Circuit Court of Appeals affirmed the district court's detention order.

D. Government and Faulkner's plea negotiations

Beginning in July of 2018, Faulkner and the government started plea negotiations. The parties filed motions to continue the time to indict the case as they engaged in plea negotiations.

Doc. 16, 25. On October 4, 2018, Faulkner entered into a Rule 11(c)(1)(C) plea agreement to plead guilty to a three count Information for securities fraud, illegal monetary transactions, and tax evasion for a term of imprisonment of 144 months. Doc. 32. On October 23, 2018, Faulkner entered his plea of guilty to the Information. Doc. 36. Faulkner’s guilty plea was accepted and he was adjudicated guilty. Doc. 41.

E. Rule 11(c)(1)(C) plea agreement rejected at sentencing, guilty plea subsequently withdrawn

Faulkner’s sentencing hearing was held on March 21, 2019. Doc. 54. At the beginning of the hearing, the district court stated that it was rejecting the plea agreement and would allow Faulkner to withdraw his plea if he chose. *Id.* On April 15, 2019, Faulkner filed his motion to withdraw his guilty plea which the district court granted on April 21, 2019. Doc. 59, 61.

F. Superseding Indictment and Discovery Process

On May 29, 2019, the Government filed a twenty-one count indictment against Faulkner that superseded the October 2018 Information. Doc. 72, Superseding Indictment. The district court then issued an amended scheduling order, setting trial for August 8, 2019. Doc. 75, Scheduling Order. On June 19, 2019, Faulkner filed an unopposed motion requesting that the court appoint the Federal Public Defender (“FPD”) as coordinating discovery attorney because of the “voluminous discovery” related to this case. Doc. 76, Mot. to Appoint, 3. The motion was granted on June 21, 2019. Doc. 78, Order. Shortly thereafter, on June 22, the parties filed a joint motion to continue the trial setting and to designate the case as complex under 18 U.S.C. § 3161(h)(7)(B)(ii). Doc. 79, Joint Mot. The parties represented that the case was complex due to “the nature of the prosecution, the complexity of the facts underlying the indictment, and the voluminous nature of the discovery.” *Id.* at 1–2. The parties asked the court to grant an “ends of justice” continuance on the basis that it outweighed “the best interests of the public and the defendant in a speedy trial.” *Id.* at 1. The parties

recommended that the court schedule a status conference “in approximately 6 months for the parties to advise the court as to the status of discovery, outstanding issues, and to consider the scheduling of motion and trial deadlines.” *Id.* at 3. On July 16, 2019, the Court granted the parties’ motion and declared the case complex. Doc. 81, Order Decl. Case Complex. The Court set trial for March 16, 2020. *Id.* The court also set a status conference for November 21, 2019.

G. Discovery Production Discussions

On August 16, 2019, Faulkner was appointed new counsel because his previous attorney had to withdraw from his representation. Doc. 86. On August 29, 2019, the government, Faulkner’s counsel and the FPD discovery coordinator conducted a “meet and confer” on discovery related issues. Doc. 92, at 9. It was at this meeting that the government informed the parties that because of the volume of discovery it would have to be a “rolling” production. *Id.* A rolling production was necessary because the government had not yet processed the discovery materials. *Id.* In addition to the government’s disclosure that the discovery needed to be processed before being provided to the defense, the government provided the parties with a written inventory of the ninety-one digital devices it had obtained from the search warrant. Only fourteen of those devices had been imaged and there were also 144 .pst files that were imaged with only thirty-six deemed relevant by the government.

The first production of discovery was provided on October 17, 2019. The second production of discovery was provided on January 9, 2020. It was undetermined how many more productions would be forthcoming. On November 21, 2019, the district court held a conference to get the status of discovery disclosures. Doc. 87. On December 5, 2019, the parties submitted a joint motion to remove the case from the trial docket because additional time was needed for the government to complete its disclosure and for defense counsel to organize, analyze, and process

the discovery. Doc. 88. The district court granted the motion and set a status conference for March 26, 2020. Doc. 89. It was thought at the time that discovery processing would not be completed until the end of March 2020. *Id.*

H. Motion to reconsider and revoke pretrial detention filed by Faulkner denied

On January 2, 2020, Faulkner filed his motion to reconsider his order of detention and revoke the August 2, 2018 Detention Order (Doc. 20). Doc. 90. On January 17, 2020, the district court held a hearing on Faulkner's motion and ultimately denied his motion.

Faulkner appealed the district court's decision to the Fifth Circuit Court of Appeals. On April 16, 2020, the Fifth Circuit affirmed the district court's denial of Faulkner's motion. *See United States v. Christopher Aundre Faulkner*, 801 Fed.Appx. 322 (5th Cir., April 16, 2020) (No. 20-10128). (Appendix A). the Fifth Circuit Court of Appeals rejected Faulkner's argument stating:

Although the length of the detention (roughly 18 months) weighs in favor of a due process violation, this factor alone is not dispositive and courts have allowed much lengthier detentions. *Stanford*, 394 F. App'x at 75 (citing cases rejecting due process challenges to detentions lasting thirty or more months). The uncertain length of future detention also supports Faulkner, though the district court is working with the parties to set a trial date. But the complexity of this investment fraud case weighs against a due process violation, and we find no basis for disrupting the district court's factual determination that the delay is not the government's fault. *Id.* (noting these factors weigh against a due process finding). Instead, much of the delay resulted from Faulkner's withdrawal of his guilty plea after the district court rejected a plea agreement. That unusual situation and the resulting delay did not transform the purpose of this pretrial detention from a permissible regulatory one into an unconstitutionally punitive one.

Id.

REASONS FOR GRANTING THE WRIT

When the government brings a criminal accusation against a defendant, the defendant is entitled to a review of the evidence the government has gathered, in a timely fashion, to prepare his defense. The writ should issue because when the government fails to exercise due diligence in providing discovery to a defendant, which results in the defendant's prolonged pretrial detention, the Due Process Clause of the Fifth Amendment is violated and the relief is release from pretrial detention with conditions.

ARGUMENT

Mr. Faulkner's prolonged detention violates the Due Process Clause of the Fifth Amendment. “[E]xcessively prolonged” detention may become so unreasonable in relation to the regulatory goals of detention that it violates due process.” *United States v. Stanford*, 722 F.Supp.2d 803, 806 (5th Cir. 2010)(citing *United States v. Salerno*, 481 U.S. 739, 749, 107 S.Ct. 2095 (1987); *United States v. Hare*, 873 F.2d 796, 800-01 (5th Cir. 1989)). “Due process challenges to pretrial detention must be assessed ‘on a case-by-case basis.’” *Standford*, *supra*. at 806; citing *Hare*, 873 F.2d at 801. The “case-by-case basis” is problematic. As set out below:

. . . the Supreme Court has given us essentially no guidance about how, or through what criteria, to conduct that ultimate balancing-comparison. How do we value or ascribe weight to different lengths of confinement? Does that process vary with or depend at all on characteristics or circumstances of the individual defendant (e.g., should it matter whether the defendant is old, ill, or the kind of person who suffers more in confinement than most others)? More significant, when we compare apples (the government's regulatory interests) with oranges (the length of pretrial detention), how do we ascribe *relative* value to each? How do we determine their relative weight? And is the balancing analytically open-minded, or does it start with the scales pre-weighted in some measure (how much?) in favor of the government (whose detention law, *Salerno* and other courts have held, is clearly supportable, in the abstract, by important governmental interests)?

United States v. Ailemen, 165 F.R.D. 571, 579 (N.D. Cal. 1996).

In *United States v. Gonzales-Claudio*, 806 F.2d 334, 339 (2nd Cir. 1986), the court found that the defendants' pretrial detention beyond fourteen months would exceed the standards of due process. *See also, United States v. Zannino*, 798 F.2d 544, 548 (1st Cir. 1986)(in perhaps most cases, sixteen months would be found to exceed due process limitations). However, the length of pretrial detention is not the sole determining factor. The issue in Faulkner's case is the length of delay because of the government's lack of diligence in producing discovery that it had in its possession approximately two years before filing their case against Faulkner.

In *Faulkner*, the Fifth Circuit found that “[s]erious concerns about flight risk supported [Faulkner's] original detention order” and that “[t]his strong basis for the original detention order weighs against Faulkner's due process claim.” (Appendix A). However, even when there is strong support for risk of flight, that finding is not alone dispositive. See *Gonzales Claudio*, 806 F.2d 334, 343 (stating “Although these circumstances provide a reasonable basis for inferring that the appellants might flee rather than attend their trial, they do not establish that risk to a degree sufficient to render continued detention within constitutional limits.”). The Fifth Circuit concluded that length of delay (18 months) and the uncertain length of detention weighed in favor of Faulkner. Yet, the court found that the complexity of the case weighed against Faulkner and that there “was no basis for disrupting the district's court's factual determination that the delay is not the government's fault.” *Id.* The court concluded that “much of the delay resulted from Faulkner's withdrawal of his guilty plea after the district court rejected a plea agreement.” *Id.* However, it is Faulkner's position that the current status of the delay is the responsibility of the government for failing to diligently process the evidence in the case to turn over to Faulkner. The district court stated, “The Court tends to agree with Faulkner that the Government could have initiated the process sooner. However, this did not amount to a strategic decision on the part of the Government to slow the case down and punish Faulkner with a lengthy detention.” Doc. 95, at 16-17. The district concluded that the “main culprits”

in the delay of the case were the complexities of the case and the related discovery. *Id.* Yet, had government processed the voluminous discovery over the two-year period prior to charging Faulkner, the discovery issues would not be cause for the delay and for Faulkner's excessive pretrial detention.

When looking at the timeline of the case, it is evident that the government did not exercise due diligence in preparing, processing and providing Faulkner with discovery to prepare his case. First, on April 28, 2016, the IRS-CI and FBI executed search warrants and seized a substantial number of documents and electronic data from Breitling, Crude and Patriot's office located in Dallas, Texas. The government had the discovery in its possession in April 2016. The government waited over two years to file a case. It was not until June 15, 2018 that the government filed a Criminal Complaint against Faulkner alleging Securities Fraud, a violation of 15 U.S.C. §77(q)(a) and 77x,; Mail Fraud (Aiding and Abetting), a violation of 18 U.S.C. §§1341 and 2; and Money Laundering (Aiding and Abetting), a violation of 18 U.S.C. §§1957 and 2. (Doc. 1). Faulkner was arrested on June 18, 2018.

The government did not provide its first installment of the rolling production of discovery until October 17, 2019. The second production of discovery to Faulkner did not occur until January 9, 2020. It remains unknown how much additional discovery will be forthcoming, though at the time of the hearing it was believed discovery would be able to be completed by the end of March 2020.

Factors to Consider if a Due Process violation occurred

In determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision, such as the seriousness of the charges, the strength of the government's proof that the defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits, but also additional factors such as [1] the length of the detention that has in fact occurred or may occur in the future, [2] the non-speculative nature of future detention, [3] the complexity of the case, and [4] whether the strategy of one side or the other occasions the delay.

Stanford, 722 F. Supp. 2d 803, 806 (S.D. Tex.), aff'd, 394 F. App'x 72 (5th Cir. 2010)(citing *Hare*, 873 F.2d at 801). The district court conducted an analysis of the four factors set forth in *Hare* and applied them to Faulkner's case. Those factors are as follows:

1. The length of the detention that has in fact occurred or may occur in the future.

As to the length of detention that has already occurred and may occur in the future, the district court acknowledged that this weighed in Faulkner's favor. (Memorandum Opinion and Order, Doc. 95, p.14-15). However, the Court was not convinced that it outweighed the other factors that must be considered. *Id.* at 15.

Faulkner has been held in pretrial detention for over 18 months. Though the length of detention is not itself dispositive, it is a starting point in the Court's analysis. *United States v. Salerno*, 481 U.S. 739, 748 n.4, 107 S.Ct 2095 (1987). The Court looks at "the length of detention that has in fact occurred or may occur in the future." *Stanford*, 722 F. Supp. 2d 803, 806 (S.D. Tex.), aff'd, 394 F. App'x 72 (5th Cir. 2010)(citing *Hare*, 873 F.2d at 801). In *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986) the court stated, "[e]ven so, we shall assume that in many, perhaps most, cases, sixteen months would be found to exceed the due process limitations on the duration of pretrial detention." The court in *Standford* found, "[a]bsent any prosecutorial delay or extended speculative detention, which the court discusses below, the length of Standford's pretrial detention [twelve months] to this point does not offend due process." *Id.* at 809 (citations omitted). This is where Faulkner's facts are distinguishable from the *Standford* case because the reason for prolonged detention here is prosecutorial delay in processing and producing discovery and the length of Faulkner's continued future detention is uncertain.

2. The non-speculative nature of future detention.

The district court concluded that the reason there is no trial date rests as much with Faulkner as it does with the Government. *Id.* The reasoning of the district courts rests on the fact that a joint

motion was filed to remove the case from the trial docket because both parties needed more time to complete discovery. *Id.* However, Faulkner had to take this position because the government was just beginning to process and produce discovery even though the discovery had been in their possession since April 28, 2016 after the search warrant was executed. Mr. Faulkner, up to the time of the hearing on the motion, had been detained for approximately 18 months and for the first 16 months, no discovery had been processed or produced by the government. It still remains an uncertainty of how much additional time will be needed to process, review and analyze the discovery and when a realistic trial date can be set. Simply stated, Faulkner cannot prepare a defense for trial if the government has not produced the discovery to Faulkner for review. Usually, once a case is filed, the government provides the discovery for the defendant and defense attorney to review. In this case, months have passed before the government started to process and produce discovery, though it secured evidence and proceeded to prosecution.

3. The complexity of the case.

There is no doubt that this case is complex based on the voluminous discovery and number of counts in the indictment. The district court declared the case complex. (Doc.81, Order Declaring Case Complex). The district court cites *Simpson*, 2010 WL 3283053, at *3(quoting *Standford*, 722 F.Supp.2d 803,810) for the proposition that “When the complexity of a case is a reason for the length of detention, the detention continues to be regulatory in nature rather than penal.” Though true, Faulkner asserts that he had already been detained for nearly 12 months before the case was declared complex¹, and prior to the government beginning to process the discovery for defense review. During this time, when plea negotiations were ongoing, the government still had not processed the discovery. Accordingly, Faulkner sat detained for nearly a year without being provided discovery by the government.

4. Whether the strategy of one side or the other occasions the delay.

The government's delay in processing and producing discovery weighs heavily in favor of finding a due process violation. (Doc. 90, Mot. to Reconsider, 8-9). The government responded that this delay was due to Faulkner's plea-related conduct. (Doc. 92, Gov't's Resp., 17-18). The district court agreed with the government that there was no strategic decision on the government's part that occasioned the delay, and that Faulkner agreed to the delays that had occurred. (Doc. 95, Memorandum Opinion and Order, 16). Yet, Faulkner mainly agreed to waiving the time for securing an indictment and also the right of a speedy trial. The prosecutorial delay that Faulkner argues about is the year delay in the government's lack of processing and producing the discovery in its possession which also requires an extended period of time for Faulkner to review and prepare for trial. Perhaps the government's strategic reason was to save itself the time and resources by not processing and producing the discovery Faulkner was entitled to after being arrested and charged with federal criminal offenses. If so, that should not be a sufficient strategy when it comes to Faulkner's due process rights.

Faulkner's case is distinguishable from *Standford* because the delay in trial, removal from the trial docket, and the extension of Faulkner's detention is because the government failed to timely produce discovery to allow Faulkner to prepare his defense. The government's failure to produce discovery for over 16 months is not the fault of Faulkner, yet Faulkner's pretrial detention is exacerbated by the significant prosecutorial lack of due diligence and delay. *See United States v. Chen*, 820 F.Supp. 1205, 1210 (N.D. Cal 1992). Faulkner is not the source of the delay for the government's lack of providing discovery in his case.

The government's failure to timely produce discovery weighs heavily in favor of finding that Faulkner's rights to due process have been violated and such violation continues everyday he sits

¹ Faulkner was arrested 6/18/2018 (Doc. 20) and on 7/16/2019 case declared complex (Doc. 81).

detained. *United States v. Gonzales Claudio*, 806 F.2d 334, 342 (2d 1986) (defendants facing potential pretrial detention of 22 months and the court noted that prosecutorial delay – *including the government's delay in disclosing the existence of certain evidence* – was “significant enough to add considerable weight to the defendant’s claim that the duration of detention had exceeded constitutional limits.”)(emphasis added).

The government has had the discovery in its possession since after the execution of the search warrant in April 2016, but did not begin producing it to the defense until October 2019. *See Gonzales Claudio*, 806 F.2d at 342 (noting the government’s responsibility in delay).² In Faulkner’s case, the district court found that there was no strategic decision on the Government’s part that is responsible for the delay. (Doc.95, Memorandum Opinion and Order, 16). However, such a finding should not be made an excuse for the government to not timely process and produce discovery which results in Faulkner’s prolonged pretrial detention. As the *Briggs* Court stated:

We caution, however, that the difficulties faced by the prosecution in a large and complex case do not justify the indefinite detention of the defendants. The realities of limited resources and the interests of efficiency may lead us to uphold exercises of prosecutorial discretion, but they do not suffice to excuse failures of prosecutorial diligence. When the government decides to prosecute a case of considerable complexity and scope, it must still pursue that case with promptness and energy. Due process does not slumber because cases are complex.

United States v. Briggs, 697 F.3d 98, 103 (2d Cir. 2012), as amended (Oct. 9, 2012).

² “Examining the Government’s share of responsibility for the pretrial delay, we note the following undisputed circumstances. The wiretapping was conducted over a two-year period from September 1983 until defendants’ arrest on August 30, 1985. The Government began providing the defendants certified translations of audiotapes in December 1985, and the translation task was not completed until May 1986, nine months after the defendants were arrested and incarcerated. The translation of the seized documents, a task that could have begun at the time of the seizures on August 30, 1985, had not been completed within one year after detention began and has only recently been accomplished. The *existence* of the videotapes was not disclosed to the defendants until June 1986, ten months after detention began. Obviously some interval of time is required for the defendants and their counsel to examine these materials, both for trial preparation and for making challenges to the admissibility of such materials.” *United States v. Gonzales Claudio*, 806 F.2d 334, 341–42 (2d Cir. 1986).

**Fundamental Fairness, the Due Process Clause
And an Individual's Deprivation of Liberty**

[We] recognize that the release of these defendants upon reasonable conditions creates a risk that they may flee. We are not indifferent to that prospect. But the enforcement of all constitutional restraints upon government in its efforts to administer the criminal law entails risks. Occasionally such enforcement creates the risk that a person convicted of crime may escape punishment. In this case the enforcement of due process limits upon the duration of preventive detention creates the risk that a person accused of crime may avoid a trial that might result in conviction and punishment. That risk is serious, but of at least equal gravity is the preventive detention for fourteen months of defendants who are presumed innocent and whose trial to determine guilt or innocence will not even begin until detention has lasted eighteen months. In mandating fundamental fairness, the Due Process Clause endeavors to set outer limits at which risks to society must be accepted to avoid unconscionable deprivations of the liberty of individuals.

United States v. Gonzales Claudio, 806 F.2d 334, 343 (2d Cir. 1986).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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