No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

PEDRO HERNANDEZ,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the Ninth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Did the district court prejudicially err denying petitioner's motion to dismiss based on Sixth Amendment violations?

Parties to the Proceeding

The parties to the proceedings in the Ninth Circuit Court of Appeal were the United States of America and petitioner Pedro Hernandez. There were no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Pedro Hernandez, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeal filed on July 30, 2020.

Opinions and Orders Below

The original opinion of the Ninth Circuit Court of Appeal affirming petitioner's conviction is attached hereto as Appendix A.

Jurisdiction

The decision of the Ninth Circuit Court of Appeal sought to be reviewed was filed on July 30, 2020. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 131.1. This Court has jurisdiction to review under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law ...."

Statement of the Case

Petitioner was convicted of conspiracy to distribute methamphetamine and cocaine base, in violation of 21 U.S.C. § 846; dealing firearms without a license, in violation of 18 U.S.C. §922(a)(1)(A); distribution of methamphetamine, heroin, and cocaine base, in violation of 21 U.S.C. §§ 841 (a)(1), (b)(1)(B)(viii), (b)(1)(B)(iii), and (b)(1)(C); and aiding and abetting, in violation of 18 U.S.C. § 2(a). (see Appendix A.)

On appeal, petitioner contended that the district court prejudicially erred when it denied his motion to dismiss based on Sixth Amendment violations. (U.S. Const., Amends. VI, XIV). (Appendix A pp. 2-9.)

The Ninth Circuit Court of Appeal disagreed and affirmed the conviction, contradicting this Court's precedent and decision from most other circuits. (Appendix A.)

Reasons for Granting the Writ

This Court Should Allow The Writ In Order To Decide An Important Question Of Law And To Resolve The Conflict In The Federal Circuit Courts of Appeals On This Issue.

A. The Ninth Circuit erred in upholding the District Court's denial of Petitioner's motion to dismiss for a speedy trial violation under the Sixth and Fourteenth Amendments because the government's admitted negligence in causing the delay was presumptively prejudicial.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Sixth Amendment speedy trial right attaches after a defendant is "indicted, arrested, or otherwise officially accused," whichever comes first. *United States v. MacDonald*, 456 U.S. 1, 6 (1982). The concerns underlying the Sixth Amendment speedy trial guarantee include prejudice to the defendant's ability to defend his case, "oppressive pretrial incarceration" and "anxiety and concern of the accused." *Doggett v. United States*, 505 U.S. 647, 654 (1994). However, even when a defendant is neither arrested, nor aware of his indictment, as in *Doggett* and as is the case here, the Speedy Trial Clause still protects a criminal defendant's interest in fair adjudication.

Id. at 505 U.S. at 654 (rejecting the government's suggestion that the Speedy Trial Clause does not significantly protect the interest in fair adjudication under such circumstances). Courts assess a claimed violation of the Sixth Amendment speedy trial right by applying a balancing test involving four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). These factors are related and "must be considered together with such other circumstances as may be relevant." *Id*. at 533 (emphasis added). This approach requires an "ad hoc" balancing of factors," *id*. at 530, where none of the four factors is either necessary or sufficient to support a finding that a defendant's speedy trial right has been violated, *id*. at 533.

Here, the Circuit Court wrongfully affirmed the decision of the District Court. Indeed, while the District Court's ruling identifies the relevant factors and case law, it lacks any detailed analysis of how those factors and laws applied to the facts specific to this case. Considering these factors together, the record in this case not only established an

egregious delay caused by the government's negligence, it established the government conceded such negligence after petitioner asserted his speedy trial rights. This delay was presumptively prejudicial. Yet, assuming arguendo petitioner must establish prejudice, he did so here. Thus, the motion to dismiss should have been granted.

(a) Length of Delay

"The length of the delay, is to some extent a triggering mechanism." *Barker*, 407 U.S. at 530. For speedy trial claims, like the one here, the length of the "delay is measured from 'the time of the indictment to the time of trial.'" *United States v. Gregory*, 322 F.3d 1157, 1162 (9th Cir.2003) (citation omitted). Courts have generally found delay to be "'presumptively prejudicial' at least as it approaches one year.'" *Doggett*, 505 U.S. at 652 n.1 (citation omitted). However, there is no uniformity among the Circuit Courts as to what length of delay is presumptively prejudicial and what length of delay is necessary to trigger the necessary analysis under *Barker*.

For instance, the Third Circuit found that a length of delay of 14 months is sufficient to trigger the *Barker* analysis. *United States v. Velazquez* (3d Cir. 2014) 749 F.3d 161, 174. More importantly, the

Third Circuit found that once that threshold has been passed, "the state, not the prisoner, bears the burden to justify the delay," *Hakeem v. Beyer,* 990 F.2d 750, 770 (3d Cir. 1993). Like the Third Circuit, the Fourth Circuit and Eleventh Circuit also view a delay of one year as enough to satisfy the *Barker* analysis. *United States v. Ingram,* 446 F.3d 1332, 1336 (11th Cir. 2006); *United States v. Clark,* 83 F.3d 1350, 1352 (11th Cir. 1996) Alternatively, the D.C. Circuit found a delay of 6 months may trigger the *Barker* analysis. *Mitchell v. United States* (D.D.C. 2012) 841 F. Supp. 2d 322, 328-29. In fact, that Circuit found "a delay of over six months in bringing a case to trial warrants inquiry and justification[.]" *United States v. Goss,*646 F.Supp.2d 137, 141 (D.D.C.2009) (citing *United States v. Lara,*520 F.2d 460, 464 (D.C.Cir.1975)). "[A]nd a one-year delay is generally considered 'presumptively prejudicial,' " triggering an analysis of the remaining *Barker* factors. *Id.* (citing *Doggett v. United States,*505 U.S. 647, 651–52, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). The First Circuit, on the other hand, generally views a delay of one

year as a trigger. *United States v. Irizarry-Colón* (1st Cir. 2017) 848 F.3d 61, 67-68.

Here, the delay admittedly caused by the government should have removed the necessity for petitioner to prove prejudice. However, the Ninth Circuit failed to reverse the judgment of the District Court and instead upheld the decision that petitioner's speedy trial rights were not violated. This warrants review.

Significantly, here petitioner was indicted back on July 3, 2013. He was residing in Colorado at the time and later booked into a Colorado jail on unrelated state charges. The FBI placed a hold and detainer on petitioner while he was in custody in Colorado on December 9, 2014 yet then negligently released that hold permitting petitioner to be released from the local jail and causing petitioner to believe he was no longer needed nor wanted by the federal government. (ER I; pgs. 51-65) Petitioner was not arrested on this case until February 2017, nearly 38 months after the Indictment. The delay that ensued between his indictment and his trial was "presumptively prejudicial" -- indeed, nearly four times the baseline length of time

deemed to be so -- and was thus sufficient to trigger inquiry into the following three factors.

(b) Reason for Delay

Here, the government admitted its negligence caused a significant portion of the pretrial delay. Nevertheless, petitioner discusses alternative reasons and their import to a speedy trial claim. Indeed, reasons for delay fall along a continuum from inevitable and justifiable delay, like delays caused by the need for the government to "collect witnesses against the accused, oppose his pretrial motions, or if he goes into hiding, track him down," *Doggett*, 505 U.S. at 656; see also *Barker*, 407 U.S. at 533-34 (noting that the illness of a key prosecution witness was a "strong excuse" for delay), to intentional, bad faith delay intended to gain a tactical advantage at trial, *Doggett*, 505 U.S. at 656; see also *Barker*, 407 U.S. at 531. Negligent delay "falls on the wrong side of the divide between acceptable and unacceptable reasons." *Doggett*, 505 U.S. at 657. The government has the primary responsibility for bringing defendants to trial. Here, the government failed to do so in reasonable time. If the defendant is not attempting to

avoid detection and the government makes no serious effort to find him, the government is considered negligent in its pursuit. See *Doggett*, 505 U.S. at 653. The government is negligent in pursuing a defendant where it makes no effort to contact the defendant once he has been indicted, and only places a warrant in a law enforcement database. See *U.S. v. Mendoza*, 530 F.3d 758 (9th Cir. 2008); see also *Rashad v. Walsh*, 300 F.3d 27, 37 (1st Cir. 2000) (noting that authorities' failure to lodge detainer was negligent and cut in favor of petitioner's speedy trial claim).

For example, in *Mendoza*, the agent in charge of Mendoza's investigation made no effort to contact him to inform him that he had been indicted. Mendoza himself had left the country and had declined to leave his contact number, but the government had Mendoza's wife's telephone number and the telephone number of Mendoza's relatives in the Philippines. Rather than attempting to inform Mendoza that he had been indicted through those avenues, the government simply put a warrant out on the law enforcement database so that Mendoza would be detained when he returned to the United States. In holding that the

delay between the government's indictment and its arrest of Mendoza had been caused by the government's negligence, the court reasoned:

> Even though Mendoza left the country prior to his indictment, the government still had an obligation to attempt to find him and bring him to trial. After Doggett, the government was required to make some effort to notify Mendoza of the indictment, or otherwise continue to actively attempt to bring him to trial, or else risk that Mendoza would remain abroad while the constitutional speedy-trial clock ticked. However, the government made no serious effort to do so. . .And it was not Mendoza's responsibility to contact the government during the investigation.
> *Id*. at 763.

Here, the government was admittedly negligent and, contrary to the District Court's finding, that negligence caused the entirety of the delay. During the hearing on petitioner's motion to dismiss, the government attempted to place blame on him for his failure to appear in court on the indictment. This attempt failed. It is true that petitioner was indicted in 2013. However, nothing in the record established petitioner knew of this indictment. It is not petitioner's responsibility to keep himself updated on the status of the government's investigation. The government appears to believe petitioner held some responsibility for failing to appear on this indictment despite the fact that government

can point to no evidence to suggest petitioner actually knew he had been indicted. Instead, the record established petitioner moved away from his home in Orange County several months prior to the filing of this indictment and was living in Colorado. He was gainfully employed in Colorado working at the Dairy. (ER I: pgs. 51-65, also see PSR) Nothing proved petitioner was living under an alias as the government claimed. The government actually had a detainer hold on Petitioner when he was in the custody of the Yuma County Sheriff in December 9, 2014 and then negligently released that hold. Petitioner was never served with a copy of the Indictment, or even informed of the charges and told to go to the Central District of California to address this case. Thus, petitioner reasonably believed the Government no longer wanted him. He went about his life, on probation, in Colorado. See *Doggett*, 505 U.S. at 648-650 (holding that delay was caused by government's negligence where defendant returned to the United States, got married, earned a college degree, found a steady job, lived openly under his own name, and stayed within the law). Under these circumstances, the

excessive delay in bringing petitioner to trial was caused by the government's admitted negligence.

Significant to this case, the evidence admitted by the government failed to support their claim that petitioner caused the delay by "living in a remote part of Colorado under an alias." (ER I: pgs. 32-50). The government claims that Exhibit D, as attached to their opposition to petitioner's motion to dismiss, proved this fact. This is simply not true. Exhibit D, as discussed above, is a report generated by Boykins indicating that petitioner was arrested in December of 2014 for state charges. (ER I; pgs. 47-48.) It does NOT state that petitioner was living under an alias. Nor does it provide the location of petitioner's Colorado arrest. This report simply states that Boykins was advised of petitioner's arrest. It lacks any information as to the facts behind the state allegations. It lacks any information as to where or how petitioner was living or apprehended in Colorado. Instead, this report actually proved the government's negligence in lifting the hold it originally placed on petitioner during his incarceration on the state case. (ER I: pgs. 47-48.) Here, the government asserted as facts information it

could not and did not prove. In fact, it appears the government misrepresented the information contained in exhibit D.

Finally, and of utmost significance to this case, the District Court erroneously found as true that "[petitioner] was living under a fake name in a remote area of another state." (ER I: pgs. 1-2.) The District Court appears to adopt as fact that which the government asserted but could not and did not prove. Again, while it is true that the government claimed that petitioner living under an alias was the cause of part of the delay in this case, nothing in the record supported that claim. The government presented no evidence to establish this claim to be true. Instead, the government attached exhibits to its opposition to petitioner's motion to dismiss that claimed petitioner was arrested in Colorado for various fraud charges. Once again, these exhibits lacked any information surrounding the details of petitioner's arrest. The location of his arrest is unknown. The circumstances surrounding his arrest are unknown. Thus, the government presented Boykins' recitation of the state allegations for which petitioner was arrested as if

the allegations proved true that petitioner lived under an alias. Yet, nothing in the record supports this claim.

In fact, the government presented no information regarding these Colorado laws or the likely myriad of circumstances and acts that could lead one to be accused of such crimes. Instead, the government assumed petitioner was living under an alias due to the fraud allegations. Assumptions are not facts. Nor are they evidence. The government failed to present any evidence to identify the theory under which petitioner was arrested in Colorado. Nor did the government present any evidence establishing to which charges petitioner pleaded guilty or suffered convictions. The government failed to identify any factual basis for petitioner's conviction(s). Instead, the government elected to believe these allegations alone meant petitioner lived under an alias when the very documents the government attached as exhibits tend to suggest otherwise. The booking information form from the Colorado jail says petitioner worked at the Dairy. Nothing says he worked under a different name at this Dairy. Claiming petitioner lived

in a remote area of Colorado under an alias simply has no basis in the record.

More importantly, the PSR indicates that on June 1, 2015, in Colorado, petitioner was sentenced to probation and 180 days in the county jail for his guilty plea to a single count of Possession of a Forged Instrument. (see PSR) Clearly, this information was readily available to the government before they filed their opposition to petitioner's motion to dismiss over two years after this conviction on June 28, 2017. Yet, this information- the accurate information- surrounding petitioner's Colorado case was left out of the government's opposition. The government instead chose to rely on brief summaries of reports drafted by agents two years after they mistakenly lifted their hold on petitioner. (ER I: pgs. 41-50.) Had the government presented accurate information regarding petitioner's time in Colorado and accurate information regarding petitioner's criminal case in Colorado, the outcome of this motion may have been decidedly different. Instead, the District Court accepted the government's erroneous statements as true. This was in error. This error lead to the wrongful denial of

petitioner's motion to dismiss. Review is required to establish uniformity among the circuits as to how to analyze and examine post indictment delays caused by the government's admitted negligence.

(c) Assertion of Speedy Trial Right

Petitioner asserted his Sixth Amendment speedy trial rights by moving to dismiss the indictment on speedy trial grounds. This does not appear to be in dispute. The Supreme Court has weighed this factor in favor of the defendant where the evidence indicated that he was not aware of his indictment until his arrest, and when, like here, he asserted his right by moving to dismiss this indictment on speedy trial grounds. See *Doggett*, 505 U.S. at 653. Where a defendant asserted his right to a speedy trial only after he had asked for eight continuances, including one request after objecting to a continuance sought by the government, this Court found that this factor weighed "neither in favor of dismissal nor in favor of the government." See *Corona-Verbara*, 509 F.3d at 1116.

Based on the foregoing, the undisputed fact that petitioner asserted his speedy trial rights contributed to the District Court's error

in denying petitioner's motion to dismiss. As in *Doggett*, and *Mendoza*, petitioner was not aware the Government was looking for him or still wanted him to answer for the pending charges because they released the hold. Nothing in the record indicates petitioner was informed of any specific charges while in custody in Colorado. Again, significant to this case, petitioner sought only one continuance before seeking a dismissal for a Sixth Amendment violation and that continuance was essential to investigate the facts concerning the Government's lack of due diligence.

(d) Prejudice to Petitioner

Petitioner maintains he need not show prejudice because the government's negligence resulting in the delay was presumptively prejudicial. However, assuming arguendo, petitioner must establish he suffered prejudice, he did so here. Notably, while prejudice is necessary to a Fifth Amendment due process claim, it is not a requirement for a Sixth Amendment speedy trial claim. See *Moore v. Arizona*, 414 U.S. 25, 26 (1973); *Barker*, 407 U.S. at 533. Rather, it is merely a factor to be considered. Further, while prejudice to the

defendant's ability to defend at trial is the sole consideration in the due process context, in the Sixth Amendment context, courts also look to the other interests which the speedy trial right was designed to protect, more broadly. See *Barker*, 407 U.S. at 532.

Courts have held that delay may be so lengthy that it "presumptively comprises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. 655. In *Doggett*, where the defendant was neither arrested nor aware of his indictment, the Court held that the eight and a half year delay was "presumptively prejudicial" in a way qualitatively different than the initial one-year period of "presumptively prejudicial" delay that triggers a Sixth Amendment speedy trial inquiry. There, the excessively long delay was considered, without any specific showing of any form of prejudice, to satisfy the fourth *Barker* factor.

Likewise, in *Mendoza*, this Ninth Circuit recognized that the prejudice factor is "the most difficult to prove because time's erosion of exculpatory evidence and testimony can rarely be shown," and echoed *Doggett's* pronouncement that excessive delays can

"compromise[ ] the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id*. at 655. Due to these concerns, the court held, "no showing of prejudice is required when the delay is great and attributable to the government." See *id*. (citations omitted). Instead, prejudice is presumed, and "[t]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.* The court went on to find that, because the government had failed to pursue Mendoza with "due diligence," but had simply placed the warrant in the law enforcement database, the eight-year delay between Mendoza's arrest and indictment gave rise to a strong presumption that Mendoza suffered prejudice. See *id*. (citing *Doggett* for the proposition that the absence of particularized trial prejudice "has not, and probably could not have, affirmatively proved that the delay left [the defendant's] ability to defend himself unimpaired").

So too here. This delay was "great and attributable to the government," thereby excusing petitioner from showing actual prejudice. *United States v. Gregory*, 322 F.3d 1157, 1163 (9th Cir. 2003). Indeed, the government admittedly caused a significant part of

the delay in this case. Nevertheless, assuming arguendo, petitioner must establish actual prejudice, he has done so here. Traditionally, actual prejudice can be shown in three ways: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired. *Doggett,* 112 S.Ct. at 2692. Petitioner here not only suffered oppressive pretrial incarceration, the delay did cause anxiety and concern, and it impaired his defense.

Significantly, the government's admitted negligence in mistakenly lifting the hold on petitioner while he was incarcerated in Colorado caused petitioner to serve additional time in custody- time for which he could have and should have received credit for in this case. Specifically, in December of 2014, the government placed a hold on petitioner while petitioner was in custody in the Colorado jail. Had that hold remained, petitioner would have been transferred, in custody, from Colorado to California to face the allegations in this case. Petitioner would have been earning custody credits the entire time. These credits would have been awarded toward the sentence imposed in this case. However, because of the government's admitted negligence in

mistakenly lifting that hold, petitioner failed to receive such credits. Thus, petitioner suffered actual prejudice because he is now serving additional time in custody due to the government's negligence.

Moreover, this negligence prejudiced petitioner by causing anxiety and concern. Petitioner established that he believed he the federal government was no longer interested in his appearance since they lifted the hold on him while he was in state custody. (ER I: pgs. 51-65). Petitioner thus went about his life in Colorado, unaware of the charges filed against him in federal court and unaware that the federal government was still seeking his appearance. Then, over one year in to his state probation, petitioner was arrested on this federal warrant, for reasons unknown to him. *Ibid.* Petitioner's undisputed disability, Major Neurocognitive Disorder, likely exacerbated this anxiety and concern since, once incarcerated, he was unable to read any documents provided to him or write to anyone seeking information. (see PSR) It was not until he was able to speak to his appointed attorney that petitioner was afforded the opportunity to hopefully understand what was happening.

Finally, the passage of time, a period of almost three years and seven months from the date of the Indictment, has unquestionably affected the memory of petitioner and the agents who were present during the December 6, 2006 encounter that produced the three counts in the instant Indictment. Thus, Petitioner has, unquestionably, lost the opportunity to question these officers close to the time of the operative events, rather than three years and seven months later, and therefore, to build his defense around an investigation and development of the facts that occurred contemporaneously, or roughly so, with the time of the event. Beyond that indisputable fact, as the courts recognized in *Doggett* and *Mendoza*, it will be difficult for Petitioner ever to articulate the particularized effect the passage of time has had on his ability to develop the facts and present his defense, more broadly. What is clear, however, is that the delay that transpired between petitioner's indictment and his trial is an excessive delay in the context of the government's negligence, and in particular, the government's ready access to contact him when he was detained in Colorado and then released. In this setting, the delay is plainly accountable to the

government, and thus, presumptively prejudicial to petitioner. Thus, like the other three factors, this fourth *Barker* factor, mandated dismissal of the indictment. Again, review is necessary in order to create uniformity among the circuits as to how to analyze this issue.

In light of the above, petitioner urges that this writ should be allowed so that this Court can decide the very important question of law regarding the Sixth Amendment to the United States Constitution.

For all of the above reasons, petitioner respectfully requests the writ be allowed.

Dated: October 21, 2020

Respectfully submitted,

/s/ Karren Kenney

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