No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS CONNER,

Petitioner,

v.

INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to resolve the conflict in the federal and state courts over recognizing that lengthy pretrial incarceration, without provable impairment of the trial defense, can be sufficient to weigh the prejudice factor in the accused's favor under the Sixth Amendment speedy trial balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption to the case on the cover page.

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner states that there are no proceedings in any state or federal trial or appellate court, including proceedings in this Court, that are directly related to the case in this Court.

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Petitioner Marcus Conner respectfully petitions for a writ of certiorari to review the decision of the Indiana Court of Appeals below.

OPINIONS BELOW

The decision of the Indiana Court of Appeals, App., *infra*, 3a–13a, is unpublished and reported as *Conner v. State*, 2020 Ind. App. Unpub. LEXIS 458 (Ind. Ct. App. April 8, 2020) (*mem.*), *reh'g denied, trans. denied*. The Indiana Supreme Court's order denying transfer, App., *infra*, 2a, is unpublished and reported at 153 N.E.3d 1108 (Ind. September 24, 2020) (Table).

JURISDICTION

The Indiana Court of Appeals issued its decision and judgment on April 8, 2020. App., *infra*, 3a-13a. Petitioner timely sought review of that judgment by the Indiana Supreme Court, which that court denied on September 24, 2020. App., *infra*, 2a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

INTRODUCTION

The Sixth Amendment guarantees "the accused shall enjoy the right to a speedy trial" because "a presumptively innocent person should not languish under an unresolved charge." *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016). But the Petitioner in this case languished in the Elkhart County Jail under an unresolved charge of dealing 2.4 grams of cocaine for 34 months.

In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court established a four-factor balancing test for determining whether an accused's Sixth Amendment right to a speedy trial has been violated. This test weighs the length of the delay, the reasons for the delay, the accused's assertion of his right, and prejudice to the accused. *Id.* at 530. According to *Barker*, prejudice to the accused is assessed in light of the interests "which the speedy trial right was designed to protect. . . .: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. The *Barker* test has been reaffirmed often by this Court, most recently in *Vermont v. Brillon*, 556 U.S. 81, 90 (2009).

Although *Barker* said defense impairment was the "most serious" of the three types of speedy trial prejudice, 407 U.S. at 532, many courts have misinterpreted this to mean it is the *only* prejudice worth considering. The Indiana Court of Appeals is one of those courts. Petitioner was held in jail for 1,034 days after he was arrested, waiting nearly three years behind bars for his trial. The Court of Appeals found that each of the first three *Barker* factors were in his favor. App., *infra*, 11a.

But the Court of Appeals rejected Petitioner's claim that his speedy trial rights were violated, weighing the prejudice factor "heavily in favor of the State" because he asserted no prejudice beyond the fact of his 34 months of pretrial incarceration. *Id.*

This Court has repeatedly indicated the accused may be prejudiced, and his speedy-trial rights violated, without evidence of trial impairment. *See e.g., United States v. Marion*, 404 U.S. 307, 320 (1971) ("[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."); *Moore v. Arizona*, 414 U.S. 25, 26–27 (1973) ("[P]rejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings."); *United States v. McDonald*, 456 U.S. 1, 8 (1982) (speedy trial right is "not primarily intended to prevent prejudice to the defense caused by passage of time," but to "minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."); *Doggett v. United States*, 505 U.S. 647, 655 (1992) ("consideration of prejudice is not limited to the specifically demonstrable").

This case presents an important question about the "prejudice" prong of *Barker*'s four-part balancing test. Despite *Barker* and its progeny, the lower courts are in conflict over whether pretrial incarceration alone should be recognized as speedy-trial prejudice. *Compare, e.g., United States v. Oriedo*, 498 F.3d 593, 600–01 (7th Cir. 2007) ("three years of pretrial confinement no doubt created some of this sort of

[*Barker*] prejudice"), *and Maples v. Stegall*, 427 F.3d 1020, 1031–32 (6th Cir. 2005) (17 months of pretrial incarceration "harmed his liberty interest" under *Barker*), *with United States v. Frye*, 489 F.3d 201, 213 (5th Cir. 2007) ("Frye cannot establish that [47 months of] pretrial incarceration created prejudice") *and United States v. Margheim*, 770 F.3d 1312, 1329–31 (10th Cir. 2014) (recognizing 22 months of pretrial incarceration as "well-established type of prejudice that a defendant may rely upon in making a Sixth Amendment speedy trial claim," but weighing *Barker* prejudice factor against accused because he could not demonstrate impairment of his defense).

STATEMENT OF THE CASE

A. Background through Petitioner's First Direct Appeal

Petitioner was arrested on September 19, 2012. After five days in jail he was charged with three counts of dealing in cocaine and appointed a public defender. Ten months later and still in the county jail, Petitioner became frustrated with the lack of progress in getting his case resolved.

Beginning on July 22, 2013, Petitioner sent a series of five *pro se* letters and motions from his jail cell to the trial court complaining about the delay in bringing him to trial. The court refused to acknowledge his concerns because he was represented by counsel. On February 26, 2015, Petitioner's public defender filed a motion for discharge based on the delay, which was then approaching two and one-half years. The motion for discharge relied only on Indiana's procedural rules for early trial; it said nothing about Petitioner's Sixth Amendment speedy-trial rights. The trial court denied the motion and Petitioner remained in jail until his trial began on July 20, 2015. After evidence was presented that Petitioner sold a total of 2.4 grams of cocaine in three controlled buys, he was convicted and sentenced to a term of years.

Petitioner argued on direct appeal that he was entitled to be discharged because his speedy-trial rights guaranteed by the United States and Indiana constitutions were violated. The Indiana Court of Appeals acknowledged that the nearly three-year delay in bringing Petitioner to trial was "extraordinarily–and disconcertingly–long." *Conner v. State*, 2016 Ind. App. Unpub. LEXIS 804 (Ind. Ct. App. July 13,

2016) (*mem.*); App., *infra*, 20a. But the court found Petitioner's constitutional speedy-trial claims had been forfeited because they were never raised in the trial court. *Id.* at 21a.

B. State Post-Conviction Proceedings

Petitioner alleged in a state post-conviction action that his trial counsel were ineffective for failing to assert and preserve his constitutional speedy-trial rights. They had no explanation for failing to raise Petitioner's speedy-trial rights under the federal and state constitutions, although one speculated it might have been because no evidence was lost during the delay. The post-conviction trial court recognized that Petitioner was prejudiced by his pretrial incarceration, but concluded he was not denied his constitutional speedy-trial rights.

On post-conviction appeal, the Indiana Court of Appeals purported to apply *Barker*'s four-part balancing test. *Conner v. State*, 2020 Ind. App. Unpub. LEXIS 458 (Ind. Ct. App. April 8, 2020) (*mem.*), *reh'g denied, trans. denied*; App., *infra*, 3a-13a. The court held each of the first three *Barker* factors (length of delay, reasons for delay, the accused's assertion of the right) weighed in Petitioner's favor. App., *infra*, 11a. But the court said the fourth factor—prejudice to the accused—weighed "heavily in favor of the State" because Petitioner "puts forth no assertion of prejudice beyond the fact of his incarceration" of 1,034 days. *Id.* The court held this "lack of prejudice" outweighed the other three *Barker* factors and concluded that Petitioner's constitutional speedy-trial rights were not violated. *Id.* A divided

Indiana Supreme Court denied discretionary review by a vote of 3-2. App., *infra.*, 2a.

REASON FOR GRANTING THE PETITION

The Court Should Grant Certiorari to Resolve the Conflict in the Lower Courts Over Whether Lengthy Pretrial Incarceration, without Provable Defense Impairment, May Suffice to Establish Prejudice to an Accused's Speedy Trial Rights.

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Barker v. Wingo, 407 U.S. 514, 532 (1972).

Both before and after *Barker*, this Court has recognized that the primary purpose of the Sixth Amendment Speedy Trial Clause is to prevent extended incarceration of a person presumed to be innocent. Under this Court's precedents, pretrial incarceration alone is a form of speedy trial prejudice. Yet many lower courts have minimized and even ignored pretrial incarceration in evaluating prejudice to the accused when applying the *Barker* balancing test.

A. The Speedy Trial Clause was designed to protect the liberty rights of every person accused of a crime.

Over fifty years ago, this Court first declared the Sixth Amendment's speedy-trial guarantee to be "an important safeguard to prevent undue and oppressive incarceration prior to trial," as well as to minimize anxiety and limit impairment of an accused's ability to defend himself. *United States v. Ewell*, 383 U.S. 116, 120

(1966). The Speedy Trial Clause protects accused persons against "prolonged detention without trial." *Klopfer v. North Carolina*, 386 U.S. 213, 224 (1967). This Court later clarified that, while delay between arrest and trial may impair a defendant's ability to present an effective defense,

> . . . the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Marion, 404 U.S. at 320. In 1972, this Court set out the criteria by which to determine whether the Sixth Amendment's speedy-trial right has been violated: balancing the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Barker*, 407 U.S. at 530.

Barker recognized that lengthy pretrial incarceration of the accused in a local jail "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." *Id.* at 520 (footnote omitted).

> We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.

Id. at 532–33 (footnotes omitted). There was no impairment of Barker's defense. *Id.* at 534. Yet his ten months in jail and living over four years under a cloud of suspicion prejudiced him. *Id.* Although this Court ultimately denied relief to Barker, it did not find a "lack of prejudice" or weigh the prejudice factor "heavily in favor of the State," as the Indiana Court of Appeals did below in Petitioner's case. See App., *infra*, 11a. The concurring opinion in *Barker* reiterated that delay may seriously interfere with the accused's liberty "wholly aside from possible prejudice to a defense on the merits." 407 U.S. at 537 (White, J., and Brennan, J., concurring).

B. The federal courts are divided over whether pretrial incarceration of the accused must be recognized as speedy-trial prejudice.

There is a conflict among the federal courts on whether pretrial incarceration approaching 34 months, as suffered by Petitioner here, must be recognized as prejudice to the accused under the *Barker* balancing test.

1. *Federal courts recognizing pretrial incarceration as* Barker *prejudice—The Second, Sixth, and Seventh Circuits*

In the Sixth Circuit, pretrial incarceration of ten months or more has been consistently held to constitute recognizable speedy-trial prejudice. "We find that the appellee was prejudiced by the delay. The 10-month pretrial incarceration was oppressive and constituted prejudice." *Redd v. Sowders*, 809 F.2d 1266, 1272 (6th Cir. 1987) (citing *Barker*). *See also Maples v. Stegall*, 427 F.3d 1020, 1031–32 (6th Cir. 2005) (petitioner suffered *Barker* prejudice because pretrial incarceration totaling 17 months "harmed his liberty interest"); *Cain v. Smith*, 686 F.2d 374, 385 (6th Cir. 1982) (under *Barker*, pretrial incarceration for over 11 months recognized

as "paradigm example of the personal prejudice the right a speedy trial is designed to prevent"); *Cobb v. Aytch*, 643 F.2d 946, 958 (3rd Cir. 1981) ("[T]he Sixth Amendment's speedy trial clause, which was derived from the most ancient guarantees of fundamental rights, prevents lengthy periods of detention that unnecessarily interfere with those liberty interests enjoyed by the accused.").

The Seventh Circuit has acknowledged this Court's "repeated . . . admonish[ments]" that prejudice in the presentation of a defense is not the only kind of prejudice that an accused may demonstrate in support of a speedy-trial claim. *United States v. Oriedo*, 498 F.3d 593, 600 (7th Cir. 2007). *Oriedo* notes that time spent in jail awaiting trial "seriously interfere[s] with the defendant's liberty" and "has a detrimental impact on the individual." *Id.* at 600–01 (quoting *Marion*, 404 at 320, and *Barker*, 407 U.S. at 532–33). *Oriedo* concluded that "three years of pretrial confinement no doubt created some of this sort of prejudice." 498 F.3d at 600–01. *See also United States v. White*, 443 F.3d 582, 591 (7th Cir. 2006) (9-month pretrial incarceration was "demonstrable prejudice," but relief not warranted in light of other *Barker* factors); *United States v. Bell*, 925 F.3d 362, 376 (7th Cir. 2019) (23-month pretrial incarceration "one consideration that weighs in his favor," but speedy trial claim rejected because delay primarily attributable to defense).

The Second Circuit has found that almost seven years of pretrial incarceration was "egregiously oppressive" and "amply demonstrate[d] prejudice." *United States v. Tigano*, 880 F.3d 602, 618 (2d Cir. 2018). "Nearly seven years of pretrial detention in local jails—before the defendant has been convicted of any crime—is precisely the

type of prejudice contemplated by the right to a speedy trial." *Id. See also United States v. Black*, 918 F.3d 243, 265 (2d Cir. 2019) ("sheer length of time at issue here [five years and eight months] makes this pretrial detention 'egregiously oppressive'" (quoting *Tigano*)).

2. *Federal courts ignoring pretrial incarceration as* Barker *prejudice—The First, Third, Fifth, Eighth, and Eleventh Circuits*

The Fifth Circuit has held pretrial incarceration of 47 months does not establish Sixth Amendment speedy-trial prejudice. *United States v. Frye*, 489 F.3d 201, 213 (5th Cir. 2007). This was based on the pronouncement—suspect in light of *this* Court's cases—that "lengthy pretrial incarceration does not inherently offend a defendant's liberty interest." *Id.* The *Frye* court relied on *Gray v. King*, 724 F.2d 1199, 1204 (5th Cir.1984), but the accused in *Gray* was incarcerated for only ten months and failed to contend that his pretrial incarceration was prejudicial under *Barker*.

The First Circuit denied a Sixth Amendment speedy-trial claim in *United States v. Casas*, 425 F.3d 23, 36 (1st Cir. 2005), holding the appellants "did not suffer prejudice of a constitutional dimension" resulting from 41 months of pretrial incarceration. *See also United States v. Worthy*, 772 F.3d 42, 49 (1st Cir. 2014) (27 months of pretrial incarceration was not "cognizable prejudice"); *United States v. Munoz-Amado*, 182 F.3d 57, 63 (1st Cir. 1999) (19 months of pretrial incarceration insufficient "by itself" to establish a "constitutional level of prejudice"); *United States v. Santiago-Becerril*, 130 F.3d 11, 23 (1st Cir. 1997) ("15 months of pretrial

incarceration by itself was insufficient to establish a constitutional level of prejudice").

The Eighth Circuit appeared to assign no *Barker* prejudice to pretrial incarceration of 17 months in *United States v. Shepard*, 462 F.3d 847, 864–65 (8th Cir. 2006). The defendant claimed this incarceration kept him from seeing his children and caused him anxiety. Although the court did not specifically identify how it weighed the prejudice factor, it noted anxiety "without concurrent prejudice to the defendant's ability to mount a defense is likely the weakest interest[.]" *Id.* at 465. *See also United States v. Williams*, 557 F.3d 943, 949–50 (8th Cir. 2009) (pretrial incarceration of over 400 days insufficient to show "particularized prejudice").

The Eleventh Circuit has held 15 months of pretrial incarceration was not enough to demonstrate *Barker* prejudice. *United States v. Dunn*, 345 F.3d 1285, 1296–97 (11th Cir. 2003). *See also United States v. Woodley*, 484 Fed. Appx. 310, 319–20 (11th Cir. 2012) (18 months of pretrial incarceration "insufficient to establish actual prejudice" under *Barker* test). *But see Wylie v. Wainwright*, 361 F. Supp. 914, 916–17 (S.D. Fla. 1973) (22 months of pretrial incarceration, including 11 months before being convicted in another case, held "a particularly oppressive period of incarceration").

The Third Circuit has held pretrial incarceration of 14 1/2 months does not by itself amount to recognizable Sixth Amendment speedy-trial prejudice. *Hakeem v. Boyer*, 990 F.2d 750, 760–62 (3rd Cir. 1993). *See also United States v. Villalobos*,

560 Fed. Appx. 122, 127 (3rd Cir. 2014) (holding 16 1/2 months of pretrial incarceration not "oppressive" enough to constitute *Barker* prejudice).

3. *Federal courts unclear on pretrial incarceration as* Barker *prejudice—The Ninth and Tenth Circuits*

The Tenth Circuit has sent mixed messages about lengthy pretrial incarceration as prejudice. On the one hand, it has recognized oppressive pretrial incarceration as the "second most important" of *Barker*'s three types of prejudice "([b]ecause the seriousness of a post-accusation delay worsens when the wait is accompanied by pretrial incarceration[.]" *Jackson v. Ray*, 390 F.3d 1254, 1264 (10th Cir. 2004). And in *United States v. Seltzer*, 595 F.3d 1170, 1179–80 (10th Cir. 2010), the court found that the government added to Seltzer's 24-month pretrial incarceration by maintaining a federal detainer instead of holding a detention hearing. "This type of prolonged pretrial incarceration is a well-established type of prejudice that a defendant may rely upon in making a Sixth Amendment speedy trial claim." *Id.* at 1180. But *United States v. Margheim*, 770 F.3d 1312, 1329–31 (10th Cir. 2014), held "the final *Barker* factor weighs against" the defendant, despite 22 months of pretrial incarceration, because he failed to demonstrate any impairment of his trial defense. *See also United States v. Toombs*, 574 F.3d 1262, 1275–76 (10th Cir. 2009) ("Even assuming the first two interests, prevention of oppressive pretrial incarceration and minimization of the accused's anxiety and concern, weigh in Toombs's favor, ... the [*Barker* prejudice factor] does not weigh in his favor.").

It is also difficult to ascertain where the Ninth Circuit stands. In *United States v. Lam*, 251 F.3d 852, 860 (9th Cir. 2001), the defendant's pretrial incarceration of

14 1/2 months, primarily in "total separation" conditions, was of "significant concern given the centrality of the liberty component of the prejudice inquiry." Relief was denied in light of the other *Barker* factors and the fact that Lam eventually pleaded guilty. *Id.* In *McNeely v. Blanas*, 336 F.3d 822, 825–26 (9th Cir. 2003), the accused sought habeas corpus relief in federal court before his case went to trial. The delay was three years when the district court denied relief, but more than five years by the time the circuit court found his speedy-trial right had been violated. *Id.* at 826. The accused was incarcerated throughout this time, including a six-month state hospital commitment. *Id.* at 824–25. While the court found the *Barker* prejudice factor weighed "strongly" in McNeely's favor, this was not based solely on its finding of "oppressive pretrial incarceration." *Id.* at 832 (defense also hindered by passage of time and medication impaired his memory). But *United States v. Drake*, 543 F.3d 1080, 1086 (9th Cir. 2008), held the defendant "cannot establish that he was prejudiced," despite two years of pretrial incarceration, without showing that the delay impaired his defense. *See also United States v. Sutcliffe*, 505 F.3d 944, 957 (9th Cir. 2007) (19 months of pretrial incarceration "insufficient to demonstrate that Defendant suffered impermissible prejudice as a result of the delays he caused").

C. The state courts are divided over whether pretrial incarceration of the accused must be recognized as speedy-trial prejudice.

There is also widespread disagreement among the state courts on whether pretrial incarceration approaching 34 months, as suffered by Petitioner here, must be recognized as prejudice to the accused under the *Barker* balancing test without a specific showing of prejudice to the defense caused by the delay.

1. *State courts recognizing pretrial incarceration as* Barker *prejudice*

The Maryland Court of Appeals has held the intermediate appellate court "was wrong in so perfunctorily dismissing" the prejudicial effect of 2 1/2 months of pretrial incarceration. *Brady v. State*, 434 A.2d 574, 577–78 (Md. 1981). "On this basis alone Brady suffered at least some actual prejudice." *Id. See also Epps v. State*, 345 A.2d 62, 77 (Md. 1975) (one year of pretrial incarceration deemed "oppressive. One of the interests which the right was designed to protect was thus defeated."); *Hayes v. State*, 236 A.3d 680, 710 (Md. App. 2020) (one year and 131 days of pretrial incarceration weighed *Barker* prejudice factor "slightly" in defendant's favor). *But see Wilson v. State*, 814 A.2d 1, 23 (Md. App. 2002) (20 months of pretrial incarceration not "demonstrable" or "significant" prejudice).

The Delaware Supreme Court has held the accused suffered *Barker* prejudice due to 372 days of pretrial incarceration because "[b]eing incarcerated is inherently prejudicial." *Dabney v. State*, 953 A.2d 159, 163 (Del. 2008). "Dabney has established that he suffered prejudice from the lengthy delay *without needing to address his specific arguments about the impairment of his defense*." *Id.* (emphasis added). *See also Brodie v. State*, 966 A.2d 347 (Del. 2009) ("Brodie has established that he suffered prejudice by the mere fact that he was incarcerated for 4 additional months awaiting trial. . . . This factor weighs only slightly in his favor.").

The Wisconsin Court of Appeals has held that the concerns of "oppressive pretrial incarceration and prevention of anxiety are enough for us to conclude that the 17-month delay resulted in at least minimal prejudice." *State v. Borhegyi*, 588

N.W.2d 89, 95 (Wis. App. 1998). *See also State v. Shears*, 229 N.W.2d 103, 112 (Wis. 1975) (one year of pretrial incarceration resulted in "some prejudice").

The Ohio Supreme Court recently held that pretrial incarceration of 483 days was enough to "conclude that the fourth *Barker* factor of prejudice weighs in Long's favor," even in the absence of "particularized prejudice relating to the impairment of his defense." *State v. Long*, ___ N.E.3d ___, 2020 Ohio LEXIS 2615, * 11 (Ohio Nov. 24, 2020).

The Illinois Supreme Court has held that 26 months of incarceration "weighs heavily against the State" in the *Barker* analysis. *People v. Crane*, 743 N.E.2d 555 (Ill. 2001). "The impairment of defendant's liberty is an element of prejudice which cannot be ignored. Detention prior to a proper adjudication is exactly the type of prejudice that the speedy-trial clause was intended to protect against." *Id.* at 566. *Cf. People v. Jackson*, 515 N.E.2d 390, 393 (Ill. App. 1987) ("Here, defendant's liberty was already impaired because of the separate offense for which he was incarcerated. Such circumstances differ materially from the plight of an individual imprisoned for a substantial period prior to any determination of his guilt or innocence for any crime.").

In *State v. Ochoa*, 406 P.3d 505, 517–20 (N.M. 2017), the New Mexico Supreme Court held the Defendant's two-year incarceration resulted in prejudice. *See also State v. Serros*, 366 P.3d 1121, 1146 (N.M. 2015) ("[H]e was incarcerated for over four years without an adjudication of guilt, a length of time that we hold is oppressive on its face"); *State v. Brown*, 396 P.3d 171, 182 (N.M. App. 2017) ("As 33

months of incarceration occurred in this case . . . we conclude that Defendant was substantially prejudiced by his pre-trial incarceration"); *State v. Moreno*, 233 P.3d 782, 790–91 (N.M. App. 2010) (22 months of pretrial incarceration was main factor in determining prejudice factor weighed slightly in defendant's favor).

And in New York, five years of pretrial incarceration amounted to speedy trial prejudice in the absence of any specific impairment to the accused's defense in *People v. Wiggins*, 95 N.E.3d 303, 313–15 (N.Y. 2018). Whether or not there has been an extended period of pretrial incarceration is regarded as one of five speedy trial factors by the New York Court of Appeals. *People v. Taranovich*, 335 N.E.2d 303, 306 (N.Y. 1975). "Historically, this factor has been considered significant because the speedy trial guarantee affords the accused a safeguard against prolonged imprisonment prior to the commencement of his trial." *Id.*

2. *State courts ignoring pretrial incarceration as* Barker *prejudice*

The California Supreme Court has found "that being jailed without a trial for seven years" constituted oppressive pretrial incarceration. *People v. Williams*, 315 P.3d 1, 29 (Cal. 2013). However, *Williams* held the *Barker* prejudice factor "weigh[ed] against defendant" because he "failed to demonstrate specific prejudice resulting from the delay[.]" *Id.* at 40.

The North Carolina Supreme Court recently held the "final *Barker* factor of prejudice to defendant as a result of the trial's delay significantly weighs against defendant" despite over five years of pretrial incarceration. *State v. Farmer*, 852 S.E.2d 334, 340, 343 (N.C. 2020). While professing to "not disregard nor diminish

the deleterious effects of defendant's prolonged pretrial incarceration," the court found his time in jail "did not rise to a level which amounted to *any* prejudice to defendant's rights" because there was no impairment of his defense. *Id.* at 340 (emphasis added). *See also State v. Spivey*, 579 S.E.2d 251, 257 (N.C. 2003) (four and one-half years of pretrial incarceration created no *Barker* prejudice because defendant "failed to show that his defense was impaired in any way").

The Arizona Supreme Court gives little or no weight to lengthy pretrial incarceration as prejudice in the *Barker* analysis. *State v. Spreitz*, 945 P.2d 1260, 1271 (Ariz. 1997), found no speedy trial violation where the appellant "claim[ed] no prejudice from the trial delay other than that arising out of his long period of custody." Although "five years in custody may have increased defendant's anxiety quotient, we find, on the entire record, that the delay did not prejudice his ability to defend against the state's claims." *Id.* (emphasis added). *See also State v. Parker*, 296 P.3d 54, 62 (Ariz. 2013) (Sixth Amendment right to speedy trial not violated where accused "failed to show any prejudice other than pretrial incarceration" of almost four years).

In *Henderson v. Commonwealth*, 563 S.W.3d 651 (Ky. 2018), the Kentucky Supreme Court accorded minimal *Barker* prejudice to four and one-half years of pretrial incarceration. But this "extremely significant" pretrial detention was "not sufficient, while weighing and examining all the *Barker* factors, to find a constitutional violation." *Id.* at 666. The dissent noted that the Kentucky Supreme Court "has over the years persistently refused to recognize the impairment of one's

liberty as the core concern of the speedy trial right, and I submit respectfully that we once again undervalue that principle in our disposition of this case." *Id.* at 689 (Venters, J., dissenting, joined by Minton, C.J., and Cunningham, J.). *See also McLemore v. Commonwealth*, 590 S.W.3d 229, 245 (Ky. 2019) (29 months of pretrial incarceration "fails to show real prejudice" and *Barker* prejudice factor "does not weigh in favor of McLemore"); *Bratcher v. Commonwealth.*, 151 S.W.3d 332, 345 (Ky. 2004) ("Conclusory claims about the trauma of incarceration, without proof of such trauma, and the *possibility* of an impaired defense are not sufficient to show prejudice." (original emphasis)).

The South Carolina Supreme Court appears to give little weight to pretrial incarceration in evaluating *Barker* prejudice. *See State v. Reaves*, 777 S.E.2d 213, 219 (S.C. 2015) ("[A]lthough we are cautious to not diminish the injurious effect of his lengthy incarceration prior to trial [39 months], we find Reaves has not shown the delay caused any particularized prejudice to his defense"); *State v. Barnes*, 846 S.E.2d 389, 401 (S.C. 2020) (27 months of pretrial incarceration insufficient because "presumptive prejudice cannot alone support a speedy trial claim"); *State v. Langford*, 735 S.E.2d 471, 484 (S.C. 2012) ("While we are cognizant of not minimizing the deleterious effects of lengthy pre-trial incarceration, the two-year delay in bringing this case to trial does not amount to a constitutional violation in the absence of any actual prejudice to Langford's case.").

The Oklahoma Court of Criminal Appeals has said pretrial incarceration of nearly two and one-half years makes a "fairly unsubstantial" case for *Barker*

prejudice. *Ellis v. State*, 76 P.3d 1131, 1136, 1141 (Okla. Crim. App. 2003). "Yes, Appellant suffered some prejudice as a result of the deprivation of his liberty," but the prejudice factor "weighs in the State's favor" because his defense "was in no way impaired." *Id.* at 1141.

The Michigan Supreme Court found the defendant "suffered considerable personal deprivation" by 27 months of pretrial incarceration, but there was "no undue prejudice" because there was no prejudice to his trial defense. *People v. Chism*, 211 N.W.2d 193, 197–98 (Mich. 1973). *See also People v. Williams*, 716 N.W.2d 208, 219 (Mich. 2006) (rejecting 19-month incarceration before trial as prejudice because "the prejudice prong of the *Barker* test may properly weigh against a defendant incarcerated for an even longer period if his defense is not prejudiced by the delay" (citing *Chism*)).

The Mississippi Supreme Court held the *Barker* prejudice factor "weighs in favor of the State," where the accused was incarcerated for 26 months before trial but did not prove his defense was prejudiced. *Franklin v. State*, 136 So. 3d 1021, 1036-37 (Miss. 2014). *See also Williams v. State*, 305 So. 3d 1122, 1133 (Miss. 2020) (recognizing 16 months of pretrial incarceration as "lengthy" but "insufficient to show prejudice" without impairment to the accused's defense); *Ross v. State*, 605 So. 2d 17, 23 (Miss. 1992) ("A defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal").

The Rhode Island Supreme Court has adopted the position that pretrial incarceration "merely constitutes a prejudice inherent in being held while awaiting

trial" and "alone is insufficient to satisfy the fourth *Barker* factor." *State v. Oliveira*, 961 A.2d 299, 317–19 (R.I. 2008) (holding 25 months of pretrial incarceration insufficient to demonstrate prejudice). *See also State v. Austin*, 643 A.2d 798, 800–02 (R.I. 1994) ("lack of any prejudice" due to 18-month pretrial incarceration); *State v. Perez*, 882 A.2d 574, 592-93 (R.I. 2005) (finding no *Barker* prejudice in one year of pretrial incarceration).

The Washington Supreme Court has held that while the accused "spent almost two years in jail awaiting his trial this is not, on its face, oppressive." *State v. Ollivier*, 312 P.3d 1, 19 (Wash. 2013). *See also State v. Shemesh*, 347 P.3d 1096, 1101–02 (Wash. App. 2015) (refusing to characterize 40 months in jail as "oppressive pretrial incarceration" because of "county jail staff testimony that he was treated the same as any other prisoner").

The Connecticut Supreme Court has found that almost 19 months of pretrial incarceration resulted in "the lack of any particular prejudice" in *State v. McCarthy*, 425 A.2d 924, 928–30 (Conn. 1979). *See also State v. Flowers*, 503 A.2d 1172, 1178 (Conn. 1986) (affording no weight to 18 months of pretrial incarceration in assessing *Barker* prejudice).

3. *State courts unclear on pretrial incarceration as* Barker *prejudice*

In *State v. Harberts*, 11 P.3d 641, 654 (Or. 2000), the state argued that while five years of pretrial incarceration was serious "in the abstract," the "real type of prejudice relevant to a speedy trial claim is impairment of a defendant's defense."

The Oregon Supreme Court disagreed:

> The state cites no authority for its argument that prejudice to the defense is the only relevant form of prejudice. That argument ignores one of the centuries-old principles that undergirds the speedy-trial requirement, namely, the purpose of preventing prolonged incarceration without trial. *See Klopfer* [*v. North Carolina*], 386 U.S. at 224, 87 S. Ct. 988 (identifying principle). As this court stated in *Mende*, "the longer the defendant must endure pretrial incarceration or anxiety and other forms of personal prejudice, the more the 'prejudice to defendant' factor weighs in the defendant's favor."

Id. (citation omitted). But in *State v. Johnson*, 157 P.3d 198, 207–11 (Or. 2007), while conceding that pretrial incarceration of five years and eight months "cuts against the state," the court denied speedy-trial relief because the delay "did not cause a reasonable possibility of prejudice to defendant's ability to defend against the charges."

It is unclear how much weight the Pennsylvania Supreme Court accords to pretrial incarceration in conducting the *Barker* prejudice analysis. It said in *Commonwealth v. Williams*, 327 A.2d 15, 17 (Pa. 1974), that "a pretrial delay of three and one-half years during which the accused is incarcerated is oppressive." *Williams* found a speedy trial violation, although there was also impairment of the appellant's ability to present his defense. *Id.* at 18. The defendant was not denied his constitutional right to a speedy trial in *Commonwealth v. Myers*, 371 A.2d 1279, 1284 (Pa. 1977), although he "unquestionably . . . suffered inherent prejudice from his four and one-half year incarceration," because his defense was not impaired and other *Barker* factors weighed against him. But in *Commonwealth v. DeBlase*, 665 A.2d 427, 436 (Pa. 1995), the court could not "say with certainty that a two year,

seven month period of pretrial incarceration represents 'oppressive pretrial incarceration' under these facts, especially where a person is charged with a potentially capital murder charge[.]"

In *People v. Glaser*, 250 P.3d 632, 648–49 (Colo. App. 2010), the fact that the accused was "incarcerated for two and one-half years without being convicted of anything" amounted to "only a minimal showing of prejudice." *See also People v. Valles*, 412 P.3d 537, 548 (Colo. App. 2013) (accused "arguably suffered some prejudice" from two years of pretrial incarceration); *Cf. People v. Jompp*, 440 P.3d 1166, 1174 (Colo. App. 2018) (prejudice factor "favors the People" where accused was incarcerated for 13 months).

In *State v. Billman*, 194 P.3d 58, 67 (Mont. 2008), the Montana Supreme Court held that 278 days in jail, "coupled with the relatively simple charges," established prejudicial pretrial incarceration. But it has also held the prejudice factor favored the State, despite 924 days of pretrial incarceration, due to the "complexity of the charged offenses" (deliberate homicide and evidence tampering) and reasonable conditions of incarceration. *State v. Couture*, 240 P.3d 987, 1004–05 (Mont. 2010).

Due to 720 days of pretrial incarceration, the Wyoming Supreme Court found in *Berry v. State*, 93 P.3d 222, 237 (Wyo. 2004), that the *Barker* prejudice factor "weighs heavily in favor of Mr. Berry." But in *Lafferty v. State*, 374 P.3d 1244, 1255 (Wyo. 2016), the same court held the prejudice factor "weighs heavily against Mr. Lafferty" despite pretrial incarceration of 811 days.

* * *

This Court has *never* held that demonstrable trial prejudice resulting from lengthy pretrial incarceration is necessary to establish a violation of the Speedy Trial Clause under the *Barker* analysis. Yet that is what the Indiana Court of Appeals held in this case and, as the survey of the federal and state cases above shows, the lower courts, federal and state, are divided on the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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