No. 20-7935

IN THE

Supreme Court of the United States

WILMAR RENE DURAN GOMEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Cullen Macbeth
Assistant Federal Public Defender
OFFICE OF THE FEDERAL PUBLIC DEFENDER
6411 Ivy Lane
Suite 710
Greenbelt, MD 20770
(301) 344-0600
cullen_macbeth@fd.org

QUESTION PRESENTED

Whether, under the balancing test in *Barker v. Wingo*, 407 U.S. 514 (1972), prosecutors may prevent attachment of a defendant's Sixth Amendment speedy-trial right by effecting a pretextual arrest for an unrelated civil immigration offense and delaying indictment while they continue their criminal investigation.

RELATED PROCEEDINGS

United States v. Duran Gomez, No. 4:10-cr-459, U.S. District Court for the Southern District of Texas. Judgment entered Mar. 16, 2020.

United States v. Duran Gomez, No. 20-20147, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Dec. 23, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes: **Page(s)**

Constitutional Provisions: **Page(s)**

INTRODUCTION

The government may not manipulate criminal charging decisions "in bad faith" in an effort to "evade the speedy trial guarantee" of the Sixth Amendment. *See United States v. MacDonald*, 456 U.S. 1, 10 n.12 (1982). But the Fifth Circuit's opinion in this case provides prosecutors a road map for doing exactly that, allowing them to prevent attachment of a defendant's speedy-trial right—and thereby delay trial—by effecting a pretextual arrest for unrelated civil offenses.

Petitioner Wilmar Rene Duran Gomez came to the attention of Immigration and Customs Enforcement (ICE) in November 2006, when a confidential informant alleged he had beaten two unlawful aliens to death. After conducting further investigation that supposedly corroborated his involvement, agents arrested Duran Gomez the next day and took him into custody. But rather than charge Duran Gomez with homicide at that time, ICE agents purported to detain him for "administrative immigration violations" while they continued investigating the homicides. ROA.1273. Although the government finished its initial investigation in the spring of 2007, it did not indict Duran Gomez for homicide-related crimes until July 2010, when it brought capital charges under the federal alien-harboring statute.

In March 2020, with the scheduled trial date still a year away, the district court dismissed the indictment, holding the pretrial delay violated the Sixth Amendment Speedy Trial Clause. The court found as a fact that when ICE agents took Duran Gomez into custody, they were arresting him for the homicides, not for supposed civil immigration violations. It therefore determined the speedy-trial clock for Duran Gomez's capital charges

began to run in November 2006. The court further found that the government delayed indicting Duran Gomez in a deliberate, bad-faith effort to prejudice his defense on the capital charges. Citing this bad faith and the extraordinary fourteen-and-a-half-year delay between arrest and trial, the district court concluded Duran Gomez was entitled to relief under the balancing test in *Barker v. Wingo*, 407 U.S. 514 (1972).

The Fifth Circuit reversed. It found—without explaining why the district court's factual findings were clearly erroneous—that Duran Gomez's November 2006 arrest was based on civil immigration violations, not the homicides. The court therefore held his speedy-trial right did not attach until indictment in July 2010, and as a result the pretrial delay was only eleven years, rather than fourteen and a half. And because the bad faith found by the district court occurred before indictment, the Fifth Circuit disregarded the government's misconduct when deciding which party was more responsible for the pretrial delay. Based on this blinkered view of the record, the court held Duran Gomez suffered no violation of his right to a speedy trial.

The Fifth Circuit's decision threatens the vital interests protected by the Speedy Trial Clause and invites prosecutors to engage in deliberate, prejudicial delay. As the district court recognized, ICE's claim that it arrested Duran Gomez for civil immigration violations was plainly pretextual—an obvious ploy designed to avoid attachment of his speedy-trial right while agents continued their investigation. By accepting that implausible claim at face value, the Fifth Circuit short-circuited a proper balancing of the *Barker* factors, permitting the government to postpone attachment of Duran Gomez's speedy-trial right indefinitely as it prepared its case. If

permitted to stand, the Fifth Circuit's rule will warp the *Barker* analysis in the government's favor and encourage similar subterfuge in any case where the government perceives an advantage in delaying. That rule artificially reduces the length of pretrial delay; precludes courts from examining pre-indictment governmental bad faith when apportioning blame for the delay; makes it harder for a defendant to assert his speedy-trial right; and simultaneously aggravates the prejudice from pretrial delay while forbidding judicial consideration of prejudice that arises before indictment.

Because the Fifth Circuit committed a "fundamental error in its application of *Barker*," the decision below "calls for this Court's correction." *Vermont v. Brillon*, 556 U.S. 81, 91 (2009).

OPINIONS BELOW

The district court's order granting Duran Gomez's motion to dismiss is at 2020 WL 1187248 (S.D. Tex. Mar. 12, 2020) and is reproduced in the appendix to this petition. App.24a. The Fifth Circuit's opinion reversing and remanding is reported at 984 F.3d 366 (5th Cir. Dec. 23, 2020) and is reproduced in the appendix to this petition. App.1a.

JURISDICTION

The court of appeals' decision issued on December 23, 2020. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This Court's Rule 13.1 ordinarily requires that a petition for certiorari be filed within 90 days of the court

of appeals' entry of judgment. On March 19, 2020, this Court extended the deadline to 150 days in light of the ongoing public health concerns related to COVID-19.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI.

STATEMENT OF THE CASE

I. Homicide investigation and arrest

On November 15, 2006, sheriff's deputies discovered an abandoned pickup truck in a cotton field in Richmond, Texas. ROA.1294. Inside were the bodies of two dead Hispanic males, who appeared to have been badly beaten. ROA.1294. An autopsy later confirmed the two men had died from blunt force trauma, approximately 12-24 hours before being discovered. ROA.786, 2249. Near one of the bodies, deputies found Honduran identification cards. ROA.785. Investigators believed, based on the smell of gasoline and the presence of gas containers and rags, that someone had tried, but failed, to set the truck on fire. ROA.785.

On November 20, 2006, a confidential informant contacted the Houston ICE office regarding a recent double homicide. ROA.786, 1273. The informant asserted Duran Gomez was a human smuggler who had beaten to death two aliens, both Honduran nationals, whom he was holding at a warehouse in Houston pending payment of their smuggling fees. ROA.786, 1273. According

to the informant, Duran Gomez beat the aliens with a golf club because he was angry that they had tried to escape from the warehouse. ROA.786. The informant further claimed Duran Gomez had removed their bodies from the warehouse in a pickup truck and attempted to set fire to the truck with a gas can. ROA.786.

ICE initiated what it called "a criminal investigation involving alien harboring in which two aliens were beaten to death." ROA.2191. Agents researched Duran Gomez and discovered he "had connections" to a business in the 7300 block of Ashcroft Drive in Houston. ROA.787. Further investigation indicated that on November 14, 2006, someone had called the Houston Police Department to report that five men were being beaten at 7315 Ashcroft Drive. ROA.787. After following additional leads, agents located witnesses who said aliens were being held hostage and beaten in a warehouse at 7315 Ashcroft Drive. ROA.787. Those witnesses also claimed one of the aliens had previously tried to escape from the warehouse. ROA.787.

ICE began surveilling Duran Gomez's Houston home on November 20th and arrested him the next evening as he was leaving his house. ROA.787-88. Immediately following the arrest, agents searched Duran Gomez and catalogued what they found in the Seized Assets and Case Tracking System (SEACATS). ROA.699, 2825. The SEACATS report listed Duran Gomez's "Law Charged" as 8 U.S.C. § 1324(a)(1)(A), which prohibits harboring unlawful aliens. ROA.2826. The report indicated ICE arrested Duran Gomez pursuant to its "alien smuggling organizations investigations." ROA.2825. Both the "seizing officer" and the "supervisor" overseeing his arrest were described with the notation "CRIM INVSTGR." ROA.2825. In the

notes section of the SEACATS report, agents wrote Duran Gomez had been arrested "for being in the US unlawfully because of two [crime involving moral turpitude] convictions." ROA.2829.

The next afternoon, on November 22, 2006, Duran Gomez appeared before a "senior special agent" with the Department of Homeland Security. ROA.1304; C.A. Gov't Br. 85. That agent determined Duran Gomez was in the country illegally, and therefore issued an arrest warrant and notice to appear for removal proceedings. ROA.1304-07.

In another SEACATS entry dated December 1, 2006, ICE again listed Duran Gomez's "Law Charged" as 8 U.S.C. § 1324(a)(1)(A) (harboring unlawful aliens) and wrote that he had been "arrested . . . for alien smuggling and potential involvement in 2 homicides." ROA.2832-33. The report made no mention of his supposed unlawful immigration status. ROA.2832-33.

II. Continued investigation of the homicides

The U.S. Attorney's Office became involved in Duran Gomez's case immediately following his arrest. *See* ROA.1301. [redacted] On March 30, 2007, ICE told Texas state police that "[f]ederal prosecutors planned to indict" Duran Gomez and "seek the death penalty under [the] Federal Statute for Hostage Taking." ROA.1270. The lead ICE investigator confirmed in an October 2007 email that the U.S. Attorney's Office "[wa]s requesting authorization from the Department of Justice to seek the death penalty." ROA.1292. [redacted]

[redacted]

In March 2008, ICE placed Duran Gomez in a live lineup for witnesses to the homicides. App.32a; ROA.1901. Nothing in the record indicates ICE conducted any further investigation into the homicides after that time.

III. Prosecution for obstruction of justice

On December 4, 2006, while the homicide investigation was ongoing, the ICE agent overseeing the investigation swore out a complaint charging Duran Gomez with obstruction of justice under 18 U.S.C. § 1505. ROA.2189. She alleged that while Duran Gomez was in jail following his arrest, he called his mother and sister and asked them to remove from his home a computer and certain documents related to his alleged alien-smuggling operation, in an effort to thwart ICE's investigation of the smuggling scheme. ROA.2191. On December 27, 2006, a grand jury returned an indictment charging Duran Gomez, his mother, and his sister with one count of obstructing an ICE investigation "into the harboring of illegal aliens resulting in the death of any person." ROA.2211.

[redacted] the government allowed Duran Gomez's attorney in the obstruction case to depose several "material witnesses" to the homicides. ROA.1904. That attorney was not learned in capital defense, had previously handled only two or three federal cases in his entire career, was not assigned to represent Duran Gomez on homicide charges, and had access to only limited discovery relating to the homicides. ROA.580, 1171-

72. [redacted]

Duran Gomez pled guilty to the obstruction count on May 25, 2007, and the district court scheduled sentencing for June 12, 2008. ROA.2184, 2244. [redacted] Duran Gomez met with the government for a proffer session on the 12th. ROA.1223, 2275, 2835-38. During the proffer, the government asked Duran Gomez questions about his involvement in the homicides. ROA.2838-39.

[redacted] After two additional continuances requested by defense counsel, and one ordered on the court's own motion, the parties appeared for sentencing on January 13, 2011. ROA.2186-87, 2289, 2295. The court sentenced Duran Gomez to 60 months' imprisonment, the statutory maximum. ROA.798-99, 2313-14, 2366-67.

IV. Capital prosecution

A. Indictment and pretrial litigation

On July 1, 2010, the government finally indicted Duran Gomez for the homicides allegedly committed in November 2006. The grand jury charged Duran Gomez

and two co-defendants, Jose Alberto Bolanos-Garza and Efrain Rodriguez-Mendoza, with two counts of harboring unlawful aliens resulting in death, under 8 U.S.C. § 1324(a)(1). ROA.2488-90. Those counts were punishable by death. § 1324(a)(1)(B)(iv). Superseding indictments subsequently added charges for kidnapping resulting in death, under 18 U.S.C. § 1201(a)(1), and hostage-taking resulting in death, under 18 U.S.C. § 1203(a), both of which are also punishable by death. ROA.184-95. In addition, the grand jury charged Duran Gomez, Bolanos-Garza, Rodriguez-Mendoza, and three other co-defendants with one count of conspiracy to transport and harbor unlawful aliens, under 8 U.S.C. § 1324(a)(1). ROA.2483-88. The government referred to the latter three as the "driver defendants" because they allegedly worked as drivers in Duran Gomez's alien-transportation operation. ROA.2078, 2486.

Pretrial preparation proceeded slowly. Although the government had indicted Duran Gomez on death-eligible offenses in July 2010—and although ICE had finished its initial investigation of those offenses in the spring of 2007—local prosecutors did not decide to seek the death penalty against him until November 2011, when they submitted a death-authorization request to the Attorney General's Review Committee on Capital Cases (RCCC). ROA.547, 1883. The RCCC took almost a year to consider that request, delaying the filing of the government's death notice until October 4, 2012, nearly two-and-a-half years following indictment. ROA.95-103.

Six months later, in April 2013, the government arrested Rodriguez-Mendoza, who had been at large when the indictment was unveiled. ROA.449. That arrest required local prosecutors to decide whether to seek the death penalty against Rodriguez-Mendoza. They debat-

ed that question for [redacted], waiting until [redacted] to send a death-authorization request to the RCCC. ROA.1882. It would be another [redacted] before the RCCC approved that request, in February 2017. ROA.2513-20.

The government's foot-dragging delayed trial in other ways. At a status conference in May 2013, prosecutors announced [redacted]

Yet the government did not finalize plea agreements with those defendants until January 2016, September 2016, and December 2016, respectively. ROA.2799, 2847-73.

The government's "creepy-crawly discovery disclosures," as the district court described them, set back trial as well. ROA.1055. The government did not begin turning over discovery until November 2010, four months after indictment. ROA.1899. It made minor additional productions in April 2011 and January 2012, bringing the total number of pages produced to roughly 8,000. ROA.1958-59. Then, in January 2017, the government handed over approximately 65,000 pages of discovery. ROA.1900. This document "dump"—to use the government's own word, ROA.1189—included roughly 55,000 pages that had not previously been produced to Duran Gomez in the preceding six-and-a-half years. ROA.829, 1030, 1697-98, 1900-01, 1960. Among those documents were essential materials without which Duran Gomez could not have proceeded to trial, such as forensic reports, witness statements, evidence of bene-

fits provided to cooperating witnesses, and notes and reports of interviews. ROA.1900-01.

Even after "dumping" these documents on Duran Gomez, the government had not fully complied with its discovery obligations. ROA.1028-30. Prosecutors said they still needed, among other things, to interview additional witnesses and conduct further forensic testing, then disclose the products of that investigation to Duran Gomez. ROA.1029-30, 1034-35. As late as January 2020—almost ten years after indictment—the government still had not provided a substantial number of discovery materials, despite repeated requests from Duran Gomez. ROA.1281-83, 1219-20, 1902.

Duran Gomez's trial preparation was also stymied by a lack of funding. Beginning in March 2013, shortly after the government announced its intent to seek the death penalty, Duran Gomez's counsel made repeated requests to the district court for [redacted] to hire a mitigation specialist. C.A. Def. Br. 37-43. Counsel's motions explained that [redacted] And the district court

and the Fifth Circuit did not fully approve defense counsel's mitigation budget—which the government has never claimed was unreasonable—until January 2018. C.A. Def. Br. 37-43.

In the years following indictment, Duran Gomez either requested or acceded to numerous continuances of the trial date. App.39a-40a. He explained that he could not be ready for trial without knowing whether the government would seek death against him and co-defendant Rodriguez-Mendoza, without access to crucial discovery, and without the funding required to do a thorough mitigation investigation in El Salvador (and elsewhere). *E.g.*, ROA.71-72, 81-82, 106-07, 140-41, 169-70.

B. Motion to dismiss on speedy-trial grounds

On August 26, 2019, Duran Gomez filed a motion to dismiss the indictment based on pretrial delay. ROA.448-79. He argued that pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), the excessive delay in his case violated the Sixth Amendment, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial."

Barker "established a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Brillon*, 556 U.S. at 90. Courts begin by determining the length of pretrial delay, measured from the date the speedy-trial right attaches, i.e., the earlier of (1) arrest on criminal charges or (2) indictment on those charges. *See Betterman v. Montana*, 136 S. Ct. 1609, 1612-13 (2016); *United States v. Gouveia*, 467 U.S. 180, 190 (1984). If pretrial delay reaches at least one year, then it "trigger[s]" a full "speedy trial enquiry." *Doggett v. United States*, 505 U.S. 647, 651-52 & n.1 (1992). That inquiry requires assessment of four factors:

"[1] whether delay before trial was uncommonly long, [2] whether the government or the criminal defendant is more to blame for that delay, [3] whether, in due course, the defendant asserted his right to a speedy trial, and [4] whether he suffered prejudice as the delay's result." *Id.* at 651. Thus the length of delay "is actually a double enquiry," serving both as a triggering mechanism and as "one factor among several" in the *Barker* balancing test. *Id.* at 652. At the fourth step of the analysis, prejudice can be presumed if the first three factors weigh heavily in the defendant's favor. *See id.* at 656-58. Otherwise, the defendant must demonstrate "actual prejudice." *See id.* at 651.

At the time Duran Gomez filed his motion to dismiss, trial was scheduled to begin in March 2021. ROA.442-43. He argued that the period of pretrial delay—whether fourteen-and-a-half years, measured from arrest in November 2006, or eleven years, measured from indictment in July 2010, *see* ROA.452-53, 471-72, 563-65—was "extraordinary." ROA.453. While acknowledging he had requested numerous trial continuances, Duran Gomez argued the government was primarily responsible for the delay because prosecutors' dilatory tactics, coupled with his inability to obtain necessary mitigation funding, had left him no meaningful choice but to ask for more time. ROA.454-58, 567-77. As for the third *Barker* factor, Duran Gomez recognized he had not filed a motion formally demanding a speedy trial. ROA.458-59. But he identified several points in the district court proceedings where he expressed concern that delay had compromised his ability to receive a fair trial. ROA.458-59, 578. Finally, Duran Gomez urged the district court to presume prejudice but argued, alternative-

ly, that he could demonstrate actual prejudice. ROA.459-66.

The district court held a hearing on Duran Gomez's motion, at which it received exhibits and heard argument. ROA.1133-1229, 1266-1307. On March 12, 2020, the court entered an order granting Duran Gomez's motion and dismissing the indictment with prejudice. App.24a-70a.

The district court made a factual finding that when ICE agents took Duran Gomez into custody in November 2006, they were arresting him for the homicides. App.25a, 44a-47a. As a result, the court held, Duran Gomez's Sixth Amendment speedy-trial right as to the homicide-related offenses attached in November 2006. App.46a-47a. The court also found as a fact that the homicide investigation "was for all practicable purposes concluded in 2007-08," and that the government "was prepared to indict Duran-Gomez for alien smuggling based on the deaths of the two aliens in 2007." App.34a, 48a. Nevertheless, prosecutors "sat on [Duran Gomez]" for three years, "cho[osing] to delay the Indictment until he was sentenced in the obstruction case." App.34a, 46a. This delay, the court found, was "deliberate[]," reflected "bad faith," was "intentional and undertaken for the sole purpose of gaining some tactical advantage," and "lacked a[ny other] plausible explanation." App.47a. Specifically, the government used the intervening period (from the end of its investigation in 2007 until July 2010), during which Duran Gomez was unrepresented by death-qualified counsel, to place him a live lineup for homicide witnesses, to meet with him for a proffer session regarding the homicides, and to make homicide witnesses nominally available for depositions before deporting them. App.32a, 47a. In addition, the district

court found that despite claiming to have an "open file" policy, the government had "not provided discovery," had "withh[e]ld[]" the large majority of discovery materials, and "was not operating with candor or honesty." App.66a.

Given this bad faith, as well as the government's general dilatoriness in prosecuting the case, the court concluded "the vast majority, if not all, of the continuances that Duran-Gomez sought were precipitated by the Government's trial strategy of intentional delay." App.64a. The court held that the fourteen-and-a-half-year pretrial delay presumptively prejudiced Duran Gomez, and that the government had not rebutted that presumption. App.65a-70a. Accordingly, the court dismissed the indictment with prejudice and entered final judgment. App.70a; ROA. 850. The government timely appealed. ROA.852-54.

C. The Fifth Circuit's opinion

The Fifth Circuit reversed and remanded for trial. The court wrote that it "need not decide" whether Duran Gomez's speedy-trial right attached in 2006 (the time of arrest) or 2010 (the time of indictment), "because the length of delay in either instance far exceeds the one-year threshold required to trigger an analysis of the remaining *Barker* factors." App.8a. Regardless, the length of delay was, "at the very least, greater than nine years," and the first *Barker* factor therefore "weigh[ed] heavily against the government." App.8a-9a.

Implicitly, however, the Fifth Circuit did decide when the right attached. The court's recitation of the facts asserted "Duran-Gomez was arrested for civil immigration violations" in 2006. App.3a; *see also* App.8a (referring to "Duran-Gomez's December [sic] 2006 ar-

rest for administrative immigration violations"). If that were true, there would be no doubt that his speedy-trial right did not attach until 2010, since a bona fide *civil* arrest does not trigger the protections of the Sixth Amendment; only *criminal* arrest does that. Moreover, as explained below, the Fifth Circuit's discussion of the reasons for delay focused entirely on the post-indictment period. *See* App.9a-15a. The failure to address which party was responsible for the delay between 2006 and 2010 demonstrates that the court considered that period irrelevant—which would be true only if Duran Gomez's speedy-trial right had not yet attached. Likewise, the prejudice portion of the Fifth Circuit's opinion avoided addressing a specific form of prejudice that Duran Gomez argued had arisen pre-indictment, indicating the court believed Duran Gomez enjoyed no speedy-trial right during that period. *Compare* App.18a-21a, *with* C.A. Def. Br. 135-36. In sum, the Fifth Circuit—notwithstanding its claims to the contrary—found that Duran Gomez was arrested for civil immigration violations in 2006, and that his speedy-trial right therefore attached in 2010.

The Fifth Circuit acknowledged that factual findings are reviewed for clear error, which exists only when an appellate court has "a definite and firm conviction that a mistake has been committed." App.7a. But it did not explain why the district court's contrary finding—i.e., that Duran Gomez's speedy-trial right attached in November 2006 because he was in fact arrested for the homicides at that time—was erroneous, much less clearly so. Instead, the Fifth Circuit simply accepted at face value, and then repeated, the government's representation that Duran Gomez's arrest was "for administrative immigration violations." App.8a; *see* C.A. Gov't Br. 4_83-84.

As to the second *Barker* factor, the Fifth Circuit concluded the reasons for the delay "weigh[ed] heavily against Duran-Gomez" because he requested or consented to numerous continuances. App.9a, 15a. The court faulted Duran Gomez for seeking continuances designed "to satisfy his own investigative and preparatory needs," such as the need to "'develop[] mitigation'" in the face of "'budget constraints.'" App.11a. Yet it did not acknowledge that, despite repeated requests, he did not receive adequate mitigation funding from the court until January 2018, seven-and-a-half years after indictment.

The Fifth Circuit also concluded the government's "withholding" of discovery, App.66a, did not justify Duran Gomez's continuance requests. According to the Fifth Circuit, the documents the government "dump[ed]" on Duran Gomez in January 2017, ROA.1028, had been "available under the open file policy" ever since the indictment. App.13a. The court did not explain how the district court's factual finding to the contrary—i.e., that when the government "claimed to be operating under an 'open file policy' . . . it was not operating with candor or honesty"—was clearly erroneous. App.66a. Instead, it once again simply accepted at face value, and then repeated, the government's conflicting representation. App.13a (citing government counsel's statement at oral argument).

The Fifth Circuit held that the third *Barker* factor, assertion of the speedy-trial right, also "weigh[ed] heavily against Duran-Gomez," since he never lodged "an objection to a continuance" or filed "a motion asking to go to trial." App.17a. Because the first three *Barker* factors, considered together, did not weigh heavily in Duran Gomez's favor, the Fifth Circuit held he was unentitled to a presumption of prejudice. App.18a-19a. And to

the extent a presumption was appropriate, it was "extenuated" by Duran Gomez's supposed "acquiesce[nce]" in the delay. App.19a-20a. Finally, the Fifth Circuit held Duran Gomez had failed to demonstrate "actual prejudice." App.20a-21a. The court therefore remanded the case for trial. App.23a.

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional importance regarding the government's ability to evade the protections of the Sixth Amendment through pretextual arrests and charging decisions.

The district court made a factual finding, well supported by the record, that the government arrested Duran Gomez for a double homicide in November 2006. But the government then "sat on him" for three-and-a-half years, App.46a, waiting until July 2010 to bring the indictment in this case. Although the Sixth Amendment speedy-trial right attaches at the earlier of arrest or indictment, the Fifth Circuit held Duran Gomez's right to a speedy trial on the homicide-related charges did not attach until indictment. It reached this conclusion by crediting the government's assertion that when ICE agents detained Duran Gomez in November 2006, they were arresting him for civil immigration offenses, not the homicides. But as the district court recognized, the immigration proceedings were an obvious pretext—an artifice by which to hold Duran Gomez, without access to learned counsel, while the government continued its investigation. Accepting such a facially implausible claim threatens to hollow out the Speedy Trial Clause, stripping defendants of a meaningful right to a speedy trial. This Court should therefore make clear that at-

tachment of the speedy-trial right depends not on what the government *claims* to do, but on what it *actually* does.

The Fifth Circuit's rule—that a pretextual arrest on unrelated civil offenses prevents attachment of the speedy-trial right indefinitely—warps the proper analysis at each step of the *Barker* test. First, it artificially postpones the start date for the speedy-trial clock, shortening the delay that weighs against the government. Second, it allows prosecutors to cause substantial delay without having to bear responsibility for that delay. Third, it makes assertion of the speedy-trial right more difficult, as an arrested but unindicted defendant has no criminal case in which he can assert his speedy-trial right, and no judge to whom he can complain. And fourth, it greatly increases the potential for prejudice, since a defendant (at least an indigent one) cannot investigate his case, preserve evidence, or lock in witness statements until he is appointed a lawyer following indictment.

If the Fifth Circuit's decision is allowed to stand, prosecutors will have both the ability and the incentive to frustrate defendants' speedy-trial rights through pretextual arrests on unrelated offenses. The fundamental error committed by the Fifth Circuit warrants this Court's attention.

I. The government's ability to manipulate the date on which the speedy-trial right attaches prevents proper application of the *Barker* factors.

Although ICE agents claimed they arrested Duran Gomez in November 2006 for civil immigration offenses, that purported basis for his detention was, as the district court realized, plainly pretextual. By accepting the

government's pretext as fact, the Fifth Circuit skewed the *Barker* balancing in the government's favor, adopting a standard that will only encourage prosecutors and law enforcement officers to engage in prejudicial pretrial delay.

A. The civil immigration proceedings were a ruse to detain Duran Gomez pending further investigation into the homicides.

The lower courts have recognized that when immigration officials believe an unlawful alien has committed a crime unrelated to his immigration status, they sometimes effect an "administrative or civil detention [that] amounts to nothing but a cover for criminal detention." *United States v. Rodriguez-Amaya*, 521 F.3d 437, 441 (4th Cir. 2008). These "sham civil proceedings," *United States v. Pasillas-Castanon*, 525 F.3d 994, 997 (10th Cir. 2008), permit ICE to hold an alien "not to effectuate deportation, but solely to provide it time to establish a . . . violation" of a criminal statute, *United States v. Garcia-Martinez*, 254 F.3d 16, 20 (1st Cir. 2001). In such cases, civil immigration detention is "used as a substitute for criminal arrest," *United States v. Cepeda-Luna*, 989 F.2d 353, 357 (9th Cir. 1993)—that is, as a "delay tactic" that permits law enforcement officers to hold a defendant while they work to develop probable cause, *United States v. De La Pena-Juarez*, 214 F.3d 594, 598 (5th Cir. 2000). Agents, in other words, employ civil immigration detentions "as mere ruses to detain a defendant for later criminal prosecution." *United States v. Drummond*, 240 F.3d 1333, 1336 (11th Cir. 2001) (per curiam).

As the district court recognized, that is exactly what happened in this case. ICE agents may have claimed to be detaining Duran Gomez for civil immigra-

tion violations, but their real purpose—their *actual* purpose—in arresting him was to hold him "pending the filing of the [indictment]." *Cepeda-Luna*, 989 F.2d at 357.

Duran Gomez initially came to ICE's attention because a confidential informant implicated him in the murders of two aliens. ROA.1273. Agents then began to investigate and surveil Duran Gomez as part of what they themselves called "a criminal investigation involving alien harboring in which two aliens were beaten to death"—not a civil investigation of aliens in the country unlawfully. ROA.2191. When they arrested him, agents suspected, based on the informant's tip, that Duran Gomez was an alien smuggler who had beaten two Honduran nationals to death after an escape attempt, removed their bodies from a warehouse in a pickup truck, and attempted to set the truck on fire—information they believed was later corroborated. At roughly the time of death estimated by the medical examiner, someone had called the police to report that men were being beaten at a warehouse on a Houston block to which Duran Gomez "had connections." ROA.787. The government contended below that this evidence gave ICE probable cause to arrest Duran Gomez for the homicides on November 21, 2006. ROA.789-90. In short, the operation pursuant to which agents arrested Duran Gomez was undeniably a homicide investigation.

Post-arrest paperwork confirms that ICE's real purpose in arresting Duran Gomez was to hold him for the homicides. In a SEACATS report completed hours after the arrest, agents wrote that Duran Gomez was "charged" with harboring unlawful aliens under 8 U.S.C. § 1324(a)(1)(A), and that he had been arrested pursuant to ICE's "alien smuggling organizations inves-

tigations." ROA.2825-26. The report described the "seizing officer" and the "supervisor" of the arrest with the code "CRIM INVSTGR." ROA.2825. So did a second SEACATS report, dated December 1, 2006, which again indicated Duran Gomez was "charged" with alien harboring under § 1324(a)(1)(A). ROA.2832. Agents even wrote in that second report that Duran Gomez had been "arrested . . . for alien smuggling and potential involvement in 2 homicides," without any mention of his immigration status. ROA.2833.

To be sure, ICE wrote in the first SEACATS report that Duran Gomez "was arrested ... for being in the US unlawfully," and agents took him before an immigration official the day after his arrest. ROA.1304, 2829. But these facts cannot overcome the substantial other evidence establishing that agents' real purpose when taking Duran Gomez into custody was to arrest him for the homicides. To conclude that future criminal charges were *not* the primary purpose of Duran Gomez's detention, one would have to believe ICE was holding him "to effectuate his deportation," rather than "to provide the government the time and evidence necessary to establish his guilt [of the homicides] beyond a reasonable doubt." *De La Pena-Juarez*, 214 F.3d at 599. But the idea that ICE agents intended to skip criminal prosecution and proceed directly to deporting Duran Gomez, who they believed had committed a double homicide, is wholly implausible.[1] At the very least, the dis-

---

1 To its credit, the government has never maintained that ICE actually intended to proceed this way. Nor has it ever disputed that ICE's principal purpose in arresting Duran Gomez was to hold him pending criminal prosecution. *See* C.A. Gov't Reply Br.

trict court's finding as to ICE agents' purpose was "plausible," and thus not clearly erroneous. *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017).

B. Permitting the government to effect pretextual arrests thwarts meaningful application of the *Barker* factors.

When, as in this case, the government places a defendant in pretextual civil detention so it can continue a criminal investigation, starting the speedy-trial clock from the date of indictment improperly distorts the *Barker* analysis in the government's favor. At each step of that analysis, using the date of indictment prevents courts from weighing the considerations most relevant under *Barker*, and therefore threatens to render Speedy Trial Clause protections illusory.

1. First *Barker* factor: the length of delay

To determine whether pretrial delay has violated the Sixth Amendment, courts must start by determining how long the delay has persisted. The longer the delay, the more heavily the first *Barker* factor weighs against the government. *See Doggett*, 505 U.S. at 652. It is therefore important to determine, with precision, the date on which the delay began.

Delay runs from the date when the speedy-trial right attaches, which this Court has held is the earlier of arrest or indictment. *Betterman*, 136 S. Ct. at 1612-13; *Gouveia*, 467 U.S. at 190. Thus in cases where the government purports to detain a defendant on civil immi-

---

44-45 (arguing only that homicides were not "sole[]" justification for Duran Gomez's detention).

gration offenses (and the court accepts that pretext), prosecutors can artificially shorten the length of delay by waiting to indict while the defendant lingers in immigration detention. This sleight of hand, in turn, reduces the weight with which the first factor counts against the government.

Duran Gomez's case is instructive. Had the speedy-trial clock begun to run in November 2006, when he was arrested, the period of delay before the March 2021 trial would have come out to roughly fourteen-and-a-half years. But because the government purported to arrest Duran Gomez on civil immigration violations, rather than the homicides—and because the Fifth Circuit indulged that fiction—the period of delay shrank to under eleven years, beginning with indictment in July 2010. The result is that, by using the civil immigration proceedings as a ruse to detain Duran Gomez, the government shaved almost four years off the length of delay. The government's ability to manipulate the length of delay to such a substantial degree significantly undermines the protections of the Speedy Trial Clause.

2. Second *Barker* factor: reason for the delay

In assessing the second factor, courts "ask[] whether the government or the criminal defendant is more to blame for the delay." *Brillon*, 556 U.S. at 90. Where the delay is attributable to the government, the reasons for that delay determine how courts weigh the second factor:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or

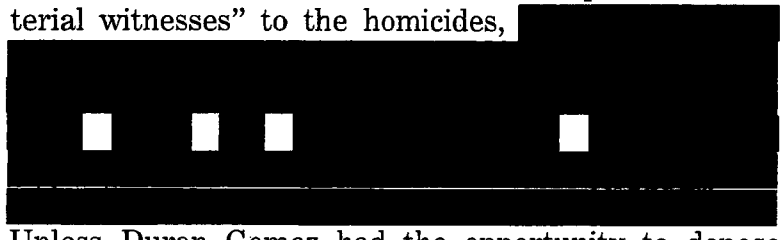
> overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531; *see also Doggett*, 506 U.S. at 656 ("[O]fficial bad faith in causing delay will be weighed heavily against the government.").

The Fifth Circuit's rule upends this analysis by permitting the government to engage in bad-faith delay without consequence. If the government arrests a defendant on pretextual immigration violations, and if a court accepts the pretext as true, then the government can avoid triggering attachment of the speedy-trial right until indictment, potentially months or even years in the future. In the interim, the government can deliberately delay the criminal case, secure in the knowledge that its bad faith will not be weighed against it, since the *Barker* analysis considers only the delay that follows attachment of the speedy-trial right. *See MacDonald*, 456 U.S. at 6-7. The government, for example, might use the arrest-to-indictment window to obtain evidence and testimony it would be unable to secure following indictment. Or it might simply seek to run down the clock, knowing that a defendant will be unable to conduct any independent investigation from his jail cell as memories fade, evidence degrades, and witnesses die or disappear. Either way, the government can deliberately engineer prejudicial delay and yet avoid the negative repercussions that ordinarily attend bad faith under the second *Barker* factor.

Such misconduct is not hypothetical, as Duran Gomez's case illustrates. In 2008—while Duran Gomez was represented by a lawyer who had no capital experience and was defending him on an unrelated obstruction charge—the government conducted a homicide-related proffer session with Duran Gomez and placed him in a live lineup for homicide witnesses. Had a capital indictment been returned already, Duran Gomez would have been appointed two attorneys to represent him on the homicide charges, at least one of whom would have been learned counsel. *See* 18 U.S.C. § 3005. And those counsel—armed with discovery about the capital charges, a fuller understanding of the relevant law, and expertise in capital defense—could have (1) advised Duran Gomez whether to proffer at all and, if so, what to say, and (2) preserved important objections at the lineup to protect Duran Gomez's rights. *See United States v. Wade*, 388 U.S. 218, 236-37 (1967) (holding post-indictment lineup is critical stage of prosecution at which defendant is entitled to counsel). But by delaying indictment, the government denied Duran Gomez that safeguard.

Similarly, [redacted] the government permitted Duran Gomez's obstruction counsel to depose two "material witnesses" to the homicides, [redacted]



Unless Duran Gomez had the opportunity to depose those witnesses [redacted], the government would be unable to use their testimony against him at trial. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). So by making these material witnesses

available to Duran Gomez's obstruction counsel, the government nominally complied with its Confrontation Clause obligations—or at least believed it did. But that counsel was not death-qualified, had minimal federal-court experience, had a non-homicide focus (obstruction of justice) when interviewing the witnesses, and had been provided only minimal relevant discovery. The result is that, as the government surely realized, the depositions did not meaningfully protect Duran Gomez's right to confront those witnesses as to the homicides.

The government knew delay would inure to its benefit. [redacted] It is hard to tell [redacted] why, exactly, the government wanted to postpone sentencing. But a reasonable—indeed, the most likely—inference is that the government was attempting to extract additional inculpatory statements or other evidence from Duran Gomez before bringing capital charges that would trigger the appointment of learned counsel, and while he might think he could gain some benefit by cooperating. Indeed, at the hearing on Duran Gomez's motion to dismiss, the district court asked the government why it had repeatedly continued sentencing and delayed indictment on the homicide charges. The government could provide no explanation. ROA.1208-15. Nor could the government offer an explanation when asked the same question at

oral argument in the Fifth Circuit. Audio of Oral Arg. at 9:10-11:14.

The district court found as a fact that the above conduct was "intentional," evinced "bad faith," and was designed to "gain[] some tactical advantage." App.47a. Although the government's homicide investigation "was for all practicable purposes concluded in 2007-08," the court found the government "deliberately delayed charging [Duran Gomez] with the capital offense[s] for which he was initially arrested and detained." App.47a-48a. Under *Barker*, this "bad faith" should have "weighed heavily against the government" at the second step of the analysis. *Doggett*, 505 U.S. at 656. But the bad faith occurred before indictment, which the Fifth Circuit—having accepted the government's ruse—treated as the triggering event for attachment of Duran Gomez's speedy-trial right. The appellate court therefore gave no weight at all to the government's deliberate bad faith, slanting the second *Barker* factor substantially in the government's favor. This Court has indicated prosecutors may not manipulate charging decisions "in bad faith" in order "to evade the speedy trial guarantee." *See MacDonald*, 456 U.S. at 10 n.12. Yet the Fifth Circuit's approach not only condones such conduct, but rewards it.

3. Third *Barker* factor: assertion of the right

Although this Court has "refused to ... hinge the right on a defendant's explicit request for a speedy trial," *Brillon*, 556 U.S. at 89-90, a defendant's failure to assert his speedy-trial right will be weighed against him, *Barker*, 407 U.S. at 532. The Fifth Circuit's rule makes assertion of that right more difficult. A defendant invokes his right by asking the court for a prompt trial,

see Barker, 407 U.S. at 535; objecting to a trial continuance, *see id.* at 534-36; or moving to dismiss the indictment under the Speedy Trial Clause, *see Doggett*, 505 U.S. at 650. All of these steps presuppose, and require, the existence of a criminal case in which the defendant can express his desire to go to trial; it is impossible to ask the court for a prompt trial if the case has not been docketed and assigned to a judge who can entertain that request. So when the government arrests a defendant on pretextual immigration offenses and delays bringing a criminal indictment, it frustrates the defendant's ability to assert his speedy-trial right, potentially reducing the weight of the third *Barker* factor.

4. Fourth *Barker* factor: prejudice

Prejudice is "assessed in the light of the interests of defendants 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." *Barker*, 407 U.S. at 532. The Fifth Circuit's rule heightens all these forms of prejudice, while simultaneously making it harder for a defendant to establish them.

First, when the government effects a pretextual civil arrest pending indictment, a defendant is likely to spend more time in pretrial incarceration, and that incarceration is therefore more likely to turn "oppressive." *Id.* But if the court accepts the government's pretext, then any pre-indictment period of incarceration will be excluded from the prejudice analysis. Thus the defendant suffers one of the ills the Speedy Trial Clause is intended to prevent, but the government's pretextual arrest precludes the court from taking note.

Second, and relatedly, time spent in civil detention produces substantial "anxiety and concern." *Id.* Detention "interfere[s] with the defendant's liberty" and "may disrupt his employment, drain his financial resources, curtail his associations, [and] subject him to public obloquy." *Dillingham v. United States*, 423 U.S. 64, 65 (1975). And when detention is simply a ruse for eventual criminal charges, it will occasion the additional anxiety of knowing an indictment is looming. None of that pre-indictment anxiety will factor into the prejudice analysis, however, if the court accepts the government's pretext.

Third, "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense," which "skews the fairness of the entire system." *Barker*, 407 U.S. at 532-33. And if he has not yet been indicted, he is not entitled to a lawyer who can take those steps in his stead. A pretextual civil arrest, therefore, engenders an unusually severe degree of prejudice: the government alone is able to continue investigating and gathering evidence, while neither the defendant nor his yet-to-be-appointed attorney is in a position to do so. But once again, if the court accepts the government's pretext, its analysis will exclude any prejudice arising from witnesses or evidence lost during the pre-indictment period.

Relatedly, a pretextual civil arrest undermines the important role that the presumption of prejudice plays in the *Barker* analysis. The "presumption that pretrial delay has prejudiced the accused intensifies over time," *Doggett*, 505 U.S. at 652; the longer the delay, the stronger the presumption the government must overcome, *see id.* at 656-58. Longer delays mean memories are more likely to fade and evidence is more likely to

disappear. Crucially, evidence degrades in this way—and a defendant is thereby prejudiced—regardless of whether he has been indicted. But by holding a defendant on pretextual civil offenses, the government can exclude any pre-indictment delay from the presumption of prejudice. The result may be that in some cases the government can avoid triggering the presumption of prejudice, or can weaken the presumption enough to rebut it. In either case, the government avoids judicial consideration of the kind of prejudice against which the Sixth Amendment is designed to guard.

II. The "fundamental" nature of the Fifth Circuit's error warrants this Court's review.

The *Barker* analysis "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis, and the balance arrived at in close cases ordinarily would not prompt this Court's review." *Brillon*, 556 U.S. at 91. But a lower court's "fundamental error in its application of *Barker*... calls for this Court's correction." *Id.* This case involves such an error. Courts should not apply the Speedy Trial Clause in a credulous, formalistic manner that causes it to "lose all meaning." *De La Pena-Juarez*, 214 F.3d at 598. Yet that is what the Fifth Circuit did here, allowing the government to prevent attachment of the speedy-trial right through an obvious fiction and thereby deny Duran Gomez the protections of the Sixth Amendment.

In a closely related context, the lower courts have concluded that form must not prevail over substance. Under the Speedy Trial Act (STA), "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested." 18

U.S.C. § 3161(b). The "thirty-day requirement applies only to an indictment issued in connection with the offense for which the defendant was arrested," with "offense" defined as "'any Federal *criminal* offense.'" *De La Pena-Juarez*, 214 F.3d at 597 (emphasis added). As "a general rule," therefore, the STA "is not implicated when a defendant is detained on civil deportation charges." *Id.* That is, if someone is arrested on civil immigration charges and then later indicted for a criminal offense, the STA's 30-day clock starts to run from the date of indictment, not the date of civil arrest. *Id.* at 597-98.

But the lower courts have recognized that "the requirements of the Speedy Trial Act . . . would lose all meaning if federal criminal authorities could collude with civil . . . officials to have those authorities detain a defendant pending federal charges solely for the purpose of bypassing the requirements of the Speedy Trial Act." *Id.* at 598. Because "civil detention should not be used as a delay tactic," courts have "carved out an exception" to the general rule that "the provisions of the Speedy Trial Act do not apply to civil detentions." *Id.* at 597. Under this "ruse exception," the "Speedy Trial Act [i]s triggered by civil detentions which are mere ruses to detain a defendant for later criminal prosecution." *Id.* at 598. The exception applies when "the primary or exclusive purpose of the civil detention was to hold [the defendant] for future criminal prosecution." *Id.*; *see also Cepeda-Luna*, 989 F.3d at 357 (adopting ruse exception); *Garcia-Martinez*, 254 F.3d at 20 (same); *Drummond*, 240 F.3d at 1336 (same); *Rodriguez-Amaya*, 521 F.3d at 441 (same); *Pasillas-Castanon*, 525 F.3d at 997 (same); *United States v. Guevara-Umana*, 538 F.3d 139, 142 (2d Cir. 2008) (per curiam) (same); *cf. United States v. Saucedo*, 956 F.3d 549, 553 (8th Cir. 2020) (assuming

without deciding that ruse exception exists); *United States v. Garcia-Echaverria*, 374 F.3d 440, 451 (6th Cir. 2004) (same).

This Court should make clear that the principle underlying these decisions is equally applicable in the constitutional context. Instead of relying on how law enforcement purports to classify an arrest in official paperwork, courts should ask whether, "in substance," it is "an arrest in connection with . . . later criminal charges." *Guevara-Umana*, 538 F.3d at 142. If "putative civil detention" is in fact "merely a ruse to avoid the requirements of the Speedy Trial [Clause]," *id.*, courts should treat it as an arrest on criminal charges that triggers the Sixth Amendment. Under the alternative approach, endorsed by the Fifth Circuit here, the "requirements of the [Speedy Trial Clause] would lose all meaning," *Cepeda-Luna*, 989 F.2d at 357, as the government could use a pretextual civil arrest to engage in bad-faith, prejudicial delay without any consequences for its misconduct.

The potential for abuse is not limited to interaction between criminal and civil officials. In cases where federal and state officials are cooperating, the Fifth Circuit's rule will allow one sovereign to deliberately delay indictment by coordinating with the other sovereign to arrange a pretextual arrest on unrelated charges. This fear is not imaginary. The lower courts have recognized that defendants are sometimes "held by state authorities solely to answer to federal charges." *United States v. Woolfolk*, 399 F.3d 590, 596 (4th Cir. 2005); *see also, e.g., United States v. Odom*, 42 F.3d 1389 (6th Cir. 1994) (unpublished) ("[W]here a state arrest and detention are a 'mere device' used to restrain a defendant until federal authorities choose to prosecute, the time in state custo-

dy is included in the federal speedy trial calculation."); *United States v. Mooneyham*, 376 F. App'x 440, 441-42 (5th Cir. 2010) (noting ruse exception applies if "federal authorities . . . colluded with the state authorities for the primary or exclusive purpose of detaining [a defendant in state custody] for the instant federal criminal proceedings"); *United States v. Asfour*, 717 F. App'x 822, 826 (10th Cir. 2017) (assuming without deciding that ruse exception applies to arrests by state officials). And just as in the civil-criminal context, the Speedy Trial Clause "would lose all force if federal criminal authorities could arrange with state authorities to have the state authorities detain a defendant until federal authorities are ready to file criminal charges." *United States v. Benitez*, 34 F.3d 1489, 1494 (9th Cir. 1994).

The Fifth Circuit's rule, moreover, would impose negative externalities on other actors. The speedy-trial right "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused," as it safeguards not only a defendant's individual interests but also "a societal interest in providing a speedy trial." *Barker*, 407 U.S. at 519. Among other things, the Speedy Trial Clause recognizes that "when a crime is committed against a community, the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. . . . Crime inflicts a wound on the community, and that wound may not begin to heal until criminal proceedings have come to an end." *Flanagan v. United States*, 465 U.S. 259, 265 (1984). That societal interest in closure will be compromised if the government can prolong criminal proceedings through pretextual arrests that keep defendants in limbo for months or, as in this case, years before indictment.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

Cullen Macbeth
Assistant Federal Public
Defender
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
6411 Ivy Lane
Suite 710
Greenbelt, MD 20770
(301) 344-0600
cullen_macbeth@fd.org

May 6, 2021