No. 20-7935

IN THE SUPREME COURT OF THE UNITED STATES

WILMAR RENE DURAN-GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's Sixth Amendment speedy trial right was not violated in the circumstances of this case, in which he asserted that right only after seeking or not opposing 17 defense motions for a continuance over the course of nine years.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Duran-Gomez, No. 10-CR-459 (Mar. 12, 2020)

United States v. Duran-Gomez, No. 06-CR-459 (Jan. 20, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 984 F.3d 366. The order of the district court (Pet. App. 24a-70a) is not reported in the Federal Supplement but is available at 2020 WL 1187248.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2020. By order of March 19, 2020, the Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for

rehearing. The petition was filed on May 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his indictment in the United States District Court for the Southern District of Texas for a variety of capital crimes, including kidnapping and hostage taking resulting in death, petitioner moved to dismiss the indictment. Pet. App. 3a-4a, 6a. The district court granted the motion to dismiss. Id. at 24a-70a. The court of appeals reversed. Id. at 1a-23a.

1. The indictment and the government's death-penalty recommendation in this case allege that petitioner illegally smuggled noncitizens into the United States for money and is responsible for the torture and killing of two men. Pet. App. 2a & n.1. Specifically, they allege that petitioner in November 2006 was holding two Honduran men in a warehouse "until he received their smuggling fees." Id. at 2a. When the men tried to escape, petitioner "beat and tortured the men over the course of a week," "sodomized one of the men with several objects," and "directed someone to set the man on fire." Ibid. The men died from the abuse, and petitioner left their bodies in an abandoned pickup truck in south Texas, which he unsuccessfully tried to burn "with the bodies inside." Ibid. "He then fled the scene." Ibid.

Sheriff's deputies discovered the bodies the next day. Pet. App. 3a. A few days later, a confidential informant told agents at U.S. Immigration and Customs Enforcement (ICE) that petitioner

"directed an international alien-smuggling operation and that he had recently killed two smuggled aliens." Ibid. ICE also learned that petitioner was unlawfully present in the United States because he had been convicted of two crimes involving moral turpitude -- including an "aggravated assault with a deadly weapon in which he beat, threatened with a knife, and later raped the victim" -- after entering the country on a visa. Id. at 3a & n.3.

ICE arrested petitioner for civil immigration violations on November 21, 2006. Pet. App. 3a. "A few days later, [petitioner] called his family from the immigration detention center and asked them to destroy evidence of his smuggling scheme." Ibid. On December 4, 2006, the government charged petitioner by criminal complaint with obstruction of justice, in violation of 18 U.S.C. 1505. C.A. ROA 2189-2192. A federal grand jury indicted petitioner for that offense on December 27, 2006. Id. at 2174, 2211. Petitioner pleaded guilty in May 2007 and was sentenced to 60 months of imprisonment. Pet. App. 3a.

2. In July 2010, a federal grand jury indicted petitioner and several co-defendants for conspiring to transport and harbor unlawfully present persons, in violation of 8 U.S.C. 1324(a)(1)(A)(ii), (iii), (v)(I), and (B)(i); harboring such persons resulting in death, in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and (v)(II) and (B)(i) and (iv); and money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 3a-4a; C.A. ROA 35-46. In 2012, a grand jury returned a superseding

indictment with special findings supporting a capital sentence, and the government informed petitioner that it would seek such a sentence. C.A. ROA 95-103, 113-124. A second superseding indictment issued in 2017 added capital charges for kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1), and hostage taking resulting in death, in violation of 18 U.S.C. 1203. Pet. App. 3a-4a & n.4; C.A. ROA 184-199.

Between July 2010 and August 2019, petitioner moved or joined his co-defendants in moving for continuances 17 times. Pet. App. 4a; see id. at 4a-6a (listing each request). In March 2019, the district court granted petitioner's co-defendant's motion to sever his trial from petitioner's. Id. at 6a. At a meeting with the government in May 2019, petitioner's "counsel suggested continuing the trial to January 2022, but the government expressed a desire to have the trial in 2021." Ibid. The court set the trial for March 2021. Ibid. In August 2019, however, petitioner "moved to dismiss all charges against him for purported violations of his Sixth Amendment right to a speedy trial -- the first time he had ever raised the issue." Ibid.

The district court granted the motion to dismiss, concluding in relevant part that the delay between indictment and trial had violated petitioner's rights under the Speedy Trial Clause. Pet. App. 24a-70a. The court based that conclusion on the four-factor test established by Barker v. Wingo, 407 U.S. 514 (1972), which considers "(a) the length of the delay; (b) the reason(s) for the

delay; (c) the defendant's diligence in asserting his right to a speedy trial; and (d) any prejudice to the defendant resulting from the delay." Pet. App. 42a (citing Barker, 407 U.S. at 530-533). In applying those factors, the court did not attribute the delay resulting from petitioner's multiple requests for continuances to him, instead taking the view that "the vast majority, if not all, of the continuances that [petitioner] sought were precipitated by the Government's trial strategy of intentional delay." Id. at 64a. The court did not fault petitioner for a lack of diligence in failing to assert his speedy trial right, instead taking the view that the delay up until 2017 "must be attributed to the Government because it was then that the vast majority of discovery was finally delivered to [petitioner]." Id. at 68a. The court dismissed the charges against petitioner with prejudice and ordered his immediate release. Id. at 2a.

3. The court of appeals granted a stay pending appeal and subsequently reversed, determining that under the "balancing test in Barker v. Wingo," petitioner's "speedy trial right was not violated." Pet. App. 2a.

On the first Barker factor, the length of delay, the court of appeals noted that the parties "disagree as to the precise amount of delay," in particular whether petitioner's speedy trial right attached at the time of his arrest in 2006 or upon his indictment in 2010. Pet. App. 8a; see id. at 8a n.7. The court explained, however, that it "need not decide this issue because the length of

delay in either instance far exceeds the one-year threshold required to trigger an analysis of the remaining Barker factors." Id. at 8a n.7. And it accepted that a delay of at least nine years "weighs heavily against the government." Id. at 8a-9a.

On the second Barker factor, the reason for the delay, the court of appeals observed that petitioner "either sought or explicitly consented to seventeen" continuances and rejected his arguments for why the delay should be attributed to the government. Pet. App. 10a. The court rejected petitioner's argument that his co-defendant's death-penalty review process, which was "protracted at least in part by [the co-defendant's] assertion of an intellectual disability and the extensive testing required to examine such a claim," required attributing to the government a substantial portion of the period covered by those defense continuances. Id. at 11a. The court explained that "[n]othing prevented [petitioner] from asserting his right to a speedy trial" during that time, and "nothing kept him from attempting to effectuate that right by moving to sever" his trial from that of his co-defendant. Id. at 12a. The court additionally noted that "[i]n all ten of his motions for continuance, including the ones made during [the co-defendant's] death-penalty review process, [petitioner] stressed his own counsel's independent need for delay." Id. at 10a-11a.

The court of appeals also rejected petitioner's argument that the delay resulted from "the government's negligent discovery

methods." Pet. App. 12a-13a. The court observed that the government had maintained an "'open file' policy" from the inception of the case until early 2017 and had "proactively turned over discovery" in 2010 (about 8,000 pages) and again in 2017 (about 65,000 pages). Id. at 13a. The court rejected petitioner's assertions that the government's 2017 disclosure contributed to the delay and that the government "should have explained exactly how an open file policy worked." Id. at 14a. Instead, emphasizing that petitioner "contributed substantially to the delay" by requesting continuances -- which he represented were needed "to investigate the issues, prepare his defense and mitigation, attempt to make a plea deal with the government, and 'wait and see' if his co-defendants could serve a helpful purpose in his own defense" -- the court held "that the second Barker factor weighs heavily against" petitioner. Id. at 15a.

On the third Barker factor, diligence in the assertion of the speedy trial right, the court of appeals found that petitioner lacked such diligence. Pet. App. 15a-17a. Petitioner had "concede[d] that he never objected to a continuance or specifically asked to go to trial," and the court rejected petitioner's suggestion that he asserted his rights either by requesting in 2012 a deadline for the government's notice of intent to seek the death penalty or by responding affirmatively at a 2012 status conference that he would file a time-related pretrial motion that he never wound up filing. Id. at 16a-17a. The court emphasized

that petitioner did not move to dismiss on speedy trial grounds until 2019, had sought multiple continuances until then, and in May 2019 had in fact "suggested continuing the trial * * * to January 2022." Id. at 17a. The court accordingly determined that this factor "weighs heavily against [petitioner]." Ibid.

On the fourth Barker factor, the court of appeals rejected petitioner's claim that prejudice should be presumed based on the other Barker factors. Pet. App. 18a-19a. The court explained that even though "the length of delay weighs heavily against the government, the second and third factors weigh heavily against [petitioner]." Id. at 19a. The court moreover determined that even if petitioner was in fact entitled to a presumption of prejudice, it would be "heavily extenuated" because petitioner "acquiesced in and indeed actively sought the delay about which he now complains." Ibid. The court then found that petitioner had "failed to prove that he suffered actual prejudice," observing that petitioner's "failure to object to a single motion for continuance * * * undercuts any assertion of anxiety or concern, as does his failure to provide any evidence in support of" such an assertion. Id. at 20a-21a. And it explained that petitioner's assertion of an impaired defense was "the type of 'speculative' argument" that courts "are wary of in pre-trial, Sixth Amendment cases," particularly given that petitioner's counsel in his obstruction-of-justice case had "deposed some of the witnesses he says he now cannot contact." Ibid.

Finally, balancing the Barker factors, the court of appeals determined that petitioner's "right to a speedy trial has not been violated." Pet. App. 21a. The court emphasized that the case involved allegations of an "international, multi-year human-smuggling operation" in which petitioner "allegedly killed two men and committed several capital crimes"; petitioner sought and acquiesced to "myriad continuances," asserting that "he needed more time to investigate the issues, interview witnesses, and negotiate a possible plea deal with the government"; petitioner "did not assert his speedy trial right for over nine years"; and petitioner failed to demonstrate prejudice. Id. at 21a-22a. "Simply put," the court stated, "'the record strongly suggests' that [petitioner] -- while hoping to 'take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges' -- 'definitely did not want to be tried.'" Id. at 22a (quoting Barker, 407 U.S. at 535). The court accordingly reversed and remanded "for a prompt trial." Id. at 23a.

The court of appeals declined to address the district court's separate conclusion that petitioner's "due-process rights had been violated in the pre-indictment period" because petitioner had conceded on appeal that he "did not seek dismissal on Fifth Amendment grounds." Pet. App. 22a-23a. "In any event," the court of appeals added, petitioner "did not suffer a Fifth Amendment due-process violation because he failed to prove that the

government acted in bad faith and caused him actual, substantial prejudice during the pre-indictment period." Id. at 23a.

ARGUMENT

Petitioner principally contends that the court of appeals erroneously held that his "right to a speedy trial * * * did not attach until indictment" and that the court's decision allows the government to "manipulate the date on which the speedy-trial right attaches." Pet. 18-19 (emphases omitted). The court, however, expressly declined to decide when petitioner's speedy trial right attached, instead finding that even if petitioner's position was correct, he nevertheless could not show a Sixth Amendment violation. Petitioner does not independently dispute the court's speedy-trial-right analysis, which is thorough, correct, and so highly case-specific that it would not warrant this Court's review. In any event, petitioner is mistaken that his speedy trial right attached in 2006 and that the decision below allows the government to use civil immigration detention to circumvent the Speedy Trial Clause. And in any event, the interlocutory posture of the case would counsel against this Court's review at this time.

1. The court of appeals correctly applied the settled standard of Barker v. Wingo, 407 U.S. 514 (1972), to the facts of this case and determined that petitioner's Sixth Amendment right to a speedy trial was not violated in the particular circumstances here. Petitioner is incorrect that the court "held" that his "right to a speedy trial on the homicide-related charges did not

attach until indictment." Pet. 18; see Pet. 2 (stating that the court "held" that petitioner's "speedy-trial right did not attach until indictment in July 2010"). To the contrary, the court explained that it "need not decide" whether petitioner's speedy trial right attached at the time of his arrest for administrative immigration violations in 2006 or when he was indicted on the charges in this case in 2010. Pet. App. 8a n.7. It recognized that the delay "is, at the very least, greater than nine years," id. at 8a; accepted that such delay "weighs heavily against the government," id. at 9a; and determined that, even with such a delay, consideration of all the Barker factors did not support petitioner's claim of a Sixth amendment violation, id. at 22a.

Because the court of appeals found that petitioner's speedy trial claim would fail regardless of whether the right attached in 2006 or 2010, petitioner cannot show that resolving the date of attachment in his favor would benefit him. Even if he did, the fact-specific questions of when his speedy trial right attached and whether the court properly weighed the Barker factors, in the pretrial posture of this particular case, would not warrant this Court's review.

To the extent that petitioner contends (Pet. 14, 16-18) that the court of appeals improperly disregarded factual findings by the district court, he does not raise those arguments as independent bases for further review, but instead ties them to a question presented limited to the timing issue. Moreover, his

principal factual contention itself involves a dispute over when his speedy trial right attached; as just explained, the court of appeals made clear that petitioner's speedy trial claim lacked merit even if the right attached at the earliest possible date, so any factual dispute on the issue is immaterial. Pet. App. 8a n.7. And the court's factual analysis of the discovery process in addressing the second Barker factor was firmly grounded in the record. See id. at 12a-15a; Gov't C.A. Br. 117-122 (addressing the discovery issue in detail); see also Gov't C.A. Br. 80-95 (further addressing petitioner's factual claims).

2. In any event, petitioner is mistaken that his speedy trial right on the capital charges in this case attached at his initial immigration arrest on different charges in 2006.

a. The Sixth Amendment right to a speedy trial "does not attach" until "a defendant is arrested or formally accused" of the charged crime. Betterman v. Montana, 136 S. Ct. 1609, 1613 (2016). That is because the speedy trial right is "not primarily intended to prevent prejudice to the defense caused by passage of time" after a crime is allegedly committed, but instead "to minimize the possibility of lengthy incarceration prior to trial, to reduce the * * * 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." United States v. MacDonald, 456 U.S. 1, 8 (1982). Before "indictment, information, or other formal charge," a person "suffers no

restraints on his liberty and is not the subject of public accusation." United States v. Marion, 404 U.S. 307, 321 (1971). Thus, "as far as the Speedy Trial Clause of the Sixth Amendment is concerned," preindictment delay "is wholly irrelevant." United States v. Lovasco, 431 U.S. 783, 788 (1977). "[B]efore arrest or indictment, * * * statutes of limitations provide the primary protection against delay, with the Due Process Clause as a safeguard against fundamentally unfair prosecutorial conduct." Betterman, 136 S. Ct. at 1613.

Until petitioner's indictment in 2010, he was not the "subject of public accusation" on the charges in this case and suffered no "restraints on his liberty" in connection with those charges. Marion, 404 U.S. at 321. The restraints on his liberty up to that point resulted from (i) his immigration-related administrative detention (which lasted for 13 days), (ii) his pre-trial detention on the obstruction-of-justice offenses with which he was charged in December 2006, and (iii) his pre-sentencing detention following his guilty plea to the obstruction charges in May 2007. Pet. App. 3a; see C.A. ROA 1304-1307, 2176-2178, 2198-2199. Those restraints did not arise from the charges in this case, which had not yet been filed. They accordingly do not implicate the speedy trial claim that petitioner raises here. See, e.g., Rashad v. Walsh, 300 F.3d 27, 36 (1st Cir. 2002) ("Although arrest may trigger the right to a speedy trial, it does not do so unless the arrest is the start of a continuous restraint on the defendant's liberty,

imposed in connection with the same charge on which he is eventually put to trial.") (emphasis added), cert. denied, 537 U.S. 1236 (2003); United States v. Sprouts, 282 F.3d 1037, 1042 (8th Cir. 2002) (explaining that, where defendant was "already incarcerated on another charge," he did not "become accused for purposes of the Sixth Amendment speedy trial provision until he was indicted" on the charge at issue).

b. Petitioner contends that the court of appeals' decision improperly allows "civil immigration detentions" to be used as "'mere ruses to detain a defendant for later criminal prosecution.'" Pet. 20 (quoting United States v. Drummond, 240 F.3d 1333, 1336 (11th Cir. 2001) (per curiam)). He cites a number of cases that addressed claims under the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq., which (unlike the Speedy Trial Clause of the Sixth Amendment) specifically requires that a defendant be charged by information or indictment "within thirty days from the date on which such individual was arrested * * * in connection with such charges." 18 U.S.C. 3161(b). The cases petitioner cites uniformly recognized that immigration detentions "are civil in nature and do not trigger the Speedy Trial Act," but nevertheless countenanced the possibility of a contrary result where civil detentions are "used by the government as 'mere ruses to detain a defendant for later criminal prosecution.'" Drummond, 240 F.3d at 1336 (citation omitted); see United States v. Pasillas-Castanon, 525 F.3d 994, 997 (10th Cir. 2008) (explaining that "arrests

connected to civil matters do not trigger the Speedy Trial Act," but allowing for a "ruse exception"); United States v. Rodriguez-Amaya, 521 F.3d 437, 441 (4th Cir.) (explaining that "the Speedy Trial Act does not apply to * * * ICE administrative detention" but allowing for a "'ruse exception'" where the detention "amounts to nothing but a cover for criminal detention"), cert. denied, 555 U.S. 904 (2008); United States v. Garcia-Martinez, 254 F.3d 16, 19-20 (1st Cir. 2001) (same); United States v. De La Pena-Juarez, 214 F.3d 594, 597-598 (5th Cir.) (same), cert. denied, 531 U.S. 983, and 531 U.S. 1026 (2000); United States v. Cepeda-Luna, 989 F.2d 353, 357 (9th Cir. 1993) (same).

Even assuming that such a "ruse exception" is warranted in the Speedy Trial Act context, and further assuming that some basis existed to export it to the Sixth Amendment context, the exception would not support petitioner's claim here. As an initial matter, petitioner could not meet his burden of showing that the "primary or exclusive purpose of the civil detention was to hold him for future prosecution." Drummond, 240 F.3d at 1336 (citation omitted). Petitioner does not dispute that he was properly subject to administrative detention and removal. Nor does he contend that the government was required to charge him with a crime immediately upon obtaining probable cause to do so. See, e.g., Lovasco, 431 U.S. at 791 ("[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilty beyond a reasonable

doubt."). Moreover, the government did in fact charge petitioner with an obstruction crime soon after ICE took him into administrative custody, see Pet. App. 3a, and its expedition in doing so undercuts petitioner's suggestion that the government employed civil detention as an alternative to criminal proceedings that it was otherwise ready to commence.

Furthermore, petitioner's civil detention did not, as he claims (Pet. 24), allow the government to "shave[] almost four years off the length of delay." That detention lasted less than two weeks, after which the restraints on petitioner were based on the criminal charges for obstruction of justice and on his subsequent guilty plea to that offense. Pet. App. 3a. Petitioner cites no authority for the proposition that the government may not detain a defendant on federal criminal charges, or detain him pending sentencing on those charges after a guilty plea, while also investigating the possibility of bringing more serious charges. Nor does petitioner explain how a two-week period of delay attributable to his civil detention could change the court of appeals' application of Barker when that court found it unnecessary to resolve whether the period of delay was 13 years or nine years. Id. at 8a & n.7.

Petitioner asserts (Pet. 27) that the government "likely" delayed sentencing on the obstruction charges until 2011 in order to improperly "extract additional inculpatory statements" and to avoid "trigger[ing] the appointment of learned counsel." But he

offers nothing to support this claim beyond mere "inference," ibid., and he acknowledges that his counsel requested two of the continuances of his sentencing, Pet. 8. Nor does he show a causal connection between his delayed sentencing in the obstruction case, which occurred in January 2011, and the pre-indictment delay on the capital charges, which was filed six months earlier in July 2010. Pet. App. 3a. Thus, even if petitioner could show that his obstruction-related sentencing was improperly delayed, that would not support his claim that the speedy trial right in this case attached prior to indictment.

In any event, petitioner's argument that the government improperly delayed sentencing in the obstruction-of-justice prosecution would not support his Sixth Amendment claim. The Speedy Trial Clause "does not apply to delayed sentencing." Betterman, 136 S. Ct. at 1613. Instead, the "primary safeguard" against undue delay between conviction and sentencing "comes from statutes and rules," with "due process serv[ing] as a backstop against exorbitant delay." Id. at 1617. Petitioner has not raised any due process claim here. Moreover, petitioner himself could have sought a speedy sentencing in his prosecution for obstruction of justice, but he did not. Instead, he joined in each of the government's requests to continue sentencing and requested two additional continuances of his own. Pet. 8; C.A. ROA 2289, 2295, 2903-2924.

3. Review in this case is also unwarranted in light of its interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court "is not yet ripe for review by this Court"); see also Stephen M. Shapiro et al., Supreme Court Practice § 4.18 & n.72, at 282-283 (10th ed. 2013) (noting that this Court routinely denies interlocutory petitions in criminal cases). If petitioner is convicted at trial, he can raise his speedy trial claim on appeal from a final judgment; indeed, the Court has held that such claims are more appropriately considered at that time. See United States v. MacDonald, 435 U.S. 850, 858-861 (1978) (explaining that a defendant may not file an interlocutory appeal from the denial of a speedy trial claim). This case presents no occasion for this Court to depart from its usual practice of awaiting final judgment before determining whether to grant review in a criminal case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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