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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government does not deny that law enforcement agents' primary purpose in arresting Duran Gomez was to hold him for future criminal prosecution on homicide charges, rather than to detain him for civil immigration proceedings. Nor does it deny that arresting a defendant on pretextual grounds, as agents did here, distorts the *Barker v. Wingo*, 407 U.S. 514 (1972), balancing analysis, threatening to undermine defendants' Sixth Amendment right to a speedy trial. The government makes no effort to defend the rule adopted by the Fifth Circuit, and it does not deny that that rule opens the door to serious prosecutorial abuse.

Instead, the government principally argues that any error is harmless because the Fifth Circuit (1) wrote that it "need not decide" when Duran Gomez's speedy-trial right attached (2006 or 2010), and (2) said it would have rejected Duran Gomez's speedy-trial claim even if the right attached in 2006. The government's second claim is simply false: at no point in its opinion did the Fifth Circuit give any indication that it would have reached the same ultimate result if Duran Gomez's speedy-trial right had attached in 2006. As to the first claim, the Fifth Circuit *did* have to decide when the right attached. The exact date of attachment is relevant to the length of pretrial delay (first *Barker* factor), whether the government should be held responsible for the delay because of the deliberate, bad-faith conduct in which the district court found it engaged (second factor), and the extent of prejudice Duran Gomez suffered (fourth factor). There was no way the Fifth Circuit could

resolve Duran Gomez's appeal without first determining when his speedy-trial right attached. And the Fifth Circuit's analysis leaves no doubt that the court concluded—erroneously—that the right attached in 2010, not 2006. The court's error was not harmless.

ARGUMENT

I. Duran Gomez's speedy-trial right attached in 2006, when ICE effected a pretextual arrest for civil immigration violations.

The government acknowledges a defendant's Sixth Amendment speedy-trial right attaches at the earlier of arrest or indictment, but it contends Duran Gomez's 2006 arrest did not trigger the Speedy Trial Clause because he was not then held "in connection with" the homicides. BIO.12-13. To support this argument, the government cites Immigration and Naturalization Service paperwork showing Duran Gomez appeared before an immigration official on the day after his arrest. BIO.13 (citing ROA.1304-07). That paperwork is immaterial. Duran Gomez has never denied that the government *claimed* to arrest him for "administrative immigration violations," for which he was taken before an INS official. App.8a. He argues, instead, that ICE used civil immigration arrest as a ruse to detain him for a future homicide prosecution, and therefore that his post-arrest detention did in fact "arise from the [homicide] charges in this case." BIO.13. On this question of pretext, the government has almost nothing to say about the record.

The government does not dispute that ICE began surveilling Duran Gomez as part of what agents called "a criminal investigation"; that the arrest occurred pur-

suant to ICE's "alien smuggling organizations investigations" project; that the "seizing officer" and "supervisor" overseeing the arrest were "criminal investigators"; that on the day of his arrest, agents wrote in an inventory report that Duran Gomez was being "charged" with harboring unlawful aliens; or that, in a follow-up report, agents said Duran Gomez had been "arrested . . . for alien smuggling and potential involvement in 2 homicides." *See* Pet.21-22. Nor does the government dispute that in the hours immediately following his arrest, Duran Gomez was questioned about the homicides by FBI agents—who are not typically involved in interviewing suspects arrested for civil immigration violations. App.25a. During that interview, agents told Duran Gomez that he was being charged with alien smuggling and that he faced death or life in prison if convicted. Dist. Ct. Dkt., ECF Nos. 655 at 1-2, 655-2.

In the face of this evidence, the government cannot bring itself to represent that Duran Gomez's arrest was a bona fide effort to detain him for civil removal proceedings. And no wonder: the idea that ICE actually intended to deport Duran Gomez—having arrested him as part of a criminal investigation into a double homicide, and having identified the criminal statute under which prosecutors would charge him—is beyond farfetched. Under these circumstances, the record establishes that "'the primary or exclusive purpose of the civil detention was to hold [Duran Gomez] for future criminal prosecution.'" Pet.32 (quoting *United States v. De La Pena-Juarez*, 214 F.3d 594, 598 (5th Cir. 2000)).

The government claims Duran Gomez "does not dispute that he was properly subject to administrative detention and removal." BIO.15. That is beside the point. The question in a "ruse exception" case is not

whether agents were legally authorized to arrest the defendant on civil immigration violations, but whether those violations were the true basis of the arrest, or instead a mere pretext. If unlawful immigration status were enough to show that an arrest is not pretextual, then the ruse exception would never apply; the exception takes it for granted that a defendant may be detained because of his immigration status *if that status is the true basis of his arrest.* Thus even assuming Duran Gomez was in the country illegally, that fact would not make his arrest for "administrative immigration violations" any less pretextual.

The government also observes that prosecutors were not "required to charge [Duran Gomez] with a crime immediately upon obtaining probable cause to do so." BIO.15. This is true but irrelevant. Duran Gomez does not argue the government should have indicted him on the homicides in 2006, when agents believed they had probable cause. He simply argues that, because he was arrested for the homicides in 2006, his speedy-trial right attached at that time; how quickly the government obtained an indictment after arrest does not bear on law enforcement's basis for the arrest at the time it was made.

Equally irrelevant is the fact that "the government did in fact charge [Duran Gomez] with an obstruction crime soon after ICE took him into administrative custody." BIO.16. Post-arrest charges on one offense (obstruction of justice) cannot retroactively change the fact that the basis of Duran Gomez's arrest was a different offense (homicide). In consequence, Duran Gomez's speedy-trial right as to the homicide charges attached in November 2006, regardless of when he was indicted on the unrelated obstruction count.

Finally, the government argues Duran Gomez's post-arrest detention added only two weeks to the length of pretrial delay, because after December 2006 he was held "based on the criminal charges for obstruction of justice." BIO.16. But once Duran Gomez was arrested for the homicides in November 2006, the speedy-trial clock began to run, and it continued to run notwithstanding that he was later charged with other offenses. The government cites no authority for the proposition that the filing of additional charges tolls the speedy-trial clock as to previous offenses.

II. The Fifth Circuit's error was not harmless.

The government contends "any factual dispute" regarding the date of attachment "is immaterial." BIO.12. According to the government, the Fifth Circuit said "it 'need not decide,'" and therefore did not decide, whether Duran Gomez's speedy-trial right attached in 2006 or 2010. BIO.11. And, the government asserts, the Fifth Circuit "found that [Duran Gomez's] speedy trial claim would fail regardless of whether the right attached in 2006 or 2010." BIO.11. The government is wrong on all three counts: the Fifth Circuit *did* need to determine the precise date of attachment, it *did* in fact decide that question (even if it purported not to), and it did *not* say the *Barker* balancing would have come out the same way if Duran Gomez's speedy-trial right had attached in 2006. Contrary to the government's suggestion, therefore, the Fifth Circuit's error was not harmless.

First, resolving Duran Gomez's appeal required identifying the exact date on which his speedy-trial right attached. The Fifth Circuit wrote that it "need not decide" whether Duran Gomez's right attached in 2006 or 2010 "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 n.7. That is true as far as it goes: regardless of whether the pretrial delay was fourteen-and-a-half years (because Duran Gomez's speedy-trial right attached in 2006) or eleven years (because it attached in 2010), the delay was greater than one year. For purposes of whether delay is sufficient "to trigger a speedy trial analysis," all periods exceeding one year are indistinguishable. *Doggett v. United States*, 505 U.S. 647, 651 (1992). But they are not indistinguishable for purposes of the first factor in that speedy-trial analysis, which concerns "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Id.* at 652. The first *Barker* factor, in other words, asks not just whether delay exceeds one year, but *how much greater* than one year it is. So a fourteen-and-a-half-year delay will weigh more heavily against the government than an eleven-year delay, and a court cannot properly balance the *Barker* factors unless it determines exactly how long the delay is.

The Fifth Circuit apparently tried to sidestep this problem by concluding that "the delay (from indictment to dismissal) is, at the very least, greater than nine years," which "weighs heavily against the government." App.8a-9a. But even if a delay of nine-plus years weighs heavily against the government, it does not weigh as heavily as a delay of fourteen-plus years. *Barker* therefore required the Fifth Circuit to decide when exactly the delay began, i.e., when Duran Gomez's right attached.

There are additional reasons, specific to this case, that the Fifth Circuit needed to commit to an attachment date. The district court found as a fact that the

government finished investigating the homicides in 2007 "but chose to delay the Indictment until [Duran Gomez] was sentenced in the obstruction case." App.34a. The court made a further factual finding that this delay was "deliberate[]," reflected "bad faith," and "was intentional and undertaken for the sole purpose of gaining some tactical advantage." App.47a. The district court's bad-faith finding played a central part in its *Barker* balancing analysis, and Duran Gomez relied heavily on that finding in urging the Fifth Circuit to affirm. *See, e.g.*, App.47a-48a, 63a-64a, 68a-70a; C.A. Def. Br. 75-84. If the government indeed delayed in bad faith, and if that bad faith occurred after Duran Gomez's speedy-trial right had attached, that fact would tilt the second *Barker* factor decisively in Duran Gomez's favor. *See Doggett*, 505 U.S. at 656 (explaining that defendant "would prevail if he could show that the Government had intentionally held back in its prosecution of him to gain some impermissible advantage at trial," and adding that "official bad faith in causing delay will be weighed heavily against the government"). The Fifth Circuit therefore could not meaningfully review the district court's speedy-trial holding without deciding whether Duran Gomez's right had attached by the time of the government's bad-faith conduct between 2007 and 2010.[1]

Likewise, at the fourth *Barker* prong, Duran Gomez argued to the Fifth Circuit that he was preju-

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[1] The only way to avoid deciding that question would have been to hold that the district court's bad-faith finding was clearly erroneous, and thus that it did not matter whether the supposed bad faith occurred pre- or post-attachment. But the Fifth Circuit did not take that route.

diced by, among other things, certain events that occurred in the arrest-to-indictment period. *See* C.A. Def. Br. 135-36. To evaluate this particular claim of prejudice, the Fifth Circuit needed to decide whether his speedy-trial right had attached by that point; if it had not, any prejudice would be non-cognizable.

Second, although the Fifth Circuit refused to say so, it did decide—at least implicitly—that Duran Gomez's speedy-trial right attached in 2010, not 2006. At numerous points, the court's analysis assumed attachment in 2010:

- In reciting the case history, the Fifth Circuit wrote that "[o]n November 21, 2006, Duran-Gomez was arrested for civil immigration violations." App.3a. Thus the Fifth Circuit believed Duran Gomez was not arrested for the homicides in 2006, which would mean his speedy-trial right did not attach at that time.
- The Fifth Circuit declined the government's invitation to hold that "the speedy trial right is charge-specific, such that the speedy trial 'clock' begins anew with respect to additional counts charged in superseding indictments." In explaining why it was unnecessary to resolve this question, the court wrote that the length of the delay "[wa]s the same regardless of whether Duran-Gomez's speedy trial right attached in 2010 (the original indictment) with respect to all counts or whether the right attached as to some counts in 2010 and as to others in 2017 (the second superseding indictment)." App.8a-9a n.8. In the Fifth Circuit's view, the earliest the speedy-trial right could have attached as to counts in the

superseding indictment was 2010; the court did not even consider the possibility that it attached following arrest in 2006.

- The Fifth Circuit began its analysis of the second *Barker* factor by noting that "[s]ince his original indictment in 2010," Duran Gomez had moved for ten continuances. App.10a. By starting its speedy-trial analysis in 2010, the Fifth Circuit made plain that it believed Duran Gomez's right did not attach in 2006.
- The Fifth Circuit's second-factor analysis made no mention of the district court's factual finding that the government engaged in bad-faith delay between 2007 and 2010. *See* App.9a-15a. The only way to justify ignoring that bad faith—which was essential to both the district court's holding and Duran Gomez's appellate argument—was to conclude his speedy-trial right did not attach until 2010.
- The prejudice portion of the Fifth Circuit's opinion did not address Duran Gomez's argument that he was prejudiced by certain pre-indictment events. *See* App.18a-21a.
- In weighing the *Barker* factors, the Fifth Circuit wrote that "Duran-Gomez did not assert his speedy trial right for over nine years"—i.e., until he filed the motion to dismiss in August 2019, nine years after the 2010 indictment. App.22a. The use of 2010 as the starting point for measuring when Duran Gomez asserted his rights means the court

> believed the speedy-trial right attached in 2010, not 2006.

The reasoning and analysis in the Fifth Circuit's opinion fall apart unless Duran Gomez's right attached in 2010, and not sooner.

Third, the government argues the Fifth Circuit "found that [Duran Gomez's] speedy trial claim would fail regardless of whether the right attached in 2006 or 2010." BIO.11. That is wrong. Nowhere in its opinion does the Fifth Circuit say it would have rejected Duran Gomez's claim even if his speedy-trial right had attached in 2006—i.e., even if the delay were fourteen-and-a-half years rather than eleven, even if the court considered the government's deliberate, bad-faith delay at the second *Barker* prong, and even if pre-indictment events could contribute to prejudice. The Fifth Circuit made no such harmlessness holding, and the government cites no language in the opinion that suggests it did. The government's characterization of the Fifth Circuit's opinion is inaccurate.

And, contrary to the government's suggestion, Duran Gomez does "independently dispute the [Fifth Circuit's] speedy-trial-right analysis." BIO.10. The "*Barker* factors must be viewed collectively," which means that a change in how any one factor is weighed "could very well . . . affect[] the outcome" of the balancing analysis. *Boyer v. Louisiana*, 569 U.S. 238, 247 (2013) (Sotomayor, J., dissenting from dismissal of writ of certiorari as improvidently granted). Here, the Fifth Circuit's error regarding the attachment date affected proper weighing of three separate factors (the first, second, and fourth). Accordingly, this Court should hold the government may not use pretextual civil arrests to stymie defendants' Sixth Amendment speedy-trial rights, and

should remand to the Fifth Circuit for reconsideration in light of that ruling.

III. The posture of this case does not counsel against granting the petition.

The government argues review in this case is "unwarranted in light of its interlocutory posture." BIO.18. But while "the interlocutory nature" of a judgment "is relevant to [this] Court's discretionary assessment of the appropriateness of immediately reviewing such a judgment," it is not dispositive. Stephen M. Shapiro et al., Supreme Court Practice § 4.18 at 282 (10th ed. 2013). Where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." *Id.* at 283. Indeed, the government itself has elsewhere acknowledged that this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. 5, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (No. 17-654) (citing cases).

Duran Gomez's case presents such an issue. The government does not defend the legal principle the Fifth Circuit endorsed. It does not attempt to explain why it should be permitted to effect pretextual arrests on civil immigration violations while agents continue their investigation. It does not deny that condoning such pretextual arrests would warp the *Barker* analysis by artificially shortening the period of pretrial delay, excluding relevant evidence of governmental bad faith when apportioning blame, making it harder for defendants to assert their speedy-trial rights, and preventing judicial consideration of prejudice suffered in the arrest-to-indictment window. *See* Pet.23-31. And it does not disagree that, if courts countenance pretextual arrests de-

signed to prevent attachment of the Sixth Amendment right, the Speedy Trial Clause "'would lose all meaning.'" Pet.32 (quoting *De La Pena-Juarez*, 214 F.3d at 598).

That silence is telling. Prosecutors are not ordinarily shy about justifying the tools at their disposal. That the government has not done so here suggests the Fifth Circuit's opinion permits a type of abuse that threatens to render the speedy-trial promise illusory.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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