No. _____

In the

Supreme Court of the United States

MARK ELDON WILSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

1. Whether a criminal complaint, at least when paired with an arrest warrant, triggers a defendant's Sixth Amendment speedy trial rights, which attach once "the putative defendant in some way becomes an 'accused.'" *United States v. Marion*, 404 U.S. 307, 313 (1971) (quoting U.S. Const. amend. VI).

2. Whether, after the Government rests its case and a defendant raises a meritorious motion for a judgment of acquittal under Federal Rule of Criminal Procedure Rule 29, a district court has the discretion to reopen the evidence to permit the Government to correct a deficiency in its proof.

Statement of Related Proceedings

- *United States v. Mark Eldon Wilson*,
  Case No. 2:04-cr-0476-SJO-TJH (C.D. Cal.)

- *United States v. Mark Wilson*,
  Case No. 18-50333 (9th Cir.)

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Petition for Writ of Certiorari

Mark Eldon Wilson petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the Court of Appeals is unreported and is included in the Appendix at App. 1-5. The Court's denial of rehearing and rehearing en banc is included in the Appendix at App. 6. The relevant rulings of the District Court are also unreported and are included in the Appendix at App. 7-30.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on February 9, 2021. App. 1. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on April 19, 2021. App. 6. This Court's miscellaneous orders dated March 19, 2020, and July 19, 2021, extended the deadline for this petition for a writ of certiorari to 150 days from the Court of Appeals' order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Criminal Procedure 29(a) provides:

> **Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

Introduction

The Government filed a criminal complaint and arrest warrant accusing Mark Wilson of mail and wire fraud, and then it waited six-and-a-half years to initiate Mr. Wilson's prosecution. In denying Mr. Wilson's challenge this extraordinary delay, the Ninth Circuit acknowledged that there is a circuit split, as well as a split of authority from within the Ninth Circuit, about whether a criminal complaint triggers the protections of the Sixth Amendment's speedy trial rights, which attach once "the putative defendant in some way becomes an 'accused.'" *United States v. Marion*, 404 U.S. 307, 313 (1971). This case presents this Court an opportunity to resolve this circuit split and address this important question of law.

The Ninth Circuit rejected Mr. Wilson's speedy trial claim by concluding that regardless of whether his speedy trial rights triggered with the complaint, his "claim still fails." App. 2. Specifically, the Court reasoned that Mr. Wilson's claim that the Government violated his speedy trial rights failed because he knew about the charges and did not affirmatively pursue his own trial. But the Ninth Circuit's analysis contradicts this Court's consistent admonition that a defendant has "no duty to bring himself to trial," *Barker*, 407 U.S. at 527, and that it is instead "the duty of the charging authority [] to provide a prompt trial," *Dickey v. Fla.*,

398 U.S. 30, 38 (1970). This case thus presents a good vehicle for the Court to address whether a criminal complaint triggers Sixth Amendment speedy trial rights while affirming that a defendant does not have a duty to bring on his own trial.

Alternatively, this case also presents an opportunity for this Court to correct the circuit courts' consistent but erroneous interpretation of Federal Rule of Criminal Procedure 29. The Rule provides that a district court "must" enter an acquittal if the evidence is insufficient after the Government "closes its evidence." But in contravention of the plain terms of the Rule, the circuit courts have all held that after the Government rests its case and a defendant brings a meritorious Rule 29 motion, a district court can reopen the evidence to allow the Government to fix a deficiency in its proof. The circuit courts' have all coalesced around this interpretation in a series of terse decisions that do not consider the text of the Rule. This case presents an ideal vehicle to correct this persistent error.

Statement of the Case

In June 2000, the Government filed a criminal complaint and arrest warrant charging Mark Wilson with wire fraud. App. 2; ER 92-122.[1] Although the Government admitted that it could have sought Mr. Wilson's extradition on the basis of the complaint, ER 171 n.3, 277 n.4, the Government waited approximately six-and-a-half years to request Mr. Wilson's extradition from Canada. The Government indicted Mr. Wilson in April 2004, nearly four years after it filed the complaint, and it finally sent an extradition request to Canada in January 2007. ER 123, 298, 2179.

Once he was extradited to the U.S., Mr. Wilson argued that the delayed prosecution violated his constitutional speedy trial rights. ER 240-57. The District Court found that Mr. Wilson "had no control over when he would be arrested, nor did he seek to avoid detection by Canada or the Government." App. 17. Additionally, Mr. Wilson "'lived openly under his own name, and stayed within the law' after being indicted." App. 17 (citation omitted). The Court nonetheless denied the motion, concluding that the nearly four-years between complaint and indictment were irrelevant to the Sixth-Amendment analysis and that the remaining two-and-a-half years between indictment

[1] Citations to "ER" refer to the Excerpts of Record filed in Mr. Wilson's appeal to the Ninth Circuit Court of Appeals, case number 18-50333.

and the extradition request did not violate the Sixth Amendment. App. 9-10, 15-20.

Mr. Wilson proceeded to trial facing mail fraud and wire fraud charges. ER 141-46. At the conclusion of trial, after both parties rested, the Defense moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 because "no one's identified Wilson in the courtroom." App. 25-26. The District Court indicated that this lack of identification was a problem for the Government's case, meaning that the evidence was insufficient at the time the Government rested. *See* App. 26-29. But instead of entering a judgment of acquittal, the Court reopened the evidence, over the Defense's objection. App. 29-30. The Government then introduced evidence of identification. ER 1547-49.

The jury returned guilty verdicts on all counts. App. 1; ER 2102-11. On appeal, Mr. Wilson argued, among other things, that the Government's six-and-a-half-year delay violated his Sixth Amendment right to a speedy trial, and that the District Court's decision to reopen the evidence violated the plain terms of Rule 29. App. 1-2, 5.

A panel of the Ninth Circuit Court of Appeals issued an unpublished memorandum decision affirming the conviction. First, the Ninth Circuit "recognize[d] that a split exists within our circuit over whether a complaint is

sufficient to trigger the protections of the speedy trial right." App. 2. But the Ninth Circuit concluded that "even assuming that Wilson's right to a speedy trial attached upon the filing of the complaint, his claim still fails." App. 2. The Ninth Circuit's analysis hinged on the fact that Mr. Wilson "knew of the charges against him potentially as early as 2001 but at the latest by 2003." App. 3. The Ninth Circuit reasoned that Mr. Wilson "could have at that time ended the delay and avoided any prejudice caused by the passage of time by voluntarily presenting himself to United States authorities." App. 3 (quotation marks and citation omitted). The Ninth Circuit concluded that Mr. Wilson thereby "contributed" to the delay, and the panel therefore refused to apply the presumption of prejudice that applies to lengthy delays caused by the Government. App. 3.

As to Mr. Wilson's Rule 29 motion, the Ninth Circuit concluded that under *United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001), the District Court had discretion to "reopen[] the evidence after the defense's Rule 29 motion." App. 5.

Mr. Wilson then filed a petition for rehearing that the Ninth Circuit denied without analysis. App. 6.

Reasons for Granting the Writ

A. This Court should decide whether a criminal complaint, at least when paired with an arrest warrant, triggers the speedy trial protections of the Sixth Amendment

1. There is an entrenched inter- and intra-circuit split on the question presented

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. By its text, Sixth Amendment speedy trial rights attach once "the putative defendant in some way becomes an 'accused.'" *United States v. Marion*, 404 U.S. 307, 313 (1971). The right therefore attaches once "a defendant is indicted, arrested, or otherwise officially accused." *United States v. MacDonald*, 456 U.S. 1, 6 (1982); *see also Doggett v. United States*, 505 U.S. 647, 655 (1992).

There is a circuit split about whether a criminal complaint, at least when paired with an arrest warrant, is an official accusation that triggers the Sixth Amendment speedy trial right. Specifically, the Fourth Circuit and the First Circuit have held that a criminal complaint (along with an arrest warrant) is "sufficient to implicate the speedy trial provision of the Sixth Amendment." *United States v. Thomas*, 55 F.3d 144, 149 (4th Cir. 1995); *see also United States v. Woolfolk*, 399 F3d 590, 595 (4th Circ. 2005); *United States v. Henson*, 945 F.2d 430, 437 (1st Cir. 1991). In contrast, in *United*

States v. Richardson, 780 F.3d 812 (7th Cir. 2015), the Seventh Circuit held that a complaint and federal detainer (serving the function of a warrant for an incarcerated defendant) do not trigger speedy trial rights since, prior to arrest, the complaint "imposes no deprivation of liberty on the defendant." *Id.* at 814.

For its part, the Ninth Circuit has issued published decisions on both sides of this split. In one line of cases, the Ninth Circuit has concluded that the Sixth Amendment speedy trial right attaches when the complaint is filed *See United States v. Terrack*, 515 F.2d 558, 559 (9th Cir. 1975); *Northern v. United States*, 455 F.2d 427, 429 (9th Cir. 1972). In these decisions, the Ninth Circuit reasoned that it is a basic tenet of federal criminal procedure that a criminal complaint is an official accusation that initiates a criminal proceeding. To that end, Court looked to foundational definitions of a criminal complaint: Blacks' Law Dictionary defines a criminal complaint as a "formal charge accusing a person of an offense." Complaint, Black's Law Dictionary (11th ed. 2019); *see also Terrack*, 515 F.2d at 559. Rule 3 of the Federal Rules of Criminal Procedure similarly states, "the complaint is a written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 3; *see also Terrack*, 515 F.2d at 559. Indeed, the sole purpose of the complaint is to charge a defendant and initiate criminal

proceedings against him. *See* 1 C. Wright & A. Miller, *Federal Practice and Procedure* § 41 (4th ed. 2014) ("A complaint is the typical way for a criminal proceeding to be instituted in federal court."). These considerations led the Ninth Circuit to conclude that "[c]learly, once a suspect is 'charged' with an offense, he is an 'accused,' within the meaning of *United States v. Marion*," and so the speedy trial right attaches when the complaint is filed. *Terrack*, 515 F.2d at 559.

In another line of cases, the Ninth Circuit also looked to this Court's decision in *Marion* but drew the opposite conclusion, holding that the period following the filing of a complaint but "prior to arrest or formal indictment" is not protected by the Sixth Amendment. *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978); *see also Favors v. Eyman*, 466 F.2d 1325, 1327-28 (9th Cir. 1972) (same). This case is at least the second time the Ninth Circuit has recognized this internal split of authority without resolving the issue. *See United States v. Gonzalez-Avina*, 234 F. App'x 758, 759 (9th Cir. 2007) (unpublished) (assuming without deciding that a complaint triggers speedy trial rights).

There is thus a long-standing circuit split on the issue, and given that the Seventh Circuit recently took the opposite position from majority of circuits, *see Richardson*, 780 F.3d at 813-15, the split is unlikely to resolve

itself in the circuit courts. There is no reason to let the lower courts continue to struggle over the question; this is a case that "presents an important question of federal law that has divided the courts of appeal" and merits this Court's review. *See Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting from denial of certiorari) (citing Sup. Ct. Rule 10).

2. The question presented is of exceptional importance.

The Sixth Amendment speedy trial right "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966). Even if a defendant is not subject to pretrial detention of any form, his public accusation "may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer v. State of N.C.*, 386 U.S. 213, 222 (1967).

As demonstrated by the facts of this case, a complaint is an official accusation that causes the same public scorn as an indictment or information. Once the complaint was unsealed in June 2001, several media

outlets discussed the accusation against Mr. Wilson, and a Government attorney even testified before the Senate about the allegations. *See* ER 276, 412, 466-70. But the Government did not indict Mr. Wilson until April 2004, nearly four years after it filed the complaint, and it finally sent an extradition request to Canada and thereby initiated the prosecution in January 2007. ER 123, 298, 2179. The speedy trial right is meant to protect against lingering accusations precisely to protect against these kinds of reputational, economic, and liberty-related harms. *See Ewell*, 383 U.S. at 120.

If, as the Government argued below, a complaint does not trigger Sixth Amendment speedy trial rights, then the Government can publicly charge a defendant—thereby sullying his reputation and economic prospects—and then wait years to actually prosecute the case and thereby give the defendant the opportunity to clear his name. Indeed, the Government here filed a complaint and arrest warrant and then intentionally waited approximately four years—until the eve of the statute of limitations—to indict Mr. Wilson. *See* ER 170 (Government brief acknowledging that it waited until the statute of limitations was "approaching" to indict Mr. Wilson).

While a defendant can challenge a preindictment delay under the Due Process Clause, a defendant bringing such a claim carries a "heavy burden" of

showing actual prejudice that is "definite and not speculative." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985); *see also United States v. Lovasco*, 431 U.S. 783, 790 (1977). The Due Process Clause—with its actual prejudice requirement—provides an insufficient remedy for post-accusation delays since, as this Court has recognized, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655 (1992). Because of this issue, an excessive delay "skews the fairness of the entire system." *Id.* at 564 (citation omitted). Consequently, in assessing a delay between accusation and trial under the Sixth Amendment, "no showing of prejudice is required when the delay is great and attributable to the government." *United States v. Mendoza*, 530 F.3d 758, 764 (9th Cir. 2008) (citation omitted). "Instead, we presume prejudice." *Id.*; *see also Doggett*, 505 U.S. at 647.

Recognizing the importance of the Sixth Amendment speedy trial right, this Court has issued multiple decisions specifying when, exactly, the right attaches. *See Marion*, 404 U.S. at 313 (speedy trial right attaches when "the putative defendant in some way becomes an 'accused.'"); *Lovasco*, 431 U.S. at 788-95 (speedy trial clause does not require the Government to rush its investigation if no accusatory document is pending); *United States v.*

MacDonald, 456 U.S. 1, 6 (1982) (period between the dismissal of charges in military court and indictment in civilian court does not factor into the speedy trial analysis since no accusatory document was pending); *United States v. Loud Hawk*, 474 U.S. 302, 310-11 (1986) (any delay between dismissal of one indictment and filing a new indictment did not trigger speedy trial rights because defendant was not subject to any accusation or liberty restraints).

But the Court has never addressed whether a criminal complaint is an official accusation that triggers Sixth Amendment speedy trial rights. The Court should resolve the issue here, as it is of fundamental importance.

3. Mr. Wilson's petition presents a good vehicle for the question presented because the Ninth Circuit's application of the Sixth Amendment right conflicts with this Court's precedents

The Ninth Circuit concluded that even if Mr. Wilson's speedy trial rights triggered with the complaint, his "claim still fails." App. 2. But the Ninth Circuit's application of the Sixth Amendment right conflicts with this Court's precedents and therefore presents an opportunity for this Court to reaffirm and clarify them.

The Ninth Circuit reasoned that even if the criminal complaint triggered Mr. Wilson's speedy trial rights, his "claim still fails" because he was aware of the charges against him and could have pursued his own trial. App. 2-3. This analysis conflicts with this Court's precedents which have repeatedly emphasized that it is the Government—as the charging authority and plaintiff in the case—that has the duty to bring a speedy trial. The defendant has "no duty to bring himself to trial." *Barker v. Wingo*, 407 U.S. 514, 527 (1972). To be sure, a defendant's conduct can undermine a speedy trial claim where he evades prosecution or otherwise actively causes the delays about which he later complains. But this Court should reaffirm that where, as here, the defendant lives openly and does not evade arrest or prosecution, it is the Government's duty, and not the defendant's, to bring a speedy trial.

i. To assess whether a defendant's speedy trial right has been violated, the Court balances four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. Assuming that the complaint triggered Mr. Wilson's speedy trial rights, the *Barker* factors compel the conclusion that the Government violated Mr. Wilson's speedy trial rights.

First, as the Ninth Circuit decision recognizes, approximately six-and-a-half years elapsed from the filing of the complaint until the Government finally requested Mr. Wilson's extradition from Canada and thereby initiated the prosecution. App. 2. This Court has called even a five-year delay "extraordinary," which weighs in favor of dismissal. *Barker*, 407 U.S. at 533.

Second, even by the Government's account of the facts, the Government intentionally caused the vast majority of the delay in order to gather additional evidence and add charges to the indictment. (*See* ER 171 n.3, 277 n.4.) The second *Barker* factor—the reason for the delay—must therefore weigh against the Government. *See Barker*, 407 U.S. at 533-34; *United States v. Gregory*, 322 F.3d 1157, 1160-62 (9th Cir. 2003). This is especially so since, as the District Court found, Mr. Wilson "had no control over when he would be arrested, nor did he seek to avoid detection by Canada or the Government." App. 17.

Third, under *United States v. Alexander*, 817 F.3d 1183 (9th Cir. 2016), the assertion-of-the-right factor "favors neither party" where, as here: (1) the delay at issue regards the Government's delay in seeking extradition; (2) following that delay, the defendant lawfully defended himself in his home country by contesting extradition; and (3) the defendant timely asserted his speedy trial rights once he was extradited to the United States. *Id.* at 1183.

Finally, such a lengthy delay that is attributable to the Government creates a "strong" presumption of prejudice requiring dismissal unless the Government can "persuasively rebut[]" the presumption. *Doggett v. United States*, 505 U.S. 647, 658 (1992); *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992). This presumption of prejudice is so strong that the Third Circuit has characterized it as "potentially insurmountable." *United States v. Velazquez*, 749 F.3d 161, 185 (3d Cir. 2014). This Court and circuit courts consistently dismiss cases based on similar, and even shorter, delays without requiring any showing of prejudice from the defendant. *See McNeely v. Blanas*, 336 F.3d 822, 831 (9th Cir. 2003) (dismissing case based on 29-month delay); *Shell*, 974 F.2d at 1036 (five-year delay); *United States v. Black*, 918 F.3d 243, 248-49 (2d Cir. 2019) (68-month delay); *Velazquez*, 749 F.3d at 185 (six-years and eight-months of delay); *Mendoza*, 530 F.3d at 765 (eight-year

delay); *Doggett*, 505 U.S. at 657 (eight-and-a-half-year delay). This caselaw compels the same result here.

ii. The Ninth Circuit concluded that the delay did not violate the Sixth Amendment since Mr. Wilson "knew of the charges against him . . . at the latest by 2003." App. 3. The Ninth Circuit reasoned that Mr. Wilson "could have at that time ended the delay and avoided any prejudice caused by the passage of time by voluntarily presenting himself to United States authorities." App. 3 (quotation marks and citation omitted). The Ninth Circuit concluded that Mr. Wilson thereby "contributed" to the delay, and it consequently refused to apply the presumption of prejudice. App. 3.

The Ninth Circuit's analysis contradicts this Court's consistent admonition that a defendant has no "no duty to bring himself to trial," *Barker*, 407 U.S. at 527, and that it is instead "the duty of the charging authority [] to provide a prompt trial," *Dickey v. Fla.*, 398 U.S. 30, 38 (1970). By placing the burden on Mr. Wilson to initiate his own prosecution, the Ninth Circuit undermined this fundamental principle that it is the plaintiff—the Government—who has the duty to prosecute its case or suffer dismissal.

To be sure, the Ninth Circuit decision points to cases where defendants undermined their speedy trial claims by evading prosecution, misleading the authorities, or otherwise actively causing the delays. But, as addressed

below, the Court has never placed the burden on a defendant to actively seek his own prosecution so long as he does not actively undermine it. Here, as the District Court found, Mr. Wilson "had no control over when he would be arrested, nor did he seek to avoid detection by Canada or the Government." App. 17. Additionally, Mr. Wilson "'lived openly under his own name, and stayed within the law' after being indicted." App. 17 (citation omitted). The Government decided to delay his prosecution for six-and-a-half years, and yet the Ninth Circuit decision faults Mr. Wilson for failing to bring himself to trial, in direct contravention of this Court's guidance from *Barker* and *Dickey*.

The Ninth Circuit decision also conflicts with the Third Circuit's decision in *Velazquez* and the Ninth Circuit's decision in *Mendoza*. In *Velazquez*, defendant-Velazquez learned of the complaint and arrest warrant in 2005. *Velazquez*, 749 F.3d at 170. The authorities did not know his whereabouts. *Id.* Velazquez did not bring himself to the authorities and remained "transient" until his arrest in 2011. *Id.* at 173. The Court nonetheless reversed the district court's finding that Velazquez bore responsibility for the delay and ordered the indictment dismissed. *Id.* at 178-79 & 186. The Court held that "Velazquez had no duty to bring on his own trial," and his knowledge of the arrest warrant "does not diminish any governmental negligence in failing to pursue him." *Id.* at 179. "Absent

evidence of evasive conduct, Velazquez's knowledge does not aid the government's argument." *Id.*

The Ninth Circuit articulated the same rule in *Mendoza*:

> If a defendant attempts to avoid detection, the government is not required to make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension. However, if the defendant is not attempting to avoid detection and the government makes no serious effort to find him, the government is considered negligent in its pursuit.

Mendoza, 530 F.3d at 763 (quotation marks and citations omitted). In *Mendoza*, the defendant learned the FBI was investigating him while he was abroad, and he contacted the FBI, informing them that he would return to the country within a few months. *Id.* at 761-62. He refused, however, to share his whereabouts or contact information. *Id.* Despite his earlier promise to return to the country within months, the defendant did not return to the country for eight years. *Id.* The Ninth Circuit reversed the conviction, concluding that since the defendant did not actively evade arrest, it was the Government's burden to pursue him. *Id.* The Government was negligent in its pursuit, which caused the delay, and so the presumption of prejudice attached. *Id.*

The Ninth Circuit's conclusion here—that Mr. Wilson "contributed significantly" to the delay because he knew about the charges and did not actively seek a trial—conflicts with this Court's consistent guidance, the Third Circuit's decision in *Velazquez*, and the Ninth Circuit's holding in *Mendoza*.[2] The District Court found that Mr. Wilson "lived openly under his own name" and did not "seek to avoid detection by Canada or the Government." App. 17 (citation omitted). Mr. Wilson did not prevent his prosecution, and it was the Government's duty to either pursue trial or forgo it.

3. This case thus comes down to (1) resolving the question presented, namely whether a criminal complaint triggers the Sixth Amendment speedy trial right, and (2) reaffirming that a defendant has "no duty to bring himself to trial," *Barker*, 407 U.S. at 527. Indeed, at oral argument, a member of the Ninth Circuit panel stated that if the Court "start[s] the clock when the complaint is filed," then Mr. Wilson's speedy trial

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[2] The Ninth Circuit's decision relies primarily on *United States v. Aguirre*, 994 F.2d 1454 (9th Cir. 1993), and *United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995). Those decisions stand for the uncontroversial proposition that where a defendant evades arrest or otherwise actively undermines his prosecution, he bears the blame for the delays. They have no bearing here, where the District Court found that Mr. Wilson "lived openly under his own name," "had no control over when he would be arrested, nor did he seek to avoid detection by Canada or the Government." App. 17.

claim would entirely hinge on whether the presumption of prejudice can attach when the defendant was aware of the charges against him but did not affirmatively bring himself to trial. *See* Oral Argument at 11:03-16:12, *United States v. Wilson*, 843 F. App'x 889 (9th Cir. 2021), https://www.ca9.uscourts.gov/media/video/?20210114/18-50333/.

This Court should hear this case to resolve the circuit split on whether a criminal complaint is an official accusation that triggers Sixth Amendment speedy trial rights. Moreover, the case presents a good vehicle for the Court to address the question presented while affirming the principle it articulated in *Barker* and *Dicky*, namely that a defendant's knowledge of charges brought against him does not undermine the Government's fault for a lengthy delay where, as here, the defendant did not evade prosecution or otherwise cause the delay.

B. Alternatively, the Court should grant the writ to correct consistent but erroneous caselaw that contravenes the plain terms of Rule 29

1. The circuit courts' consistent rulings subvert the plain terms of Rule 29

Rule 29 provides: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion *must* enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a) (emphasis added). The Rule is not discretionary: it provides that the court "must" enter an acquittal if the evidence is insufficient after the Government "closes its evidence." Of course, a party closes its evidence by resting. *See* Rest, Black's Law Dictionary (11th ed. 2019) ("[T]o voluntarily conclude presenting evidence in a trial."). Thus, if the evidence is insufficient after the Government rests, the court *must* enter an acquittal; it may not reopen the evidence and give the Government a second bite at the apple.

Despite the Rule's plain language, the circuit courts have consistently held that after the Government rests and the defense raises a meritorious Rule 29 motion, the a district court has the discretion to reopen the evidence to allow the Government an opportunity to correct a deficiency in its proof. *See United States v. Mojica-Baez*, 229 F.3d 292, 299-300 (1st Cir. 2000); *United States v. Parkes*, 497 F.3d 220, 231 (2d Cir. 2007); *United States v.*

Trant, 924 F.3d 83, 87-90 (3d Cir. 2019); *United States v. Gray*, 405 F.3d 227, 238 (4th Cir. 2005); *United States v. Arledge*, 553 F.3d 881, 896 n.3 (5th Cir. 2008); *United States v. Brown*, 181 F.3d 104, 104 (6th Cir. 1999) (unpublished); *Rhyne v. United States*, 407 F.2d 657, 661 (7th Cir. 1969); *United States v. Rouse*, 111 F.3d 561, 573 (8th Cir. 1997); *United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001); *United States v. Smurthwaite*, 590 F.2d 889, 891 (10th Cir. 1979); *United States v. Molinares*, 700 F.2d 647, 649-50 & 652 (11th Cir. 1983).

In reaching this unanimity, the circuit courts have offered scant analysis, and they have not considered the plain text of the Rule. The courts instead consistently appeal to the general notion that "a district judge retains wide discretion to allow the government to re-open its case." *Parkes*, 497 F.3d at 231 (citation omitted); *see also Rhyne*, 407 F.2d at 661; *Rouse*, 111 F.3d at 573; *Smurthwaite*, 590 F.2d at 891. The courts also consistently quote the following statement from the Ninth Circuit's decision in *Suarez-Rosario*: "One purpose of Rule 29 motions is to alert the court to omitted proof so that, if it so chooses, it can allow the government to submit additional evidence." *Suarez-Rosario*, 237 F.3d at 1167 (cleaned up). In making this claim about the purpose of Rule 29, *Suarez-Rosario* cites to *United States v. Tisor*, 96 F.3d 370, 380 (9th Cir. 1996), which in turn quotes from *United*

States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978), which flatly made this claim about the purpose of Rule 29 without citation or further analysis. The circuit courts have thus entrenched an understanding of Rule 29 with little analysis by consistently quoting from the same unpersuasive caselaw.

But given the Rule's plain language, the circuit courts' interpretation of Rule 29 cannot stand. The Federal Rules of Criminal Procedure are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *see also Carlisle v. United States*, 517 U.S. 416, 426 (1996).

Moreover, the circuit courts' interpretation of Rule 29 subverts the constitutional structure that places the burden of proof solely on the Government. Rule 29 codifies the Due Process Clause's requirement that the Government must prove beyond reasonable doubt "every fact necessary to constitute the crime" charged. *In re Winship*, 397 U.S. 358, 364 (1970). A conviction "cannot constitutionally stand" if the Government fails to meet its burden. *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979). As the D.C. Circuit put it, a Rule 29 motion for acquittal "fosters one of the greatest safeguards for the individual under our system of criminal justice[:] the

requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense." *United States v. Wiley*, 517 F.2d 1212, 1218-19 (D.C. Cir. 1975) (quotations marks and citation omitted). The circuit courts' interpretation of Rule 29 undermines these principles by giving the Government a second chance to prove its case after the Government rests and the Defense points out a deficiency in the Government's proof.

The circuit courts' interpretation also places defense counsel in a problematic ethical position. The duty of loyalty "prohibit[s] the lawyer from harming the client." Restatement (Third) of the Law Governing Lawyers § 16 (2000); *see also* California Rule of Professional Conduct 1.7, cmt. 1 (2020). By raising a detailed Rule 29 motion, defense counsel may, as occurred here, inform the prosecution of a deficiency in its case. Under the circuit courts' interpretation of Rule 29, the Government can then move to reopen the evidence and correct the deficiency. By raising a detailed Rule 29 motion, defense counsel thereby harms the client and undermines his duty of loyalty.

The only fix to this ethical problem is for defense counsel not to specify any particular deficiencies in the Government's case in its pre-verdict Rule 29 motions and to instead withhold those arguments for post-trial litigation or

appeal. To preserve a challenge to the sufficiency of the evidence in the Ninth Circuit, "Rule 29 motions for acquittal do not need to state the grounds upon which they are based because the very nature of such motions is to question the sufficiency of the evidence to support a conviction." *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (quotation marks and citation omitted); *see also United States v. Cruz*, 554 F.3d 840, 844 n.4 (9th Cir. 2009). Thus, to avoid helping the Government "fix" its case, the lower courts' interpretation of Rule 29 forces defense counsel to make only non-specific Rule 29 motions. This is an odd directive for the courts to send defense lawyers.

The circuit courts' interpretation thus conflicts with the plain terms of Rule 29, undermines the constitutional mandate placing the burden solely on the Government to prove its case, and places defense counsel in an awkward ethical position. This Court should correct the error.

2. The problem will persist without this Court's intervention

The fact that all of the circuit courts have entrenched an incorrect interpretation of Rule 29 indicates that the mistake will likely persist unless this Court corrects it. Moreover, as this Court's recent docket demonstrates, the fact that circuit courts have consistently ruled a certain way does not mean that they are correct or that the practice does not merit this Court's review. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (noting that the majority "overturn[ed] the long-established interpretation of an important criminal statute" that had "been adopted by every single Court of Appeals to address the question" and had "been used in thousands of cases for more than 30 years"); *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting) (noting that the majority's decision interpreting Title VII conflicted with "every single Court of Appeals to consider the question" before 2017).

This issue also affects numerous defendants' rights around the country. In the Ninth Circuit alone, panels of the court regularly cite to *Suarez-Rosario* in unpublished decisions affirming district courts' decisions reopening evidence. *See, e.g.*, *United States v. Castro*, 704 F. App'x 675, 676 (9th Cir. 2017); *United States v. Cano-Matus*, 274 F. App'x 558, 559 (9th Cir. 2008); *United States v. Cuesta*, 286 F. App'x 358, 360 (9th Cir. 2008). This

Court should correct this erroneous precedent.

3. This case presents a good vehicle to correct the lowers courts' misinterpretation of Rule 29

This case squarely presents the question presented with respect to Rule 29. At the conclusion of trial, after both parties rested, Mr. Wilson moved for a judgment of acquittal under Rule 29 because "no one's identified Wilson in the courtroom." App. 25-26. The District Court indicated that this lack of identification was a problem for the Government's case, meaning that the evidence was insufficient at the time the Government rested. App. 26-29. But instead of entering a judgment of acquittal, the Court reopened the evidence, over the Defense's objection. App. 29-30. The Government then introduced evidence of identification, correcting the deficiency in its proof. ER 1547-49.

Mr. Wilson's guilty verdicts can stand only if the lower courts are correct that a district court can reopen the evidence after the Government rests and a defendant raises a meritorious Rule 29 motion. Conversely, if Mr. Wilson is correct that Rule 29 mandates that a district court must enter an acquittal when the Government's evidence is insufficient, then his guilty verdict cannot stand.

Conclusion

For the foregoing reasons, Mr. Wilson respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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