

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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**JOEL RIVERA-ALEJANDRO, a/k/a "J"**

**Petitioner**

**Vs.**

**UNITED STATES OF AMERICA**

**Respondent**

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

I- Whether Petitioners Constitutional Fifth Amendment's Right to Due Process of Law and his Sixth Amendment Right to a Speedy Trial were violated when his trial did not begin until five years/two months after his indictment; his trial lasted seventeen months/ eight days, and from conviction to sentence two years/four months, **for a total of nine years/ten days**. The filing of excessive multi-defendant Indictments that will necessarily cause Constitutional Speedy Trial violations should be prohibited.

II- The excessive delay of seventeen months/eight days length of trial violated Petitioner's Due Process rights to a speedy and fair trial since the verdict was based on the jury's faulty memory.

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**PETITION FOR A WRIT OF CERTIORARI  
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**TO THE HONORABLE COURT:**

The Petitioner, **Joel Rivera Alejandro**, represented by Court appointed counsel, respectfully prays and requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered against him in this case.

**OPINION BELOW**

The opinion of the Court of Appeals (App. 1-47) is reported at 4 F.4<sup>th</sup> 1 (1<sup>st</sup> Cir. 2021). The District Court rendered no opinion.

LIST OF PROCEEDINGS IN FEDERAL COURT

Petitioner Rivera-Alejandro was the lead defendant in an Indictment filed in the Federal District Court of P.R. on 05/05/2009, charging 54 co-defendants in five counts for conspiracy and substantive narcotics offenses involving in excess of 1 kilo of heroin, 5 kilos of cocaine, 50 grams of cocaine base, a measurable amount of marijuana, Oxycodone and Alprazolam within a 1,000ft. of a playground located in Los Claveles Housing Project in Trujillo Alto, P.R. all in violation of 21 U.S.C. 841(a)(1), (b) (1)(A) (iii), 846, 860, and one count of conspiracy to possess firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. 924(c)(1) and 924(o). (Count six) (Docket 3- App.48-87). He was arrested on 06/08/2009 (Docket 281- App. 162) and ordered detained pending trial. (Docket 397-App. 164).

His jury trial did not begin until 07/28/2014 (Docket 2805- App. 166). A verdict of conviction on all counts was rendered by the jury on 01/05/2016 (Docket 4244- App. 168) for a total of **6 years eight months from indictment until conviction**. He was sentenced on 05/15/2018 (Docket 4988- App. 171), **2 years 4 months after the verdict** to a 30-year incarceration term. (App. 88-97). **From the date of his indictment until his sentence a total of 9 years 10 days elapsed.** A timely Notice of Appeal to the First Circuit Court of Appeals was filed on 05/15/2018. (Docket 4990- App. 170).

Petitioner filed his appellate Brief on 10/15/2019, appellee United States filed its Brief on 02/11/2020. The First Circuit entered its opinion on 06/30/2021. (App. 1-47). A timely Petition for Rehearing and Rehearing En Banc was filed on 07/26/2021 and denied on 08/31/2021. (App. 175).

The present timely Petition for Certiorari follows.

### **JURISDICTIONAL STATEMENT**

The District Court's jurisdiction over this criminal proceeding is conferred by 18 U.S.C. 1331. The First Circuit Court of Appeals jurisdiction is conferred by 18 U.S.C. 3742(a) and 28 U.S.C. 1291.

The Judgment of the Court of Appeals was entered on June 30, 2021. (App. 1). Petitioner was granted by the Court of Appeals an extension to file a Petition for Rehearing and/or Rehearing En Banc until July 30, 2021. A timely Petition was filed on July 26, 2021 and denied on August 31, 2021. (App. 175). This Petition for a Writ of Certiorari is being filed within the time provided in Rule 20.1 of this Court. The jurisdiction of this Hon. Court is invoked under title 28 U.S.C. 1254(1).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

1- The Fifth Amendment provides in its pertinent part:

*"No person...shall be... deprived of life, liberty, or property without due process of law..."*

2- The Sixth Amendment provides in its pertinent part:

*"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial...."*

### **STATEMENT OF THE CASE**

The present Writ of Certiorari raises the important issue of what this Court should do when the practice of filing excessive multidefendant Indictments necessarily violates a defendants Constitutional Sixth Amendment right to a Speedy Trial. In addition, the 5<sup>th</sup> Amendment Due Process protections should be extended to delays in sentencing.

All phases of this criminal prosecution were excessive, and the Court needs to take corrective action because it will be a recurring problem.<sup>1</sup> **Petitioner Rivera-Alejandro**

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<sup>1</sup> In the Federal District Court of P.R. there are still pending cases with excessive number of defendants such as U.S. v. Medina-Rivera, Cr. 17-622 (FAB) (104 defendants); U.S. v. Garcia-Arriaga, Cr. 15-561 (52

**had to wait 5 years two months after being indicted to start his trial; his trial lasted an exorbitant 17 months 8 days, and he had to wait 2 years 4 months after the verdict before he was finally sentenced, for a total of 9 years ten days!**

The First Circuit in its published opinion (App. 1-47) brushed aside the core problem that caused these delays, which is the excessive number of defendants indicted (55) that necessarily extended the statutory speedy trial time periods due to the amount of motions filed and the Court waiting until all co-defendants pled guilty before scheduling the trial of Rivera-Alejandro. This manner of proceeding violated petitioner's Constitutional Due Process and Speedy Trial rights. **No one should have to wait more than 9 years to finalize a federal criminal proceeding.**

Petitioner on three occasions asserted his constitutional rights to a speedy trial (Dockets 2318- App. 98-111; 2499- App. 112-115; 2727- App. 116-119), all of which were denied by the District Court. (Docket 2457- App. 132-133). His first Motion to Dismiss the indictment on constitutional speedy trial violations was denied by the magistrate on statutory speedy trial grounds where he concluded that the number of motions filed by co-defendants justified the delays. (Docket 2416- App. 120-131). Petitioner appealed, but the District Court adopted the magistrates Report & Recommendation. (App. 132-133).

Incredibly, the panel opinion dismissed the argument of excessive delay due to the number of defendants indicted relying on precedent in U.S. v. Casas, 425 F.3d 23, 33-34 (1<sup>st</sup> Cir. 2005), that the joint proceeding constituted an; "*efficient administration of justice*" even though it acknowledged "*the efficient administration of justice is at least questionable*

*in this case and the delay causes us much concern.”* U.S. v. Maldonado-Pena, 4 F.4<sup>th</sup> 1, at 9-10). What a contradictory analysis!

Although Petitioner adopted co-defendant Carlos Rodriguez Alejandro’s Fifth Amendment due process argument concerning excessive trial delays (App. 174), the panel only addressed the issue as to said co-defendant, denying the same because the issue was novel so the District Court could not have committed clear error.<sup>2</sup>

On two occasions Petitioner asserted his right to speedy sentencing (Docket 4423-App. 134-149; Docket 4808- App. 150-153), all of which were denied or ignored by the District Court. (Docket 4435- App. 177). The issue of excessive delay in sentencing was dispatched by the First Circuit in a footnote citing this Court’s opinion in Betterman v. Montana, 136 S. Ct. 1609, 1612 (2016), which held that speedy trial protections under the Sixth Amendment does not extend to sentencing, ignoring that it could be addressed under the 5<sup>th</sup> Amendments Due Process Clause. (Fn. 7. Pg. 123- App. 42).

### **ARGUMENT**

Due to the extreme delays in all phases of this criminal proceeding; Pre-Trial, Trial and Sentencing, there are compelling reasons for this Court to grant the writ on its merits since it involves important issues of what measures should be taken or prohibited when a practice of indicting excessive multi-defendant indictments necessarily will cause Constitutional Speedy Trial violations and the Constitutional 5<sup>th</sup> Amendments Due Process protections as to excessive delays in sentencing.

A prosecutorial practice that conflicts with constitutional protections must be prohibited. Here, the Government’s deliberate filing of a 55 defendant Indictment led to

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<sup>2</sup> As to this both the Court of Appeals and petitioner erred since the trial is covered by the Sixth Amendment’s Speedy trial clause. See Betterman v. Montana, 136 S.Ct. 1609, 1612 (2016) (The Sixth Amendment’s Speedy trial clause protects the accused from arrest through trial.)

the prejudicial delay of Petitioner's constitutional speedy trial rights. Contrary to the First Circuit's opinion in U.S. v. Casas, 425 F.3d 23, 34 (1<sup>st</sup> Cir. 2005), there is nothing efficient in a practice that leads to a trial delay that exceeds 5 years, particularly when the excessive number of defendants will cause the filing of multiple motions that will extend the statutory speedy trial periods of 18 U.S.C. 3161, et seq., legitimizing a practice that violates constitutional speedy trial protections. Neither a statute nor a prosecutorial practice can override constitutional protections. The panel opinion in denying the constitutional speedy trial claims erred in concentrating on the number of motions filed, converting the constitutional analysis into a speedy trial act analysis, and its erroneous conclusion that Petitioner failed to establish specific prejudice, avoiding confronting the core issue that the presumptively excessive delay was caused by the number of defendants indicted.

The 6<sup>th</sup> Amendment guarantees that, "*in all criminal prosecutions, the accused shall enjoy the right to a speedy.... Trial....*".

In Barker v. Wingo, 407 U.S. 514, 529 (1972), this Court identified four factors to decide whether a constitutional speedy trial violation has occurred; "*length of the delay, the reason for the delay, the defendant's assertion of that right, and prejudice to the defendant.*". There, a delay from arrest to trial exceeding 5 years was found to be "extraordinary." (Ibid at 533). As the First Circuit recognized in petitioner's appeal, delays of more than one year in that Circuit are presumptively prejudicial, finding the delay in his case exceeding 5 years; "*certainly raises our eyebrows.*" U.S. v. Maldonado-Pena, 2021 U.S. App. LEXIS 19508, Pgs. 2, 6 (1<sup>st</sup> Cir. 2021).

As has already been argued, the reason for the delay was the practice of the U.S. Attorney's Office filing excessive multi-defendant Indictments, here 55 persons, that necessarily will cause unconstitutional speedy trial delays. Since the practice conflicts with

speedy trial constitutional protections, it should be prohibited, which if allowed will cause future violations.

As to the third reason, Petitioner on three occasions asserted his right to a speedy trial (Dockets 2318- App. 98-111; 2499- App. 112-115, 2727- App.116-119), which were denied precisely due to the number of pretrial motions the 55 defendants had filed. (Docket 2416- App. 120-131; Docket 2457- App. 132-133).

It is clear that as to the first three Barker factors petitioner met his burden. The fourth factor, specific trial prejudice, was not found to be established by the Court. However, as held in Doggett v. U.S., 505 U.S. 647, 651 (1992); “*the presumption that pretrial delay has prejudiced the accused intensifies over time.*” ... “*Unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including “oppressive pretrial incarceration,” “anxiety and concern of the accused,” and “the possibility that the accused’s defense will be impaired” by dimming memories and loss of exculpatory evidence.*” (*Ibid* at 654-citations omitted) ....” *affirmative proof of particularized prejudice is not essential to every speedy trial claim.* See Moore, supra, at 26; Barker, supra at 533. Barker explicitly recognized that *impairment of one’s defense is the most difficult form of speedy trial prejudice to prove* because *time’s erosion of exculpatory evidence and testimony can rarely be shown.*” (*Ibid* at 655). See also U.S. v. Black, 918 F.3d 243, 264-265 (2<sup>nd</sup> Cir. 2019) (“*Affirmative proof of impairment of the defense is not required in order to find a Sixth Amendment violation.*” Tigano, 880 F.3d at 618;”). There a delay of 5 years 8 months was found to be “*egregiously oppressive.*” Barker recognized that; “*We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.*” (*Ibid* at 533).

**The prejudice factor is compounded when one considers the trial lasted 18 months, which clearly is part of the Sixth Amendment Constitutional Speedy Trial violation.** As recognized in Betterman v. Montana, 136 S.Ct. 1609, 1612 (2016); The Sixth Amendment's speedy trial guarantee protects the accused from arrest **through trial** but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges. As appears from the panel opinion, it erred in failing to consider as part of the Sixth Amendment Speedy Trial analysis the extreme delay of the trial, treating it only as a novel Fifth Amendment Due Process issue. See Maldonado-Pena, at 16-18. This Court has yet to rule on a constitutional speedy **trial** duration violation. However, other appellate courts have addressed the issue.

As stated in U.S. v. Warner, 506 F.3d 517, 523 (7<sup>th</sup> Cir. 2007) (Posner, J., dissenting from denial of En Banc):

*[T]he longer the trial, the less likely the jury is to be able to render an intelligent verdict. Jurors become overwhelmed by the volume of evidence and numbed by its repetitiousness. Their attention flags; their minds wander; the witnesses... get mixed up in the juror's minds, or forgotten; the profusion of exhibits... makes the documentary record unintelligible. The impressions created by the closing arguments are likely to wipe out everything that went before.*

\* \* \*

*We are not alone in our concerns about protracted trials, "Exceedingly lengthy trials lead to reduce concentration and recollection of events on the part of all participants, particularly witnesses and jurors. In every long case, exhaustion may diminish everyone's performance. The quality and representative nature of the jury may be reduced by the fact that many citizens – often the most competent – are unable or unwilling to take the time to sit for cases lasting weeks or months." Gordon Van Kessel, "Adversary Excesses in the American Criminal Trial," 67 Notre Dame L. Rev. 403, 478-79 (1992); see also "Principle 12: Courts Should Limit the Length of Jury Trials Insofar as Justice Allows, and Jurors Should Be Fully Informed of the Trial Schedule Established," in American Bar Association, Principles of Juries and Jury Trials (Aug. 2005); Patrick E. Logan, "The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials," 35 Ariz. L.Rev. 603, 703-07 (1993).*

See Also U.S. v. Baker, 107 F.3d 1374, 1390 (9<sup>th</sup> Cir. 1993) where the Court held:

*The risk of prejudice to the defendants increases sharply with the number of defendants and the length of the trial. A trial's length expands with the number of*

*defendants not only because of the amount of evidence that must be presented, but also due to the scheduling conflicts that abound when dozens of jurors, defendants, and attorneys must be present in court at all times. This may often result in defendants having to endure months or even years of incarceration while they are presumed, and may in fact turn out to be, innocent. The Sixth Amendment speedy trial guarantee is rendered toothless when a verdict is not returned until years after an indictment.*

**When one factors in the 18 months trial duration, Barker's fourth 'prejudice' factor is met.**

The prejudice of the extreme duration of the trial is patent. Can the judges of this Court remember the contents of a Brief filed or an oral argument heard 18 months ago? How could jurors render a fair verdict based on their memory of testimonial evidence heard during 18 months of trial? Obviously not! That the jury's memories were affected can be evidenced by their request for the transcripts of the 3 cooperating witnesses during deliberations, which was denied by the District Court. (Tr. 01/05/2016, pg. 3-30 App. 361-388). The judge offered to read back the extensive testimony provided by the cooperating witnesses which the jury rejected, rendering the guilty verdict shortly thereafter. (Excerpt Tr.- App. 154-161). **A verdict based on faulty memory should not be allowed to stand.**

It is clear from the above the First Circuit's Sixth Amendment Speedy Trial violation analysis was faulty and that it erred in failing to include as part of its analysis the prejudice caused to petitioner by the duration of the trial which warrants this Court to grant the Writ to establish precedent concerning this aspect of the 6<sup>th</sup> Amendment Right to a Speedy Trial.

Finally, although Betterman, *supra* at 1612, held that the 6<sup>th</sup> Amendment Speedy Trial guarantee does not extend to sentencing, this Court left open the possibility that delays in sentencing could be raised under a Fifth Amendment Due process claim particularly when Fed. Rule Crim. Proc. 32(b)(1) directs district courts to "impose sentence

*without unnecessary delay.*" (Ibid at 1617-68). This Court refused to entertain the Due process claim because Betterman did not raise it. In the case of Petitioner, the issue was raised. (App. 174 – Motion Adopting Due Process 09/29/20). The First Circuit refused to entertain the **exorbitant 2 years 4 months delay from verdict to sentencing** relying on Betterman, ignoring the 5<sup>th</sup> Amendment Due Process claim that said opinion recognized.

Post Betterman, at least one Circuit has recognized a 5<sup>th</sup> Amendment Due Process violation can arise in delays in sentencing. In U.S. v. James, 712 Fed. Appx. 154, 161 (3<sup>rd</sup> Cir. 2017)<sup>3</sup> the Court held:

*Appellants were not sentenced for fourteen months after they were convicted at trial. They claim that this violated their constitutional right to speedy sentencing. We review the District Court's legal conclusion that appellants failed to establish a violation of their rights to a speedy sentencing *de novo*, but any factual findings supporting that conclusion are reviewed for clear error. Burkett v. Fulcomer ("Burkett II"), 951, F.2d 1431, 1437-38 (3<sup>rd</sup> Cir. 1991).*

*Until 2016, the Third Circuit reviewed claims of delays in sentencing under both the Sixth Amendment and the Due Process Clause. Burkett v. Cunningham, ("Burkett I"), 826 F.2d 1208, 1219-21 (3<sup>rd</sup> Cir. 1987). It analyzed claims under both clauses using [\*\*\*17] the same four-factor test, as set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Burkett II, 951, F.2d at 1438.*

*Last Year, though, the Supreme Court held unanimously that the Sixth Amendment provides no guarantee of speedy sentencing. Betterman v. Montana, 136 S. Ct. 1609, 194 L. Ed. 2d 723 (2016). However, the Court expressly left open the possibility that due process protects against improper delay in sentencing, noting that "Jaifster conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair." *Id.* at 1617. The Court did not set forth what a due process speedy sentencing claim might consist of, although it suggested that the Barker factors might be "[r]elevant considerations." *Id.* at 1618 n. 12.*

*Because the Supreme Court put forward no holding on the availability of a speedy sentencing claim under the Due Process Clause, our prior precedent under the Due Process Clause survives Betterman. We have held that the process, specifically, protects against delays in sentencing. Burkett I, 826 F.2d at 1221 ("The Due Process Clause thus protects not only under delay of trials, including sentencing..."). Moreover, we held that these due process claims are analyzed under the basic framework of the four Baker factors, *Id.* at 1222 ("as a general matter, the Baker factors should also inform our due process*

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<sup>3</sup> Although unpublished, the case is cited for its persuasive value.

*determination"); Burkett II, 951 F.2d at 1438 ("We are to assess four factors [\*\*18], in determining whether the constraints imposed by speedy trial and due process rights have been honored...") (citing Baker, 407 U.S. at 517-38). Betterman, which addressed only the Sixth Amendment, does not disturb this precedent.*

The First Circuit in U.S. v. Nelson Rodriguez, 319 F.3d 12, 60 (1<sup>st</sup> Cir. 2003), a pre-Betterman opinion, recognized that Due Process extends to speedy sentencing claims. The present case provides the full Court with the opportunity to address this issue post-Betterman.

**The uniqueness of this Petition is that it involves exorbitant delays in all phases of a federal criminal proceeding, Pre-Trial, Trial, and Sentencing. It is probably the first case where the violations occurred in such a fashion and provides the Court with the opportunity to address the extent of Constitutional Speedy Trial Protections under the 6<sup>th</sup> and 5<sup>th</sup> Amendments in each phase.**

### **CONCLUSION**

For all the above stated reasons, this Hon. Court should grant the Writ of Certiorari.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 4<sup>th</sup> day of November 2021.



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