No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

Carlos Rivera-Alejandro,
Petitioner,
v.
United States of America,
Respondent.

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

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QUESTIONS PRESENTED

1. Whether the Supreme Court should resolve a circuit split concerning the standard of review for a constitutional speedy trial claim.
2. Whether the second and third factors set forth in *Barker v. Wingo,* 407 U.S. 14 (1972), were correctly evaluated under either the (appropriate) *de novo* standard of review, or under the (applied) abuse of discretion standard.
3. Whether an unduly lengthy trial—consisting of 128-days spanning 18 months—violates the Due Process Clause.

RELATED PROCEEDINGS

- *United States v. Rivera-Alejandro, et al.,* Criminal No. 09-165(CC), in the United States District Court for the District of Puerto Rico

- Appeal No. 18-1184 in the United States Court of Appeals for the First Circuit, reported as *United States v. Maldonado-Peña, et al.*, 4 F.4th 1 (1st Cir. 2021).

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The Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming the judgment against him.

PROCEEDINGS AND OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit affirming the Petitioner's conviction was handed down on June 30, 2021. It is published at 4 F.4th 1 (1st Cir. 2021) and attached as **Appendix A**. Carlos Rivera-Alejandro filed a Petition for Rehearing *En Banc* which was denied on October 19, 2021. That Order is attached as **Appendix B.**

JURISDICTIONAL GROUNDS

Petitioner requests review of the Judgment by the First Circuit on June 30, 2021. Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition concerns the provisions of the Due Process Clause of the Fifth Amendment to the United States Constitution and the Speedy Trial Clause of the Sixth Amendment to the United States Constitution. Copies are attached as **Appendices C and D.**

STATEMENT OF THE CASE

Overview: On May 5, 2009, Carlos Rivera-Alejandro and 54 others, including several members of his immediate family, were charged with distributing drugs since 2006. ***Count One*** charged a conspiracy to possess with the intent to distribute heroin, cocaine, cocaine base, marijuana, Oxycodone, and Alprazolam, within 1000 feet of a playground, in violation of 21 U.S.C. §§ 841, 846, and 860. ***Counts Two through Five*** were substantive charges alleging possession with intent to distribute heroin (Count Two), cocaine base (Count Three), cocaine (Count Four), and marijuana (Count Five), in violation of 21 U.S.C. §§ 841, 860, and 18 U.S.C. § 2. ***Count Six*** set forth a conspiracy to possess firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(o). A forfeiture count, relating to property alleged to have facilitated the offenses, was also included.

Mr. Rivera-Alejandro was arrested on June 19, 2009 and remained detained since then. By any measure, an inordinate amount of time transpired from the indictment until trial, from the start of trial until its conclusion, and from the conclusion of trial until sentencing. Trial did not begin until July 2014, ***over five years*** after the indictment and arrest. Then, numerous long and shorter delays plagued the trial, which lasted for ***128 days over almost 18 months***, followed by a 5-day forfeiture hearing. Finally, even though proceedings before the jury concluded in February 2016, sentencing did not take place until February 2018, slightly ***more than two years*** later. All told, ***nearly nine years*** passed between the Petitioner's arrest and his sentence.

Pretrial Litigation: With respect to the defendants who went to trial, pretrial litigation was sparse. There were discovery requests during the initial months of the proceedings and motions to suppress filed in mid-2013. The suppression matters were not concluded until a year later, in May 2014.

Speedy Trial Litigation: Mr. Rivera-Alejandro first asserted his right to a Speedy Trial in May 2013. After a magistrate recommended denial in July, the district court adopted the recommendation in October, three months afterward. The Petitioner's brother, a codefendant, filed a second speedy trial motion in December 2013, and another in May 2014. The district court noted the first and ignored the second. The Petitioner's son, another codefendant, also filed a motion to dismiss on Speedy Trial grounds in June 2014. The district court denied the motion just before jury selection.

Trial: Jury selection started on July 28, 2014, and closing arguments took place in December 2015. The verdicts were received almost 18 months after trial began, on January 5, 2016. Over the course of that year-and-a-half, illnesses, pregnancies, and myriad scheduling concerns arose for the codefendants, jurors, attorneys, and the court. Recesses often lasted several days, sometimes they went on for weeks, and on a few occasions the intermissions spanned months.

For example, due to the emergency withdrawal of one of defense counsel, trial was continued for seven weeks to allow replacement counsel time to get up to speed. Six months later, after several hospitalizations and other medical appointments due to complications with her pregnancy had provoked other trial delays, another codefendant was about to give birth. The ensuing recess interrupted the already-protracted testimony of a local police case agent for almost three months. At this point in the trial, the Petitioner and his brothers requested release on bail. The district judge denied the request a month later.

Overall, as demonstrated by the following chart, the district court utilized ***less than a third*** of the available trial days over a year and a half:

Month	Available Trial Days	Actual Trial Days
August 2014	21	17
September 2014	21	9
October 2014	22	1
November 2014	16	4
December 2014	19	12
January 2015	17	8
February 2015	19	10
March 2015	22	14
April 2015	22	6
May 2015	20	11
June 2015	22	0
July 2015	22	0
August 2015	21	8
September 2015	21	7
October 2015	21	4
November 2015	17	0
December 2015	20	13
	Total Available Days: 383	**Total Trial Days: 123**

The jury deliberated for three days before returning guilty verdicts against all of the remaining codefendants. Over two years later, Mr. Rivera-Alejandro was sentenced to 324 months in prison as to Counts One through Four, 120 months for Count Five, and 240 months for Count Six, all to run concurrently and followed by ten years of Supervised Release.

Appeal: Mr. Rivera-Alejandro made several claims on appeal: that his constitutional right to a speedy trial was violated; that the excessive and unnecessary length of the trial violated the Due Process Clause; that numerous evidentiary and procedural errors combined to warrant reversal; and that the sentencing guidelines were incorrectly calculated and applied by the district court.

The First Circuit affirmed on all grounds. Regarding the constitutional speedy trial claim, the appellate court lodged their "grave concerns" about the "protracted delay to verdict," but concluded that "the trial judge did not abuse her discretion" by refusing to dismiss the indictment. 4 F.4th at 18. The court went a bit further, stating:

> This five-year gap between the indictment and the start of trial does not sit well with us. Some of the defendants spent this entire pretrial period detained while still presumed innocent. When speedy trial rights claims are raised, drawing a line and knowing when it has been crossed is circumstance-dependent, ***but the defendants' five-year wait for trial was as close as it comes to infringement.***

4 F.4th at 18 (emphasis added).

As for the "lengthy trial" Due Process claim, the circuit court determined, under a plain error standard, that no precedent warranted a determination of "clear or obvious legal error." 4 F.4th at 20.

REASONS FOR GRANTING THE WRIT

Carlos Rivera-Alejandro was denied his Fifth and Sixth Amendment rights to a speedy and fair trial in unique, extreme, and severe fashion. The excessive time between arrest and trial along with the extraordinary length and unnecessary complications of the trial itself created an inherently untenable scenario. The First Circuit's review of those claims on appeal conflicts with the standards in other appellate courts and creates a circuit split. Further, despite a plain error standard of review, the excessive length of the trial is of sufficient importance to this Court to also warrant consideration.

I. THE FIRST CIRCUIT UTILIZED AN INCORRECT STANDARD OF REVIEW FOR CONSTITUTIONAL SPEEDY TRIAL CLAIMS, IN ADMITTED TENSION AND CONFLICT WITH SEVERAL OTHER CIRCUITS.

The First Circuit's misplaced deferential standard of review, particularly given the breadth of the constitutional violation and the circuit's own determination that the "defendants' five-year wait for trial was as close as it comes to infringement," conflicts with other circuits and suggests that under a less deferential standard dismissal would have been warranted. The anomaly should be corrected by this Court.

Regarding the Speedy Trial violation itself, the first three *Barker* factors overwhelmingly favored the Petitioner.[1] The delay was unconscionably long, particularly since Mr. Rivera-Alejandro remained detained for over five years awaiting trial. The trial codefendants did not precipitate the delay; to the contrary they filed only a handful of easily managed motions prior to trial's start. Moreover, a speedy trial claim was raised more than a year before trial began.[2] Instead,

[1]Half a century ago, in *Barker v. Wingo,* 407 U.S. 514, 530 (1972), this Court mandated a now-familiar balance of four factors when considering constitutional speedy trial violations: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right; and (4) prejudice to the defendant.

[2]The First Circuit's mischaracterization of the trial defendants' responsibility for the pretrial delay as well as its

the major source of the delay was the district court, which took sometimes months to rule on those few substantive matters that did arise. The circuit's understated comment—that "[a]s reasonably viewed, the efficient administration of justice is at least questionable in this case", 4 F.4th at 17—belies the inordinately convoluted docket that resulted from five years of mismanagement. The circuit did have some pointed criticism of the prosecution's determination to charge dozens of defendants in "so-called 'mega-cases,'" insisting that:

> We did not give our blessing … to multidefendant indictments regardless of the consequences, nor did we bless years of delay caused by allowing the time for codefendants' change of pleas to make it easier for the government to use codefendant testimony. When the government indicts, it should have enough evidence to prove the case as to each and every defendant without delays such as occurred here.

4 F.4th at 17.

As to prejudice, the fourth - and arguably most important - factor, *Barker* teaches that the Speedy Trial Clause is designed: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532. And in *Doggett v. United States*, 505 U.S. 647 (1992), this Court amplified upon those considerations and refused to require Doggett, who waited eight and a half years for his trial, to produce specific evidence of harm. Instead, Justice Souter explained that: "[e]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." 505 U.S. at 655. While "presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, ***and its importance increases with the length of delay.***" *Doggett*, 505 U.S. at 655 (citations omitted) (emphasis added).

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erroneous analysis of the whether Mr. Rivera-Alejandro sufficiently asserted his speedy trial rights is the subject of Part II of this Petition.

Mr. Rivera-Alejandro suffered a delay that was ***five times*** the presumptive amount. His conditions of confinement were indeed oppressive, the anxiety and stress of trial patently overwhelming, and the course of the trial itself convoluted and troublesome. In short, every *Barker* and *Doggett* factor militated in favor of the Petitioner.

On the one hand, the First Circuit seemed to recognize the seriousness of the Speedy Trial claim by expressing its "grave concerns" repeatedly and opining that "at the very least witnesses' memories would have dulled and faded over that time." 4 F.4th at 18. But the deferential standard of review—assessing only whether the district court abused its discretion—did not allow for reversal or remedy, despite the egregiously long wait until trial and the ability of the court and the prosecution to manage the multidefendant matter much more efficiently.

Not only did the defective standard of review deprive Mr. Rivera-Alejandro of a remedy, it also conflicts with the standard in several other appellate courts where review is *de novo*. The resulting circuit split that should be addressed by this Court.

By the time the opinion was written in the instant case, the First Circuit panel noted: "there is some debate about whether the abuse of discretion standard is the appropriate standard of review for this issue, but for various reasons it is the standard we consistently apply." 4 F.4th at 16, fn. 6. As to that "consistency," in *United States v. Irizarry-Colon*, 848 F.3d 61, 68 (1st Cir. 2017), the lower court recognized "that applying an abuse of discretion standard of review to constitutional speedy trial claims is in tension with the rules of other circuits, as well as this circuit's standard of review when considering other similar issues." More recently, in *United States v. Lara*, 970 F.3d 68, 80 (1st Cir. 2020), the judges acknowledged the "tension" between circuits, but "conduct[ed their] review under that relatively deferential standard."

In fact, the *Irizarry-Colon* and *Lara* panels patently understated the appellate court split.

Nine other circuits— the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits—adhere to a *de novo* standard of review when addressing denials of constitutional speedy trial violations. *See e.g., United States v. Velazquez,* 749 F.3d 161, 174 (3d Cir. 2014) (applying a *de novo* standard of review and reversing the district court's determination, under the second *Barker* factor, that the government did not act negligently); *United States v. Molina-Solorio,* 577 F.3d 300 (5th Cir. 2009) (excessive pretrial delay amounted to a Sixth Amendment violation, under a *de novo* standard of review); *United States v. Jackson,* 473 F.3d 660, 664 (6th Cir. 2007) (*de novo* standard of review applied to Sixth Amendment Speedy Trial claim); *United States v. Hills,* 618 F.3d 619, 629 (7th Cir. 2010) (same); *United States v. Summage,* 575 F.3d 864, 875 (8th Cir. 2009) (same); *United States v. Corona–Verbera,* 509 F.3d 1105, 1114 (9th Cir. 2007) (same, in context of delay between indictment and arrest); *United States v. Seltzer,* 595 F.3d 1170, 1175 (10th Cir. 2010) (affirming district court's dismissal on Sixth Amendment Speedy Trial grounds after *de novo* review); *United States v. Ingram,* 446 F.3d 1332 (11th Cir. 2006) (dismissing indictment after *de novo* review that addressed district judge's faulty analysis and conclusion); *United States v. Lopesierra–Gutierrez,* 708 F.3d 193, 202 (D.C.Cir. 2013) (legal review is *de novo*).

The First Circuit gives little rationale for its use of the deferential abuse of discretion standard. In fact, in addition to feeding a circuit split, it also creates within-circuit tension, as noted in *United States v. Carpenter*, 781 F.3d 599, 607-608 (1st Cir. 2015) (recognizing that *de novo* review is also warranted when "reviewing motions to dismiss under the Speedy Trial Act" and when determining "whether prison officials have violated the Eighth Amendment") (citations omitted).

Applying *de novo* review for the assessment of constitutional speedy trial claims would force circuits to place appropriate weight on the different *Barker* factors and then provide guidance

to district courts about how to balance them. Without such a mandate, district judges will continue to provide their own weights and analyses, and this patchwork will most probably survive abuse of discretion scrutiny. Considering the First Circuit's assessment that the delay suffered by Mr. Rivera-Alejandro was "as close as it comes to infringement" and that same court's erroneous assessment of the second and third *Barker* factors, resolving the circuit split and mandating *de novo* review would serve to correct present and future injustices.

II. THE FIRST CIRCUIT ERRONEOUSLY APPLIED THE SECOND AND THIRD *BARKER* FACTORS.

In addition to failing to assess, under a *de novo* standard of review, the district court's very problematic applications of the second (cause of the delay) and third (assertion of the right) *Barker* factors, the First Circuit itself missed the mark in evaluating those factors.

Even though the panel labeled the second *Barker* factor the "focal inquiry," 4 F.4th at 16, its unwillingness to engage in a *qualitative* analysis of the parties' conduct over the five-year span must be corrected. Concluding that the assignment of blame essentially resulted in a wash, and that "the five-year wait for trial was clearly caused by the numerous motions of all stripes filed by both the government and the defendants," 4 F.4th at 17, the circuit failed to consider:

(1) that the ***primary*** cause for delay, dwarfing anything else by far, was the district court's determination, goaded and guided by the prosecution, to prolong the start of trial by first handling ***every one*** of the dozens of other defendants who determined to negotiate plea agreements; and

(2) that apart from the assertion of a speedy trial claim, the only two sets of motions from the trial defendants that were in any way matters of substance were the Petitioner's brother's request for different counsel, and the trial defendants' motion to suppress.

Had the circuit made a qualitative determination—mandated in Barker itself, which counsels "different weights should be assigned to different reasons," 407 U.S. at 532—the question of who bears the brunt of the blame for the inordinate delay would fall clearly upon the district court (for failing to manage the case) and the government (for filing a huge indictment, withholding responses to discovery and designation requests, and failing to follow through with efficiency). The circuit's toothless criticisms of the prosecution and the district court, 4 F.4th at 17-19, are no substitute for the qualitative assessment required by *Barker*.

To illustrate, the First Circuit treated Joel Rivera-Alejandro's motion for new counsel as simply another defense motion causing delay. A qualitative analysis would have demonstrated something far different. After Joel's initial counsel had to withdraw in January 2012 for personal reasons, she was replaced by an attorney far too inexperienced to assume representation of the alleged leader of a large drug conspiracy. Numerous requests for withdrawal—in April 2012, August 2012, and February 2013—were denied by the district court. The attorney was not replaced until March of 2013, when the attorney who ultimately served as trial counsel was appointed to take the helm.

Almost immediately after the counsel matter had been (belatedly) resolved, the substantive defense for the family members who went to trial at last took shape. Within a few weeks, the suppression and speedy trial motions were filed. Even so, both matters took several months for the district court to resolve, despite the defense's timely filings and responses. And trial still did not begin until July 2014.

Viewed with the perspective of a qualitative analysis, the obstacles to efficient and constitutionally speedy movement of this case in no sense emitted from the trial defendants, who asserted their rights as efficaciously as possible. Instead, the unprecedented delay was nearly all attributable to the mismanagement by the court and by the government.

Along these same lines and as to the third *Barker* factor, by characterizing Joel and Carlos Rivera-Alejandro's assertion of their speedy trial rights as "rather anemic," the panel disregarded Joel's essential lack of counsel until mid-2013, just before the speedy trial motion was filed. The district court deprived Joel of adequate counsel and deprived the trial defendants—Joel's brother, mother, and other close family members—of a cohesive force for over a year. The panel's analysis also fails to address the passage of near a year ***after*** the speedy trial claim was denied until the start

of trial.

Qualitatively analyzing the second and third *Barker* factors within a *de novo* framework would have compelled a different result on appeal. In conjunction with the request set forth in Part I of this Petition, or on its own merits, *certiorari* is requested on these grounds.

III. IN THE FACE OF SUCH EXTRAORDINARILY LONG PROCEEDINGS, THIS COURT SHOULD SET PARAMETERS, UNDER THE DUE PROCESS CLAUSE, FOR AN UNCONSTITUTIONALLY LENGTHY TRIAL.

Compounding the excessive pretrial delay was the uncommonly long and unduly burdensome trial. Circuit courts other than the First have long recognized that excessive trial length can amount to a denial of due process:

> [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 jurors' 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.

United States v. Warner, 506 F.3d 517, 523 (7th Cir. 2007) (Posner, J., dissenting from denial of rehearing *en banc*).

Over the course of the 18-month trial, sometimes with only a handful of trial days each month, testimonies were alternately peppered with interruptions or "numbingly" repetitive, the admission of exhibits was chaotic and confusing, bench conferences could take hours, and recesses lasted as long as three months. In short, the trial was a vivid illustration of every one of the dangers Judge Posner described.

United States v. Baker, 10 F.3d 1374 (9th Cir. 1993) contains sharp and enduring commentary about the "indisputably staggering hardships" inherent in joint trials of large scope and long duration:

> 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.***

10 F.3d at 1390 (emphasis added).

The *Baker* court went on to describe a "myriad of other potential sources of prejudice to an effective defense," including the burdens on counsel, jurors, the court itself, and, ultimately, the taxpayers. As in Baker, "[A] trial of this scope and duration challenges the most fundamental goals of our federal criminal justice system: "simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. R. Crim. P. 2." 10 F.3d at 1390-92. *See also United States v. Ellender*, 947 F.2d 748, 754 (5th Cir. 1991) ("Exceedingly long trials impose substantial burdens on the trial court, attorneys, defendants, support personnel, and particularly on jurors."); *United States v. Casamento*, 887 F.2d 1141, 1151-52 (2d Cir. 1989) (discussing the significant burdens "on jurors, defendants, counsel, and trial judges" presented by lengthy multi-defendant trials).

To address this recognized constitutional deprivation, the Petitioner asked the First Circuit to approach the unwieldy proceedings with a modified *Barker* analysis and examine: (1) the length of the trial; (2) the reasons for the prolonged proceedings; (3) whether the defendant/appellant sought a remedy; and (4) the prejudice suffered. The result: all four factors tilt strongly in favor of the appellant.

Mr. Rivera-Alejandro's trial was unnecessarily long, spanning almost 18 months and 128 (more often than not, shortened) trial days. It paralyzed the calendar of the court and the attorneys, and caused significant hardship to the jurors, who were constantly requesting personal and professional accommodations. When the harm to the defendants themselves is factored in, it becomes clear that the proceedings were infused with every one of the harms detailed by the *Baker*

court. It is difficult to imagine a more fitting illustration to the maxim: "Justice delayed is justice denied."

One way to understand the meaning and impact of such protracted proceedings is to consider that excluding the three days of trial in July 2014 and the two days in January 2016 for deliberation and verdict, ***123 days of trial over the course of 17 months amounted to an average of 7.2 trial days per month***. Such a calculation, however, does not take into account the interruptions in testimony, or the length of the delays. Looked at from another perspective, the trial court utilized less than a third of the available trial days over the year and a half the trial took place.

And as with the lengthy pretrial delay, Mr. Rivera-Alejandro and his codefendants did not cause the proceedings to protract, nor did they fail to assert themselves about moving the trial along more quickly.

Finally, while this court should seriously consider whether ***any*** trial lasting more than a year should be presumed to be unfair to the accused, prejudice was overwhelmingly established. The jury was simply unable to process the information provided by dozens of witnesses and purportedly illustrated by hundreds of exhibits. It is absurd to think that a juror could rely on memory, even their collective one, after so many months of stops and starts and lengthy interruptions.

Protracted and convoluted proceedings are far from conducive to a functioning jury system. "[T]he longer the trial, the less likely the jury is to be able to render an intelligent verdict." *Baker*, 506 F.3d at 523. Further,

> Exceedingly lengthy trials lead to reduced concentration and recollection of events on the part of all participants, particularly witnesses and jurors. In very long cases, 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), *quoted in Warner*, 506 F.3d at 524, which also contains a citation to "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).

The Due Process violation resulting in an essentially monolithic verdict emitted after eighteen excruciating and mind-numbing months should now be addressed by the Supreme Court.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for *Certiorari*.

Respectfully submitted,

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