

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMSHID MUHTOROV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTIONS PRESENTED

Mr. Muhtorov joins in two questions presented in the separately filed petition for certiorari of his co-defendant Bakhtiyor Jumaev, which are:

I. Whether the judge-made and ahistorical balancing test for assessing a deprivation of the Sixth Amendment's right to a speedy trial set out in *Barker v. Wingo*, 407 U.S. 514 (1972) should be overruled.

II. May a court penalize a defendant for asserting his constitutional right to exculpatory evidence by weighing resultant delays against him in determining whether his right to a speedy trial was violated?

RELATED PROCEEDINGS

This petition is related to the proceedings of co-defendant Bakhtiyor Jumaev in both the United States District Court for District of Colorado, case no. 1:12-cr-00033, and in the United States Court of Appeals for the Tenth Circuit, where the two cases were procedurally consolidated for appeal, case nos. 18-1296 (Jumaev) & 18-1366 (Muhtorov).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
RELATED PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
FEDERAL PROVISION INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	8
CONCLUSION.....	12
APPENDIX	
Decision of the Tenth Circuit Court of Appeals.....	A1
District court’s oral ruling on Mr. Muhtorov’s motion to dismiss for constitutional speedy trial violation	A91
District court’s oral ruling on Mr. Muhtorov’s renewed motion to dismiss for constitutional speedy trial violation	A101
Order of the Tenth Circuit Court of Appeals Denying Petition for Rehearing or Rehearing En Banc.....	A106
Order Granting Extension to File Petition for Certiorari.....	A107

TABLE OF AUTHORITIES

	Page
Cases	
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	7, 9
<i>United States v. Jumaev</i> , 20 F.4th 518 (10th Cir. 2021)	<i>passim</i>
<i>United States v. Muhtorov</i> , 20 F.4th 558 (10th Cir. 2021)	<i>passim</i>
Statutes	
18 U.S.C. § 3231	1
18 U.S.C. § 3742	1
28 U.S.C. § 1254	1
28 U.S.C. § 1291	1
50 U.S.C. § 1881a	10
Rules	
Sup. Ct. R. 12.4	4
Sup. Ct. R. 12.7	4
Other Authorities	
Brief of Petitioner, <i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013) (No. 11-1025)	11
Charlie Savage, <i>Door May Open for Challenge to Secret Wiretaps</i> , N.Y. Times (Oct. 16, 2013)	10

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jamshid Muhtorov, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on December 8, 2021.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Muhtorov*, 20 F.4th 558 (10th Cir. 2021), is found in the Appendix at A1. The published decision in co-defendant Mr. Jumaev's procedurally-consolidated case, also issued on December 8, 2021, is reported at *United States v. Jumaev*, 20 F.4th 518 (10th Cir. 2021).

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on December 8, 2021. (Appendix at A1.) On March 25, 2022, the Tenth Circuit denied Mr. Muhtorov's and Mr. Jumaev's requests for panel rehearing or rehearing en banc. (Appendix at A106.) On June 14, 2022, this Court extended the time within which to file a petition for a writ of certiorari until July 22, 2022. (Appendix at 107.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution 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.

STATEMENT OF THE CASE

The government took six years and four months to bring Jamshid Muhtorov to trial. A man with no criminal history, he spent every day of that time in pretrial detention, deprived of in-contact visits with his family. By the time he went to trial, after repeatedly invoking his Sixth Amendment speedy trial right, a defense witness had died. A divided Tenth Circuit panel concluded that although “six-and-a-half years is an unusually lengthy period of pre-conviction detention,” *and* that three of the four *Barker v. Wingo* speedy trial factors weighed in Mr. Muhtorov’s favor, no constitutional violation occurred here.

Mr. Muhtorov’s co-defendant in these procedurally consolidated appeals, Bakhtiyor Jumaev, also waited six years for his trial. On appeal, the two men pursued their overlapping constitutional speedy trial claims in tandem, with Mr. Muhtorov joining in Mr. Jumaev’s claim pursuant to Fed. R. App. P. 28(i). A split panel in the Tenth Circuit similarly rejected Mr. Jumaev’s constitutional speedy trial claim. *Jumaev*, 20 F.4th at 532.

Mr. Jumaev has filed a petition for certiorari. (See Tenth Circ. case no. 18-1296; Sup. Ct. case no. 22-____ (filed July 22, 2022).) His arguments on Issues I and II are equally applicable to Mr. Muhtorov. Rather than repeat them, Mr. Muhtorov adopts them in full, just as he did in briefing on the parties’ constitutional speedy

trial claims before the Tenth Circuit. He respectfully requests that this Court grant review in both cases for the reasons stated in Mr. Jumaev's petition, and writes separately to explain briefly how those arguments apply to him and to identify facts unique to his case. *See generally* Sup. Ct. R. 12.4 (providing that parties interested jointly in a judgment may petition separately for a writ of certiorari).

* * *

Not long after his 2007 arrival in the United States as a political refugee from Uzbekistan (vol. 16 at 210),¹ the federal government began surveilling Mr. Muhtorov (vol. 11 at 483-87, 695-98; vol. 12 at 356-59, 406-08, 549; vol. 13 at 456-61). Over the years, its efforts were all-encompassing: agents tracked his comings and goings (vol. 11 at 512; vol. 20 at 659, 717-18); they installed bugs in his home to listen to the intimate details of his family life (vol. 3 at 604-05; vol. 20 at 233); they recorded and listened to his phone calls, including those with his friend and co-defendant, Bakhtiyor Jumaev (vol. 1 at 180-86; vol. 12 at 824; vol. 16 at 211); and, utilizing clandestine surveillance tools of unprecedented scope, they intercepted untold amounts of his electronic communications (vol. 1 at 552, 666; *Muhtorov*, 20 F.4th at

¹ Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. *See* Sup. Ct. R. 12.7.

585-90). Throughout, investigators nicknamed him “Borat,” after the caricature of a bumbling reporter from Kazakhstan popular at the time. (Vol. 20 at 657.)

This surveillance generated large amounts of recorded material, and culminated in charges that Mr. Muhtorov and his co-defendant Mr. Jumaev sought to provide material support—in the form of a \$300 check and Mr. Muhtorov himself—to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B. (*Muhtorov*, 20 F.4th at 581, 635, 641-42; Vol. 1 at 263-66.) Mr. Muhtorov was arrested on January 21, 2012. (Vol. 20 at 396-400.) But the government did not bring him to trial until May 14, 2018. (Vol. 16 at 230; Vol. 19 at 438.) Mr. Jumaev, who was arrested a few months later, fared similarly, and wasn’t tried until March 2018.

Both men were detained the entire six years between their arrests and trials. (*Muhtorov*, 20 F.4th at 655-56; *Jumaev*, 20 F.4th at 542.) Importantly, from the very beginning Mr. Muhtorov and Mr. Jumaev made clear that they intended to proceed to trial as soon as possible—once the government presented them with the evidence it believed proved their guilt. Both men first moved for the production of discovery on September 5, 2012 (*Muhtorov*, 20 F.4th at 641; vol. 1 at 463-69); despite many assurances that it would be completed sooner, discovery continued to be provided

until the eve of trial in May 2018. (See *Muhtorov*, 20 F.4th at 635, 641-43; see also *id.* at 664-66 (Lucero, J., dissenting) (cataloging discovery delays).)

Much of what transpired over these six years is recounted in the opinion below, as well as in Mr. Jumaev's petition for certiorari, which is equally relevant to Mr. Muhtorov. In particular, the men were joined for trial from their arrests in 2012, until November 29, 2016, when the district court severed the cases. (*Muhtorov*, 20 F.4th at 635-36.) As such, the delays prior to that time that Mr. Jumaev recounts impact Mr. Muhtorov as well. And even post-severance, the two cases moved along parallel paths, with most court hearings held jointly, and many motions jointly pursued. (See, e.g., Vol. 1 at 90-137.) Accordingly, Mr. Jumaev's recounting of the government's administrative failures and discovery delays thereafter, including the addition and subsequent dismissal of a superseding indictment *four years* into the case, also apply with equal force to Mr. Muhtorov. (See *Jumaev*, 20 F.4th at 533-35 & n.7 (recognizing overlap in claims on *Barker*'s second prong).)

While awaiting trial, Mr. Muhtorov filed two counseled motions to dismiss the indictment on constitutional speedy trial grounds (as well as numerous related pro se filings), which the court denied. (*Muhtorov*, 20 F.4th at 636-37, 651.)

Ultimately, a jury convicted him of three counts alleging that he'd conspired and attempted to provide material support to a foreign terrorist organization. (Vol. 15 at

575-76.) The district court sentenced him to eleven years' incarceration, a term he completed while his appeal was pending.² (*Muhtorov*, 20 F.4th at 582.)

As noted above, on appeal both Mr. Muhtorov and Mr. Jumaev challenged the district court's denial of their constitutional speedy trial claims. (*Id.* at 582-83, 633-61; *Jumaev*, 20 F.4th at 528.) Such claims are guided by the four factors this Court articulated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): [1] "[l]ength of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant." As to Mr. Muhtorov, the majority and dissent agreed that the first, third, and fourth *Barker* factors all favored him. (*Muhtorov*, 20 F.4th at 658-61; *id.* at 665 & n.6, 671 (Lucero, J., dissenting).) The disagreement—and outcome—turned on the second: the reason for the delay.

While acknowledging that it was a "close question," (*id.* at 643), the majority believed that the delay in this case was principally attributable to "a lengthy discovery process necessitated by the nature of the investigation and the breadth of Mr. Muhtorov's discovery requests" (*id.* at 639-50). It also found significant the lack of bad faith evidenced by the government, ultimately concluding that "a primary consideration is that the delay was attributable to the necessities of the discovery

² Mr. Muhtorov was removed from the United States to Uzbekistan on January 10, 2022.

process untainted by government bad faith or negligence.” (*Id.* at 658-59.) It not only found that the second *Barker* factor did not weigh in Mr. Muhtorov’s favor, but that these considerations outweighed the other three factors that did—counseling against finding a Sixth Amendment violation. (*Id.* at 633-34, 658-61.)

The dissent, in contrast, would have vacated the convictions because, in its view, all four *Barker* factors weighed against the government. (*Id.* at 661-73 (Lucero, J., dissenting).) As to the second factor, which “weighed heavily against the government,” (*id.* at 673), the dissent explained that “too much of the delay [was] directly attributable to discretionary decisions of the government,” which “needlessly delayed commencement of the trial and caused the delay that is glaringly before us.” (*id.* at 662-63, 673.) This outcome, it further explained, presents an “extreme departure . . . from accepted norms of constitutional . . . law,” and sets “a new Sixth Amendment ‘standard of speed.’” (*Id.* at 661.)

REASONS FOR GRANTING THE WRIT

As he did before the Tenth Circuit at both the panel and rehearing stages, Mr. Muhtorov also joins in Mr. Jumaev’s arguments for granting a writ of certiorari here, specifically his constitutional speedy trial claims in Issues I and II.

In his first claim, Mr. Jumaev argues that the balancing test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), conflicts with the original public

understanding of the right to a speedy trial. Mr. Muhtorov joins in that argument, and because the Tenth Circuit similarly applied the *Barker* balancing test in both Mr. Jumaev's and Mr. Muhtorov's cases, review is appropriate here as well.

In his second claim, Mr. Jumaev argues that, even under the *Barker* test, review is still appropriate because the Tenth Circuit's opinions below improperly applied that test. Mr. Muhtorov joins in this argument as well. Just as in Mr. Jumaev's case, the majority opinion in Mr. Muhtorov's case similarly penalized Mr. Muhtorov for asserting his constitutional right to notice and discovery of the government's evidence against him by weighing the resulting delays against him under *Barker*'s second prong. And, as Mr. Jumaev explains, such balancing impermissibly forces defendants to choose between *which* rights they wish to preserve: the constitutional right to exculpatory evidence or to a speedy trial.

Additionally, beyond the errors identified by Mr. Jumaev, one additional issue is presented by Mr. Muhtorov's case alone. Specifically, Mr. Muhtorov's prosecution is the first case in the country in which the government acknowledged using a novel kind of electronic surveillance under a law known as Section 702 of FISA, 50 U.S.C. § 1881a. (Vol. 1 at 552.) Although the government collects billions of communications under this statute—without a warrant—for years it thwarted legal challenges by concealing its use of Section 702 surveillance. *See, e.g.*, Charlie Savage,

Door May Open for Challenge to Secret Wiretaps, N.Y. Times, Oct. 16, 2013, <https://nyti.ms/2NmNFpS>; Pet. Br. at 8, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013) (No. 11-1025).

As the dissent observed (at 663), the government waited until nearly *two years* after Mr. Muhtorov’s arrest to provide notice that it had employed warrantless Section 702 surveillance in his case, despite the fact that Congress has expressly required such notice by statute. 50 U.S.C. §§ 1806(f), 1881e(a); *see Savage, Door May Open*.³ This disclosure resulted in extensive litigation before the district court, some of it involving classified information. *See generally Muhtorov*, 20 F.4th at 583-92; *Muhtorov Opening Brief* at 13-51, Tenth Cir. case no. 18-1366 (Sept. 30, 2019). But in a single paragraph of its 163-page opinion, the majority dismissed these delays as irrelevant because the delayed disclosure “did not extend the pretrial period.” 20 F.4th at 649. That is, because it took over four years for the government to produce discovery, anything that happened during that time couldn’t have contributed to the

³ The government’s belated notice prompted Mr. Muhtorov to seek disclosures about this novel surveillance in order to mount an informed challenge to it. To the extent the majority opinion regards these requests and the resulting litigation as a contributing factor in the delay, the majority elsewhere *faults* Mr. Muhtorov for not putting forward precisely the type of information about the government’s use of Section 702 queries that he sought in these requests—but never received. (*Compare Muhtorov*, 20 F.4th at 591-92 *with id.* at 673-75 (Lucero, J., dissenting).)

delay. But as the dissent points out, this makes little sense—“[i]t is axiomatic that withholding the basis of the government’s case against a defendant for two years has a downstream effect of delaying progress to trial.” *Id.* at 662 (Lucero, J., dissenting).

The majority also repeatedly asserts that the delay was attributable to Mr. Muhtorov’s “broad discovery requests,” *id.* at 634, 643-46, 648, but what made the discovery so extensive in his case especially was the all-encompassing nature of the government’s surveillance, which generated nearly two thousand hours of recordings and vast amounts of other data. The majority acknowledges this fact, but still faults the defense. *Id.* at 644 n.64. But, as Mr. Jumaev also explains, it is the government’s responsibility to provide the discovery required by Fed. R. Crim. P. 16, *Brady*, and other authorities, and it must do so within a time-frame that honors defendants’ speedy trial rights. If the government uses highly classified surveillance tools to record a person’s every private conversation over a period of months or years, it must also quickly put in place adequate resources to declassify and disclose the required information to the defense once it commences a prosecution. It did not do that here. The government cannot override a defendant’s speedy trial rights simply because it chose to conduct sweeping surveillance as part of its investigation and then finds itself awash in data that must be turned over.

CONCLUSION

For these reasons and those stated in the petition for certiorari filed by co-defendant Mr. Jumaev in procedurally consolidated Tenth Circuit case no. 18-1296, the petition for a writ of certiorari should be granted.

Dated: July 22, 2022

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ John C. Arceci
JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002