No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER RACHON COOLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower courts err in analyzing the four factor balancing test outlined in Barker v. Wingo, 407 U.S. 514, (1972) when they denied Mr. Cooley's motion to dismiss, thus violating his Sixth Amendment right to a speedy trial?

LIST OF PARTIES

Petitioner, who was the Defendant-Appellant in the Eighth Circuit, is Roger Rachon Cooley.

Respondent, who was the Plaintiff-Appellee in the Eighth Circuit, is the United States of America.

RELATED PROCEEDINGS

United States v. Cooley, No. 3:19-CR-00137, United States District Court for the District of North Dakota. Judgment entered May 31, 2022.

United States v. Cooley, No. 22-2201, United States Court of Appeals for the Eighth Circuit. Judgment entered March 28, 2023. Petition for rehearing *en banc* denied May 10, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Roger Rachon Cooley, by and through his attorney, Adam Justinger of SW&L Attorneys, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported as United States v. Cooley, 63 F.4th 1173, 1176 (8th Cir. 2023). The district court's relevant rulings are unreported.

JURISDICTION

The court of appeals entered judgment on March 28, 2023. App. 1a-10a. Mr. Cooley timely filed his petition for rehearing *en banc*, which was denied by the court of appeals on May 10, 2023. App. 24a. This petition is timely filed under Rule 13.3, having timely been filed within ninety days of the Court of Appeals order denying rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> 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.

U.S. Const. amend. VI

INTRODUCTION

This Court in Barker v. Wingo, 407 U.S. 514, (1972) established a four factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial is violated. Because this is not a bright line rule, various courts, including the numerous United States courts of appeals, have interpreted the factors differently when deciding whether there was a violation of a defendant's right to a speedy trial. This case presents an ideal opportunity for the Court to settle any conflicts surrounding the four factor Barker balancing test that has arisen between the various United States courts of appeals and/or other state courts of last resort.

STATEMENT OF THE CASE

Criminal case: On August 4, 2019, a search warrant was executed where Mr. Cooley provided his temporary license to law enforcement. Dist. Ct. Dkt. 354-4[1]. Mr. Cooley had resided at this residence for over eight years. Id. As a result of the search warrant, Mr. Cooley was charged with an Infraction for possession of less than a half ounce of marijuana. Dist. Ct. Dkt. 327. The citation listed Mr. Cooley's home address and he regularly contacted the state court and the prosecutor in that district throughout November 2019. Dist. Ct. Dkt. 327, 354-4.

On August 21, 2019, a grand jury indicted Mr. Cooley and eight other defendants. App. 2a. Within two days, an arrest warrant for Mr. Cooley was issued and was entered into the National Crime Information Center (NCIC) system by the Federal Bureau of Investigation (FBI). Id. About 14 months later, the FBI discovered that the arrest warrant was removed from the NCIC system. Id. The FBI believed the arrest warrant was

[1] All citations to "Dist. Ct. Dkt." are to the docket in United States v. Cooley, No. 3:19-CR-00137, (D.N.D).

removed around February 28, 2020. Id. On October 20, 2020 the United States Marshals Service (USMS) was assigned Mr. Cooley's arrest warrant. Id. In February 2021, the USMS confirmed Mr. Cooley's address; despite the fact that Mr. Cooley provided the information numerous times in the past including to law enforcement in this case. Dist. Ct. Dkt. 354-4, App. 2a. On March 16, 2021, almost nineteen months after the arrest warrant was issued, Mr. Cooley was arrested at his residence. Dist. Ct. Dkt. 222, App. 2a. Mr. Cooley was arraigned March 20, 2021, ordered detained pending trial, and trial was scheduled for July 13, 2021. Dist. Ct. Dkt. 247, App. 2a.

After three continuances, none of which were sought by Mr. Cooley, trial was set for January 25, 2022. App. 2a. On December 28, 2021, Mr. Cooley filed a motion to dismiss asserting his Sixth Amendment right to a speedy trial, which was later denied. App. 2a. Mr. Cooley then filed a motion for reconsideration, which was also denied. Id. Trial began on January 25, 2022. Id. The jury found Mr. Cooley guilty on Count One. Id.

Appeal: On appeal, Mr. Cooley argued that the district court erred by denying his motion to dismiss for a violation of his Sixth Amendment right to a speedy trial. App. 2a. The court of appeals analyzed the four factor balancing test outlined in Barker. App. 4a-10a. The court of appeals determined that factors one and two weighed in favor of Mr. Cooley. App. 5a-7a. The court determined that factor three was neutral. App. 7a. The court also concluded that factor four weighed in favor of the government. App. 7a-10a. Despite the majority of the factors weighing in Mr. Cooley's favor, the court of appeals affirmed the district court's order denying Mr. Cooley's motion to dismiss. App. 10a.

Mr. Cooley timely filed a petition for rehearing *en banc*. On May 10, 2023, the court of appeals denied Mr. Cooley's petition for rehearing *en banc* and for rehearing by the panel. App. 24a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that an individual's right to a speedy trial is a fundamental right. Barker, 407 U.S. at 515 (citing Kloper v. North Carolina, 386 U.S. 213, (1967)). As such, this Court established a four part balancing test to determine whether there is a Sixth Amendment violation of an individual's right to a speedy trial. In this case, the four factor balancing test demonstrates that Mr. Cooley was deprived of his right to a speedy trial.

I. Mr. Cooley was denied his right to a speedy trial under the Sixth Amendment of the United States Constitution, which warranted dismissal of the Indictment.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial. U.S. Const. amend. VI; *See also* Barker v. Wingo, 407 U.S. 514, 530 (1972). "The speedy-trial right is "amorphous," "slippery," and "necessarily relative." Vermont v. Brillon, 556 U.S. 81, 89 (2009). "It is consistent with delays and dependent upon circumstances." Id. "On its face, the Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an "accused" for any reason at all." Doggett v. United States, 505 U.S. 647, 651 (1992).

"Our cases, however, have qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries…" Doggett, 505 U.S. at 651. The four factor balancing test established by this Court, known as the Barker factors, analyze whether a defendant's Sixth Amendment speedy trial right has been

violated by addressing: 1) whether delay before trial was uncommonly long; 2) whether the government or the criminal defendant is more to blame for the delay; 3) whether, in due course, the defendant asserted his right to a speedy trial; and 4) whether he suffered prejudice as a result of the delay. Id. (citing Barker, 407 U.S. at 530)).

A. The twenty nine month delay in bringing Mr. Cooley to trial easily meets the threshold to become presumptively prejudicial and has been recognized by at least one of the circuits as intolerable.

"The first [factor] of these is actually a double enquiry." Doggett, 505 U.S. at 651. "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness. Id. at 651-52.

Many of the circuit courts have recognized that a delay of one year is presumptively prejudicial. United States v. Flores-Lagonas, 993 F.3d 550, 563 (8th Cir. 2021); United States v. Bikundi, 926 F.3d 761, 779 (D.C. Cir. 2019); United States v. Oriedo, 498 F.3d 593, 597 (7th Cir. 2007); United States v. Lucien, 61 F.3d 366, 371 (5th Cir. 1995). Other courts have recognized that delays of less than one year can be presumptively prejudicial. *See* United States v. Walker, 840 F.3d 485, 485 (8th Cir. 2016)(holding delay of approximately eleven and a half months between Walker's indictment and his trial meets the threshold, but barely); State v. Garza, 212 P.3d 387, 396 (N.M. 2009)(Therefore, the delay of ten months and six days was sufficient to trigger inquiry into the Barker factors);

State v. Corarito, 268 N.W.2d 79, 80 (Minn. 1978)(Although the total delay was 6 months, a delay which we believe is sufficient to trigger further inquiry…).

In the present case, Mr. Cooley's indictment was filed on August 21, 2019, which is when his constitutional right to a speedy trial attached. Mr. Cooley was arrested on March 16, 2021. His trial commenced on January 25, 2022. The delay from the indictment to trial was over twenty nine months. The delay in bringing Mr. Cooley to trial easily meets the "presumptively prejudicial" standard triggering further analysis under Barker. Further, this case gives the Court an opportunity to determine how long of a delay is presumptively prejudicial, which will address conflicts in other courts.

"If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." Doggett at 652. "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." Id. For example, the Eighth Circuit has acknowledged that a seventeen month delay is a lengthy delay. United States v. Mallett, 751 F.3d 907, 914 (8th Cir. 2014). The Eleventh Circuit has found that a two-year post indictment delay was intolerable. United States v. Ingram, 446 F.3d 1332, 1339 (11th Cir. 2006) This Court has described a delay of eight-and-a-half years as "extraordinary." Doggett, 505 U.S. at 652.

The delay in bringing Mr. Cooley to trial was twenty nine months. This delay is almost two and a half times more than what is generally required to trigger a speedy trial analysis according to some of the circuit courts. This delay falls between what has been considered to be an intolerable delay and an extraordinary delay. This case would allow

the Court to weigh in and determine the bare minimum needed to trigger judicial examination, which will help determine how egregious of a delay occurred.

B. The government was negligent in bringing Mr. Cooley to trial, which should have weighed heavily against the government.

Under the second Barker factor, the courts must consider the reasons for the delay and evaluate "whether the government or the criminal defendant is more to blame for that delay." Doggett, 505 U.S. at 651. "The government's intentional delay in locating a defendant will weigh heavily against it." Walker, 92 F.3d at 717. "Negligence, on the other hand, will be weighted less heavily against the government but is still a considerable factor in the weighing process." Id. This Court has recognized that "The flag all litigants seek to capture is the second factor, the reason for delay." United States v. Loud Hawk, 474 U.S. 302, 315 (1986).

This Court has recognized that it is the "primary burden on the courts and the prosecutors to assure that cases are brought to trial." Barker, 407 U.S. at 529. Other circuit courts have stated: "Because the prosecutor and the court have an affirmative constitutional obligation to try the defendant in a timely manner…the burden is on the prosecution to explain the cause of the pre-trial delay." United States v. Ingram, 446 F.3d 1332, (11th Cir. 2006); United States v. Brown, 169 F.3d 344, (6th Cir. 1999); *See also* United States v. Garcia, 59 F.4th 1059, 1066 (10th Cir. 2023)(the prosecution must explain the cause of the pretrial delay). The Eighth Circuit appears to only require the government to "justify the delay." United States v. Johnson, 990 F.3d 661, 671 (8th Cir. 2021); Flores-Lagonas, 993 F.3d at 563.

The Eighth circuit's approach, as reflected in this case, seems to be more relaxed as to who bears the ultimate burden of proving the pre-trial delay compared to this Court, the Sixth Circuit, and Eleventh Circuit. Ultimately, the burden should be on the prosecution to explain the cause of the pre-trial delay as it is their duty to bring a defendant to trial. This would not only include an explanation for part of the pre-trial delay, as was decided in this case, but would require the prosecution to explain all of the pre-trial delay.

In this case, the Eighth Circuit only addressed eighteen of the twenty nine months of delay. They addressed eight months of the delay which was a result of the government's negligence in removing the warrant from the NCIC system. The lower court also looked at the ten months post-arrest that were attributed to motions for continuance submitted by the government and Mr. Cooley's co-defendants. However, the lower court in this case refused to hold the government to its burden and disregarded eleven of the twenty nine months of negligent delay caused by the government pre-arrest. This is not the standard that has been established by this Court and other circuit courts.

The lower court was required to hold the government to their burden of proof, which they failed to do. An arrest warrant was issued for Mr. Cooley on August 22, 2019. The warrant for Mr. Cooley's arrest was removed from the NCIC system around February 28, 2020. For over six months, the government had access to Mr. Cooley's arrest warrant and failed to provide any justification for this delay. Once it was discovered that the arrest warrant was removed, the warrant was reentered into the NCIC system. On October 20, 2020, the United States Marshals Service (USMS) was assigned Mr. Cooley's

arrest warrant. Despite getting the arrest warrant in October, the government waited nearly five months to arrest Mr. Cooley. The government failed to provide a justifiable reason as to why there was this additional eleven months of delay, despite having the burden of proof to do so.

Instead, the evidence indicates that the government had sufficient evidence and refused to execute the arrest warrant. Mr. Cooley lived at the same address for over eight years, he provided agents with his temporary license that contained his home address, and he was in communication with a state court and local prosecutor in regards to his state infraction case. Certainly if the government wanted to locate Mr. Cooley they could have done so easily. There has been no justifiable reason that the government could not have arrested Mr. Cooley between August 22, 2019 and February 28, 2020 nor was there any information provided as to why it took five months to finally arrest Mr. Cooley after the USMS was assigned Mr. Cooley's arrest warrant. At a minimum, this is further negligence on behalf of the government, which would result in approximately nineteen months of the pretrial delay.

Additionally, the Eighth Circuit determined that the second factor favored Mr. Cooley, but not heavily. Had the Eighth Circuit held the prosecution to its burden, this factor would have weighed far more heavily in Mr. Cooley's favor. For example, the Tenth Circuit has stated: "Moreover, when the petitioner does not argue that the state deliberately delayed his trial and the state does not argue that the petitioner caused the delay—as occurs in this case—courts must conclude negligence on the part of the government and weigh the second Barker factor moderately against the state." Jackson v. Ray, 390 F.3d 1254, 1262 (10th Cir. 2004)(citing Doggett, 505 U.S. at 656–57; Barker, 407

U.S. at 531, 533–34; Strunk v. United States, 412 U.S. 434, 436, (1973)). Another example would be the Eleventh Circuit, which weighed this factor heavily against the government when law enforcement had various pieces of information about the defendant and law enforcement's efforts to contact the defendant were weak. Ingram, 446 F.3d at 1339-1340. As such, the Eighth Circuit's decision in this case conflicts with other circuits like the Tenth and Eleventh Circuit. At a minimum, the Eighth Circuit should have weighed the second Barker factor moderately against the government. Had the Eighth Circuit applied the rationale of other circuits, the second factor, the flag that all litigants seek to capture, would have had a far more substantial impact on the overall balancing test.

C. Mr. Cooley asserted his right to a speedy trial.

The third Barker factor considers whether in due course the defendant asserted his right to a speedy trial. Doggett, 505 U.S. at 651. In Doggett, that the defendant "[was] not to be taxed for invoking his speedy trial right only after his arrest." Id. at 654.

As previously stated, Mr. Cooley was unaware of the indictment against him until he was arrested. Thus, Mr. Cooley's failure to assert his right to a speedy trial prior to his arrest cannot be weighed against him.

After Mr. Cooley was arrested, Mr. Cooley attempted to invoke his right to a speedy trial. First, Mr. Cooley opposed the government's motion for joinder and motion for continuance. Second, Mr. Cooley continued to invoke his right to a speedy trial when he stipulated to the government's motion to sever and proceed with the trial scheduled for December 14, 2021. *See* United States v. Shepard, 462 F.3d 847, 864 (8th Cir. 2006)(Straughan made no attempt to have his case brought to trial sooner, nor did he file

a motion to sever his case from that of the codefendants). However, both of Mr. Cooley's oppositions were denied by the district court. After both attempts to obtain a speedy trial failed, Mr. Cooley filed his motion to dismiss.

At least one United State's court of appeals has determined that if a defendant asserts his right to a speedy trial, this factor weighs against the government. *See* Ingram, 446 F.3d at 1338 (The district court found that factor three weighed against the Government when Ingram properly asserted his right to a speedy trial). The Eleventh Circuit's decision is in direct conflict with the Eighth Circuit's decision in this case. Mr. Cooley properly asserted his right to a speedy trial, which should have weighed against the government. This would result in the first three factors all weighing in Mr. Cooley's favor or against the government.

D. Because the government was seriously negligent in bringing Mr. Cooley to trial, which resulted in an excessive delay, prejudice can and should be presumed.

"If, after the threshold inquiry is satisfied and the second and third factors are considered, all three of these factors weigh heavily against the Government, the defendant need not show actual prejudice (the fourth factor) to succeed in showing a violation of his right to a speedy trial." Ingram, 446 F.3d at 1336 (citing Doggett, 505 U.S. 647). This case is analogous to Ingram in many respects. As such, the first three factors should have weighed heavily against the government, which would not require Mr. Cooley to demonstrate actual prejudice resulting from the delay.

However, even if the Court addresses the fourth factor, the case against Mr. Cooley should have been dismissed. "The final Barker factor considers whether the defendant suffered prejudice as a result of the delay." United States v. Erenas-Luna, 560

F.3d 772, 778 (8th Cir. 2009). "The extent to which a defendant must demonstrate prejudice under this factor depends on the particular circumstances." United States v. Rodriguez-Valencia, 753 F.3d 801, 808 (8th Cir. 2014). "We assess this prejudice in the light of the interests of defendants which the speedy trial right was designed to protect .... (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." Erenas-Luna, 560 F.3d at 778. "Of these interests, prejudice to the last is the most serious ... because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. "A showing of actual prejudice is required if the government exercised reasonable diligence in pursuing the defendant." Id. "Where the government has been negligent, however, prejudice can be presumed if there has been an excessive delay." Id.; Rodriguez-Valencia, 753 F.3d at 808.

"[Courts] toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial. Doggett, 505 U.S. at 657. "[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Doggett, 505 U.S. at 655. "Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." Id. at 657. "The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." Id.

"To be sure, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." Doggett, 505 U.S. at 657. This Court has recognized presumed delay when "the Government's negligence far exceeds the threshold needed to state a speedy trial claim…" Id. at 658.

Several circuit courts have recognized when prejudice has been presumed for excessive delays. *See* United States v. Ferreira, 665 F.3d 701, 707-708 (6th Cir. 2011)(finding a thirty-five month delay based on the government's negligence to be presumptively prejudicial); Erenas-Luna, 560 F.3d at 780(concluding that three-year delay between indictment and arraignment due to "the serious negligence of the government" triggered presumption of prejudice); Ingram, 446 F.3d at 1339-40(holding that two-year delay caused by egregious government negligence created presumption of prejudice).

Here, the government's negligence far exceeded the threshold needed to assert a speedy trial claim. Under the first Barker factor, many courts require between six and twelve months to bring a speedy trial claim.[2] At that point, the delay is presumptively prejudicial. Doggett, 505 U.S. at 652. The nineteen month pre-trial delay from indictment to arrest was solely caused by the government's negligence. The pre-arrest delay was over one and a half times more than required to trigger a speedy trial analysis. Eight of the nineteen months was because the government lost Mr. Cooley's arrest warrant.[3] The

[2] United States v. Flores-Lagonas, 993 F.3d 550, 563 (8th Cir. 2021); United States v. Bikundi, 926 F.3d 761, 779 (D.C. Cir. 2019); United States v. Walker, 840 F.3d 485, 485 (8th Cir. 2016); United States v. Oriedo, 498 F.3d 593, 597 (7th Cir. 2007); United States v. Lucien, 61 F.3d 366, 371 (5th Cir. 1995); State v. Garza, 212 P.3d 387, 396 (N.M. 2009); State v. Corarito, 268 N.W.2d 79, 80 (Minn. 1978).

[3] In Erenas-Luna, the government readily admitted that it had 'dropped the ball' and let the defendant's case 'slip through the cracks,' because it did not try to locate and arrest the defendant and 'missed multiple opportunities to apprehend' the defendant. Erenas-Luna, 560 F.3d at 775, 777.

government failed to present any evidence of the other eleven months of the delay. However, it was shown that the government knew where Mr. Cooley resided, he was unaware of the indictment against him, and the police failed to make any serious effort in arresting Mr. Cooley until October 2020. Even then it took them approximately five months to confirm Mr. Cooley's address, which was readily available, and arrest him in his home. Additionally, the total delay from indictment to trial was twenty nine months; almost two and a half times more than required to trigger a speedy trial analysis. The ten months of post-arrest delay was also partially attributable against the government and opposed by Mr. Cooley on at least two occasions. Prejudice should have been presumed in this case which would have weighed heavily in favor of Mr. Cooley.

Further, even if prejudice was not to be presumed, there is evidence that Mr. Cooley suffered from actual prejudice. Mr. Cooley was denied an evidentiary hearing to present evidence of actual prejudice. Despite being denied an evidentiary hearing, evidence of actual prejudice can still be obtained from the record. For example, one of Mr. Cooley's co-defendant's became ill and was hospitalized. This resulted in a continuance of the trial by the district court. At trial, the co-defendant was too ill to travel and/or testify and was in a nursing home. The co-defendant did not testify.

The Eighth Circuit erred in concluding that the fourth factor weighed heavily against Mr. Cooley. Instead, if anything, prejudice should have been presumed based on the excessive delay and the government's negligence in bringing Mr. Cooley to trial. Even if prejudice was not to be presumed, Mr. Cooley demonstrated actual prejudice that resulted in the delay. The fourth factor should have weighed in favor of Mr. Cooley and certainly should not have weighed heavily against him.

CONCLUSION

For the foregoing reasons, Mr. Cooley, respectfully requests the petition for writ of certiorari should be granted.

Dated this 8th day of August, 2023

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