No. 23A441

23-6638

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

TRENT DREXEL HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Petitioner in Pro Se

QUESTION PRESENTED

Did the Ninth Circuit err by failing to treat "undue and oppressive incarceration" and "anxiety and concern accompanying public accusation" as the major evils against which the Sixth Amendment's Speedy Trial Clause protects while improperly faulting Petitioner for Inter-Divisional Governmental delay in seeking his extradition from custody in Kazakhstan?

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The decision of the Ninth Circuit (App., infra, 1a-2a) is reported at 2023 U.S. App. LEXIS 9069. The district court's decision (App., infra, 3a-21a) can be found in the docket of the United States District Court for the Eastern District of Washington, case number 4:19-cr-06036-SMJ, docket entry number 132.

JURISDICTION

The opinion and judgment of the Ninth Circuit Court of Appeals was filed on April 17, 2023. The petition for rehearing was denied on July 18, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION PROVISION INVOLVED

"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. Article VII, Amendment 6.

STATEMENT

The Federal Constitution's Sixth Amendment guarantee of a speedy trial is an important safeguard that protects three basic foundations of criminal justice: (1) preventing undue and oppressive incarceration prior to trial; (2) minimizing anxiety and concern accompanying public accusation; and (3) limiting the possibility that long delay would impair the ability of the accused to defend himself. These demands are both aggravated and compounded in the case of an accused who is charged while being imprisoned by another jurisdiction. Smith v. Hooey, 393 U.S. 374 (1969). The

Sixth Amendment right to a speedy trial is a more fluid concept than other procedural rights and it is impossible to determine with precision when the right has been denied. Barker v. Wingo, 407 U.S. 514 (1972). The factors that are weighed by the courts to determine whether an accused has been deprived of the right to a speedy trial under the Federal Constitution's Sixth Amendment are (1) the length of the delay; (2) the reason for the delay; (3) the accused's assertion of his speedy-trial right; and (4) prejudice to the accused resulting from the delay. Id.

Since this Court's announcement of what have come to be known as the "Barker Factors", district courts across the country have engaged in balancing the factors, weighted as directed by their respective circuit courts. However, the weight to assign each factor and the identity of the determinitive factor have been subject to disagreements within the courts of appeals. It appears that circuit courts, and therefore the district courts, have, over time, lost focus of the major evils against which the Sixth Amendment's right to a speedy trial was meant to protect: undue and oppressive incarceration prior to trial and the anxiety and concern accompanying public accusation.

The confusion is nationwide, deeply entrenched, and important to the fair and efficient administration of the federal criminal justice system. Petitioner submits that it may be time for this Court to clarify the focus of the Speedy Trial Clause after five decades to reflect modern realities in the application of the Barker factor. He also asks this Court to remedy clear error in the opinion of the court below, particularly as applied to the facts related to his rare and unusual degree of oppressive pretrial detention and extreme anxiety suffered.

A. The District Court Proceedings

On June 5, 2019, federal agents executed a search warrant at Petitioner's residence related to evidence of child pornography violations. App., infra, 4a. As Petitioner was on a work assignment in Kazakhstan at the time, he learned through his wife about the search and the child pornography investigation. Id.

He immediately spoke with a Federal Bureau of Investigation (FBI) special agent by phone and asked if he needed to return to the United States. The FBI agent recommended that Petitioner "live his life as normal" Id. Petitioner was also told that he was free to remain in Kazakhstan pending indictment, even after several emails were exchanged between him and the FBI agent. Id. at 4a, 10a. On June 18, 2019, Petitioner was indicted on charges of receipt, distribution, possession, and attempted production of child pornography. This indictment was sealed, and there was no evidence that Petitioner ever learned of this indictment at that time. Id. at 10a. After Petitioner did not return on a flight arranged by his employer, and pending a return flight for late September 2019, the United States Attorney's Office (USAO) and the FBI submitted an international notice for Petitioner's arrest which was published on September 5, 2019; Petitioner had no knowledge of this. Id. at 5. On September 12, 2019, Petitioner was arrested in his hotel in Kazakhstan, and on September 14, 2019, he appeared before a Kazakh court and ordered detained for forty days pending an extradition request from the United States. Id.

On September 13, 2019, the USAO submitted a draft affidavit to the Department of Justice Office of International Affairs (OIA), and on September 23, 2019, the USAO submitted final documents to the OIA for inclusion in the extradition package. On October 4, 2019--22 days later--the United States Embassy presented the formal extradition request to Kazakhstan, who extended Petitioner's detention for up to an additional twelve months pending some assurances from the Government. Id. at 6a. On November 7, 2019, the Government received a request for diplomatic assurances from the Kazakh government, one of which was the "rule of specialty", asking the United States to assure that it would only prosecute Petitioner for the crimes for which his extradition is granted. Id.

On or about November 14, 2019--based on a letter from Petitioner to his family intercepted by the vice consular who visited Petitioner in detention--USAO notified OIA that it was conducting further investigation, and the FBI advised that

the Kazakh government would wait for the issuance of the assurances until the anticipated superseding indictment was filed. Id. at 7a. The superseding indictment was filed on January 7, 2020, additional additional counts for the same crimes alleged in the initial indictment, and adding one more similar but new charge. As a result, the Government knew that to satisfy the "rule of specialty", it needed to supplement the original extradition packet. Id.

After more than eight months, the Government formally presented a supllemental eight-page affidavit to the extradition package on August 11, 2020. The Kazakh government then granted the United States' extradition request on August 14, 2020.

The decision granting extradition was affirmed on September 25, 2020. On November 11, 2020, the Government took custody of Petitioner in Kazakhstan, and he appeared before a Magistrate in the Eastern District of Washington on November 13, 2020. Id.

On June 10, 2020, while still detained in Kazakhstan, Petitioner filed a motion to dismiss for violation of his right to a speedy trial under the Sixth Amendment. The court held the motion in abeyance pending Petitioner's return to the United States, and then summarily denied the motion once Petitioner was back in the United States. Petitioner filed a renewed motion to dismiss. After a two day hearing, the court denied the motion and a formal order was filed on September 17, 2021. App., infra, 3a-21a. In its order, the court relied on the factors set forth in Barker v. Wingo, 407 U.S. 514, 530 (1972).

The court found that although the length of the delay raised a presumption of prejudice favoring dismissal, the Government acted with reasonable diligence because there was no official extradition treaty, the global pandemic and the Government acted swiftly. This is despite the fact that the original package was submitted in 22 days, whereby the supplemental eight-page affidavit took 217 days to submit. The court also incorrectly attributed a majority of the delay to the OIA--not the [USAO]. Id. The court did no weigh the delay but found that it was

reasonable delay. Id. at 18a.

In assessing the third Barker factor of "assesrtion of his right", the court determined that it weighed against him because of a nine-month delay between his arrest in Kazakhstan and the filing of his motion to dismiss. Id. at 19a. This is despite the fact that the record reflected Petitioner had no access to counsel and suffered significant weight loss, thoughts and ideations of self harm and the only visitor he had was a United States Government representative.

Finally, in assessing the fourth Barker factor of "prejudice", the district court held that the limitation to the possibility that the defense will be impaired is the most serious. Id. at 19a. And, while the court was "sympathetic to the anxiety and concern [Petitioner] must have suffered while detained in a foreign, non-English speaking jurisdiction during a global pandemic," he failed to show "actual prejudice" Id. at 20a.

The court found that the Barker factors weigh against Petitioner and therefore denied the renewed motion. On September 25, 2021, Petitioner entered a plea agreement, reserving the right to appeal several of the court's rulings.

B. The Court of Appeals Decision

Petitioner appealed the court's denial of his motion to dismiss for violation of his right to a speedy trial (among other issues not subject to this Petition), arguing the district court made clear factual errors The Ninth Circuit affirmed, holding that the Government acted reasonably in light of the fact that Petitioner did not return voluntarily in the delay, that the timing of Petitioner's assertion of his speedy trial rights weigh against him, and while the Ninth Circuit was also "sympathetic to the anxiety and concern [Petitioner] must have suffered while detained in a foreign, non-Enlgish speaking jurisdiction during a global pandemic", he failed to make a showing of actual prejudice because he "provided no evidence that the pretrial incarceration impaired his ability to prepare a

defense, nor evidence that his incarceration was oppressive." App., infra at 2a. This is despite the record that provided that Petitioner was unable to get needed medication, was unable to communicate with his american counsel, had thoughts of self-harm, feared for his life, lost a significant amount of weight, and was extremely concerned about the charges against him; as was testified to by United States Vice Consular to Kazakhstan. Additionally, the only visits he had were from the vice Consular--a representative of the United States--under the watch of the detention guards; a Government agent who passed along a note intended for his family to the authorities that resulted in the superseding indictment.

REASONS FOR GRANTING THE PETITION

I. CIRCUITS ARE DIVIDED IN THEIR VIEWS OF THE APPROPRIATE WEIGHT TO ASSIGN THE VARIOUS HARMS THAT THE SPEEDY TRIAL CLAUSE AIMS TO PREVENT

The court of appeals assigned little weight to Petitioner's evidence of prejudice - specifically evidence of oppressive pretrial incarceration, and of extreme anxiety that arose from that detention. Indeed, the Ninth Circuit specifically found that Petitioner provided "no evidence that the incarceration was oppressive," despite testimony by the Government's Vice Consul that Petitioner was kept in a crowded cell, did not speak the native language, could not meet with his American lawyer, lost significant amount of weight, threatened self-harm, feared for his safety, and was denied his medication. The court of appeals stated that it was sympathetic to the anxiety and concern he felt, but because he provided no evidence that the pretrial detention impaired his ability to prepare a defense, it found this factor weighed slightly in favor of the Government.

This mere acknowledgment in passing of the Petitioner's anxiety fails to recognize the historical tradition of the Speedy Trial Clause, and that the major evils that it was intended to prevent are oppressive pretrial incarceration and the anxiety and concern of the accused.

A. The Second, Fourth, Sixth and Ninth Circuits each Emphasize the Grave Importance of the Prejudice Analysis in Assessing Speedy Trial Clause Violations.

The fourth factor set forth by this Court in Barker relates to the prejudice that a defendant suffers in the face of delay. One court in the Second circuit described the fourth Barker factor as "the most critical". United States v. Solomon, 1996 U.S. Dist. LEXIS 9948 (S.D. NY 1996). The Fourth Circuit used the same language, referring to it as "a prime issue and a critical factor". Ricon v. Garrison, 517 F. 2d 628 (4th cir. 1975). The Sixth circuit did not mince words when conducting the Barker analysis, stating simply "[t]he critical factor is prejudice to the defendant". United States v. Reynolds, 489 F. 2d 4, 7 (6th Cir. 1973). The Ninth Circuit has used nearly the same language, stating that "[w]e have described the fourth factor, prejudice, as the critical factor". United States v. Alfaro-Hidalgo, 2022 U.S. App. LEXIS 9015 (9th Cir. 2022). And the Third Circuit goes a final step further, finding not only that the fourth factor is the "most critical", but also stating that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense". Wells v. Petstock, 941 F. 2d 253, 258 (3rd Cir. 1991)(citing United States v. Marion, 404 U.S. 307, 320 (1971)).

B. The First, Fifth, Seventh and Eighth Circuits each Emphasize the Reason for the Delay as the Primary Barker Factor.

The second factor referenced in Barker, the reason for the delay, is elevated above the prejudice analysis in several circuits, and far above the consideration of the degree of oppressive prison conditions and the anxiety of the defendant. Each of these circuits reference the second factor as "the flag all litigants seek to capture" and "the focal inquiry". United States v. Trueber, 238 F. 3d 79, 88 (1st Cir. 2001); Boyer v. Vannoy, 863 F. 3d 428, 444 (5th Cir. 2017); Cole v. Beck, 765 Fed. Appx. 137, 138 (7th Cir. 2019); United States v. Erenas-Luna, 560 F. 3d 772, 777 (8th Cir. 2008). Indeed, even this factor is not treated uniformaly by

those circuits, like the Ninth Circuit, that emphasize the prejudice analysis. The Ninth Circuit has gone so far as to hold that the government need only pursue a defendant with "reasonable diligence", and that if the government does so, a defendant does not have a speedy trial claim. United States v. Mendoza, 530 F. 3d 758, 763 (9th Cir. 2007). This holding, if read literally, would disregard even the most oppressive of pretrial detention conditions and the most severe anxiety imaginable (for example, where a defendant, like Petitioner, considers and threatens self-harm), and find that no violation of the Sixth Amendment occured where the government makes some showing that it put forth some modest effort to move the case along. See, e.g., United States v. Sandoval, 990 F. 2d 481, 485 (9th Cir. 1993) (holding that the government merely has "some obligation" to pursue a defendant and bring him to trial). Further, while acknowledging that even mere negligence "falls on the wrong side of the divide between acceptable and unacceptable reasons for delay", it nonetheless did not find that the second factor favored the Petitioner where his extradition was delayed by many months by the negligence of two different divisions of the Department of Justice in preparing the necessary paperwork. United States v. Alfaro-Hidalgo, 2022 U.S. App. LEXIS 9015 (9th Cir. 2022)

The Speedy Trial Clause's core concern is the impairment of liberty. United States v. Loud Hawk, 474 U.S. 302, 312 (1986). The Clause is not directed generally at delayed-related prejudice, but against delay-related prejudice to a defendant's liberty. "The speedy trial guarantee is designed to minimize the possibility of lengthy incaceration prior to trial, to reduce the lesser, but neverthtless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the distruption of life caused by arrest and the presence of unresolved criminal charges." United States v. MacDonald, 456 U.S. 1, 8 (1982). "Passage of time, whether before or aftr arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.

Marion, supra, 404 U.S. at 321-322.

This Court's review is necessary to not only align the application of the Barker factors between the circuits, but more importantly, to ensure that the major evils that the Sixth Amendment sought to address - oppressive pretrial incarceration and the anxiety and concern of the accused - are given their proper weight vis-a-vis the other factors. the circuits are confronted with two conflicting lines of authority, the one declaring that "limit[ing] the possibility that the defense will be impaired" is an independent and fundamental objective of the Speedy Trial Clause, e.g., Barker, supra at 532, and the other declaring it is not, e.g. Marion, supra, in addition to MacDonald and Loud Hawk.

Barker's suggestion that preventing prejudice to the defense is a fundamental and independent objective of the Clause is plainly dictum. It is hard to envision a future case in which a defendant will suffer more oppressive pretrial detention that the Petitioner did here - imprisoned in a dungeon in Kazakhstan in the midst of a global pandemic, without access to counsel or medication, or an English-speaking jailor. It is similarly difficult to imagine weightier evidence of severe anxiety than contemplation and vocalization of thoughts of self-harm, the loss of an extreme amount of weight, severe emotional distress, and separation from one's family, all while lingering under the public accusation of one of the most reviled criminal charge in the United States Code.

If 14 months of detention under these circumstances does not produce a predictable outcome across the various circuits, then the Barker factors cease to be a guarantee of Sixth Amendment protection of one of our most sacred rights, and instead becomes an exercise of arbitrary law enforcement regulation by our district courts. This cannot be the result that our framers intended, regardless of the passage of time since the Sixth Amendment took effect. Petitioner submits that the time has come to re-evaluate, or at least clarify, this Court's decision in Barker issued more than five decades ago.

II. THE NINTH CIRCUIT ASSIGNED INSUFFICIENT WEIGHT TO OPPRESSIVE INCARCERATION AND EXTREME ANXIETY WHILE IMPROPERLY FAULTING PETITIONER FOR INTER-DIVISIONAL GOVERNMENTAL DELAY

The purpose of the Sixth Amendment's Speedy Trial Clause is to safeguard against undue and oppressive incarceration of an accused prior to trial, minimize anxiety and concern accompanying a public accusation and limit the possibility that long delay could impair the ability of an accused to defend himself. Smith v. Hooey, 393 U.S. 374 (1966); United States v. Marion, supra. More importantly, a prosecuting authority is not relieved of its obligation to provide an accused with a speedy trial simply because he is in custody elsewhere. See United States v. Mauro 438 U.S. 340 (1978). In fact, an affirmative demonstration of prejudice to the accused is not required to prove a denial of the constitutional right to a speedy trial. Prejudice caused by delay in bringing an accused to trial is not confined to the possible prejudice to an accused's defense in the proceeding, but also includes possible prejudice that such delay might have with respect to the accused's liberty, disruption of employment, draining of financial resources, curtailing association, subjecting the accused to public shame, and creating anxiety in the accused or his family and friends. Moore v. Arizona, 414 U.S. 25 (1973). It is an error for a lower court to require proof of actual prejudice resulting from a long delay. Dillingham v. United States, 423 U.S. 64 (1975). And so it follows that significant delay between indictment and trial does not require showing of actual prejudice is the delay is lengthy.

In this case, the district court and the Ninth circuit held that Petitioner failed to prove actual prejudice even though the courts were "sympathetic to the anxiety and concern that [Petitioner] must have suffered while detained in a foreign, non-English speaking jurisdiction during a global pandemic. App, infra, 2a. This finding was made despite the fact that the record showed that the main reason that Petitioner was incarcerated in Kazakhstan was because an FBI agent told him he could remain in Kazakhstan and continue to "live his life as usual". All the while, the Department of Justice kept his indictment sealed and then revoked his passport

knowing he was in Kazakhstan, and issued an arrest notice to the Kazakh government resulting in Petitioner's arrest. Additionally, the record contained evidence that not only did Petitioner suffer oppressive incarceration and anxiety, by the Government took 437 days to extradite him from a country that willingly agreed to do so and did so within three days of receiving the information it requested from the United States; information that had been in the Government's hands for an unexplained 217 days. Even after the extradition was granted and Kazakhstan approved a plane to land to pick up Petitioner, the Government took an additional unexplained 41 days to do so.

The Ninth Circuit's holding that the oppressive incarceration and extreme anxiety was only a minor consideration of the Barker analysis is wrong and should be reversed.

A. The Court Improperly Faulted Petitioner for an Eight-Month Delay in Filing his Motion to Dismiss Despite His Complete Lack of Access to Counsel While in Kazakhstani Custody During That Time.

In determining whether a Speedy Trial Clause violation occured, the Ninth Circuit was required to consider whether Petitioner asserted his right to a speedy trial. Barker supra. And under Ninth Circuit precedent, an accused "does not waive [his] Sixth Amendment right by failing to assert it" as that is only one factor in the inquiry. United States v. Sandoval, 990 F. 2d 481, 484 (9th Cir. 1993). Even Barker concluded that a defendant's **assertion** of his speedy trial right is entitled to strong evidentiary weight in determining whether a defendant is being deprived of the right. Barker, 407 at 531-32. The test set forth in Barker requires a finding of not **when**, but rather, **if**, an accused asserted this right. It is a qualitative test, not a quantitative one, particulary when the accused has been denied his access to counsel during that period.

Here, nearly nine months passed between Petitioner's arrest in Kazakhstan with no access to counsel communications and his counsel's filing of a motion to dismiss for violations of the Sixth Amendment. The district court then held the

motion in abeyance for Petitioner to return to the United States, and three months later summarily denied it because Petitioner was back in the country. Petitioner then re-asserted his right via a renewed motion to dismiss, which the court denied.

Therefore, the courts below erred in attributing an eight-month delay in "asserting the right to a speedy trial" to Petitioner. He had no communication with counsel, was not permitted to send out letters in English, and the only visits he had--which were few and far between--were from the United States Government with Kazakhstani guards present, and with no Miranda warning (the Government ultimately used his conversations with the vice consular agasint him, relaying messages to the FBI).

B. Petitioner Suffered More Than a Year of Oppressive Incarceration and Extreme Anxiety due to Inter-Divisional Governmental Delay in Seeking his Extradition From Custody in Kazakhstan.

The essential ingridient in the Federal Constitution's Sixth Amendment guarantee of a speedy trial is orderly expidition rather than mere speed. Smith v. United States, 360 U.S. 1 (1959); United States v. Ewell, 383 U.S. 116 (1996); United States v. Marion, 404 U.S. 307 (1971). The Sixth Amendment's core concern is the impairment of liberty associated with a criminal defense. United States v. Loud Hawk, 474 U.S. 302 (1986). When assigning blame for a speedy trial delay, "different weights are to be assigned to different reasons" for the delay. Doggett v. United States, 505 U.S. 647, 657 (1992)(citing Barker, supra). "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying criminal prosecution once it has begun". Id.

Here, the district court concluded that the "majority of the delay is attributable to OIA -- not the Government".App., infra, 17a. Of course, the OIA is not only part of the Government, but also part of the Department of Justice

itself. And "while it is unclear why it took OIA nearly two months to review the Government's [supplemental 8-page] draft, this delay does not appear unreasonable. Id. at 15a. The Ninth Circuit affirmed, holding that Petitioner failed to voluntarily return, thereby forcing the Government to resort to extradition with a country that the United States has no formal treaty with during a pandemic. App., infra, 2a. But the Ninth Circuit's findings are contradicotry to the evidence in the record.

The record reflects the following: Petitioner was unaware of his indictment at the time of his arrest. Upon learning that the FBI searched his home and the purpose of the search, Petitioner immediately called the FBI agent in charge and was "explicitly told [] that he was free to stay in Kazakhstan pending indictment, that it would take 6 to 12 months for the investigation" and that he recommended that Petitioner "live his life as normal". This is despite the fact that an was filed during communications between Petitioner and the agent in charge. The Government then revoked Petitioner's passport and issued an arrest request to Kazakhstan. The record further showed that the global pandemic did not impact the Government's ability to extradite Petitioner, the lack of formal treaty did no impact extradition, and that Kazakhstan granted the extradition request only three days after it received the requested information from the Government. App. infra, 6a-8a.

Therefore, the Ninth Circuit's decision was clearly contrary to the record. After he was detained in Kazakhstan because of his reliance on the FBI's assurances, the Government --Department of Justice's Attorney's Office, the Office of International Affairs and the U.S. Embassy in Kazakhstan--took only 28 days to prepare two affidavits (totaling 27 pages and addressing nine criminal statutes) and submitted the information requested to the Kazakh government. However, after the Government filed a superseding indictment adding several victims and one additional, but related, criminal statute, it took the Government 134 days to prepare and submit an eight-page supplemental affidavit

which was practically a "copy and paste" of the prior affidavit. It then took the Government an additional 83 days to deliver this information to the Kazakhstani government who then granted extradition in only three days and approved the landing of a U.S. plane to transport Petitioner back to the United States. Following such approval, the Government inexplicably delayed Petitioner's transport for more than a month to pick him up and return him to the United States.

In the district court, the court stated that there was no apperant reason for the two-month delay that it took the OIA to approve the supplemental affidavit. The Government caused the initial detention by assuring Petitioner that he could remain in Kazakhstan and simply make contact with the FBI when he returned, hiding the indictment from him, revoking his passpot and issuing an INTERPOL "Red Notice" for his arrest, delaying his extradition for more than 200 days for no reason. This Court should hold that this delay and gamesmanship between the different divisions of the Government should weigh against the Government and not the Petitioner.

CONCLUSION

The petition for a writ of certiorari shoud be granted.

Respectfully submitted,

Date: 12-14-23

TRENT DREXEL HOWARD
Petitioner in Pro Se