No. ________

IN THE SUPREME COURT OF THE UNITED STATES

TOMMY LEE WALKER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the firearm at issue was manufactured in California and found in a home in California, did the district court err by refusing to give a requested defense instruction that required the jury to find Mr. Walker knew that the gun had traveled in or affected interstate or foreign commerce before it could convict him for violating 18 U.S.C. § 922(g)?

2. Does the Ninth Circuit's interpretation of the Speedy Trial Act allow trial courts to circumvent the speedy trial guarantee in the Sixth Amendment and the Act by giving them authority to indefinitely suspend jury trials based on local orders and subjective safety concerns without making defendant-specific findings justifying the exclusions of time?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

United States v. Tommy Lee Walker, Nos. 21-10364, 21-1036, 568 F.4th 1227 (9th Cir. May 30, 2023), petition for rehearing *en banc* denied, *United States v. Tommy Lee Walker*, Nos. 21-10364, 21-10365, 2023 U.S. App. LEXIS 29816 (9th Cir. Cal., Nov. 8, 2023)

United States District Court for the Eastern District of California:

United States v. Tommy Lee Walker, No. 2:20-cr-00039-KJM-1 (December 7, 2021) (felon-in-possession case) and No. 2:20-cr-00206-KJM-1 (December 7, 2021) (revocation of supervised release case).

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PETITION FOR CERTIORARI

TOMMY LEE WALKER petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The Ninth Circuit's published opinion is *United States v. Walker*, 68 F.4th 1227 (9th Cir. 2023), and is reproduced at Appendix, pp. 2-21 (A-1– A-21). The Circuit order denying rehearing *en banc* is reproduced at A-1. The district court's order denying Walker's motion to dismiss is unpublished and is reproduced at A-26–A-30.

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JURISDICTION

The Ninth Circuit's opinion was filed on May 30, 2023. App.-2. Mr. Walker's timely petition for rehearing *en banc* was denied on November 8, 2023. App.-1. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

At issue are the elements of the felon-in-possession statute as defined by the interplay of two statutes: 18 U.S. C. §§ 922(g)(1) and 924(a)(2). Section 922(g)(1) provides in relevant part:

> (g) It shall be unlawful for any person--
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> >
> > * * *
> >
> > to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

In turn, 924(a)(2) provides, in relevant part:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both. The provisions of law whose application is disputed in this case include the Sixth Amendment's speedy trial clause and the Speedy Trial Act, 18 U.S. Code § 3161.

The speedy trial rights are also at issue. The Sixth Amendment reads, in pertinent part, as follows:

> 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 . . . .

Amend. VI, U.S. Constitution.

> The Speedy Trial Act, reads, in pertinent part, as follows:
> (c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.
> * * *
> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * *
>
> (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> * * *
>
> (H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.
>
> * * *
>
> (7) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney

for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the

> defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.
>
> (C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

18 U.S. Code § 3161.

STATEMENT OF THE CASE

The government charged Mr. Walker in a single-count indictment alleging he violated 18 U.S.C. Section 922(g)(1); that is, that he, being a felon, possessed a firearm that had been shipped and transported in interstate commerce. The indictment was filed on February 20, 2020. The firearm at issue was marked with its manufacturer's name and location – Jimenez Arms in Costa Mesa, California. A-22.

The district court had jurisdiction over Mr. Walker's criminal case under 18 U.S.C. §§ 3231 and 3583. The Circuit Court had jurisdiction over his appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Mr. Walker entered a plea of not guilty and the case was eventually set for trial, some 557 days after Walker had been indicted. *United States v. Walker*, 68 F.4th 1227, 1229 (9th Cir. 2023). His defense largely focused on the firearm's California origin and his reading of 922(g)(1) as requiring, before a conviction could be won, that the government had to prove Walker knew this firearm had traveled in interstate

commerce. Walker declared he was ready to go to trial June 15, 2020, and demanded a speedy trial. But his trial did not start until August 30, 2021.[1]

In the interim, a global pandemic befell the world in the form of COVID-19. The President declared a national emergency. On March 12, 2020, Chief Judge Mueller entered the first of many Eastern District General Orders concerning the pandemic. By March 18, 2020, all federal courthouses in the Eastern District were closed to jury trials. When the trial was finally had, well more than the statutory 70 day period had passed.

Mr. Walker petitions for certiorari review to address two important questions. The first concerns the plain meaning of 922(g)(1) and 18 U.S.C. § 924 which requires a defendant to "knowingly" violate 922(g). The second concerns the legal analysis applicable to the statutory and the Sixth Amendment speedy trial protections. Both issues involve prior published cases from the Ninth Circuit, *United States v. Olsen*, 21 F.4th 1036 (9th Cir. 2022) (en banc), regarding the Speedy Trial Act and the COVID-19 pandemic, and *United States v. Stone*, 706 F.3d 1145 (9th Cir. 2013), regarding the scope of the *mens rea* requirement in § 922(g) cases.

The Circuit opinion errs regarding the jury instruction issue by binding itself to following the *Stone* decision. In doing so, the Circuit erred by failing to follow the

[1] A-39–A-42 (indictment), A-23–A-25 (minutes first day of trial).

plain meaning analysis required by this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), and other Supreme Court decisions.

The Circuit also erred by misapplying the Circuit's own *en banc Olsen* decision to the facts. Instead, the appellate panel imported into the Sixth Amendment analysis factors from the Bail Reform Act that have no application to the assessment this Court called for in *Barker v. Wingo*, 407 U.S. 514 (1972). By allowing an open-ended delay because of the COVID-19 pandemic, Mr. Walker's statutory and Sixth Amendment rights to a speedy trial were lost.

ARGUMENT

A. Relevant Procedural History

Mr. Walker was arrested on November 22, 2019, by Sacramento police officers and charged in superior court with being a felon in possession of a firearm. *People v. Walker*, 19FE021230 (arraigned November 26, 2019). After the state exhausted its speedy time limit to try Mr. Walker,[2] a federal indictment was filed on

[2] Mr. Walker was held in county jail custody for more than 70 days without trial when the state case was dismissed on February 7, 2020. (The state court docket information is available at: https://services.saccourt.ca.gov/PublicCaseAccess/Criminal/CaseDetails?sourceSystemId=8&sourceKey=1662595) (last accessed August 9, 2023). The federal complaint was filed on January 31, 2020. A-43–A-47. Cal. Penal Code § 1382 requires a defendant be brought to trial for felonies within 60 days of arraignment. *See generally*, *People v. Brown*, 14 Cal. 5th 530, 539, 525 P.3d 1036, 1042 (Ca. 2023).

February 20, 2020. It alleged Mr. Walker violated 18 U.S.C. § 922(g)(l). The penalty provision for this offense is found in section 924.

Trial did not begin until August 30, 2021. Mr. Walker declared he was prepared for trial and demanded a speedy trial on June 15, 2020 – just less than four months after the federal indictment was filed. A-23 (minutes). After this date, he opposed continuances. Mr. Walker recognized and agreed that the speedy trial clock was stayed when he filed motions, up to 30 days after the motion was submitted for decision, and later when he or witnesses were unavailable.[3/] Of the 557-day delay from federal indictment to the start of the trial, Walker agreed to exclude time or motions excluded time for only 313 days of the delay. The remaining time, 244 days, was based on the district court's refusal to conduct a trial because of the COVID-19 pandemic.

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[3] The specific dates he agreed to exclude or which were excluded because of motions, were: August 21, 2020, when Walker moved for depositions and disclosures, to September 28, 2020, when the court denied these; January 11, 2021 - January 25, 2021, Walker agreed to exclude time because he was unavailable due to jail COVID protocols; March 26, 2021, to June 9, 2021, from Walker filing motions to dismiss the indictment for violations of the Speedy Trial Act and the Sixth Amendment, and the 30th day the court had these matters under submission. *See* 18 U.S.C. § 3161(h)(1)(D), (H) (30 days of the time a motion is submitted with the district court qualifies for automatic exclusion of time); June 16, 2021, to August 24, 2021, as Walker agreed via stipulation for defense investigation needs. *Walker*, 68 F.4th at 1236 n. 5. A final stipulation agreed to exclude time from August 2, 2021, to August 31, 2021. But the actual start of trial began on August 30, 2021. A-23 (minutes).

Mr. Walker was charged with possession of a firearm that was manufactured in California. The firearm manufacturer marked the gun with its name and where it was made: "JIMENEZ ARMS COSTA MESA, CA, USA." A-22. Walker sought to apply the plain language of 18 U.S.C. §§ 922(g)(1) and 924, in light of this unusual fact, to have the jury instructed that before it could convict Walker, it had to find he "knowingly" committed each of the four elements contained in 18 U.S.C. § 922(g)(1). Section 924(a)(2) explicitly premises punishment not just on the defendant's knowledge that he has possessed a firearm, but his "knowingly" "violates subsection . . . (g) . . . of section 922." A defendant cannot "know" that he has violated § 922(g) unless he knows (1) that he has a certain status (here, a felon), (2) he knows he possessed a firearm, (3) he knows that the item is a firearm, and (4) he knows that firearm traveled in or affected commerce. This is because it is not a crime to possess a firearm; indeed, such conduct is constitutionally protected. *See e.g., United States v. Range*, 69 F.4th 96, 103-106 (3d Cir. 2023) (en banc) (enjoining enforcement of 18 U.S.C. § 922(g)(1) against Range after concluding it unconstitutionally violated his Second Amendment rights; but suggesting even violent felons were not disarmed by "founding-era laws.")

/ / /

B. The Two Questions Presented Should be Reviewed

1. The District Court's Jury Instruction Removed an Element of the Offense, thus Relieving the Government of Its Full Burden of Proof

The criminal offense of being a felon in possession of a firearm is defined by the interplay of two statutes: 18 U.S. C. §§ 922(g)(1) and 924(a)(2). Section 922(g)(1) provides in relevant part that it is unlawful for any person who has a felony conviction "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In turn, 924(a)(2) provides that "[w]hoever knowingly violates subsection [922(g)] shall be . . , imprisoned not more than 10 years . . . ."

The government charged Mr. Walker with this offense. He sought to defend against the charge based on an unusual fact – the specific firearm he was alleged to have possessed had been made in California. In fact, it was stamped with the manufacturer's name and place of manufacture: Jimenez Arms in Costa Mesa, CA USA. Walker sought to have the jury decide whether the government could prove he knew this firearm had traveled in or affected interstate commerce. Both the district court and the panel rejected his argument by relying on the Ninth Circuit's decision in *Stone. Walker*, 68 F.4th at 1239-41. In doing so, the Circuit's opinion ignores the plain text of the statutory language and this Court's decisions that hold the plain

meaning of a statute controls. In order to achieve this outcome, the panel's opinion also misreads the holding in *Rehaif*.

Simply put, the government should be required to prove all elements of the offense and the plain meaning of sections 922(g)(1) and 924(a)(2) requires *Stone* to be overruled and the jury instruction Mr. Walker requested be given. This Court has repeatedly focused on the statutory language and has held that it controls where the statutes' language is plain. The standard is ingrained in this current Supreme Court. David A. Strauss, *The Plain Language Court*, 38 Cardozo L. Rev. 651 (2016). Professor Strauss's main thesis is straightforward:

> The Roberts Court has embraced a plain language approach to statutory interpretation. That approach often prevailed in previous Courts, but it was controversial, and the Court, previously, was closely divided on the question whether it was the right approach. On the Roberts Court, though, the plain language approach seems to be accepted nearly unanimously.
>
> The plain language approach is more easily illustrated than described, but roughly it is a matter of trying to resolve issues about statutory interpretation by looking exclusively, or nearly exclusively, to the language of the statute.

Id., p. 651-52. This approach respects the separation of powers between the Courts and Congress. "In principle, [judges] need only look at a series of words in a statute. They do not have to consider the purposes of the statute, or the policy implications that might be advanced or defeated by one or another interpretation of the statute.

Those latter considerations potentially implicate political or other sensitive views that might be divisive." *Id*. at p. 669. Policy and political decision making is left for the legislative and executive branches to address. The courts are to simply apply the statutory language as written.

This Court did so in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). There, this Court reaffirmed the importance of making sure the government is held to its burden of proof on the *mens rea* element in criminal statutes. The statute involved, 18 U.S.C. § 1028A(a)(1), imposes a mandatory consecutive two-year prison term if the defendant "*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification of another person . . . ." The government had argued that the statute only requires a defendant have knowledge of his action – that he was transferring/possessing/using "something." But the Court agreed with Flores-Figueroa that the knowing *mens rea* required not only that a defendant know that he is transferring/possessing/using "something," but also know that the "something" is a means of identification that belongs to another person. *Id*. at 648. This Court concluded the "knowing" requirement modified the entire series of acts that made up the element of the offense.

The Court began its analysis by observing that:

> There are strong textual reasons for rejecting the Government's position. As a matter of ordinary English grammar, it seems natural to read the

statute's word "knowingly" as applying to all the subsequently listed elements of the crime.

Id. at 650. The Supreme Court noted that pursuant to normal rules of English grammar, when the adverb "knowingly" modifies a transitive verb, the reader understands that he or she is being told how the subject of the sentence—the defendant in the case of a criminal statute—performed the *entire* action. *Id*.

Moreover, the Court observed, construing the language of the statute to apply the "knowingly" requirement to all elements of the offense is consistent with the way in which courts ordinarily interpret criminal statutes: "[t]hat is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element." *Id*. at 652 (*citing United States v. X–Citement Video, Inc*., 513 U.S. 64, 79 (1994) (Stevens, J., concurring)). While the government pointed out that it would have difficulty proving defendants knew the identification they used belonged to another person, this Court held that this concern was "insufficient to outweigh the clarity of the text." *Flores-Figueroa*, 556 U.S. at 656. Thus, the Court construed the statute to require that the government prove that the defendant knew that the means of identification he or she transferred, possessed, or used belonged to another person. *Id*. at 657.

The natural reading of the statute's word was applied by this Court again in *Rehaif*. It applied the plain meaning of the 924 and 922(g)(1) statutes to conclude that

"Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Rehaif*, 139 S.Ct. at 2196. *Rehaif*'s actual holding is entirely consistent with Mr. Walker's proposed jury instruction. Did Walker, the jury has to decide, knowingly violate 922(g)? As there are four elements listed in 922(g)(1), the government was obligated to prove Walker knowingly met each element – did he know that: (1) he has a certain status (here, a felon), (2) he possessed a firearm or ammunition, (3) the item posses is a firearm, and (4) this firearm traveled in or affected commerce? Without meeting all four, there is no crime. It is not a crime to possess a firearm; indeed, such conduct is constitutionally protected. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 213 L. Ed. 2d 387 (2022); *Range*, 69 F.4th at 103-106.

The trial court and now the Ninth Circuit continues to follow *Stone* as excusing the government from its obligation to prove Walker knew the firearm he allegedly possessed traveled in or affected interstate commerce. This holding is contrary to *Flores-Ortega*'s and *Rehaif*'s plain meaning requirement. Reading the same language, 922(g)(1) and 924(a)(2), *Rehaif* held that knowing modifies 922(g)(1)'s list. It deliberately did not address the interstate commerce element, but put it "aside" because "[n]o one here claims that the word "knowingly" modifies the statute's jurisdictional element." 139 S.Ct. at 2196. Mr. Walker makes that claim.

Stone and now *Walker* are contrary to *Rehaif* and the plain text analysis the Supreme Court used in *Flores-Ortega.* Given the plain meaning of the 922(g) and 924 texts, the analysis required by *Rehaif* and *Flores-Ortega*, this Court should grant review to properly apply the "knowing" requirement Congress put in 924(c) to all the elements of 922(g)(1).

2. The Courts Misapplied the Statutory and Sixth Amendment Speedy Trial Rights Analysis

The statutory and Sixth Amendment rights to a speedy trial are fundamentally important. This Court's review is needed to correct the Ninth Circuit's flawed analysis. For the Speedy Trial Act, the panel opinion affirms an open-ended suspension of Mr. Walker's trial based on the pandemic and not the case-specific facts. For the Sixth Amendment speedy trial guarantee, the panel opinion imports from the Bail Reform Act standards that are designed to determine a different question and undermine the presumption of innocence.

Putting aside the dates where Walker consented to delay or had motions pending, his federal trial was delayed 244 days over his objection. These delays were justified by the trial court and the Circuit's opinion by the "interests of justice" exception which was justified only by the pandemic. None of the facts the district court relied on or that the Circuit's opinion suggests are "case-specific" are actually case specific. There was only one specific and detailed factual reference made part

of the record in Mr. Walker's case regarding the COVID-19 pandemic. A-33–A37. All other references were based on the court's general orders. The trial court based its decision to exclude time on "the persistence of the coronavirus pandemic to be a factor supporting an [18 U.S.C. § 3161](h)(7) interest of justice exclusion." A-31–A-32. By the time Mr. Walker's jury trial actually commenced a year later, August 2021, the infection rates were higher than when the court refused to conduct a trial in June 2020.[4/]

The Circuit's opinion does the same thing, citing more recent National Centers for Disease Control and World Health Organization reports on the mortality rates from the COVID-19 pandemic. *Walker*, 68 F.4th at 1237-38 & n. 12-14. The Circuit ignores the case-specific facts – that state court trials were taking place a few blocks away in superior court and throughout many of the counties that make up the Sacramento division of the Eastern District. But more fundamentally, there was no change in the evidence of risk before the district court judge between the many months she refused to hold Mr. Walker's trial and when the trial actually took place.

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[4] Case rates are available at the Sacramento County Public Health Epidemiology website, available at: https://sac-epidemiology.maps.arcgis.com/apps/MapSeries/index.html?appid=e11bc926165742ab99f834079f618dad (last accessed February 5, 2024). The 7-day case rate per 100, 000 on August 30, 2021, was 38.6, but it had been 3.6 on June 15, 2021.

Because the district court asked no questions of jurors or court personnel regarding their vaccination or COVID immunity status, there were no case-specific facts showing it was relatively safer to have Mr. Walker's trial in August 2021 versus June 2020 when he was prepared for trial. Time was excluded because of the pandemic and not for any case-specific findings. Mr. Walker made reasonable and fact-specific decisions to consent to excluding time when the circumstances justified it. The district court was rightly concerned by the health risks that COVID-19 posed. But that concern cannot and should not have trumped Mr. Walker's right to a jury trial.

The Speedy Trial right was especially important because Mr. Walker was held in the county jail since his arrest on November 22, 2019. As noted earlier, Mr. Walker was originally charged in superior court with being a felon in possession of a firearm. *People v. Walker*, 19FE021230 (arraigned November 26, 2019). It was only after the state exhausted its speedy time limit to try Mr. Walker, that a federal indictment was filed on February 20, 2020. While these extra dates do not figure in the panel's calculations, they certainly affect the Sixth Amendment analysis.

Starting at his actual arrest date, November 22, 2019, the trial was delayed an additional 90 days without his consent. Of that time, the panel recognizes that Mr. Walker consented or had motions pending to exclude 313 days. Given this perspective, Walker waited 334 days for trial over his objection. Nearly a full year.

As *Olsen* recognized, "the right to a speedy and public jury trial provided by the Sixth Amendment is among the most important protections guaranteed by our Constitution," it is "not one that may be cast aside in times of uncertainty." *Olsen*, 21 F.4th at 1049 (citing *Furlow*, 644 F.2d at 769). The Sixth Amendment's speedy trial clause guarantee of a prompt jury trial for Walker was denied. This period was just shy of the year the Circuit has held was presumptively prejudicial. *United States v. Mendoza*, 530 F.3d 758, 762 (9th Cir. 2008) (delay of more than one year is presumptively prejudicial).

This Court in *Barker v. Wingo*, 407 U.S. 514, 519 (1972), rejected a bright-line rule in favor of evaluating challenges on an "ad hoc basis." *Id*. at 530, 92 S.Ct. 2182. The Court listed factors that should be considered: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id*. In Mr. Walker's case, he opposed delays consistently once he was prepared for the federal case, after being bounced and dropped by the state. Yet, he suffered 657 days from his initial arrest, 557 days from his federal indictment of delay. The bulk of that time was not justified by anything other than the fact that the federal court had closed its doors to jury trials. However well intentioned, it violated Mr. Walker's Sixth Amendment rights.

In affirming this denial of Mr. Walker's right to a constitutionally timely trial, the Circuit's opinion does not use *Barker* factors. Instead, it imports Bail Reform Act factors into its analysis. *Walker*, 68 F.4th at 1238-39. It does so by citing to a case relying on a Due Process argument, not a Sixth Amendment claim. Using those factors – which play no role in the Sixth Amendment analysis – the panel dismisses the Sixth Amendment concern because it fails to give Walker a presumption of innocence, but views Walker as a bad man – one with prior serious convictions, one who had to be detained, one who waived a gun in front of his neighbors. *Walker*, 68 F.4th at 1238-39, citing *United States v. Torres*, 995 F.3d 695, 708 (9th Cir. 2021).

But applying *Torres* in Walker's context – in a non bail appeal – reverses the logic of why *Torres* invoked the Bail Reform Act. *Torres* was a bail appeal under FRAP 9 in which the Court concluded Torres's pretrial detention was consistent with the Speedy Trial Act. *Torres*, 995 F.3d 695, 699. To assess the correctness of Torres's detention, the Court had to focus on the demands and requirements of the Bail Reform Act. *Id*. at 701-03. That act is focused solely on whether conditions can be fashioned to allow for a defendant's release. The deciding question for pretrial release is whether the defendant poses a danger to the public or is a flight risk. 18 U.S.C. § 3142(b), (c). If he is not, whether with or without conditions, he has a right to be released. *Id*.

Flight and risk is not the question under the speedy trial rights under the Sixth Amendment. Mr. Walker's case is not a bail appeal and the Bail Reform Act factors used in *Torres* should have had no application here. Mr. Walker was entitled to a presumption of innocence and not the risk of flight/dangerousness analysis the Circuit's opinion imported from the pretrial release context.

Certiorari review is needed to correct the legal analysis that was used by the Circuit in its published – and so now-precedential – opinion. Under the correct legal analysis, *Barker*, Mr. Walker's Sixth Amendment rights were not protected. The long delay left him custody where he was exposed to not only the constant threat of getting a COVID-19 infection, which he eventually caught, but also the loss of the limited programs and resources that are normally available in a county lockup.

/ / /

CONCLUSION

Mr. Walker asks this Court to grant the petition and correct these fundamentally important errors in the interpretation of the elements of the 922(g) statute and in the analysis of the Speedy Trial rights under the statue and the Sixth Amendment.

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Respectfully submitted,

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