No._____

In the
Supreme Court of the United States

Spencer . Peace,
Petitioner

v.

State of Wisconsin
Respondent

On Petition for Wit of Certiorari to the Wisconsin Court of Appeals District 3

Petition for a Writ of Certiorari

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Question Presented

For 800 years the English Common Law prohibited jailing a defendant for more than one year prior to their trial. Fifty years ago, this Court changed course and created a balancing test to determine if pretrial delay violated the constitution's speedy trial guarantee. This balancing test has left the lower courts fractured, and the right to a speedy trial in shambles.

Should this Court overturn *Barker v. Wingo*?

Parties to the Proceeding

The petitioner is Spencer P. Peace who was the defendant in the circuit court, defendant-appellant in the Wisconsin Court of Appeals, and the defendant-appellant-petitioner in the Supreme Court of Wisconsin.

The respondent is the State of Wisconsin, who was the plaintiff in the circuit court, and the plaintiff-respondent in subsequent appellate proceedings.

Statement of Related Proceedings

This case arises from the following proceedings:

- *State of Wisconsin v. Spencer P. Peace* 2024 WI 5 (Wis. 2024)(Order denying review)
- *State of Wisconsin v. Spencer P. Peace*, 2023 Wis. App. LEXIS 823(Wis. Ct. App. 2023) (opinion affirming the judgement of conviction)
- *State of Wisconsin v. Spencer P. Peace*, Outagamie County 2018-CF-191

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Mr. Peace respectfully petitions for a writ of certiorari to the Wisconsin Court of Appeals, District 3, in *State v. Peace*, 22-AP-624, 2023 Wis. App. LEXIS 823(Wis. Ct. App. 2023).

Opinions Below

The Wisconsin Supreme Court's order denying review has been reproduced at Appendix B. The court of appeals opinion affirming the decision of the circuit court is unpublished, but can be found at, 2023 Wis. App. LEXIS 823(Wis. Ct. App. 2023) and is reproduced at Appendix A..

Jurisdiction

The Supreme Court of Wisconsin issued its order denying review on December 12, 2023. A copy of this order is reproduced at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional, Statutory, and Regulatory Provisions Involved

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial".

The Fourteenth amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

Statement of the Case

Spencer Peace was arrested on March 7, 2018. Even though he was indigent, the court imposed a cash bond of one hundred thousand dollars, an amount he could never hope to obtain. (R.440:4). Mr. Peace sat in jail for the next 1,229 days before his trial finally commenced. (R.457:1). Mr. Peace lost three years, four months and twelve days of his life before he was ever brought to trial.

Mr. Peace was accused of selling a small amount of heroin to ZR. (R.460:192-196). This transaction occurred on October 5, 2016. ZR would die as a result of an overdose. Police had been investigating this case for seventeen months before arresting Mr. Peace. Nearly five years passed from the date the alleged crime occurred and the day Spencer's trial started.

There are complications which help understand the delay before arresting Mr. Peace. Like many drug addicts, ZR had multiple suppliers of drugs. (R.477:51). ZR was taken to the hospital, and after he died, his organs were removed for donation. The hospital then released ZR's body, not the the medical examiner, but to a funeral home. The funeral home began the

embalming process before anyone realized the medical examiner should have taken custody of the body. (R.458:78-84).

Complex investigations take time. When there are highly unusual complications in the process, it is proper for the government to develop its case before arresting and charging a suspect. The delay from October 2016, to March 2018 is an example of how our criminal justice system should work.

After being arrested, Mr. Peace filed a demand for a speedy trial on June 14, 2018. (R.24). Counsel withdrew less than a month later. (R.29). Another attorney was appointed, and filed an unsigned pleading reportedly withdrawing Spencer's fundamental right to a speedy trial. (R.33). In December, this second attorney also moved to withdraw, due to Mr. Peace's desire to proceed to trial. (R.92; 453:2-4). When the Court held a hearing on this motion, Mr. Peace reiterated he never consented to or wanted to withdraw his speedy trial demand. (R.453:4).

Not every attorney is capable of trying a complex case like this one. More importantly, many attorneys are not willing to try complex cases like these. The State Public Defender struggled to appoint Mr. Peace another attorney. (R.106). On March 8, 2019,

one year after his initial appearance, Attorney LaKeisha Haase accepted Mr. Peace's case.

Prior to Attorney Hasse's appointment, the State had filed just one substantive motion, a motion to admit other acts filed on December 5, 2018. In October of 2019, nearly 17 months after Spencer's initial appearance, the State filed two more substantive filings: a motion to amend the information and a notice of intent to introduce certified records and DNA evidence. (R. 145; R.144). From January 2020 through March 2020, the State filed just four substantive documents. (R. 150; R.152, R.153; R.156).

It would be nearly five more months before the State filed another substantive document. Mr. Peace reiterated his desire for a speedy trial. (R.169).

Mr. Peace filed his first speedy trial demand in June of 2018, but the State did not begin full scale trial preparation until November of 2020. (R.462:22). The State filed its first witness list on November 20, 2020. (R.191). It also provided a highly technical, 180 page toxicology report to the defense on November 24, 2020. (R.461:24-27). The State filed notices of expert

testimony, and a notice inquiring about the possibility of using video testimony for three expert witnesses. (R.178; 181, 193).

Attorney Haase refused to compromise Spencer's right to confront witnesses against him in person. (R.466:20). The State then promptly requested a continuance, citing Covid related concerns for the experts and general population. (R.206:1-7). At that time, the Outagamie County Courts had reopened for jury trials; there was nothing different about this case, except several witnesses did not want to travel. (R.206:4-6).

The next day the Outagamie County operation plan committee voted to suspend all jury trial in Outagamie County until February. (R.464:3-10). The assistant district attorney prosecuting Mr. Peace was a member of that committee, as was the circuit court judge. (R.464:3-10). The circuit court addressed the State's motion, the suspension of jury trials, and Mr. Peace's demand for a speedy trial over three hearings on December 3rd, 8th, and 11th. (R.464:3-21; 465:3-28 469:3-27;)(Appendix 15-34, 39-64, 69-94). The circuit court acknowledged Mr. Peace's constitutional right to a speedy trial was implicated. (R.465:4; 469:9). The court indicated it expected future litigation of the

issues, (R.465:21), and specifically stated it would not deem any arguments waived. (R.469:27)

Attorney Haase was appointed by the governor to become a judge in the Winnebago county circuit court. She would not be able to represent Mr. Peace due to the delay in Mr. Peace's trial. (R.474:4).

A new attorney was appointed. Prior to his appointment, Mr. Peace filed a motion alleging he had been deprived of his right to a speedy trial, and requesting a modification of bond as relief. (R.244:1-3)(Appendix 10-12). This motion was denied. (R.471:3).

At the final pretrial hearing, the issue of the forensic toxicologists appearing remotely was raised. (R.468:4-5). Attorney Russell Jones stated "we've had discussions about some witnesses appearing remotely given their medical situation". (R:468:4-5)(Appendix 106-108). Mr. Peace quickly interrupted the court, asking his attorney to call him. Attorney Jones then represented Mr. Peace was confused as to who was going to be testifying remotely, "and he thought that that -- anyways, it doesn't matter. We're good to go". (R.468:5-6). The State then

clarified it would be the forensic toxicologists who would testify remotely. These analysts would testify ZR had heroin and fentanyl in his system. (R.476:21-25, 67). The medical examiner determined cause of death by using these samples. (R.460:136).

At the end of a four day trial, Mr. Peace was found guilty of first degree reckless homicide and delivery of heroin. Mr. Peace was sentenced to nine years of initial confinement and six years of initial supervision. He was given credit for each day he sat in jail, waiting for the resolution of this case: One thousand, three hundred fifty-seven days. (R.475:57-58). Mr. Peace filed a timely notice of intent to appeal, and a timely notice of appeal. (R.434; 479).

Mr. Peace appealed. On July 25, 2023, the Court of Appeals issued an order affirming the judgment of conviction, and holding Mr. Peace failed to preserve his arguments for appeal. (Appendix A). The Supreme Court of Wisconsin denied review on December 12, 2023. (Appendix B)

Reasons for Granting the Petition

Like many others, Mr. Peace was jailed indefinitely during the pandemic, waiting for the courts to hold jury trials. But unlike others, the pandemic was not the reason Mr. Peace's trial was delayed. The State of Wisconsin was not prepared to try his case. Once the State was prepared, Mr. Peace refused to compromise his right to in-person cross examination.

So the State delayed his trial again, knowing delay would cause Mr. Peace to lose his attorney. The new attorney appointed by the State of Wisconsin was much more amicable. Over Mr. Peace's objection, he waived Mr. Peace's right to in-person confrontation. .

These tactics are reminiscent of the despotic abuses of the criminal justice system the founding generation sought to protect against. The Wisconsin appellate courts have refused to address Mr. Peace's claim, despite the trial court indicating the delay would likely cause interesting appellate litigation.

This Court should grant certiorari to affirm Mr. Peace's rights. More importantly, it should grant certiorari to correct *Barker v. Wingo*, where this Court refused to interpret the constitution, and left constitutional interpretation to the legislature.

I. *Barker v Wingo* should be overturned.

Stare decisis plays an important role in the rule of law. It protects the interests of those who have taken reliance on past decisions, reduces incentives for challenging settled precedents, fosters evenhanded decision making, and contributes to the actual and perceived integrity of the judicial process. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2261, 213 L.Ed. 2d 545 (2022). But *stare decisis* is not an inexorable command; the doctrine is at its weakest when interpreting the Constitution. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405, 206 L.Ed. 2d 583 (2020). While it can be said sometimes it is more important to have an issue be settled than right, when it comes to the interpretation of the Constitution, the importance of having the matter settled right is significantly higher. *Dobbs*, at 2261. Blind adherence to precedent should be rejected when the error is egregious, the quality of the original decision is lacking, subsequent legal developments question the decision, and the decision is unworkable. *Id*; *Dobbs*, at 2265. These factors all suggest *Barker* cannot control speedy trial analysis any longer.

A. The right to a speedy trial was widely understood prior to its codification in our Constitution.

The right to a speedy trial is one of the fundamental rights which precedes the adoption of our Constitution. The earliest expression of the right to a speedy trial comes from the Assize of Clarendon–King Henry II's attempt to establish criminal procedure in 1166. Patrick Ellard, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 Am. Crim. L. Rev. 1207, 1209 (2007). In 1166, a prisoner had a right to promptly be brought in front of a judge and have their case heard. If no judge was readily available, the sheriffs had to bring the prisoner elsewhere to have their case resolved.

In 1215 the Magna Carta codified the right further, stating "[w]e will sell to no man, we will not deny or defer to any man either justice or right. Magna Carta, 1215 c. 40, as translated by Edward Coke, The Second Part of the Institute's of the Laws of England 45 (London, Clarke & Sons, 1817). The king dispatched judges to each county of the kingdom with the duty to administer justice for each prisoner. *Id*. at 56. Judges arrived at least twice a year, ensuring the prisoner had not been detained overly long. *Id*. at 42.

Over time, the Crown violated the speedy trial provisions of its laws, using long imprisonments without indictment to hold its enemies. Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 Notre Dame L. Rev. 1949, 1976 (2016). In response, Parliament passed the Habeas Corpus Act of 1679. *Id*. When an accused was jailed before trial, the act required the accused to be tried within two court terms (a term of three to six months). The Habeas Corpus Act of 1679 §7. An accused not indicted and tried by the second term "shall be discharged from his Imprisonment". *Id*.

In 1765 William Blackstone commented "no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. 1 *Commentaries on the Laws of England* 131 (1st ed. 1765)("Blackstone"). He noted how judges arrived twice every year throughout the kingdom, so "one way or other, the [jails] are cleared, and all offenders tried, punished, or delivered, twice in every year". 4 Blackstone 267. While a trial could occur with greater expediency, the two terms in a year set an outer limit for pretrial detention. *Id*.

Some commentators have argued there is a paucity of historical data surround the founder's adoption of the speedy trial right. This is largely reflective of two factors. First, the Sixth Amendment was not

thought to apply to the States until incorporation through the Fourteenth Amendment. *See e.g. Klopfer v. North Carolina*, 386 U.S. 213, 222, 87 S. Ct. 988, 18 L.Ed. 2d 1 (1967). Second, the right to a speedy trial was well understood: Blackstone and Coke were the preeminent authority on English law for the founding generations, and they explicitly detailed the right. *District of Columbia v. Heller*, 554 U.S. 570, 593-94, 128 S. Ct. 2783, 171 L.Ed. 2d 637; *Klopfer* at 225.

The recognition of the origins and original understanding of the right to a speedy trial continued until the middle of the 20th century. In 1880, the federal Supreme Court of the Territory of Montana discussed the English common law at the founding, quoted Blackstone as to the provision for clearing jails twice yearly and held if a prisoner was held longer than one year, it would be a denial of the right to a speedy trial. *United States v. Fox*, 3 Mont. 512, 515-16 (1880). In 1967, the *Klopfer* Court discussed our common law heritage, the assize of Clarendon, and the Magna Carta. *Klopfer*, 223-224. The Court noted "Coke's Institutes were read in the American Colonies by virtually every student of the law." *Id*. at 225. Thomas Jefferson wrote it was the universal elementary book of law students, and to John Rutledge, the Institutes seemed to be almost the foundation of our law. *Id*. The Court recited how by the thirteenth century, justices were visiting the countryside three times a year, and did not suffer prisoners

to be detained long, but at their next coming would give the prisoner speedy justice. *Id*. at 224. The right to a speedy trial had been well understood for hundreds of years.

The *Barker* Court's insistence the right to a speedy trial was vague and amorphous is in conflict with 800 years of laws, cases, and legal scholarship. This is a monumental error.

B. *Barker*'s constitutional analysis was sorely lacking, and has been throughly repudiated.

Barker's ad hoc interest balancing test is based on several premises which are all easily refutable when using historical sources to understand the idea of a speedy trial when the Sixth Amendment was ratified.

1. When the Sixth Amendment was ratified, the founding generation balanced societal interest in resolving criminal cases and the rights of the accused.

The *Barker* Court began ravaging the right to a speedy trial by claiming the right to a speedy trial is different from other rights in the Constitution because there is an interest to society as well as the accused. *Barker*, 407 U.S. at 519. This is an odd premise. The right to a speedy trial is far from the only right whose enforcement has societal cost.

Law enforcement can ask for permission to search a person and their belongings. With the person's consent, no warrant, or even probable cause is needed. Sometimes these searches can lead to the discovery of incriminating evidence. Society certainly has a profound interest in prosecuting the individual, yet if the individual did not know they did not have to consent, or their consent was not truly voluntary, the evidence has been obtained in violation of the Fourth Amendment, and may suppressed. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973).

An accused's confession is powerful inculpatory evidence, and society has a strong interest in hearing this confession. Our Constitution protects defendants from the government compelling their testimony. U.S. Const. Amend V. It may cost society to allow the accused to invoke this privilege, but this is a right guaranteed to us. The authors of, and those who voted to ratify our Constitution were aware of the abuses of the Stuarts whose inquisitorial system was used to browbeat confessions from those they accused. Against this backdrop, they enshrined the right to remain silent in our highest law. *Brown v. Walker,* 161 U.S. 591, 596-97, 16 S. Ct. 644, 40 L.Ed. 819 (1896).

The trial process might move more swiftly if state laboratory analysts could simply submit their reports and forego testimony.

These reports are likely reliable, and are what the analysts would testify to. This would benefit society, reducing the time of trial, and requiring less time in court for state employees. But society's interest is countered by an accused's right to confront witnesses against them. U.S. Const. Amend VI. After the infamous trial of Sir Walter Raleigh, the English enacted a series of judicial and statutory reforms to prevent this miscarriage of justice. Our founders went a step further, they enshrined this right in our Constitution. *Crawford v. Washington*, 541 U.S. 36, 43-50, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). Society might benefit from the use of *ex parte* lab reports, but this is not what our Constitution demands. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed. 2d 314 (2009).

"It is a truism that constitutional protections have costs." *Coy v. Iowa*, 487, U.S. 1012, 1020, 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988). The right to a speedy trial is not alone in having a societal cost. Just like the right to remain silent, and the right to confront witnesses, our founders knew governments can and do abuse pretrial incarceration. *Supra.* To protect the people of their new country from these abuses, they enshrined this right into our founding documents. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. U.S. Const. Amend. VI cl 1.

2. The right to a speedy trial is not a vague concept

The *Barker* Court continued to depotentiate the right to a speedy trial, calling the right vague, and impossible to determine when it had been violated. *Barker*, at 521. "We cannot definitely say how long is too long". *Id*. The Court stated there was no basis for determining whether a speedy trial can be quantified, and to do so would be akin to legislating. But "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 1 Cranch 137 (1803). It is the job of judges and justices, not the legislature, to examine and interpret the Constitution. *Marbury* at 179. The *Barker* Court abandoned its most sacred duty.

The Constitution was written to be understood by the voters. *District of Columbia v. Heller*, 554 U.S. 576-577; *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 188, 6 L.Ed. 23 (1824). Thomas Jefferson wrote at the time he studied law, "*Coke Lyttleton* was the universal elementary book of law students". *Klopfer* 386 U.S. at 225. John Rutledge of South Carolina echoed this, the Institutes seemed "to be almost the foundation of our law." *Id.*

Coke and Blackstone make it quite clear. At the time of the ratification of the Sixth Amendment, the right to a speedy trial was

well understood: the government had one year to try an accused, or the accused would be set free. The *Barker* Court did not need to legislate, it simply needed to open the treatises it had cited to five years prior.

3. The right to a speedy trial is not relative

The *Barker* Court continued, calling the right to speedy trial "relative". To support this position, it relied upon the case of *Beavers v. Haubert*. *Barker* at 522. This reliance is misplaced.

Beavers is, in actuality, an early case on removal proceedings. *Beavers. v. Haubert*, 198 U.S. Ct. 77, 25 S.Ct. 573, 49 L.Ed. 950. On July 16, 1903, Beavers was indicted in the Eastern District of New York. *Beavers*, at 78. On September 3, 1903, a bench warrant was issued, and Beavers surrendered himself, and was subsequently released on bail. *Id*. On June 8, 1904, Beavers was in court; the prosecutor announced he would not be proceeding further with the indictments, but that the government was instituting proceedings for the removal of Beavers to the District of Columbia. *Id*. at 79.

Beavers challenged the second arrest. *Id*. Beavers's argument regarding the right to a speedy trial is a single sentence.

> The refusal of the District Attorney to proceed with the prosecution and the failure of the court below to discharge Beavers from the arrest complained of deprived him of his constitutional right to a speedy trial by jury in the Eastern District of New York.
>
> *Beavers* at 82.

Beavers wanted to assert the right to a speedy trial to avoid arrest for yet another crime. But based on the original understanding of the right to a speedy trial, Beavers would not have been able to assert this right as he was released on bail. 4 Blackstone 267; The Habeas Corpus Act of 1679 §7.

The Court, seeing through Beavers undeveloped and specious argument, soundly rejected this premise. While the right to a speedy secures rights to a defendant, it does not not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses. *Id*. 87.

The proceedings in New York could not have had a speedy trial implication, as Beavers was not jailed. The proceedings in the District of Columbia could not have had a speedy trial implication as the case was a mere 313 days old when the Supreme Court of the United States issued its decision. The right to a speedy trial was never at issue. The Court's comment of the right's relativity is dicta.

The *Barker* Court's reliance on this line of dicta is largely misplaced. To an extent, the right is consistent with delays and circumstances. If the Crown were not ready to prosecute its case in the first term, it could wait until the second. The Habeas Corpus Act of 1679 §7. But this was the extent of the rights flexibility. Judges arrived twice every year throughout the kingdom, so "one way or other,

the [jails] are cleared, and all offenders tried, punished, or delivered, twice in every year". 4 Blackstone 267. Within the year, the right is relative, and subject to delays and circumstances. After a year, the right is no longer relative. This is the original understanding of the right to a speedy trial which was ratified into our Constitution.

C. Subsequent decisions of this Court suggest *Barker*'s *ad hoc* test should be discontinued.

In 2004, this Court rejected another amorphous, *ad hoc* balancing test in *Crawford v. Washington*. The forceful opinion noted the inconsistencies of the *Robert's* test, and how the test failed to prevent flagrant violations of the confrontation clause. These same problems are occurring with *Barker*'s test; it is unpredictable, routinely excuses heinous pretrial incarceration, and grants windfalls to out-of-custody defendants. Replacing the constitution's categorical guarantees with opened ended balancing tests damages the very fabric of the constitution. *Crawford*, at 67-68.

Crawford does not exist in isolation. Since *Barker*, this Court has repeatedly interpreted the constitution using its text, history, and tradition. *See*, *e.g. District of Columbia v. Heller*, 554 U.S. 576-577; *Dobbs*, 235-250; *Timbs v. Indiana*, 139 S.Ct. 682, 203 L.Ed. 2d11 (2019). *Barker* does not follow this methodology. Like *Ohio v. Roberts*,

Barker abstracts from the right its purposes, and then eliminates the right. *Maryland v. Craig*, 497 U.S. 836, 862 110 S.Ct. 3157, 111 L.Ed. 666 (1990)(Scalia, J., dissenting).

D. The fractures amongst the lower courts demonstrate *Barker*'s test is simply unworkable.

When determining whether to continue to apply *stare decisis*, courts should consider whether the rule imposed is workable–can it be understood and applied in a consistent, predictable manner. *Dobbs* at 2272 (Internal citations omitted). The right to a speedy trial used to be a simple concept. *Barker* twisted this into a complex-multi factor test with few guidelines, which permits weighing any number of factors a judge choses and balancing them however they deem appropriate.

As constitutional law grows more complex, it loses its clarity and obscures its fundamental principles. This obfuscation has peaked as the lower courts have been consistently fractured in their understanding and application of *Barker's* four part test.

Some courts think it's acceptable for the federal government to wait on a state prosecution before bringing the defendant to trial. *United States v. Grimmad*, 137 F.3d 823 (4th Cir. 1998); *United States v. Schrane*, 331 F.3d 548 (6th Cir. 2003). Others don't. *United Staes v. Battis*, 589 F.3d 673 (3rd Cir. 2009).

How soon and how often must a defendant demand the government bring him to trial? This Court says it's not the defendant's responsibility to bring themself to trial. *Barker* at 527. But some lower courts hold it against the defendant if the defendant does not do enough to assert their right, which effectively forces the defendant to bring themselves to trial. *United States v. Reyes*, 24 F.4th 1, 28 (1st Cir. 2022); *State v. Alexander*, 295 Ga. 154, 158; 758 S.E.2d 289 (2014); *Eubanks v. State*, 341 So. 3d 896, 905 (Mississippi 2022). In *United States v. Jumaev*, the court concluded Jumaev's multiple motions to dismiss for speedy trial violations weighed against him as they were filed after the delay had already occurred. *United States v. Jumaev*, 20 F.4th 518, 536 (10th Cir. 2021). The court also faulted Jumaev for litigating a suppression motion, and failed to credit his objections to the slow pace of the government's discovery efforts. But it is the governments burden to bring a defendant to trial, and ensure the trial is consistent with due process. *Barker*, at 527.

One would think the federal circuits could at least agree on a standard of review. But they can't. There is an open and acknowledged circuit split there as well. The First and Second Circuits apply abuse of discretion standards. *See*, *United States v. Handa*, 892 F.3d 95, 101 (1st Cir. 2018); *United States v. Black*, 918 F.3d 243, 254 (2nd Cir. 2019). The other federal circuits examine the lower courts

factual findings for clear error, and their legal conclusions are reviewed *de novo*. *See, United States v .Claxton*, 766 F.3d 280, 293 (3rd. Cir. 2014); *United States v. Pair*, 84 F.4th 577, 588 (4th Cir. 2023); *United States v. Allen*, 86 F.4th 295, 304 (6th Cir. 2023); *United States v. Cooley*, 63 F.4th 1173, 1177 (8th Cir. 2023); *United States v. Myers*, 930 F.3d 1113, 1118 (9th Cir. 2019); *United States v. Garcia*, 59 F.4th 1059, 1065 (10th Cir. 2023)

There seems to be just one thing the federal circuits agree on. After a year of delay, they are required to invoke *Barker*. But the state courts disagree. In Minnesota, 60 days of delay will trigger review. *State v. Paige*, 977 N.W.2d 829, 838 (2022). Nebraska found six months to be the appropriate length of time. *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999). 200 days is the right amount for Montana. *State v. Ariegwe*, 167 P.3d 815, 2007 MT 204, 338 Mont. 442 (2007). But 23 months of delay wasn't enough in Kansas. *State v. Mathenia*, 262 Kan 504, 510, 942 P.2d 624 (1997). Louisiana and Maryland both employ a flexible approach, and Maryland does not consider the length of delay to be a weighty factor. *State v. Kanneh*, 403 Md. 678, 689, 944 A.2d 516 (2008); *State v. Reaves*, 376 So.2d 163, 138 (La 1979). New Mexico breaks its delays into three categories, depending on the complexity of the case; 12 months for simple, 15 for

intermediate, and 18 months in complex cases. *State v. Garza*, 146 N.M. 499, 212 P.3d 387 (NMSC 2009)

These large, categorical splits do not even begin to cover how different the factors can be cut up, diluted, measured, and weighed against each other. How much stress and anxiety must there be to be prejudicial? Sometimes, pretrial stress and anxiety can be enough to be prejudicial. Other-times, this isn't prejudicial, even when the case is also impaired. How little effort can the government spend on apprehending a suspect without becoming negligent?

Perhaps this Court could replace its current arcane and unpredictable methodology with a modern mathematical algorithm. Take the total time prior to trial, subtract 365 days. Multiply by 2 for days in-custody. Multiply by 0 for days serving another lawful sentence. Add 10 for each time the defendant asserted their righto to a speedy trial. Subtract 20 for each time the defendant requests an extension. Multiply by 3 for bad faith actions by the government. Multiply by 1.5 for ordinary negligence. Square the total if witnesses memories are foggy, or if evidence is lost. At least litigants would then have some clue how courts might weigh the factors infringing on a defendant's rights.

Or this Court could revive the simple rule which stood for over 800 years. The government has one year to bring an in-custody defendant to trial. That's a rule everyone can understand and any court can apply.

Conclusion

The petition for certiorari should be granted.

Dated: Monday, March 11, 2024

Respectfully submitted,

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