

No. 25-_____

SUPREME COURT OF THE UNITED STATES

CARLOS RAY KIDD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

- I. Whether a criminal defendant who suffers inordinate delay in sentencing is protected by the Fifth Amendment right to due process under this Court's precedent in *Barker v. Wingo* or *United States v. Lovasco*?
- II. Whether prejudice may be presumed when there is an egregious delay in sentencing and, if not, what constitutes prejudice in a post-conviction context?

Parties to the Proceeding

Petitioner is Carlos Ray Kidd, who was the Defendant-Appellant in the court below. Respondent, the United States, was the Plaintiff-Appellee in the court below. No party is a corporation.

Rule 14.1(b)(iii) Statement

This case arises from the following proceedings in the United States Court of Appeals for the Fifth Circuit and the Northern District of Texas:

- *United States v. Kidd*, No. 23-11265, 127 F.4th 982 (5th Cir. 2025)
- *United States v. Kidd*, No. 5:05-CR-00117-H(1) (N.D. Tex. Dec. 19, 2023)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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Petition for Writ of Certiorari

Carlos Ray Kidd, by and through his Attorney of Record, Michael King, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The decision by the United States Court of Appeals for the Fifth Circuit denying Mr. Kidd's direct appeal is reported as *United States v. Kidd*, 127 F.4th 982 (5th Cir. 2025). The district court did not issue a written opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 11, 2025. This Petition was filed within ninety days of the entry of that judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

Constitutional Provisions Involved

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This case presents what is seemingly the longest delay in sentencing ever recorded in a court of the United States: sixteen years. Prior to 2016, courts grappled with whether the Sixth Amendment’s Speedy Trial Clause applied to post-conviction matters as it did pre-conviction. *Compare United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996) (holding that, “The constitutionally guaranteed right to a speedy trial applies to sentencing.”) *with United States v. Ray*, 578 F.3d 184, 198-99 (2d Cir. 2009) (holding that, “the Speedy Trial Clause of the Sixth Amendment . . . does not apply to sentencing to proceedings.”). Nearly seventy years ago, in *Pollard v. United States*, this Court “assume[d] *arguendo*” that it did. *Pollard v. United States*, 352 U.S. 354, 364 (1957). Almost a decade ago, this Court in *Betterman v. Montana* decided unequivocally that it did not. *Betterman v. Montana*, 578 U.S. 437, 440-41 (2016). Importantly, in *Betterman*, this Court noted that due process protects defendants from a fundamentally unfair sentencing and left open the question of what test to use. *See id.* at 448. This Court has not answered the question it left open in *Betterman*; however, federal and state courts have struggled to decide the proper framework to analyze claims that a delay in sentencing violated a defendant’s due process rights.

I. The Letters and Original Proceedings

Carlos Ray Kidd (Kidd) has been incarcerated for over twenty-three years. Kidd began his time behind bars in the Texas Department of Criminal Justice (TDCJ). While an inmate in state custody, Kidd was raped by a prison guard named David Larsen.

Kidd reported the rape, availed himself of any assistance he could find, but ultimately, Kidd remained in state custody. Approximately a year and a half later, still in custody, Kidd was raped again. Desperate for safety and looking for a way to be transferred from state custody to federal custody, Kidd wrote threatening letters to federal judges and court staff. Six months after the second rape, in June of 2005, Kidd wrote the first letter to U.S. District Judge Sam Cummings. Later that same month, Kidd drafted a letter to the U.S. District Clerk, Northern District, Lubbock Division, which made threats to Judge Cummings, a District Clerk, and to burn down the federal courthouse.

Kidd was formally charged in December of 2005. Because the letters threatened Judge Cummings, he recused himself and the case proceeded in Amarillo with Judge Mary Lou Robinson presiding. On January 10, 2007, Kidd pleaded guilty to count two of the indictment, with counts one and three dismissed pursuant to the plea agreement between Kidd and the Government. On April 24, 2007, Judge Robinson sentenced Kidd to sixty months of imprisonment, to run consecutively to his state sentence in cause number 20,431-CR out of the 20th Judicial District of Texas, followed by three years of supervised release.

Prior to the imposition of the sixty-month sentence, Judge Robinson granted Kidd a three-level deduction for acceptance of responsibility. As a result, the sixty-month sentence was outside of the applicable Guideline range, and Kidd timely appealed his sentence. In September of 2007, the Government moved to remand the

case back to the district court for re-sentencing, and that motion was granted on November 16, 2007.

II. Re-Sentencing

On April 25, 2023, sixteen years after Kidd's original sentencing, J. Matthew Wright, of the Federal Public Defender's Office for the Northern District of Texas, notified the district court that the re-sentencing hearing never occurred. The re-sentencing hearing was finally held on December 19, 2023, with U.S. District Judge James Wesley Hendrix presiding. Judge Hendrix ultimately denied the Defendant's Motion to Dismiss for Violation of Due Process and Rule 32(b) of the Federal Rules of Criminal Procedure. Judge Hendrix denied Kidd the three-level deduction for acceptance of responsibility and denied the Motion for Downward Variance. Kidd was sentenced to sixty months of imprisonment, to run consecutively to the sentence imposed in cause number 1:12-CR-190 of the U.S. District Court for the District of North Dakota.

III. Direct Appeal

On direct appeal, Kidd renewed his argument that his right to due process was violated based on the extraordinary sixteen-year delay between the remand for his re-sentencing and the actual re-sentencing. Kidd urged the Fifth Circuit to apply the four-factor test established in *Barker v. Wingo* to his post-conviction delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (establishing that the four-factor test for pre-trial delay analyzes the length of the delay, the reason for the delay, the defendant's assertion of

his right to a speedy trial, and prejudice to the defendant). Kidd argued that the first factor, the length of the delay, weighed in his favor because a delay of more than sixteen years is egregious. Kidd argued that the second factor, the reason for the delay, weighed in his favor because the delay was no fault of his own; the delay was the result of the government's extreme negligence. Further, Kidd argued that he adequately asserted his right to a speedy sentencing when he timely appealed his sentence in 2007 and continued to seek clarification of his sentence in the years following. Lastly, Kidd argued that the fourth factor, prejudice, weighed in his favor because Kidd suffered anxiety due to sixteen years of uncertainty regarding the length of his federal sentence and how it would run in light of his state sentences. Moreover, Kidd argued prejudice should be presumed due to the extraordinary length of the delay.

The Fifth Circuit held that, while the test it adopted is facially similar to the *Barker* test, the analysis for a due process violation differs from that of a speedy trial violation. *United States v. Kidd*, 127 F.4th 982, 987 (5th Cir. 2025). The court reasoned that the considerations are different in each circumstance. *Id.* In a pre-trial delay, courts are concerned with oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility of an impaired defense by loss of memory and exculpatory evidence. *Id.* at 987-88. The Fifth Circuit opined that those concerns are absent in a post-conviction delay, and therefore, the analysis differs, even if the factors do not. *Id.* at 988. The court held that while the length of the delay in the instant case is egregious, the blame for the delay is shared between the Government, Kidd, and the district court.

Id. at 989. The court further held that while Kidd was unaware of his need for a re-sentencing hearing, the fact that he did not seek a re-sentencing hearing weighs against him. *Id.* Finally, the court held that Kidd suffered no prejudice as a result of the egregious delay, and as a result, affirmed the district court's denial of the Motion to Dismiss for Violation of Due Process. *Id.* at 991.

IV. Reasons for Granting the Writ

Lower courts desperately need this Court's guidance on the appropriate test to use when considering issues of sentencing delay. In 2016, this Court decided unambiguously in *Betterman v. Montana* that the Sixth Amendment right to speedy trial does not apply to post-conviction matters. *Betterman*, 578 U.S. at 441. There, this Court explained that, while a defendant's right to speedy trial is not engaged in the post-conviction phase, there are two alternative safeguards against undue delays in sentencing: Federal Rule of Criminal Procedure 32(b)(1) and due process. *Id.* at 447-48. This Court, however, did not establish the appropriate test to use when considering if either safeguard has been violated. *See id.* at 448.

Even prior to this Court's decision in *Betterman*, lower courts struggled with inconsistent treatment of claims that a delay in sentencing arose to the level of a constitutional violation. *Compare United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999) (analyzing whether a 29-month delay in resentencing violated due process under the *Barker* factors), with *United States v. Sanders*, 452 F.3d 572, 583 (6th Cir. 2006) (analyzing whether a four-year delay in resentencing violated due process under the two-step

Lovasco test). Moreover, without further guidance, whether a defendant must demonstrate prejudice and what constitutes such in a post-conviction setting is dependent on the jurisdiction a defendant is in. *Compare Ray*, 578 F.3d at 202 (holding that making a defendant return to prison after years of living a productive life in society would cause substantial prejudice), *with Sanders*, 452 F.3d at 582 (rejecting the defendant's argument that returning to prison after building a life and family after his initial release was adequate to show prejudice). Without guidance from this Court, lower courts will continue to inconsistently apply constitutional protections when individuals like Mr. Kidd have their cases fall through the cracks.

With only one avenue for recourse available to defendants who find themselves at the other end of a sentencing delay, it is crucial for courts to have a uniform test to determine when a delay violates due process. However, the last time an egregious delay in sentencing was presented to this Court, the issue of whether it violated due process was not raised, so this Court did not consider it. *See Betterman*, 578 U.S. at 448 (Thomas, J., concurring) (noting the question of what test to use for an undue delay in sentencing is left unanswered). Since *Betterman*, courts have implemented different tests to analyze due process claims for post-conviction delay. *See* discussion *infra* Section IV.A. Moreover, federal and state courts have acknowledged the split in authority due to the lack of guidance on this issue. *See, e.g.*, *State v. Lopez*, 2018-NMCA-002, ¶¶ 13-14, 410 P.3d 226 (describing the split); *United States v. Yupa Yupa*, 796 Fed. App'x 297, 299 (7th

Cir. 2019) (recognizing *Betterman* does not establish the proper test to use for sentencing delay).

A. Courts are squarely divided on whether to use the *Barker* factors or the two-step *Lovasco* test to consider issues of delayed sentencing.

Two circuits currently rely upon this Court’s analysis in *United States v. Lovasco*, which considered whether a pre-indictment delay of more than eighteen months violated due process. *United States v. Lovasco*, 431 U.S. 783, 784 (1977). In *Lovasco*, this Court held that proof of prejudice “is generally a necessary but not sufficient element of a due process claim[.]” *Id.* at 790. The Second Circuit, following the due process analysis in *Lovasco*, considers “[1] the reasons for the delay as well as [2] the prejudice to the accused.” *Ray*, 578 F.3d at 199 (citing to *Lovasco*, 431 U.S. at 790). The Sixth Circuit also utilizes the same test. *See Sanders*, 452 F.3d at 580 (holding the *Barker* factors are inapplicable to post-conviction delay and utilizing the two-prong *Lovasco* test). *Id.* While both *Ray* and *Sanders* pre-date this Court’s decision in *Betterman*, the Second Circuit has continued to utilize the two-prong *Lovasco* test in analyzing post-conviction delay. *United States v. Cain*, 734 F. App’x 21, 24-25 (2d Cir. 2018).

While some courts have adopted the two-prong *Lovasco* test, others rely on Justice Sotomayor’s concurrence in *Betterman* and apply the four-factor *Barker* test to determine whether post-conviction delay violates due process. *See United States v. James*, 712 F. App’x 154, 162 (3d Cir. 2017); *United States v. Maradiaga*, 539 F. Supp. 3d 1027, 1029 (N.D. Cal. 2021); *United States v. Washington*, No. 1:17-CR-071, 2024 WL 3568924,

at *9 (S.D. Ohio July 29, 2024) (citing *United States v. Young*, 146 F. App'x 824, 832 (6th Cir. 2005)). The *Barker* factors consider the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant. *Barker*, 407 U.S. at 530. Since this Court's decision in *Betterman*, the Third, Fifth, and Eleventh Circuits have held the *Barker* factors, or a modified version thereof, apply to situations of sentencing delay. *See James*, 712 F. App'x at 162; *Kidd*, 127 F.4th at 988; *United States v. Hornberger*, No. 23-10250, 2024 WL 3067249, at *3 (11th Cir. June 20, 2024). Prior to *Betterman*, the *Barker* factors were also utilized by the Seventh Circuit, however, the Seventh Circuit has not expressly ruled on the issue since this Court held that sentencing delays implicate due process rather than speedy trial. *See Yupa Yupa*, 796 F. App'x at 299.

B. The decision below aggravates the circuit split because the Fifth Circuit's modification of the *Barker* factors is inconsistent with this Court's precedent as well as the decisions of its sister courts.

In the opinion below, the Fifth Circuit applied a modified *Barker* test, consisting of three factors: "(1) length of and reason for delay, (2) the defendant's diligence in requesting expeditious sentencing, and (3) prejudice." *Kidd*, 127 F.4th at 988. The Fifth Circuit reasoned that, because *Barker* analyzed pre-conviction delay, the considerations in a post-conviction delay will necessarily differ. *Id.* at 987-88. In doing so, the Fifth Circuit widened the existing circuit split on issues relating to sentencing delay and set up a prime opportunity for this Court to quash the disagreement of the lower courts on

two pivotal issues: first, which test to use; and second, is a showing of actual prejudice required for relief and, if so, what does prejudice look like in a post-conviction setting?

1. The circuits that utilize the *Barker* factors are split on whether due process requires a showing of prejudice to obtain relief.

While this Court has not yet had occasion to apply the *Barker* factors in a situation of sentencing delay, this Court has held that none of the four factors are “necessary or sufficient” to find a violation of speedy trial. *Barker*, 407 U.S. at 533. A showing of actual prejudice is required for due process to provide relief in situations of pre-indictment delay. *United States v. Marion*, 404 U.S. 307, 324 (1971); *Lovasco*, 431 U.S. at 790. Importantly, that requirement to show prejudice is rooted in respect for federalism—the primary protection against pre-indictment delay is the statute of limitations. *Marion*, 404 U.S. at 322; *Lovasco*, 431 U.S. at 789. Statutes of limitation represent a legislative judgment about the balance of equities. *Marion*, 404 U.S. at 322 n.14. Further, statutes of limitation provide practical guidance to law enforcement and prosecuting attorneys on the timeline for investigating and prosecuting criminal activity. *See id.* at 323. Notably, the same concerns of respecting the balance of federalism and fairness to law enforcement and the prosecuting attorney are not present when considering a sentencing delay.

The decision below compounds the circuit split on this issue by reinforcing a secondary split. When applying the *Barker* factors in a post-conviction context, the Third Circuit has held that the presence or absence of any *Barker* factor is not

dispositive, but “rather, they are ‘related factors and must be considered together with such other circumstances as may be relevant.’” *United States v. Small*, No. 22-1469, 2023 WL 4399212, at *3 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 523 (2023). While the Third Circuit has established that the first factor, the length of the delay, is a “threshold requirement,” it nevertheless has held that all four factors are to be balanced together. *Id.* (citing *Barker*, 407 U.S. at 533).

In contrast to this Court’s precedent on the *Barker* factors and the application of such by the Third Circuit, here, the Fifth Circuit, citing *Lovasco*, modified the *Barker* factors and determined a showing of actual prejudice is *required* for due process to provide relief in the context of a sentencing delay, despite acknowledging that the concerns present in a pre-indictment context are not present in a delayed sentencing context. *Kidd*, 127 F.4th at 987-88. The Eleventh Circuit also uses the same modified version of the *Barker* factors. *Hornberger*, 2024 WL 3067249, at *3. The fact that courts which fall on the same side of the initial circuit split still apply the *Barker* factors differently demonstrates the pressing need for this Court’s clarification.

2. The circuits that require prejudice are split on what constitutes such in a delayed sentencing context.

Lower courts have struggled to define prejudice when considering delayed sentencing. In part, this struggle is caused by the uniquely different contexts of pre-indictment and sentencing delays; delayed sentencing rarely deprive the defendant of evidence necessary to mount a defense in further proceedings and that type of prejudice

weighs heavily in favor of a due process violation. *See Doggett v. United States*, 505 U.S. 647, 654 (1992); *Kidd*, 127 F.4th at 988. Nonetheless, this Court recognized in *Betterman* that due process protects against a fundamentally unfair sentencing, which implies that if a showing of prejudice is required, there is some circumstance warranting relief that does not require the defendant to languish without being sentenced until their time spent in custody exceeds statutory maximums.

The best evidence of the need for this Court's clarification of whether prejudice is required and what is prejudice is the inconsistent opinions of lower courts on the same type of harm. For example, in *United States v. Ray*, the Second Circuit considered a situation in which the defendant had lived out in society for fifteen years due to a delayed sentencing. *Ray*, 578 F.3d at 201. The Second Circuit held it would prejudice the defendant to incarcerate her after such a delay because the defendant had been completely rehabilitated—she had married, had children, built a career, and obtained higher education. *Id.* In contrast, in *United States v. Sanders*, the Sixth Circuit held the defendant was not prejudiced by being required to serve time in custody after a four-year delay in sentencing when the defendant had married, built strong relationships with his children, and played an active role in the community, rather, the Sixth Circuit held the delay benefited the defendant. *Sanders*, 452 F.3d at 582. These polar opposite conclusions on the same type of harm highlight that circuits will not reconcile this issue on their own.

Further demonstrating the inconsistency regarding prejudice is the role of anxiety in the analysis. In *Barker* and its progeny, this Court has been clear that the anxiety an accused person suffers due to delay is prejudice. *Barker*, 407 U.S. at 532. The Seventh Circuit, however, has held that anxiety is no longer a weighty consideration in a post-conviction setting because, even when sentencing is delayed for years, the defendant's anxiety is no different than that of a defendant waiting to see if punishment will be imposed after exhausting the appellate process. *Sanders*, 452 F.3d at 580. Circuits which do consider anxiety continue to exacerbate the split by requiring different showings of the effect of a delayed sentencing on a defendant's mental health. Some lower courts require proof that anxiety has caused actual medical issues. *See Burkett v. Fulcomer*, 951 F.2d 1431, 1443 (3d Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992); *United States v. Carpenter*, 781 F.3d 599, 614-15 (1st Cir. 2015). Other courts take a hyper-technical approach to anxiety. To illustrate, here, the Fifth Circuit recognized Kidd suffered anxiety from not receiving sentence clarification that was dispositive to his release date, though it determined this was inadequate to show prejudice because Kidd needed to be anxious about the resentencing specifically, despite acknowledging prior counsel likely failed to inform Kidd that his sentence had been remanded. *Kidd*, 127 F.4th at 990. If a showing of prejudice is required, so is clarification from this Court on what constitutes such, otherwise, due process relief will continue to be based on jurisdiction rather than constitutional principles.

C. The issue of how courts should analyze post-conviction delays under the Due Process Clause is important.

Without the protection of the Sixth Amendment's right to speedy trial, convicted defendants are shortlisted when it comes to guaranteeing a fair sentencing. The Fifth Amendment's right to due process of law is a pinnacle of American jurisprudence, serving as a protection to "a defendant's most fundamental rights to justice." *Lovasco*, 431 U.S. at 789. Due process exists to ensure that our accused and convicted are given a procedure that is fundamentally fair and to prevent outcomes that shock the conscience of the nation. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Generally, a sixteen-year delay in sentencing alone is enough to shock even tough-on-crime citizens into a silent horror of the failure of the criminal justice system. The true nail in the coffin to the collective conscious is struck by the utter lack of consistency in how these situations have been resolved by lower courts.

Case law on due process violations for post-conviction delay is scarce, hopefully, because such egregious delays in sentencing are infrequent in the United States. However, Kidd is certainly not the sole defendant who has suffered from having his case fall through the cracks. *See, e.g., Ray*, 578 F.3d at 201 (fifteen-year delay in re-sentencing); *Sanders*, 452 F.3d at 582 (four-year delay in re-sentencing); *Hornberger*, 2024 WL 3067249, at *2 (seven-year delay in final judgment on restitution); *Young*, 146 F. App'x at 831 (two-and-a-half-year delay in sentencing); *Small*, No. 22-1469, 2023 WL 4399212, at *1-2 (four-and-a-half-year delay in sentencing). This Court should resolve

the issue of how to analyze post-conviction delay because, as thorough as the American criminal justice system should be, some defendants and cases manage to escape the court's docket and be forgotten. It is important, both for defendants and for the public's perception of the justice system, that courts have direction on how to analyze these delays when they occur.

D. The egregious sixteen-year delay in this case presents an ideal vehicle for this Court to resolve these issues.

The decision below, along with the current split in authority, presents a prime opportunity for this Court to address the questions presented because they are outcome-determinative. The Fifth Circuit held that Kidd cannot prevail without a showing of actual prejudice. *Kidd*, 127 F.4th at 990. Under a true *Barker* analysis, however, Kidd *can* prevail.

The first *Barker* factor weighs heavily in Kidd's favor. The delay between the Fifth Circuit's remand for re-sentencing and the actual re-sentencing hearing was more than sixteen years. This is exactly the kind of delay which shocks the conscience and leads to distrust in the criminal justice system. The Fifth Circuit, in its opinion below, combined the first and second *Barker* factors, to make the first factor of the modified test, "the length of and reason for the delay." *Id.* at 988. However, combining these factors and applying it as the Fifth Circuit did minimizes the first *Barker* factor's heavy weight in Kidd's favor.

The second factor, the reason for the delay, also weighs in Kidd's favor, even if slightly. In *Barker*, this Court held that while more deliberate delay for the purpose of hampering the defense should weigh heavily against the government, more neutral reasons, *i.e.*, governmental negligence, should be weighed against the government, but less heavily. *Barker*, 407 U.S. at 531. The Fifth Circuit opined that "there is plenty of blame to go around[,"] and noted that blame for the delay in Kidd's case belongs to the government and Kidd. *Kidd*, 127 F.4th at 989. However, the Fifth Circuit held that its first factor (the length of and reason for the delay), "[o]n balance, weighs in favor of Kidd." *Id.*

The third factor, the defendant's assertion of his right, also weighs in Kidd's favor. The Fifth Circuit modified the third *Barker* factor, "defendant's assertion of his right to speedy trial," to "defendant's diligence in requesting an expeditious sentencing." *Id.* Framing the factor this way necessarily impairs a defendant who is unaware of his need for a re-sentencing hearing, but is nevertheless actively engaged with his sentence, as Kidd did. Kidd repeatedly asked the sentencing court to run his 2007 sentence concurrently with his state sentence. He sought clarification of his sentence. While he was unaware of the specific need for a re-sentencing hearing, the Fifth Circuit weighs this factor against Kidd, because his unawareness of the remand or need for a re-sentencing "does not excuse his failure to request a hearing." *Id.* Under the proper *Barker* standard, however, the third factor, assertion of his right, weighs in his favor.

Finally, the fourth *Barker* factor, also weighs in Kidd's favor, even if slightly. While courts may disagree over what constitutes prejudice or whether prejudice may be presumed, this Court, in *Barker*, makes no mention of the degree of prejudice that tips the scale on balance. Kidd was prejudiced by the delay because of the anxiety he suffered during the more than sixteen-year delay between the remand and his resentencing hearing. For more than sixteen years, Kidd did not know the status of his federal sentence and whether his 2007 sentence would require he serve additional time after finishing his stint at TDCJ. As the Fifth Circuit stated below, there was no "dead time" during the delay period because Kidd was serving other sentences; however, this fact does not foreclose Kidd's argument that he was nevertheless prejudiced by the delay. *Id.* at 990.

The Fifth Circuit erred by making the final factor, prejudice, a prerequisite to a finding that due process has been violated. The four factors are to be weighed together to allow a court to make a holistic determination. When one of those factors is deemed necessary, it is no longer a balancing test. This Court's determination of the appropriate test to use, and how to weigh that test, when a delay in sentencing occurs is outcome-determinative in Kidd's case. Had the Fifth Circuit utilized a true *Barker* analysis, either by recognizing sixteen years of anxiety is enough or by presuming prejudice due to the egregious delay, Kidd would have prevailed. This case is the perfect vehicle for addressing the questions presented.

Conclusion

For the foregoing reasons, Kidd asks this Court grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.