No. 16-1373

IN THE

Supreme Court of the United States

RYAN BROWN,

Petitioner,

v.

RANDALL HAAS, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING

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REPLY BRIEF FOR PETITIONER

Petitioner Ryan Brown's argument, at bottom, is that this Court should grant certiorari because the lower courts "need more guidance" on how to assess prejudice under the Speedy Trial Clause, in order to clear up the splits that currently divide them. *United States* v. *Ferreira*, 665 F.3d 701, 711 (6th Cir. 2011) (Kethledge, J., dissenting).

The government offers little response to that argument. It does not, for example, even cite the dissent in *Ferreira*. It offers no legal principle to account for the admitted variation in the lower courts over when to presume prejudice. And it effectively concedes that the lower courts have applied two different standards for determining actual prejudice.

The government's main response is that certiorari should be denied because the Sixth Circuit declined to resolve two other issues that might ultimately preclude relief. But the questions presented were undisputedly pressed and passed upon below. And as is this Court's usual practice, any unresolved issues can be addressed (if necessary) on remand.

I. NOTHING PREVENTS THIS COURT FROM REACHING THE QUESTIONS PRESENTED.

The government contends that two issues the Sixth Circuit chose not to resolve preclude a grant of certiorari. The "traditional rule" in this Court, however, "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

Here, the questions presented were both pressed and passed upon below: The Sixth Circuit rejected

Brown's prejudice arguments, holding that he "was not entitled to a presumption of prejudice," App. 21a, and that, "despite the missing tapes, [he] has not shown substantial prejudice," App. 23a. The government concedes the point. Opp. 8 (The Sixth Circuit "considered in turn Brown's arguments that he was entitled to a presumption of prejudice and that he had shown actual prejudice, and rejected both arguments."). Hence nothing stops this Court from reaching the questions presented.

That remains true in view of the two issues the Sixth Circuit declined to resolve. The court "assum[ed]" without deciding first that AEDPA's deferential standard of review did not apply (as the government agreed, then), and second that the delay here was 25 months (instead of five, as the government contended). App. 10a, 14a.

This Court need not resolve either issue before reaching the questions presented. Respondents frequently argue that issues unresolved below preclude the ultimate relief sought by a petitioner. And this Court has consistently responded that these issues can be addressed (if necessary) on remand. When the issues bear on the questions presented, this Court has made an assumption about them for purposes of decision. They do not preclude a grant of certiorari.

For example, in *Tapia* v. *United States*, 564 U.S. 319, 321 (2011), this Court addressed whether "the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." The lower court decided that issue against the defendant and thus had no reason to address whether his failure to

object precluded relief under the plain-error standard of review. This Court addressed the merits of the question and left "it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed." *Id.* at 335.

Similarly, in *Kentucky* v. *King*, 563 U.S. 452, 455, 458 (2011), this Court addressed whether the exigent-circumstances rule (justifying a warrantless search under those circumstances) applies when it is "'reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances'" (citation omitted). The lower court assumed as a threshold matter "that exigent circumstances existed" before holding that the rule did not apply. *Id.* at 470. This Court again reached the merits of the question presented, "assum[ing] for purposes of argument that an exigency existed." *Id.* at 471. "Any question about whether an exigency actually existed" could be "addressed … on remand." *Ibid.*

There are many other examples. *E.g.*, *Town of Chester, N.Y.* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 n.2 (2017) ("We assume for the sake of argument only that Laroe does not have Article III standing. If resolution of this issue becomes necessary on remand, the Court of Appeals will be required to determine whether the district court's decision was correct."); *Arizona* v. *Johnson*, 555 U.S. 323, 334 n.2 (2009) ("The Arizona Court of Appeals assumed, 'without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous.' We do not foreclose the appeals court's consideration of that issue on remand."); *Rice* v. *Cayetano*, 528 U.S. 495, 521-22 (2000) ("As the Court of Appeals did, we assume the validity

of the underlying administrative structure and trusts, without intimating any opinion on that point.").

So too here, the Sixth Circuit decided both questions presented. This Court can address those questions while assuming for purposes of decision that AEDPA's deferential standard does not apply and that the delay was 25 months. If necessary, those issues can be addressed by the Sixth Circuit on remand. And since this Court would not apply AEDPA's deferential standard, there is no concern about making new constitutional law under that standard. *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (per curiam).

II. THE DECISION BELOW ADDS TO THE DISCORD AND CONFUSION IN THE LOWER COURTS OVER WHEN TO PRESUME PREJUDICE.

The government concedes that there is "variation" in the lower courts over when to presume prejudice, but denies the existence of a numbers game on which the lower courts are split. Opp. 16.

The "numbers game" description is not, as the government suggests, Opp. 16-17, something that Brown invented—and the government does not cite, let alone answer, the dissent in *Ferreira*, 665 F.3d at 710 (Kethledge, J., dissenting). Another case the government does not cite is *United States* v. *Erenas-Luna*, 560 F.3d 772, 780 (8th Cir. 2009), which illustrates that the length of delay is often dispositive. The only material difference between there and here was an additional year of delay. App. 18a.

The government responds with cases where the lower courts "consider all of the [*Barker*] factors" or deny speedy-trial claims with delays longer than

those that had previously sufficed to presume prejudice. Opp. 16-18. For example, the government says that, if the Eleventh Circuit were playing a numbers game, "it could not after *Ingram* have denied speedy-trial claims involving delays longer than two years." Opp. 17.

This response misses the point. Brown's argument is not that the lower courts have held that any delay beyond a certain threshold automatically results in a speedy-trial violation. *Doggett*'s presumption applies only when the government is negligent. *E.g.*, 505 U.S. 647, 657 (1992). And Brown's argument, therefore, is that "in the usual case where the government's delay is the result of negligence," the lower courts are engaged in a numbers game. *Ferreira*, 665 F.3d at 710 (Kethledge, J., dissenting).

To show that the lower courts are not, the government would have to cite an Eleventh Circuit case where the court refused to presume prejudice for a delay longer than two years attributable to government negligence. Or a Fifth Circuit case to the same effect involving a delay longer than five years owing to government negligence.

The government cannot. In every Eleventh Circuit case it cites denying relief for a delay longer than two years, the government's conduct fell short of negligence. These cases are thus immaterial to the split over when the presumption applies if the government is negligent. *See United States* v. *Cruz*, 681 F. App'x 819, 823 (11th Cir. 2017) ("[T]he government has provided a sufficient explanation for the delay."); *United States* v. *Villarreal*, 613 F.3d 1344, 1353 (11th Cir. 2010) ("Because Villarreal made substantial efforts to

evade police … we weigh this factor in favor of the government."); *United States* v. *Spaulding*, 322 F. App'x 942, 946 (11th Cir. 2009) (government's actions were "closer to diligence than bad faith").

In the Fifth Circuit, the government cannot even cite a case where the court denied relief for a delay longer than five years, much less one involving government negligence. Instead, as if to illustrate the numbers game in action, the government cites a 16-month delay where the court did not presume prejudice and a ten-year delay where the court did. *Compare United States* v. *Frye*, 372 F.3d 729, 737 (5th Cir. 2004), *with United States* v. *Molina-Solorio*, 577 F.3d 300, 307 (5th Cir. 2009). These cases happen to fall on either side of the five-year line the court had previously drawn.

The government concedes that the Third Circuit "appears to [have] establish[ed] a bright-line rule," Opp. 18, but says that the court has not "treated this as a bright-line rule" because it has gone through all the *Barker* factors in a subsequent case. Opp. 18. There again, however, the government acted with "reasonable diligence," so the presumption was not even in play. *United States* v. *Vasquez-Uribe*, 426 F. App'x 131, 138-39 (3d Cir. 2011).

It is also immaterial that the lower courts have continued to discuss *Barker*'s other factors and that they have not acknowledged the bright-line nature of their analysis. As explained above, the splits here concern only one of *Barker*'s factors (which itself implicates two others: the length and reason for the delay), so it is unremarkable that the lower courts continue to discuss the other factors. And Brown's argument

has always been that as a practical matter, if not a strictly legal one, "the analysis in the lower courts … has devolved into a numbers game." *Ferreira*, 665 F.3d at 710 (Kethledge, J., dissenting).

Thus, it remains the case that when the government is negligent, different lengths of delay result in different outcomes in different circuits. (The government does not mention the Eighth or Ninth Circuits.)

The government says this variation is "only natural" because "the inquiry is a fact-specific, multi-factor one." Opp. 19. Yes, different cases involve different facts. But if the presumption is to be governed by a consistent standard—a rule of law—then the lower courts must know what facts matter for the presumption and why. *Doggett* "provides little guidance" in that respect. *Ferreira*, 665 F.3d at 710 (Kethledge, J., dissenting). While the government recites some factual differences between some cases in the lower courts, Opp. 16-18, it never suggests any legal principle that explains why these differences should result in different outcomes.

Take the government's discussion of *United States* v. *Ingram*, 446 F.3d 1332 (11th Cir. 2006). The government says that the defendant there asserted his right to a speedy trial, unlike Brown. Opp. 17. But the government does not explain why that difference should matter for a presumption of evidentiary prejudice. Maybe a defendant's failure to assert the right normally indicates that he was untroubled by the delay and thus unlikely to have been prejudiced in his defense. But that reasoning collapses where, as here, the defendant fails to assert the right because he was unaware of the charges against him. Even more so

where, as here, the defendant unsuccessfully tried to persuade his trial and appellate counsel to assert the right. R. 9-11 at 760-61.

Nor does the government try to explain why the other facts the Sixth Circuit relied on to reject the presumption matter. Whether a defendant suffered pretrial incarceration or undue anxiety does not make it any more or less likely that he suffered evidentiary prejudice. App. 22a. The defendant in *Doggett* suffered neither pretrial incarceration nor anxiety, which did not weigh against the presumption. 505 U.S. at 654. And the government's lack of attention to Brown's case, which culminated in its careless loss of crucial evidence, made it more likely that Brown suffered unidentifiable evidentiary prejudice—not less, as the Sixth Circuit held.

Without any legal principles for separating relevant factual differences from irrelevant ones, the lower courts are free to draw arbitrary and irrational distinctions, which can vary by circuit and even panel. No two cases are exactly alike. And when lower courts elevate minor differences over major similarities, they undermine the rule of law. Similarly situated defendants will be treated differently, and the system will lack predictability. *Barker* "compels courts" to decide speedy-trial cases "on an *ad hoc* basis," not an arbitrary one. 407 U.S. 514, 530 (1972). Amid this uncertainty, the length of delay predominates.

In sum, the lower courts are some combination of split on the length of delay necessary to presume prejudice and engaged in a largely standardless exercise of discretion. Certiorari is necessary.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND THAT OF OTHER CIRCUITS REGARDING ACTUAL PREJUDICE.

The lower courts are also split on the legal standard for measuring actual prejudice: Some lower courts have followed *Barker* and asked whether the defense was impaired; others have taken a different path and asked whether the outcome at trial would have been different but for the delay. The government's attempts to downplay this split only clarify it.

The government correctly points out that *United States* v. *Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998), involved preindictment delay under the Due Process Clause. The government then says that "an entirely different" prejudice standard applies under the Due Process Clause—one that requires "actual (as opposed to possible) prejudice." Opp. 21.

But the Seventh Circuit has applied the same "actual and substantial prejudice" standard under the Speedy Trial Clause. *United States* v. *Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992). And the court has since treated these supposedly distinct standards as interchangeable. *See United States* v. *Henderson*, 337 F.3d 914, 920 (7th Cir. 2003) (citing *Spears* and *Koller*). For example, the court has held under the Speedy Trial Clause that a witness's unavailability "likely resulted in some prejudice, but it could not be characterized as substantial" because the witness might not have been "reliable or believable." *Koller*, 956 F.2d at 1414-15. The court further reasoned that another witness's "unavailability had little effect at trial." *Id.* at 1414.

By the government's own concession, then, the Seventh Circuit—along with the Fifth and Sixth Circuits—have departed from *Barker* in applying an "entirely different" (and more demanding) prejudice standard to speedy-trial claims. Opp. 20. To wit, the Sixth Circuit imposed on Brown a "burden of establishing substantial prejudice," App. 25a, consistent with its earlier holding that a defendant must show that "the outcome of the trial would have been [ ] different" had missing evidence "been presented to the jury," *Wilson* v. *Mitchell*, 250 F.3d 388, 396 (6th Cir. 2001). *See also Cowart* v. *Hargett*, 16 F.3d 642, 648 (5th Cir. 1994). The split between these courts and those that have followed *Barker* is clear.

The government responds that these outlier circuits have made just "fleeting reference[s] to a different outcome at trial" and have not "squarely held" as much. Opp. 20. The opinions speak for themselves. And if these circuits have not expressly adopted a rule to apply in all cases, the problem is worse, since defendants and the government alike will face varying prejudice standards both within and across circuits.

The government next argues that this split is irrelevant because "the [Sixth Circuit's] prejudice analysis shows that Brown did not suffer any impairment to his defense at all from the delay." Opp. 21 (emphasis omitted). In the government's view, "it is impossible to believe that" the lost tapes "would have exonerated Brown," and their loss actually helped him, by allowing him "'to attack an otherwise air-tight case.'" Opp. 21 (quoting App. 24a-25a).

This argument lays bare the conflict between the decision below and *Barker*. The nature of lost evidence

is that nobody can know with certainty what it would have revealed. That means the defendant's view of missing evidence will inevitably clash with the government's. *Barker* recognizes this uncertainty and places the risk of delay on the government: When evidence "disappear[s] during a delay, the prejudice is obvious." 407 U.S. at 532. A defendant need only show "that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." *Doggett*, 505 U.S. at 655. Thus, so long as a defendant identifies specific missing evidence and explains how it could have helped him, prejudice exists. *See* 5 W. LaFave, J. Israel, N. King & O. Kerr, Criminal Procedure § 18.2(e) (4th ed.).

Brown has consistently maintained that Mirza lied about the conversations between the two. Inherent in that defense is that the tapes of those conversations could have helped prove it—which Brown specifically asserted in an affidavit substantiating his claim of prejudice. R. 9-11 at 760-61. By this Court's precedent, that sufficed to show actual prejudice.

Brown's claim of prejudice is "impossible" only if one assumes that he is guilty. Opp. 21. Only by crediting Mirza—and disbelieving Brown—can one eliminate the possibility that the tapes could have helped Brown. That is what the Sixth Circuit did below, and what the government does now.

But it is the jury's place to resolve conflicts in the evidence, and thus prejudice under *Barker* lies in the delay skewing the jury's resolution of those conflicts in the government's favor. To allow courts to use other evidence against a defendant to reject his assertions about what a missing witness could have testified to,

or what missing evidence could have revealed, is to assume away any possible conflict and exacerbate the prejudicial effect of delay. For there will likely always be some other evidence against the defendant and some uncertainty about what missing evidence would have revealed. Under the decision below, a defendant must somehow be able to prove the content of missing evidence in a way that refutes the other evidence against him. It is difficult to see how.

Ultimately, the Sixth Circuit held that Brown was not prejudiced because it assumed that he was guilty. That illustrates just how far some lower courts have strayed from *Barker*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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