No. 17-394

In the Supreme Court of the United States

STATE OF TEXAS, PETITIONER

v.

JERRY HARTFIELD

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH COURT OF APPEALS DISTRICT OF TEXAS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. This Court's review is warranted because the court of appeals below directly contravened this Court's standard waiver doctrine in the context of Sixth Amendment right to a speedy trial. In *Barker v. Wingo*, the Court rejected a *presumption* of waiver from the mere fact of a defendant's failure to demand a trial—but simultaneously held that, when "the prosecution [can] *show* that the claimed waiver was knowingly and voluntarily made," "then [the] waiver may be given effect under standard waiver doctrine, the demand rule aside." *Barker v. Wingo*, 407 U.S. 514, 529 (1972) (emphasis added).

The Texas court of appeals thus needed to perform a freestanding, threshold waiver analysis. But it did not. Instead, it applied only the balancing test for finding a *violation* of the speedy-trial right. Pet. App. 2a-29a. Hartfield does not dispute this. *See* Br. in Opp. 13-14 (noting that the court of appeals cited *Barker*'s rejection of the demand rule, but conceding that the court did not "address the standard waiver doctrine").

This failure to apply standard waiver doctrine conflicts with *Barker* and numerous other precedents of this Court holding that constitutional rights can be waived. *See* Pet. 19. That conflict with this Court's precedents is important and warrants review. *See* Sup. Ct. R. 10. It allows criminal defendants to knowingly and voluntarily choose a benefit inconsistent with a retrial, yet later complain about that very lack of a retrial and thereby escape a conviction altogether.

Hartfield opposes certiorari by arguing, not that the court of appeals was correct in failing to do a threshold waiver analysis, but that it does not matter because waiver allegedly would not apply on the facts of this case. Br. in Opp. 18-21. Neither of Hartfield's offered reasons for that position withstands scrutiny or is a barrier to this Court's review.

Hartfield first raises a factual challenge. The trial court found that Hartfield made "a strategic [choice] guided by counsel's advice" to accept "the life sentence offered in commutation by the Governor." Pet. App. 80a; *accord* Pet. App. 67a & n.24 (finding that "Hartfield sought" the result of a "life sentence" and "did not want" a new capital-murder trial). Hartfield now argues that "[n]othing in the record" supports this finding. Br. in Opp. 20. As an initial matter, that argument is forfeited. Hartfield did not raise it in the court of appeals. Resp. C.A. Br. 31-48. Hartfield is wrong that the court of appeals applied "state procedural and evidentiary law" to conclude that it could "not defer to the trial court's finding." Br. in Opp. 21. Hartfield fails to provide any citation for that assertion. The court of appeals did not address any challenge to this finding—because Hartfield did not make one. *See* Pet. App. 2a-29a. Hartfield cannot now press this forfeited argument. *E.g.*, *United States v. Jones*, 565 U.S. 400, 413 (2012) ("consider[ing] the argument forfeited" where litigant "did not raise it below"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived.").

In any event, Hartfield's forfeited challenge to the trial court's factual finding is without merit. The trial court did not *presume* waiver from Hartfield's failure

to demand a retrial. *Cf.* Br. in Opp. 20 (noting *Barker*'s rejection of this demand-waiver presumption). Rather, the State accepted its burden to show a knowing and voluntary waiver—as *Barker* expressly contemplates. 407 U.S. at 529. Specifically, the State put on testimony from Hartfield's attorney at the time, Robert Scardino. Scardino testified that "he knew then the Governor's post-mandate commutation was ineffective." Pet. App. 67a; 2.Supp.RR.37. Scardino thus initially expected a retrial. 2.Supp.RR.36. But Scardino testified that he learned "that, in fact, [he] would not have to try this case again." 2.Supp.RR.36.

Hartfield raised no objection to that testimony, 2.Supp.RR.36-37, which is therefore part of the record. And Hartfield does not dispute that Scardino was his counsel throughout the relevant time. Pet. App. 67a. Accordingly, it is simply untrue that "[t]he record is silent" on whether Hartfield made a choice in 1983 to forego a retrial in light of the Governor's commutation. Br. in Opp. 20. The record readily supports the trial court's finding.[1]

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[1] Moreover, if Hartfield had raised on appeal a challenge to the trial court's finding of Hartfield's strategic choice, the State would have been all the more incentivized to dispute Hartfield's privilege objection to Scardino's affidavit further describing his communication with Hartfield. *See Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003) (stating standard for review of evidentiary rulings on speedy-trial claim); *cf.* Br. in Opp. 15 (noting this privilege dispute over 5.Supp.RR.7). The State is not "asking this Court to review" this privilege question. *Cf.* Br. in Opp. 21. But a desire to avoid consideration of the Scardino affidavit may explain why Hartfield did not challenge the trial court's finding.

Hartfield's other reason for maintaining that waiver doctrine would not change the outcome here is legal in nature. He argues that "[i]t appears to be the case" that a waiver of the speedy-trial right requires "affirmative steps to cause [a] delay." Br. in Opp. 18. But that was precisely the sort of standard rejected in *New York v. Hill*, 528 U.S. 110 (2000), where the defendant's counsel did not initiate any trial delay but chose to accept a later trial date proposed by the prosecution. *Id.* at 112-13. This Court rejected the argument that the defense counsel's decision "was not an 'affirmative request' and therefore did not constitute a waiver." *Id.* at 118. Instead, the Court instructed that there is no distinction "between waiver proposed and waiver agreed to." *Id.* To hold otherwise would "enable defendants to escape justice by willingly accepting treatment inconsistent with the [governing] time limits, and then recanting later on." *Id.*

That waiver test—willing acceptance of treatment inconsistent with a known right—is met here. Hartfield's attorney knew at the time that Hartfield had a right to a retrial despite the Governor's commutation. Pet. App. 67a. But, assisted by that counsel, Hartfield made a strategic decision to accept the life sentence offered in commutation rather than stand retrial for a capital murder to which he had already confessed. Pet. App. 67a, 80a. That willing choice is inconsistent with and thus waived any right to a speedy retrial.

This Court's guidance is needed in this area. Hartfield himself hedges in presenting his position, arguing only that "[i]t appears to be the case" that a waiver requires something more than the State proved here. Br. in Opp. 18. And Hartfield too has been unable to

identify any decision of this Court in the past 45 years applying standard waiver doctrine in a Speedy Trial Clause case. *See* Pet. 20. *Vermont v. Brillion*, 556 U.S. 81 (2009), did not do so. *Contra* Br. in Opp. 18. *Brillion* simply held that appointed defense counsel's choices are attributable to the defendant "in applying *Barker*['s]" balancing test. 556 U.S. at 90.

Barker's direction that standard waiver doctrine applies to the Speedy Trial Clause deserves confirmation and exemplification. And the Texas court of appeals is not alone in its confusion about whether waiver is something more than a "factor" in finding a Speedy Trial Clause violation. *Cf.* Pet. App. 23a. The Third Circuit, contrary to *Barker*, has equated "waiver" with "the defendant's assertion of or failure to assert his right to a speedy trial," and therefore stated incorrectly that "the issue of waiver . . . would be one of the factors" under *Barker*. *United States v. Velazquez*, 749 F.3d 161, 182 (3d Cir. 2014). Failure to demand a speedy trial is indeed one of those factors for assessing a *violation*. But *Barker* expressly declined to upset the freestanding standard doctrine of waiver, which the prosecution may *prove* rather than merely *presume*—as the State did here. 407 U.S. at 529.

2. Regardless of the waiver issue, the Texas court of appeals' application of the second and third *Barker* factors for assessing a *violation* of the speedy-trial right warrants review.

a. The second *Barker* factor examines the reason for a trial delay. *Id.* at 530. Hartfield's opposition to review on this factor turns on a faulty premise: that application of this Court's test for a federal Speedy Trial Clause violation is "a question of state procedur-

al, not federal, law." Br. in Opp. 22. Hartfield cites no authority for this novel view.

As Hartfield accepts, this Court's Sixth Amendment jurisprudence has drawn a distinction between delay from reasonable versus unreasonable litigation. Br. in Opp. 22; *see United States v. Loud Hawk*, 474 U.S. 302 (1986). Although the merits of the prosecution's legal position on a matter of state law is of course a question of state law, how to *weigh* that litigation period in assessing a Sixth Amendment Speedy Trial Clause violation is necessarily a question of federal constitutional law. *See Barker*, 407 U.S. at 530; *cf. Virginia v. Moore*, 553 U.S. 164, 172 (2008) (holding that state law on a seizure does not control the question of the seizure's reasonableness under the Fourth Amendment).

Hartfield is conflating two separate questions, one arising under state law and one arising under federal law. The State is not asking this Court to redo the Texas Court of Criminal Appeals' 2013 decision of whether Hartfield's conviction stood intact as commuted or was instead vacated notwithstanding the commutation. *Cf.* Br. in Opp. 22 (noting that this "was a state law question"). But whether delay from the State pressing its position on that issue was reasonable and occurred in good faith, without dilatory purpose, was not a question before the Court of Criminal Appeals in 2013. That was not a state-law question relevant to the status of Hartfield's original conviction. Rather, that is a federal-law question germane to Hartfield's current Speedy Trial Clause challenge. *See Loud Hawk*, 474 U.S. at 315-17 (reviewing such good-faith considerations under the Speedy Trial Clause, without suggest-

ing that the Court was somehow reopening the merits of the prior government litigation at issue).

Hartfield's other argument is that *Loud Hawk* does not apply because "the status of Hartfield's conviction was clear." Br. in Opp. 22. That may be easy for Hartfield to say now. But it was not clear to the trial court in 1983, which told the Court of Criminal Appeals that its mandate had been satisfied by the Governor's commutation of Hartfield's sentence. 3.CR.483. Nor was any clairvoyance about the Court of Criminal Appeals' ultimate 2013 determination available to the federal district court in 2011, which found the status of Hartfield's ruling "not at all clear." *Hartfield v. Director, TDCJ-CID*, No. 6:09-cv-98, 2011 WL 1630201, at *5 (E.D. Tex. Apr. 29, 2011) (mem. op.). Hartfield concedes that his own counsel called this issue "complex." Br. in Opp. 10 n.3. And although Hartfield maintains that the Court of Criminal Appeals "was aware" in 2006 that the conviction stood vacated, Br. in Opp. 2, it is undisputed that no contemporaneous document so states. That view was not settled until the Court of Criminal Appeals' 2013 ruling after briefing and oral argument—which would have been unnecessary if the answer had been made clear by that Court seven years earlier.

Hartfield intimates that, even if the issue were complex and unclear, the State's position was weak. *See* Br. in Opp. 6. But courts are divided on whether that assessment even matters, so long as the government's litigation is not in bad faith or dilatory. *Compare, e.g.*, *United States v. Ewell*, 383 U.S. 116, 118-24 (1966) (in finding the Speedy Trial Clause satisfied, conducting no examination of the strength of the gov-

ernment's position on the merits issue that caused a retrial after a "substantial interval" following an initial conviction); *United States v. Trueber*, 238 F.3d 79, 89 (1st Cir. 2001) (refusing to count against the government the delay from its interlocutory appeal not undertaken in bad faith or to cause delay, even where the trial court thought the government's position was weak); *United States v. Guerrero*, 756 F.2d 1342, 1349 (9th Cir. 1984) (per curiam) ("In the absence of bad faith, neglect, or purpose to delay, an appeal by the government does not of itself weigh against the government."), *with United States v. Herman*, 576 F.2d 1139, 1147 (5th Cir. 1978) (examining the strength of the government's unsuccessful position in an interlocutory appeal). This conflict alone deserves clarification.

Yet even *Herman*'s testing of the strength of the government's unsuccessful position was cleared when the court that adjudicated that position "bypassed the summary procedures available" and "required oral argument." 576 F.2d at 1147. The State's position here required even more deliberation: the 2013 briefing and oral argument in the Court of Criminal Appeals occurred only after the Fifth Circuit certified the question on appeal from a district court's opinion expressly calling the issue unclear. *See* Pet. 7-9; Docket for Case No. AP-76,926, *Hartfield v. Thaler* (Tex. Crim. App.).

Thus, Hartfield has no authority supporting his claim that delay due to the State's position on the effectiveness of the Governor's commutation can be weighed "heavily against the State." Pet. App. 22a. He cites no authority weighing heavily against the government the delay from its good-faith, non-dilatory maintenance and litigation of a legal position like this

one—that disinterested courts have accepted, called unclear, or believed called for briefing and oral argument. The Texas court of appeals contravened this Court's precedents in weighing this *Barker* factor heavily against the government, and that conflict warrants review.

b. The court of appeals' disposition of the third *Barker* factor also warrants review, and Hartfield does not dispute the relevant conflict on this point between the disposition below and decisions of this Court.

The trial court held that "Hartfield's failure to assert his right to a speedy trial weighs heavily against him." Pet. App. 69a (capitalization altered). But the court of appeals reversed that heavy weight, reasoning that "Hartfield chose to no longer acquiesce to his incarceration in 2006, when he began pro se to assert his right to a speedy trial," and made the State aware of his complaints in "at least late 2007." Pet. App. 26a-28a. Those complaints cannot mitigate this factor's heavy weight against Hartfield under the *Barker* speedy-trial analysis.

As the trial court chronicled, Hartfield's filings citing the speedy-trial right fall into two categories: (1) 2006-2007 filings that were not reasonably calculated to call the trial court's or prosecutor's attention to a demand for a new trial; and (2) filings that did not demand a new trial at all and instead sought only dismissal of the charges. *See* Pet. App. 57a-64a. The court of appeals relied on *both* categories—including pure dismissal claims, not making any trial demand—in reversing the heavy weight against Hartfield from his decades-long failure to raise a complaint of any sort.

Pet. App. 26a (relying on all of Hartfield's filings "from 2006 to 2013 in state and federal court").

Hartfield does not dispute this, or dispute that treating dismissal claims as showing that a defendant desired a speedy trial contradicts precedents of this Court and federal courts of appeals. *See* Pet. 28-30. That conflict warrants review.

Hartfield appears to argue that this conflict is unimportant because some of his filings—those in the first category—supposedly do demand a speedy trial and could thus independently mitigate the third *Barker* factor, even if the court of appeals had not considered the pure-dismissal filings in the second category. Br. in Opp. 23. That logic is mistaken: the court of appeals relied on both categories, and its reasoning cannot be rewritten.

In any event, Hartfield's 2006-2007 filings were not directed to any official with the power to retry him. The relevant question is not the form of "document" at issue, *cf.* Br. in Opp. 23, but whether a supposed assertion of the right is "reasonably calculated to call the speedy trial claim to the trial court's attention." Pet. App. 62a; *cf. Barker*, 407 U.S. at 529 ("a defendant has some responsibility to assert a speedy trial claim"); *United States v. Battis*, 589 F.3d 673, 681 (3d Cir. 2009) (noting that even a pro se litigant must make "a reasonable assertion of the right"). Whereas Hartfield cites examples of a letter or motion sent to the prosecutor or trial court to demand a speedy trial, Br. in Opp. 23, that is not what occurred here. The 2006-2007 filings that contain a prayer for a new trial were not directed to the trial court or reasonably calculated to

alert an official with the power "to schedule or conduct the trial." Pet. App. 63a.

Regardless, even if a relevant official had received those filings, they would have come far too late to be adequate demands for a new trial. Under *Barker*'s third factor, trial demands made when any trial would be far from expeditious is not evidence that the defendant actually wanted a speedy trial. *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006) ("The question . . . is whether the defendant's behavior during the course of litigation evinces a desire to go to trial with dispatch."); *see, e.g.*, *United States v. Black*, 830 F.3d 1099, 1120-21 (10th Cir. 2016) (finding *Barker*'s third factor to weigh heavily against the defendant where he "didn't promptly assert his speedy-trial right"); *United States v. Colombo*, 852 F.2d 19, 26 (1st Cir. 1988) (refusing to count an assertion in defendants' favor where they waited 18 months and "did not want a speedy trial until their right to a speedy trial became a possible means by which to obtain dismissal of the charges against them"). That readily describes Hartfield's claimed assertions of his speedy-trial right here, which came more than two decades after the 1983 mandate and commutation. That could not possibly qualify as a demand for a prompt retrial after those events, so as to allow the court of appeals to reduce the second *Barker* factor's heavy weight against Hartfield.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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