

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   BRANDON THOMAS BETTERMAN,                   :

4                               Petitioner                   :   No. 14-1457

5                   v.                                       :

6   MONTANA,   :

7                               Respondent.                   :

8   - - - - - x

9   Washington, D.C.

10    Monday, March 28, 2016

11

12                               The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 11:07 a.m.

15   APPEARANCES:

16   FRED A. ROWLEY, JR., ESQ., Los Angeles, Cal.; on behalf  
17       of Petitioner.

18   DALE SCHOWENGERDT, ESQ., Solicitor General, Helena,  
19       Mont.; on behalf of Respondent.

20   GINGER D. ANDERS, ESQ., Assistant to the Solicitor  
21       General, Department of Justice, Washington, D.C.; for  
22       United States, as amicus curiae, supporting  
23       Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 14-1457, Betterman v. Montana.

5 Mr. Rowley.

6 ORAL ARGUMENT OF FRED A. ROWLEY, JR.

7 ON BEHALF OF THE PETITIONER

8 MR. ROWLEY: Mr. Chief Justice, and may it  
9 please the Court:

10 The Speedy Trial Clause applies to a  
11 criminal prosecution through its culmination in  
12 sentencing. It is not cut off when the defendant pleads  
13 or is found guilty. The Court has said that the clause  
14 guarantees an early and proper disposition of a criminal  
15 charge, and that guarantee applies to the guilt stage of  
16 a prosecution when most defendants plead guilty and to  
17 the sentencing stage, which may be the only place in a  
18 criminal prosecution today when a defendant actually  
19 mounts a defense.

20 JUSTICE GINSBURG: Does the Federal Speedy  
21 Trial Act -- not the constitutional provision, but the  
22 legislation -- does that cover sentencing, or is that  
23 limited to trial?

24 MR. ROWLEY: Your Honor, my understanding is  
25 that it's limited to trial. The Court has recognized

1 specific interests that are protected by the Speedy  
2 Trial Clause, and those interests apply not just to  
3 presumptively innocent defendants, as the State and the  
4 United States suggests, but some of them apply  
5 specifically to guilty defendants.

6 In Barker, for instance, the Court notes  
7 that one of the interests that are protected by this --  
8 that is protected by this clause is the interest in  
9 rehabilitation, and that a prolonged period of detention  
10 in jail can affect a defendant's rehabilitation. Well,  
11 that's specific to a guilty defendant. And in Smith v.  
12 Hooey, the Court noted that even though the defendant  
13 had been incarcerated in Federal prison, that that  
14 defendant could still be prejudiced by a prolonged delay  
15 in the State prosecution that followed because it could  
16 affect his ability to seek a concurrent sentence. That  
17 interest also is specific to a guilty defendant.

18 So the sharp line between the guilt stage of  
19 a prosecution and the criminal -- and the sentencing  
20 stage of a prosecution isn't supported by this Court's  
21 speedy trial precedence.

22 JUSTICE GINSBURG: What do you do with  
23 the -- all of our speedy trial decisions say there's  
24 only one remedy, and that is case over. Dismissal is  
25 the only appropriate remedy. But you're -- you're not

1     arguing that, I understand, with respect to sentencing.

2                 MR. ROWLEY:   Yes, Your Honor.

3                 JUSTICE GINSBURG:   You are arguing --

4                 MR. ROWLEY:   We were not arguing that.

5                 JUSTICE GINSBURG:   So it's different.   The  
6     speedy trial requirement says if you -- if you don't  
7     comply with the constitutional provision, dismissal.  
8     But you're saying sentencing is not the same as trial,  
9     to that extent, that the remedy is different?

10                MR. ROWLEY:   Your Honor, at the guilt stage  
11     of the prosecution, the outcomes are -- are binary.   So  
12     the defendant is either adjudicated guilty or the  
13     charges are dismissed or the defendant is acquitted.   So  
14     there's two possible outcomes at the guilt stage:   Guilt  
15     or innocence.

16                At sentencing, the situation is quite  
17     different.   There's greater opportunity for tailoring,  
18     which is what the Court requires per Morrison; and there  
19     may be a greater need for tailoring because the  
20     defendant has been adjudicated guilty.   So in the  
21     sentencing context where courts have wide discretion,  
22     where there's a range of possible sentences, where  
23     there's a range of possible outcomes, tailoring --  
24     there's a greater opportunity for tailoring and --

25                JUSTICE KAGAN:   So -- so what would the

1     remedy be in a case like this?

2                   MR. ROWLEY: Your Honor, we submit that a  
3     proper remedy in a case like this would be to reduce  
4     Mr. Betterman's sentence by the period of delay, and the  
5     Montana Supreme Court concluded that the period of  
6     unjustified delay here was 14 months.

7                   JUSTICE KENNEDY: Well, he was serving on  
8     another sentence. He was serving a sentence for another  
9     crime.

10                  MR. ROWLEY: Yes, Your Honor. He was -- so  
11     he got time served credit on the prior sentence that --  
12     that he was serving. But that period of delay, the 14  
13     months was not credited to his sentence on the  
14     bail-jumping sentence, which is the -- the sentence  
15     that -- that's at issue here.

16                  And we submit that a proportionate remedy,  
17     an appropriate remedy, would be to reduce that sentence  
18     by the period during which he was denied access to  
19     rehabilitation programs and suffered the anxiety that is  
20     detailed in his affidavit, and that that would be a -- a  
21     way to go. The lower courts have applied that sort of  
22     remedy to sentencing delays. And another possible  
23     outcome in another case would be simply to vacate the  
24     remaining portion of the defendant's sentence.

25                  But here we submit that a tailored remedy

1 would be just reducing his sentence by --

2 JUSTICE ALITO: What do you make of the fact  
3 that the Sixth Amendment says that "the accused shall  
4 enjoy the right to a speedy and public trial by an  
5 impartial jury"?

6 MR. ROWLEY: Your Honor, the impartial jury  
7 clause doesn't cut off or limit the word "trial." We  
8 know that because the Court has recognized that the  
9 public trial right might apply at a suppression hearing,  
10 and there's no jury convened at a suppression hearing.  
11 The Court concluded that in Waller. So the impartial  
12 jury clause applies to the portions of a criminal  
13 prosecution, the stages of a prosecution where a jury is  
14 actually impaneled. And if you go back to the purpose  
15 of an -- of the impartial jury clause, which was to  
16 prevent jurors from offering evidence against the  
17 defendant, it makes good sense that it would apply to  
18 the stages of a criminal prosecution where a jury is  
19 convened.

20 JUSTICE SOTOMAYOR: Mr. Rowley, if we were  
21 to disagree with you and say that there's no Sixth  
22 Amendment right and there was only a due process right,  
23 have you waived any argument that you meet the due  
24 process standard?

25 MR. ROWLEY: We haven't included that. We

1 didn't include that in the question presented, Your  
2 Honor. And the Montana Supreme Court rejected that  
3 challenge. It applied a due process test and concluded  
4 that under a due process analysis, Mr. Betterman  
5 wouldn't be entitled to relief.

6 And that gets to an important point here  
7 because --

8 JUSTICE SOTOMAYOR: Well, I -- I understand  
9 that. So you're admitting you're giving up that its  
10 analysis under the Due Process Clause might have been  
11 wrong?

12 MR. ROWLEY: Your Honor, we are not  
13 advancing that claim here. And so there is a  
14 significant difference, we submit, between the due  
15 process analysis and the Barker test that this Court has  
16 applied under the Sixth Amendment speedy trial right,  
17 and -- and that is that under a Barker analysis,  
18 prejudice may be presumed. And -- and Barker also  
19 addresses specific forms of prejudice that may flow from  
20 a delay in a criminal prosecution.

21 The Lovasco test that is applied under a due  
22 process analysis does not address some of those  
23 specific --

24 JUSTICE SOTOMAYOR: I agree, but why do you  
25 think Lovasco applies at all, meaning that's to



1 pre-indictment delay where we were creating an exception  
2 and saying generally you have -- the State has the  
3 period of statute of limitations to bring an action.

4 MR ROWLEY: Your Honor, that line of --

5 JUSTICE SOTOMAYOR: If you want to cut them  
6 off from having that right, you need to show actual  
7 prejudice.

8 MR. ROWLEY: Your Honor, that's the test  
9 that the Montana Supreme Court applied below. It is the  
10 test that other courts that have rejected the Sixth  
11 Amendment's speedy trial rights application at  
12 sentencing, they have pivoted to the due process test in  
13 *Lovasco*, and that test creates a significant burden.

14 JUSTICE KAGAN: For example, Mr. Rowley,  
15 just to continue on this line of questioning, there's  
16 another case that we have which dealt with civil  
17 forfeitures, which is the \$8,850 in U.S. currency case  
18 where it said, Well, we're going to do a due process  
19 analysis, but we're going to take the Barker factors as  
20 our test for that due process analysis.

21 So I think one of the questions that Justice  
22 Sotomayor is asking is: Why wouldn't that be equally  
23 appropriate here? In other words, even if -- and I'm  
24 not saying that this is right, but even if there's --  
25 this is -- falls within the due process box rather than

1 the Sixth Amendment box, that there's still a further  
2 question as to whether the Lovasco approach is right or  
3 whether this U.S. currency approach is right.

4 MR. ROWLEY: Your Honor, that's what the  
5 Montana Supreme Court attempted to do. So it eventually  
6 modified the Lovasco test and tried to draw on Barker  
7 principles in applying it. But if you compare the  
8 results in this case to, say, the result in the Burkett  
9 case where the court analyzed the specific forms of  
10 prejudice that are at issue in a -- a pretrial or  
11 presentencing delay situation, and if you don't -- and  
12 if you presume prejudice or require the State  
13 prosecution to rebut articulated prejudice  
14 particularized by -- it's been articulated by the  
15 defendant, the court there found a violation, and the  
16 Court here, despite modifying Lovasco, did not find a  
17 violation. And so the test is still inadequately  
18 protective.

19 JUSTICE KAGAN: I guess I'm -- I guess I'm  
20 not -- just not sure what you -- you mean by that,  
21 because in this other case, the civil forfeiture case,  
22 we just said we're going to apply the four factors of  
23 Barker. And if that were the result of the due process  
24 approach, I mean, it just wouldn't make any difference  
25 which box it was in.

1                   MR. ROWLEY: That would -- that would  
2     certainly be true, Your Honor, but that's not what the  
3     Montana Supreme Court here did. So it didn't apply all  
4     the factors in Barker. It didn't apply Barker in a  
5     straightforward fashion because it approached prejudice  
6     the same way that Lovasco did. It required the  
7     defendant to make an affirmative showing of prejudice.  
8     It required that that showing be substantial. That's  
9     different from the Barker test. And we submit also that  
10    given the specificity of this right, that it's  
11    enumerated in the Sixth Amendment, that it would not be  
12    appropriate for the Court to shunt that interest, that  
13    set of interests that are enumerated in the Sixth  
14    Amendment, into the due process test; that the better  
15    approach is to do what the lower courts have done, which  
16    is to take the Barker framework, which already exists,  
17    and apply it in straightforward fashion to a delay at  
18    sentencing.

19                  JUSTICE SOTOMAYOR: But you're not asking us  
20    to do it in a straightforward fashion. That's what  
21    Justice Ginsburg asked you, because you're giving up the  
22    Barker remedy.

23                  MR. ROWLEY: Your Honor, the lower courts,  
24    in applying Barker to the sentencing context, have fixed  
25    more tailored remedies in recognition of the fact that

1     there may be a difference between a delay at the guilt  
2     stage and a delay at sentencing, because now the  
3     defendant's been convicted.

4                     And so the lower courts, in applying Barker,  
5     have done this. They have tailored remedies. They have  
6     applied remedies that leave the conviction standing and  
7     try to affix some proportionate remedy for the delay at  
8     the --

9                     JUSTICE SOTOMAYOR: So why don't you think  
10    that they've done the same thing under the Due Process  
11    Clause, recognizing that it is unfair to undo a  
12    conviction merely for sentencing delay because you're no  
13    longer presumed innocent, you're now guilty?

14                    MR. ROWLEY: The key -- yes, Your Honor.

15                    JUSTICE SOTOMAYOR: Why isn't the due  
16    process test that's being applied that modification?

17                    MR. ROWLEY: Your Honor, the -- the reason  
18    why the due process test, as it's been applied by the  
19    lower courts, doesn't do the job is because they  
20    continue to require an affirmative showing of prejudice.  
21    So they don't presume prejudice which may be  
22    significant. Washington, the case out of the Fifth  
23    Circuit that we cite, illustrates this point because the  
24    court there didn't presume prejudice. And as the Court  
25    explained in Doggett, it may be important to presume

1 prejudice because it is sometimes hard to show the  
2 effect of a delay on the defendant's defense or other  
3 forms of prejudice.

4 And so even the courts that have applied  
5 *Lovasco*, and have modified it, still -- still don't  
6 presume prejudice, still don't require the prosecution  
7 to make a showing in response to articulated prejudice.  
8 They just apply *Lovasco* and require an affirmative  
9 showing of substantial prejudice.

10 So even this modified version that you see  
11 in the Montana Supreme Court's opinion below, we submit  
12 is inadequate and also not appropriate because there is  
13 this enumerated right in the Sixth Amendment and -- and  
14 shouldn't be shunted into the --

15 JUSTICE ALITO: Well, when you say prejudice  
16 should be presumed, do you mean it should be presumed  
17 conclusively? Could it be rebutted?

18 MR. ROWLEY: Yes, Your Honor, it could be  
19 rebutted. And indeed, in a case like this where the  
20 defendant has articulated specific forms of prejudice, I  
21 was denied access to rehabilitation, I suffered anxiety,  
22 the State ought to be able to come in and rebut that  
23 presumption.

24 Now here, despite those specific forms of  
25 prejudice being set out in the motion to dismiss that

1 Mr. Betterman filed, the State did not offer that  
2 evidence. The first evidence that we saw was in the  
3 briefing on the merits in this Court. So the State did  
4 have the opportunity to make a showing, and it didn't do  
5 that.

6 JUSTICE ALITO: When you say that the -- the  
7 remedy should be tailored, tailored to what? What is --  
8 what is the Court supposed to do, in -- in your view?  
9 Select a punishment that is appropriate to deter the  
10 State from doing this again, or select a remedy that in  
11 some way undoes the -- the damage or the prejudice  
12 that's been done to the defendant?

13 MR. ROWLEY: Your Honor, Morrison speaks to  
14 this, and it requires that the Court fix a remedy that  
15 is tailored to the injury suffered from the  
16 constitutional violation.

17 JUSTICE ALITO: Okay. Well, then, in that  
18 situation, I don't know why reducing the sentence by the  
19 length of the unconstitutional delay -- the supposedly  
20 unconstitutional delay undoes the damage that's been  
21 done by the delay.

22 MR. ROWLEY: Your Honor, it's a  
23 proportionate remedy because the defendant was denied.  
24 Mr. Betterman was denied access to these rehabilitation  
25 programs that aren't only good in themselves, as Barker

1 recognizes, but that also bear on his prospects for  
2 parole, on his case for parole or early release. And so  
3 the fact that he was denied access to them for a  
4 significant period of time bears on his ability to try  
5 to win early release. And this Court has recognized  
6 that any amount of time that the defendant has to spend  
7 in prison as a result of a Sixth Amendment violation is  
8 cognizable.

9 And so we submit that it is proportionately  
10 tailored, even if the fit isn't perfect.

11 JUSTICE ALITO: When Justice Ginsburg asked  
12 you about the Federal Speedy Trial Act, and you said  
13 that does not cover sentencing. But there are  
14 provisions of Montana law that do cover sentencing. Why  
15 didn't you seek relief under those?

16 MR. ROWLEY: Your Honor, there are Montana  
17 statutes that require that sentencing take place within  
18 a reasonable amount of time and foreclose on reasonable  
19 delay. But we have been unable to find a case where the  
20 defendant was actually able to win some kind of relief  
21 on the basis of those statutes. As the Montana Supreme  
22 Court decision below reflects, the court's view there  
23 was that those statutes incorporate due process  
24 principles, and so it would be due process principles  
25 that provided the relief. And we haven't found any case

1     that gives any freestanding, independent relief on the  
2     basis of those statutes.

3                     If you'd look at the Rule 32 cases --

4                     JUSTICE ALITO: Did you bring a claim under  
5     those statutes?

6                     MR. ROWLEY: We did not, Your Honor. We did  
7     not.

8                     JUSTICE GINSBURG: Would -- would it be  
9     appropriate for the government to respond, yes, there  
10    are these disadvantages, but he had certain advantages,  
11    too, from being in jail. He was closer to his family.  
12    He was closer to his counsel to confer more easily with  
13    counsel. Isn't it then we have to consider the pluses  
14    as well as the disadvantages?

15                    MR. ROWLEY: Certainly, Your Honor. If  
16    the -- if the prosecution offered that kind of evidence,  
17    it would weigh in the balance, and Barker itself  
18    discusses that. It notes that the Speedy Trial Clause  
19    is unusual in that delay in some instances may benefit  
20    the defendant. But -- but here, where Mr. Betterman has  
21    submitted an affidavit, and also in the initial motion  
22    detailed the prejudice that he suffered from this delay,  
23    inability to access these programs that he was ordered  
24    to complete as part of the suspended portion of his  
25    sentence that under Montana regulations would bear



1 directly on his case for parole, the prejudice is  
2 palpable. It resonates strongly with Barker itself and  
3 with Smith v. Hooey where the Court noted that even if  
4 you're incarcerated on a prior charge, you may yet  
5 suffer prejudice as a result of delay in a subsequent  
6 prosecution.

7               So back to Justice Sotomayor's question  
8 about Lovasco, and about the difference between these  
9 two tests. We submit that if you compare the outcome  
10 here and compare the outcome in Burkett, Burkett  
11 involved a defendant who advanced a very similar theory  
12 of prejudice. The theory was he was denied access to  
13 rehabilitation programs and that he suffered anxiety.  
14 The defendant testified to that effect, and the Third  
15 Circuit concluded that in the absence of contrary  
16 evidence, that that was enough to state or to show a  
17 Sixth Amendment violation.

18               Whereas in -- in the decision below, the  
19 Montana Supreme Court placed the burden squarely on  
20 Mr. Betterman to make an affirmative showing of  
21 substantial prejudice. So even though he submitted this  
22 affidavit that detailed the prejudice, the Montana  
23 Supreme Court deemed it speculative.

24               JUSTICE SOTOMAYOR: My problem is with this  
25 use of -- of language. Prejudice is prejudice. And

1     they -- they seem to be arguing that substantial  
2     prejudice means something like actual damages, that you  
3     can point to something that I've actually been damaged  
4     by either having served longer than the sentence that's  
5     ultimately imposed, or something else like that.

6                     But why are you even taking on the  
7     substantial damage definition? Why aren't you just  
8     arguing that prejudice is prejudice?

9                     MR. ROWLEY: Well, it is, Your Honor, but  
10    Lovasco actually uses the word "actually." So the  
11    Lovasco test that was applied by the Montana Supreme  
12    Court --

13                    JUSTICE SOTOMAYOR: You're still -- you're  
14    still in the Lovasco test?

15                    MR. ROWLEY: Yes. I mean, if -- if the  
16    court -- that's the court -- that's the due process test  
17    that the court has applied. Now, if the court were to  
18    say that the Barker test, including the way that Barker  
19    approaches prejudice, could be actionable under the Due  
20    Process Clause, that would be a different story, but  
21    simply not the way that lower courts have examined it.  
22    That would effectively give a defendant Sixth Amendment  
23    relief under the Due Process Clause.

24                    But that is not what the Montana Supreme  
25    Court did, Your Honor, and that is not the way that it

1 applied.

2 JUSTICE SOTOMAYOR: And that's not the way  
3 you're arguing the case.

4 MR. ROWLEY: Well, Your Honor, we didn't  
5 preserve a -- a due process challenge. Our challenge is  
6 solely under the Sixth Amendment. It's set forward  
7 in -- in the -- in the question presented and, indeed,  
8 in the lower courts we pressed a Sixth Amendment right.

9 But to Your Honor's question, if the court  
10 were to take that Sixth Amendment analysis and drop it  
11 in the due process context, the defendant would  
12 certainly get the same relief. But we submit that just  
13 given that the right is enumerated in the Sixth  
14 Amendment, that it ought to -- that the relief ought to  
15 be granted under that clause and not shunted into due  
16 process.

17 If there are no further questions, I'd like  
18 to reserve the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 General Schowengerdt.

21 ORAL ARGUMENT OF DALE SCHOWENGERDT

22 ON BEHALF OF THE RESPONDENT

23 MR. SCHOWENGERDT: Mr. Chief Justice, and  
24 may it please the Court:

25 The Speedy Trial Clause does not include

1 sentencing delay because its purpose is to protect a  
2 presumptively innocent defendant from the harms  
3 associated with a criminal charge. That purpose is  
4 consistent with the text in history of the clause. It's  
5 consistent with the remedy that this Court has said must  
6 apply to speedy trial violations. And, importantly, it  
7 leaves defendants with other means of challenging  
8 unjustified sentencing delay without requiring the court  
9 having to modify both the test and the remedy for a  
10 speedy trial violation.

11               The Speedy Trial Clause is unique among  
12 Sixth Amendment rights because it goes to the heart of  
13 the government's authority to try a presumptively  
14 innocent defendant at all. If the government  
15 unjustifiably delays, it may forfeit the right, which is  
16 why dismissal is the remedy.

17               Sentencing delay doesn't impact the validity  
18 of trial. It doesn't impact the authority of the  
19 government to bring a defendant to trial. And after  
20 conviction, none of the interests that are supported by  
21 the Speedy Trial Clause apply. For example, there can  
22 be no anxiety over public accusation because the  
23 accusation has been confirmed. At the moment of  
24 conviction, a defendant's liberty is justly deprived  
25 because -- and that's why bail is presumptively

1 unavailable at that point.

2 JUSTICE GINSBURG: When, in your view --  
3 let's say we agree with you that speedy trial isn't the  
4 right rubric. When would a delay in sentencing amount  
5 to a due process violation?

6 MR. SCHOWENGERDT: I think if a -- if a  
7 defendant could show prejudice, for example, if he was  
8 not able to present mitigating evidence at sentencing  
9 because of passage of time, a lost witness, that -- that  
10 may be one example. If he's serving a -- if he's  
11 awaiting sentencing for a time longer than the maximum  
12 sentence for -- for the charge, that would -- that would  
13 be another example.

14 JUSTICE GINSBURG: But you -- you would not  
15 count factors of the kind that were raised here, that  
16 is, I could have gotten into a drug treatment program in  
17 the penitentiary that's not available in the jail. You  
18 would not include that?

19 MR. SCHOWENGERDT: That's right, Justice  
20 Ginsburg. And -- and the reason why it -- it's too  
21 speculative a basis, you know, it's speculative whether  
22 rehabilitative programs or parole would have been  
23 available and whether the defendant would have taken  
24 advantage of them.

25 And I -- this case is -- is a good example

1 of that. It's not in the record because it happened  
2 after the Montana Supreme Court's decision, but the  
3 Petitioner was -- was offered parole in March of 2014  
4 on -- conditioned on that he would fill -- fulfill a  
5 rehabilitation program. He started the rehabilitation  
6 program, and 16 days later he quit, quit it, so his  
7 parole was rescinded. And that's -- that's the sort of  
8 speculative basis -- I think it's too speculative a  
9 basis to -- to give a remedy.

10 But the defendant's always able to file a  
11 mandamus claim if he -- if he's -- the sentence is  
12 harming him. He can first ask to be sentenced. The  
13 defendant in this case didn't mention it until nine  
14 months into the progress -- process.

15 JUSTICE KAGAN: General, there -- there may  
16 be some real differences between the pretrial context  
17 and the presentencing context, but one which seems quite  
18 similar is the potential of delay to impair the defense.  
19 So I guess I would like you to address that, because,  
20 you know, as the Petitioners point out, in most cases  
21 these days, most of the actual adjudication of contested  
22 issues goes on in sentencing rather than at the trial  
23 stage, given that we don't have very many trials  
24 anymore.

25 And certainly Barker and certainly Doggett

1 made it very clear that this was an important interest  
2 in thinking about the speedy trial right.

3 MR. SCHOWENGERDT: Yes, Justice Kagan, a few  
4 points. First of all, I would -- I would say that that  
5 danger is equally at issue in pre-indictment delay,  
6 delay involving interlocutory appeal, which the court  
7 held was not included in the speedy trial analysis in  
8 Loud Hawk v. United States. Second -- so that can be  
9 remedied by -- by due process, even if it's a similar  
10 interest.

11 Second, there's --

12 JUSTICE KAGAN: Well, doesn't -- Lovasco  
13 really talks about a whole different set of  
14 considerations in the pretrial context, which simply  
15 don't apply once the indictment -- once the accusation  
16 has been made.

17 MR. SCHOWENGERDT: Perhaps not. But I think  
18 it would apply in the -- in the interlocutory appeal  
19 context or even -- or even appeal in resentencing. I  
20 mean, those same considerations would be at issue. The  
21 delay could impact or retrial -- if there's a retrial  
22 ordered on remand in a case. And those are interests  
23 the Due Process Clause can -- can remedy.

24 But the other -- the other point is that  
25 sentencing is different. I mean, there -- the same

1 rules don't apply. And usually, the same facts that  
2 aren't -- aren't at issue. I mean, given the ubiquity  
3 of plea agreements, so often the -- the real action is  
4 in the plea bargaining, anyway. And -- and the  
5 prosecutor and the defendant agree on a sentence or a  
6 range of sentence, and then -- and then that's  
7 implemented by the judge.

8 JUSTICE KAGAN: Well, sometimes, but there  
9 may also be real factual disputes. It might be about  
10 the amount of loss. It might be about the amount of  
11 drug quantity. It might be about prior bad acts. It  
12 might be about a whole range of things which are the  
13 kinds of things that we actually typically think of as  
14 contested issues at trial.

15 MR. SCHOWENGERDT: That's true. I would  
16 argue the due process provides adequate remedy in that  
17 situation, but there is different standard, too. I  
18 mean, the rules of evidence don't apply. The  
19 Confrontation Clause doesn't apply. There's no burden  
20 to prove facts beyond a reasonable doubt. So it is a  
21 different type of proceeding.

22 And our argument is that -- that due process  
23 can remedy any prejudice that happened -- -

24 JUSTICE SOTOMAYOR: That's the problem. How  
25 do you prove -- I mean, let's take an indeterminate



1 sentence, more or less like this one, where you have the  
2 possibility of a sentence between zero and ten years.

3 How do you -- how does the judge know  
4 whether -- if the defendant is brought before him at  
5 year eight, eight and a half, nine, how does the judge  
6 know that if the defendant had been brought to him at  
7 year five, he would have given him a six-year sentence  
8 instead of an eight?

9 Don't you think that there's a lot of  
10 pressure on the judge if the defendant's hearing is  
11 delayed for eight years to, say, time served? That  
12 really -- don't -- don't you think there's prejudice in  
13 the fact that an unexplained delay caused by the State  
14 more likely than not had some sort of effect on the  
15 sentence?

16 MR. SCHOWENGERDT: Well, I think in that  
17 case, the defendant should -- if it's that lengthy of a  
18 delay, he should ask to be sentenced. And like I say,  
19 he can -- he can always file a mandamus petition in that  
20 context.

21 JUSTICE SOTOMAYOR: Look, this defendant  
22 asked to be sentenced faster. He was told that there  
23 were other issues the court was dealing with. So a  
24 couple of the months were not his fault, clearly not his  
25 fault, it was an administrative fault.

1                   MR. SCHOWENGERDT: That's true. There  
2 was -- not all the delay was his fault. But he  
3 didn't -- he didn't mention anything about wanting to be  
4 sentenced until nine months into that process when he  
5 filed a --

6                   JUSTICE SOTOMAYOR: Well, that may go to the  
7 issue of whether, under a Barker analysis or any  
8 analysis, he should be heard to complain about the  
9 delay, but I still am not quite sure why your definition  
10 of substantial prejudice or actual prejudice should be  
11 the controlling one.

12                  MR. SCHOWENGERDT: I -- I think the court  
13 said -- even the court -- lower courts that have applied  
14 the Speedy Trial Clause to sentencing delay, they -- you  
15 know, the Tenth Circuit, for example, in *Perez v.*  
16 *Sullivan*, they assume that it applies, on the one hand,  
17 based on the Court's decision in *Pollard*, but then on  
18 the other, they recognize that the interests don't  
19 apply. They -- they recognize that in order to fashion  
20 a remedy in a post-conviction setting, the defendant has  
21 to show prejudice.

22                  In addition, it takes into account that  
23 the -- that the balance is shifted. The person is no  
24 longer accused, but convicted, and -- and his  
25 presumption of innocence has vanished.

1 JUSTICE KENNEDY: Assume -- assume that  
2 there is a prompt trial, then a very substantial delay  
3 in sentencing, and then there's an appeal, and the  
4 appeal results in new trial. Does the Speedy Trial Act  
5 then apply when the defendant says that my second trial  
6 was delayed?

7 Are there cases on that?

8 MR. SCHOWENGERDT: I don't -- I don't think  
9 so. I think generally when courts -- lower courts are  
10 applying delay in the appellate context, resentencing  
11 context, they apply due process. And I can't think --

12 JUSTICE KENNEDY: Because if that delay were  
13 attributable to the State, it seems to me there would be  
14 a Speedy Trial Act violation in that connection.

15 MR. SCHOWENGERDT: There may be. And -- and  
16 lower courts, when they're look at appellate delay or  
17 delay in resentencing, I mean, it's a -- it's a pretty  
18 similar test as far as the Speedy Trial Clause is  
19 concerned when courts are applying at presentencing,  
20 because it requires a showing of prejudice, and it  
21 evaluates the government's reasons for the delay.

22 JUSTICE KENNEDY: But -- but you're not  
23 aware of any cases of the kind I've indicated where  
24 they -- the Speedy Trial Act then clicks in for the  
25 second prosecution?

1                   MR. SCHOWENGERDT: I'm not aware of any  
2 cases.

3                   JUSTICE ALITO: Under Montana law, can a --  
4 a defendant who suffers inordinate delay in sentencing  
5 get relief?

6                   MR. SCHOWENGERDT: Certainly. There's --  
7 there are rules on delay, prohibiting delay, just like  
8 there are in most States, if not every State. And under  
9 the Federal rules there's specific procedures that put  
10 into place --

11                  JUSTICE GINSBURG: But Mr. Rowley indicated  
12 that there -- there's the rules there, but no defendants  
13 have had the benefit of getting it -- their sentences  
14 shortened because of those.

15                  MR. SCHOWENGERDT: Well, I -- I'm not aware  
16 of any defendants pressing claims, any reported  
17 decisions on those -- those claims, one way or the  
18 other. But a defendant always has that option, and  
19 especially under mandamus.

20                  And -- and I think at that point, fashioning  
21 a remedy just for delay, I think, is difficult because  
22 my friend mentioned 14 years, but the delay -- I mean,  
23 14 months. The delay wasn't really 14 months of  
24 unjustified delay. Like I said, he didn't make his  
25 claim until nine months. But before that, there's

1 going -- always going to be some delay and the --

2 JUSTICE GINSBURG: But the court did -- did  
3 say that it -- the delay was principally caused by the  
4 court's institutional problems.

5 MR. SCHOWENGERDT: It -- it was. There  
6 were -- the court took a while to -- to decide  
7 post-conviction motions, and it was institutional delay.  
8 I don't -- I don't disagree with that. But my point is  
9 that there's always going to be some delay in the  
10 processes. And so to figure out what the remedy would  
11 be simply by -- by including the entire 14 months, I  
12 think, would be a windfall to the defendant, especially  
13 in this case where he's -- he was receiving credit on  
14 his sentence for --

15 CHIEF JUSTICE ROBERTS: Is that typical? Is  
16 it typical for a sentencing court to give credit for  
17 time served?

18 MR. SCHOWENGERDT: Yes. In fact, it's  
19 statutory.

20 CHIEF JUSTICE ROBERTS: Is there any way  
21 they can do that when you have a indeterminant range,  
22 sentence is zero to ten? Is there any way they can do  
23 that? Can they say it should be zero to nine in this  
24 case because of the delay?

25 MR. SCHOWENGERDT: I'm -- I'm not sure. I

1 mean, I think a judge could do that. I mean, the -- in  
2 his -- in the Petitioner's first conviction on domestic  
3 assault, he was awarded 53 days of credit for -- against  
4 his sentence. And the court specifically stated on the  
5 record that he took that into account and applied that  
6 against -- against his sentence.

7 JUSTICE SOTOMAYOR: Do you think the courts  
8 are -- the judges are incapable of making determinations  
9 of a remedy?

10 MR. SCHOWENGERDT: Certainly not, no. I  
11 think -- I -- and I think under due process, they -- you  
12 know, that's -- that's the advantage of due process, if  
13 courts can fashion a remedy to target the specific  
14 prejudice. And I think they're well equipped to do  
15 that.

16 JUSTICE BREYER: Where did -- where did it  
17 come from that Barker v. Wingo prejudice is supposed to  
18 be assumed? I was just looking at the case. It doesn't  
19 say that. In fact, they analyze prejudice.

20 MR. SCHOWENGERDT: That's right. The -- the  
21 Court has only presumed prejudice, that I'm aware of, in  
22 one case, Doggett, and --

23 JUSTICE BREYER: You think we held that?

24 MR. SCHOWENGERDT: You know that -- there --  
25 two -- two things: Extraordinary delay. It was an

1 eight and a half-year delay between when a person was  
2 indicted and when they were brought to trial. And then  
3 it was -- there -- the Court said there was no  
4 justifiable reason for that delay.

5 JUSTICE BREYER: No, no. My question is you  
6 heard your -- your brother counsel say that Barker v.  
7 Wingo, if it applied, would presume prejudice. So I've  
8 just been looking at that. And in the case itself it  
9 doesn't presume prejudice.

10 MR. SCHOWENGERDT: It does not.

11 JUSTICE BREYER: It analyzes whether there  
12 was or was not prejudice. So I want to know where that  
13 requirement of presumed prejudice comes from.

14 MR. SCHOWENGERDT: The first -- the first  
15 factor in Barker is to -- to analyze what --

16 JUSTICE BREYER: I know the four factors. I  
17 have them in front of me.

18 MR. SCHOWENGERDT: Yes. That's the  
19 presumptive prejudice factor gets you -- gets you to the  
20 test. So it triggers the test. I think my friend is  
21 referring to the Doggett case, though. That's -- and in  
22 his brief, he cites Doggett as -- as sort of this, at  
23 some point, if the delay is so excessive -- and I -- I  
24 take it that he's not arguing --

25 JUSTICE BREYER: All right. So -- so it --

1 I mean, obviously, it's a 20-year delay. The person  
2 won't even remember who he was going to call, and all  
3 the witnesses will be gone and so forth. So I think  
4 it's fair to say there was prejudice in such a case, if  
5 that's what it's about.

6 So if it isn't presumed all the time, do you  
7 have any objection, as he apparently does not have any  
8 objection, to our saying you're right. It's the Due  
9 Process Clause.

10 Now, in applying the Due Process Clause to  
11 cases where the sentencing has been unduly delayed or  
12 that is the claim, you -- the Court should apply the  
13 factors as set out in Barker v. Wingo.

14 MR. SCHOWENGERDT: And there's a couple  
15 problems with that. One, Barker was specifically  
16 designed to take into account pretrial interests under  
17 the Speedy Trial Clause. And in the case that Justice  
18 Kagan mentioned, the forfeiture case, that was a  
19 pre-adjudication case, so it fit in that context. So  
20 applying Barker, courts have done it, applied it --

21 JUSTICE SOTOMAYOR: Sorry, that was a  
22 forfeiture case.

23 MR. SCHOWENGERDT: Correct.

24 JUSTICE SOTOMAYOR: And that's a penalty  
25 after adjudication. The forfeiture doesn't start until



1 someone has been found --

2 MR. SCHOWENGERDT: I think it was a -- I'm  
3 sorry, it was a pre -- basically, property was taken  
4 before --

5 JUSTICE BREYER: Whatever the case is, I'd  
6 like to get an answer to my question.

7 MR. SCHOWENGERDT: Sure.

8 JUSTICE BREYER: It says the Court should  
9 balance four factors: Length of delay, the reason for  
10 delay, the defendant's assertion of his right, and  
11 prejudice to the defendant.

12 Now, if I quote that sentence and say those  
13 are the factors that should be taken into account under  
14 the Due Process Clause, do you have any objection to  
15 that?

16 MR. SCHOWENGERDT: Prejudice needs to take  
17 the forefront in that analysis.

18 JUSTICE BREYER: I should just reverse the  
19 four?

20 MR. SCHOWENGERDT: Well, the problem with  
21 Barker is it held -- it holds that -- I mean, in the  
22 postconviction setting is that none of the factors are  
23 necessary. So prejudice doesn't necessarily have to be  
24 shown in Barker. Lower courts have modified that and  
25 said in the postconviction setting, a defendant has to

1 show prejudice. In the -- the test that lower courts  
2 use, the modified Barker test looks a lot like Lovasco.  
3 In fact, it say it's indistinguishable because  
4 prejudice. And prejudice is the key, to the answer to  
5 your question, Justice Breyer, that in a postconviction  
6 setting, that's what's necessary.

7 And also, to my friend's point that the  
8 Petitioner made claims of prejudice, I'd point the Court  
9 to Joint Appendix 66 and 68 where he -- he made his  
10 claim of prejudice in -- in the space of a couple  
11 paragraphs. And this sort of illustrates the problem  
12 the State has in rebutting claims of prejudice that  
13 aren't substantiated. He didn't file his -- his  
14 affidavit, which was still fairly bare, but at least  
15 more substantiated, until three months after he filed  
16 his motion, and the motion was denied, his motion to  
17 reconsider. So I think defendants in this context have  
18 to come forward with some showing of prejudice.

19 JUSTICE KAGAN: Well, that -- that might  
20 present some challenges, but there are also challenges  
21 on the other side. It's often hard to show that people  
22 have forgotten things, that, you know, they've forgotten  
23 them. So unless there's something like a witness dying,  
24 it's very difficult to make the kind of showing that you  
25 are suggesting. And that's why Barker, you know, left

1 things flexible and said, you know, in most cases, we  
2 really are going to look at prejudice. We're going to  
3 see what you have to say for yourself. In some extreme  
4 cases, we're not going to do that.

5 So, again, I guess I'm back with  
6 Justice Breyer's question as to, yes, this is a  
7 different context, but why don't all the same  
8 considerations apply?

9 MR. SCHOWENGERDT: The court has never  
10 presumed prejudice, except in the extreme --

11 JUSTICE KAGAN: I wasn't suggesting presumed  
12 prejudice, because Barker doesn't suggest presumed  
13 prejudice. As you say, the difference that Barker has  
14 with respect to your test is simply that Barker says  
15 it's not always necessary to show prejudice, that there  
16 are extreme circumstances in which we'll just take that  
17 for granted.

18 MR. SCHOWENGERDT: I don't think that takes  
19 into consideration the change that happens at  
20 conviction. I mean, there's a substantial change.  
21 The -- the interests of the society take the forefront.  
22 And to give -- I think it gives the defendant a windfall  
23 if -- if he can come to court and say this, you know,  
24 delay has prejudiced me, but I'm not really going to --

25 JUSTICE KAGAN: Well, but if you think that

1 a very significant part of this rule has to do with  
2 impairment of the ability to defend yourself, and if you  
3 think that that kind of consideration applies just as  
4 well at the sentencing phase as it does at the  
5 conviction stage, maybe in most cases more so, given  
6 that most of the action these days takes place in the  
7 sentencing phase, I guess I just wouldn't see why  
8 there's any need for a different rule, especially given  
9 the level of flexibility that Barker gives.

10 It's not like Barker says we're presuming  
11 prejudice in all circumstances. Barker is saying  
12 prejudice is one of the four factors. And it's a very  
13 important one. And usually we'll expect people to come  
14 in with some kind of showing, except for in extreme  
15 cases when not.

16 MR. SCHOWENGERDT: I think it comes down to  
17 a remedy. You know, the remedy for a speedy trial  
18 violation is dismissal. So in the postconviction --

19 JUSTICE KAGAN: Well, that's what we said in  
20 Barker when we were talking about a pretrial case, but  
21 the remedy in this case would be different.

22 MR. SCHOWENGERDT: Right. But it would be  
23 more difficult. If the defendant doesn't have to show  
24 prejudice, I'm not -- I'm not sure how you -- what  
25 you -- what the Court would remedy. And that's one of

1 the reasons that the prejudice should be required,  
2 because there's got to be something, something that --  
3 that the Court is actually remedying. And even in the  
4 speedy trial cases, the courts usually -- usually  
5 require some showing --

6 JUSTICE ALITO: When it comes to the  
7 determination of facts that are relevant at sentencing,  
8 that does not take place exclusively, or probably even  
9 it doesn't take place primarily at the time when the  
10 sentence is pronounced; isn't that correct? It -- it  
11 takes place during the preparation of the presentence  
12 report, at least in the Federal system. Is that true in  
13 Montana as well?

14 MR. SCHOWENGERDT: May I answer?

15 CHIEF JUSTICE ROBERTS: You may.

16 MR. SCHOWENGERDT: Yes -- yes, Justice  
17 Alito, that's exactly right. Most of the facts are  
18 analyzed through that presentence report, and speedy --  
19 and the sentencing hearings at that point are pretty  
20 drab affairs because most of the facts have been  
21 resolved.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
23 Ms. Anders.

24 ORAL ARGUMENT OF GINGER D. ANDERS  
25 FOR UNITED STATES, AS AMICUS CURIAE,

1 SUPPORTING THE RESPONDENT

2 MS. ANDERS: Mr. Chief Justice, and may it  
3 please the Court:

4 To go right to Justice Kagan's concern about  
5 the possibility that a defendant's defense at sentencing  
6 could be impaired, we think the due process analysis is  
7 adequate to address that. And we think that's so  
8 because, although the defendant has to show prejudice,  
9 the prejudice standard should essentially be the same  
10 one that applies in cases of other violations of  
11 constitutional rights that may affect the defendant's  
12 ability to defend at sentencing. And that is the  
13 defendant should have to show that theirs is a  
14 reasonable probability that the result would have been  
15 different, the outcome would have been different. That  
16 is the same standard that's used in cases of Brady  
17 violations of ineffective assistance of counsel. It's  
18 one that doesn't require the defendant to show by a  
19 preponderance that he would have received a different  
20 sentence or anything like that. He just has to show  
21 that -- that he suffered prejudice. That -- that  
22 when -- when you take all the evidence into account, it  
23 puts the outcome in a different light.

24 JUSTICE KAGAN: And how did you see that as  
25 different from what goes on under the Barker analysis?

1                   MS. ANDERS: Well, I think under Barker, the  
2 Court does allow for prejudice to be presumed in some  
3 cases, so the defendant does not have to show -- make  
4 any kind of concrete or particularized showing of  
5 prejudice. We think that -- that in the case of  
6 sentencing -- prejudice at sentencing that the defendant  
7 should have to show some concrete effect -- some  
8 concrete effect --

9                   JUSTICE KAGAN: But I take it that we've  
10 said that that's the case where the delay is super-long,  
11 so take a delay of eight or ten years. And, you know,  
12 why is it in that very extreme circumstance that the  
13 defendant should make -- that the defendant should have  
14 to make any particularized showing?

15                  MS. ANDERS: Well, I think the defendant may  
16 well be able to make a particularized showing in that  
17 case, but I think -- I think there are -- there are two  
18 primary reasons that it's just not appropriate in any  
19 case for prejudice to be presumed at sentencing. And --  
20 and the first one of those is that, I think, you know,  
21 the constitutional rule has to take into account the  
22 wide range of sentencing proceedings here. So when  
23 we're talking about pretrial delay, I think, you know,  
24 all trials involve historical facts that, in theory,  
25 could be affected, could be prejudiced by delay.

1                   That's not the case of all sentencing  
2   hearings. There are fully discretionary systems  
3   where -- where historical facts would not have as great  
4   an effect. There are sentencings that turn mostly on  
5   the present characteristics of the defendant, rather  
6   than on -- on historical facts.

7                   So I think -- I think prejudice should not  
8   be presumed in any case, but in a situation where the  
9   defendant actually will be affected, the due process  
10   analysis is tailored enough to allow him to have relief  
11   in that situation.

12                  And I think the second reason it's not  
13   appropriate ever to presume prejudice at sentencing is  
14   that the conviction changes everything. It -- once --  
15   once a defendant has been convicted, there's a strong  
16   societal interest in giving him an appropriate sentence.  
17   And so to give him a remedy for presentencing delay, I  
18   think, involves -- generally, the remedy is going to  
19   involve lowering what would otherwise be an appropriate  
20   sentence. So in that context, I think it's appropriate  
21   to require the defendant to show some actual injury in  
22   order to justify the societal cost of lowering an  
23   otherwise appropriate sentence.

24                  CHIEF JUSTICE ROBERTS: In the -- in the  
25   Federal system, do judges typically give credit for time



1 served?

2 MS. ANDERS: They do, yes.

3 JUSTICE KAGAN: Your rule would apply to  
4 capital cases, as well?

5 MS. ANDERS: Well, I think capital cases may  
6 be different. I think the -- the Court has said that in  
7 some context, for instance, double jeopardy, the -- the  
8 capital sentencing is essentially, in some respects, an  
9 extension of the trial. So in that situation, you may  
10 say the same thing with respect to -- to speedy trial  
11 claims, as -- as well.

12 JUSTICE KAGAN: I'm sorry. Could you say a  
13 little bit more than that? You would -- you would say  
14 because the penalty phase really is a trial?

15 MS. ANDERS: I think there are some respects  
16 in which you treat the -- the penalty phase as a -- as  
17 an extension of the trial, yes.

18 I -- I think, finally, the other reason  
19 that -- that it's not appropriate to presume prejudice  
20 at sentencing is that in the pre-indictment context, of  
21 course, the Court has said that the core interests of  
22 the Speedy Trial Clause aren't implicated; and,  
23 therefore, even though that kind of delay, pre-arrest  
24 delay, may have the same sort of effects on -- on the  
25 trial that are -- you know, prejudice that is hard to

1 articulate, that --

2 JUSTICE GINSBURG: In that situation, the  
3 defendant is at liberty in a pre-indictment delay?

4 MS. ANDERS: That's right. And that's --  
5 that's why the core concerns of the Speedy Trial Clause  
6 aren't implicated in that scenario, that -- that -- the  
7 Speedy Trial Clause isn't implicated because the  
8 defendant's liberty interest hasn't been -- hasn't been  
9 restrained by the indictment.

10 But a similar thing happens after  
11 conviction. At that point, the defendant doesn't have a  
12 cognizable liberty interest -- a cognizable interest in  
13 avoiding the -- the detriments that can be imposed on  
14 him as a result of the conviction and as an incident of  
15 the sentence.

16 JUSTICE SOTOMAYOR: If we take out the  
17 "presumed prejudice" which is not part of the Barker  
18 analysis, it just says -- defines "prejudice," how would  
19 using the Barker standard in saying, no presumed  
20 prejudice, you have to prove some prejudice, how would  
21 that change the analysis?

22 MS. ANDERS: Well, I think that -- I think  
23 there's one other difference, I think, in -- in the two  
24 approaches, aside from the presumed prejudice; and that  
25 is what counts as cognizable prejudice. So I think

1 in -- in the due process context, the Court said in  
2 Marion that the type of prejudice we're concerned about  
3 is actual prejudice to the defense of a criminal case.

4 JUSTICE SOTOMAYOR: That's for the pretrial.

5 MS. ANDERS: Right, but what that -- we  
6 think what that means in the sentencing context is that  
7 the defendant should have to show a concrete effect on  
8 his defense at sentencing; in other words, the  
9 probability that the result would have been different  
10 or, you know, that he's been serving longer time than he  
11 should have been. But I think it also means that --  
12 that things like -- like access to rehabilitation  
13 programs, anxiety, that those would not be independently  
14 cognizable as prejudice under the due process inquiry.

15 JUSTICE SOTOMAYOR: You think that if a  
16 defendant was writing to a judge every week saying, I'm  
17 anxious, I really need to know what my sentence is, and  
18 the judge ignores it for a period of time, that that  
19 defendant still has to prove something more? That's not  
20 the facts of this case. There was no complaint for nine  
21 months. So whatever treatment the defendant started,  
22 started -- for anxiety started well before any time had  
23 elapsed in this sentence.

24 But you don't think that defendant is  
25 entitled to any consideration by a -- a trial court, or

1     that we should be barring a trial court from considering  
2     that?

3                   MS. ANDERS:  And two points with respect to  
4     that.  I mean, certainly if a -- if a defendant is  
5     asking for sentencing and the court is ignoring that,  
6     that would be inappropriate.  The defendant would  
7     obviously have -- have other remedies, I think, at that  
8     point after requesting sentence, perhaps mandamus,  
9     perhaps a habeas petition.

10                  But if all -- if the only prejudice he's  
11     claiming is anxiety, then -- then yes, I do think that  
12     that would not be cognizable under due process.  And I  
13     think that's -- that's really because once a defendant  
14     has been convicted, he can -- he now can be sentenced.  
15     He can be subject to the practical deprivations that are  
16     an incident of sentence.  And I -- I think that after he  
17     has been sentenced, of course, he doesn't have an  
18     interest in not being anxious, that kind of thing.  And  
19     so I think it would be very odd to say that he has a --  
20     a sentencing delay-related interest in that kind of  
21     claim that could be the basis for a constitutional  
22     violation.

23                  JUSTICE KAGAN:  Ms. Anders, I'm sorry, one  
24     of the things that strikes me as odd about your argument  
25     is that you are suggesting that a remedy would be

1 appropriate in certain circumstances. You just want to  
2 put this under the Due Process Clause. And what's --  
3 what's odd is that, as you say, that in this  
4 post-conviction context, the president -- the -- the  
5 defendant has been deprived of any liberty interest, and  
6 yet the Due Process Clause talks about a deprivation of  
7 liberty, but the defendant no longer has a liberty  
8 interest.

9               So it seems a very odd place to park this  
10 right and this remedy, the Due Process Clause, in this  
11 context. It seems much more natural that you would do  
12 it under the Speedy Trial Clause on the assumption -- on  
13 the -- on the view that the -- that the trial has to do  
14 with both the adjudication of guilt and the  
15 determination of the proper sentence.

16              MS. ANDERS: Well, two points with respect  
17 to that. I think if the Court were to say -- to -- to  
18 use the standard that -- that we propose, so essentially  
19 no presumed prejudice, only certain things are  
20 cognizable as prejudice, and -- and the remedy would not  
21 always be -- vacatur the conviction, then I think we  
22 probably wouldn't have a practical objection to calling  
23 that a Speedy Trial Clause, right? What we're concerned  
24 about is the substantive standard and -- and the remedy.

25              But I do think after a defendant has been

1 convicted, the societal interests have shifted; and  
2 that's why it's appropriate, I think, to apply due  
3 process. The defendant has a liberty interest in the  
4 length of his sentence. He has a -- he has a due  
5 process interest in a fundamentally fair sentencing  
6 proceeding. And so we think due process nicely captures  
7 that interest the defendant has.

8 And so the Court has said before -- before  
9 rest, before speedy trial kicks in, due process applies.  
10 And it provides a right. And we think that after the  
11 defendant no longer has the interest protected by the  
12 Speedy Trial Clause, due process can, again, provide the  
13 proper approach.

14 If there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Rowley, you have 10 minutes remaining.

17 REBUTTAL ARGUMENT OF FRED A. ROWLEY, JR.

18 ON BEHALF OF THE PETITIONER

19 MR. ROWLEY: The standard for prejudice  
20 articulated by the United States shows well why due  
21 process protections are ill-suited to the specific  
22 interests protected by the speedy trial right. The  
23 United States suggested that the defendant would have to  
24 show that the outcome would have been different,  
25 consistent with Lovasco. The only form of prejudice

1 that would be cognizable under that test is an effect on  
2 the defendant's defense at sentence.

3 But as Barker illustrates, and Smith v.  
4 Hooey also illustrates, there are other forms of  
5 prejudice that are specific to the Speedy Trial Clause  
6 that may apply to a defendant and, indeed, may apply to  
7 a defendant even after they've been convicted.

8 So, for example, in Smith v. Hooey, the  
9 defendant had already been incarcerated on a prior  
10 Federal charge. That defendant's liberty interests were  
11 already impinged, and yet the Court noted that the delay  
12 from the follow-on prosecution could still prejudice  
13 him.

14 So this notion that you would apply the due  
15 process test or the Lovasco test and require a showing,  
16 an affirmative showing that the defendant would have had  
17 a different outcome at sentencing but for the delay  
18 really highlights why due process is inadequately  
19 suited.

20 Justice Kagan's question points to another  
21 anomaly in the test that has been proposed by the  
22 government because of this focus on liberty interests.  
23 And in -- in Smith v. Hooey, the defendant had  
24 already --

25 JUSTICE KENNEDY: Or I suppose if it isn't

1 liberty, it's not incorporated under the Fourteenth  
2 Amendment, anyway.

3 MR. ROWLEY: Yes, Your Honor, but -- but --

4 JUSTICE KENNEDY: I mean, the Sixth  
5 Amendment applies only to the Federal government, and  
6 it's only because of the Fourteenth Amendment liberty  
7 that it applies to the States. So liberty is involved.

8 MR. ROWLEY: Yes, Your Honor, but the -- the  
9 position that the State of Montana and the United States  
10 has taken is that at sentencing, once a defendant has  
11 been convicted, they don't have a specific liberty  
12 interest of the kind that was recognized in Barker and  
13 the kind that was recognized in Smith v. Hooey; and that  
14 is the interest in rehabilitation, in accessing  
15 rehabilitation programs that could be affected by a  
16 delay in a prosecution.

17 JUSTICE BREYER: Isn't -- his liberty is  
18 certainly affected. He's in jail. So he's sitting  
19 there in jail. Tell him you're free. I don't think he  
20 believes it.

21 MR. ROWLEY: Well --

22 JUSTICE BREYER: And -- and then the  
23 question is: Is -- at some point, is being in jail a  
24 deprivation of his liberty without due process? Because  
25 the Due Process Clause would require application of



1 sentencing under -- and when it's -- it's not due  
2 process when, say, Barker v. Wingo or some violation is  
3 violated. I don't see a problem with liberty.

4 MR. ROWLEY: Well, Your Honor, the point is  
5 simply that the Speedy Trial test that the court  
6 articulated in Barker is better suited to the specific  
7 forms of prejudice that are at issue in this case,  
8 because it addresses this concern with even a defendant  
9 who's been guilty, accessing rehabilitation programs, or  
10 the anxiety that that defendant may feel at the  
11 sentencing stage.

12 And this gets to another point that the  
13 United States made, and that is that -- that the  
14 conviction changes everything, because the concerns that  
15 the court articulated in Barker may yet be more  
16 significant at the sentencing stage, given that most  
17 convictions today result from guilty pleas.

18 And so the fact that a defendant -- their  
19 defense may be impaired by a delay in criminal  
20 proceedings, may be more significant at the sentencing  
21 stage because it may be the only place where the  
22 defendant challenges an upward adjustment or contests  
23 facts.

24 The fact that the defendant may need to  
25 access rehabilitation programs may be more pronounced at

1 sentencing because the defendant's already been  
2 convicted, they're going to serve time, and they want to  
3 get access to the programs that they'll need to get  
4 parole as soon as -- as possible.

5 So we submit that -- that Barker is the  
6 appropriate test; that if the Court agrees that  
7 Barker -- Barker's the appropriate framework, that the  
8 proper right to ground that analysis in is the Sixth  
9 Amendment and not the Due Process Clause.

10 And that is particularly so because of the  
11 antecedents of the Due Process Clause which -- which  
12 apply, not just to the -- the guilt stage of the  
13 prosecution, but also to sentencing. And why? Because  
14 at -- at common law, and at the time of the Framing --  
15 Framing, sentencing and -- and the jury verdict were so  
16 closely bound.

17 And -- and the right is rooted in this  
18 practice of circuit justices riding into the countryside  
19 and resolving cases. Not just presiding over jury  
20 trials, but resolving cases. They had the power to hear  
21 and decide those cases. Their jurisdiction was from the  
22 beginning of the prosecution through the end.

23 So we think the Sixth Amendment is the  
24 appropriate basis for this right.

25 JUSTICE ALITO: Well, at the time of the

1 adoption of the Sixth Amendment, weren't post-trial but  
2 presentencing delays fairly common?

3 MR. ROWLEY: Your Honor, the Stevens  
4 Treatise says that at the time, at common law, that  
5 sentencing took place usually -- not always --

6 JUSTICE ALITO: Usually.

7 MR. ROWLEY: Usually soon thereafter.

8 JUSTICE ALITO: But -- but not always.

9 MR. ROWLEY: That's right, Your Honor. But  
10 as a general rule, the sentencing did take place soon  
11 after the -- the jury issued its verdict, and oftentimes  
12 immediately. And the cases that we catalog in our  
13 appendix illustrate that point.

14 But it's not just that. As the Court has  
15 recognized, the sentence was usually automatic. It  
16 flowed from the jury verdict. And so --

17 JUSTICE ALITO: But that's just not true as  
18 a historical matter.

19 MR. ROWLEY: Well, it --

20 JUSTICE ALITO: It's not true as a  
21 historical matter. If you look at the -- at the first  
22 criminal provisions that were enacted by Congress, they  
23 called for a range of -- of sentences, and the -- and  
24 the sentencing judge had to select within that range.

25 MR. ROWLEY: Justice Alito --

1 JUSTICE ALITO: I'm talking about the early  
2 18th century, not when you say that it was automatic.

3 MR. ROWLEY: Your Honor, I'm referring to  
4 the observations that this Court has made in the  
5 Apprendi line of cases. And it is the early part of the  
6 18th century, because as the Court has noted -- I'm  
7 sorry -- in the early part of the 19th century, because  
8 as the Court has noted, States started to adopt statutes  
9 that gave sentencing courts more discretion. But  
10 certainly at common law, certainly at the time of the  
11 Founding, the Court noted that typically the verdict  
12 dictated the sentence. And so this right that was  
13 created --

14 JUSTICE ALITO: That just isn't true. We  
15 don't have the right to change history. It isn't true.  
16 The first -- if you look at the very first criminal  
17 provisions that were enacted by Congress, the first  
18 Congress, they were not. It was not determined at  
19 sentencing.

20 MR. ROWLEY: Your Honor, many of the -- for  
21 many crimes, serious crimes at common law, and even for  
22 some that today we would consider not so serious,  
23 usually the penalty was death. And so there was this  
24 close relationship. The Court has called it a close  
25 relationship between the verdict and sentencing.

1                   And we submit that that, together with the  
2   way that the process was consulted -- was conducted,  
3   shows that the right was created to cover the whole  
4   proceeding, through the imposition or pronouncement of  
5   sentence.

6                   If there are no further questions.

7                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8   The case is submitted.

9                   (Whereupon, at 12:04 p.m., the case in the  
10   above-entitled matter was submitted.)

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