

No. 17-1604

In the Supreme Court of the United States

JULIAN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that an approximately ten-year delay between petitioner's guilty plea and the imposition of a sentence to time served did not deprive him of due process of law on the facts of this case.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter but is reprinted at 709 Fed. Appx. 103. The memorandum and order of the district court (Sealed Pet. App. A6-A10) is unreported. A redacted version is reproduced at Pet. App. A9-A17.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. The petition for a writ of certiorari was filed on April 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to commit mail fraud and health care fraud, in violation of 18 U.S.C. 371. He was

sentenced to time served and ordered to pay \$9468 in restitution. C.A. App. 265-267. The court of appeals affirmed the judgment, with the exception of the restitution award, which it vacated and remanded for recalculation. Pet. App. A1-A8. On remand, no restitution was imposed. Am. Judgment 3.

1. Petitioner participated in a scheme involving a series of staged automobile accidents, false claims of injuries, and fraudulent insurance submissions. Pet. App. A10; see Gov't Sealed C.A. Br. 3. A federal grand jury in the Eastern District of New York indicted petitioner on one count of conspiracy to commit mail fraud and health care fraud, in violation of 18 U.S.C. 371, 1341, and 18 U.S.C. 1347 (2000); five counts of substantive mail fraud, in violation of 18 U.S.C. 1341; and one count of substantive health care fraud, in violation of 18 U.S.C. 1347 (2000). C.A. App. 20-25.

In August 2003, petitioner pleaded guilty to the conspiracy charge pursuant to a plea agreement. C.A. App. 26-31. The plea agreement noted that petitioner potentially faced deportation as a consequence of his plea, *id.* at 27, and petitioner also was informed of that possibility during the plea hearing, *id.* at 53.

2. Sentencing was initially scheduled for January 5, 2004, but, for a series of reasons, did not take place as scheduled. See Sealed Pet. App. A6-A7 (discussing the reasons for the delay until late 2012 or early 2013); Gov't Sealed C.A. Br. 4-5. By that point, the district judge who had taken the plea (Judge Trager) had passed away and the case had been reassigned to Judge Townes. See Pet. App. A10-A11 & n.2. Judge Townes "ordered an expedited presentence report and set the sentencing date for September 20, 2013." *Id.* at A11.

About a week before sentencing, petitioner moved for dismissal of the charges against him or a permanent adjournment of sentencing, arguing that the ten-year delay between his guilty plea and the upcoming sentencing violated his right to due process. Pet. App. A11. Petitioner submitted an affidavit stating that he had rehabilitated himself and started a family, and argued that sentencing would disrupt his life and potentially subject him to mandatory deportation to Jamaica. *Ibid.*

Judge Townes denied petitioner's motion. See Pet. App. A12; C.A. App. 104-109. Relying on *United States v. Ray*, 578 F.3d 184, 200 (2d Cir. 2009), cert. denied, 559 U.S. 1107 (2010), "Judge Townes explained that the defendant had to show both that the delay in sentencing was not justifiable, and that he was prejudiced by it." Pet. App. A12. Judge Townes found that petitioner "had not presented enough evidence of prejudice." *Ibid.* Judge Townes also determined that, under *Ray*, even if petitioner were correct that the delay was excessive, the appropriate remedy would not be dismissal of the indictment. *Ibid.*; see *Ray*, 578 F.3d at 203 ("The violation of Ray's due process right has prejudiced her insofar as a delayed custodial sentence threatens to undermine her successful rehabilitation. To remedy that harm, the appropriate relief is to release her from any requirement that she submit to a custodial sentence.").

Sentencing was rescheduled for May 2014, but was adjourned several times due to requests by defense counsel—including one necessitated by petitioner's rearrest and pending charges in state court. Pet. App. A12-A13 & n.3. Sentencing was also delayed because petitioner moved to withdraw his guilty plea based on ineffective assistance of counsel. See *id.* at A12.

On November 17, 2015, the case was reassigned to Judge Gleeson. Pet. App. A12-A13. Judge Gleeson denied the motion to withdraw, and set a sentencing date of March 8, 2016. *Id.* at A13. The day before sentencing, however, Judge Gleeson ordered the government to show cause why the indictment should not be dismissed on due process grounds in light of the delay in the imposition of the sentence. See *ibid.* Judge Gleeson then adjourned the sentencing due to his impending retirement and on March 15, 2016, the case was reassigned yet again, this time to Judge Donnelly. *Ibid.*

3. After briefing on the order to show cause, the district court denied the motion to dismiss the indictment. Sealed Pet. App. A8-A10. The court determined that the facts and law supporting Judge Townes's previous decision denying petitioner's motion to dismiss the charges against him were unchanged, and that the prior decision was law of the case. *Id.* at A8-A9. The court found the prior decision to be "supported by precedent," and it found "no change in the applicable law," no "newly discovered evidence, and no manifest injustice" since that time. Pet. App. A15-A16. The court also found that any delay in sentencing after the prior ruling was "largely attributable to [petitioner]" and thus did not constitute unjustifiable delay. *Id.* at A17.

On August 4, 2016, the district court sentenced petitioner to time served (approximately six weeks between his arrest and his release on bond) and ordered him to pay \$9468 in restitution. Pet. App. A3; Judgment 2-3.

4. The court of appeals affirmed in all respects except restitution, in an unpublished summary order. Pet. App. A1-A8. The court recognized that "inordinate sentencing delay can violate the Due Process Clause," *id.* at A4 (citing *Betterman v. Montana*, 136 S. Ct. 1609,

1612 (2016), and *Ray*, 578 F.3d at 199), and it stated that a court evaluating a claim of excessive delay must consider the reasons for the delay as well as the prejudice to the defendant, *ibid.* (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977), and *Ray*, 578 F.3d at 199). The court further noted that, while a defendant does not bear the burden of seeking his own sentencing, his or his counsel’s failure to seek more prompt sentencing “weighs heavily against him.” *Ibid.* (quoting *Ray*, 578 F.3d at 200) (brackets omitted).

Turning to the facts of this case, the court of appeals stated that petitioner never requested sentencing, and found that he was unable to show prejudice resulting from the delay. Pet. App. A4. “Although he has shown that entry of a final judgment of conviction may cause him substantial harm,” the court explained, “he has not demonstrated that imposing sentence now would be prejudicial ‘in a way that the immediate imposition of sentence would not have been.’” *Id.* at A4-A5 (quoting *United States v. Paul*, 634 F.3d 668, 675 (2d Cir.), cert. denied, 565 U.S. 993 (2011)) (brackets omitted).

The court of appeals also vacated the restitution award and remanded for recalculation of the loss amount. Pet. App. A5-A8. On remand, the district court found no loss and entered an amended judgment ordering no restitution. Am. Judgment 3.

ARGUMENT

Petitioner contends (Pet. 13-25) that the delay between his guilty plea and his sentencing violated his due process rights, and that this Court should grant certiorari to decide both when a delay before sentencing violates due process and what remedy is appropriate when it does. Petitioner, however, neither argues that the court of appeals applied the incorrect legal standard nor

claims any disagreement among the courts of appeals on this issue. The result below is correct, and the court of appeals' factbound determination that petitioner did not show a due process violation on the particular facts of this case does not warrant further review.

1. In *Betterman v. Montana*, 136 S. Ct. 1609 (2016), this Court explained that multiple statutory and constitutional provisions provide “checks against delay” at different stages of the criminal prosecution and that “each [is] geared to its particular phase.” *Id.* at 1613. Before the defendant is arrested or charged, “statutes of limitations provide the primary protection against delay, with the Due Process Clause as a safeguard against fundamentally unfair prosecutorial conduct.” *Ibid.* (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). At that stage, the “Due Process Clause may be violated, for instance, by prosecutorial delay that is ‘tactical’ or ‘reckless.’” *Ibid.* (quoting *Lovasco*, 431 U.S. at 795 n.17).

The Sixth Amendment’s Speedy Trial Clause “homes in” on the prosecution’s second phase: “from arrest or indictment through conviction.” *Betterman*, 136 S. Ct. at 1613; see *United States v. Marion*, 404 U.S. 307, 320-321 (1971). For such claims, the Court has adopted a four-factor balancing test that weighs the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Barker v. Wingo*, 407 U.S. 514, 530 (1972). With respect to prejudice, “unreasonable delay between formal accusation and trial threatens to produce” three forms of harm: “‘oppressive pretrial incarceration,’” “‘anxiety and concern of the accused,’” and “‘the possibility that the accused’s defense will be impaired’ by dimming memories and loss of exculpatory evidence”—the last

being the “most serious.” *Doggett v. United States*, 505 U.S. 647, 654 (1992) (quoting *Barker*, 407 U.S. at 532) (brackets omitted).

In *Betterman*, this Court held that the Speedy Trial Clause right “detaches upon conviction” and offers no protection against delays between conviction and sentencing. 136 S. Ct. at 1613; see *id.* at 1612 (“[T]he Sixth Amendment’s speedy trial guarantee [does not] apply to the sentencing phase of a criminal prosecution.”). After conviction, statutes and rules again provide the “primary safeguard” against undue delay, with due process “serv[ing] as a backstop against exorbitant delay.” *Id.* at 1617. In *Betterman*, the defendant “advanced no due process claim,” *ibid.*, and the Court “express[ed] no opinion” about the proper analytical framework to analyze such claims, *id.* at 1618. The Court noted, however, that “[r]elevant considerations may include the length of and reasons for delay, the defendant’s diligence in requesting expeditious sentencing, and prejudice.” *Id.* at 1618 n.12.

2. Petitioner contends (Pet. 14-15) that this Court should grant certiorari and “hold that the test for unconstitutional delay in sentencing should be based on a flexible interpretation of the four-part test of *Barker*.” But he does not argue that the court of appeals applied the incorrect legal standard. To the contrary, he acknowledges (Pet. 16-17) that the Second Circuit’s approach to sentencing delay in *United States v. Ray*, 578 F.3d 184 (2d Cir. 2009), cert. denied, 559 U.S. 1107 (2010), is consistent with both *Barker* and *Betterman*. And he identifies *Ray* (Pet. 16) as an “illustrative example” of the correct analytical framework. Indeed, petitioner endorses (Pet. 20) *Ray* as “set[ting] forth a work-

able *Barker*-based framework for adjudicating due process claims such as his.” But the court of appeals (as well as two different district court judges) applied *Ray* to his case and found no due process violation on the facts, because petitioner neither requested expeditious sentencing nor demonstrated prejudice. See Pet. App. A4-A5 (court of appeals); Sealed Pet. App. A8-A10 (Judge Donnelly); Pet. App. A12 (Judge Townes).

Petitioner’s claim, therefore, is simply a request for correction of the court of appeals’ application of law to the facts of this case. This Court’s review of that factbound issue is not warranted. See Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.”). Petitioner does not argue that the court of appeals’ factbound decision conflicts with the decision of any other circuit court. And the court of appeals’ unpublished summary order could not give rise to a conflict meriting this Court’s review as it is not binding precedent. See 2d Cir. R. 32.1.1(a).

3. In any event, the courts below correctly rejected petitioner’s claim of a due process violation. As those courts have recognized and as this Court has suggested, analysis of a due process claim of sentencing delay requires consideration of the prejudice to the defendant. See *Betterman*, 136 S. Ct. at 1618 n.12; *Barker*, 407 U.S. at 530. And petitioner’s failure to demonstrate prejudice alone supports the court of appeals’ decision.

Petitioner received a sentence of time served, and the only prejudice he has asserted (Sealed Pet. 13) resulted not from any delay in sentencing but from the fact of his conviction itself. See Pet. 22 (petitioner arguing that he “potentially faces deportation to Jamaica” and an inability to acquire citizenship as a result of his

conviction); see also Pet. 22-24 & n.3; Pet. App. A4-A5 (“Although he has shown that entry of a final judgment of conviction may cause him substantial harm, he has not demonstrated that imposing sentence now would be prejudicial ‘in a way that the immediate imposition of sentence would not have [been].’”) (quoting *United States v. Paul*, 634 F.3d 668, 675 (2d Cir.), cert. denied, 565 U.S. 993 (2011)) (brackets in original). Petitioner knew from the time of his plea that deportation was a potential consequence of his conviction. And the delay between the plea and sentencing allowed petitioner to avoid earlier deportation and remain in this country, which is likely why petitioner did not “seek more prompt sentencing.” *Id.* at A4 (quoting *Ray*, 578 F.3d at 200).^{*} His postconviction rehabilitation, moreover, may have led the court to impose a lower sentence than it would have otherwise. Cf. *Pepper v. United States*, 562 U.S. 476 (2011).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2018

^{*} Petitioner acknowledges that, due to the district court’s amended judgment finding no loss, he was not convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M), so only “discretionary removal remains a possibility.” Pet. 22 n.3.