

18-496-cr (L)

United States v. Black

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: August 14, 2018

Decided: March 18, 2019)

Docket Nos. 18-496-cr(L), 18-548-cr(XAP), 18-574-cr(XAP)

UNITED STATES OF AMERICA,

Appellant–Cross-Appellee,

v.

RODSHAUN BLACK, AKA Rashaun Black, AKA Shaun,

Defendant-Appellee,

DANIEL RODRIGUEZ, AKA Danny, ERNEST GREEN, AKA Ern,

*Defendants-Appellees–Cross-Appellants.**

Before: NEWMAN and POOLER, *Circuit Judges*, and COTE, *District Judge*.[†]

* The Clerk of the Court is directed to amend the caption as above.

[†] Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

The United States appeals from the judgment of the United States District Court for the Western District of New York (William M. Skretny, J.) granting Rodshaun Black, Daniel Rodriguez, and Ernest Green's motion to dismiss the remaining criminal charges against them on Sixth Amendment speedy trial grounds. Due to a panoply of delays, Black, Rodriguez, and Green were not tried until approximately sixty-eight months after they were first indicted. For two years of that time, the government failed to render a decision on whether Defendants-Appellees would face the death penalty.

On appeal, the government principally argues that the district court should not have attributed two years' delay to the government for its prolonged death-penalty decision and that the district court should have held Black, Rodriguez, and Green responsible for more of the delay than it did. Applying the factors outlined in *Barker v. Wingo*, 407 U.S. 514 (1972), we hold that the delay was an unconstitutional deprivation of Black's, Rodriguez's, and Green's Sixth Amendment rights to a speedy trial. Accordingly, we AFFIRM the judgment of the district court.

Judge Cote concurs in the judgment in part and dissents in part in a separate opinion.

Affirmed.

MICHAEL P. FELICETTA, Assistant United States Attorney (Tiffany H. Lee, Assistant United States Attorney, *on the brief*), for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY, *for Appellant–Cross-Appellee*.

DONALD M. THOMPSON, Easton Thompson Kasperek Shiffrin, LLP, Rochester, NY, *for Defendant-Appellee Rodshaun Black*.

BARRY N. COVERT, Lipsitz Green Scime Cambria LLP (Erin E. McCampbell, *on the brief*), Buffalo, NY, *for Defendant-Appellee–Cross-Appellant Daniel Rodriguez*.

JESSE C. PYLE, Harrington & Mahoney (James P. Harrington, *on the brief*), Buffalo, NY, *for Defendant-Appellee–Cross-Appellant Ernest Green*.

POOLER, *Circuit Judge*:

The case before us treads on familiar ground—the fundamental protections for criminal defendants that are enshrined in the Sixth Amendment to the Constitution. Defendants-Appellees Rodshaun Black, Daniel Rodriguez,

and Ernest Green (collectively, “Defendants-Appellees”) were indicted on March 6, 2012, and charged with one count of Hobbs Act conspiracy. On March 7, 2012, prosecutors informed the district court that the case against Defendants-Appellees might become eligible for capital prosecution. Two years and nine months later, having not yet reached a decision on whether to seek the death penalty, the prosecution filed a superseding indictment that added new charges and accused Green and Black of an entirely new crime. On January 13, 2015—two years and ten months after the government informed Defendants-Appellees that they could face capital prosecution—the government decided that it would not seek the death penalty. With the nature of the case finally settled, it took another two years and ten months to bring Defendants-Appellees to trial. In all, Defendants-Appellees waited sixty-eight months for a trial.

Today we hold for the third time in two years that criminal defendants’ rights to a speedy trial have been violated in the Western District of New York. *United States v. Tigano*, 880 F.3d 602 (2d Cir. 2018); *United States v. Pennick*, 713 F. App’x 33 (2d Cir. 2017) (summary order). Defendants-Appellees endured an extraordinary sixty-eight-month delay, suffered anxiety occasioned by the

government's nearly three-year deliberation over whether to argue that they should be sentenced to death, and repeatedly requested a speedy trial.

Accordingly, we AFFIRM the district court's dismissal of the remaining charges against Defendants-Appellees because Defendants-Appellees' rights to a speedy trial were violated.

BACKGROUND

I. Proceedings on the Original Indictment

On March 6, 2012, a grand jury indicted Rodshaun Black, Daniel Rodriguez, and Ernest Green on one count of Hobbs Act conspiracy. Rodriguez was arraigned on the charge on March 7, Green on March 9, and Black on March 13.

Although Black, Green, and Rodriguez were all confined in federal custody during the pendency of this case, each was detained under different circumstances. Black was serving a state sentence when he was arraigned on the federal charges; Green was arrested and detained on February 24, 2012, to answer to the charges in this case; and Rodriguez was at large at the time of the indictment and was subsequently arrested and detained on March 7, 2012.

A. The Government's Death-Penalty Decision

During Rodriguez's arraignment hearing on March 7, the government alerted the court that the case might become a capital case. Specifically, the prosecution informed the district court:

[T]here is the possibility if not [the] likelihood of additional charges down the road. . . . [I]n terms of appointment of counsel, it could be a death penalty eligible case, Judge. So, no decisions have been made in that regard obviously, no charges have brought in that regard yet. But I would just urge the Court to appoint[] experienced counsel.

Gov't App'x at 102. Thereafter, Black, Green, and Rodriguez were each appointed learned counsel.

Mindful of the government's statements regarding death-eligible charges, the magistrate judge (to whom all pre-trial matters were referred) gave the parties until April 9, 2012, to complete discovery. But on the day discovery was scheduled to close, the government sought an extension to facilitate obtaining additional discovery from law-enforcement agencies and to accommodate the prosecutor's vacation. The court granted a three-week extension until April 30, 2012, with pre-trial motions due on May 29, 2012.

With discovery in progress, Defendants-Appellees expressed concern that the pre-trial motion deadline would force them to submit motions before the government had issued its decision on whether to seek the death penalty, which would necessarily change the posture of the defense and impact Defendants-Appellees' arguments in their motions. Therefore, on April 19, Black, Rodriguez, and Green requested adjournment of the pre-trial motion deadline until the government had issued its death-penalty decision. The court granted the motion and vacated the pre-trial motion deadlines, with the intention of setting new deadlines when it could assess the government's progress on the death-penalty decision at a May 11, 2012, status conference. That status conference was subsequently postponed until May 17, 2012, because the government failed to produce the defendants.

At the May 17 conference, speedy trial concerns permeated the hearing. The government admitted that it had "not requested authorization from Washington" to seek the death penalty. Gov't App'x at 126. Nonetheless, the government simultaneously objected to Defendants-Appellees' request to defer pre-trial motion practice until the government issued a notice of intent. "[T]he

government should not be in a position to have to justify speedy trial exclusions when the government is more than ready and satisfied to proceed in this case with the schedule,” the prosecutor informed the court. Gov’t App’x at 127.

Defendants-Appellees indicated that they would be amenable to a limited exclusion of time from the speedy trial clock, but they remained hesitant to proceed with motions without a decision because if the government sought the death penalty, the defense would need to scrap existing motions and begin anew. Counsel for Green then noted, “My client has indicated to me that he will agree to a definite extension of the motion schedule, but he is anxious to have this case move along.” Gov’t App’x at 132. Counsel for Rodriguez and Black echoed this concern. Striking a middle ground, the court extended the deadline for filing motions to July 28, 2012.

But by July 24, 2012—just four days before the deadline—the government still had not determined whether it would seek the death penalty. Defendants-Appellees therefore moved for an extension of time to file pre-trial motions pending the government’s decision, noting that the government had informed them that it expected to have a decision within sixty days. At a status conference

on August 2, 2012, the government told the court that the decision might come in October. Nonetheless, Defendants-Appellees expressed a desire to press forward on the assumption that the government would not bring a superseding indictment. Heeding this request, the court made pre-trial motions due on September 28, 2012. Defendants-Appellees timely filed their motions, and after receiving a 10-day extension, the government responded to Defendants-Appellees' motions.

At a December 4, 2012, hearing on the motions, the court again addressed Defendants-Appellees' concerns about obtaining a speedy trial in the face of the government's ever-pending death-penalty decision. The government refused to provide a timeline for its decision—noting, “Obviously my prediction games have been inaccurate so far, so I’m sort of hesitant to keep predicting.” Gov’t App’x at 179. The government at first indicated that the Department of Justice was proceeding with the death-penalty process, but after further prodding from the court, it disclosed that, in fact, the prosecution had not met with the Department of Justice to discuss whether to seek the death penalty.

B. Delay Due to Missing Evidence

While the government contemplated its death-penalty decision, the parties engaged in extensive litigation regarding the unexplained disappearance of several of the photo arrays that law enforcement had shown to witnesses to identify Defendants-Appellees. Defendants-Appellees requested additional discovery and to suppress identification evidence on December 28, 2012. On February 5, 2013, with some of the arrays still missing, the court ordered the government to produce all photo arrays used to identify Defendants-Appellees. The government failed to produce one of the photo arrays that Rodriguez sought, and on March 11, 2013, the court directed the government to consult with the Buffalo Police Department again, which had previously claimed that the photo array used to identify Rodriguez was not in its possession.

On June 7, 2013, with little headway being made on locating the photo arrays, the court issued a scheduling order giving the government until June 21, 2013, to make supplemental disclosures related to the photo arrays. Then, on the day of the deadline, the government sought and obtained a two-week extension

to make supplemental disclosures to accommodate the prosecutor's military commitments.

On August 14, the court decided that an evidentiary hearing was necessary to resolve the pending pre-trial motions and scheduled a hearing for October 2, 2013—a full fifty days from the order. But even this date was not to be: the government moved to adjourn the hearing due to the lead prosecutor's commitments in another case and a death in his family. The court rescheduled the hearing for November 6, 2013. But on November 6, the government requested another adjournment because one of the government's witnesses was unavailable. The hearing was rescheduled a third time for December 3, 2013. But on December 3, the government failed to produce Black, and the hearing had to be rescheduled for December 20. On December 20, the government *again* failed to produce Black, and the hearing was rescheduled for February 19, 2014. Finally, on February 19, 2014—140 days after it was originally scheduled—the court held a hearing at which it ordered the government to look again for the missing photo array and for any documents regarding the missing photo array's parameters. The court also scheduled a follow-up hearing for March 7, 2014, if necessary.

The hearing was necessary. Defendants-Appellees argued that the government had not produced all documents and witnesses related to the photo arrays. The court gave Defendants-Appellees until March 24, 2014, to file supplemental motions regarding unproduced witnesses and discovery. On March 19, 2014, Defendants-Appellees moved for an extension of that deadline, and the court moved the deadline to April 14, 2014. But after the government informed Defendants-Appellees that the missing photo arrays had been discovered in a retired police detective's house, Rodriguez requested additional time. The court vacated the scheduling order and set a conference for May 8, 2014, that was subsequently accelerated to April 18, 2014, by consent of the parties. Defendants-Appellees filed additional motions regarding the photo arrays on April 21 and April 23.

By the end of June, both sides reported that after meeting and conferring, the remaining discovery disputes were largely resolved. Following a one-day adjournment requested by Black's counsel, on August 19, 2014, the court held oral argument on the last of the parties' suppression motions and reserved decision. On August 22, 2014, however, the judge decided another evidentiary

hearing was necessary and scheduled one for October 14, 2014. On August 28, Black requested that the evidentiary hearing be delayed by two weeks. The magistrate granted the request, and the court held an evidentiary hearing and reserved decision on October 28, 2014.

II. Proceedings on the Superseding Indictment

Before the magistrate judge issued his report and recommendation, on December 12, 2014, the government filed a nine-count superseding indictment. The indictment charged Green, Black, and Rodriguez and Amilcar Ramos and John Coronado with the following in relation to the murder of Jabril Harper: Hobbs Act conspiracy (Count 1); Hobbs Act robbery and extortion (Count 2); kidnapping (Count 3); and use, brandishing, and discharge of a firearm (Count 5). Green, Black, Rodriguez, and Coronado were also charged with discharge of a firearm causing death (Count 4). Finally, the indictment charged Green and Black with the following in relation to the kidnapping of Morris Singer in January of 2010: Hobbs Act conspiracy (Count 6); Hobbs Act robbery and extortion (Count 7); kidnapping (Count 8); and possession and brandishing of a firearm (Count 9). The indictment was filed just days before the statute of limitations was set to run

on certain charges related to Morris Singer and made Green, Black, and Rodriguez eligible for the death penalty.¹

On January 13, 2015—two years and ten months after notifying the court that the government was considering seeking the death penalty—the government informed the parties and the court that it would not seek the death penalty against any defendant.

During arraignment proceedings for Green, Black, Rodriguez, and Ramos on the superseding indictment, Green expressed his frustration with the age of the case:

I mean, I [would] rather represent myself. Like this is unconstitutional. I don't feel like this is right. I feel like counsel is ineffective. This whole proceeding, like it's a five year . . . statute of limitation[s] on the Hobbs Act. I'm very abreast with the law. This whole proceeding seem[s] illegal and it's like it's nothing being happening, like it's no bail.

I've been incarcerated five years^[2] and then come up with this superseding indictment. Like I don't understand it and everybody—

¹ The government explains that it could not bring the additional charges until it secured the cooperation of Antoine Callahan, who pled guilty on February 14, 2014. We note that the government had secured Callahan's cooperation ten months prior to filing the superseding indictment.

² At the time of Green's statement, he had in fact been detained on federal charges for just under three years.

I mean, we put in for a speedy trial. We don't want to file no motions.

Gov't App'x at 229. Thereafter, the court held a hearing on February 3, 2015, to address Green's concerns and evaluate his relationship with counsel. The court relieved Green's counsel at the hearing and appointed new counsel two weeks later.

A. Pre-Trial Matters on the Superseding Indictment

On March 30, 2015, pre-trial briefing began anew with a motion from Green. Black and Rodriguez requested extensions, which the court granted, extending the deadline to file motions to May 1, 2015. The parties participated in three evidentiary hearings in June and July, and the court ordered post-hearing briefing due by September 28, 2015. After Black sought an extension of that due date, the court extended the deadline for all defendants' briefing to October 9, 2015. Green timely filed his briefing. Black and Rodriguez twice requested additional time, which caused a twenty-six-day delay. This was insufficient for Black, who requested even more additional time and ultimately filed his post-hearing brief on January 20, 2016.

Before the magistrate judge could consider the briefing, however, it needed to address several conflict-of-interest motions concerning Green, Ramos, and Coronado, which were not resolved until June 8, 2016.

Less than one month later on July 6, 2016, the magistrate judge issued a report and recommendation on the pre-trial motions. Upon a motion by Rodriguez, the court granted Defendant-Appellees a forty-three-day extension to file objections to the report and recommendation. Black and Rodriguez requested and received an additional four-week extension for filing objections until September 30, 2016. Green did not join in this request and timely filed his objections on September 2, 2016.³ Black and Rodriguez then requested an additional extension of time because they were being held far outside the district and their counsel were encountering difficulty consulting with them. The court accommodated the request, making objections due on November 30, 2016. But Black and Rodriguez, again citing in part counsel-access issues, requested an additional extension of time to file objections until January 30, 2017, which was

³ On September 23, 2016, counsel for Green died. Green was appointed replacement counsel six days later, without occasioning delay.

granted. Black and Rodriguez requested one last extension for their objections, and the court ordered their objections to be filed by March 1, 2017. Despite requesting an extension, Rodriguez filed his objections on January 30. Black filed his objections on February 27. After receiving a nine-day extension to file its response, the government responded to Defendants-Appellees' objections on March 29.

On April 26, 2017, the court resolved the parties' objections to the magistrate judge's report and recommendation. At a May 25, 2017, status conference, Green again objected to the delay in the proceedings, and the district court set trial for October 31, 2017.

B. Motion to Dismiss and Trial

Prior to trial, Defendants-Appellees moved to dismiss the superseding indictment on speedy trial grounds. The motion was fully briefed before the jury reached a verdict.

On November 7, 2017, the jury was sworn in and opening statements began. There were numerous delays during the trial, occasioned by attorney illnesses, late-breaking evidentiary disclosures, and several prolonged,

unexplained delays. Thus, the jury did not begin deliberating until January 5, 2018, almost two months later. On January 17, the jury returned a partial verdict that acquitted Green and Black of Counts 6-9—the charges related to the Singer kidnapping. On January 18, 2018, the jury hung on the remaining counts (Counts 1-5) related to the Harper murder.

By opinion dated February 8, 2018, the district court granted Defendants-Appellees' motion to dismiss Counts 1-5 (the Harper counts) on speedy trial grounds. *United States v. Green*, No. 12-CR-83S (1)(2)(3), 2018 WL 786185, at *1 (W.D.N.Y. Feb. 8, 2018). The district court denied reconsideration on February 20, 2018. The government timely appealed.

DISCUSSION

The Sixth Amendment guarantees that “the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. The right to a speedy trial has been deemed “fundamental” to our system of justice since its inception. *Klopfer v. North Carolina*, 386 U.S. 213, 223-26 (1967) (“The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution.”). Pursuant to the Sixth Amendment,

the court and the government owe an “affirmative obligation” to criminal defendants and to the public to bring matters to trial promptly. *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979). This burden weighs particularly heavily on the government, which “owe[s] the additional duty of monitoring the case and pressing the court for a reasonably prompt trial.” *United States v. Vispi*, 545 F.2d 328, 334 (2d Cir. 1976).

The right to a speedy trial primarily protects three interests of criminal defendants: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *United States v. Ewell*, 383 U.S. 116, 120 (1966) (“This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.”). In addition, the right to a speedy trial serves a societal interest in the fair and efficient operation of the criminal justice system and in limiting the costs to the

community of pretrial detention and its deleterious effects. *Barker*, 407 U.S. at 519-21.

Noting that “[i]t is . . . impossible to determine with precision when the right has been denied,” the Supreme Court shaped the now-familiar inquiry for whether a defendant’s right to a speedy trial has been violated in *Barker v. Wingo*. *Id.* at 521. We consider four factors: the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Id.* at 530. The Supreme Court emphasized in *Barker* that any individual factor cannot be a “necessary or sufficient condition” for a speedy trial violation but instead the factors are “related” and “must be considered together” in the context of the case. *Id.* at 533. Because we agree with the district court that the balanced factors reveal a speedy trial violation, we affirm the district court’s dismissal of the remaining charges against Black, Green, and Rodriguez.

I. Standard of Review

We review the dismissal of an indictment for a violation of the Sixth Amendment’s guarantee of a speedy trial for abuse of discretion, *United States v. Moreno*, 789 F.3d 72, 78 (2d Cir. 2015), though we have indicated that the abuse-

of-discretion standard authorizes broad review of a district court's balancing of the *Barker* factors, *United States v. Ghailani*, 733 F.3d 29, 44 (2d Cir. 2013) (“[I]n evaluating a defendant’s rights under the Speedy Trial Clause, a district court is in no better position than a reviewing court to undertake the required balancing.”). We review the district court’s factual findings for clear error. *See Moreno*, 789 F.3d at 78.

II. The Length of Delay Is Presumptively Prejudicial

The first factor, the length of delay, serves as a “triggering mechanism” that places a speedy trial violation on the table and requires us to balance the other factors. *Barker*, 407 U.S. at 530. Once a defendant demonstrates a “presumptively prejudicial delay” based on “the interval between accusation and trial,” then we can consider the reason for the delay, the assertion of the right, and prejudice. *Ghailani*, 733 F.3d at 43 (internal quotation marks omitted). Where a defendant establishes a particularly substantial delay, “the burden is upon the government to prove that the delay was justified and that [the defendant’s] speedy trial rights were not violated.” *New Buffalo Amusement Corp.*, 600 F.2d at 377.

Whether a delay is presumptively prejudicial “is necessarily dependent upon the peculiar circumstances of the case.” *Barker*, 407 U.S. at 530-31. Nonetheless, the Supreme Court has noted that a post-accusation delay approaching one year may be considered presumptively prejudicial, *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992), and that a delay of “well over five years [] was extraordinary,” *Barker*, 407 U.S. at 533. This Court has held that a delay of “four and one-half years is unquestionably substantial,” *New Buffalo Amusement Corp.*, 600 F.2d at 377, and has stated that a delay of nearly seven years is “extreme,” *Tigano*, 880 F.3d at 612.

Defendants-Appellees waited nearly five years and eight months to stand trial. The delay exceeds the “extraordinary” delay of over five years in *Barker* and the “unquestionably substantial” delay of four and one-half years in *New Buffalo Amusement Corp.* See *Barker*, 407 U.S. at 533; *New Buffalo Amusement Corp.*, 600 F.2d at 377. In fact, the government has conceded that the delay in this case was presumptively prejudicial, and the circumstances of the case affirm the propriety of that concession. While the present case evolved from a single-count indictment against three defendants to a nine-count indictment against five

defendants, the myriad delays here did not arise from any unique complexities in the case, and there is no suggestion that a case of this nature would require sixty-eight months of pre-trial litigation. We therefore easily find that the delay of five years and eight months in this case is substantial and presumptively prejudicial.

Our dissenting colleague, however, would hold that the delay in this case as to Counts 2 to 5 was substantially shorter than sixty-eight months and was not presumptively prejudicial. The dissent urges that the district court improperly calculated the length of delay by measuring the delay for *all* charges (that is, for both the charge in the original indictment and the additional charges in the superseding indictment) as the period between when Black, Green, and Rodriguez were first indicted and when they were tried. The district court's measure will not do for our dissenting colleague, who concludes that the time for measuring Defendants-Appellees' constitutional speedy trial claims as to Counts 2 to 5 starts with the date of the superseding indictment. Drawing upon double jeopardy jurisprudence from *Blockburger v. United States*, 284 U.S. 299 (1932), the dissent would hold that each charge brought on a superseding indictment that

requires proof of a different element than the charges in the original indictment marks the beginning of the period for assessing Defendants-Appellees' constitutional speedy trial claim for that charge. The dissent would therefore find that the district court erred in dismissing Counts 2 to 5.

We decline to adopt the dissent's view for three primary reasons. First, the government forfeited this argument by not raising it below or even in its briefs to this Court. Second, the dissent's advocacy for a *Blockburger*-type analysis rests on the flawed premise that the Sixth Amendment right to a speedy trial attaches only after formal charges are filed and thus that it is possible for the relevant time period for a speedy trial claim to attach separately to each charge that a defendant faces. And finally, we are convinced that importing *Blockburger* to determine when the relevant time period for a speedy trial claim begins to run on charges brought on superseding indictments would vitiate the bedrock purposes of the Sixth Amendment.

As a preliminary matter, were it not for the dissent, we would not here consider whether the superseding indictment marked the start of the relevant speedy trial time period for Counts 2 to 5 because the government did not

argue—or even suggest—that the December 2014 indictment was the relevant trigger for Defendants-Appellees’ speedy trial calculation for Counts 2 to 5.

Instead, the government accepted the district court’s timeframe and argued that the district court erred in allocating the responsibility for the delay between the parties and in finding that Defendants-Appellees had regularly asserted their rights to a speedy trial. “It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.” *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994) (citations omitted) (internal quotation marks omitted).

No manifest injustice would inure from deciding this case on the terms the government presented to us. This is the third speedy trial case the United States Attorney for the Western District of New York has argued before us in the last two years. *Tigano*, 880 F.3d 602; *Pennick*, 713 F. App’x 33. Given the familiarity with speedy trial cases in the United States Attorney’s Office in the Western District of New York, we conclude the government’s failure to raise this argument was most likely a strategic decision. But for the dissent, we would

decline to save Appellant from its own choices. We thus do not perceive manifest injustice as a consequence of our refusal to entertain an argument that we should revolutionize Sixth Amendment speedy trial jurisprudence by shifting the trigger of the relevant time period for a speedy trial.

More importantly, we disagree with the dissent's predicate conclusion that the Sixth Amendment is triggered only by formal charges and is therefore compatible with double-jeopardy jurisprudence. The dissent uses right-to-counsel jurisprudence to justify a traverse to the Fifth Amendment in adjudicating a speedy trial claim, but the right to counsel is fundamentally distinct from the right to a speedy trial. Binding precedent establishes that the right to a speedy trial can attach before any formal charge is filed, and we therefore conclude it would be inappropriate to assign each charge against Defendants-Appellees its own time period for a speedy trial based on the time of indictment.

The right to counsel and the right to a speedy trial attach at different points in a defendant's journey through the criminal justice system. The right to counsel engages "at or after the time that judicial proceedings have been initiated against

him whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (internal quotation marks omitted); *see also Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008) (“[T]he right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.”). The right to a speedy trial, in contrast, is engaged by “either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge.” *United States v. Marion*, 404 U.S. 307, 320 (1971). As a consequence, unlike the right to counsel, the right to a speedy trial attaches at arrest—not when formal charges are filed. *Dillingham v. United States*, 423 U.S. 64, 65 (1975).

In *Dillingham*, the Supreme Court reversed the Fifth Circuit when it calculated the speedy trial delay from the date the indictment was filed and thereby failed to account for the twenty-two months between the defendant’s arrest and the indictment. *Id.* at 64-65. The Supreme Court concluded that accounting was contrary to its precedent, which counseled, “Invocation of the

speedy trial provision . . . need not await indictment, information, or other formal charge.” *Id.* at 65 (internal quotation marks omitted) (quoting *Marion*, 404 U.S. at 321). The Court made the relevance of arrest emphatically clear: “[T]he Government constituted petitioner an ‘accused’ when it *arrested* him and thereby commenced its prosecution of him.”⁴ *Id.* at 65 (emphasis added).

⁴ The full passage in which this sentence appears elaborates the point:

The Court of Appeals for the Fifth Circuit affirmed, holding that under *United States v. Marion*, 404 U.S. 307 (1971), the 22-month “pre-indictment delay . . . is not to be counted for the purposes of a Sixth Amendment motion absent a showing of actual prejudice.” 502 F.2d 1233, 1235 (1974). This reading of *Marion* was incorrect. *Marion* presented the question whether in assessing a denial of speedy trial claim, there was to be counted a delay between the end of the criminal scheme charged and the indictment of a suspect not arrested or otherwise charged previous to the indictment. The Court held: “On its face, the protection of the (Sixth) Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.” 404 U.S. at 313. In contrast, *the Government constituted petitioner an “accused” when it arrested him and thereby commenced its prosecution of him.* *Marion* made this clear, *id.* at 320-21, where the Court stated:

“To legally arrest and detain, the Government must assert probable cause to believe the arrestee has

In *United States v. MacDonald*,⁵ the Supreme Court again made it clear that when a defendant is arrested, a criminal prosecution has begun, and a defendant's speedy trial right attaches. 456 U.S. 1, 7 (1982). The Court noted that while "[a] *literal* reading of the [Sixth] Amendment suggests that this right

committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina* [386 U.S. 213 (1967)]; see also *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969). So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

"Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge."

Dillingham, 423 U.S. at 64-65 (alterations in original) (emphases added) (citations edited) (quoting *Marion*, 404 U.S. at 313, 320-21).

⁵ In *MacDonald*, the Supreme Court was presented with the question of whether the time between when military charges were filed and when a later indictment containing civil criminal charges was filed based on the same conduct counted toward speedy trial delay. 456 U.S. 1, 3 (1982). The Court held that it did not. *Id.* at 9-10.

attaches only when a formal criminal charge is instituted and a criminal prosecution begins,” the right to a speedy trial properly attaches after the government has “legally arrest[ed] and detained” the defendant—in which case, a criminal prosecution implicating a defendant’s Sixth Amendment right to a speedy trial has begun. *Id.* at 6, 8 (emphasis added) (internal quotation marks omitted). That is true because “the speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial . . . [and] shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.” *Id.* at 8. Therefore, the Court reasoned, “[i]n addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim.” *Id.* at 7.

The Supreme Court has, in fact, repeatedly instructed that courts are required to count the time between a defendant’s arrest and the filing of an indictment in the duration of the relevant speedy trial time period. In *Doggett*, the Court said, “Once triggered by *arrest*, indictment, or other official accusation, . . . the speedy trial enquiry must weigh the effect of delay on the accused’s defense just as it has to weigh any other form of prejudice that *Barker*

recognized.” 505 U.S. at 655 (emphasis added). And in *Betterman v. Montana*, the Court held “that the [Sixth Amendment speedy trial] guarantee protects the accused from *arrest* or indictment through trial” 136 S. Ct. 1609, 1612 (2016) (emphasis added). The Supreme Court has therefore left little doubt that the right to a speedy trial is not mechanistically linked to the filing of formal charges but instead attaches at arrest.

The difference between the points at which the right to counsel and the right to a speedy trial attach reflects the substantive differences between the two Sixth Amendment protections. The Supreme Court has made it clear that “the right to counsel exists to protect the accused during trial-type confrontations,” while “the speedy trial right exists primarily to protect an individual’s liberty interest.” *United States v. Gouveia*, 467 U.S. 180, 190 (1984). Since a criminal defendant’s liberty interest is jeopardized by an arrest even prior to the defendant facing an indictment, the speedy trial right must attach in some cases before formal charges are filed. *See MacDonald*, 456 U.S. at 7.

Deployment of the *Blockburger* test, however, is only viable if the right to a speedy trial triggers at the time formal charges are filed. To apply the *Blockburger*

test to speedy trial claims with superseding indictments, a court would need to compare two or more indictments and determine whether the superseding indictment brought new charges that required additional elements to be proven in order to determine the duration of the relevant period of delay. To do so would require us to ignore the fact that a defendant's liberty interests had been compromised since the original indictment was filed. Giving each charge its own relevant time period for assessing delay could subject a criminal defendant to nearly ceaseless pre-trial detention due to superseding indictments, each time justified by a new charge with a new element. Instead of condoning this troubling consequence, we conclude that the mechanistic inquiry that *Blockburger* requires is at odds with the "amorphous" right to a speedy trial, the scope of which is attuned to the facts of each case rather than just to the charges the government brings. See *Barker*, 407 U.S. at 522, 531-32.

Third and finally, we disagree with the dissent because we conclude that the application of a *Blockburger* test to speedy trial cases with superseding indictments would vitiate the important interests that the Speedy Trial Clause protects. As we have noted, the Sixth Amendment protects defendants against

“oppressive pretrial incarceration,” seeks to minimize the accused’s “anxiety and concern” in the face of criminal charges, and “limit[s] the possibility that the defense will be impaired.” *Id.* at 532. But if we allowed the government to use an indictment as a placeholder while contemplating more severe charges based on the same conduct, as it did here, those protections would fall. For example, if we marked the beginning of the relevant period of delay in this case for all charges other than Hobbs Act conspiracy at the time of the second indictment, we would ignore the two years and nine months prior that Defendants-Appellees had been actually restrained, *cf. United States v. Sorrentino*, 72 F.3d 294, 297 (2d Cir. 1995) (determining whether the appellant was either arrested or subjected to substantial restrictions for purposes of answering a criminal charge), *overruled in part on other grounds by United States v. Abad*, 514 F.3d 271, 274 (2d Cir. 2008). Thus, not only does the Supreme Court’s instruction to count “the period between arrest and indictment” make such an accounting impermissible, *MacDonald*, 456 U.S. at 7, the practical application of this principle would require us to turn a blind eye to years of pre-trial incarceration that ultimately became oppressive.

No more easily could we ignore that the accused persons' anxiety and concern regarding the charges and their potential consequences persisted from the filing of the first indictment until the jury declined to convict Defendants-Appellees. Such anxiety was only increased, not initiated, when the government filed a superseding indictment. Lastly, where charges on a superseding indictment arise from the same conduct as the original indictment, allowing the superseding indictment to start a new relevant speedy trial time period for certain charges would only exacerbate our concerns about aging evidence. Witnesses' memories and availability are preciously limited, and adopting a framework that permits the government to indict by placeholder and prolong the time between the wrongful act and trial fails to fiercely guard a defendant's access to unimpaired evidence.

We therefore hold that the relevant interval for Defendants-Appellees' Sixth Amendment speedy trial claim is from the *first* indictment or arrest to trial. In so doing, we, like six of our sister circuits, do not apply the dissent's suggested *Blockburger* approach to calculate the relevant delay for a speedy trial violation where a superseding indictment is filed. *See United States v. Handa*, 892 F.3d 95,

106-07 (1st Cir. 2018) (measuring duration of delay from the first indictment where charges in the superseding indictment arose from the same occurrence and the government reasonably could have brought all charges at once); *United States v. Battis*, 589 F.3d 673, 679 & n.5 (3d Cir. 2009) (calculating delay as the period “between the [first] federal indictment . . . and the start of trial,” and holding “that the speedy trial right was not affected by the filing of a superseding indictment”); *United States v. Oriedo*, 498 F.3d 593, 595, 597 (7th Cir. 2007) (finding presumptive prejudice where “nearly three years passed from original indictment to trial” in a case with four superseding indictments); *United States v. Milhim*, 702 F.2d 522, 524-25 (5th Cir. 1983) (starting speedy trial time period upon filing of original indictment despite superseding indictment being filed four months later); *see also United States v. Black*, 830 F.3d 1099, 1103–09, 1112 (10th Cir. 2016) (calculating speedy trial delay where parties agreed on length of delay by combining “the three periods during which an indictment was pending against Black”); *United States v. Jeanetta*, 533 F.3d 651, 653-54, 656 (8th Cir. 2008) (counting, without discussion, delay from original indictment until trial despite superseding indictment nine months after original indictment).

III. Significant Delay Is Attributable to the Government

The second factor, the reason for the delay in bringing the defendant to trial, asks us to consider whether the delay was deliberate, neutral, or valid. *Barker*, 407 U.S. at 531. Even where the delay at issue is neutral, we must determine who bears responsibility for the delay. *E.g.*, *New Buffalo Amusement Corp.*, 600 F.2d at 377-78 (considering whether the government or defendants were responsible for numerous delays); *see also, e.g., Tigano*, 880 F.3d at 613 (engaging in similar analysis). Nonetheless, we routinely count neutral delay “such as negligence or overcrowded courts” against the government because “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Barker*, 407 U.S. at 531; *see also Vispi*, 545 F.2d at 334 (“We have repeatedly emphasized that affirmative action by the government in bringing cases to trial is mandated and that it cannot escape this duty on the ground that the delay is for institutional reasons.”). Thus, “[a]lthough negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused’s defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution

once it has begun.” *Doggett*, 505 U.S. at 657. “[O]ur toleration of such negligence varies inversely with its protractedness and its consequent threat to the fairness of the accused’s trial.” *Id.* (citation omitted).

The district court concluded that there was no evidence of deliberate delay but there was significant neutral delay. The court also considered some delay to be valid given the complexity of the case. We agree with the district court that much of the delay in this case was neutral but properly charged to the government. The neutral delay we charge to the government largely emanates from: (1) the government’s delayed decision on whether to seek the death penalty; (2) protracted litigation over missing evidence; (3) the government’s decision to file the superseding indictment just before the statute of limitations on certain charges was set to run; and (4) the government’s failure to produce witnesses and Defendants-Appellees at court proceedings. Defendants-Appellees, particularly Black and Rodriguez, are also charged with some delay from filing objections to the magistrate judge’s report and recommendation, though some of this delay is tempered by the fact that attorney–client access issues occasioned it.

A. Delay from the Government's Death-Penalty Decision

The government informed the court that the prosecution might seek the death penalty as early as March 7, 2012. The district court concluded that despite the prominence of a possible death sentence in the pre-trial proceedings, the government took no action for over two years to decide whether to pursue the death penalty. The government urges us to overturn this conclusion, but it has not provided any indication that it took more action on the issue than the district court gave it credit for. Indeed, while we understand that whether to seek the death penalty is a complex and appropriately deliberative process, the government has not explained why this particular deliberation lasted nearly three years.

The government urges that its deliberations were not the source of delay in this case but instead that, prior to the superseding indictment, the parties were prepared to proceed as if the death penalty were not on the table. The parties may have been prepared to proceed on the single-charge indictment as of December 2012, but the death-penalty decision was explicitly noted as the reason for numerous extensions in the early months of the case. From April 2012 until

December 2012 (when it became clear that the prosecutor's predictions as to when the government would receive a death-penalty determination were woefully inaccurate), Defendants-Appellees repeatedly sought extensions to avoid filing motions that would be substantively useless if the prosecution sought the death penalty. Even the magistrate judge explicitly recognized that the government's death-penalty deliberations were the driving force behind the extensions. Gov't App'x at 157 (after vacating briefing schedule due to pending death-penalty decision, setting the schedule "to accommodate what is now some 60-day timeline"). And even still, the progress made in prosecuting the original indictment was substantially compromised by the late-breaking superseding indictment, which required new rounds of motion practice. The government's attempts to minimize its responsibility for the delay are unavailing.

While we agree that the looming death-penalty decision cannot properly charge the government with the entirety of the two years and ten months of delay before the government filed notice of its intent not to seek the death penalty, the government bears the burden of the delay between April 2012 and December 2012 occasioned by the death-penalty decision and can properly be

credited with some delay produced by the continuing threat that the proceedings would ultimately turn capital and nullify the work done to date.

B. Delay Arising from Litigation over Missing Photo Arrays

The district court also attributed about five months of delay to the government for its failure to efficiently manage its case, arising largely from protracted litigation about photo arrays that were used to identify Defendants-Appellees and had gone missing. Beginning in December 2012 and continuing until the last of the missing arrays was found in April of 2014, the photo arrays were a central focus of pre-trial litigation, and the photo array used to identify Rodriguez alone accounted for at least five months of delay between February and June of 2014.

We find this failure particularly egregious. The government lost a piece of evidence for over two years after the indictment was filed, only for the array to be found in the home of a retired Buffalo police detective who was not even involved in police identification efforts. We find no difficulty in attributing to the government a five-month delay based on the time spent litigating the photo

arrays and the government's failure to produce key evidence and witnesses related to the photo arrays.

C. Delay Occasioned by the Late-Breaking Superseding Indictment

The government's decision to file a superseding indictment just as the statute of limitations was about to run on some charges and two years and nine months after it filed the original indictment created significant additional delay.⁶ Effectively, between March of 2012 and January of 2015, Defendants-Appellees were waiting to find out what type of case this would become: for almost three years it was unclear what the ultimate charges against Defendants-Appellees would be and whether the government would pursue the death penalty. Once the dust settled, much of the pre-trial litigation prior to the superseding indictment needed to be restarted because the superseding indictment added

⁶ The dissent would also exclude the government's "investigative delay" in bringing the superseding indictment. While we concur that it is good practice for a prosecutor to wait to bring a superseding indictment until she is satisfied that a suspect can be shown to be guilty beyond a reasonable doubt, the dissent offers no reason that this investigative delay is not properly counted as neutral delay attributed to the government for purposes of the Speedy Trial Clause. *See Barker*, 407 U.S. at 531 (noting that a "neutral reason" for delay "should be weighted less heavily but nevertheless should be considered").

new charges related to the conduct that Defendants-Appellees were already defending against, brought charges regarding completely unrelated conduct, and made Defendants-Appellees eligible for a death sentence.⁷ While some of the delay in litigating pre-trial issues anew is attributable to Defendants-Appellees' requests for extensions, the fact that there was a new round of pre-trial litigation *at all* is attributable to the government's poor case management.

D. Delay from the Government's Failure to Produce Defendants-Appellees and Witnesses and Extension Requests

The government's total delay must also recognize smaller "neglects" that nonetheless extended the case. *Tigano*, 880 F.3d at 606. Most significantly, the government brought proceedings to a standstill between October 2, 2013, and December 3, 2013. During that time, the government requested a postponement of an evidentiary hearing—from October 2 to November 6—to accommodate the prosecutors' other commitments (thirty-five days of delay). But on November 6, when the hearing was to go forward, the prosecution did not produce a key

⁷ We of course acknowledge that the government finally issued its "no-see" decision approximately one month after it filed the superseding indictment. Nonetheless, the new charges meant that Defendants-Appellees faced a life sentence.

witness, causing another twenty-seven-day delay. On the rescheduled date for the evidentiary hearing, the government failed to produce Black (resulting in a seventeen-day delay). At the parties' next attempt to hold a hearing, the government again failed to produce Black, and after that misstep, the hearing did not go forward for another sixty-one days. All told, the delay in holding this single evidentiary hearing totaled almost five months. Added to the government's extension requests and other failures to produce Defendants-Appellees, these small delays amount to five-and-a-half months of delay attributable to the government.

E. Delays Accrued from Defendants-Appellees' Extension Requests

Defendants-Appellees also shoulder the blame for some of the five years and eight months between when the original indictment was filed and the start of trial. Two delays in Defendants-Appellees' filings are particularly noteworthy here. First, Defendants-Appellees significantly delayed post-evidentiary-hearing briefing in the fall of 2015. Submissions were originally due by September 28, 2015, but Defendants-Appellees sought and received a ten-day extension to file. Green timely filed his post-hearing brief, but Black and Rodriguez sought and

received a two-week extension. Upon Rodriguez's motion, the magistrate judge granted Black and Rodriguez another two-week extension. Black and Rodriguez sought and received yet another extension of the post-hearing briefing deadline, this time postponing the due date by sixty-four days. Rodriguez then filed his post-hearing submission, but Black did not file his submission until January 20, 2016—a full thirteen days after the deadline. Thus, while Green caused a brief, ten-day delay, Black and Rodriguez were significantly more dilatory.

Defendants-Appellees also requested numerous extensions to file objections to the magistrate judge's report and recommendation. Black, Green, and Rodriguez all requested a forty-four-day extension for submitting their objections, and thereafter Green timely filed. Black and Rodriguez, however, each received twenty-eight extra days to file their objections due to their attorneys' scheduling conflicts. Thereafter, Black and Rodriguez requested an additional sixty-day extension, citing attorney–client access issues caused by Black and Rodriguez being held outside the district. As that extension expired, they sought and received a second sixty-day extension, again in part due to attorney–client access issues. Rodriguez and Black also sought one final

extension of thirty days, which Rodriguez ultimately did not use. While we count these delays against Black and Rodriguez, we attribute little weight to delays that Defendants-Appellees incurred due to institutional considerations, such as Black and Rodriguez being held in distant federal facilities. *See Tigano*, 880 F.3d at 612-13 (noting the “spectrum of weights” to be applied to different delays).

F. The Government Is Responsible for Significant Delay

In sum, we agree with the district court that a significant portion of the delay is attributable to the government. The government bungled its production of documents used in identification procedures, failed to produce Defendants-Appellees and witnesses, and poorly managed the case against Defendants-Appellees. Significantly, the government’s inaction and subsequent indecision over whether to seek the death penalty loomed over the case for two years and ten months, and just when the case was nearly ready for trial, the government superseded the indictment, effectively scrubbing two years and nine months of belabored pre-trial litigation.

IV. Defendants-Appellees Regularly Asserted Their Rights to a Speedy Trial

On the third *Barker* factor, we consider Defendants-Appellees' assertions of their rights to a speedy trial. *Barker*, 407 U.S. at 531-32. This inquiry is closely related to the other three inquiries—we expect a defendant's assertion of his right to a speedy trial “will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences.” *Id.* at 531. We have previously noted that this inquiry is a fluid one that concerns itself with whether the government and the court were “put on notice” that a defendant has asserted his right to a speedy trial. *New Buffalo Amusement Corp.*, 600 F.2d at 378; *see also Tigano*, 880 F.3d at 617-18.

The district court concluded that Defendants-Appellees frequently expressed their desire for a speedy trial. We agree. Defendants-Appellees first raised their preference to “mov[e] the case along to the extent possible” in August of 2012 at a status conference held to determine how best to proceed in the absence of the promised superseding indictment. Gov't App'x at 156-57. Defendants-Appellees again asserted their desire for a speedy trial and voiced

their concerns that a delayed death-penalty decision might interfere with a speedy trial at a status conference on December 4, 2012. In the midst of protracted litigation over the photo arrays, Defendants-Appellees for a third time, on April 18, 2014, noted that they were preserving their right to a speedy trial. On January 21, 2015, when Defendants-Appellees were arraigned on the superseding indictment, Green raised his concerns about the age of the case directly with the court. Speaking for himself, Green stated, “This whole proceeding seem[s] illegal and it’s like it’s nothing being happening, like it’s no bail. I’ve been incarcerated five years and then come up with this superseding indictment [W]e put in for a speedy trial.” Gov’t App’x at 229. He reiterated, “We scheduled for a trial after 71 days, that’s what we want a speedy trial, all three of us, we [are] all in concurrence with that” Gov’t App’x at 229. The court ultimately even held a separate conference with Green to discuss the issue and Green’s relationship with his attorney. Defendants-Appellees’ invocation of the right continued over the next two years, as they raised concerns with pre-trial delay on June 3, 2015, and Green objected to the delay of trial yet again at a May 25, 2017, status conference.

These assertions, standing on their own, undoubtedly put the government on notice that there would be consequences if Defendants-Appellees' speedy trial rights were not protected. *Tigano*, 880 F.3d at 617. While the government on appeal makes much of the district court's references to Defendants-Appellees' motions for severance, we find the aforementioned assertions of their speedy trial rights sufficient to preserve the right even absent consideration of the severance motions. The fact that Defendants-Appellees also sought severance does not affect our analysis of the direct assertions of their rights. Thus, since Defendants-Appellees raised speedy trial concerns frequently and explicitly, we conclude that they have satisfied their obligation to preserve their right, and this factor weighs in their favor.

V. The Delay Was Prejudicial to Defendants-Appellees

We assess the prejudice to criminal defendants "in the light of the interests . . . the speedy trial right was designed to protect" —namely, "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. While prejudice to the defense is "the most serious" of

these interests, we also consider the “dead time” defendants spend in pre-trial detention, the effect of detention on a defendant’s ability to “prepare his defense,” and the detrimental effect of “living under a cloud of anxiety, suspicion, and often hostility.” *Id.* at 532-33. “Affirmative proof of impairment of the defense is not required in order to find a Sixth Amendment violation.” *Tigano*, 880 F.3d at 618; *see also Doggett*, 505 U.S. at 655 (“[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim.”). To the contrary, “we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” *Doggett*, 505 U.S. at 655.

We agree with the district court that a significant portion of the prejudice in this case arises from the government’s delayed death-penalty decision. In addition to the psychological effects of pre-trial custody, Black, Green, and Rodriguez were forced for two years and ten months to worry over whether the government would seek not just their liberty, but their lives. The magnitude of the anxiety and concern incurred by this decision is great, and this consideration

weighs heavily in our determination that the delay here prejudiced Defendants-Appellees.

The prejudice against Defendants-Appellees did not end there, however. Indeed, they were forced to endure five years and eight months of pre-trial detention, time that the Supreme Court has noted “is simply dead time.” *Barker*, 407 U.S. at 533. The sheer length of time at issue here makes this pre-trial detention “egregiously oppressive.” *Tigano*, 880 F.3d at 618.

We recognize that this consideration weighs less strongly in favor of Black, who was already in state custody serving a lengthy sentence when he was charged in this case. Black nonetheless argues that he was prejudiced by the extensive pre-trial detention because if the case had proceeded more quickly, he could have served his state sentence concurrently with his federal sentence. Although Black is correct that “[j]udges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings,” *Setser v. United States*, 566 U.S. 231, 236 (2012), we need not hazard a guess as to whether the

district court would have imposed a concurrent sentence on Black in this case or whether Black was realistically concerned that a trial delay would shorten the portion of his state sentence to which a federal sentence could run concurrently in order to find that the delay prejudiced Black. This is because Black faced the oppressive weight of the death-penalty decision, making the lengthy pre-trial time served concurrently with his state sentence particularly harsh.

We are also cognizant that Defendants-Appellees have not obviously suffered prejudice to their defense—indeed, they were acquitted on the charges related to Morris Singer, and the jury hung on the charges related to Jabril Harper. However, the delay in this case did present obstacles for the defense to overcome. First, the government's decision to file a superseding indictment two years and nine months into the case forced Defendants-Appellees to restructure their defense strategy while living with the decisions they had made in litigating the one-count indictment for years. Thus, facing a drastically changed case against them, Defendants-Appellees' defense options were constrained by their prior choices in defending against a significantly lighter indictment. Second, particularly later in the pre-trial detention, Black and Rodriguez were housed far

from their counsel,⁸ making it difficult for them to file objections to the magistrate's report and recommendation and prolonging their already extraordinary detention. As such, we recognize that prejudice to building a meritorious defense was modest, but the consequences of an extensive delay between indictment and trial nonetheless exacerbated the anxiety of the accused and impacted the defense.

VI. The Factors Balance in Favor of Dismissal on Speedy Trial Grounds

Bearing heavily in mind the sheer length of the time between indictment and trial, the neglected death-penalty decision, and the tardy superseding indictment, we conclude that the district court correctly dismissed the remaining counts on speedy trial grounds. The government bears responsibility for making

⁸ While Black would have been detained in state custody if not for this case, because he was placed in federal custody for a portion of the pretrial proceedings, he was housed in the Northeast Ohio Correctional Center. Motion for an Extension of Time at 3, *United States v. Green*, No. 1:12-cr-83 (W.D.N.Y.), ECF No. 326; Motion for an Extension of Time at 3, *Green*, No. 1:12-cr-83, ECF No. 351. He had originally been serving his state sentence in Cossackie, New York. Petition & Order for Writ of Habeas Corpus Ad Prosequendum at 1, *Green*, No. 1:12-cr-83, ECF No. 2. Thus, these attorney-access issues were a unique feature of Black's time in federal custody.

no effort to resolve the death-penalty question for two years, for waiting until the eve of the expiration of the statute of limitations to file a superseding indictment, for losing key evidence, and for repeatedly failing to produce Defendants-Appellees at court proceedings. Defendants-Appellees' requests for scheduling accommodations pale in comparison to these delays. Defendants-Appellees made known their desire to proceed expediently to trial throughout the litigation, but these repeated requests failed to spur the government into upholding its "affirmative duty" to bring the case to trial without "unnecessary delay." *Tigano*, 880 F.3d at 613. And while Defendants-Appellees successfully avoided a guilty verdict in this case, they did so at the cost of five years and eight months of incarceration and at the psychological expense of uncertainty over whether they would face the death penalty for two years and ten months. Defendants-Appellees' rights to a speedy trial were violated and dismissal is appropriate.

CONCLUSION

Our holding today reiterates the affirmative obligation of both the court and the government to bring criminal defendants to trial promptly. *New Buffalo*

Amusement Corp., 600 F.2d at 377. The court and government here made Black, Green, and Rodriguez await trial for five years and eight months. For two years and ten months of that extraordinary time, the government dangled the prospect of a capital prosecution. The Sixth Amendment right to a speedy trial requires significantly more vigilance from the court and the government than was demonstrated here. Accordingly, for the reasons given above, the judgment of the district court is **AFFIRMED**.⁹

⁹ The grounds for the cross-appeals by Green and Rodriguez were rejected by this Court's order of May 16, 2018, denying Green's request for immediate pre-trial release without conditions and Rodriguez's request for less restrictive conditions of release. No. 18-574, ECF No. 39; No. 18-548, ECF No. 46. Accordingly, the cross-appeals, Nos. 18-574 and 18-548, are dismissed as moot.