

NOTES

The Better Way to Stop Delay: Analyzing Speedy Sentencing Claims in the Wake of *Betterman v. Montana*

In Betterman v. Montana, the U.S. Supreme Court held that the Sixth Amendment's speedy trial right terminates after a defendant's conviction. In dicta, the Court suggested that a defendant might pursue a constitutional claim of undue sentencing delay under the Due Process Clause. Lower courts have generally embraced this suggestion. Still, the Betterman Court's limited holding left certain questions open: What analytical framework is appropriate to address due process claims of delay between conviction and sentencing? And if a court finds that sentencing was unduly delayed, what is the proper relief?

After Betterman, some courts have analyzed postconviction delay using Barker v. Wingo's four factors: length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. Other courts have used United States v. Lovasco's two-prong test: the defendant must demonstrate that he suffered actual prejudice and the government delayed in bad faith. This Note advocates for adopting the more flexible balancing test established by Barker but argues that Barker's traditional remedy for undue delay (dismissal of charges) is inappropriate in the sentencing context. Instead, this Note proposes a default remedy in which a defendant's sentence is reduced by the amount of delay if a speedy sentencing violation is proven.

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INTRODUCTION

On April 19, 2012, Brandon Betterman pleaded guilty to bail jumping.¹ The court ordered him to return to the local jail to await his sentencing hearing.² And indeed, Betterman waited—it took fourteen months before he was sentenced.³

1. Brief for Petitioner at 4, *Betterman v. Montana (Betterman II)*, 136 S. Ct. 1609 (2016) (No. 14-1457).

2. *Id.*

3. *Id.*

After his sentencing, Betterman appealed, asserting that the delay between his conviction and sentencing violated his Sixth Amendment right to a speedy trial.⁴ At the time, state and federal courts disagreed as to whether the speedy trial right applied at the sentencing phase.⁵ Unfortunately for Betterman, the Montana Supreme Court held that the right does not extend after conviction.⁶ The U.S. Supreme Court subsequently granted certiorari in *Betterman v. Montana* to resolve the split.⁷ The Court agreed with Montana, holding that the Sixth Amendment’s Speedy Trial Clause ceases to apply after a defendant’s conviction or guilty plea.⁸ The Court emphasized that the only relief available for a Speedy Trial Clause violation—automatic dismissal of a defendant’s charges—would be inappropriate for undue sentencing delay.⁹

Justice Ginsburg, writing for a unanimous Court, suggested in dicta that a defendant might nevertheless be afforded constitutional relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁰ The vast majority of courts addressing postconviction delay after *Betterman* have accordingly employed some form of due process analysis.¹¹ Yet, because *Betterman* only presented a Speedy Trial Clause question, the Court’s limited holding did not conclude which framework would apply to constitutional claims alleging postconviction delay¹² or what the proper relief would be for delayed sentencing.¹³

4. *State v. Betterman (Betterman I)*, 342 P.3d 971, 972 (Mont. 2015); see U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

5. See *Betterman II*, 136 S. Ct. at 1613 & n.1 (acknowledging a court split).

6. *Betterman I*, 342 P.3d at 978.

7. *Betterman II*, 136 S. Ct. at 1613.

8. *Id.*

9. *Id.* at 1615.

10. See *id.* at 1612 (“For inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.”); see also *Figueroa v. Buechele*, No. 15-2972 (CCC), 2016 WL 3457013, at *4 (D.N.J. June 23, 2016) (recognizing as dicta the *Betterman* Court’s suggestion that relief might be sought via a due process claim).

11. See *infra* notes 167–172 and accompanying text (summarizing and collecting postconviction-delay cases after *Betterman*).

12. See *Betterman II*, 136 S. Ct. at 1618 (Thomas, J., concurring) (“We have never decided whether the Due Process Clause creates an entitlement to a reasonably prompt sentencing hearing. Today’s opinion leaves us free to decide the proper analytical framework to analyze such claims if and when the issue is properly before us.”); *id.* at 1619 (Sotomayor, J., concurring) (noting the question of the “appropriate test for such a Due Process Clause challenge . . . is an open one”).

13. The Court was clear that automatic dismissal was an inappropriate remedy; however, the majority did not propose an alternative remedy. See *id.* at 1615 (majority opinion) (noting that the

Justice Sotomayor's concurrence—and implicitly the majority opinion as well¹⁴—proposed analyzing undue sentencing delay under the four-factor balancing test from *Barker v. Wingo*, which contemplates “the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant” when scrutinizing delays between a defendant's arrest or charge and trial.¹⁵ After *Betterman*, several courts have applied *Barker* to Due Process Clause claims of postconviction delay.¹⁶ Other courts,¹⁷ however, have looked to *United States v. Lovasco*, which provides a strict two-prong test to analyze Due Process Clause claims of precharge delay—the court must consider if the reason for delay violates “fundamental conceptions of justice,” and the defendant must show actual prejudice as a result of the delay.¹⁸ Today, courts are generally split over whether the *Barker* factors or the *Lovasco* test should apply to delayed sentencing claims.¹⁹ This Note addresses the split by advocating for adoption of the *Barker* factors to analyze sentencing delay but with a modified remedy scheme that is more appropriate for sentencing than dismissal of the defendant's charges, which *Barker* traditionally requires.

Part I provides background on the criminal prosecution process and describes why sentencing delay is troubling.²⁰ Part II then explores how the pre-*Betterman* split mirrors the post-*Betterman* divide over *Barker* versus *Lovasco*—courts that applied the Speedy Trial Clause used *Barker*, while courts that rejected the Speedy Trial Clause often

“sole remedy” for a Speedy Trial Clause violation is dismissal of charges and that dismissal would be an unjustified windfall for a speedy sentencing violation).

14. See *infra* notes 165–166 and accompanying text (explaining how Justice Ginsburg listed in a footnote the four factors from *Barker v. Wingo*, 407 U.S. 514 (1972), as reasonable considerations for sentencing delay but did not explicitly cite or endorse *Barker* by name); see also *Betterman II*, 136 S. Ct. at 1618 n.12 (suggesting in a footnote that courts could consider the “length of and reasons for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice”).

15. *Betterman II*, 136 S. Ct. at 1619 (Sotomayor, J., concurring); *Barker*, 407 U.S. at 529–30; see *United States v. Marion*, 404 U.S. 307, 321 (1971) (explaining that the speedy trial right attaches upon arrest or charge, but not before).

16. See cases cited *infra* notes 168–169.

17. See cases cited *infra* notes 168–169.

18. See 431 U.S. 783, 788–90 (1977) (“[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.”); *id.* at 790–91 (“It requires no extended argument to establish that prosecutors do not deviate from ‘fundamental conceptions of justice’ when they defer seeking indictments until they have probable cause to believe an accused is guilty.”); see also *infra* Section II.B.2 (analyzing how courts have employed the *Lovasco* factors).

19. See 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(f) (4th ed. 2015 & Supp. 2017–2018) (noting that some courts following *Betterman* have employed the *Barker* factors while others have used *Lovasco*).

20. See *infra* Part I.

employed a *Lovasco* due process analysis.²¹ Accordingly, courts' pre-*Betterman* rationale is particularly salient to understanding the current division between these two approaches. Part III discusses the merits and disadvantages of the *Barker* and *Lovasco* frameworks and their respective remedies, and it considers how each framework's original purpose applies to postconviction delay. In Part IV, this Note proposes that the *Barker* factors be used to analyze sentencing delay due process claims. While the *Barker* test should be adopted, courts should adopt a less aggressive remedy. Specifically, this Note advocates that courts should, as a default, reduce a defendant's sentence by the amount of delay if a speedy sentencing violation is proven.

I. A CAUSE FOR CONCERN: WHY UNDUE DELAY IN SENTENCING MATTERS

Sentencing delays happen for a number of reasons, and defendants' protections against undue delay vary in each phase of their criminal prosecution. Section I.A describes each phase and the corresponding protections against delay. It also explains why bifurcated proceedings are outside the scope of the sentencing proceedings to which *Betterman* and this Note pertain. Section I.B explores why delay is detrimental to both defendants' and society's interests.

A. Protections Against Delay in Criminal Prosecutions

As *Betterman* succinctly explains, criminal prosecutions unfold in three phases.²² In each phase, the suspect or defendant has at least some protection against delay.²³ In the first phase, the government decides whether a suspect should be arrested and charged.²⁴ The Supreme Court held in *Lovasco* that the Due Process Clause provides suspects with constitutional protection against undue prosecutorial delay.²⁵ Both the Fifth and Fourteenth Amendments' Due Process Clauses provide that individuals shall not be deprived of "life, liberty, or property, without due process of law."²⁶ If a defendant's due process

21. See *infra* Part II.

22. *Betterman II*, 136 S. Ct. 1609, 1613 (2016).

23. *Id.*

24. *Id.*

25. See *United States v. Lovasco*, 431 U.S. 783, 789, 795 & n.17 (1977) (explaining that the Due Process Clause protects against "oppressive delay," which the defendant can demonstrate by proving actual prejudice that resulted from unreasonable delay by the prosecutor); see also *Betterman II*, 136 S. Ct. at 1613 (citing *Lovasco*).

26. U.S. CONST. amend. V (pertaining to the federal government, providing that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV, § 1

rights are violated, the court should try to “counteract any resulting prejudice” proven by the defendant.²⁷

Second, once the suspect is arrested or charged, he must be tried as a criminal defendant or strike a plea deal with the prosecutor; during this phase, the defendant is presumed innocent until proven guilty.²⁸ As the Supreme Court explained in *Barker*,²⁹ the Sixth Amendment’s Speedy Trial Clause protects defendants from delay between arrest or charge and trial.³⁰ If a court finds a Speedy Trial Clause violation, the defendant’s charges must be dismissed.³¹ The Supreme Court has acknowledged that dismissal is an “unsatisfactorily severe remedy,”³² but the Court has nevertheless upheld this remedy because the speedy trial right is unique.³³ Unlike other Sixth Amendment trial guarantees, a new trial would not cure a Speedy Trial Clause violation, because it would not negate—in fact, it would only worsen—the emotional stress and postponed rehabilitation associated with trial delays.³⁴

Third, the defendant’s conviction concludes the trial phase, and the defendant enters the sentencing phase.³⁵ In the federal system, the average time elapsed between conviction and sentencing is just over

(applying due process to the states, prohibiting them from “depriv[ing] any person of life, liberty, or property, without due process of law”).

27. *Burkett v. Cunningham* (*Burkett I*), 826 F.2d 1208, 1222 (3d Cir. 1987).

28. *See Betterman II*, 136 S. Ct. at 1613 (“Once charged, the suspect stands accused but is presumed innocent until conviction upon trial or guilty plea.”).

29. *See Barker v. Wingo*, 407 U.S. 514, 515 (1972) (“[A] speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution . . .”); *see also* *United States v. Marion*, 404 U.S. 307, 321 (1971) (holding that the speedy trial right commences upon arrest or charge).

30. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); *see Betterman II*, 136 S. Ct. at 1613–14 (first citing *Barker*, 407 U.S. at 532–33; and then citing *Marion*, 404 U.S. at 320) (explaining that the Speedy Trial Clause protects the period from arrest or charge through conviction and protects defendants from the risks of delayed trial).

31. *See Betterman II*, 136 S. Ct. at 1615 (“The sole remedy for a violation of the speedy trial right [is] dismissal of the charges . . .” (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973); *Barker*, 407 U.S. at 522)).

32. *Barker*, 407 U.S. at 522.

33. *See Strunk*, 412 U.S. at 439–40 (explaining that the denial of the speedy trial right is unlike the denial of other Sixth Amendment guarantees and confirming that dismissal must remain the only remedy for a speedy trial violation).

34. *See id.* at 439 (describing how denying the Sixth Amendment rights to an impartial jury or public trial, for example, could be remedied by a new trial but the same is not true of the speedy trial right).

35. *See Betterman II*, 136 S. Ct. at 1613 (holding that the speedy trial right “detaches upon conviction, when this second stage ends”). A defendant’s conviction may be by trial or by guilty plea. *See id.* (explaining that the presumption of innocence lasts “until conviction upon trial or guilty plea”).

three months.³⁶ The defendant is often incarcerated during this time.³⁷ Much of the wait can be attributed to the creation of the presentence report, which is prepared by the probation office after the defendant's conviction.³⁸ The report includes detailed information about the defendant's personal and criminal history, recommends an appropriate type and length of punishment, and may provide information needed to calculate restitution.³⁹ In fashioning a sentence, the court may consider an array of information, including the presentence report, trial evidence, victim statements, defendant testimony, witness testimony, and other submissions by the defense and prosecution.⁴⁰ In contrast to the beyond a reasonable doubt standard at trial, the burden of proof for the sentencing hearing is the lower preponderance of the evidence standard.⁴¹

After conviction and during the sentencing phase, the defendant is no longer presumed innocent.⁴² Consequently, *Betterman* held, the defendant does not enjoy a postconviction speedy trial right, because the Speedy Trial Clause only protects the accused.⁴³ Still, defendants retain some protection against sentencing delay.⁴⁴ Justice Ginsburg pointed out that defendants can often seek statutory relief under applicable federal or state rules of criminal procedure.⁴⁵ Moreover, as prefaced earlier, the *Betterman* Court suggested that the Due Process

36. See *id.* at 1616 n.8 (citing the U.S. solicitor general's claim that the "the median time between conviction and sentencing in 2014 was 99 days").

37. See *id.* at 1617 n.9 (explaining that there is presumption against bail in this circumstance but that the sentencing court may credit the defendant with time served).

38. See *id.* at 1617–18, 1618 n.8.

39. See LAFAVE ET AL., *supra* note 19, § 26.5(b) (explaining that the report may include an interview with the defendant; include information about the defendant's prior criminal record; state other information about the defendant, such as employment, education, family, finances, and medical history; state information about the victim; make recommendations regarding probation or imprisonment and any conditions that should be imposed; and, under a presumptive-sentencing system, respond to certain offense characteristics, such as providing information sufficient for the court to order restitution). The defendant may usually request correction of the report before it is finalized. See *id.* § 26.5(c) (observing that it used to be standard to keep the report from the defendant but that jurisdictions now more commonly disclose them).

40. *Id.* § 26.5(b).

41. See *id.* § 26.4(h) ("[T]he Court has upheld as consistent with due process a burden of proof for facts used in setting the sentence within the range authorized for the offense of conviction that is lower than the burden of proof applied when determining elements of an offense.").

42. *Betterman II*, 136 S. Ct. at 1618 (explaining that conviction "terminates the presumption of innocence").

43. *Id.* at 1614–15, 1618 (determining, based on Court precedent, history, and the text of the Speedy Trial Clause, that the speedy trial right only protects the accused and "does not extend beyond conviction").

44. *Id.* at 1617.

45. *Id.* at 1617 & n.10 (asserting that "[t]he primary safeguard comes from statutes and rules" and collecting examples of state provisions similar to the federal rule); see also FED. R. CRIM. P. 32(b)(1) ("The court must impose sentence without unnecessary delay.").

Clause could provide a constitutional “backstop” to protect defendants against undue sentencing delay.⁴⁶

Although *Betterman* held that the speedy trial right terminates at the end of the trial phase,⁴⁷ the Court reserved the question of “whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined.”⁴⁸ Such bifurcated proceedings function more like part of a defendant’s trial than do sentencing proceedings after conviction.⁴⁹ Importantly, facts that raise the sentencing range, except for the fact of a prior conviction, must be treated as elements of a greater offense and proved beyond a reasonable doubt.⁵⁰ Because the standard of proof is higher for these sentence-raising facts than for facts at a sentencing hearing,⁵¹ more factual development may be necessary. Relatedly, a court in a bifurcated proceeding cannot place as much reliance on the presentence report; while a sentencing court may credit information included in the presentence report, even hearsay,⁵² a sentence-raising fact cannot be

46. *Betterman II*, 136 S. Ct. at 1617.

47. *Id.* at 1613 (holding that the speedy trial right “detaches upon conviction, when this second stage ends”).

48. *Id.* at 1613 n.2; *see id.* at 1618 (Thomas, J., concurring) (emphasizing that the question remained open).

49. *See* LAFAVE ET AL., *supra* note 19, § 26.4(f) (“Such a determination is part of the ‘trial’ that must precede the defendant’s conviction for the offense carrying the higher sentencing range; it is not part of sentencing for that conviction.”). Some criminal statutes provide that if certain facts are proved, the minimum or maximum sentence (or both) for that crime increases. *See id.* § 26.4(i). In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, the Court evaluated the limits on the legislature’s “ability to characterize certain facts as mere sentence factors rather than as elements of separate, aggravated offenses,” ultimately requiring that facts raising the sentencing range (besides a prior conviction) be treated as elements of a greater offense. LAFAVE ET AL., *supra* note 19, § 26.4(i); *see* *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Alleyne v. United States*, 570 U.S. 99 (2013); *Ring v. Arizona*, 536 U.S. 584 (2002); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Some trials with *Apprendi* facts are bifurcated into separate proceedings—one for the elements of the underlying crime and one for the *Apprendi* facts that determine the defendant’s sentencing range. LAFAVE ET AL., *supra* note 19, § 26.4(i); *see Betterman II*, 136 S. Ct. at 1613 n.2 (referring to bifurcated proceedings where, “at the sentencing stage, facts that could increase the prescribed sentencing range are determined”). For example, Justice Ginsburg highlighted capital cases, where a defendant is only eligible for the death penalty if certain aggravating factors are found beyond a reasonable doubt. *Betterman II*, 136 S. Ct. at 1613 n.2; *see* LAFAVE ET AL., *supra* note 19, § 26.4(i) (explaining that any fact that raises the sentencing range is required to be proven beyond a reasonable doubt).

50. LAFAVE ET AL., *supra* note 19, § 26.4(i); *see Hurst*, 136 S. Ct. 616; *Alleyne*, 570 U.S. 99; *Ring*, 536 U.S. 584; *Apprendi*, 530 U.S. 466; *Almendarez-Torres*, 523 U.S. 224.

51. *See* LAFAVE ET AL., *supra* note 19, § 26.4(h) (explaining that the Court has accepted the lower preponderance of evidence standard of proof in sentencing proceedings, but when “a fact functions as an element of an aggravated offense, then the defendant has the right to demand proof of its existence beyond a reasonable doubt before a jury”).

52. *See id.* § 26.5(a) (describing the leniency of the evidentiary standard for sentencing hearings and acknowledging that the “[t]he sentencing court can consider other types of hearsay, whether contained in the presentence report or offered by the prosecution or defense”).

proven just by virtue of inclusion in the presentence report.⁵³ It made sense for the *Betterman* Court to distinguish bifurcated proceedings in which facts raising the sentencing range are found—there is a convincing argument for applying the Speedy Trial Clause to such proceedings.⁵⁴ Thus, when this Note hereinafter refers to sentencing delay or speedy sentencing claims, it refers to sentencing after conviction and excludes those unique bifurcated proceedings in which sentence-raising facts are found.

B. Causes and Effects of Delay

Both *Lovasco* and *Barker* contemplate the reasons for delay and the resulting prejudice suffered by the defendant.⁵⁵ Under both frameworks, legitimate, nonprejudicial reasons for delay weigh in favor of the government—that is, denying the defendant’s motion to dismiss the charge.⁵⁶ Reasons for delay that are generally found to be nonprejudicial include preparing the presentence report, calculating restitution, and conducting discovery concerning these tasks.⁵⁷ If the defendant contributes to the delay—by requesting discovery to challenge the restitution, for example—the court may be less sympathetic to claims of undue delay.⁵⁸ Conversely, understaffed government pretrial teams, full dockets, and strained judicial resources do not serve as valid reasons for delay.⁵⁹ If these factors are present,

53. See *id.* § 26.4(i) (“[A] fact is not admitted merely because the defendant fails to object to its allegation in a presentence report.”).

54. See *id.* § 26.4(f) (“There is strong basis for applying the Speedy Trial Clause to a determination of a fact that must be treated as an element under the *Apprendi* line of cases.”).

55. See *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (“[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.”); *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (“Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”).

56. *Barker*, 407 U.S. at 531 (describing reasons for delay that should be weighed against the government and those that might justify delay).

57. See, e.g., *United States v. James*, 712 F. App’x 154, 162–63 (3d Cir. 2017) (declining to find undue delay when the probation office spent eight months preparing an extensive presentence report and calculating restitution and defendants subsequently made discovery motions regarding the loss calculation for restitution).

58. See, e.g., *id.* (finding no prejudice when defendants’ numerous discovery motions contributed to the delay and resulted in a reduction of the restitution calculation).

59. See *Burkett v. Fulcomer (Burkett II)*, 951 F.2d 1431, 1433 (3d Cir. 1991) (finding violations of due process and the Sixth Amendment caused by “saturated dockets and the apparent strain on judicial resources” in the state court system); see also *James*, 712 F. App’x at 162 (weighing “a crowded docket” and “court congestion” against the government).

however, they merely weigh against the government; they do not mandate a finding for the defendant.⁶⁰

Postconviction delay may negatively impact both the defendant and any victims.⁶¹ Sentencing generally provides closure and punishment following conviction, while delay prolongs resolution for both the victim and the defendant.⁶² For the defendant, particularly, this uncertainty can provoke anxiety or depression and accompanying physical ailments.⁶³ For example, defendants have complained that they were unable to eat or sleep during delay, that their significant others ended their relationships due to the uncertainty of defendants' ultimate incarceration, and that family members suffered ill effects as a result of delay.⁶⁴

Moreover, sentencing delay may keep defendants from participating in rehabilitative programs available at long-term correctional facilities,⁶⁵ as defendants are generally held prior to sentencing in local jails with few services.⁶⁶ The Court in *Barker* described local jails as “deplorable” and asserted that “[l]engthy exposure to these conditions ‘has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult.’”⁶⁷ For example, defendants are often unable to access drug or alcohol treatment, sex offender programs, and educational programs.⁶⁸ Because some defendants awaiting sentencing have already been sentenced for other crimes, they may be unable to timely

60. See *James*, 712 F. App'x at 162 (noting these factors “weighed against” the government).

61. See 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 524 (4th ed. 2011 & Supp. 2018) (“Delay in sentencing may leave the defendant, as well as the victim, in limbo concerning the consequences of conviction.”).

62. See *id.* (discussing various consequences of sentencing delays).

63. See *Burkett II*, 951 F.2d at 1443–44 (finding that uncontested evidence of Burkett's anxiety and its effect on his wellbeing leaned slightly in Burkett's favor in his claim of delay); *Betterman I*, 342 P.3d 971, 973–74 (Mont. 2015) (describing Betterman's claims that he suffered from anxiety, depression, and accompanying physical ailments, such as stomach problems, while awaiting sentencing).

64. See, e.g., *Burkett II*, 951 F.2d at 1443–44 (describing Burkett's inability to eat or sleep and noting his claim that his fiancée broke off their engagement due to the uncertainty of the length of Burkett's incarceration); *United States v. Zamichieli*, No. 12-182, 2016 WL 3519550, at *10 (E.D. Pa. June 27, 2016) (reporting defendant's contention that he suffered from anxiety, that his fiancée left due to his indeterminate sentence, and that his mother fell ill as a result of the uncertain delay).

65. See WRIGHT & WELLING, *supra* note 61, § 524 (“It postpones the commitment of the defendant to corrections facilities, [and] may have a detrimental effect on rehabilitation . . .”).

66. See, e.g., Brief for Petitioner, *supra* note 1, at 3–7 (describing Betterman's fourteen-month stint in county jail and the detrimental effects it caused).

67. *Barker v. Wingo*, 407 U.S. 514, 520 (1972).

68. See, e.g., *Burkett II*, 951 F.2d at 1443 (restating Burkett's claims that he had no access to alcohol and sex offender programs); *Betterman I*, 342 P.3d at 973–74 (detailing how Betterman had no access to a mental-health assessment, counseling for chemical dependency, or education).

complete required programs under their first sentences, further compounding their problems.⁶⁹ Finally, several defendants have pointed out that being held in jail precludes them from becoming potentially eligible for conditional release or expanded visitation privileges that correctional facilities may allow.⁷⁰

Delayed sentencing may also interrupt the rehabilitation of defendants out on bail during the period between their conviction and sentence.⁷¹ For example, one defendant was inadvertently not sentenced for fifteen years.⁷² In the interim, she had built a life for herself with a family and a job and had rehabilitated on her own.⁷³ Her ultimate sentence, six months in a halfway house, threatened to set back her progress.⁷⁴

From a procedural standpoint, a delay in sentencing may also delay a defendant's ability to appeal his sentence. Under the final judgment rule, an appeal generally cannot be filed until final judgment has issued.⁷⁵ In a criminal case, the sentence represents the final judgment.⁷⁶ As one defendant protested, the more time that passed before his sentence, the more difficult it would be to reconstruct his defense if needed after his appeal was decided.⁷⁷

Society also suffers costs of delay, as the *Barker* Court pointed out.⁷⁸ First, failure to provide prompt sentencing is inefficient, as it creates a backlog in the court system.⁷⁹ A crowded docket will inevitably lead publicly funded court staff, prosecutors, and public defenders to remain involved in cases for longer than otherwise necessary and to

69. See, e.g., *Betterman I*, 342 P.3d at 973 (describing Betterman's complaints that a warrant had issued in another county because his sentencing delay inhibited him from completing portions of the sentence imposed by the other county).

70. See, e.g., *Burkett II*, 951 F.2d at 1443 (crediting defendant's argument that he would have had more liberal visitation rights in state prison than he had in county jail); *Betterman I*, 342 P.3d at 973 (noting defendant's argument that he would have been eligible for conditional release if he was an inmate at the state Department of Corrections instead of the county jail).

71. See *United States v. Ray*, 578 F.3d 184, 187 (2d Cir. 2009) (describing a defendant who had been going about her life, unaware that her sentence was even pending).

72. *Id.*

73. *Id.*

74. See *id.* at 201–02 (asserting that the defendant had been a successful, law-abiding citizen in the intervening fifteen years and that six months in a halfway house would destabilize her successful rehabilitation).

75. See *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940) (establishing the final judgment rule).

76. See *Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment.").

77. *Burkett II*, 951 F.2d 1431, 1446 (3d Cir. 1991).

78. See *Barker v. Wingo*, 407 U.S. 514, 519–20 (1972) (listing concerns). Of course, *Barker* addresses preconviction delays, but many of its interests are applicable to the postconviction-presence context as well. See *infra* Section III.A.1.

79. *Barker*, 407 U.S. at 519.

waste resources squabbling over scheduling.⁸⁰ Additionally, it burdens local jail systems, as defendants awaiting sentencing crowd these facilities.⁸¹ As discussed above, delay also prevents defendants' access to certain programs and services in corrective facilities that may not be available in local jails.⁸² Delaying access to these programs thwarts defendants' rehabilitation,⁸³ making it difficult for defendants to ultimately rejoin and contribute to society.

Two points are clear from this exploration of the causes and effects of delay. First, there are both legitimate and nonlegitimate reasons for delay.⁸⁴ Second, real harm can result from the failure to sentence a defendant promptly.⁸⁵ Both society and, of course, the defendant may suffer as a result of this delay.

II. THE LEGAL LANDSCAPE: CLAIMS OF DELAYED SENTENCING BEFORE AND AFTER *BETTERMAN*

Before the Supreme Court's holding in *Betterman*, lower federal and state courts disagreed over how to analyze delay between conviction and sentencing.⁸⁶ One view, which *Betterman* argued for, was that the Sixth Amendment right to a speedy trial extended to sentencing.⁸⁷ Other courts disagreed, taking the position—ultimately adopted by the Supreme Court in *Betterman*—that the speedy trial right terminates upon conviction.⁸⁸ Courts that rejected a postconviction speedy trial right generally still allowed defendants to

80. See, e.g., *United States v. Cain*, 734 F. App'x 21, 25 (2d Cir. 2018) (describing the district court's failure to promptly schedule sentencing and admonishing the government that it has a responsibility remind the court of "the unfinished business before it" in such lapses).

81. *Barker*, 407 U.S. at 520.

82. See *Betterman I*, 342 P.3d 971, 973, 977 (Mont. 2015) (noting *Betterman* was prevented from entering the correctional facility and unable to attend chemical-dependency counseling or a sex offender program that he was required to complete for a sentence in another county).

83. *Barker*, 407 U.S. at 520.

84. Compare *United States v. James*, 712 F. App'x 154, 162 (3d Cir. 2017) (finding that an extensive presentence report was justifiable), with *Burkett II*, 951 F.2d 1431, 1440 (3d Cir. 1991) ("[T]he delay caused by the backlog of cases in Blair County cannot be classified as justifiable.").

85. See, e.g., *Burkett II*, 951 F.2d at 1443–44 (describing *Burkett*'s extreme anxiety awaiting sentencing, his inability to obtain rehabilitative services, and the loss of his fiancée due to the uncertainty of his sentence).

86. See *Betterman II*, 136 S. Ct. 1609, 1613 (2016) ("We granted certiorari to resolve a split among courts over whether the Speedy Trial Clause applies to such delay." (citation omitted)).

87. See, e.g., *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978) (per curiam) ("The constitutionally guaranteed right to speedy trial applies to sentencing." (citing *Pollard v. United States*, 352 U.S. 354 (1957))).

88. See, e.g., *United States v. Ray*, 578 F.3d 184, 198–99 (2d Cir. 2009) ("[I]t is apparent that sentencing proceedings and trials are separate and distinct phases of criminal prosecutions. Accordingly, we hold that the Speedy Trial Clause of the Sixth Amendment, which governs the timing of trials, does not apply to sentencing proceedings.").

pursue a constitutional claim under the Due Process Clause,⁸⁹ an approach the *Betterman* Court endorsed in dicta.⁹⁰ By explicitly rejecting the contention that the Speedy Trial Clause applies to sentencing, the Supreme Court in *Betterman* resolved the controversy in one sense.⁹¹ Under *Betterman*'s limited holding, however, open questions remain: What analytical framework is appropriate to address constitutional claims of inordinate delay in sentencing?⁹² And if a court finds that sentencing was unduly delayed, what is the proper relief?⁹³

Justice Sotomayor explicitly advocated⁹⁴ for analyzing sentencing delay under *Barker*, which established four factors to consider in analyzing Speedy Trial Clause violations.⁹⁵ Lower courts, however, traditionally applied the *Lovasco*⁹⁶ test to Due Process Clause claims of delay in the sentencing context, even though *Lovasco* concerned precharge delays.⁹⁷ After *Betterman*, courts have split over whether to apply *Barker* or *Lovasco* in speedy sentencing claims under the Due Process Clause.⁹⁸ To lay the foundation for this Note's proposal, this Part examines the conflicting pre-*Betterman* approaches, the rationale of *Betterman* itself, and post-*Betterman* approaches. Lastly, this Part explores the various remedies that have been previously employed.

89. See, e.g., *id.* at 199 (“A delay in criminal proceedings that ‘violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency,’ can, depending on the circumstances, constitute a violation of the Due Process Clause.” (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977))).

90. See *Betterman II*, 136 S. Ct. at 1617–18 (asserting that defendants are not without a remedy and could seek relief under the Due Process Clause).

91. See *id.* at 1613 (holding that the Sixth Amendment right to a speedy trial detaches after conviction).

92. See *id.* at 1618 (Thomas, J., concurring) (“We have never decided whether the Due Process Clause creates an entitlement to a reasonably prompt sentencing hearing. Today’s opinion leaves us free to decide the proper analytical framework to analyze such claims if and when the issue is properly before us.”); see also *id.* at 1619 (Sotomayor, J., concurring) (noting the question of the “appropriate test for such a Due Process Clause challenge . . . is an open one”).

93. See *supra* note 13.

94. See *Betterman II*, 136 S. Ct. at 1619 (Sotomayor, J., concurring) (explicitly proposing *Barker* factors); see also *id.* at 1618 n.12 (majority opinion) (listing the *Barker* factors without explicitly naming the case).

95. *Barker v. Wingo*, 407 U.S. 514 (1972).

96. *United States v. Lovasco*, 431 U.S. 783 (1977).

97. See *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (applying *Lovasco* to sentencing delay but acknowledging it was developed for the precharge context).

98. See LAFAVE ET AL., *supra* note 19, § 26.4(f) n.135.80 (noting that some courts following *Betterman* have employed the *Barker* factors while others have used *Lovasco*).

A. *Pre-Betterman Approaches to Postconviction Delay*

Prior to *Betterman*, the Supreme Court only briefly addressed whether the sentencing phase of a trial could be examined under the Sixth Amendment's Speedy Trial Clause. In the 1957 case *Pollard v. United States*, the Court simply stated: "We will assume *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment."⁹⁹ Subsequently, many courts—including the U.S. Courts of Appeals for the Third, Fifth, Sixth, Tenth, and Eleventh Circuits and at least seventeen state courts—explicitly held that the Sixth Amendment applied to delays between conviction and sentencing.¹⁰⁰ Other courts, like the *Pollard* Court, avoided the question altogether—the First, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits and many states simply assumed that the Speedy Trial Clause applied to speedy sentencing claims but denied that undue delay had occurred in the cases before them.¹⁰¹ The Second Circuit and some states—including Montana¹⁰²—disagreed, holding that the Speedy Trial Clause did not apply but that the Due Process Clause provided constitutional protection against delay.¹⁰³ Finally, some courts that applied the Speedy Trial Clause also held that the Due Process Clause applied.¹⁰⁴

1. The Speedy Trial Clause and the *Barker* Factors

Courts holding that the Speedy Trial Clause applied to sentencing delays regularly applied the *Barker* balancing test,¹⁰⁵ which

99. 352 U.S. 354, 361 (1957).

100. See Kristin Saetveit, Note, *Beyond Pollard: Applying the Sixth Amendment's Speedy Trial Right to Sentencing*, 68 STAN. L. REV. 481, 491–93 (2016) (collecting cases applying the Speedy Trial Clause to sentencing proceedings); see also *Jolly v. State*, 189 S.W.3d 40, 44 (Ark. 2004) (noting that seventeen states recognized a speedy trial right to sentencing delays and collecting state cases), *abrogated by Betterman II*, 136 S. Ct. 1609 (2016).

101. See Saetveit, *supra* note 100, at 493–94 (collecting cases).

102. See *Betterman I*, 342 P.3d 971, 978 (Mont. 2015) (rejecting application of the Speedy Trial Clause).

103. See Saetveit, *supra* note 100, at 489–90, 494–95 (describing and collecting cases rejecting the Speedy Trial Clause in the sentencing context and noting that "[s]ome, but not all, of the courts prohibiting application of the speedy trial right to sentencing have instead located a right to prompt sentencing under the Due Process Clauses of the Fifth and Fourteenth Amendments").

104. See *id.* at 495 n.101 (describing how some courts have analyzed delay under both constitutional provisions).

105. See, e.g., *United States v. Danner*, 429 F. App'x 915, 917–18 (11th Cir. 2011) (holding that the Speedy Trial Clause applied to postconviction claims of delay and applying the *Barker* factors to a claim of delayed sentencing); *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (holding that the Sixth Amendment right to a speedy trial applies from arrest through sentencing and applying the *Barker* factors to defendant's claim of postconviction delay); *United States v. Sanders*, 452 F.3d 572, 577 (6th Cir. 2006) (acknowledging that for Sixth Amendment claims of delay between trial and sentencing, "the majority of circuits, including this one," use the *Barker*

considers four factors: (1) length of delay, (2) reason for delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant.¹⁰⁶ Specifically, *Barker* sought to address prejudice caused by “oppressive pretrial incarceration,” “anxiety and concern of the accused,” and fading memories or lost exculpatory evidence that could possibly weaken the defendant's case.¹⁰⁷ The defendant is not required to affirmatively prove actual prejudice to his case—the mere possibility is enough.¹⁰⁸ Moreover, *Barker*'s factors are relatively flexible and should be considered with the particular facts and circumstances of each case.¹⁰⁹ Courts applying these factors may also take note of the underlying concerns at play in *Barker*: decency and fairness; the societal interest in prompt and efficient adjudication; the potential for the defendant to commit other crimes or jump bail if he is not confined between conviction and sentencing; and any “detrimental effect on rehabilitation.”¹¹⁰

While *Barker* involved delay between the defendant's arrest and trial,¹¹¹ some courts applied the *Barker* factors in the sentencing context as well.¹¹² For example, in *Burkett v. Cunningham*, the Third Circuit held that the Speedy Trial Clause applied to the five-and-a-half-year postconviction delay before Wayne Burkett's sentencing, and it

test, though declining to apply *Barker* to a similar claim under the Due Process Clause); *United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999) (applying the Sixth Amendment to claims of delayed resentencing and using the *Barker* factors); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996) (stating that the “constitutionally guaranteed right to a speedy trial applies to sentencing” and that “[w]e review sentencing delays under *Barker v. Wingo*”); *Burkett I*, 826 F.2d 1208, 1220 (3d Cir. 1987) (holding explicitly that the Speedy Trial Clause applies through the sentencing phase and that the *Barker* factors should be applied to analyze the claim); *Jolly*, 189 S.W.3d at 45 (“[W]e conclude that the right to a speedy sentence is encompassed within the Sixth Amendment right to a speedy trial. We therefore turn to an application of the factors enunciated in *Barker v. Wingo* . . . to determine whether Jolly was denied his right to a speedy sentencing in this case.” (footnote omitted)).

106. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

107. *Doggett v. United States*, 505 U.S. 647, 654 (1992) (quoting *Barker*, 407 U.S. at 532).

108. See *Barker*, 407 U.S. at 532 (identifying an interest in limiting “the possibility” of an impaired defense and noting that “[l]oss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown”).

109. See *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986) (“[T]he factors set forth in *Barker* are guidelines, not rigid tests. . . . [A]ll four factors are to be balanced in light of the facts and circumstances of the case.”).

110. *Barker*, 407 U.S. at 519–20.

111. See *id.* at 533 (describing the right to a speedy trial and detriments resulting from delay between arrest and trial, which was extraordinary in *Barker*'s case). *Barker* waited over five years after his arrest for his murder trial to begin—the prosecution wanted to convict the other suspect accused of the murder first, then obtain his testimony against *Barker*. *Id.* at 516–19.

112. See cases cited *infra* notes 168–169.

considered his claim under *Barker*.¹¹³ The court implied that *Barker* provided an appropriate analysis of the circumstances causing delay, which was necessary to determine if the delay in Burkett's case was undue.¹¹⁴ Ultimately, the Third Circuit held that the trial court acted within its discretion in finding that all *Barker* factors weighed in favor of Burkett.¹¹⁵ The court emphasized the length of the delay (over five years) and its detrimental effect on Burkett, who suffered anxiety as a result of his indeterminate sentencing.¹¹⁶ In fashioning relief for Burkett, the court noted that the "normal remedy" for a Speedy Trial Clause violation is dismissal,¹¹⁷ and in light of the egregiousness of the violation, "no remedy short of discharge can vindicate Burkett's right to speedy trial."¹¹⁸ Accordingly, the Third Circuit ordered the lower court to discharge Burkett's convictions.¹¹⁹

2. The Due Process Clause and the *Lovasco* Test

In the pre-*Betterman* era, some courts declined to apply the Speedy Trial Clause to sentencing but found that due process provided defendants with an avenue for constitutional relief.¹²⁰ These courts applied the *Lovasco*¹²¹ test to determine whether defendants' due process rights were violated.¹²² *Lovasco* requires that courts consider both (1) the reason for the delay and (2) the prejudice to the accused.¹²³

113. See *Burkett I*, 826 F.2d 1208, 1211, 1220, 1223–24 (3d Cir. 1987) (holding that the Speedy Trial Clause applies to sentencing and that Burkett's claim of undue sentencing delay could be properly considered under *Barker*).

114. See *id.* at 1219 (describing the application of *Barker*). But see Saetveit, *supra* note 100, at 491 (suggesting that the *Burkett* court's reasoning for accepting the Speedy Trial Clause in this context was sparsely).

115. *Burkett I*, 826 F.2d at 1224.

116. *Id.*

117. *Id.* (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)); see also *Strunk*, 412 U.S. at 440 (holding that for a Speedy Trial Clause violation, "dismissal must remain, as *Barker* noted, 'the only possible remedy'" (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972))).

118. *Burkett I*, 826 F.2d at 1224–25.

119. *Id.* at 1226.

120. See, e.g., *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (holding that the Speedy Trial Clause did not apply to sentencing but explaining that the Due Process Clause could protect defendant against undue delay); *Betterman I*, 342 P.3d 971, 978 (Mont. 2015) (rejecting application of the Speedy Trial Clause to sentencing delay but holding that *Betterman*'s "interest in being sentenced without unreasonable delay is 'protected primarily by the Due Process Clause'" (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982))).

121. *United States v. Lovasco*, 431 U.S. 783 (1977).

122. See, e.g., *Ray*, 578 F.3d at 199 (holding *Lovasco* is the appropriate standard to analyze due process violations at the sentencing phase); *Betterman I*, 342 P.3d at 979 (same).

123. *Lovasco*, 431 U.S. at 790; see *id.* ("[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim."); see also *Ray*, 578 F.3d at 199 (noting that prejudice alone is not enough to examine due process and that the reason for the delay must be balanced against the prejudice imposed).

Lower courts have interpreted the first prong of *Lovasco* to require proof that the government delayed in bad faith, even if the defendant can show some prejudice.¹²⁴ Under the second prong of this test, speculative claims of prejudice are not enough—the defendant must demonstrate actual prejudice.¹²⁵

Although the *Lovasco* test was originally conceived to analyze suspects' due process rights against delay before arrest or charge, some courts found it applied to the posttrial context as well.¹²⁶ *United States v. Ray* exemplifies the application of *Lovasco* to a Due Process Clause claim for speedy sentencing.¹²⁷ In late 1991, Shenna Ray pleaded guilty to conspiracy to commit mail fraud, but she was not ultimately sentenced until early 2008, over sixteen years later.¹²⁸ After her plea, Ray was originally sentenced to one year of incarceration, which she appealed.¹²⁹ While her appeal was pending, the Second Circuit issued a separate decision that required reexamination of Ray's sentence, so the case was remanded to the district court.¹³⁰ The court, however, inadvertently failed to reschedule Ray's sentencing.¹³¹ Ray, who had been released on bail pending her appeal, assumed the matter was settled and moved on—she started a family, worked, attended school, and paid taxes.¹³² Sixteen years later, the court discovered the issue and scheduled Ray to be sentenced.¹³³ Acknowledging that the long delay was troubling and commending Ray's considerable rehabilitation, the government recommended that she be sentenced to probation and home detention.¹³⁴ Instead, the court sentenced Ray to one day in prison and

124. See, e.g., *United States v. Sanders*, 452 F.3d 572, 581 (6th Cir. 2006) (finding no due process violation under *Lovasco* when defendant did not provide affirmative evidence of bad faith by the government).

125. See *United States v. Marion*, 404 U.S. 307, 325–26 (1971) (explaining that the defendants did not demonstrate actual prejudice and that the due process claims are thus “speculative and premature”); *Betterman I*, 342 P.3d at 980–81 (rejecting *Betterman*'s due process claim as “speculative” and concluding that *Betterman*'s prejudice was “not substantial and demonstrable,” even though it involved unacceptable institutional delay).

126. *Sanders*, 452 F.3d at 580; see also *Ray*, 578 F.3d at 199 (noting that although *Lovasco* pertains to pretrial delay, it is “equally applicable” to sentencing).

127. See *Ray*, 578 F.3d at 199–202 (explaining the rationale for using *Lovasco* and applying the same to the case).

128. *Id.* at 186–87.

129. *Id.* at 187.

130. *Id.*

131. *Id.*

132. *Id.*

133. See *id.* at 187–88 (describing how Ray sought documentation of her criminal record from the court and that it became apparent that she was never resentenced and never served her original sentence).

134. See *id.* at 188–89 (explaining that the government took responsibility for the delay and recommended defense counsel's proposed sentence).

three years of supervised release, with the first six months in a halfway house.¹³⁵ This last provision was most troublesome, because it prevented Ray from working and caring for her youngest child.¹³⁶ Ray appealed under the Speedy Trial Clause and the Due Process Clause, seeking to have her conviction vacated and sentence dismissed.¹³⁷

The Second Circuit rejected her speedy trial claim, taking issue with the fact that a Speedy Trial Clause violation requires dismissal of all charges.¹³⁸ The court reasoned that long postconviction delays do not invoke the same anxiety as preconviction delays, nor do postconviction delays affect the defendant's ability to defend herself.¹³⁹ Nevertheless, the Second Circuit concluded, the Due Process Clause provides some protection against "oppressive delay" in sentencing, noting such delays violate due process notions of fairness and decency.¹⁴⁰ The court found that *Lovasco* offered an appropriate analysis, because the primary consideration after conviction—similar to precharge—is oppressive delay.¹⁴¹ The court reasoned that considerations of prejudice and nonlegitimate reasons for delay must each be evaluated "in light of each other and the surrounding circumstances," such that even substantial prejudice could be outweighed by a legitimate reason for the delay.¹⁴²

Ultimately, the court found that the government's negligence caused the delay and that Ray did not have a duty to seek out sentencing.¹⁴³ Moreover, the prejudice to Ray would be significant, as time in a halfway house would disrupt her successful rehabilitation.¹⁴⁴ The court explained that an appropriate remedy would instead counteract any prejudice caused by the violation of Ray's rights.¹⁴⁵ Accordingly, it suspended the remainder of her sentence but

135. *Id.* at 189.

136. *Id.*

137. *Id.* at 186.

138. *See id.* at 193–94, 199 (noting that dismissal, as mandated by *Strunk*, was an inapposite remedy and denying that the Speedy Trial Clause applied).

139. *See Saetveit, supra* note 100, at 490 (summarizing the *Ray* court's lengthy reasoning, including the theory that the anxiety that defendants suffer from public accusation before trial is unlike the postconviction experience).

140. *Ray*, 578 F.3d at 199.

141. *See id.* ("The directive set forth in Rule 32, taken together with the general prohibition of 'oppressive delay' established by the Due Process Clause, protects criminal defendants from unreasonable delays between conviction and sentencing." (citation omitted) (quoting *United States v. Lovasco*, 431 U.S. 783, 789 (1977))).

142. *Id.* at 199–200.

143. *See id.* at 200 (noting that the government acknowledged its responsibility for the delay and that so long as Ray sought to have her sentence reconsidered rather than vacated, she did not bear responsibility for seeking out sentencing).

144. *Id.* at 201–02.

145. *Id.* at 202.

emphasized that not every sentencing delay would necessarily warrant such drastic relief.¹⁴⁶

Betterman did not fare so well when the Montana Supreme Court similarly rejected his Speedy Trial Clause claim but considered his claim of delay under the Due Process Clause.¹⁴⁷ The court explained that, as to the Due Process Clause claim, both the reason and prejudice prongs of *Lovasco* were necessary to establish a violation: even if a defendant demonstrated “actual and substantial prejudice,” no remedy was warranted if there was a “legitimate reason” for the delay.¹⁴⁸ The court attributed the majority of the fourteen-month sentencing delay to the state, because preparing the presentence report and scheduling the sentencing hearing took “an inordinate amount of time” through no fault of Betterman’s.¹⁴⁹ Nevertheless, the court rejected Betterman’s claim—even after noting Betterman suffered an “unacceptable delay”—because his claims of prejudice were too “speculative.”¹⁵⁰

3. Dual Application of the Speedy Trial Clause and the Due Process Clause

Some courts have held that both the Speedy Trial Clause and the Due Process Clause are applicable to sentencing delay; these courts have proceeded to conflate the analyses for the two clauses.¹⁵¹ For example, in *Burkett*, the Third Circuit held that the Speedy Trial Clause applied to Burkett’s five-and-a-half-year sentencing delay.¹⁵² Additionally, the court asserted that the Due Process Clause applied to any delay attendant to conviction, including sentencing delays.¹⁵³ Interestingly, the court analyzed the potential Due Process Clause and Speedy Trial Clause violations together,¹⁵⁴ asserting that both clauses constrained postverdict delay and that the *Barker* factors should

146. *Id.*

147. *Betterman I*, 342 P.3d 971, 978 (Mont. 2015).

148. *Id.* at 979 (quoting *United States v. L’Allier*, 838 F.2d 234, 238 (7th Cir. 1988)).

149. *Id.* at 980.

150. *See id.* at 980–81 (finding Betterman’s anticipated access to Department of Corrections rehabilitative services was too speculative).

151. Saetveit, *supra* note 100, at 495 n.101; *see Burkett I*, 826 F.2d 1208, 1221–22 (3d Cir. 1987) (asserting that the Due Process and Speedy Trial Clauses both “constrain post-verdict delay” and using the *Barker* factors to “inform” the due process analysis).

152. *Burkett I*, 826 F.2d at 1220.

153. *See id.* at 1221 (“The Due Process clause . . . protects not only against delays in trial, including sentencing; it also guarantees a reasonably speedy appeal . . .”). In *Burkett*, the court was particularly concerned that the delay in sentencing had hindered Burkett’s ability to seek appeal. *See id.* at 1225 (“Burkett has been prejudiced by the monumental delay he has encountered in his attempts to secure his appeal as of right.”).

154. *Id.* at 1222.

“inform [the] due process determination.”¹⁵⁵ Of course, the analysis for Speedy Trial Clause and Due Process Clause violations are not wholly dissimilar. Indeed, the *Barker* and *Lovasco* tests both consider the reason for delay and prejudice to the defendant.¹⁵⁶

B. Post-Betterman Approaches to Postconviction Delay

In 2015, the *Betterman* Court definitively held that the Sixth Amendment’s Speedy Trial Clause was inapplicable to sentencing delays.¹⁵⁷ Justice Ginsburg, writing for the Court, reasoned that protection under the Speedy Trial Clause only applies before the defendant is convicted or pleads guilty and is thus still presumed innocent.¹⁵⁸ She pointed to the history and text of the Speedy Trial Clause as support: the Sixth Amendment refers only to the “accused,” who were traditionally treated differently than those already tried and convicted.¹⁵⁹ In dicta, the Court suggested that the Due Process Clauses of the Fifth and Fourteenth Amendments could still provide relief to defendants complaining of undue delay between conviction and sentencing.¹⁶⁰ But Justice Ginsburg did not apply this analysis, as the petitioner did not pursue a due process claim before the Court.¹⁶¹

In her concurrence, Justice Sotomayor emphasized that the question of the “appropriate test for such a Due Process Clause challenge . . . is an open one.”¹⁶² Nevertheless, Justice Sotomayor proposed that the *Barker* factors, though traditionally used to analyze Speedy Trial Clause violations, could provide the proper framework for a due process analysis.¹⁶³ Moreover, while Justice Ginsburg asserted that the “primary safeguard comes from statutes and rules,”¹⁶⁴ she suggested that courts analyzing a constitutional claim of sentencing

155. *See id.* (explaining that sentencing served as a gatekeeping function to seeking an appeal and thus implicated *Burkett*’s due process rights by delaying his ability to appeal); *see also* Saetveit, *supra* note 100, at 495 n.101 (stating that *Burkett* conflates the two standards).

156. *See* *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (focusing on prejudice to defendant and reason for delay); *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (considering the length of the delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant).

157. *Betterman II*, 136 S. Ct. 1609, 1612 (2016).

158. *Id.* at 1614.

159. *Id.*

160. *Id.* at 1612.

161. *Id.*

162. *Id.* at 1619 (Sotomayor, J., concurring).

163. *Id.*

164. *See id.* at 1617 & n.10 (majority opinion) (referencing Federal Rule of Criminal Procedure 32(b)(1) and collecting examples of state provisions similar to the federal rule); *see also* FED. R. CRIM. P. 32(b)(1) (“The court must impose sentence without unnecessary delay.”).

delay could consider the “length of and reasons for delay, the defendant’s diligence in requesting expeditious sentencing, and prejudice.”¹⁶⁵ These are the same four *Barker* factors that Justice Sotomayor proposed, but Justice Ginsburg did not cite *Barker* or explicitly endorse its application.¹⁶⁶

While *Betterman* did not explicitly recognize a constitutional right to speedy sentencing, courts have been cognizant of *Betterman*’s dicta regarding the application of the Due Process Clause.¹⁶⁷ To date, only the Second and Third Circuits have ruled on a defendant’s constitutional right to speedy sentencing following *Betterman*. Both courts analyzed the defendants’ claims under the Due Process Clause, but they disagreed on whether to apply *Barker* or *Lovasco*.¹⁶⁸ Federal district courts and state courts have also failed to agree on the appropriate speedy sentencing analysis.¹⁶⁹ Generally, they have

165. *Betterman II*, 136 S. Ct. at 1617–18, 1618 n.12.

166. Rory Little, *Opinion Analysis: “Speedy Trial” Guarantee Does Not Apply to Sentencing*, SCOTUSBLOG (May 19, 2016, 8:30 PM), <http://www.scotusblog.com/2016/05/opinion-analysis-speedy-trial-guarantee-does-not-apply-to-sentencing> [<https://perma.cc/7NJ5-KQNN>].

167. See Neathery v. Rader, No. 13-658-BAJ-RLB, 2016 WL 8313923, at *6 (M.D. La. Dec. 30, 2016) (“There is no precedent from the United States Supreme Court specifically holding that the Constitution guarantees a right to speedy sentencing. . . . Nevertheless, this Court is cognizant of the Supreme Court’s dicta in *Betterman* . . .”).

168. Compare *United States v. Cain*, 734 F. App’x 21, 24–26 (2d Cir. 2018) (analyzing delay between appeal and resentencing under the *Lovasco* factors: reason for delay and prejudice to accused), and *United States v. Brown*, 709 F. App’x 103, 103 (2d Cir. 2018) (analyzing delay between defendant’s guilty plea and sentencing under the Due Process Clause and employing *Lovasco* to find no violation), with *United States v. James*, 712 F. App’x 154, 161–63 (3d Cir. 2017) (employing the *Barker* factors to find that a fourteen-month delay between conviction and sentencing did not violate due process when that time was used for the probation office to determine the full amount of restitution owed and for the defendant to seek discovery).

169. After *Betterman*, several courts have used the *Barker* factors to analyze claims of sentencing delay. Some have held, implicitly or explicitly, that *Barker* provides the proper analysis for postconviction due process claims. See *United States v. Phillips*, No. 1:15-cr-104, 2017 WL 3129135, at *4 (S.D. Ohio July 24, 2017) (asserting, pursuant to circuit precedent, that “[a]fter a defendant is found guilty, or a guilty plea has been entered, any alleged undue delays are assessed under the *Barker* due process analysis”); *Deck v. Steele*, 249 F. Supp. 3d 991, 1079–82 (E.D. Mo. 2017) (using the *Barker* factors as the framework for a due process analysis of petitioner’s claim of delayed sentencing in his capital case); *United States v. Zamichieli*, No. 12-182, 2016 WL 3519550, at *8 (E.D. Pa. June 27, 2016) (holding that *Barker* is the appropriate test to apply to defendant’s due process claim of unreasonable sentencing delay).

Others have rejected a constitutional right to speedy sentencing or have declined to characterize defendants’ claims as due process claims yet have nevertheless relied on *Barker* to analyze a claim of delayed sentencing. See *Arnett v. Paramo*, No. EDCV 16-1169-FMO (JPR), 2017 WL 4325576, at *19 (C.D. Cal. Aug. 7, 2017) (citing *Betterman* for the proposition that petitioner had “no constitutional right to a speedy sentencing hearing” but nevertheless citing *Barker* in finding that the delay was not prejudicial to the point of violating petitioner’s constitutional rights in part because he did not object to the continuance of both his trial and sentencing), *adopted*, No. EDCV 16-1169-FMO (JPR), 2017 WL 4325586 (C.D. Cal. Sept. 25, 2017) (mem.); *Li v. State*, No. 70100, 2017 WL 1215890, at *2 (Nev. Ct. App. Mar. 22, 2017) (relying on the *Barker* factors without explicitly mentioning the Due Process Clause to find no speedy sentencing violation).

utilized some form of a due process analysis but have not agreed on whether to apply the *Barker* factors,¹⁷⁰ as Justice Sotomayor recommended.¹⁷¹ In many ways, this divide now mirrors the prior split between courts applying the *Barker* factors under the Speedy Trial Clause and those using a Due Process Clause *Lovasco* analysis.¹⁷²

Several courts have relied on the two prongs of the *Lovasco* test to analyze Due Process Clause claims of delayed sentencing. *See* *United States v. Evans*, No. 15-16 ADM/LIB, 2017 WL 1047254, at *2 (D. Minn. Mar. 17, 2017) (naming reasons for delay and prejudice to the defendant as the primary considerations for a due process claim); *Neathery*, 2016 WL 8313923, at *6 (declining to endorse Justice Sotomayor's proposal to use *Barker* to analyze speedy sentencing violations but considering the reason for defendant's sentencing delay and any resulting prejudice in finding no due process violation); *State v. Lopez*, 410 P.3d 226, 232–33 (N.M. Ct. App. 2017) (asserting that the *Lovasco* test is “most suitable” to analyze sentencing delays under the Due Process Clause).

Other courts have either declined to endorse or rejected a specific test but have nevertheless decided claims of delayed sentencing under the Due Process Clause; these courts generally rely on notions of fundamental fairness. *See* *Jurado v. Davis*, No. 08cv1400 JLS (JMA), 2018 WL 4405418, at *127 (S.D. Cal. Sept. 17, 2018) (asserting that even after *Betterman*, the California Supreme Court could decline to apply the Speedy Trial Clause to bifurcated proceedings and holding that under the Due Process Clause, the capital petitioner failed to prove that sentencing delay caused the penalty phase of his trial to be “fundamentally unfair”); *United States v. Lymon*, Nos. 15-CR-4302MCA, 15-CR-4082MCA, 2016 WL 9488764, at *3 (D.N.M. Dec. 9, 2016) (relying on Federal Rule of Criminal Procedure 32(b)(1) and a due process right to a fundamentally fair sentencing proceeding to determine that vacating a sentencing hearing would cause unnecessary and unfair delay, respectively); *Figueroa v. Buechele*, No. 15-2972 (CCC), 2016 WL 3457013, at *4 (D.N.J. June 23, 2016) (applying neither *Lovasco* nor *Barker* explicitly but finding defendant's due process rights had not been violated, because he was not prejudiced by the delay in his sentencing); *People v. Dalby*, No. C078421, 2018 WL 316442, at *2 (Cal. Ct. App. Jan. 8, 2018) (noting that “[d]iminished due process rights arguably protect against fundamental unfairness in sentencing and resentencing” but implicitly declining to adopt the *Barker* test, instead simply finding no prejudice); *People v. Wiseman*, 413 P.3d 233, 241–42, 242 n.10, 244 (Colo. App. 2017) (explicitly rejecting the *Barker* test to analyze delay in sentencing and instead applying a “shock the conscience” standard to Wiseman's due process claim regarding delayed resentencing).

Finally, a few courts have simply held that there is no constitutional right to speedy sentencing under *Betterman*. *See* *Johnson v. Lester*, No. CV-17-90-BU-BMM, 2018 WL 934605, at *1 (D. Mont. Feb. 16, 2018) (holding that under *Betterman*, “[n]o due process claim for unreasonable sentencing delay clearly exists under federal law at this time”); *Stevens v. McTighe*, No. CV-18-01-BU-BMM, 2018 WL 747846, at *2 (D. Mont. Feb. 7, 2018) (same); *State v. D.S.*, No. 16-0693, 2017 WL 5509925, at *7–8 (W. Va. Nov. 17, 2017) (holding that defendant had no right to a speedy sentencing hearing under *Betterman* and that, while sentencing should be imposed without unreasonable delay, the delay in this case was not oppressive or purposeful).

170. *See Lopez*, 410 P.3d at 233 (noting that at least one federal district court has adopted the *Barker* factors following *Betterman* while other jurisdictions have adhered to the *Lovasco* framework).

171. *Betterman II*, 136 S. Ct. 1609, 1619 (2016) (Sotomayor, J., concurring).

172. *See id.* at 1613 n.1 (majority opinion) (collecting cases split on whether Speedy Trial Clause applied to sentencing); *see also, e.g.*, *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006) (rejecting *Barker* and analyzing undue delay in sentencing under the *Lovasco* framework for due process); *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986) (applying the *Barker* factors to a Speedy Trial Clause analysis of undue delay in sentencing).

1. Applying the *Barker* Factors to Due Process Claims

After *Betterman*, the Third Circuit has continued to apply the *Barker* factors to sentencing, now solely under the Due Process Clause.¹⁷³ For example, in *United States v. James*, two defendants were convicted of crimes related to their tax fraud scheme.¹⁷⁴ After the trial, the government sought to calculate and prove the total loss stemming from the defendants' scheme, which delayed the presentence report.¹⁷⁵ One defendant challenged the calculation and sought related discovery, further postponing the sentencing hearing.¹⁷⁶ Attorney scheduling conflicts and the district judge's illness caused another two-month delay.¹⁷⁷ Ultimately, the defendants waited fourteen months for sentencing.¹⁷⁸

The Third Circuit noted that *Betterman*'s holding did not preclude the application of the *Barker* test to due process claims, which was consistent with circuit precedent.¹⁷⁹ As discussed in Section II.A.3, the Third Circuit had previously justified applying *Barker* to due process claims on the basis that both the Speedy Trial and Due Process Clauses protect defendants against undue postconviction delay.¹⁸⁰ Thus, it reasoned, the Clauses could be analyzed under the same test.¹⁸¹ In *James*, the Third Circuit acknowledged that it might need to revisit its speedy sentencing jurisprudence in light of *Betterman*.¹⁸² Nevertheless, the court declined to set out a new standard and instead applied the *Barker* factors to the defendants' Due Process Clause claims.¹⁸³

Ultimately, the Third Circuit denied the defendants' speedy sentencing claim under a *Barker* due process analysis.¹⁸⁴ The court acknowledged that fourteen months was an undesirably long wait

173. See *James*, 712 F. App'x at 161–62 (employing the *Barker* factors to analyze a due process claim regarding a sentencing delay).

174. *Id.* at 156–57.

175. *Id.* at 156.

176. *Id.* at 156–57, 162.

177. *Id.* at 162.

178. *Id.*

179. See *id.* at 161–62 (citing *Burkett I*, 826 F.2d 1208, 1219–21 (3d Cir. 1987)) (noting that *Burkett* had previously addressed claims of undue delay in sentencing under both the Speedy Trial Clause, now precluded in this context, and the Due Process Clause).

180. See *Burkett I*, 826 F.2d at 1222 (“Because both the Due Process and Speedy Trial clauses constrain post-verdict delay, the Fifth Circuit and the Tenth Circuit have looked to the four *Barker* factors as a means of determining whether due process has been violated.”).

181. See *id.* (“[T]he *Barker* factors should also inform our due process determination.”).

182. *James*, 712 F. App'x at 161–62.

183. *Id.* at 162.

184. *Id.* at 163.

under *Barker's* first factor.¹⁸⁵ But it found that the reasons for delay—*Barker's* second factor—were nondeliberate and justified, as the delay was attributable to defendants' discovery requests, the complexity of calculating restitution, the judge's illness, and scheduling conflicts.¹⁸⁶ Under *Barker's* third factor—assertion of right—the Third Circuit found that the defendants did not demand their right to speedy sentencing for over a year.¹⁸⁷ Lastly, the court was not convinced that defendants demonstrated prejudice, *Barker's* fourth factor.¹⁸⁸ The defendants asserted that their confinement in a local jail—where they consumed a poor diet, had no law library, and suffered anxiety—was prejudicial.¹⁸⁹ The *James* court acknowledged that confinement in a local jail pending sentencing could be prejudicial but held that this was not enough, on its own, to tip the scales in the defendants' favor, particularly when the defendants received “substantial benefits” from the delay.¹⁹⁰

2. Utilizing the *Lovasco* Test

Post-*Betterman*, the Second Circuit has continued to analyze speedy sentencing claims under the Due Process Clause, applying the *Lovasco* test consistent with circuit precedent.¹⁹¹ In *United States v. Cain*, the defendant waited five years for sentencing after his case was remanded to the district court.¹⁹² The court described how Cain's requests for an attorney and resentencing were ignored, chastising the government and district court for demonstrating a “dismaying disregard for Cain's right to a timely resentencing.”¹⁹³ But despite attributing nearly all responsibility for the delay to the government and district court, the court concluded that Cain could not demonstrate the

185. *Id.* at 162.

186. *Id.*

187. *Id.*

188. *Id.* at 163.

189. *Id.*

190. *See id.* (noting that defendants were able to successfully contest certain restitution calculations for a reduction).

191. *See United States v. Cain*, 734 F. App'x 21, 24–25 (2d Cir. 2018) (citing *Ray* and applying *Lovasco* to defendant's due process claim of delayed sentencing); *United States v. Brown*, 709 F. App'x 103, 103 (2d Cir. 2018) (denying, in summary order, defendant's due process claim under *Ray*); *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (applying *Lovasco* to a due process analysis of delay in sentencing).

192. 734 F. App'x at 25.

193. *See id.* (asserting that the trial court and the government must not “leave a defendant in limbo, uncounseled, uncertain whether he will be retried, and without any indication of when, if ever, his arguments for a more lenient sentence after the dismissal of some of the most serious charges against him will be heard”).

necessary prejudice.¹⁹⁴ His claims were too “speculative”—for example, Cain could not assert much more than the possibility of being released sooner.¹⁹⁵

Some district courts and state courts have similarly applied the *Lovasco* test to alleged sentencing delays.¹⁹⁶ In *State v. Lopez*, the New Mexico Court of Appeals found that *Lovasco* was better suited to delayed sentencing due process claims than *Barker* because *Barker* might not translate well to the postconviction context.¹⁹⁷ The *Lopez* court noted that due process is satisfied when a defendant receives “adequate procedure to redress an improper deprivation of liberty.”¹⁹⁸ *Lovasco*, the court explained, appropriately limits the court’s inquiry to whether the procedure violated the community’s “fundamental conceptions of justice which lie at the base of civil and political institutions, and which define the community’s sense of fair play and decency.”¹⁹⁹ Arguably, the court in *Lopez* implied that *Barker* is not well suited to the due process arena, because *Barker* considers more than merely whether appropriate procedural protections were employed.²⁰⁰

The *Lopez* court emphasized that regardless of the test, the burden of demonstrating prejudice—a necessary but not sufficient element of a due process claim—fell on the defendant.²⁰¹ Ultimately, the court rejected the defendant’s claim because he did not meet this burden.²⁰² Although the defendant waited 209 days between his conviction and sentencing, the reasons for delay included preparation of the presentence report, the judge’s medical leave, and the defendant’s request for delay to “get his affairs in order.”²⁰³ Because the defendant did not demonstrate significant prejudice, the court held that vacating the sentence would result in an unjustified windfall.²⁰⁴

194. *Id.* at 26.

195. *Id.*

196. See cases cited *supra* note 169.

197. *State v. Lopez*, 410 P.3d 226, 233 (N.M. Ct. App. 2017).

198. See *id.* (“However, as recognized in Justice Thomas’s concurrence, the *Barker* factors ‘may not necessarily translate to the delayed sentencing context.’ Instead, ‘[t]he Due Process Clause can be satisfied where a [s]tate has adequate procedure to redress an improper deprivation of liberty or property.’” (alterations in original) (citation omitted) (quoting *Betterman II*, 136 S. Ct. 1609, 1618 (2016) (Thomas, J., concurring))).

199. *Id.* (quoting *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006)).

200. See *id.* (explaining that *Barker* may not translate well to due process claims, as due process only requires adequate procedure).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 234 (citing *Betterman II*, 136 S. Ct. 1609, 1615 (2016)).

C. Remedies for Finding Undue Delay in Sentencing

Courts that find a speedy sentencing violation may impose various remedies.²⁰⁵ In *Burkett*, the Third Circuit held that the egregious five-and-a-half-year delay in Burkett's sentencing could not warrant any remedy other than dismissal.²⁰⁶ The court was clear that *Burkett* was a unique case with extreme facts: the length of delay was "monumental" and inexcusable, his right to review on appeal had been impaired, and the state court had continued to blatantly ignore federal orders to sentence him promptly—even the assistant district attorney for the county acknowledged that dismissal was appropriate given the circumstances.²⁰⁷

Burkett later appealed to the Third Circuit again in a separate proceeding, complaining of a twenty-nine-month sentencing delay arising from a trial and conviction unrelated to that discussed above.²⁰⁸ The court acknowledged that he was harmed by the amount of time he spent in local jails without rehabilitative support and by the anxiety resulting from the uncertainty about his sentence and isolation from his family and friends.²⁰⁹ Accordingly, the court reduced Burkett's sentence by the amount of time that he had spent in local jail awaiting his sentencing after conviction (twenty-nine months).²¹⁰ It distinguished this case from Burkett's prior vacated sentence by explaining that in the previous case, the state court repeatedly flouted federal instructions to sentence him.²¹¹

Other courts have found that suspending the remainder of a sentence may be appropriate.²¹² In *Ray*, for example, the Second Circuit

205. *Cf.* *Brody v. Village of Port Chester*, 345 F.3d 103, 119–20 (2d Cir. 2003) (explaining that "[t]he appropriate remedy for a proven due process violation often depends on the stage at which the violation is found and the relief sought" and noting that damages for a violation that has already occurred might prompt consideration of how the outcome would have changed with the required process, but when "injunctive relief is sought, courts simply have ordered the responsible government entity to provide an opportunity for process going forward").

206. *Burkett I*, 826 F.2d 1208, 1226 (3d Cir. 1987).

207. *See id.* at 1225–26 ("Under the unusual circumstances of this case, including the ongoing violation of the federal court order and Blair County's concession as to the appropriate remedy, it appears that no relief short of discharge could fully remedy these violations.").

208. *Burkett II*, 951 F.2d 1431, 1436–37 (3d Cir. 1991); *see id.* at 1449 (Alito, J., dissenting) (describing Burkett's third arrest and set of charges to which this appeal pertained).

209. *Id.* at 1447 (majority opinion).

210. *Id.* The defendant in *Betterman* also suggested a reduction in sentence equivalent to the delay, but he did not receive such relief. *Betterman II*, 136 S. Ct. 1609, 1615 n.6 (2016).

211. *See Burkett II*, 951 F.2d at 1447 ("In *Burkett I*, however, the state court continued to violate the federal court order that petitioner be sentenced . . . Here, the relief is more difficult to fashion.").

212. *See, e.g., United States v. Ray*, 578 F.3d 184, 202–03 (2d Cir. 2009) (suspending the remainder of Ray's sentence in light of a sixteen-year delay and her substantial rehabilitation).

found that vacating the remainder of Ray's sentence was proper²¹³ because a custodial sentence imposed fifteen years late would threaten her successful rehabilitation.²¹⁴ The court recognized, however, that this circumstance was unusual and that "[t]he normal remedy for a due process violation is not discharge; rather, a court faced with a violation should attempt to counteract any resulting prejudice demonstrated by a petitioner."²¹⁵

Lastly, some circuits have fashioned an appropriate sentence in an ad hoc fashion, with a discretionary reduction that does not necessarily correspond to the length of the delay.²¹⁶ For example, the D.C. Circuit found that several months' reduction in sentencing and a judicial apology were sufficient reparations for a thirty-three-month sentencing delay, during which time the defendant was confined to local jail.²¹⁷

In sum, a range of remedies may address undue delay, and courts have held that the context of the delay is relevant to the remedy.²¹⁸ These examples help inform the relevant considerations in addressing claims of undue delay.

III. AN UNEASY FIT: ORIENTING POSTCONVICTION DELAY WITHIN PRECONVICTION FRAMEWORKS

After *Betterman* rejected the application of the Speedy Trial Clause to claims of delayed sentencing, courts have generally agreed that defendants' constitutional due process rights may protect them from undue sentencing delay.²¹⁹ The Supreme Court endorsed this

213. Ray was sentenced to one day in prison and three years of supervised relief. *Id.* at 189. She served one day in prison before bringing this appeal. *Id.* at 190.

214. *Id.* at 202–03.

215. *Id.* at 202 (quoting *Burkett I*, 826 F.2d 1208, 1222 (3d Cir. 1987)).

216. See *United States v. Yelverton*, 197 F.3d 531, 537–39 (D.C. Cir. 1999) (upholding Yelverton's remedy for undue delay in sentencing when he received a judicial apology and was intentionally sentenced in the middle of the guideline range rather than at the top).

217. *Id.*

218. See, e.g., *Ray*, 578 F.3d at 202–03 (suspending the remainder of Ray's sentence because the delay was fifteen years and she had substantially rehabilitated herself); *Yelverton*, 197 F.3d at 537–39 (upholding judicial apology and sentence in the middle of the sentencing guideline rather than at the top when sentencing delay could be attributed to the government but was not done in bad faith); *Burkett II*, 951 F.2d 1431, 1447 (3d Cir. 1991) (holding that a sentence reduction was appropriate but, unlike Burkett's prior speedy sentencing claim, a sentence vacatur was not appropriate, since the lower court had willfully disregarded orders to sentence Burkett in the prior case).

219. See *United States v. Cain*, 734 F. App'x 21, 24–25 (2d Cir. 2018) (using Due Process Clause and *Lovasco*); *United States v. Brown*, 709 F. App'x 103, 103–04 (2d Cir. 2018) (using Due Process Clause and *Lovasco*); *United States v. James*, 712 F. App'x 154, 161–62 (3d Cir. 2017) (using Due Process Clause and *Barker*); *Jurado v. Davis*, No. 08cv1400 JLS (JMA), 2018 WL 4405418, at *127 (S.D. Cal. Sept. 17, 2018) (using Due Process Clause); *United States v. Phillips*,

approach in dicta.²²⁰ And lower courts' application of due process analyses to alleged speedy sentencing violations, both before and after *Betterman*, demonstrates that due process is a workable analysis in the postconviction phase.²²¹ A split remains, however, over the appropriate analysis to determine whether due process has been violated. An evaluation of the benefits and drawbacks of *Barker* and *Lovasco* should consider the behavior that courts are attempting to deter and how the remedy effectuates that deterrence.

A. Comparing Frameworks to Analyze Undue Delay

Neither *Barker* nor *Lovasco* addressed undue delay in sentencing—*Barker* involved delay between arrest and trial, while *Lovasco* pertained to precharge delay.²²² Nevertheless, each test has features that render it well suited for the sentencing context and reasons that it might not be appropriate.

No. 1:15-CR-104, 2017 WL 3129135, at *4 (S.D. Ohio July 24, 2017) (using Due Process Clause and *Barker*); *Deck v. Steele*, 249 F. Supp. 3d 991, 1080 (E.D. Mo. 2017) (using Due Process Clause and *Barker*); *United States v. Evans*, No. 15-16 ADM/LIB, 2017 WL 1047254, at *2 (D. Minn. Mar. 17, 2017) (using Due Process Clause and *Lovasco* factors, though not by name); *Neathery v. Rader*, No. 13-658-BAJ-RLB, 2016 WL 8313923, at *6 (M.D. La. Dec. 30, 2016) (using Due Process Clause and *Lovasco*-type analysis); *United States v. Lymon*, No. 15-CR-4082MCA, 2016 WL 9488764, at *3 (D.N.M. Dec. 9, 2016) (using Due Process Clause); *United States v. Zamichieli*, No. 12-182, 2016 WL 3519550, at *7–8 (E.D. Pa. June 27, 2016) (using Due Process Clause and *Barker*); *Figueroa v. Buechele*, No. 15-2972 (CCC), 2016 WL 3457013, at *4 (D.N.J. June 23, 2016) (using Due Process Clause); *People v. Dalby*, No. C078421, 2018 WL 316442, at *2 (Cal. Ct. App. Jan. 8, 2018) (acknowledging that the Due Process Clause “arguably protect[s] against fundamental unfairness in sentencing”); *People v. Wiseman*, 413 P.3d 233, 241–42, 242 n.10 (Colo. App. 2017) (using Due Process Clause but rejecting *Barker*); *State v. Lopez*, 410 P.3d 226, 233 (N.M. Ct. App. 2017) (using Due Process Clause and *Lovasco*). *But see* *Johnson v. Lester*, No. CV-17-90-BU-BMM, 2018 WL 934605, at *1 (D. Mont. Feb. 16, 2018) (holding there is no federal due process claim for unreasonable sentencing delay); *Stevens v. McTighe*, No. CV-18-01-BU-BMM, 2018 WL 747846, at *2 (D. Mont. Feb. 7, 2018) (same); *Arnett v. Paramo*, No. EDCV 16-1169-FMO (JPR), 2017 WL 4325576, at *18–19 (C.D. Cal. Aug. 7, 2017) (asserting that defendant has “no constitutional right to a speedy sentencing hearing” but analyzing the claim under state law limiting sentencing delay), *adopted*, No. EDCV 16-1169-FMO (JPR), 2017 WL 4325586 (C.D. Cal. Sept. 25, 2017) (mem.); *State v. D.S.*, No. 16-0693, 2017 WL 5509925, at *7–8 (W. Va. Nov. 17, 2017) (holding that defendant has no right to a speedy sentencing hearing under *Betterman* but that sentencing should be imposed without unreasonable delay).

220. *See Betterman II*, 136 S. Ct. 1609, 1612 (2016) (suggesting that a defendant could seek relief under the Due Process Clauses of the Fifth and Fourteenth Amendments).

221. *See, e.g., Brown*, 709 F. App'x at 103 (acknowledging *Betterman*'s dicta that sentencing delay could violate the Due Process Clause and citing *Ray* for the proposition that *Lovasco* should be used to analyze the due process claim); *Ray*, 578 F.3d at 199 (rejecting the Speedy Trial Clause prior to *Betterman* and applying the Due Process Clause).

222. *See United States v. Lovasco*, 431 U.S. 783, 789–94 (1977) (distinguishing precharge delay from the right to a speedy trial and defining the relevant interests to be considered); *Barker v. Wingo*, 407 U.S. 514, 519–22 (1972) (describing how the right to a speedy trial is different than all other rights and describing the interests at stake).

1. The *Barker* Factors

In *Betterman*, Justice Sotomayor suggested that the *Barker* factors promote interests similar to those at stake at sentencing²²³—*Barker* seeks to promote decency and fairness, ensure efficiency through prompt adjudication, protect the public from additional harm by criminals who are not confined during adjudication, and prevent any “detrimental effect on rehabilitation.”²²⁴ Additionally, Justice Ginsburg referenced all four *Barker* factors in a footnote as potentially “relevant considerations,” albeit without a citation to *Barker*.²²⁵ Although she did not endorse the test as explicitly as Justice Sotomayor did, some commentators have suggested that the majority’s reference all but confirms *Barker*’s application to a speedy sentencing Due Process Clause analysis.²²⁶

Further, many courts have already applied *Barker* in the sentencing context,²²⁷ lending credence to its applicability. Although some courts applied *Barker* under a Speedy Trial Clause analysis, others have found that *Barker* is appropriate to analyze due process claims.²²⁸ As discussed in Section II.A.3, the *Burkett* court held that the Due Process Clause applies to postconviction delays and examined speedy trial and due process claims together under *Barker*.²²⁹ Concededly, *Burkett* was explicitly concerned with due process rights affected by the delay in Burkett’s appeal, which was caused by his delayed sentence.²³⁰ Nevertheless, the concerns raised by delay in an appeal and sentencing are not so disparate—after all, one concern with sentencing delays is that they impede a defendant’s ability to appeal.²³¹

223. *Betterman II*, 136 S. Ct. at 1619 (Sotomayor, J., concurring).

224. *Barker*, 407 U.S. at 519–20.

225. See *Betterman II*, 136 S. Ct. at 1618 n.12 (“Relevant considerations may include the length of and reasons for delay, the defendant’s diligence in requesting expeditious sentencing, and prejudice.”).

226. See Little, *supra* note 166.

227. See *Betterman II*, 136 S. Ct. at 1619 (Sotomayor, J., concurring) (asserting that the majority of circuits have applied *Barker* to speedy sentencing claims); see also cases cited *supra* note 105 (applying the *Barker* factors to speedy sentencing claims before *Betterman*, albeit under the Speedy Trial Clause); *supra* Section II.B.1 (describing cases applying the *Barker* factors to due process challenges to sentencing delay after *Betterman*).

228. See, e.g., *Burkett II*, 951 F.2d 1431, 1438 (3d Cir. 1991) (using the *Barker* factors to analyze undue delay in sentencing under the Speedy Trial Clause and the Due Process Clause).

229. *Burkett I*, 826 F.2d 1208, 1221–22 (3d Cir. 1987).

230. See *United States v. Zamichieli*, No. 12-182, 2016 WL 3519550, at *8 (E.D. Pa. June 27, 2016) (“[T]he *Burkett I* court was specifically addressing Fourteenth Amendment due process concerns resulting from unreasonable delays in the appellate process . . .”).

231. See *id.* (stating that despite the slight factual difference, *Burkett* still demonstrates the applicability of the *Barker* factors to a speedy sentencing due process claim).

As such, cases like *Burkett* demonstrate that *Barker* may be a suitable framework for a due process speedy sentencing claim.

Applying *Barker* to the sentencing context may, however, present some drawbacks. First, *Barker*'s factors are part of a balancing test, in which no single factor—length of delay, reason for delay, assertion of right, or prejudice to the defendant—functions as necessary or sufficient to finding a violation.²³² Instead, a court must engage in a case-by-case review, considering each factor under the circumstances.²³³ In one sense, this lends itself well to sentencing delays by providing courts with flexibility to engage in circumstantial review.²³⁴ Courts that have applied *Barker* to sentencing, however, demonstrate that few claims succeed under its balancing test, as evidenced by those courts that have applied its factors to sentencing.²³⁵ This poor success rate might suggest that the *Barker* balancing test does not provide a meaningful review of the harm that undue delay imposes on defendants. The *Lovasco* test, however, probably cannot resolve this problem either.²³⁶

Second, as Justice Thomas pointed out in his *Betterman* concurrence, the *Barker* factors might not lend themselves well to claims of delayed sentencing.²³⁷ *Barker*'s factors were fashioned to address the unique concerns raised by trial delays,²³⁸ which are not always present in the sentencing context. For instance, the *Barker* Court noted that the defendant can use delay in the trial phase to his benefit.²³⁹ The defendant may be able to exploit court backlog to negotiate better pleas or delay in the hope that incriminating witnesses may become unavailable or forget important facts as time passes.²⁴⁰ Additionally, society bears the cost of incarcerating a presumptively innocent individual—both directly, in paying to house the defendant in jail, and indirectly, as the defendant's family may be forced to rely on welfare if its main wage earner remains in jail for an extended period

232. *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

233. *Id.*

234. Saetveit, *supra* note 100, at 508.

235. See WRIGHT & WELLING, *supra* note 61, § 524 n.18 (collecting speedy sentencing cases that failed under *Barker*); see also *United States v. James*, 712 F. App'x 154, 162 (3d Cir. 2017) (asserting that claims that fail under *Barker* would fail under any other test).

236. See *infra* notes 270–271 and accompanying text.

237. *Betterman II*, 136 S. Ct. 1609, 1618 (2016) (Thomas, J., concurring).

238. See *Barker*, 407 U.S. at 519, 530–33 (explaining that the speedy trial right is different than other constitutional rights and describing the rationale behind the four *Barker* factors).

239. *Id.* at 519 (noting that defendants can manipulate the system and that the delay might work to a defendant's advantage).

240. *Id.* at 519–20.

of time.²⁴¹ Conversely, defendants who are already convicted are unable to negotiate favorable plea deals. Furthermore, a sentencing proceeding is not an opportunity for the defendant to retry his conviction, and thus concerns about witness reliability are less relevant.²⁴² And, perhaps most important to the *Betterman* Court, the defendant is no longer presumed innocent during sentencing.²⁴³ Accordingly, while it is true that society still must bear the expense of the defendant's incarceration and any attendant costs, these expenses would burden society regardless of the speed with which a defendant is sentenced.²⁴⁴

Some of *Barker's* other concerns about a speedy trial, however, are relevant in the sentencing context. *Barker* points out that a defendant who is released on bail while awaiting trial may commit additional crimes.²⁴⁵ This same concern applies if a defendant is out on bail pending his sentencing. Additionally, recall that *Barker* was particularly concerned with prejudice: the Court sought to protect the defendant from oppressive incarceration, minimize the defendant's anxiety, and ensure the defendant's case is not impaired.²⁴⁶ *Barker* emphasized that prejudice due to impairment of the defendant's case is the most pressing concern because the ability of a defendant to put on a complete and accurate defense is key to maintaining a fair criminal system.²⁴⁷ Admittedly, impairment is not as pertinent of a concern to a defendant who is already convicted.²⁴⁸ Defendants at the sentencing phase have already presented their defenses and been found guilty; thus, delay cannot impair their defenses. Sentencing may, however, involve additional factfinding to determine an appropriate sentence,

241. See *id.* (listing the various interests affected by delay).

242. See LAFAVE ET AL., *supra* note 19, § 26.4(f) (explaining that defendants' rights to confront and cross-examine witnesses at sentencing is limited). Of course, as explained below, if a defendant successfully appeals a conviction, witness reliability would become relevant, and any delay in sentencing would contribute to a delay in ultimately retrying the case. See *Burkett II*, 951 F.2d 1431, 1445–46 (3d Cir. 1991) (noting delay would be relevant to an appeal and subsequent new trial).

243. See *Betterman II*, 136 S. Ct. 1609, 1616 (2016) (holding that presumption of innocence does not extend to sentencing and noting that the question of guilt is not addressed at sentencing, as it has already been established).

244. In egregious circumstances, the delay in sentencing could exceed the time that a defendant is ultimately sentenced to serve in prison. In such cases, society would actually be burdened by the sentencing delay, because the defendant was incarcerated longer than necessary. I have not come across such an example, however, and accordingly deduce that this would be a rare occurrence, if it happens at all.

245. *Barker*, 407 U.S. at 519.

246. Saetveit, *supra* note 100, at 501.

247. See *Barker*, 407 U.S. at 532 (unequivocally stating that impairment of the defense is the “most serious” concern).

248. See *Burkett II*, 951 F.2d 1431, 1442 (3d Cir. 1991) (“[T]he Supreme Court stated that the *Barker v. Wingo* factors assume a different (presumably lesser) stature where the defendant is incarcerated after conviction” (citing *Moore v. Arizona*, 414 U.S. 25 (1973))).

and delay may hinder the defendant's ability to represent these facts correctly. The *Burkett* court also pointed out that delayed sentencing could impair a defendant's ability to reconstruct his defense if successful on appeal.²⁴⁹ Moreover, the Supreme Court has cautioned courts not to overlook the defendant's interest in parole and meaningful rehabilitation, which suggests that *Barker's* concerns about oppressive incarceration and the defendant's anxiety relate to sentencing as well.²⁵⁰

2. The *Lovasco* Test

The *Lovasco* test was intended to analyze Due Process Clause violations regarding undue delay at the precharge stage, not postconviction.²⁵¹ Thus, like *Barker*, the *Lovasco* test traditionally applies when the defendant is presumed innocent, a presumption that does not exist at sentencing.²⁵² Addressing this distinction, the *Betterman* Court asserted that defendants' due process rights diminish after conviction in light of their presumed guilt, but those rights are still present nonetheless.²⁵³ The Court confirmed, however, that defendants are entitled to sentencing that is "fundamentally fair."²⁵⁴

Lovasco also focuses on societal concepts of fairness and decency.²⁵⁵ It asks the court to determine "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'"²⁵⁶ Courts have interpreted the two prongs of *Lovasco* to require defendants show both (1) prejudice to the defendant *and* (2) bad faith on the government's

249. *See id.* at 1445–46 (reporting *Burkett's* concern that delay in his sentencing created uncertainty in when his appeal would be decided and damaged his ability to reconstruct his defense).

250. *Moore*, 414 U.S. at 27.

251. Little, *supra* note 166.

252. *See* United States v. *Lovasco*, 431 U.S. 783, 784 (1977) (describing the precharge delay at issue); Carissa Byrne Hessick, *Betterman v. Montana and the Underenforcement of Constitutional Rights at Sentencing*, 14 OHIO ST. J. CRIM. L. 323, 325 (2016) ("After all, trials exist to determine guilt or innocence. . . . In contrast, guilt is a forgone conclusion at sentencing . . .").

253. *Betterman II*, 136 S. Ct. 1609, 1617 (2016).

254. *Id.*

255. *See* State v. *Lopez*, 410 P.3d 226, 233 (N.M. Ct. App. 2017) (asserting *Lovasco* is well suited to analyze whether sentencing delay violates due process rights).

256. *Lovasco*, 431 U.S. at 790 (citation omitted) (first quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); and then quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)).

behalf.²⁵⁷ The defendant thus carries the heavy burden of establishing two essential elements, neither of which is particularly easy to prove.²⁵⁸

As such, *Lovasco* offers courts less flexibility in their analyses than *Barker* does, and it may impose an overly robust hurdle for defendants alleging sentencing delay. It also fails to explicitly address the length of the delay, perhaps suggesting it is ill equipped to handle complaints by defendants awaiting the final disposition of their cases.²⁵⁹ Of course, the length of the delay factors into the prejudice prong, but *Lovasco* does not place as much emphasis on length of time as *Barker* does.²⁶⁰ But unlike *Barker*, *Lovasco* was actually designed to analyze due process claims,²⁶¹ which is the generally accepted constitutional challenge to delayed sentencing now that *Betterman* rejected a Speedy Trial Clause challenge.²⁶² And *Lovasco* has a stated interest in fundamental fairness, a concept emphasized by *Betterman*.²⁶³ Nevertheless, *Barker* is not entirely devoid of this principle, asserting a “general concern that all accused persons be treated according to decent and fair procedures.”²⁶⁴

Another problem with *Lovasco* is that the behavior it seeks to deter is not entirely consistent with the sentencing context. *Lovasco* was specifically concerned with balancing the discretion of the prosecutor and the efficacy of filing charges against the prejudice to the accused.²⁶⁵ The Court sought to ensure that prosecutors had the discretion to file charges only when they believed they had probable cause and the ability to establish guilt beyond a reasonable doubt.²⁶⁶ It balanced this against the fact that delay might necessarily prejudice the defendant—for example, by impairing his defense.²⁶⁷ Under

257. See *United States v. Sanders*, 452 F.3d 572, 581 (6th Cir. 2006) (holding that defendant’s claim failed *Lovasco*, as he did not provide affirmative evidence of bad faith).

258. See *id.* at 580–81 (describing defendant’s heavy burdens to show (1) he suffered prejudice due to a fundamentally unfair process and (2) the government purposefully caused the delay).

259. Notwithstanding the extreme impact of the length of time on the defendant, there is also the possibility that the sentence could be shorter than the delay. Saetveit, *supra* note 100, at 502.

260. See *Lovasco*, 431 U.S. at 789–90 (“Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay . . .”).

261. See *State v. Lopez*, 410 P.3d 226, 233 (N.M. Ct. App. 2017) (attesting to the suitability of *Lovasco*’s due process framework to examine sentencing delay).

262. See cases cited *supra* notes 168–169 (collecting post-*Betterman* cases addressing constitutional challenges to delayed sentencing).

263. See *Lopez*, 410 P.3d at 233 (pointing to *Lovasco*’s consideration of fair play and decency).

264. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

265. See *Lovasco*, 431 U.S. at 790–94 (describing the rationale and benefits of the prosecution’s decision to bring charges at various points and the effect on defendant).

266. See *id.*

267. See *id.* at 785–86, 796 (holding that although defendant may have been “somewhat prejudiced” by delay that caused him to lose a potentially material witness, that determination did

Lovasco, some prejudice is not enough to establish a due process violation without a showing of bad faith by the prosecutor.²⁶⁸ This careful balance between ensuring evidentiary sufficiency and deterring illegitimate precharge delay is not applicable to sentencing. The prosecutor has long since decided to bring charges at the point that the defendant awaits sentencing, so questions of probable cause and reasonable doubt are moot. And, as discussed in Section III.A.1, the threat to the accuracy of a defendant's case is generally not as pronounced at sentencing as it is in preparing for trial.²⁶⁹ Lastly, some commentators have noted that the speedy trial right is a more concrete and robust right than the due process right.²⁷⁰ Thus, applying the traditional due process framework of *Lovasco* might provide less protection than *Barker*, which is traditionally designed to serve Speedy Trial Clause claims.²⁷¹

B. Analyzing Remedies for Speedy Sentencing Violations

Part of the *Betterman* Court's resistance to a Sixth Amendment analysis was the remedy—violation of the Speedy Trial Clause mandates dismissal of the case against the defendant.²⁷² But *Betterman* did not seek that remedy: he requested a reduction of his sentence.²⁷³ One scholar has questioned why the *Betterman* Court could not have simply fashioned a new remedy to suit the particular harm *Betterman* suffered.²⁷⁴ Another commentator has suggested that the Court deliberately avoided the possibility that the charges could be dismissed without prejudice and subsequently refiled, such that dismissal would not have been the “unjustified windfall” that Justice Ginsburg apparently feared.²⁷⁵ Of course, dismissal without prejudice might

not justify finding a violation when the investigation by the government had been undertaken in good faith).

268. See *United States v. Sanders*, 452 F.3d 572, 581 (6th Cir. 2006) (declining to find a due process violation under *Lovasco* when the defendant failed to affirmatively show bad faith by the government).

269. See *supra* note 242 and accompanying text.

270. See Hessick, *supra* note 252, at 334 (stating that the Due Process Clause right at sentencing is likely to be more case specific and more difficult to enforce than a bright-line rule like the speedy trial right).

271. See *id.* (“It is unclear whether defendants will fare as well under the Due Process Clause as they might have had the Court gone the other way in *Betterman*.”).

272. *Betterman II*, 136 S. Ct. 1609, 1615 (2016).

273. Hessick, *supra* note 252, at 331 (citing *Betterman II*, 136 S. Ct. at 1615 n.6).

274. See *id.* at 330–31 (“It is unclear why the Court's past practice in speedy trial cases must govern all future cases. Courts often use their inherent power to fashion remedies to address the precise nature of harm suffered in a particular case.”).

275. Little, *supra* note 166.

defeat the interest in judicial efficiency described in *Barker*,²⁷⁶ but it would render dismissal of charges a less extreme remedy. Finally, some courts have considered a sentence vacatur an appropriate remedy in the due process context as well, the value of which is worth addressing in particularly egregious circumstances, like in *Ray*.²⁷⁷

Traditionally, the only remedy available under *Barker* is dismissal of the defendant's charges.²⁷⁸ The *Betterman* Court rejected this particular bright-line approach to remedying sentencing delays.²⁷⁹ It is curious, then, why both the *Betterman* majority (implicitly) and Justice Sotomayor's concurrence (explicitly) proposed using the *Barker* factors to analyze a claim of undue delay under the Due Process Clause²⁸⁰ rather than using the more traditional *Lovasco* due process framework. Perhaps this suggests that although the Court rejects a rule that mandates dismissal of charges, it generally supports a more consistent, bright-line approach than the more amorphous *Lovasco* remedy²⁸¹—that is, to simply fashion a remedy to counteract the amount of prejudice suffered by the defendant.²⁸² Adopting this sort of case-by-case analysis would allow courts to individualize remedies, but it would also lead to inconsistency.²⁸³

One suggestion is to implement a bright-line rule where, in the case of undue delay, a court automatically imposes the minimum sentence to which the conviction exposes the defendant.²⁸⁴ This approach could be problematic for a variety of reasons. On the one hand, judges might seek to protect their discretion and, as a workaround, decline to find delay in the first place. On the other hand, even if a minimum-sentence remedy was imposed, it fails to address the individual circumstances of each defendant and each case. As a result, this remedy might seem either excessive or insufficient relative to the harm caused by delay. Additionally, a minimum-sentence rule would not provide an adequate remedy for cases where the delay exceeds the minimum. Damages might be one way to supplement this approach in

276. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

277. *See* *United States v. Ray*, 578 F.3d 184, 202–03 (2d Cir. 2009) (essentially vacating the defendant's sentence after she served one day in prison but still had three years of supervised time and six months in a halfway house yet to be served).

278. *Strunk v. United States*, 412 U.S. 434, 439 (1973) (holding that for a Speedy Trial Clause violation, “dismissal must remain, as *Barker* noted, ‘the only possible remedy’” (quoting *Barker*, 407 U.S. at 522)).

279. *Betterman II*, 136 S. Ct. 1609, 1615 (2016).

280. *Id.* at 1618 n.12; *id.* at 1619 (Sotomayor, J., concurring).

281. *See* Saetveit, *supra* note 100, at 494–95 (noting *Lovasco*'s strong emphasis on prejudice and fairness and the vague instruction in forming a remedy to fit the prejudice).

282. *Id.* at 495 (quoting *Ray*, 578 F.3d at 202).

283. *Id.* at 508.

284. *Id.* at 504.

such circumstances, but it is unlikely that defendants would consider money an adequate remedy for unjust incarceration.²⁸⁵

Taking a different tack, Justice Thomas recommended that defendants could petition for a writ of mandamus,²⁸⁶ a command from the reviewing court to compel certain action by the lower court or government actor.²⁸⁷ A writ pertaining to delayed sentencing typically compels the trial court to set a prompt sentencing hearing when there has been extreme delay.²⁸⁸ Unfortunately, this remedy fails to account for the harm already suffered by the defendant or address situations where the delay exceeds any possible sentence.

IV. A MODEST PROPOSAL: APPLYING *BARKER* TO SPEEDY SENTENCING CLAIMS

This Note proposes that speedy sentencing claims be analyzed under the Due Process Clause and that courts apply the *Barker* balancing test to determine whether there has been undue delay. A more flexible remedy, however, is called for—something more akin to the flexible relief under *Lovasco* than the automatic dismissal mandated by *Barker*.²⁸⁹ The default remedy for finding a violation should be to reduce the defendant's sentence in an amount equal to the delay. This default, however, can be overcome by a clear showing that the interests of justice would not be served by the default remedy, in which case a court could fashion appropriate relief in a more free-form fashion.

285. *Id.* at 502–03. Damages cannot negate the psychological damage of incarceration or the hurdles of reentering society. *Cf.* Leslie Scott, “*It Never, Ever Ends*”: *The Psychological Impact of Wrongful Conviction*, CRIM. L. BRIEF, Spring 2010, at 10, 10 (discussing exonerees’ struggles with the stigma of conviction, struggles to find work, difficulties reentering family life and society generally, and resulting mental-health issues). Even if awarded, the appropriate amount of damages is challenging to determine and may be considered monetarily insufficient to compensate for the harm suffered. *Cf.* Erik Encarnacion, *Backpay for Exonerees*, 29 YALE J.L. & HUMAN. 245, 259 (2017) (comparing the difficulty of awarding damages to exonerees to the challenges of damages in wrongful death suits).

286. *Betterman II*, 136 S. Ct. 1609, 1618 (2016) (Thomas, J., concurring).

287. *Mandamus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

288. *See* United States v. Yelverton, 197 F.3d 531, 538 (D.C. Cir. 1999) (noting that Yelverton failed to “seek mandamus from this court to compel the district court to impose [his] sentence”).

289. *See* *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (explaining that finding a violation of the Speedy Trial Clause leads to the severe remedy of dismissal of the charge).

A. *An Argument for Applying the Barker Factors to
Claims of Undue Delay*

The Supreme Court has recommended, albeit in dicta, that courts employ the *Barker* factors to postconviction claims of delay.²⁹⁰ Many courts previously employed *Barker* to analyze speedy sentencing claims under the Speedy Trial Clause,²⁹¹ and following *Betterman*, some courts have applied *Barker* to speedy sentencing claims under the Due Process Clause.²⁹² Advocates would be wise to heed the Supreme Court's suggestion in this regard, as it presents the best indication of the Court's approach to finding a constitutional speedy sentencing right. After all, the Justices presumably refrained from explicitly endorsing a due process analysis only because *Betterman* presented solely a Sixth Amendment Speedy Trial Clause question.²⁹³ And as one scholar pointed out, it would not be outlandish for defendants to successfully assert a constitutional right at sentencing under the Due Process Clause—courts have previously found other sentencing rights under that clause, such as the right to be sentenced without consideration of race.²⁹⁴

As the Third Circuit has demonstrated, *Barker*'s four factors—length of delay, reason for the delay, defendant's assertion of his right, and prejudice to the defendant—could easily be adapted to sentencing.²⁹⁵ As a flexible balancing test, *Barker* allows for an ad hoc consideration of each factor.²⁹⁶ No one factor is considered necessary or sufficient to find a violation of a defendant's right, and each factor is considered under the circumstances of the case.²⁹⁷ For example, in *James*, the delay was quite long (fourteen months), which weighed against the government; but the reason for delay was largely attributable to the defendants, who did not demand sentencing and

290. See *supra* notes 160–166 and accompanying text.

291. See *Betterman II*, 136 S. Ct. at 1619 (Sotomayor, J., concurring) (“The majority of the Circuits in fact use the *Barker* test for that purpose.”); Saetveit, *supra* note 100, at 491–92 (collecting cases applying *Barker* to speedy sentencing claims).

292. See cases cited *supra* notes 168–169.

293. See *Betterman II*, 136 S. Ct. at 1612 (“Brandon Betterman, however, advanced in this Court only a Sixth Amendment speedy trial claim. He did not preserve a due process challenge. We, therefore, confine this opinion to his Sixth Amendment challenge.” (citation omitted)).

294. See Hessick, *supra* note 252, at 334 (explaining that finding constitutional rights at sentencing under the Due Process Clause is “hardly new” and providing the example of courts that reversed sentences based on race as violative of due process rather than equal protection).

295. See *United States v. James*, 712 F. App'x 154, 161–63 (3d Cir. 2017) (employing the *Barker* factors to analyze a due process speedy sentencing claim).

296. See *Barker v. Wingo*, 407 U.S. 514, 529–30, 533 (1972) (rejecting an inflexible approach and endorsing a balancing test that considers the circumstances of the case).

297. *Id.* at 533.

largely benefitted from the delay.²⁹⁸ *Barker* also allows different weight to be given to factors depending on the circumstances—for example, more neutral reasons for delay, such as backlogged courts, still weigh slightly against the government, but not as much as an intentional, tactical delay.²⁹⁹ Indeed, in *James*, the government caused some delay in responding to discovery requested by one of the defendants—the court noted that this weighed slightly against the government, but not as heavily as deliberately impeding the process.³⁰⁰

Such careful balancing incentivizes the government to be proactive in seeking prompt sentencing without punishing the government whenever some delay arises. *James* exemplifies a case with various reasons for delay: a complex restitution calculation, the preparation of a presentence report based on those calculations, a defendant's discovery requests, and the judge's illness all delayed the sentencing hearing.³⁰¹ Although the defendants made some valid claims of prejudice, a number of considerations cut against their case: they did not assert their rights for nearly the entirety of the delay; they personally benefitted from a reduction in restitution due to revised calculations; and the length of time was not unreasonable, considering the preparation required.³⁰² *James* thus demonstrates another benefit of applying *Barker* in this context—it incentivizes defendants to assert their rights instead of trying to manipulate the system by prolonging their own sentencing and then complaining of delay, since their assertion of a right to prompt sentencing is a factor.³⁰³ In light of *Cain*³⁰⁴ and *Lopez*,³⁰⁵ it is clear that this *Barker* factor is important to postconviction delays: even though these cases purportedly applied the *Lovasco* test, both courts looked to the defendant's assertion of right, a

298. See 712 F. App'x at 162–63 (going through the four *Barker* factors and finding that the defendants' rights were not violated).

299. See 407 U.S. at 531 (“A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered” (footnote omitted)).

300. See 712 F. App'x at 162 (contrasting deliberate delay with a good faith effort to respond to discovery).

301. See *id.* at 162–63 (employing the *Barker* factors to analyze a due process claim regarding sentencing delay and finding no violation).

302. See *id.* (holding that the defendants' rights were not violated even though they experienced some prejudice, as that minimal showing alone was not dispositive).

303. See *id.* (explaining that the defendants did not assert their rights until one month before the sentencing hearing, after a full year of them not complaining and in fact seeking delay themselves).

304. *United States v. Cain*, 734 F. App'x 21 (2d Cir. 2018).

305. *State v. Lopez*, 410 P.3d 226 (N.M. Ct. App. 2017).

traditional *Barker* factor, in concluding that there was no speedy sentencing violation.³⁰⁶

The flexibility of the *Barker* factors can be contrasted with the rigidity of *Lovasco*'s two-prong test. Under *Lovasco*, both the improper reason and prejudice prongs are necessary to finding undue delay—even if a defendant demonstrates “actual and substantial prejudice,” relief will not be granted if there was a “legitimate reason for the delay.”³⁰⁷ *Lovasco* essentially requires bad faith on the government's behalf.³⁰⁸ This could be particularly troubling in cases with long institutional delays, such as those caused by understaffed courts. For example, consider a case in a small rural town with a defendant who cannot make bail and sits in jail, awaiting sentencing for a low-level crime. He might wait an inordinately long time if a judge falls ill, emergency cases arise, or the staff member conducting his presentence report unexpectedly quits. Even if the defendant makes frequent requests for sentencing and shows he suffered an inability to participate in substance-abuse counseling, his claim might fail under *Lovasco*. Although he might have suffered prejudice, there are legitimate reasons for delay.³⁰⁹ Courts have distinguished such institutional delays from those that are “purposeful or oppressive.”³¹⁰ Institutional delay, if particularly egregious, is still not “acceptable,” but courts applying *Lovasco* seem to counteract “unacceptable” yet unintentional delay by finding that the defendant failed to prove prejudice.³¹¹

Lovasco's requirement for actual, demonstrable prejudice sets it apart from *Barker* and makes it a poor fit for the sentencing context. Cases adhering to *Lovasco* often find that the defendant's alleged prejudice is too “speculative,” particularly when the prejudice the defendant alleges is ineligibility for release or lack of access to

306. See *Cain*, 734 F. App'x at 25–26 (describing *Cain*'s multiple pro se requests for resentencing); *Lopez*, 410 P.3d at 233–34 (explaining that the defendant actually requested more time to get his affairs in order prior to sentencing and did not make any effort to seek his presentence report).

307. *Betterman I*, 342 P.3d 971, 979 (Mont. 2015) (quoting *United States v. L'Allier*, 838 F.2d 234, 238 (7th Cir. 1988)).

308. See *United States v. Sanders*, 452 F.3d 572, 581 (6th Cir. 2006) (rejecting the defendant's due process claim when he failed to affirmatively show bad faith by the government).

309. See *Betterman I*, 342 P.3d at 979 (interpreting *Lovasco* to require both improper reasons for delay and prejudice for due process claims).

310. See, e.g., *id.* at 981.

311. See *Cain*, 734 F. App'x at 25–26 (denying the defendant's claims because the prejudice he alleged was too speculative but noting that the government and district court bore responsibility for their negligence in scheduling sentencing); *Betterman I*, 342 P.3d at 980–81 (concluding that fourteen months of institutional delay was “unacceptable” but that *Betterman*'s prejudice was neither substantial nor demonstrable when he complained of an inability to access rehabilitation services and ineligibility for conditional discharge).

rehabilitative services that local jails do not offer.³¹² This outcome is problematic, as claims of this nature go to the very heart of why delayed sentencing is troubling in the first place: sitting in local jail inhibits defendants' ability to rehabilitate and reenter society.³¹³ In contrast, cases relying on *Barker* have recognized the following as legitimate claims of prejudice: future participation in rehabilitative programs, eligibility for expanded visitation rights, and potentially missed opportunities like concurrent sentences.³¹⁴ The *Barker* Court also explicitly recognized county jails as "deplorable" places, stating that time spent there was effectively "dead time."³¹⁵ Finally, the *Barker* Court was cognizant of the fact that defendants might not always be able to affirmatively demonstrate what they have lost through delay—for example, *Barker* recognizes that witnesses' memories may fade, but this is "not always reflected in the record because what has been forgotten can rarely be shown."³¹⁶ In the sentencing context, it would be similarly difficult for defendants to prove that they would be eligible for release or could have rehabilitated more but for being kept in local jails without access to those opportunities—it is impossible to show the benefit of something that was unavailable in the first place. *Barker* and *Lovasco* may seem relatively similar, but in practice, *Lovasco* would likely make it unnecessarily difficult for defendants to succeed on speedy sentencing claims.³¹⁷

312. See, e.g., *Cain*, 734 F. App'x at 26 (finding alleged prejudice too speculative when defendant asserted he could have been released sooner if sentencing was not delayed); *Betterman I*, 342 P.3d at 980–81 (rejecting Betterman's due process claim as "speculative" and concluding that Betterman's prejudice was "not substantial and demonstrable" when he claimed an inability to access rehabilitative services available at the Department of Corrections); see also *United States v. Marion*, 404 U.S. 307, 325–26 (1971) (explaining that the defendants did not demonstrate actual prejudice and the due process claims are thus "speculative and premature").

313. See *supra* Section I.B.

314. See *Burkett II*, 951 F.2d 1431, 1443 (3d Cir. 1991) (finding merit in Burkett's reported prejudice and "credit[ing] Burkett's assertions that access to rehabilitative programs and the opportunity for more liberal visitation privileges are an appealing and legitimately valid alternative to the limbo he experienced in the county system"); *Burkett I*, 826 F.2d 1208, 1223–24 (3d Cir. 1987) (explaining that Burkett suffered prejudice from potentially losing part of an opportunity for concurrent sentencing).

315. See *Barker v. Wingo*, 407 U.S. 514, 520, 532–33 (1972).

316. *Id.* at 532.

317. See 5 LAFAYETTE ET AL., *supra* note 19, § 18.5(b) ("It can certainly be argued that the *Lovasco* rule is too demanding."); see also *id.*:

Some lower courts have read *Lovasco* to mean that once the defendant proves prejudice, then "the burden shifts" to the prosecution to show a valid reason for the delay. This is a sensible allocation of the burden, for the reasons underlying the delay are peculiarly within the knowledge of the prosecution. Nonetheless, the prevailing view is that the defendant must shoulder this burden as well. It is not an easy burden to meet, especially because there is no discernible inclination of the lower courts to treat anything except an intent to hamper the defense as an improper reason.

(footnotes omitted).

*B. Applying Default Remedies with Ad Hoc Remedies
Available as a Backstop*

While *Barker*'s factors are well suited to the postconviction setting, its bright-line remedy requiring dismissal of charges is not.³¹⁸ Instead, a finding of undue postconviction delay should warrant default remedies. *Lovasco*'s more amorphous remedial approach, however, should be available in circumstances where default remedies cannot, or should not, be applied under the particular facts of the case.

If a court finds undue delay under the *Barker* factors, the default remedy should be a reduction in the sentence by the amount of undue delay.³¹⁹ This reduction should be distinguished from the credit granted for time served, which is the routine procedure of counting the time the defendant serves while awaiting sentencing toward satisfaction of the sentence ultimately prescribed.³²⁰ State and federal statutes typically provide for this process.³²¹ To illustrate this Note's proposal, consider a defendant who was sentenced to thirty years but was subjected to an undue two-year delay while incarcerated and awaiting sentencing. The judge would reduce the defendant's sentence to twenty-eight years as a remedy for the undue delay. Under existing sentencing procedures, the defendant would generally receive time-served credit as well, such that the two years spent incarcerated would be counted toward satisfying his reduced sentence of twenty-eight years. Accordingly, this defendant would still need to serve twenty-six years after his sentencing hearing.

If such a default remedy is impossible to effectuate under the circumstances or would clearly not serve the interests of justice, the court would be permitted to fashion a flexible remedy under *Lovasco*'s ad hoc approach to appropriately address the prejudice suffered by the defendant.³²² For example, if the amount of delay exceeds the sentence, it would be impossible to reduce the sentence by the amount of delay, and the defendant would not be properly recompensed. Consider a defendant sentenced to six months of incarceration after an undue two-

318. See *Betterman II*, 136 S. Ct. 1609, 1615 (2016) (referring to dismissal of a charge for postconviction delay as an "unjustified windfall").

319. See *Burkett II*, 951 F.2d at 1447 (using a sentence reduction as a remedy).

320. See *Betterman II*, 136 S. Ct. at 1617 n.9 ("Because postconviction incarceration is considered punishment for the offense, however, a defendant will ordinarily earn time-served credit for any period of presentencing detention.").

321. See 18 U.S.C. § 3585(b) (2012) (describing how defendants should be given credit for time "spent in official detention prior to the date the sentence commences"); *Betterman II*, 136 S. Ct. at 1617 n.9 ("[State c]rediting statutes routinely provide that any period of time during which a person was incarcerated in relation to a given offense be counted toward satisfaction of any resulting sentence." (alteration in original) (quoting ARTHUR W. CAMPBELL, LAW OF SENTENCING § 9:28, at 444–45 & n.4 (3d ed. 2004))).

322. See Saetveit, *supra* note 100, at 495 (describing the remedy for a due process violation).

year delay in jail awaiting sentencing. Under this Note's proposal, his sentence should be reduced by two years (the amount of time caused by undue delay), but this is impossible—the defendant cannot serve a *negative* one-and-a-half-year sentence. In practice, the defendant would typically be released right away because the time-served credit for the defendant's two-year incarceration surpasses his six-month sentence.³²³ In other words, the defendant's sentence has already been served. Even so, the defendant in this situation has not been recompensed for the undue delay he suffered, because he cannot regain the time he lost in jail. Additionally, there might be a circumstance in which the delay in sentencing is very lengthy and would thus warrant a significant sentence reduction. But suppose the defendant is out on bail during the delay and commits another serious crime while sentencing is pending. Justice would not be served by rewarding such an individual with a substantially reduced sentence.

In sum, both *Barker* and *Lovasco* contribute important rationales to the treatment of postconviction delay—while *Barker's* factors are better suited for analyzing sentencing delay, *Lovasco's* ad hoc approach to relief may inform an appropriate remedy for undue postconviction delay.

CONCLUSION

It is true that by the time defendants have reached the sentencing phase of their criminal proceedings, they are no longer presumed innocent.³²⁴ Nevertheless, as *Betterman* acknowledges, defendants still retain a right to fundamentally fair sentencing proceedings.³²⁵ As such, the criminal justice system, and society generally, should be concerned with any oppressive delays.³²⁶ By holding that the Speedy Trial Clause does not apply to sentencing, the *Betterman* Court rejected the possibility that courts could automatically remedy sentencing delays by dismissing cases outright.³²⁷ It did not,

323. See *supra* note 321 (providing the federal and state statutory bases for routinely applying time-served credit).

324. See *Betterman II*, 136 S. Ct. at 1613–14, 1617 (dividing criminal proceedings into three stages—prearrest, arrest to conviction, and postconviction—and noting that the presumption of innocence detaches after conviction).

325. *Id.* at 1617.

326. See *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (noting that the Due Process Clause prohibits oppressive delay).

327. See *Betterman II*, 136 S. Ct. at 1615 (“The sole remedy for a violation of the speedy trial right—dismissal of the charges—fits the preconviction focus of the Clause. It would be an unjustified windfall, in most cases, to remedy sentencing delay by vacating validly obtained convictions.” (citations omitted)).

however, foreclose the prospect that the same factors applied to Speedy Trial Clause violations could be used to analyze due process violations in the sentencing context.³²⁸ This Note proposes applying the *Barker* factors to claims of unduly delayed sentencing but allowing for a more suitable remedy. This solution acknowledges that sentencing delays implicate many of the same concerns as delaying a defendant's trial while also recognizing that a defendant's interests, though present, are not as acute as they are at the trial stage. Thus, it bridges the gap between the unsatisfactory remedy of dismissal that Speedy Trial Clause claims demand³²⁹ and affording a defendant protection of a due process right to prompt sentencing.

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328. Indeed, *Betterman* endorsed this proposal. *See id.* at 1618 n.12 (implicitly endorsing the *Barker* factors); *id.* at 1619 (Sotomayor, J., concurring) (explicitly endorsing the *Barker* factors).

329. *Betterman*, of course, explicitly rejected dismissal in the speedy sentencing context. *Id.* at 1612 (majority opinion).

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