No. 20-101

IN THE
Supreme Court of the United States

LLOYD HARRIS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

REPLY IN SUPPORT OF CERTIORARI

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I. The Split Is Deep And Entrenched.

The petition set forth a conflict between 52 jurisdictions over correct interpretation of the Due Process Clause. Pet. 8-13. Respondent concedes "lower courts are divided" and offers two facially implausible responses. BIO 2.

First, it says the conflict "is not deep" enough. BIO 28. That must have taken courage to write in a brief. Respondent does not contest that 38 circuits and state high courts apply the conjunctive test, while 14 apply the balancing test.[1]

[1] Respondent says that four jurisdictions shifted to the conjunctive test decades ago. BIO at 29 & 29 n.14. Petitioner correctly categorized them. *See* Pet. 8-9.

Second, respondent assures that the 14 balancing jurisdictions will switch to the conjunctive test "without this Court's intervention." BIO 29. In support, it says four jurisdictions have "uncertain" commitment to balancing (Florida, Maine, and two circuits). This is meritless. As the petition set forth—and respondent does not contest—several balancing circuits and state high courts have explicitly acknowledged the conflicting tests and rejected the conjunctive test (and vice versa). *See* Pet. 15-17 nn.9-12. Indeed, respondent all but concedes the conflict is entrenched when the best it can say is "*[n]ot all* of the balancing jurisdictions have squarely rejected the conjunctive test." BIO 28 (emphasis added).

II. Respondent's "Practical" Preservation Argument Concerning Development Of The Record Is Baseless And Illogical.

Respondent argues this case is "ill-suited" for review because petitioner's challenge "is not preserved and, consequently, the record is inadequate to apply the balancing test." BIO 1, 13. Respondent does not contend that there is a preservation concern of any formal, legal significance—it does not contend, for instance, that the record justifies a deferential standard of review, such as plain error, that could obstruct square presentation of the legal issue. By its own express terms (BIO 1, 12-16), respondent raises a "practical" objection. As respondent tells it on page one: Petitioner "expressly stated in the lower courts that the conjunctive test applied" and "[t]hat test did not require the State to proffer the reasons for the delay." BIO 1. The record is therefore "inadequate," respondent says, because it "does not detail the reasons that

might explain the delay." *Id*. This argument does not pass the straight face test.

It is, of course, true that in the lower courts petitioner acknowledged the governing test under controlling Maryland precedent—as he was *required* to do. *See* 2/10/17 Tr. 14. But it is blatantly superficial to suggest that "admitting" the controlling test, BIO 8, is equivalent to admitting the validity of that test. Yet this is the best the BIO offers—it has *nothing* to say about petitioner's disputes with the improper-motive requirement. *See* Pet. 4-5. Respondent does not dispute that trial counsel objected to the impossibility of meeting the standard, explaining that it would require happening upon a smoking gun, like "some kind of e-mail" saying the prosecution delayed for some improper reason. *Id.* (quoting 2/10/17 Tr. 27). Respondent does not dispute petitioner argued that *it sufficed* for him to show a two-decade delay that caused actual prejudice, where the prosecution advanced no justification and discovered "literally nothing new." *Id*. (quoting 2/10/17 Tr. 27-28). And respondent does not dispute trial counsel's acknowledgement that the best he may be able to show was "a lack of diligence," but "regardless" he should prevail given "the end result" of being left without key evidence due to the twenty-year delay. *Id*. (quoting 2/10/17 Tr. at 28-29, 39); Pet. App. 16a.

In any event, the appellate court's opinion—the decision subject to certiorari review—*explicitly* recognized petitioner's challenge to the improper-motive requirement itself. In the court's words: "[Petitioner], on appeal, does not argue that the State purposefully delayed his indictment to gain a tactical advantage over him"; rather, he contended "that the abundance of

prejudice resulting from the delay *was sufficient to require dismissal*" in the absence of any justification from the State. Pet. App. 23a (emphasis added). The appellate court rejected that view, reiterating Maryland's binding conjunctive test: "[a]n accused maintains the burden of establishing both that he or she was prejudiced by the delay and that the State manipulated the delay to gain a tactical advantage over the accused." Pet. App. 22a (citing *Clark v. State*, 774 A.2d 1136, 1154-55 (Md. 2001)); *see also* Pet. App. 23a. Respondent's efforts to show that petitioner did not assert "his argument as thoroughly as [respondent] desired" are thus a distraction; petitioner "satisfied the requirement of putting the court on notice as to his concern." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988).[2]

Respondent's "practical" preservation concern also proves far too much. As respondent tells it, the reason this case is "ill-suited for this Court's review" is because the record is "undeveloped" as to the balancing approach applied in other jurisdictions. BIO 13-15. But cases are *always* litigated and developed based on the rule that controls in a particular jurisdiction, not based on alternative rules adopted elsewhere.[3]

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[2] *See also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (holding that "[i]t suffices . . . that the court below passed on" the "availability of [the relevant] right," and especially so "where the issue is . . . in a state of evolving definition and uncertainty" (quotation marks omitted)); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (collecting cases).

[3] Relatedly, the BIO says petitioner never specifically "asked the lower courts to apply the minority balancing test." BIO i. This argument is unsound. First, it conflates preservation of a *claim* (i.e., petitioner's due process challenge and resistance to Mary-

Moreover, respondent's "practical" concern about preservation is especially unconvincing here. The only thing respondent identifies as "undeveloped" in the record is respondent's own "reasons for the delay." BIO 14. But both petitioner and the trial court repeatedly pressed respondent to state its reasons for delay. The trial court urged: "What's new in your case? That's what I've been waiting to hear." 2/10/17 Tr. at 35. Respondent evaded, saying "[w]hat does it matter?" and "that's not the test." *Id*. The court summarized: "So there was no new evidence. It was new eyes on the evidence." *Id*. at 36. On appeal, respondent conceded as much: "no significant new evidence was developed after January 2000." State's Court of Special Appeals Br. 37. And the appellate court memorialized the concession: "the crux of the decision to prosecute now resulted from a re-evaluation by 'fresh eyes' of the evidence already collected." Pet. App. 19a. Respondent's "practical" concern that it "lacked the necessary opportunity" to state reasons for its delay is thus belied by the record.

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land's governing rule) with the ability to raise *arguments in support of a claim*. As explained, respondent does not dispute that petitioner lodged a due process claim and challenged the efficacy of requiring an improper motive *or* that the appellate court understood petitioner to argue his claim "was sufficient" irrespective of whether "the State purposefully delayed his indictment to gain a tactical advantage over him." Pet. App. 23a. This Court has always recognized that "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (quoting *Lebron*, 513 U.S. at 378-79). Whether petitioner specifically argued "balancing" as the alternative is beside the point and certainly would not have had any "practical" effect in light of Maryland's binding rule.

Finally, even if one accepts respondent's superficial and self-fulfilling argument, respondent never says what exactly would "frustrate" this Court's ability to announce the correct test under the Due Process Clause. BIO 15. If the Court endorses the improper-motive requirement, we're done. If the Court rejects it and respondent can in good-faith claim some yet-unrevealed explanation for its two-decade delay, the Court would simply remand for Maryland courts to consider whether respondent waived that opportunity through its earlier refusals and, if not, whether this enigmatic reason for its delay affects the outcome under this Court's test.[4]

III. Respondent's Late Attempt To Undermine The Trial Court's Finding Regarding The First Prong Is Meritless.

Respondent's second argument disputes (for the first time) whether the trial court made a finding of prejudice under the first-prong of Maryland's conjunctive test. As respondent tells it now, the trial court merely "touched" on the first prong, making an "observation" that petitioner suffered "some prejudice," and "stopped short of finding" that petitioner satisfied the prejudice prong of Maryland's two-part test. BIO 10, 20. This is hogwash.

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[4] It is telling that, to this day, respondent has never advanced *a single* reason for its nearly two-decade delay. Indeed, when pressed by the trial court to state its reason on the record, respondent cited statements that petitioner made *after being indicted*. Pet. 4 n.1 (citing 2/10/17 Tr. at 37). Respondent invokes these same statements again in its BIO. BIO 7. Needless to say, statements post-dating the indictment cannot have justified delaying indictment.

The trial court's finding here was not ambiguous: The court said that "regarding the first prong," it considered it to be "clear" that petitioner "suffered some prejudice" and that this was "the only thing [it had] to find." Pet. App. 42a. Respondent's tactic here is to lift the two words "some prejudice" from the court's oral ruling and ignore the rest. For convenience, the passage containing the court's conclusion is:

> *Regarding the first prong*, I think *it's clear* the defendant has *suffered some prejudice*. I think the State has too. 20 years is going to make it difficult for both sides. *But the only thing I have to find is whether the defendant suffered the prejudice.*

Pet. App. 20a (emphasis added). In arguing that the trial court "stopped short" of resolving the first prong, respondent conveniently omits the trial court's language that it was providing a conclusion "[r]egarding the first prong," omits that the trial court viewed the issue as "clear," and omits that the trial court viewed the prejudice it found as "the only thing [it had] to find" under the first prong.

In contrast to respondent's new argument that "[t]he trial court did not make a factual finding" as to the prejudice prong, BIO 21, respondent's appellate briefing conceded the trial court made a "finding" and explicitly declined to challenge it. In respondent's words: it "d[id] not challenge the trial court's finding" and argued only that "that finding cannot be used to bootstrap a further finding of" an improper/reckless motive. State's Court of Special Appeals Br. 39; *see also id.* at 31-39 (never challenging the prejudice finding itself). The BIO's about-face is an obvious, late attempt to concoct a vehicle issue.

Even now, respondent does not dispute that the trial court's finding of prejudice was left undisturbed. The appellate court explicitly recognized that the trial judge's determination turned on the second prong: "The trial judge ultimately found that, although Harris may have been prejudiced by the delay, he had failed to prove [the improper-motive requirement]." Pet. App. 19-20a. And the appellate court likewise rejected petitioner's claim exclusively on the improper-motive prong—"based upon [petitioner's] inability to demonstrate that the State deferred to seek the indictment to gain a tactical advantage." *Id.* at 23a.

The undisturbed finding that the prejudice prong is satisfied and that the improper-motive prong is not satisfied combine to present an exceedingly rare opportunity to resolve whether the Due Process Clause, in fact, requires improper motive. The prior petitions that respondent points to are perhaps the best proof of this: For all the states and defendants that have urged the Court to review this question, respondent does not identify *a single case* in the past two decades that arose with a finding that the prejudice prong was satisfied, so as to squarely present the correctness of the improper-motive requirement.

IV. The Conflict Is Of Immense Consequence To People Who Lose The Ability To Defend Themselves Due To Egregious Government Delay But Will Virtually Never Be Able To Unearth Some "Improper Motive."

Respondent's final argument is that disparate interpretation of the Due Process Clause by geography "is tolerable." BIO 33. It assures the Court that the improper-motive requirement "rarely affects the outcome of cases" because "many claims are denied due

to the defendant's failure to satisfy the stringent actual-prejudice requirement." *Id*. This is a misguided and troubling argument.

No one disputes that requiring an accused to show actual prejudice to his defense—which all courts do—is dispositive of many challenges to government delay and can even serve an important screening function. And no one disputes that "the universe of cases" where the improper-motive requirement has its greatest significance is where there *has been* actual prejudice to the accused. BIO 33. But this makes its correctness *more* not *less* consequential. That we are talking about instances where an accused's ability defend himself has actually been hamstrung by the government's excessive, even decades long, delay is exactly *why* it is so important to consider whether relief mandates the additional, near-impossible showing of an improper motive.[5]

Respondent asserts that requiring an accused person to unearth evidence of an improper motive is not likely to lead to a different outcome. But there is an immense difference—both in terms of evidentiary-burden and substance—between a test that considers whether there is "any evidence . . . of a justifiable reason for [the prosecution's] delay," *State v. Whiting*, 702 N.E.2d 1199, 1201 (Ohio 1998), and a test that requires an "improper motive or purpose on the part of the State," *State v. McGuire*, 786 N.W.2d 227, 239

[5] In addition, courts frequently invoke the improper-motive requirement as a reason to not even consider the degree of prejudice to the accused. *See, e.g.*, *State v. Lacy*, 929 P.2d 1288, 1294 (Ariz. 1996); *Gonzales v. State*, 805 P.2d 630, 633 (N.M. 1991).

(Wis. 2010). In fact, respondent concedes that 52 jurisdictions have adopted one test or the other, yet could not cite *a single one* saying that the choice does not matter. They have said the opposite: that the improper-motive requirement imposes "a daunting, almost insurmountable, burden" that "would force a result we would consider unconstitutional, unwarranted, and unfair." *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996). And the improper-motive requirement permits even "egregious" prejudice to a defendant "no matter how long the preindictment delay." *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990).

The record here is illustrative. Based on *respondent's own account of the evidence*, this case involved no direct evidence against petitioner. BIO 2-7. The prosecution obtained a conviction for murder based on two forms of circumstantial evidence: *first*, forensic evidence that the petitioner had a sexual relationship with the victim at the time of the crime, BIO 4-5; and, *second*, inconsistent and potentially incriminating statements that petitioner had allegedly made in a recorded interview, BIO 6-7. Yet it is also undisputed that during the State's two-decade delay, it destroyed the original evidence supporting *both* forms of circumstantial evidence. It "discarded" the actual forensic evidence (the acid phosphate test), BIO 9, such that the defense could not conduct its own analysis of when the intercourse took place. And the State destroyed the *six-hour long* recorded interrogation, replacing it with a *one-page* report authored by the State (four days later, without any notes), which contained the alleged statements that petitioner was confronted with decades later. Pet. 3; BIO 24; 2/10/17 Tr. at 83. And on top of impeding petitioner's ability to rebut *the State's*

theory, the decades-long delay deprived petitioner of evidence critical to mounting *his own* defense, including the forensic analysist who cleared petitioner based on evidence at the crime scene, an alternate suspect, and other witnesses, who died or became unavailable. Pet. 3.[6]

Under the conjunctive test none of this matters—even the most "egregious" prejudice to a defense is irrelevant unless the accused can unearth an improper motive. *Howell*, 904 F.2d at 895. This is not so in other jurisdictions, which have found violations of due process based on less delay where the State had "no valid explanation for the delay in indicting" the defendant. *State v. Lee*, 653 S.E.2d 259, 262 (S.C. 2007); *see also* Pet. 11-12 (citing additional cases). Respondent's argument that balancing "would not affect the outcome

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[6] The State's response throughout these proceedings, echoed in the BIO, has been "don't worry." *The prosecutor* who heard the recording said during oral argument that there was "scratching on the tape" so it "would not have been admitted" and that the missing hours of recording "would not have benefitted Harris's defense." BIO 24-25; Tr. 2/10/17 Tr. 31. Don't worry: *the prosecution's* experts were able to analyze the forensic data before it was destroyed and "made sure that the test was conducted properly." BIO 24-25. Don't worry: the prosecution believes the alternate suspect who died was "not viable" because his DNA was excluded from several sources at the crime scene (by the way, petitioner's DNA was also excluded from several sources at the crime scene, including the hairs and blankets found on the body). BIO 22, 23; 10/26/2017 Tr. at 72-73; 11/1/17 Tr. at 91-92.

The criminal legal system—due process—does not operate on the prosecution's assurances about the accused's guilt. The trial court correctly rejected these arguments, finding it "clear" that petitioner had been prejudiced. *See supra* Part III.

in this case" conveniently omits any discussion of these cases. BIO 16-27.

V. Respondent Provides No Way To Reconcile The Improper-Motive Requirement With The Due Process Clause.

Through the entire BIO, respondent's sole defense of the improper-motive requirement is self-described "dicta" that "lends . . . support" to the test. BIO at 32. Respondent provides no way to reconcile the majority rule with bedrock due process principles. Pet. 18-22; *see also* Amicus Br. of Crim. Defense Assocs. 3, 5-10 (explaining that the improper-motive requirement "is divorced from the demands of due process" and "out of step with the case-by-case balancing approach" adopted in several similar contexts).

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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