IN THE SUPREME COURT OF THE UNITED STATES

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TONY BROWN,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

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

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Questions Presented for Review

1. In *United States v. Lovasco,* this Court delegated to the lower courts the responsibility to "apply[] the settled principles of due process" to preindictment delay. Here, Petitioner was prosecuted in federal court for offenses that had been adjudicated by state courts *13 years* earlier and after exculpatory witness statements had been destroyed. The Ninth Circuit nonetheless held that the delay did not violate due process. Should this Court address the Ninth Circuit's interpretation of *Lovasco*?

2. In *United States v. Richardson,* the Third Circuit held that an amended statute of limitations does not apply retroactively in the absence of express congressional intent that it should. Although *Richardson* has never been overruled, its viability after this Court's decision in *Landgraf v. Usi Film Prods.* has been questioned. Should this Court grant the writ to decide whether a statute of limitations should be applied retroactively in the absence of congressional intent?

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Petitioner, Tony Brown, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

The Ninth Circuit, in an unpublished memorandum, affirmed Petitioner's convictions and sentences for RICO conspiracy, transportation of a minor to engage in criminal activity, and sex trafficking of minors.[1]

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[1] A copy of the memorandum is attached as Appendix A.

Jurisdiction

On January 15, 2020, the Ninth Circuit affirmed Petitioner's convictions and sentence. On April 7, 2020, the Ninth Circuit denied his petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions

Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . .

18 U.S.C. § 3283 (1997):

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

Statement of the Case

Petitioner, Tony Brown, is an aspiring rap-music producer and one-time resident of the San Diego, CA community called North Park. In the late 1990s, he became a member of Skanless, which is a "dance clique" loosely affiliated with another North Park group called Black Mob.

On August 13, 2000, at the age of 18, Petitioner was arrested in Las Vegas for pimping. He pleaded guilty and served 81 days in custody. On March 31, 2001, he was arrested in Los Angeles for pimping. Citing a "lack of sufficient evidence," the Los Angeles District Attorney declined to prosecute. At some point after the D.A. rejected the case, it purged the file and destroyed the videotaped statements of the three alleged victims. The investigating officer was killed in Afghanistan in 2010.

Sometime in 2007, Petitioner moved to Laverne, Arizona, where he lived with his girlfriend. In January 2013, a federal task force began investigating Black Mob and Skanless. On December 19, 2013, the government obtained a single-count, RICO conspiracy indictment against 24 defendants associated with the "Black Mob / Skanless criminal enterprise." During the 12-years that went by between the March 2001 Los Angeles incident and the December 2013 RICO indictment, Petitioner had neither been arrested nor charged with a single felony crime. Nor did the indictment allege any substantive felony conduct against him (apart from the 2000 and 2001 pimping incidents identified above and a drug sale from March 2000).

The government raided Petitioner's Laverne, Arizona residence and arrested him on January 7, 2014.[2] On November 20, 2014, the government obtained a superseding indictment. That indictment, just like the first one, failed to allege any substantive criminal conduct against Petitioner after the March 2001 Los Angeles incident. It nonetheless tacked on four substantive counts of sex trafficking, one based exclusively on the August 2000 Las Vegas incident (Count 2) and three based exclusively on the March 2001 Los Angeles incident (Counts 3-5).

On January 16, 2015, Petitioner moved to dismiss for prejudicial preindictment delay. On April 14, 2016, the district court granted that motion in part, entering a written order dismissing Counts 3-5. On April 18, 2016, the government filed a motion for reconsideration, which the court granted on May 24, 2016.

Trial for Petitioner and codefendant-appellant Robert Banks began on June 27, 2016. On July 13, 2016, the jury returned guilty verdicts as to all counts. On December 21, 2016, the district court imposed a 66-month sentence. On January 15, 2020, the three-judge panel affirmed Petitioner's convictions and sentences. On April 7, 2020, the Ninth Circuit denied his petition for rehearing en banc.

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[2] The district court suppressed the evidence from that search based on the warrant being so stale that no reasonable officer could have executed it in good faith.

Reasons for Granting the Petition

I.

Petitioner was prosecuted in federal court *13 years* after the same matters were adjudicated in state court and after the destruction of the videotaped statements of the alleged victims and the death of the investigating officer; the Ninth Circuit has completely abdicated its responsibility to "apply[] the settled principles of due process . . . to individual cases."

A. Introduction

This case is yet another example of the "new 'age of cooperative federalism,' [in which] the Federal and State Governments are waging a United Front . . . [and] join together to take a second bite at the apple." *Gamble v. United States,* 139 S. Ct. 1960, 1994 (2019) (Ginsberg, J. dissenting) (quotations and citations omitted).

To be perfectly clear, the substantive offenses at issue here were adjudicated in state court in 2000 and 2001.[3] Thirteen years later, a federal task force began investigating a handful of pimps who identified with the same "dance clique" as Petitioner. The detectives and agents dusted off some old case files and –

[3] Petitioner was prosecuted again in federal court in this case for an incident in 2000 that resulted in a conviction for pimping in the State of Nevada and for an arrest for pimping in Los Angeles in 2001. The Los Angeles D.A. dismissed the 2001 case, citing "insufficient evidence." Petitioner had no defense to the new federal charges stemming from the 2000 incident because the government introduced his conviction documents from Nevada against him at trial.

notwithstanding the fact that the videotaped statements of the alleged victims had been destroyed and the case agent was deceased – prosecuted Petitioner for the same thing, all over again.

In *Gamble,* this Court held that such prosecutions do not offend the double-jeopardy clause. This prosecution, however, offended Petitioner's right to due process, as articulated by this Court in *United States v. Lovasco,* which delegated to lower courts "the task of applying the settled principles of due process . . . to the particular circumstances of individual cases." 431 U.S. 783, 787 (1977). By affirming Petitioner's convictions in a memorandum, the Ninth Circuit has made it quite clear that it does not take that responsibility seriously.

B. The length of the delay was extraordinary, Petitioner established non-speculative prejudice from it, and the government had no justification for it; the Ninth Circuit's willful blindness warrants review.

Under the standard set forth by this Court in *Lovasco,* Petitioner was required to establish: 1) actual prejudice from the delay; and 2) that the delay offends "those fundamental conceptions of justice which lie at the base of our civil and political institutions." 431 U.S. at 789-90.

The actual prejudice here was quite obvious: during the 13-year delay between the alleged offense and the indictment, the contemporaneous, videotaped statements of the alleged victims had been destroyed and the detective who wrote

all the reports had been killed. Petitioner was therefore deprived of verbatim witness statements, which would otherwise have been discoverable under the Jencks Act and – because they invariably contained impeachment material – the Fifth Amendment.

The government accordingly enjoyed a significant windfall from the delay. Petitioner could not impeach the victim-witnesses with their videotaped statements because they had been destroyed. Nor could Petitioner impeach the victim-witnesses with contrary facts in the investigating officer's report, because that would require calling the officer to the witness stand and he was dead. Finally, Petitioner could not impeach the other officer because he had not written any reports or made any prior statements.

Separately, the fact that the Los Angeles District Attorney declined the case for insufficient evidence demonstrates that the videotapes were exculpatory. It should go without saying that the prosecution of child-sex crimes is a high priority for any prosecutorial agency. And without the videotapes, this case was not difficult to prove. It stands to reason then, that there was something on those tapes that resulted in the D.A. deciding not to bring charges. That is not speculation – it is common sense.

The Ninth Circuit nonetheless adopted wholesale the government's viciously

circular argument that Petitioner could not show prejudice from the destruction of the tapes without first reviewing the tapes that no longer exist. Again, basic common sense tells us otherwise. There was a *15-year* delay between the incident and the trial. There is no way that the victim-witnesses could have testified consistently with their statements from 15 years earlier, which the government conceded in its briefs. Moreover, by requiring a defendant to identify precisely the contents of recordings that have been destroyed and that he never had access to in the first place in order to obtain relief, the Ninth Circuit has rendered the "actual prejudice" prong of this inquiry a Catch-22.[4]

With respect to the second prong of the test – that the delay "offends those fundamental conceptions of justice which lie at the base of our civil and political institutions" – the extraordinary delay in this case is *sui generis*. Indeed, the "long" delay this Court considered in *Lovasco* was only 18 months, *see id.* at 786, while

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[4] "There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle." Joseph Heller, *Catch-22* (Simon & Schuster 1961).

the delay this Court considered "lengthy" in *United States v. Marion* was only three years. *See* 404 U.S. 307, 308 (1971); *Lovasco,* 431 U.S. at 787 (characterizing the delay in *Marion* as "a lengthy preindictment delay").

The Ninth Circuit cases are all in the same ballpark. *See, e.g, United States v. Corona-Verbera,* 509 F.3d 1105, 1113 (9th Cir. 2007) (less than five-year delay); *United States v. Manning,* 56 F.3d 1188, 1193 (9th Cir. 1995) (seven-year delay); *United States v. Butz,* 982 F.2d 1378, 1379 (9th Cir. 1993) (less than four-year delay)*; United States v. Huntley*, 976 F.2d 1287, 1288 (9th Cir. 1992) (seven-month delay); *United States v. Sherlock,* 962 F.2d 1349, 1353 (9th Cir. 1992) (36-month delay); *United States v. Mays,* 549 F.2d 670, 672 (9th Cir. 1977) (four-and-a-half-year delay).

And there was simply no justification for it, other than "we didn't start investigating the federal case until 2012." But after concluding that the destruction of the videotaped statements from the alleged victims did not constitute actual prejudice, the Ninth Circuit panel did not even bother to address this prong of the inquiry.[5]

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[5] There is also a circuit split as to whether a defendant is required to prove affirmative prosecutorial misconduct or a delay taken for tactical reasons, which a previous member of this Court has recognized. *See Hoo v. United States,* 484 U.S. 1035, 1036 (1988) (White, J., dissenting from denial of petition for writ of certiorari).

The simple fact of the matter is that if Petitioner is not entitled to relief on these facts, no defendant in the Ninth Circuit will ever be able to obtain relief for prejudicial preindictment delay. That is not what this Court held in *Lovasco,* where it left "to the lower courts, in the first instance, the task of applying the settled principles of due process . . . to the particular circumstances of individual cases." 431 U.S. at 797. This Court should grant the petition to remind the Ninth Circuit that *Lovasco* means what it says.

II.

The Ninth Circuit failed to address the retroactive application of an amended statute of limitations in the absence of congressional intent.

The Ninth Circuit panel also ducked an important question regarding the retroactive application of an amended statute of limitations in the absence of congressional intent. In *United States v. Richardson,* the Third Circuit held that a statute of limitations does *not* apply retroactively absent Congress's clear intent to the contrary. 512 F.2d 105 (3d Cir. 1975). And while there appears to be no contrary authority from any other circuits, at least one district court has questioned the viability of *Richardson* after this Court's decision in *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994). *See United States v. Nader*, 425 F. Supp. 3d 619, 630

(E.D. Va. 2019) ("*Richardson* was decided before *Landgraf*, and . . . appear[s] to be inconsistent with *Landgraf*.").

This issue was squarely presented to the Ninth Circuit panel**.** In 2000 and 2001 – when the incidents underlying the substantive sex-trafficking counts took place – the applicable limitations period ran "until the child reaches the age of 25 years":

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

18 U.S.C. § 3283 (1997). If this were the applicable statute of limitations, there is no doubt that the charges against Petitioner would have been time barred because the superseding indictment was filed on November 20, 2014, when each of the alleged victims was more than 25 years old.

In 2003, however, Congress extended the limitations period of § 3283 to "the life of the child." And in 2006, it extended the period again – to "the life of the child or for ten years after the offense, whichever is longer." Also in 2006, Congress enacted 18 U.S.C. § 3299, which states that "an indictment may be found . . . without limitation . . . for any [specified] offense." The only question, then, is whether the "life of the child" limitations period (found in both the 2003 and 2006

amendments to § 3283 or § 3299) applies retroactively.

Petitioner argued to the district court and on appeal that this question is answered by a fundamental, longstanding principle of statutory construction: if Congress does not clearly express its intent to have a statute apply retroactively, it applies prospectively only. Based on that principle, in *Richardson*, the Third Circuit held that a statute of limitations does not apply retroactively absent Congress's clear indication to the contrary. 512 F.2d at 106. And Congress gave no such indication with respect to the 2003 or 2006 amendments to § 3283 or its 2006 enactment of § 3299.

In *Richardson,* the Third Circuit recognized that the issue presented did not relate to the *ex post facto* clause, but instead focused on "ascertaining congressional intent." 512 F.2d at 106. The court began its analysis by emphasizing that "[c]riminal statutes of limitations . . . are to be interpreted in favor of repose." *Id.* It then held that because statutory "law is presumed to operate prospectively in the absence of a clear expression to the contrary" and there was no such expression with respect to the 1971 amendment, the 1968 limitations period controlled and the charge was time barred. *See id.*

The same analysis should apply here because Congress did not indicate that it intended the 2003 or 2006 amendments to § 3283, or its 2006 enactment of §

3299, to apply retroactively. Yet the Ninth Circuit dismissed this issue in a single sentence that in no way addressed the argument:

> Because Congress evinced a clear intent to extend the statute of limitations for these types of crimes in its amendments, and because there is no *ex post facto* problem here, the prosecution was timely.

2020 U.S. App. LEXIS 1545, *7 (9th Cir. Jan. 15, 2020).

Once more, Petitioner did not dispute that Congress had "evinced a clear intent to extend the statute of limitations" when it passed the new legislation. Nor did Petitioner contend that the retroactive application of the statute violated the *ex post facto* clause. Rather, the issue is discrete: whether a statute of limitations is to be applied *retroactively* in the absence of congressional intent that it should be. And the memorandum failed to address that argument entirely. *See id.*

This Court should grant the petition to address this question and to resolve any conflict between the Third Circuit's decision in *Richardson* and this Court's subsequent holding in *Landgraf.*

Conclusion

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: July 2, 2020

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