No. 20-5064

IN THE SUPREME COURT OF THE UNITED STATES

TONY BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Introduction

Petitioner, Tony Brown, submits this reply to the Brief for the United States in Opposition. On the first question presented, with respect to prejudice, the government adopts the same argument embraced by the Ninth Circuit – that Petitioner cannot establish prejudice from the destruction of videotaped witness statements without first reviewing the statements that no longer exist. But that perfectly circular reasoning is at odds with not only this Court's decisions, but also those of several circuits. With respect to the justification for a delay, the government acknowledges a circuit split, noting that the circuits "have taken nonuniform approaches" in determining whether the government's reasons for a prejudicial delay constitute a valid excuse.

Regarding the second question, the government fails to address the significant tension between *Landgraf v. Usi Film Prods.*[1] and *Toussie v. United States,*[2] which has resulted in at least two circuit courts recently lamenting the lack of guidance from this Court. The Court should grant review on both questions presented.

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[1] 511 U.S. 244 (1994).

[2] 397 U.S. 112 (1970).

Argument

I. This Court should grant review to address what constitutes "prejudice" in this context, as well as to address the circuit split regarding justifiable delay.

A. The destruction by the State of the videotaped statements of the alleged victims is prejudicial per se; the Ninth Circuit panel's circular holding conflicts with several other circuits regarding actual prejudice.

Sometime between the 2001 Los Angeles incident and the November 2014 superseding indictment, the Los Angeles District Attorney purged the case file and destroyed the videotaped statements of the three alleged victims. In 2010, the investigating officer – who wrote all the reports – was killed in combat. Petitioner's claim is simple: he was prejudiced by the State's failure to preserve the videotapes and by the death of the officer who wrote all the reports. Specifically, the destruction of the tapes and the death of the officer denied Petitioner what would otherwise have been Jencks Material; he was thus unable to impeach any witness with a prior inconsistent statement. *See United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991) ("A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness.").

In response, the government adopts wholesale the circular argument embraced by the Ninth Circuit panel – that Petitioner cannot show prejudice from the destruction of the tapes without first reviewing the tapes that no longer exist.

See Opp. at 10-11. It bears repeating then, that – unlike in every opinion cited by the government on this issue[3] – the now-unavailable evidence is a documentary item that was both created by, and in the custody of, the *State.* And it is reasonable to infer – especially after the passage of more than 15 years between the incident and the trial – that the tapes would have been a trove of impeachment material.

Moreover, the Jencks Act requires the government to produce the verbatim statements of its witnesses to the defense.[4] And when Jencks Act statements have been destroyed, the destruction is presumptively prejudicial because requiring the defendant to review the statements that no longer exist in order to demonstrate prejudice is a Catch-22. Accordingly, it is the government – not the defendant – who should suffer the consequences:

> We simply cannot tell without the notes. This is the Catch-22 caused by the destruction of the notes. But since it was of the government's doing, it must live with the consequences.

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[3] *See, e.g., United States v. Gouveia,* 467 U.S. 180, 191 (1984) ("witnesses' memories could have dimmed, albi witnesses could have been transferred . . . and physical evidence could have deteriorated"); *United States v. Schaeffer,* 586 F.3d 414, 424 (6th Cir. 2009) (appellant "does not contend . . . that specific evidence had been lost or destroyed"); *United States v. Beckett,* 208 F.3d 140, 151 (3d Cir. 2000) (appellant "does not . . . claim that items of evidence or documents were lost"); *United States v. Engstrom,* 965 F.2d 836, 839 (10th Cir. 1992) (alleged fading memories of potential witnesses); *United States v. McMutuary,* 217 F.3d 477, 482 (7th Cir. 2000) ("inability to call a single [alibi] witness at trial"); *United States v. Crooks,* 766 F.2d 7, 11 (1st Cir. 1985) (same).

[4] *See* 18 U.S.C. § 3500.

United States v. Riley, 189 F.3d 802, 807 (9th Cir. 1999) (reversing conviction based on *good-faith* destruction of notes); *see also United States v. Well,* 572 F.2d 1383, 1384 (9th Cir. 1978) ("The Jencks Act does not require the defendant to show prejudice."); *Palermo v. United States*, 360 U.S. 343, 353, n. 10 (1959) ("[T]he statute does not provide that consistency between the statement and the witness'[s] testimony is to be a relevant consideration [regarding production].").

Indeed, the only reason that the destruction of the videotapes was not a violation of the Jencks Act in this case is the *delay itself*: because the tapes were destroyed by the Los Angeles District Attorney sometime during the 13-years that went by before the indictment, they were never in the possession of the federal government for purposes of the Act.

Finally, the Ninth Circuit panel's conclusion that Petitioner's claim was "speculative" is at odds with the decisions of several other circuits and this Court, which have held that a defendant has established prejudice when he has identified specific evidence that has been lost during the delay. For example, in *United States v. Cornielle,* the Second Circuit held that "[p]rejudice in this context . . . is commonly demonstrated by the *loss of documentary evidence* or the unavailability of a key witness." 171 F.3d 748, 752 (2d Cir. 1999) (emphasis added). Similarly, in *United States v. Jackson,* the Eighth Circuit noted that "[t]o satisfy this burden,

the defendant must identify specific witnesses or documents lost during the delay and the information they would have provided." 446 F.3d 847, 851 (8th Cir. 2006); *see also Beckett,* 208 F.3d at 151 (a failure to identify "items of evidence or documents [that] were lost" renders a claim speculative). And this interpretation is consistent with this Court's conclusion that "'actual prejudice' may be shown if 'memories . . . dim, witnesses become inaccessible, and evidence [is] lost.'" *Cornielle,* 171 F.3d at 752 (quoting *United States v. Marion,* 404 U.S. 307, 325-26 (1971) (alterations in original)).

In short, but for their destruction during the 13-year delay, the government would have been required to produce the videotaped statements under the Jencks Act and its failure to produce those statements constitutes actual prejudice. This prejudice was compounded by the death of the investigating officer, whose unavailability made it impossible for Petitioner to impeach any government witness at trial with the contemporaneous statements they made *15 years* earlier. This Court should grant review to resolve any ambiguity about what constitutes non-speculative prejudice in this context.

B. The divided authority among the circuits regarding "justifiable delay" warrants further review by this Court – particularly given the facts of this case.

In *United States v. Lovasco,* this Court held that, in addition to actual prejudice, a defendant is required to show that the delay offends "those fundamental conceptions of justice which lie at the base of our civil and political institutions." 431 U.S. 783, 789-90 (1977). The *Lovasco* Court, however, did not elaborate on that standard. It instead observed that it "could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions . . . [and 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 796-97. The lower courts have since arrived at very different standards for resolving this inquiry.

The Ninth Circuit – apparently in the minority – has adopted "an approach which balances the factors in the individual situation." *United States v. Mays,* 549 F.2d 670, 677 (9th Cir. 1977). Those factors include both "the length of the delay" and "the reason for the delay." *Id.* at 678. And "although weighted less heavily than deliberate delays, negligent conduct can also be considered, since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *Id.* Accordingly, in the Ninth Circuit, the longer the prejudicial delay,

the better the government's explanation for it will have to be:

> The greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice.

Id.

As the government recognizes in the opposition, that framework is decidedly at odds with "several circuits [that] requir[e] a defendant to demonstrate that the government intentionally delayed seeking an indictment to obtain tactical advantage or for a similar bad-faith purpose." Opp. at 12-13 (citing cases).

Whether a defendant is required to demonstrate that the government acted in bad faith – rather than merely recklessly or negligently – is an important question that this Court should address. And this case is an especially appropriate vehicle for review because of its unique facts. Again, the federal government made a conscious decision to resurrect two cases that had been resolved by state courts and state prosecutors *13 years* earlier, knowing full well that one of those cases had resolved by way of a guilty plea while the other had been rejected for insufficient evidence and that the statements of the alleged victims had been destroyed. In other words, after more than a decade, the government stumbled across two old case files from state court, recognized that it now enjoyed a distinct tactical advantage, and pounced. This Court should decide whether that conduct offends "those

fundamental conceptions of justice which lie at the base of our civil and political institutions."

II. The Court should grant review to address the tension between *Landgraf* and this Court's cases holding that criminal statutes of limitations are to be interpreted in favor of repose – that is, whether the *Landgraf* analysis applies to criminal cases.

This case presents a straightforward, but challenging, question of statutory interpretation:[5] whether a criminal statute of limitations should be given retrospective application in the absence of express congressional intent that it should. In *Toussie v. United States,* this Court noted that "we have stated before the principle that criminal limitations statutes are to be liberally interpreted in favor of repose." 397 U.S. 112, 115 (1970). This Court has also observed that "[a]bsent a clear statement of [retrospective] intent, we do not give retroactive effect to statutes burdening private interests." *Johnson v. United States,* 529 U.S. 694, 701 (2000); *see also Carr v. United States,* 560 U.S. 438, 450 n. 6 (2010) (noting the "well-established presumption against retroactivity"). Consistent with those pronouncements (and expressly relying on *Toussie*), the Third Circuit held in

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[5] Once more, Petitioner's claim is one of congressional intent; it is *not* based on the *ex post facto* clause, a distinction that was lost on the Ninth Circuit panel, which concluded that "because there is no *ex post facto* problem here, the prosecution was timely." *United States v. Brown,* 800 Fed. Appx. 455, 461 (9th Cir. 2020).

United States v. Richardson – on facts indistinguishable from the facts of this case – that a successive statute of limitations cannot have a retrospective effect in the absence of congressional intent. 512 F.2d 105, 106 (3d Cir. 1975).

In response, the government cites to *Landgraf v. USI Film Products,* arguing that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Opp. at 14 (citing *Landgraf,* 511 U.S. 244, 275 (1994)). But *Landgraf* was a civil case. And in the criminal context, there is more at stake than merely a "change[] in procedural rules." This is an important distinction and one that the government recognizes – noting that "*Richardson* . . . was decided before *Landgraf* and is in some tension with *Landgraf*'*s* analysis."[6] Opp. at 15.

Indeed, the lower courts have recently struggled with the tension between *Landgraf* and *Toussie.* In *United States v. Miller,* for example, the First Circuit noted that, after *Landgraf,* the retroactivity question in a criminal case does not "yield[] a readily discernible result" and is "hard to negotiate." 911 F.3d 638, 644-

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[6] The government's fall-back argument regarding *Richardson* – that it addressed a different statute and therefore has no application here – is of no moment. The issue in *Richardson* was identical to the issue presented here: whether a statute of limitations enacted after the offense but before the expiration of the previous statute can apply retrospectively in the absence of congressional intent.

45 (1st Cir. 2018). Specifically addressing the second step of the *Landgraf* analysis, the *Miller* court observed that "[t]he problem becomes dicier because criminal statutes are to be liberally interpreted in favor of repose" and that "*Toussie* potentially alters the second step in the *Landgraf* approach." *Id.* at 645 (quotations and citations omitted). Similarly, in *Weingarten v. United States,* the Second Circuit noted that applying the *Landgraf* analysis in the criminal context "has proved particularly difficult" and lamented "the lack of controlling authority on this difficult issue."[7] 865 F.3d 48, 56, 58 (2d Cir. 2017). And at least one district court has recently held that when analyzing the interplay between *Landgraf* and *Toussie,* a court "must interpret the statute of limitations in a manner favoring repose for Defendant." *United States v. Gentile,* 235 F. Supp. 3d 649, 655 (D.N.J. 2017). This Court should grant review to resolve this difficult question.

[7] Citing the uncertainty surrounding this question, both the *Miller* and *Weingarten* courts declined to resolve this issue because it was raised in the context of a claim of ineffective assistance of counsel. *See Miller,* 911 F.3d at 645; *Weingarten,* 865 F.3d at 58.

Conclusion

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

Respectfully submitted,

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