No. 20-6387

IN THE SUPREME COURT OF THE UNITED STATES

DARRIN B. WOODARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not abuse its discretion in denying petitioner's motion to dismiss his indictment based on pre-indictment delay.

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6387

DARRIN B. WOODARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 817 Fed. Appx. 626.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2020. The petition for a writ of certiorari was filed on November 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). I C.A. App. 49. The district court sentenced petitioner to sixty months of imprisonment, to be followed by two years of supervised release. Id. at 50-51. The court of appeals affirmed. Pet. App. 1a-6a.

1. In early 2015, a confidential informant told officers with the Tulsa Police Department in Oklahoma that petitioner was selling cocaine and marijuana and storing the narcotics in his residence on North Elwood Avenue in Tulsa. Pet. App. 2a; I C.A. App. 35. On January 30, 2015, while conducting surveillance of the residence, officers observed a white SUV parked in the driveway. I C.A. App. 35. A records check revealed that the car was registered to "Calvin Harris and/or Darrin Woodard," and that the tag was registered to the North Elwood address. Ibid. Utilities records for the address likewise bore petitioner's name. Ibid.; III C.A. App. 32. After officers searched the trash abandoned on the curb outside the residence and detected cocaine and marijuana residue, they obtained a search warrant. Pet. App. 2a; I C.A. App. 35.

On March 2, 2015, officers executed the search warrant. Pet. App. 2a. When the police arrived, they witnessed four men leave the house and enter the white SUV parked in the driveway. Ibid. The officers followed the SUV and stopped it for speeding. Ibid. Petitioner was inside the SUV, along with Thomas Crawford, Billy Williams, and Nicholas McBee. Ibid.; III C.A. App. 31-32.

Meanwhile, police searched the house. Pet. App. 2a. On a closet shelf in the southeast bedroom, the officers found a loaded Taurus Judge pistol and a backpack containing a user quantity of marijuana, about 4.5 grams of powder cocaine, and about 25 grams of cocaine base. Ibid.; III C.A. App. 32. In the same bedroom, officers found a utility bill addressed to petitioner. III C.A. App. 32. Officers located additional cocaine, drug paraphernalia, and firearms throughout the house. Ibid. Several photographs in the living room showed petitioner together with Crawford and Williams. Ibid.

After they searched the house, officers "recorded a mirandized interview" with petitioner. Pet. App. 2a. Petitioner admitted that the southeast bedroom, where the officers found cocaine and the Taurus Judge pistol, was his. II C.A. App. 110-111, 154. He also admitted that the Taurus Judge pistol was his pistol, Pet. App. 2a, and that a dog that the officers had found during the search was his dog, which he kept at the house, II C.A. App. 59-60. In addition, petitioner admitted that he had

previously distributed cocaine and that he had several cocaine suppliers. Id. at 111. When asked which of the people with him in the white SUV would know that he had "work" in the house -- a term the officers and petitioner had used to refer to drugs several times in the interview -- petitioner said that Crawford would likely know, thereby confirming that he stored narcotics in the house. Id. at 112. During the interview, officers informed petitioner that he potentially faced federal charges as a result of the items found in the house. Id. at 157.

2. On April 4, 2018, a federal grand jury indicted petitioner, along with Crawford and Williams, with various drug and firearm offenses based on the items found during the search. III C.A. App. 15-24. The indictment charged petitioner with one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1); and four counts of possessing a firearm in furtherance of drug trafficking crimes, in violation of 18 U.S.C. 924(c)(1), including one charge involving the Taurus Judge pistol (Count 5). Id. at 15-20, 22.

a. In September 2018, petitioner filed a motion to dismiss the indictment, alleging that although he was indicted nearly two years before the statute of limitations would have expired, see 18 U.S.C. 3282(a), the three-year window between the search and the

indictment violated the Due Process Clause. Pet. App. 2a & n.1; I C.A. Supp. App. 13-18. Petitioner asserted that he had been prejudiced because he was unable to "reach or contact at least 7 witnesses who would testify in his defense," I C.A. Supp. App. 17, though he did not identify the purported witnesses. He further asserted that the officers did not arrest him immediately following the search because they hoped to develop him as an informant, and that delay prior to his indictment was "negligent." Id. at 14, 16.

At the October 4, 2018, pretrial conference, the district court engaged in a "case-specific" inquiry into petitioner's due process claim. II C.A. App. 153. Noting circuit precedent requiring a defendant alleging unconstitutional pre-indictment delay to show actual prejudice and that the government intentionally delayed in order to gain a tactical advantage or harass the defendant, the district court denied the motion to dismiss without prejudice to its reassertion at trial. The court found "no evidence of intentionality or purposefulness on the part of the government" underlying the delay, which reflected "nothing more than inertia or ordinary negligence." Id. at 167.

b. Petitioner then supplemented his motion to dismiss. Pet. App. 2a-3a; see D. Ct. Doc. 70 (Oct. 15, 2018). At a hearing on October 16, 2018, the morning that the trial was scheduled to commence, the district court again denied the motion, based on a

lack of prejudice to petitioner or intentional delay by the government for the sake of harassing petitioner or obtaining a tactical advantage, while leaving open the possibility that petitioner could later reassert the motion. II C.A. App. 19. When the government informed the court that the parties were in plea negotiations, the court agreed to hear any evidence relevant to the motion to dismiss that petitioner had planned to present at trial. See id. at 19-20, 24-25. Petitioner then testified, and presented testimony from his sister, Catina Moffett; his fiancée, Kennedy Donaho; and his friend, Monica Gillespie. Id. at 31-78.

Petitioner claimed that he was not living at the North Elwood residence in early 2015, and instead was living with his mother in Turley, Oklahoma. II C.A. App. 53. He admitted, however, that he knew people who stayed at the house, including Thomas Gillespie, Billy Williams (his brother), Roger Reed (his cousin), and Nicholas McBee (his friend). Id. at 53, 56-58. Petitioner asserted that Thomas Gillespie had rented the house in his own name, but that the utilities were listed in petitioner's name as a favor. Id. at 53-54. Petitioner also admitted that he had previously sold drugs. Id. at 57. And on cross-examination, petitioner confirmed a number of facts that he had admitted in the recorded interview on the day of the search, including that he kept his dog at the North Elwood residence and that the Taurus Judge pistol was his. Id. at 59-

60, 62. But he disputed or denied recalling various other admissions from the interview. See id. at 63-68.

Moffett testified that during the early part of 2015, petitioner lived in Turley. II C.A. App. 32. She disclaimed any knowledge of petitioner living at the North Elwood residence. Id. at 33-34. Donaho also testified that during the early part of 2015, petitioner was living in Turley. Id. at 38-39. She did not believe that petitioner was staying at the North Elwood residence, but acknowledged that petitioner knew people who lived there, including Thomas Gillespie and Williams. Id. at 39. She testified that the bills for the house were listed in petitioner's name as a favor to Thomas Gillespie, who was renting the house. Id. at 40-41.

Monica Gillespie, who was Thomas Gillespie's sister, testified that Thomas Gillespie rented the North Elwood home in early 2015. II C.A. App. 45-46. She asserted that Thomas's name was on the lease for the house, and that petitioner had put the utilities in his name as a favor to Thomas. Id. at 46-47. But she explained that Thomas had committed suicide on Memorial Day, 2017, and that she had not been able to locate the relevant records. Id. at 47. She also testified that after the police searched the house, Thomas confided in her -- contrary to his prior representations -- that he had been selling drugs. Id. at 48. She related his claim that if "anything [came] about," he would

make it known that "some" of the items found in the house were his. Id. at 48-49.

At the conclusion of the hearing, the district court again denied petitioner's motion. See Pet. App. 11a. The court took the view that petitioner had "shown prejudice" because "at least there would have been a possibility" that if the indictment had been brought prior to Thomas Gillespie's suicide, he would have testified that the house where the drugs were found was his, not petitioner's. Id. at 7a-8a. But the court found that petitioner had not demonstrated that the delay was the product of "more than ordinary negligence." Id. at 11a.

c. Following the denial of his motion, petitioner pleaded guilty to Count 5 of the indictment (possession of the Taurus Judge pistol in furtherance of drug trafficking crimes) pursuant to a conditional plea agreement. II C.A. App. 88-113; I C.A. Supp. App. 24-40. He waived his right to appeal, except as to the denial of his motion to dismiss, and the government agreed to dismiss the remaining charges. I C.A. Supp. App. 26, 32. The district court sentenced petitioner to five years of imprisonment. I C.A. App. 50.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-6a. The court noted circuit precedent explaining that to establish a due process violation on the basis of pre-indictment delay, a defendant must show actual prejudice

and that the delay was purposeful. Id. at 4a-5a. The court of appeals held that the district court did not abuse its discretion in denying the motion to dismiss because petitioner "failed to offer evidence that the delay here constituted anything more than negligent conduct on the part of the government." Id. at 5a.

ARGUMENT

Petitioner contends (Pet. 5-27) that the court of appeals applied an incorrect standard to evaluate his claim of unconstitutional pre-indictment delay and that the circuits and state courts of last resort are divided over the question presented. This Court should deny the petition for a writ of certiorari. The court of appeals correctly rejected petitioner's claim. Any conflict in the lower courts is both narrower and of less practical significance than petitioner suggests and, in any event, is not implicated here because petitioner's claim would fail even under his preferred standard. Petitioner's failure to preserve his claim that the government should bear the burden of proof would also impede the Court's resolution of the question presented. This Court has repeatedly and recently denied review on this issue, and the same result is warranted here. See, e.g., Brown v. United States, cert. denied, No. 20-5064 (Jan. 11, 2021); Baltimore v. United States, 568 U.S. 1232 (2013) (No. 12-7203); Swichkow v. United States, 565 U.S. 1116 (2012) (No. 11-6153); Crouch v. United States, 519 U.S. 1076 (1997) (No. 96-315); Reed

v. United States, 516 U.S. 820 (1995) (No. 94-2048); Hoo v. United States, 484 U.S. 1035 (1988) (No. 87-5620).

1. The court of appeals upheld the district court's rejection of petitioner's motion to dismiss for unconstitutional pre-indictment delay because he could not show both actual prejudice and intentional delay by the government for the sake of tactical advantage or harassment. That approach correctly applies this Court's precedents and represents a sensible accommodation between prosecutorial discretion and the rights of criminal defendants. Petitioner's proposed balancing test, in contrast, is flawed and would intrude on sensitive government investigatory and charging decisions.

a. The "'primary guarantee'" against excessive pre-indictment delay is provided by "predictable, legislatively enacted" statutes of limitations. United States v. Lovasco, 431 U.S. 783, 789 (1977) (quoting United States v. Marion, 404 U.S. 307, 322 (1971)); see Betterman v. Montana, 136 S. Ct. 1609, 1613 (2016). The Due Process Clause thus plays a "limited role * * * in protecting against oppressive delay" in the filing of an indictment. Lovasco, 431 U.S. at 789. That limited protection is available only when the defendant has suffered actual prejudice from the delay and the government's reasons for the delay violate those "fundamental conceptions of justice which lie at the base of

our civil and political institutions." Id. at 790 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam)).

This Court has made clear that "the Due Process Clause does not require" "subordinat[ing] the goal of 'orderly expedition' to that of 'mere speed.'" Lovasco, 431 U.S. at 795-796 (quoting Smith v. United States, 360 U.S. 1, 10 (1959)). It has accordingly rejected the notion that prosecutors are obligated to file indictments upon obtaining a certain quantum of proof. Id. at 791, 795. "To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.'" Id. at 791 (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)). "From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried." Ibid. It would also "preclude the [g]overnment from giving full consideration to the desirability of not prosecuting in particular cases." Id. at 794 & n.15.

Requiring a defendant asserting unconstitutional pre-indictment delay to prove both actual prejudice and intentional delay by the government to harass or obtain a tactical advantage (or reckless disregard of likely prejudice) is consistent with those principles and correctly interprets this Court's precedents.

In finding no impermissible pre-indictment delay in United States v. Marion, supra, the Court observed that "[n]o actual prejudice to the conduct of the defense [wa]s alleged or proved, and there [wa]s no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." 404 U.S. at 325. And this Court has subsequently described the standard similarly, both as to substance and burden of proof. See United States v. Gouveia, 467 U.S. 180, 192 (1984) ("[T]he Fifth Amendment requires the dismissal of an indictment * * * if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense."); Lovasco, 431 U.S. at 790 ("[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim."); see also United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8850) in U.S. Currency, 461 U.S. 555, 563 (1983) ("As articulated in [Lovasco], such claims can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges.").

The standard set forth by this Court reasonably calibrates the justice system's interests in preserving both prosecutorial

discretion and defendants' rights. Expressly invoking Marion and United States v. Lovasco, supra, this Court has recognized "the importance for constitutional purposes of good or bad faith on the part of the Government when [a due process] claim is based on loss of evidence attributable to the [g]overnment." Arizona v. Youngblood, 488 U.S. 51, 57 (1988). And it has consistently protected the government's broad discretion regarding when to initiate criminal charges. See Lovasco, 431 U.S. at 790 ("[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment."); see also United States v. Armstrong, 517 U.S. 456, 464 (1996) (recognizing federal prosecutors' "broad discretion to enforce the Nation's criminal laws") (internal quotation marks and citation omitted).

b. Petitioner's criticisms of that standard lack merit. Petitioner references Founding-era English history to suggest that the proper focus of the due process inquiry is delay and prejudice, not the government's intent. See Pet. 23-24; see also Due Process Inst. Amicus Br. 6. But this Court in Marion addressed the sources petitioner cites and found only "marginal support" for any "prevailing rule * * * that prosecutions would not be permitted if there had been long delay in presenting a charge." 404 U.S. at 313-314 & n.6. Moreover, under English law, "the ordinary criminal prosecution was conducted by a private prosecutor," usually the

victim, "in the name of the King." Id. at 329 (Douglas, J., concurring in the result). Substantially different interests are implicated in the modern-day system, where charges are initiated by disinterested officers of the Executive charged with enforcing criminal laws for the public good.

Petitioner also relies (Pet. 26; see Due Process Inst. Amicus Br. 7-8) on Brady v. Maryland, 373 U.S. 83, 87 (1963), which held that a showing of governmental bad faith is not required to demonstrate a constitutional violation based on the suppression of material evidence favorable to the defense. But "[t]he rule of Arizona v. Youngblood, * * * that 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process,' provides a more apt analogy than that of Brady." United States v. Crouch, 84 F.3d 1497, 1513 n.17 (5th Cir. 1996) (en banc) (quoting Youngblood, 488 U.S. at 58), cert. denied, 519 U.S. 1076 (1997). Petitioner attempts to distinguish Youngblood on the ground that "due process violations relating to prosecutorial charging decisions like preindictment delay are categorically different from due process violations related to police investigations," Pet. 22 n.8; see Pet. 26 n.9, but Youngblood itself expressly relied on both Marion and Lovasco in adopting its standard. See 488 U.S. at 57. And petitioner implicitly acknowledges the differences between the Brady and pre-indictment

contexts, since his proposed balancing test -- in contrast to Brady -- permits consideration of the reasons for the government's conduct. See p. 17, infra.

Petitioner's argument (Pet. 26-27) by analogy to the four-factor test set forth in Barker v. Wingo, 407 U.S. 514 (1972), for determining whether a defendant's Sixth Amendment speedy trial right has been violated -- which includes consideration of "the reason the government assigns to justify the delay," but does not require a showing of bad faith, id. at 531 -- is likewise misplaced. The Barker test is rooted not in the Fifth Amendment's Due Process Clause but in the Sixth Amendment, which expressly commands the prosecution to proceed with "orderly expedition" in the post-indictment context. Smith, 360 U.S. at 10. And the potential for intrusion on sensitive Executive functions is far more acute at the pre-indictment stage, when the government is amassing evidence and deciding whether to prosecute, than at the post-indictment stage, when the government has already publicly decided to pursue charges and the case is before the courts. See Armstrong, 517 U.S. at 465 (noting that "courts are 'properly hesitant to examine the decision whether to prosecute,'" in part to avoid "unnecessarily impair[ing] the performance of a core executive constitutional function") (citation omitted); Crouch, 84 F.3d at 1513 ("[T]he case for judicial second guessing is

particularly weak where it is directed at preindictment conduct.").

Petitioner additionally contends that, as a practical matter, placing the burden on the defendant to show intentional delay by the government is unfair because it is difficult for defendants to obtain "discovery regarding the government's charging decisions and other prosecution strategy." Pet. 18-19. But allocating the burden to the defendant is consistent with "[t]he presumption of regularity" that attaches to prosecutorial decisionmaking. Armstrong, 517 U.S. at 464 (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14 (1926)) (brackets in original). The burden of proving improper government motive regarding pre-indictment delay is similar to the burden that defendants regularly bear in related contexts, such as claims involving the government's destruction of evidence, Youngblood, 488 U.S. at 58, or selective prosecution, Armstrong, 517 U.S. at 464. And in an appropriate case, a defendant who makes a sufficient threshold showing may be able to obtain in camera discovery. See, e.g., United States v. Lindstrom, 698 F.2d 1154, 1158-1159 (11th Cir. 1983); cf. Armstrong, 517 U.S. at 463-464 (recognizing possibility of discovery for selective prosecution claims, while cautioning that "the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims").

Finally, petitioner errs in suggesting that the recent trend to "expand and even abolish statutes of limitations" for certain crimes supports more stringent limitations under the Constitution. Pet. 29; see Due Process Inst. Amicus Br. 16-17. As a threshold matter, many offenses, like capital crimes in the federal system, have long had no statute of limitations. See Act of June 25, 1948, ch. 645, 62 Stat. 827 (18 U.S.C. 3281); Pet. 30 n.11. And despite the asserted trend, this Court reaffirmed as recently as 2016 that "[i]n the first stage -- before arrest or indictment, when the suspect remains at liberty -- statutes of limitations provide the primary protection against delay." Betterman, 136 S. Ct. at 1613. Statutes of limitations represent "legislative assessments of relative interests of the State and the defendant in administering and receiving justice," Marion, 404 U.S. at 322, and petitioner's dissatisfaction with legislative choices in this area does not justify altering the constitutional standard.

c. Petitioner's own proposed approach -- that courts should "weigh proof of prejudice from the defense against whatever explanation the government is able to provide" for the delay, Pet. 25 -- is unsound. A balancing test would require courts to make wide-ranging, intrusive investigations into the details of prosecutorial decisionmaking at the pre-indictment stage, where prosecutorial discretion is at its zenith and courts are ill-suited to second-guess the government's decisions. This Court has

emphasized that "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." Armstrong, 517 U.S. at 465 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)). Petitioner's proposed test would require courts to micromanage prosecutorial resource allocation and staffing decisions. See Crouch, 84 F.3d at 1513 (decisions about "manpower" allocation and investigative "priority" "are ones essentially committed to the legislative and executive branches"); see also, e.g., United States v. Gross, 165 F. Supp. 2d 372, 384 (E.D.N.Y. 2001) (applying balancing test and dissecting the chronology of the assignment of individual Assistant United States Attorneys to an investigation). And it would invite judges to substitute their own "personal and private notions of fairness," Lovasco, 431 U.S. at 790 (citation and internal quotation marks omitted), for the Executive's determinations on these issues.

Petitioner's test would also incentivize prosecutors to bring charges with undue haste, which "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." Lovasco, 431 U.S. at 791 (citation omitted). As to the former, it "would increase the likelihood of unwarranted charges being filed." Ibid. As to the latter, it "would cause

scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts." Id. at 792. Those consequences are inconsistent with this Court's admonition that "the goal of 'orderly expedition'" should not be "subordinate[d]" "to that of 'mere speed.'" Id. at 795 (citation omitted); see Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L.Q. 713, 778 (1999). Even worse, prosecutors could not be certain that even prompt action would insulate their charging decisions from later invalidation or judicial scrutiny. The sole gatekeeping mechanism under petitioner's test (Pet. 21-22) is the defendant's burden to show prejudice, but "[a]ctual prejudice to the defense of a criminal case may result from the shortest and most necessary delay," Marion, 404 U.S. at 324, and prosecutors would have no ex ante assurance that a court would agree that they acted in a timely manner.

2. Petitioner alleges a conflict in the lower courts as to the proper standard for evaluating pre-indictment delay and the burden of proof in applying that standard. But no conflict exists that would warrant further review in this case.

a. The standard applied below represents the overwhelming majority position in the federal courts of appeals. At least seven other circuits have adopted the same or a similar standard. See United States v. Wetherald, 636 F.3d 1315, 1324 (11th Cir. 2011),

cert. denied, 565 U.S. 926 (2011), 565 U.S. 1116, and 565 U.S. 1202 (2012); United States v. Seale, 600 F.3d 473, 479 (5th Cir.), cert. denied, 562 U.S. 868 (2010); United States v. Schaffer, 586 F.3d 414, 424 (6th Cir. 2009), cert. denied, 559 U.S. 1021 (2010); United States v. Jackson, 446 F.3d 847, 849-850 (8th Cir. 2006); United States v. Beckett, 208 F.3d 140, 150-151 (3d Cir. 2000); United States v. Cornielle, 171 F.3d 748, 752 (2d Cir. 1999); United States v. Engstrom, 965 F.2d 836, 839 (10th Cir. 1992); United States v. Crooks, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), cert. denied, 474 U.S. 996 (1985).[1]

Petitioner's efforts to cast doubt on the positions of the Eighth and Second Circuits lack merit. He cites (Pet. 7 n.2) dictum from a single, decades-old case as conflicting authority in the Eighth Circuit, but that court's law has long been clear. See United States v. Davis, 690 F.3d 912, 921 (8th Cir. 2012) ("To establish a violation of his due process rights, [the defendant] must prove '(1) the delay resulted in actual and substantial prejudice to the presentation of the defense; and (2) the government intentionally delayed his indictment either to gain a

[1] The Seventh Circuit likewise requires both substantial prejudice and bad faith, but requires the government to explain the reason for the delay after the defendant demonstrates prejudice. See United States v. McMutuary, 217 F.3d 477, 481-482 (7th Cir.), cert. denied, 531 U.S. 1001 (2000); see also United States v. Sowa, 34 F.3d 447, 451 (7th Cir. 1994) (clarifying the confusion noted at Pet. 7 n.2), cert. denied, 513 U.S. 1117 (1995).

tactical advantage or to harass him.'") (quoting United States v. Haskell, 468 F.3d 1064, 1070 (8th Cir. 2006)), judgment vacated on other grounds, 570 U.S. 913 (2013). And his reliance (Pet. 7 n.2) on a district court case to show "some question" as to the Second Circuit's position is misplaced given the unambiguous precedent of that circuit itself -- which the district court decision failed even to mention. See Cornielle, 171 F.3d at 752 ("A defendant bears the 'heavy burden' of proving both that he suffered actual prejudice because of the alleged pre-indictment delay and that such delay was a course intentionally pursued by the government for an improper purpose.") (citation omitted).

As petitioner acknowledges (Pet. 8), a plurality of the states has adopted a similar approach. Indeed, petitioner undercounts the number of states that have done so. In addition to the 17 states that he cites (ibid.), the highest courts in Kentucky, Minnesota, Missouri, and Tennessee have also required the defendant to show governmental bad faith. See Shane v. Commonwealth, 243 S.W.3d 336, 342 (Ky. 2007); State v. F.C.R., 276 N.W.2d 636, 639 (Minn. 1979); State v. Scott, 621 S.W.2d 915, 917 (Mo. 1981); State v. Utley, 956 S.W.2d 489, 495 (Tenn. 1997); contra Pet. 10 & n.3. Petitioner cites (Pet. 9-10) State v. Gray, 917 S.W.2d 668 (Tenn. 1996), to distinguish Tennessee, but State v. Utley, supra, limited Gray to its "unique facts." Utley, 956 S.W.2d at 495. And beyond those 21 states, New Mexico also

requires the defendant to make a prima facie showing that the government "knew or should have known delay was working a tactical disadvantage" on him, at which point the burden of production shifts to the government. Gonzales v. State, 805 P.2d 630, 633 (N.M. 1991); see Pet. 10 n.3.

As for jurisdictions that would follow his preferred approach, petitioner cites decisions from the Fourth and Ninth Circuits, which both take the view that, if a defendant shows "'actual, non-speculative prejudice,'" the court should then balance the prejudice and "length of the delay * * * against the reasons for the delay" to determine whether the delay offends the "'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007) (citation omitted), cert. denied, 555 U.S. 865 (2008); see Howell v. W.R. Barker, 904 F.2d 889, 895 (4th Cir.) (similar), cert. denied, 498 U.S. 1016 (1990). Petitioner also identifies various state courts that appear to countenance a similar balancing test. See Pet. 9-10 (citing cases). The Ninth Circuit, however, had previously held that a defendant "must show that the delay was caused by the government's culpability." United States v. Sherlock, 962 F.2d 1349, 1354 (9th Cir. 1989), cert. denied, 506 U.S. 958 (1992). That court has also held "that, generally, protection from lost testimony" -- the very harm alleged here -- "'falls solely within

the ambit of the statute of limitations.'" Corona-Verbera, 509 F.3d at 1113 (citation omitted). And petitioner effectively acknowledges that the difference in approaches would have practical significance only in a small universe of cases.

Petitioner recognizes (Pet. 21-22) that it "is relatively uncommon for a defendant to be able to demonstrate actual prejudice," and that "[t]he government therefore is rarely required to come forward with an explanation for its charging delay" under the approach he favors. Even when such an explanation is required, the courts on which he relies have indicated that "[t]he defendant has a heavy burden to prove that a pre-indictment delay caused actual prejudice," and that "[i]f mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged." United States v. Moran, 759 F.2d 777, 782 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986). He cites only three cases (Pet. 11-13) in which the purportedly conflicting standards produced different results. One is the previously discussed district court decision that failed to acknowledge Second Circuit precedent, and another is Scott v. State, 581 So. 2d 887 (Fla. 1991) (per curiam), which in fact found that "the delay in this instance provided the prosecution with a tactical advantage," id. at 893, and thus might well have come out the same

way even under the majority's approach. In short, petitioner fails to show that the question presented carries sufficient practical significance to warrant a departure from this Court's repeated practice of denying petitions for writs of certiorari on this issue. See pp. 9-10, supra.

b. Such a departure is particularly unwarranted because the delay in this case did not violate the Due Process Clause even under petitioner's preferred balancing test. The interval between the offense and the indictment was just over three years, well within the applicable five-year statute of limitations. See 18 U.S.C. 3282(a); II C.A. App. 153. And although the district court concluded that "the defendant has shown prejudice with respect to the pre-indictment delay," its only basis for doing so was that had the case been charged earlier, "at least there would have been a possibility that [Thomas Gillespie] could have been brought to this courthouse on behalf of the defendant to testify, as the defendant contends, that the house is really [Thomas's]." Pet. App. 7a-8a. That kind of speculative possibility is inadequate to show the actual, substantial prejudice necessary to trigger an investigation of the government's reasons for the delay. See, e.g., State v. Brown, 656 N.W.2d 355, 363 (Iowa 2003) (explaining that "the possibility that the missing witnesses or evidence would

have exonerated" the defendant is "insufficient to establish actual prejudice").[2]

Even assuming that petitioner suffered some prejudice from the delay, it was minimal. Whatever Thomas Gillespie might have said, substantial evidence connected petitioner to the North Elwood residence and the drugs found inside. Petitioner himself admitted that the Taurus Judge pistol was his; that he kept his dog at the house; that the southeast bedroom where officers discovered the Taurus Judge pistol, cocaine, and the utility bill in his name, was his; that he previously distributed drugs; that he had several cocaine suppliers; and that Crawford would likely know that petitioner had cocaine in the house. Pet. App. 2a; II C.A. App. 59-60, 110-112, 154. In the course of the search in March 2015, officers found photos of petitioner displayed in the living room. III C.A. App. 32. And a records check revealed that the white SUV observed in front of the residence was registered to "Calvin Harris and/or Darrin Woodard" at that address. I C.A. App. 35.

To the extent that petitioner might nevertheless have wanted to challenge his connection to the house at trial, Thomas

---

[2] Because the government was clearly entitled to prevail under circuit precedent regardless, it had no reason to argue prejudice before the panel below. But that choice does not preclude the government from contending in this Court that it would similarly prevail even under petitioner's alternative test.

Gillespie's absence would not have substantively impeded him from doing so. Petitioner stated at the evidentiary hearing that he would have been willing to testify at trial. II C.A. App. 59. Moffett and Donaho testified that, at the time of the search, petitioner lived at his mother's house in Turley and not at the North Elwood residence. Id. at 33-34, 38-39. Donaho and Monica Gillespie testified that Thomas Gillespie rented the house and petitioner put his name on the utility bills only as a favor to Thomas. Id. at 40-41, 45-47; Pet. App. 9a-10a. Petitioner could also have potentially presented testimony from his brother Williams, his cousin Reed, and his friend McBee, all of whom stayed at the house and would have presumably been aware of whether petitioner lived there. See II C.A. App. 53, 56-58. Petitioner's mother could also have potentially testified that he lived with her. Petitioner made no showing that any of these individuals was unavailable.

It is also entirely possible that Thomas Gillespie would have balked at testifying. And even if he had testified, it is unlikely that his testimony would have exonerated petitioner. See United States v. Doerr, 886 F.2d 944, 964 (7th Cir. 1989) ("[W]e shall only conclude that the death of a witness has prejudiced a defendant where we are convinced that the witness would have testified, that his testimony would have withstood cross-examination, and that the jury would have found him a credible

witness.") (brackets, citation, and internal quotation marks omitted). Although various witnesses testified that Thomas Gillespie was the leaseholder for the North Elwood house, see, e.g., II C.A. App. 40-41, and Monica Gillespie testified that Thomas told her "some" of the items in the house were his, id. at 48-49, neither point -- even if true -- undermines the evidence that petitioner exercised control over the southeast bedroom and was responsible for at least some of the drugs in the house. And Thomas Gillespie's credibility would have been undercut by the fact that Monica Gillespie "admit[ted] that he had lied to her and that he had been a convicted felon." Pet. App. 10a.

Given the minimal prejudice present here, the reasons for the delay would not justify a finding of a due process violation even on petitioner's preferred approach. Petitioner argued below that at least part of the delay was attributable to law enforcement authorities' desire to secure his cooperation as an informant. See, e.g., I C.A. Supp. App. 14. That is a permissible basis for delay. See Lovasco, 431 U.S. at 794 n.15 (identifying "cooperation of the accused in the apprehension or conviction of others" as a legitimate prosecutorial consideration) (citation omitted). The district court concluded that the delay "appears to be nothing more than inertia or ordinary negligence." II C.A. App. 167. But even assuming there was some negligence, courts applying a balancing approach require that "[i]f mere negligent conduct by

the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged." Moran, 759 F.2d at 782. Given the minimal prejudice here, petitioner cannot satisfy that standard.

3. This case is, moreover, not an ideal vehicle for further review for the additional reason that petitioner did not argue in the district court that the government should bear the burden of proof on the reasons for the delay. Although the government did not rely on the standard of review when petitioner asked the panel below to overturn circuit precedent, plain-error review applies to his unpreserved argument -- meaning that the alleged error must, among other things, "be plain 'under current law.'" Johnson v. United States, 520 U.S. 461, 466-468 (1997) (quoting United States v. Olano, 507 U.S. 725, 732, 734 (1993)); see Henderson v. United States, 568 U.S. 266 (2013). Plain-error review applies even though circuit law would have foreclosed an objection before the district court. See Johnson, 520 U.S. at 464-465. Petitioner cannot satisfy the plain-error standard. As previously discussed, see pp. 11-12, 19-22, supra, the prevailing law requires a defendant to prove both prejudice and governmental bad faith to make out a claim that pre-indictment delay violated his due process rights. Any error thus would not qualify as "plain."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

FEBRUARY 2021