No. 20-6387

IN THE SUPREME COURT OF THE UNITED STATES

Darrin B. Woodard,
Petitioner,

v.

United States of America,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

The government does not disagree that the courts are split on the answer to the question presented, or that defendants will virtually (or literally) never prevail under the government's view of the law. Instead, the government tries to muddy these clear waters by contending that any error in the legal test applied below was harmless. That is wrong. But even if it were right, harmlessness is a question for remand. And while the government says that this Court has previously denied petitions presenting similar questions, those petitions are readily distinguishable—and this Court routinely grants review on a question after denying it repeatedly. This Court is now faced with two petitions from majority test jurisdictions involving actual prejudice resulting from the passage of time not spent investigating the cases. *See* Pet'n, *Harris v. Maryland*, No. 20-101. This Court should grant at least one. And this well-preserved federal case is a particularly good vehicle for resolving the conflict.

I. The intractable split on this question is meaningful.

A. The petition sets forth a conflict among nine circuit courts and the high courts of nearly every state over the correct interpretation of the Due Process Clause. Pet'n 7–10. The government never denies the existence of the split, attempting instead to minimize the very real practical differences between the tests. *See, e.g.,* BIO 19 ("[N]o conflict exists that would warrant further review in this case.").[1] And by the

[1] Maryland explicitly concedes the division in *Harris*. BIO 2, *supra*.

time it gets around to addressing the issue in Part 2 of its BIO, the government actually argues that the conflict is more deeply intrenched, with three other circuits and several more states having taken sides in the dispute. BIO 20–22.

B. Unable to argue that no split of authority exists, or to contest that 16 jurisdictions[2] have explicitly adopted the minority test for which Mr. Woodard advocates, the government implies that some of those courts might not actually mean what they say. *See, e.g.,* BIO 22 ("[V]arious state courts . . . appear to countenance a similar balancing test"). The government is wrong. Not only do courts in fact use the minority test—but many have explicitly considered and rejected the majority test that the Tenth Circuit applied in this case. *See, e.g., State v. Lee*, 653 S.E.2d 259, 261-62 & n.1 (S.C. 2007) ("Requiring a higher burden of proof in proving improper motives on the part of the prosecution would put an almost impossible burden on defendants to maintain a Fifth Amendment due process claim in pre-indictment delay cases."); *State v. Oppelt*, 257 P.3d 653, 657–58 (Wash. 2011) ("The formalistic and rigid two-part test used in the majority of circuits does not accurately reflect the more nuanced approach suggested by the United States Supreme Court and adopted by this court[.]"). As the government all but acknowledges, the Fourth Circuit has done the same. *See* BIO 22; *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) ("[W]e cannot

[2] Mr. Woodard incorrectly included Pennsylvania in his original list of minority-test jurisdictions, and—as the government has noted (BIO 21)—Tennessee is idiosyncratic in its application of the different rules.

agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation.").[3]

C. The government goes on to attack the salience of the division by arguing that the majority and minority tests are not actually different in their practical application. By way of example, it notes that the Florida Supreme Court (in granting relief using the minority test) said that the delay in *Scott v. State* "in fact . . . 'provided the prosecution with a tactical advantage,'" and based on this claims that *Scott* "might well have come out the same way even under the majority's approach." BIO 23–24 (quoting 581 So. 2d 887, 893 (Fl. 1991)).

This betrays a singular misunderstanding of the difference between the tests. Saying that the government ***in fact*** obtained a tactical advantage is very different

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[3] So has the Ninth. *See United States v. Moran*, 759 F.2d 777, 781–82 (9th Cir. 1985) (rejecting argument that court should not use "the balancing test" from *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977), and holding that "mere negligent conduct" on the part of the government can support dismissal if enough prejudice is shown); *Mays*, 549 F.2d at 676 ("[T]o require the defendant to prove, in addition to actual prejudice, a specific bad intent on the part of the government places an extremely difficult burden on a defendant. . . . The requirement of proof of such intentional action by the government in this situation is not warranted by the case law.").

The government identifies a single outlier case from 1989 that uniquely and sloppily uses terminology from ***both*** tests. BIO 22. But it also ultimately acknowledges that the Ninth Circuit uses the minority test. *Id.* (quoting *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007)); *see also, e.g., United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2003); *United States v. Gilbert*, 266 F.3d 1180, 1187 (9th Cir. 2001).

than saying that the government obtained one ***intentionally***. The fact of a tactical advantage must be established everywhere; it is simply another way to say that a defendant suffered prejudice. *See, e.g., Commonwealth v. Snyder*, 713 A.2d 596, 605 (Pa. 1998) (reversing lack of prejudice finding because, "[w]hether done intentionally or not, the Commonwealth gained a tremendous strategical advantage against the Appellant due to the passage of time and the loss of critical defense testimony through death and memory loss"). But only some courts hold the defendant to the impossible task of proving that the government obtained that advantage intentionally.[4]

D. A review of the case law puts to bed any remaining argument that this Court should reject Mr. Woodard's case because "the question presented [lacks] sufficient practical significance." BIO 24. Here, the government implies that the three specific examples in Mr. Woodard's petition—where a defendant has won under the minority test but would have lost under the majority test—are the entire universe of cases where a correct interpretation of the Due Process Clause has made a difference. BIO 23–24. The government is wrong.

While it is not—and should not be—an everyday occurrence for a person to win a preindictment delay motion, such victories do indeed occur (as they should). But they essentially ***only*** occur in jurisdictions using the minority test, in cases that

[4] The government also criticizes Mr. Woodard's citation to *United States v. Gross*, 165 F. Supp. 2d 372 (E.D.N.Y. 2001), because—in the government's opinion (though it never appealed the dismissal in that case)—the district court applied the incorrect test for its circuit. BIO 23. But with this criticism, the government essentially concedes that the indictment in *Gross* would not have been dismissed under the majority test, and therefore that the tests truly are substantively different.

would unquestionably have turned out differently in majority test jurisdictions. And under the majority test, some people are forced to go to trial despite having suffered tremendous prejudice from a passage of time that cannot be justified.

1. Cases from minority jurisdictions demonstrate that the mechanics of the test matter. In addition to the examples at Pet'n 11–13, consider *Howell*, where the state's "justification for the [preindictment] delay"—that it was for "convenience"—was an admission of "negligen[ce]" that could not overcome the prejudicial loss of an alibi witness. 904 F.2d at 895. Similarly, in *Lee*, the government's failure to provide any "valid explanation" for a 12-year preindictment delay merited dismissal where important contemporaneous records had been destroyed and certain witnesses could not be located, resulting in "substantial actual prejudice." 653 S.E.2d at 400. And in *State v. Whiting*, dismissal was appropriate where charges were initiated after 15 years and the prosecution presented no evidence of any additional investigation during that time or the discovery of any new evidence. 702 N.E.2d 1199 (Ohio 1998).

These cases, like the three Mr. Woodard has included in his petition, are merely illustrative. *See also* Amicus Br. 18 (discussing other cases). And like the defendants in the cases cited in the petition, Mr. Howell, Mr. Lee, and Mr. Whiting would each have lost under the majority test, as they lacked evidence of bad faith.

2. Cases from majority test jurisdictions also prove that the differences between the tests can be outcome determinative. Some people demonstrate extreme prejudice resulting from inexplicable delay that would undoubtedly lead to dismissal

in minority jurisdictions. But because they cannot show improper motive, they—like essentially every other defendant in these jurisdictions—can obtain no relief.

For example, in *State v. Krizan-Wilson*, a woman was charged "[n]early 23 years after [a] murder, with no new evidence discovered." 354 S.W. 3d 808, 811 (Tex. Crim. App. 2011). A suspect at the time of the killing, Ms. Krizan-Wilson told police she had been sexually assaulted by an intruder, and then the intruder killed her husband. *Id.* She also hired a lawyer, but he died and no one could locate the legal file or "recover evidence originally collected by the defense and sent to a lab." *Id.* at 812. The defense forensic expert had also died. *Id.* And the defense investigator only "had a very vague recollection of the case," having "turned over all evidence to" the now-deceased attorney. *Id.* The victim's medical records "had been destroyed," and the medical records relating to the sexual assault "were also no longer available." *Id.* Nor could Ms. Krizan-Wilson effectively testify on her own behalf due to "mental deterioration," which both her son and a clinical neuro-psychologist confirmed, but which did not rise to the level of incompetence to stand trial. *Id.* The only explanation anyone provided for the delay was that prosecutors simply changed their minds about whether they could prove their case. *Id.* at 818. But Texas has adopted the majority test in these cases. And so, despite the fact that the state was not even contesting prejudice on appeal, the court held that the due process clause was not offended, since Ms. Krizan-Wilson had not presented evidence of intent "to gain a tactical advantage" or any other "bad faith purpose." *Id.* With no explanation for the delay, the case would have been dismissed under the minority test. *Compare, e.g., Snyder*, 713 A.2d at 597,

605. And it is merely illustrative of a larger phenomenon. *See, e.g.,* Amicus Br. 18–19 (discussing other such cases).

Tellingly, the government has not identified ***a single case*** where a person prejudiced by preindictment delay was actually able to meet his burden of proof under the majority test and have that decision upheld on appeal.[5] That is because the split is meaningful: the difference between dismissal in essentially ***no cases*** and the possibility of dismissal in those few but important cases where allowing prosecution to continue after prejudicial preindictment delay would violate the "fundamental conceptions of justice" or "the community's sense of fair play and decency," *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

E. Nor does the government effectively address Mr. Woodard's argument (Pet'n 29–34), or the argument of amicus (Amicus Br. 14–16), that the injustices in majority test jurisdictions are likely to increase if this split is not addressed.

The government misconstrues Mr. Woodard's argument about statutes of limitations. The government correctly notes that "[s]tatutes of limitations represent 'legislative assessments of relative interests of the State and the defendant in administering and receiving justice.'" BIO 17 (quoting *United States v. Marion*, 404 U.S. 308, 322 (1971)). But, contrary to the government's argument, Mr. Woodard is not "dissat-

[5] Mr. Woodard noted a single such decision in his petition, a unique case where the defendant was only able to carry his burden to prove improper motive because, years before, the government had publicly attempted to influence a state court sentencing proceeding by promising not to prosecute. Pet'n 13 (citing *United States v. Dewing*, 2 F.3d 1161 (Table), 1993 WL 307946, *1 (10th Cir. 1993) (unpublished)).

isf[ied] with legislative choices in this area." BIO 17. Rather, as explained in his petition, even if the states' legislative assessments "are just in most cases, the extension and abolition of statutes of limitations greatly increases the chance that individual prosecutions will offend 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" Pet'n 34–35 (quoting *Lovasco*, 431 U.S. at 790).

The reason that individual prosecutions might be fundamentally unjust despite falling within legislatively prescribed statutes of limitations is clear from the Due Process Institute's discussion of the increasing ubiquity—and notable destructibility—of electronic evidence:

> Documents that might once have been letters may now be emails subject to automatic-deletion policies. Calendars that would have been kept on paper in the past may be stored in phones, liable to be replaced or lost without adequate data backup. Celltower locational data, ripe for bolstering alibis, are regularly deleted."

Amicus Br. 14–15. The government does not address this point at all.

It makes sense to respect legislatures' expansions of statutes of limitations to accommodate developments in DNA evidence and progressive understandings of delayed reporting of sex crimes (Pet'n 32–33), while at the same time empowering courts provide relief in those few cases where a defendant is truly prejudiced by preindictment delay that was not caused by the good faith investigation of the case. And it behooves this Court to review this case, rather than allowing Americans to be subject to two very different tests depending on where in the country they have been charged.

* * *

When conflicts do not make a difference, courts say so. But that is not what is happening here. Rather, courts are grappling with which test to apply, addressing both, and weighing in on one side or the other. Contrary to the arguments of the government, the split of authorities is real, ossified, and meaningful. And it will not resolve without this Court's intervention.

II. This case presents a well preserved and potentially dispositive issue more squarely than any previously rejected petition for certiorari.

A. "A litigant seeking review in this Court of a claim properly raised in the lower courts . . . generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Thus, Mr. Woodard's petition properly raises a single question on a well-preserved due process claim: after proving prejudice, was he erroneously also required to prove that the government intentionally delayed bringing charges for the purpose of obtaining a tactical advantage or to harass? Or, as many other jurisdictions hold, should the government have been required to provide an explanation for the delay sufficient to justify the extent of the prejudice he suffered? Pet'n ii.

1. The government well recognizes that Mr. Woodard raised his due process claim below—that, in fact, the district court held a number of hearings and denied the motion under binding circuit precedent; and that Mr. Woodard persisted with his claim on appeal. BIO 4–9. And yet, inexplicably, it concludes that the question presented is partially subject to plain error review, because (it says) Mr. Woodard

did not explicitly "argue in the district court that the government should bear the burden of proof on the reasons for the delay." BIO 28.

This represents a fundamental misunderstanding of preservation law, and of the proceedings below. It conflates preservation of a claim—which unquestionably occurred—with a litigant's ability to raise arguments in support of a claim. 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 v. National Railroad Passenger Corporation*, 513 U.S. 374, 378-79 (1995)). Simply by lodging a preindictment delay claim that his due process rights were violated, Mr. Woodard preserved the question presented for review.

2. But Mr. Woodard went further than that. He in fact resisted the Tenth Circuit's use of the majority test, explicitly challenging the notion that dismissal is only proper if there is proof that the government delayed with an improper motive. Pet. App. 8a–9a (arguing that dismissal is appropriate where "a defendant is deprived of valuable evidence in a case by the government's inaction, whether purposeful or not"). The district court recognized the "equity" of this argument and ruled on the question of law that it raised, noting that it was bound by the Tenth Circuit to require Mr. Woodard to prove improper motive. *Id.* 9a. ("[T]hat's just not the law . . . . You've got to show that the delay was intentional and purposeful.").

Mr. Woodard now asks this Court to review that decision. And this Court has the power to craft the correct rule on this claim, which is properly before it.

B. The government also argues that this Court should deny the petition because the facts of this case "would not justify a finding of a due process violation even on petitioner's preferred approach." BIO 27. But on the record that exists today, the motion assuredly would be granted. Mr. Woodard has shown prejudice that goes to the very heart of the government's case, and the government has not explained why it delayed for three years before indicting.

1. The district court found actual prejudice. Pet. App. 7a–7b. The government did not challenge this finding below. BIO 25 n.2. And, as the government acknowledges, Mr. Woodard presented concrete hearsay testimony about what a witness would have said at trial if Mr. Woodard had been charged before the man committed suicide. BIO 25–26. That expected (and admissible) testimony went to the heart of Mr. Woodard's defense: that Mr. Woodard did not live in the house and did not have constructive possession over drugs found inside. Pet'n 3–4, 28.[6]

2. Although the government contends that any error in the legal test was harmless, this Court's "normal practice" when confronted with harmless error arguments is to resolve the question presented and then "remand th[e] case to the" court

[6] Contrary to the government's argument, it is highly unusual to require a defendant to establish that a dead or missing witness in fact would have been willing to testify or necessarily would have been believed. *Compare* BIO 27–28 (citing for support case where defendant did not even allege what "the dead witnesses could say," *United States v. Doerr*, 886 F.2d 944 (7th Cir. 1989)), *with, e.g., United States v. Santiago*, 987 F. Supp. 2d 465 (S.D.N.Y. 2013) (dismissing reckless assault charge against serviceman without any discussion of whether missing Iraqi interpreter would have testified or been believable, where he was the only uninvolved witness, and he "disappeared" after making some statements supporting the defense but others "favorable to the Government").

below "to consider in the first instance whether the [particular] error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999). The government offers no reason to depart from that practice here. And in any event, the Court can rest assured that Mr. Woodard will be able to prevail on remand: the government waited nearly three years to indict him, and it has offered no explanation for that delay. Although it says that "cooperation" of a defendant can justify delay in indicting him (BIO 27), Mr. Woodard did not cooperate, and the government devoted no more than a day to trying to get him to do so. So that point is irrelevant.

C. Finally, the government argues that this Court has "repeatedly and recently denied review" on the issue of preindictment delay, and so should do the same thing now. BIO 9–10. But Mr. Woodard's case—unlikely the petitions previously denied by this Court—involves (1) delay unrelated to an ongoing criminal investigation (thus distinguishing it from *Lovasco*); (2) a district court finding of prejudice that was undisturbed on appeal (thus distinguishing it from *Marion*); and (3) a finding that there was no due process violation solely because the majority test requires the defendant to produce evidence of the government's intent (thus squarely presenting the split of authorities). That this Court has in the past denied petitions presenting deficient vehicles[7] is not probative of whether the issue is worthy of review.

[7] The petition in *Hoo v. United States* (No. 87-5620) came after testimony by the prosecutor that the delay bringing charges resulted from an ongoing investigation and followed closely on the heels of the discovery of "the most important evidence

The most likely vehicle for review of this split of authority would be where (1) the government lost under the minority test but would have won under the majority test; or (2) the defendant lost under the majority test but would have won under the minority test. But the government has not sought certiorari in cases it has lost. There are relatively few motions that are even brought in majority test jurisdictions, given the practical impossibility of being able to prove government intent. And in many majority-test cases, the motion to dismiss is denied because the defendant was not able to show intentional tactical delay, without any court reaching the question of prejudice at all. *See, e.g., Morrisette v. Com.*, 569 S.E. 2d 47, 52 (Va. 2002).

Despite these practical constraints, the Court now has before it two strong vehicles to address this meaningful split of authority on an important question of constitutional law. *See* Pet'n, *Harris*, *supra*. This Court should grant at least one.

III. The government's focus on the merits of this case confirms that it is worthy of consideration by the Court.

A. The government's brief focuses primarily on how it believes this split should be resolved—a clear signal that this issue is ripe for review. Its argument

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against" Mr. Hoo. *United States v. Hoo*, 825 F.2d 667, 669 (2d Cir. 1987). In *Brown v. United States*, the petitioner failed to show non-speculative prejudice. Pet'n 9, No. 20-5064. In *Baltimore v. United States* (No. 12-7203), the delay "was caused by . . . continued investigation," *United States v. Baltimore*, 482 Fed. Appx. 977, 982 (6th Cir. 2012) (unpublished). In *Swichkow v. United States* (No. 11-6153), it appears from a co-defendant's petition that the district court never found prejudice. *See* Pet'n, *Shiner v. United States*, No. 11-808. In *Crouch v. United States* (No. 96-315), the Fifth Circuit had overruled the district court's finding of prejudice. *United States v. Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996) (en banc). And likewise, in *Reed v. United States*, the Navy Court of Review had reversed the military judge's finding of prejudice. BIO 5, No. 94-2048.

begins not with a discussion of the plainly extant circuit split, but with reasons to adopt the majority test (BIO 10–13) and reject the minority test (BIO 13–19).

The government argues that the majority test "correctly interprets this Court's precedents." BIO 11. Yet it devotes the first nine pages of its argument section to justifying this position, because it cannot point to any clear statement from this Court so holding. No wonder different jurisdictions have reached different conclusions regarding the proper test to apply to preindictment delay motions, even when faced with the exact same arguments the government makes here.

B. Moreover, much of the precedent that the government cites does not support its position, but rather militates in favor of the minority test. The government recognizes that the issue of prosecutorial preindictment delay requires "reasonably calibrat[ing] the justice system's interests in preserving both prosecutorial discretion and defendant's rights." BIO 12–13. But instead of proposing a test that actually does that, it offers one that ultimately leaves the responsibility for protecting a defendant's right to a fair trial exclusively to prosecutors. BIO 18.

The government further argues that the minority test "would require courts to make wide-ranging, intrusive investigations into the details of prosecutorial decisionmaking at the pre-indictment stage." BIO 17. But as the Due Process Institute explains in its amicus brief supporting the grant of certiorari, exactly the opposite is true. It is the ***majority*** test that finds courts "inquir[ing] into the subjective motives of individual prosecutors," whereas the ***minority*** test "focus[es] on objective facts, rather than subjective intent." Amicus Br. 3.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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