No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN MATTHEW GAYDEN, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Florida's Prescription Drug Monitoring Program (PDMP), like PDMPs across the country, is a digital database that collects and analyzes controlled substance prescription information on an ongoing, statewide basis. The question presented is: whether, or under what circumstances, the Fourth Amendment permits a law enforcement officer pursuing a criminal investigation to search the PDMP without a warrant.

II. Whether, to establish that pre-indictment delay violated due process, the defendant must prove both actual prejudice from the delay and that the delay resulted from the government's improper motive or intentional tactical decision, as nine circuit courts and 28 state courts of last resort have held, or whether the defendant must prove actual prejudice and, assuming he does, courts must then balance that prejudice against the government's articulated reasons for the delay, as two circuit courts and nine state courts of last resort have held.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Gayden, Case No. 6:16-CR-187 (Sep. 26, 2018) (second corrected judgment)

United States Court of Appeals (11th Cir.),

United States v. Gayden, No. 18-14182 (Oct. 9, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Constitutional and Statutory Provisions **Page(s)**

Constituitonal and Statutory Provisions **Page(s)**

Other Authorities **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

John Matthew Gayden, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDERS BELOW

The Eleventh Circuit's opinion affirming Dr. Gayden's conviction and sentence is published at 977 F.3d 1146, and is provided in Appendix A. The Eleventh Circuit's order denying rehearing en banc is unpublished and provided in Appendix D.

The district court's order denying Dr. Gayden's motion to suppress the PDMP data and its poisonous fruits is unpublished and provided in Appendix B (denial of motion for reconsideration). The district court's order denying Dr. Gayden's motion to dismiss for prejudicial pre-indictment delay is unpublished and provided in Appendix C.

JURISDICTION

The Eleventh Circuit entered judgment on October 9, 2020. Dr. Gayden petitioned for rehearing en banc. On December 3, 2020, the Eleventh Circuit denied Dr. Gayden's petition. This Court's March 19, 2020 order extended the deadline for all petitions for writs of certiorari

to 150 days from the date of the lower court order denying a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause[.]

The Fifth Amendment to the United States Constitution provides in relevant part:

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

INTRODUCTION

This case is about protecting doctor-patient privacy in the digital age. As mandated by state law, Florida's PDMP collects, digitizes, and analyzes sensitive prescription records. The main purpose of the PDMP is to assist doctors in their treatment of patients, including to aid in the identification of "doctor shoppers"—individuals who seek out multiple controlled substance prescriptions from different doctors in a short period of time, signaling potential opioid abuse. But anyone with access to the

PDMP can manipulate the data to generate trends and draw inferences from those trends about a patient's medical conditions and a doctor's confidential treatment decisions. Increasingly, then, law enforcement officers use the PDMP as a tool to aid in criminal investigations of doctors and patients. The PDMP gives these officers an unprecedented ability to pry into the privacies of the doctor-patient relationship.

Some states, like Florida, require no more than an officer's assertion that she has an active investigation related to controlled substances before permitting access. Other states have attempted to protect doctor-patient privacy by requiring that law enforcement obtain a court order before accessing the PDMP for a criminal investigation. There, however, federal law enforcement agents routinely insist, as a matter of federal preemption, that an administrative subpoena issued under 21 U.S.C. § 867 suffices.

But the choice to proceed by subpoena cannot resolve the Fourth Amendment question presented here: whether a warrant is required to access the PDMP's confidential prescription database. This Court's intervention is necessary to define the constitutional limits of law enforcement access to these sensitive records.

STATEMENT OF THE CASE

A. The PDMP

Doctors prescribe schedules II–V drugs ("controlled substances") for sensitive and often stigmatized medical conditions—including not only acute or chronic pain or opioid addiction, but also various mental health conditions, to address side effects from AIDS or cancer treatment, and for obesity, epilepsy, ADHD, migraines, and hormone replacement therapy.[1]

Florida law mandates pharmacies upload information regarding these prescriptions into the statewide PDMP database, where it is digitized, aggregated, and analyzed. D. Ct. Dkt. 123 at 130, 246 at 258–59, 265. Analyzed information includes the patient's name, date of birth, address, and gender; prescriber information; pharmacy information; and drug information, including name, strength, dosage, and quantity. D. Ct. Dkt. 246 at 259; Fla. Stat. § 893.055(2)(a)–(3)(a).

Florida's PDMP launched in September 2011. D. Ct. Dkt. 246 at 265. The next month, doctors were notified and permitted to register for

[1] *See* Brief of Amici Curiae American Civil Liberties Union, et al. at 7, 30–31, *United States Department of Justice v. Jonas*, No. 19-1243 (1st Cir. May 29, 2019).

access to consult the database when treating their patients. *Id.* at 271–72.[2] Dr. Gayden, who operated a pain management clinic, was approved to access the PDMP on October 25, 2011, D. Ct. Dkt. 246 at 273, the same day that he stopped practicing medicine, D. Ct. Dkt. 123 at 160. Doctor registration does not affect whether the doctor's prescriptions are uploaded to the PDMP—pharmacies are required by law to add *all* controlled substance prescriptions filled on an ongoing basis, regardless of the patient or prescriber. D. Ct. Dkt. 246 at 258. Additionally, pharmacies retroactively added two years of prescription information, going back to 2009. D. Ct. Dkt. 123 at 130.

Although the PDMP's main purpose is to help doctors treat patients, D. Ct. Dkt. 246 at 264, Florida law permits law enforcement to access the records if there is an "active investigation" of "potential criminal activity . . . regarding controlled substances." Fla Stat. § 893.055(5)(c); D. Ct. Dkt. 246 at 267. An active investigation is defined as "an investigation that is being conducted with a reasonable, good faith belief that it could lead to the filing of . . . criminal proceedings, or that is

[2] Although physician PDMP access was initially voluntary, D. Ct. Dkt. 246 at 273, doctors are now required to check the PDMP before prescribing a controlled substance, Fla Stat. § 893.055(8).

ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future." Fla Stat. § 893.055(1)(a). The statute provides no limit to the records a law enforcement officer with an "active investigation" may access and no requirement that the search be reasonable in scope or relevant to the investigation. *Id.* § 893.055.

B. Criminal Investigation of Dr. Gayden

After the Drug Enforcement Administration (DEA) received an anonymous tip in June 2011 that Dr. Gayden was selling prescriptions, DEA Agent Eva Sala opened a criminal investigation. D. Ct. Dkt. 123 at 125–26, 154–55. She ran Dr. Gayden's criminal history, conducted surveillance outside his office, and sent a confidential source to obtain a prescription. *Id.* at 126–29, 155.

When the PDMP came online in fall 2011, Sala ran Dr. Gayden's name and pulled all the prescription information for all of his patients. *Id.* at 133. She explained that after she obtained this information, she "had to determine what to look for." *Id.* at 134. The data was so voluminous that at first it was not "feasible" to identify problematic prescriptions. *Id.* at 134; *id.* at 181–82, 185 (hundreds or thousands of

patients). Only by rummaging through Dr. Gayden's prescriptions, sorting them, and drawing trends did she determine that "what [she] saw from the PDMP was a very high frequency of the same or similar type of medications being prescribed for the same . . . group of patients." *Id.* at 134, 180. Sala then relied on the PDMP data to build the case against Dr. Gayden, using the data to obtain subpoenas, identify witnesses, and seize the medical files that were a critical part of the government's case at trial. *See* D. Ct. Dkt. 141 at 2–3, 12, 16; D. Ct. Dkt. 194 at 214, 225–26.

C. District Court Litigation

1. *Motion to dismiss for pre-indictment delay*

On September 28, 2016, seven days before the statute of limitations would have expired, a grand jury indicted Dr. Gayden on seven counts of distributing a controlled substance outside the usual course of professional practice and for other than legitimate medical purposes. D. Ct. Dkt. 1.

Dr. Gayden moved to dismiss the indictment based on the prejudicial pre-indictment delay, which he alleged violated due process. D. Ct. Dkt. 80. He explained that as a result of the delay, witnesses and documents were no longer available, causing him actual prejudice.

For example, at least two key witnesses had passed away: Mary Gayden, his mother, who was his former office manager and accountant and who could speak to his professional practice and character, and William Spadafora, his office manager at the time of the allegedly illegal activity, who was a credible alternative suspect because there was evidence he took bribes and prescribed medication behind Dr. Gayden's back and without Dr. Gayden's knowledge. *Id.* at 3–4. A third potential witnesses who had passed away had discussed in a taped interview the "doctor shopping" techniques she had used to convince Dr. Gayden that a prescription was medically necessary. In addition to deceased witnesses, numerous documents had been destroyed as well during the intervening years. The government issued over fifty subpoenas as part of its investigation, but the vast majority of responses were destroyed and never provided to Dr. Gayden. *Id.* at 5.

Dr. Gayden also argued that he did not have to prove bad faith on the part of the government and that reckless disregard of the probable prejudicial impact of its failure to act or even simple negligence sufficed. *Id.* at 5–6; D. Ct. Dkt. 123 at 85–86.

The district court denied Dr. Gayden's motion. App. C, D. Ct. Dkt. 145. The court employed the Eleventh Circuit's two-part test for pre-indictment, explaining that Dr. Gayden needed to show both actual prejudice and that the delay "resulted from a deliberate design by the government to gain a tactical advantage over him." *Id.* at 5 (quoting *United States v. Farias*, 836 F.3d 1315, 1325 (11th Cir. 2016)). The court determined that Dr. Gayden failed to meet the second requirement because he could not show that the delay was "an intentional device employed by the Government to gain a tactical advantage over him." *Id.* The district court continued, "That several key witnesses have died and that evidence has been lost or destroyed due to the passage time fails to demonstrate any intent by the Government." *Id.*

2. *Motion to Suppress the PDMP data and its poisonous fruits*

Dr. Gayden also moved to suppress the PDMP data and its poisonous fruits, arguing the warrantless search violated both state law and the Fourth Amendment. D. Ct. Dkt. 167 (motion for reconsideration). The district court found there was "some confusion" regarding whether the PDMP search violated Florida law and assumed in denying Dr. Gayden's motion to suppress that the access was improper under state law. App. B, D. Ct. Dkt. 172 at 2. Nevertheless, the district court stated that that because Dr. Gayden had shared individual prescriptions with patients, who shared them with pharmacies, who uploaded them to the PDMP, he lacked any protectable Fourth Amendment right in the information. *Id.* at 3. As such, the court denied the motion, explaining that "even if law enforcement did not comply with Florida statutes and regulations in obtaining that information, such action did not violate Defendant's Fourth Amendment rights, and therefore, does not warrant suppression of the evidence obtained from the PDMP." *Id.*

D. Eleventh Circuit Appeal

On appeal, Dr. Gayden reasserted that the pre-indictment delay violated due process and that the warrantless search of the PDMP violated the Fourth Amendment.

1. *Pre-Indictment delay in violation of due process*

As to his due process argument, Dr. Gayden again argued he had suffered actual prejudice due to the loss of key witnesses and the destruction of evidence. He also renewed his argument that a sinister motive or bad faith on the part of the government was not required, that recklessness or even negligence was sufficient, and that the delay in his case was too long and unjustified. The Eleventh Circuit affirmed the district court, applying the same two-prong test to determine if the delay violated due process. *See* App. A, *United States v. Gayden*, 977 F.3d 1146, 1150–51 (11th Cir. 2020) (citing *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996)). The court held that "[e]ven assuming Gayden shows prejudice here," he failed to show a "tactical delay." *Id.* at 1150.

2. *Suppression of PDMP data and poisonous fruits*

As to his Fourth Amendment argument, relying in part on *Carpenter v. United States*, 138 S. Ct. 2206 (2018), Dr. Gayden argued

that he had a reasonable expectation of privacy in the digital, comprehensive record of his prescription decisions; that the Eleventh Circuit should not extend the third-party doctrine to that record; and that permitting law enforcement to warrantlessly search the PDMP was inconsistent with case law and longstanding expectations regarding doctor-patient privacy.

The Eleventh Circuit disagreed, holding that Dr. Gayden "did not have a reasonable expectation of privacy in the prescriptions he wrote for his patients." *Gayden*, 977 F.3d at 1152. The court grounded its decision the "third-party doctrine," explaining:

> [A]n individual lacks a reasonable expectation of privacy in information revealed to a third party and conveyed by [that third party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and that confidence placed in the third party will not be betrayed.

Id. at 1151.[3] The court acknowledged that in *Carpenter*, this Court held that "the fact that [historical cell site location] information is held by a

[3] As this Court has explained, however, the "doctrine partly stems from the notion that an individual has a *reduced* expectation of privacy in information knowingly shared with another." *Carpenter*, 138 S. Ct. at 2219 (emphasis added). "But the fact of diminished privacy interests does

third party does not by itself overcome the user's claim to Fourth Amendment protection," but determined that *Carpenter* did not "on its face" apply. 977 F.3d at 1151 (quoting *Carpenter*, 138 S. Ct. at 2217).

The Eleventh Circuit recognized, however, that *Carpenter* provided two justifications underlying the third-party doctrine: the nature of the information sought and whether the information was conveyed voluntarily. *Id.* at 1152.

As to the nature of the information, the court held that Dr. Gayden "maintains no special privacy interest in his prescribing records." *Id.* After intimating that patients "*might arguably* have a stronger basis to assert such a privacy interest in their *own* medical information," the court concluded that Dr. Gayden could not "reasonably assert a privacy interest in his prescribing records," which the panel believed was "solely derived from other people's interest in the confidential nature of their own medical information *which they choose to disclose to a pharmacist to get filled*." *Id.* (first and third emphasis added).

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not mean that the Fourth Amendment falls out of the picture entirely." *Id.* (internal quotation marks omitted).

As to the voluntariness of the disclosure, the Eleventh Circuit held that Dr. Gayden's disclosure was voluntary because he "enroll[ed] as a participant in the automated system, which was specifically designed to share his prescription records between health care providers and pharmacies to combat the statewide opioid crisis." *Id.* [4] The court acknowledged that Dr. Gayden shared his prescriptions only for medical treatment purposes but held that his disclosure was nevertheless voluntary because he intended his prescriptions to be disclosed to patients and pharmacies. *Id.* The court concluded, "*Carpenter*'s rationale should [not] extend to shield from state public health and law enforcement authorities his patient prescription records.[5] Instead, the prescription records are third-party material and the district court did

[4] As explained *supra*, doctors do not volunteer their prescriptions—Florida law mandates that pharmacies upload all controlled substance prescriptions for all prescribers. And in Dr. Gayden's case, the records were added retroactively—the PDMP had not yet launched when he made the vast majority of prescribing decisions at issue.

[5] Dr. Gayden never asserted that public health officials require a warrant. Nor does he argue that the government cannot conduct regulatory inspections of controlled substances. Instead, a warrant is required when, as here, law enforcement seeks his aggregate prescribing decisions for purposes of a criminal investigation.

not err in denying his motion to suppress the evidence obtained without a warrant from the PDMP system." *Id.*

REASONS FOR GRANTING THE WRIT

I. This Case Presents an Important and Recurring Question about Protecting Doctor-Patient Privacy in the Digital Age and Whether the Fourth Amendment Permits a Law Enforcement Officer Pursuing a Criminal Investigation to Search the PDMP Without a Warrant.

In *Carpenter*, this Court clarified that the mere fact that records are held by a third party does not absolve the government of the need to obtain a warrant if an individual has a reasonable expectation of privacy in the content of the records. *Carpenter*, 138 S. Ct. at 2222. And it explained that the reasonableness of an individual's expectation of privacy must be "judged by the degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 2214. This case presents an excellent opportunity to illuminate the application of *Carpenter*'s rule in the context of highly sensitive and traditionally protected information—a doctor's prescribing records for patients with serious and potentially stigmatizing medical conditions.

Examining the reach of *Carpenter* is particularly important here because the decision below conflicts with other courts and the earlier

decisions of this Court regarding privacy expectations in the medical setting, fundamentally misunderstands the concerns animating *Carpenter*, and involves an issue of growing and nationwide importance. According to the Centers for Disease Control and Prevention (CDC), nearly half of Americans take prescription medications. *See* CDC, National Center for Health Statistics, *Prescription drug use in the past 30 days, by sex, race and Hispanic origin, and age: United States, selected years 1988–1994 through 2015–2018*, https://www.cdc.gov/nchs/data/hus/2019/039-508.pdf (last accessed Apr. 26, 2021). The rate of prescription medication use increases dramatically for adults over the age of 45. *Id.* Without this Court's intervention, the PDMP will be an investigatory tool exploited by law enforcement rather than a public health resource designed to help doctors and patients. Every moment this Court delays deciding this important issue risks further erosion of doctor-patient trust.

A. Courts across the country are divided over whether doctors have a reasonable expectation of privacy in their prescribing decisions.

1. *The Eleventh Circuit's decision conflicts with circuit court and this Court's case law demonstrating that a physician has a privacy interest in his prescribing decisions.*

At least one circuit court has held that doctors have an expectation of privacy in their medical decisions and records. *See Tucson Women's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004) ("All provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient."). The Eleventh Circuit's opinion, which held that Dr. Gayden had no privacy interest in his prescribing records, 977 F.3d at 1152, not only conflicts with the Ninth Circuit, but also with this Court's precedent, which has long recognized a physician's privacy interest in his prescribing decisions.

In *Whalen v. Roe*, 429 U.S. 589, 600 (1977), for example, this Court recognized that both patients and doctors had a privacy interest under the Fourteenth Amendment in the prescription records stored in a state database that tracked schedule II controlled substances. Although *Whalen* upheld the constitutionality of the database, it did so by balancing that undisputed privacy interest with the state's interest—

and by accepting the privacy protections in place.[6] *Id.* at 601–06. *Whalen* declined to address whether the database satisfied the Fourth Amendment, explaining that the Fourth Amendment is triggered by "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations"—exactly the type of search that occurred here. *Id.* at 604 n.32.

More recently, this Court explained that "[i]t may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential." *Sorrell v. IMS Health*, 564 U.S. 552, 572 (2011). The Eleventh Circuit's holding that Dr. Gayden has no privacy interest in his prescribing records conflicts with these decisions.

[6] Unlike Florida's PDMP, *Whalen*'s database could be searched by law enforcement pursing a criminal investigation only with a judicial subpoena or court order. 429 U.S. at 594 n.12.

2. *The Eleventh Circuit's decision conflicts with this Court's precedent establishing that communication among medical professionals does not destroy a reasonable expectation that those records will not be shared with law enforcement conducting a criminal investigation.*

The Eleventh Circuit also thought the fact that prescriptions are designed to be shared among physicians, patients, and pharmacists rendered the disclosure of the records voluntary and thus unprotected by the Fourth Amendment. But such communication for medical treatment purposes does not destroy a reasonable expectation of privacy and cannot render a warrantless search by law enforcement for purposes of a criminal investigation reasonable. In *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001), this Court explained that knowledge that medical professionals would exchange medical records did not destroy a patient's reasonable expectation of privacy that those records would not be turned over to law enforcement.

There, a state hospital referred women who failed drug screens to the county substance abuse commission for counseling and treatment. *Id.* at 70. Such actions were permissible. But when the hospital added the "threat of law enforcement" and shared the positive-drug tests with police

solely for purposes of criminal prosecution, it offended the Fourth Amendment. *Id.* at 84–86.

So too here. The PDMP is a valuable public health tool. But when law enforcement uses that tool for purposes of criminal prosecution, it needs to get a warrant. *See id.* at 86 ("While respondents are correct that drug abuse both was and is a serious problem, the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." (internal quotation marks omitted)). The Eleventh Circuit, however, contrary to this Court's decision in *Ferguson*, held that sharing prescription information for medical treatment purposes rendered that same information fair game for law enforcement purposes.

3. *The courts to consider whether there is a reasonable expectation of privacy in the PDMP are divided.*

The Eleventh Circuit held that law enforcement need not obtain a warrant to search the PDMP, but the Ninth Circuit has intimated the opposite. There, the court did not decide whether the DEA's warrantless PDMP search violated the Fourth Amendment, but it expressly stated—contrary to the Eleventh Circuit's decision below—that the privacy concerns of both patients and doctors were not unreasonable. *See Oregon*

Prescription Drug Monitoring Program v. United States Drug Enforcement Administration (*Oregon PDMP*), 860 F.3d 1228 (9th Cir. 2017).

The district courts to consider the issue are divided. *Compare Oregon PDMP*, 998 F. Supp. 2d 957, 964–67 (D. Or. 2014) (holding that DEA's warrantless search of Oregon's PDMP violated Fourth Amendment rights of both patients and physicians), *rev'd on other grounds*, 860 F.3d at 1228, *with United States Department of Justice v. Jonas,* No. 18-mc-56-LM, 2018 WL 6718579, at *5–7 (D.N.H. Nov. 1, 2018) (approving of DEA using administrative subpoena to access PDMP and holding patients had no reasonable expectation of privacy in PDMP records), *rep. & rec. adopted*, 2019 WL 251246, *and appeal pending*, 19-1243; *United States Department of Justice v. Utah Department of Commerce*, No. 2:16-cv-611-DN-DBP, 2017 WL 31896868, at *7–8 (D. Utah July 27, 2017) (determining doctors and patients lacked reasonable expectation of privacy in Utah's controlled substance database, but explaining Fourth Amendment required DEA's subpoena satisfy "reasonable relevance" test), *and United States v. Motley*, No. 3:19-cr-00026-LRH-WGC, 2020 WL 1076116, *4–7 (D. Nev. March 6, 2020)

(holding patient lacked reasonable expectation of privacy in his prescription information stored in Nevada's database); *United States v. Bereznak*, No. 3:18-CR-39, 2018 WL 1993904, at *5 (M.D. Pa. Apr. 27, 2018) (holding prescriber could not show Fourth Amendment violation in PDMP search done pursuant to court order), *appeal pending*, 20-1921.

No additional percolation is necessary because, as explained above, the range of viewpoints on this important issue has been fleshed out in the federal courts. The Court should use this case to ensure uniformity moving forward.

B. This case presents an excellent vehicle.

This case presents an ideal opportunity to resolve the question presented. First, the parties fully litigated the issue, and the Eleventh Circuit clearly decided it. Second, the PDMP search was necessary to the prosecution. As the district court explained, it was "[b]ased on information obtained from the PDMP" that law enforcement subpoenaed pharmacy records and interviewed Dr. Gayden's patients. D. Ct. Dkt. 141 at 2–3, 12, 16. Law enforcement then relied on all that information in seeking the federal search warrant for Dr. Gayden's patient files, which were critical to the government's case at trial. *Id.*; D. Ct. Dkt. 194 at 214,

225–26. Third, the government has never argued an exception to the warrant requirement, such as exigency or consent, applies; if this Court holds that the Fourth Amendment requires law enforcement to obtain a warrant before accessing a doctor's comprehensive prescription decisions stored in the PDMP, it is undisputed that law enforcement violated the Constitution.

C. The question presented is deeply important, and the decision below, if left to stand, has serious consequences for medical privacy.

Whether the Constitution requires law enforcement to obtain a warrant to access comprehensive prescription records is an issue of nationwide importance. States across the country have enacted PDMPs. If this Court does not clarify the role the Constitution plays in protecting these records, law enforcement will have carte blanche to access millions of individuals' private prescription information without a warrant. In some states, access will require an easily-obtained administrative subpoena. *See* 21 U.S.C. § 867. In other states, like Florida, law enforcement may access these private records without even demonstrating that the information is material or relevant to ongoing investigation.

The chilling effect of the Eleventh Circuit's decision cannot be overstated. The court acknowledged *Carpenter*'s directive that two principles underlie the third-party doctrine: the nature of the information sought and the voluntariness of disclosure. But its faulty understanding of these issues not only reached the wrong result but also has serious consequences for medical privacy, a foundation of our medical system.

As to the nature of the information, prescriptions are inherently sensitive—especially when they are aggregated and analyzed, revealing a trends about a doctor's patients and decision-making. The Eleventh Circuit thought this information was only "sensitive" for patients—although it suggested the same result should a patient challenge law enforcement's warrantless search of the PDMP. *See Gayden*, 977 F.3d at 1152 (stating patients "might" have a stronger privacy interest and emphasizing that patients "choose" to disclose their medical information to pharmacists).[7]

[7] The Eleventh Circuit's suggestion that patients lack a reasonable expectation of privacy in their prescriptions has serious and far-reaching consequences. *See, e.g.*, *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005) ("Information contained in prescription records . . . may reveal other facts about what illnesses a person has[.]"); *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995) ("It is now possible from looking

But this information is also sensitive to the prescribing physician. As explained *supra*, doctors have a privacy interest in their prescribing records. Prescribing decisions are a far cry from bank records or a few days' worth of dialed phone numbers. To the contrary, society's expectation regarding the doctor-patient relationship depends on the confidentiality of these records: If law enforcement can access a doctor's aggregated prescription records without a warrant and purely for purposes of criminal investigation, there will be a serious chilling effect. Doctors may be "reluctant to prescribe[]" medically-indicated drugs. *Whalen*, 429 U.S. at 600.[8] And patients may avoid seeking treatment or providing truthful information to the doctor. *See, e.g.*, *Ferguson*, 532 U.S. at 78 n.14 (explaining that giving law enforcement warrantless access to

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at an individual's prescription records to determine that person's illnesses . . . . An individual using prescription drugs has a right to expect that such information will customarily remain private.").

[8] This fear is not hypothetical. The New Hampshire Board of Medicine recently disciplined a physician "for inappropriately restricting a chronic-pain patient's daily dose of his long-term opioid treatment regimen." Jennifer D. Oliva, *Prescription-Drug Policing: The Right to Health-Information Privacy Pre- and Post-Carpenter*, Duke Law Jour., Vol. 69, at 785 (Jan. 2020).

patient medical information "may deter patients from receiving needed medical care" (*citing Whalen*, 429 U.S. at 599–600)).

As to whether Dr. Gayden provided the information voluntarily, the court determined that Dr. Gayden "voluntarily disclosed [his] prescription records to others through his participation in the computerized tracking system." *Gayden*, 977 F.3d at 1152. The panel decision fundamentally misunderstands the PDMP and—even more critically—applies an implied consent rationale that *Carpenter* rejects. *See Carpenter*, 138 S. Ct. at 2220.

Pharmacies are required by law to upload information into the PDMP; neither doctors nor patients volunteer their prescriptions. And when a patient seeks out medical care and a doctor prescribes needed medications, those are not "choices" in any meaningful sense. *See Oregon PDMP*, 998 F.Supp.2d at 967. Just as having a cell phone is indispensable to modern life, *see Carpenter*, 2217 S. Ct. at 2220, so too is medical treatment and, along with it, the PDMP. *See, e.g.*, *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. App. 1993) ("A decision to use a bank may be voluntary. A decision to use a hospital for emergency care is not.").

The Eleventh Circuit's voluntariness conclusion also depended on the principle that disclosure for a limited purpose destroys an individual's reasonable expectation of privacy. As explained *supra*, however, that principle does not extend to limited disclosure *for medical treatment*, where both an expectation of confidentiality and exchange of information are critical. *See Ferguson,* 532 U.S. at 78, 84–86 (explaining that revealing information for medical treatment purposes does not destroy an individual's reasonable expectation that the same information will not be shared with law enforcement for criminal prosecution purposes).[9] The DEA's warrantless search of the PDMP thus violated the Fourth Amendment, and the Eleventh Circuit's decision to the contrary has serious consequences for doctor-patient privacy.

D. The Eleventh Circuit's decision is wrong and ignores *Carpenter*'s teachings on the privacy intrusion implicated by warrantless searches of aggregate digital databases.

The Eleventh Circuit held that Dr. Gayden lacked a reasonable expectation of privacy in the overall record of his prescriptions—which

[9] And regardless, that Dr. Gayden shared prescriptions with his individual patients, who shared them with individual pharmacists, cannot resolve the issue here because searching the PDMP is qualitatively and quantitatively different. *See* Part I.D, *infra*.

were digitized, aggregated, and analyzed in the PDMP—under the third-party doctrine. But as explained above, *Carpenter* demonstrates that although his prescribing decisions were held in the PDMP, Gayden's expectation of privacy was reasonable. *See also Oregon PDMP*, 998 F. Supp. 2d at 964–67 (D. Or. 2014) (holding that DEA's warrantless search of Oregon's PDMP violated Fourth Amendment rights of both patients and physicians).

Critically, the Eleventh Circuit failed to reconcile its decision permitting warrantless access to the PDMP's digitized, analyzed collective prescription information with *Carpenter*'s instruction that "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," courts should "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." 138 S. Ct. at 2214 (2018) (internal quotation marks omitted) (alteration adopted).

The doctor's duty to keep patient information confidential has been central to the medical profession for centuries, and the Founders understood the concept of doctor-patient confidentiality. *See Oregon PDMP*, 998 F.Supp.2d at 964 (discussing evidence that "a number of

signers of the Declaration of Independence and delegates to the Constitutional Convention were physicians trained at the University of Edinburgh, which required its graduates to sign an oath swearing to preserve patient confidentiality").

Law enforcement access to the PDMP contravenes this important expectation of privacy. In the past, traditional investigation techniques might identify a doctor's prescriptions from individual patients or pharmacies. But those methods are much slower—and the information revealed far more limited—than searching the PDMP, where now a press of a key gives a digitized, sortable compendium of every doctor's controlled substance prescriptions from every pharmacy in the state.

To be clear, searching the PDMP is not like obtaining more limited records from patients or pharmacies. *See Oregon PDMP*, 998 F. Supp. 2d at 966 n.4. The PDMP is a comprehensive digital record of all doctors' controlled substance prescriptions for all of their patients, which can be sorted, extrapolated, and used to identify trends in ways that would be otherwise impossible.

Comparing more limited prescription records to the PDMP is like comparing tracking a discrete journey to creating a 127-day

comprehensive record of an individual's movements through cell site location information. Obtaining this depth and breadth of information about Dr. Gayden's medical practice before the PDMP would have been very difficult, if not impossible, and certainly resource-prohibitive.[10] Thus, just as "society's expectation has been that law enforcement would not—and indeed, in the main, simply could not—"track an individual's movements over a long period, *Carpenter*, 138 S. Ct. at 2217 (internal quotation marks omitted), society's expectation has been that a doctor's comprehensive prescribing record remains private.

* * *

The Eleventh Circuit's decision sets a chilling precedent for medical privacy. In holding that a doctor has no privacy interest in his prescribing decisions and that the sharing of prescription information for medical purposes renders disclosure voluntary, the court departs from Supreme Court case law and paves the way for a decision that patients, too, lack a

[10] The ways in which a law enforcement search of the PDMP far exceeds traditional types of investigation is evident here. Agent Sala had to comb through the PDMP data to "determine what to look for," D. Ct. Dkt. 123 at 134, only then having sufficient information to create a theory of prosecution and to identify prescriptions, pharmacies, and patients on which to focus her investigation.

reasonable expectation of privacy in their prescription records. And in holding that the Fourth Amendment permits law enforcement to access the PDMP without a warrant, solely for purposes of a criminal investigation, the court gives unprecedented access to one of the most sensitive areas of our private lives. Because the issue is sure to reoccur and is of nationwide importance, this Court's intervention is needed.

II. This Court Should Grant Review to Clarify the Proper Test for Deciding if Prejudicial Pre-Indictment Delay Violates Due Process.

Both the district court and the appellate court determined that the years-long delay in indicting Dr. Gayden did not violate due process because he was unable to show that the delay was the result of a deliberate decision by the government to gain a tactical advantage. In light of the deeply entrenched circuit split on the correct test for determining if pre-indictment delay violates due process and the pending petitions for certiorari currently being considered by this Court in *Harris v. Maryland*, No. 20-101, and *Woodard v. United States*, No. 20-6387, Dr. Gayden respectfully requests that this Court grant his petition for certiorari, or hold his case pending a decision in *Harris* and *Woodard* and dispose of it in light of the resolution of those cases.

A. The courts of appeals and state courts of last resort are deeply split.

Forty years ago, in *United States v. Marion*, 404 U.S. 307, 324 (1971), this Court held that "the statute of limitations does not fully define [a defendant's] rights with respect to events occurring prior to indictment. In the case of actual prejudice, the Due Process Clause may also require "dismissal of the prosecution." *Id.* But the Court did not delineate in what circumstances due process would require such dismissal, instead explaining that "[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *Id.* at 465–66.

In *United States v. Lovasco*, 431 U.S. 783 (1977), this Court considered whether an 18-month delay to conduct further investigation constituted a due process violation. Reasoning that investigative delay was unlike a delay undertaken solely to gain a tactical advantage—the type of delay the government had conceded constituted reversible error in *Marion*, this Court held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his

defense might have been somewhat prejudiced by the lapse of time." *Id.* at 795.

Since *Lovasco*, the federal circuits and state courts of last resort are split on the proper test to protect the defendant's due process rights in the context of pre-indictment delay. Nine federal circuit courts[11] and 28 state courts of last resort[12] apply a version of the two-pronged test that

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[11] *United States v. Irizarry-Colon*, 848 F.3d 61, 70 (1st Cir. 2017); *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999); *United States v. Beckett*, 208 F.3d 140, 150-51 (3d Cir. 2000); *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996); *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006); *United States v. Engstrom*, 965 F.2d 836, 838-39 (10th Cir. 1992); *United States v. Wetherald*, 636 F.3d 1315, 1324 (11th Cir. 2011); *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991), *vacated in part on other grounds*, 964 F.2d 1186 (D.C. Cir. 1992).

[12] *State v. Lacy*, 929 P.2d 1288, 1294 (Ariz. 1996); *Moore v. State*, No. CR 05-691, 2006 WL 880173, at *2 (Ark. Apr. 6, 2006); *People v. Small*, 631 P.2d 148, 157 (Colo. 1981); *State v. Roger B.*, 999 A.2d 752, 756-57 (Conn. 2010); Day, 697 A.2d at 34; *Jones v. State*, 667 S.E.2d 49, 51-52 (Ga. 2008); *State v. Martinez*, 872 P.2d 708, 714 (Idaho 1994); *Ackerman v. State*, 51 N.E.3d 171, 190 (Ind. 2016); *State v. Brown*, 656 N.W.2d 355, 363 (Iowa 2003); *State v. Crume*, 22 P.3d 1057, 1062 (Kan. 2001); *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 424 (Ky. 2011); Clark, 774 A.2d at 1156; *Commonwealth v. Ridge*, 916 N.E.2d 348, 369 (Mass. 2009); *State v. F. C. R.*, 276 N.W.2d 636, 639 (Minn. 1979); *Robinson v. State*, 247 So.3d 1212, 1233 (Miss. 2018); *State v. Scott*, 621 S.W.2d 915, 917 (Mo. 1981); *State v. Oldson*, 884 N.W.2d 10, 62-63 (Neb. 2016); *Wyman v. State*, 217 P.3d 572, 578-79 (Nev. 2009); *State v. Townsend*, 897 A.2d 316, 325-26 (N.J. 2006); *Gonzales v. State*, 805 P.2d 630, 632 (N.M. 1991); *State v. Swann*, 370 S.E.2d 533, 536-37 (N.C. 1988);

the Eleventh Circuit applied in Dr. Gayden's case. So does the D.C. Court of Appeals.[13] Those courts require a defendant show that (1) the delay caused actual prejudice, and (2) the delay resulted from an improper motive on behalf of the government, which also is interpreted to mean an "intentional[] delay[] . . . to gain a tactical advantage." *United States v. Irizarry-Colon*, 848 F.3d 61, 70 (1st Cir. 2017) (internal quotation marks omitted).

By contrast, two federal circuit courts[14] and 12 state courts of last resort[15] apply a balancing approach: the defendant must show actual

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Commonwealth v. Scher, 803 A.2d 1204, 1221-22 (Pa. 2002); *State v. Vanasse*, 593 A.2d 58, 64 (R.I. 1991); *State v. Krizan-Wilson*, 354 S.W.3d 808, 819 (Tex. Crim. App. 2011); *State v. Hales*, 152 P.3d 321, 333 (Utah 2007); *State v. King*, 165 A.3d 107, 113-14 (Vt. 2016); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 52 (Va. 2002); *State v. Hales*, 152 P.3d 321, 333 (Utah 2007); *Remnick v. State*, 275 P.3d 467, 470-71 (Wyo. 2012).

[13] *United States v. Day*, 697 A.2d 31, 34 (D.C. Ct. App. 1997).

[14] *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

[15] *Overton v. State*, 976 So. 2d 536, 560 (Fla. 2007); S*tate v. Keliiheleua*, 95 P.3d 605, 610 (Haw. 2004); *People v. Lawson*, 367 N.E.2d 1244, 1248-49 (Ill. 1977); *State v. Schrader*, 518 So. 2d 1024, 1028 (La. 1988); *State v. Cote*, 118 A.3d 805, 811 (Me. 2015); *State v. Laird*, 447 P.3d 416, 429-30 (Mont. 2019); *State v. Knickerbocker*, 880 A.2d 419, 423 (N.H. 2005); *State v. Whiting*, 702 N.E.2d 1199, 1201 (Ohio 1998); *State v. Stokes*, 248 P.3d 953, 960-62 (Or. 2011); *State v. Lee*, 653 S.E.2d 259, 260 (S.C. 2007); *State v. Oppelt*, 257 P.3d 653, 660 (Wash. 2011); *State ex rel. Knotts v. Facemire*, 678 S.E.2d 847, 856 (W. Va. 2009).

prejudice, and if he does, the court then balances the prejudice to the defendant against the government's reason for the delay. *See Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (rejecting government's argument that defendant must prove both prejudice and improper motive, and holding that "better position" is that if defendant proves prejudice, courts "must balance the defendant's prejudice against the government's justification for delay"). This Court's intervention is needed to resolve this deeply entrenched split.

B. The Eleventh Circuit's two-pronged test is inconsistent with this Court's case law on due process.

The two-pronged approach adopted by the Eleventh Circuit and the majority of other courts conflicts with this Court's directive that consideration of pre-indictment delay challenges under the Due Process Clause requires "a delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 325; *see Lovasco*, 431 U.S. at 797. Although prejudice in conjunction with an improper motive may be sufficient to establish a due process violation, it is not *necessary* to show a violation under this Court's case-specific approach to due process. S*ee, e.g.*, *Marion*, 404 U.S. at 324–25 (noting government's concession that such a delay

tactic is impermissible but explaining it need not "determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution").

Under the two-pronged approach applied below, a defendant may undisputedly have been prejudiced by years of delay and lost evidence, yet the Constitution provides no remedy unless he can point to a smoking gun establishing the government purposefully caused the delay to gain an advantage—even though uncovering such evidence is near impossible and irrelevant to the question of whether the delay deprived that defendant of a fair ability to prepare for trial. Such a result is inconsistent with the concerns animating due process, including "fundamental conceptions of justice which lie at the base of our civil and political institutions" and "the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790.

* * *

Because the Eleventh Circuit based its decision that the pre-indictment delay complied with due process not on Dr. Gayden's failure to show prejudice but rather on his failure to show a deliberate tactical decision by the government, Dr. Gayden asks that this Court grant his

petition on this issue, or hold his petition pending the resolution of *Harris* and *Woodard* and dispose of his case accordingly.

CONCLUSION

For the above reasons, Dr. Gayden requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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