NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

TOMMY DEAN BULLCOMING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an accused in a criminal case have a constitutional right to access the crime scene, where it is private property not under government control -- as the prosecution routinely does and as it did in this case -- and, in Mr. Bullcoming's trial for arson, carjacking, kidnapping and murder, did the district court err in denying him access to the crime scene, a burned trailer in which nobody was living and that was unsecured?

STATEMENT OF RELATED CASES

United States v. Bullcoming, 18-cr-00086-G (W.D. Okla.)
Judgment entered August 10, 2020.

United States v. Bullcoming, No. 20-6125 (10th Cir.)
Judgment entered January 6, 2022.

TABLE OF CONTENTS

PAGE

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

PRAYER

Petitioner, Tommy Dean Bullcoming, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on January 6, 2022.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Bullcoming, 22 F.4th 883 (10th Cir. 2022), is found in the Appendix at A1. The relevant decision of the United States District Court for the Western District of Oklahoma is found in the appendix at A11.

JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Gorsuch has extended the time in which to file a petition for writ of certiorari until May 6, 2022, see A19, so this petition is timely.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition implicates the Fifth Amendment to the United States Constitution, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V.

This petition also implicates the Sixth Amendment to the United States Constitution, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Id., amend. VI.

STATEMENT OF THE CASE

The prosecution in this case had ready access to the trailer that was the scene of the arson, kidnapping and possibly also the murder for which Tommy Dean Bullcoming was tried. The defense did not. Instead, it was forced to rely on what law enforcement chose to gather. The defense could not gain access to the scene to determine whether there was other evidence that might be helpful to defending Mr. Bullcoming. His attorneys could not bring to bear their knowledge of his circumstances, and their perspective as those duty-bound to advocate in his exclusive interest, to view the scene in a way that might help to exonerate him.

What happened here is not unusual. To the contrary, it is the norm in criminal cases in the federal and state courts that the government has this valuable advantage over those it prosecutes.

The district court denied Mr. Bullcoming access to the trailer, even thought it was not occupied at the time of his request, and had not been since the arson. And the court did so even though the defense pointed to reasons, over and above those inherent in the trailer's status as part of the crime scene, to think it might contain evidence helpful to his defense. The

Due Process Clause does not permit criminal cases to be handled in such a skewed manner, and Mr. Bullcoming's right to the effective assistance of counsel guaranteed by the Sixth Amendment was also compromised by the denial of access.

The discovery of the murder of Linda Zotigh and the arson of her trailer, and law enforcement's gathering of evidence in the trailer.

Shortly before midnight on September 6, 2017, a fire erupted at the trailer that Linda Zotigh owned and where she lived, in the small town of Hammon, Oklahoma. Her body was found around six o'clock the following evening. She had been stabbed close to seventy times and her jugular vein had been severed.

About four hours after the fire started, Special Agent Micah Ware of the Bureau of Indian Affairs went to the scene. He later went into the trailer to confirm that no victim had been overlooked. He took several pictures of the inside of the trailer and swabs of some blood he saw. He also took swabs of blood from Ms. Zotigh's SUV, which was parked in front of the trailer.

Soon after, a certified fire investigator from the Bureau of Alcohol, Tobacco and Firearms did a more thorough investigation of the trailer. He spent three and one-half to four hours processing the scene, taking pictures and gathering evidence. This included cutting out parts of the floor and of a section of a plastic mat he thought contained blood, and taking fire debris. The investigator concluded that there were three separate origin points and that the fire was intentionally set.

The prosecution's unconvincing theories for why Mr. Bullcoming would have wanted to kill Ms. Zotigh

The authorities very soon focused their attention on Tommy Dean Bullcoming, who had been in a romantic relationship with Ms. Zotigh for about two years. He would eventually be tried in federal court for her murder (on theories of intentional murder and felony murder), arson, kidnapping and carjacking. The kidnapping and carjacking counts were premised on the view that, after Ms. Zotigh was assaulted at the trailer, she was taken alive in her SUV to the field, and killed there.

Ms. Zotigh and Mr. Bullcoming lived together at the trailer, but would break up often -- as often as a couple of times a month -- and then

quickly reconcile. There was a consistent reason for their splits: Mr. Bullcoming's drinking (or sometimes his smoking of marijuana). There was no history of violence between them as a result, or at any other time.

The couple had again separated by September 6th. They were both due in tribal court at ten in the morning on September 7th, about an hour and thirty-five minutes away in Concho, on a marijuana case in which they were jointly charged.

On Thursday, August 31, Ms. Zotigh had gone with her son, Timothy Raya, to an adult basketball tournament he had in Arizona that weekend. She did not want Mr. Bullcoming staying at the trailer while she was gone. She asked her cousins, Wendel and Chris Johnson, who lived close by and who had known Mr. Bullcoming all their lives, if he could stay with them, and the two brothers agreed.

On September 6th, the day after Ms. Zotigh returned from Arizona, she went to the Johnsons to let them know she was back. Ms. Zotigh also told Wendel Johnson to tell Mr. Bullcoming he should come to the trailer to get his stuff because she did not want him there. She then left in the late

afternoon to visit her daughter in Elk City, about a twenty-minute drive from Hammon.

The prosecution pointed to two possible motives for Mr. Bullcoming to murder Ms. Zotigh by the end of the day. One was that he was upset over their break-up. But the prosecution identified no reason to think this split differed in any way from their many others. Texts between the two during her Arizona trip revealed that Mr. Bullcoming's use of alcohol was again the impetus. Ms. Zotigh's texts to others confirmed this.

There was likewise no evidence that Mr. Bullcoming was upset about what appeared to be only the latest repeat of the cycle, which would likely result once again in reconciliation. There was no proof Mr. Bullcoming was troubled when, during the Arizona trip, Ms. Zotigh became angry and broke off communication. Indeed, she was not a topic of conversation among Mr. Bullcoming and the Johnsons. Likewise, Mr. Bullcoming seemed unfazed when told that Ms. Zotigh wanted him to remove his belongings from the trailer. Wendel Johnson said Mr. Bullcoming was normal and courteous that night, and was not obsessing about Ms. Zotigh.

The prosecution's other theory for why a relationship with no history of violence had resulted in Mr. Bullcoming killing Ms. Zotigh, and burning the trailer they shared, was the marijuana case in tribal court at which they were both scheduled to appear the following morning. But the prosecution offered no evidence that the case was ever a point of contention between Ms. Zotigh and Mr. Bullcoming.

Shortly before the fire, Ms. Zotigh had been at the home of Kyle Orange, whom she supplied with pills. There was evidence that she had in her purse $1,000 in cash and prescriptions. But no money or prescriptions were found in her purse after she was killed. And when Mr. Bullcoming was arrested early on the morning of September 8th, near Concho, he had $13.10 on him.

The short time period in which the murder and arson had to have taken place, which made it especially unlikely Mr. Bullcoming could have committed the crimes.

The timeframe within which the murder and arson had to have taken place was a very small one. The daughter whom Ms. Zotigh visited in Elk City, beginning in the late afternoon of September 6th, said her mother started the twenty-minute drive back to Hammon at 9:30 that night. This

jibed with the account of another daughter that Ms. Zotigh texted her at 9:50 that she was back home. Phone records showed that Ms. Zotigh was on the phone from 9:53 until 10:26, and that she texted someone else at 10:27.

This comported with Mr. Orange's initial report to the police that she arrived at his house at about 10:30, and that she was not on her phone during her stay. Mr. Orange said that the two caught up, that she spoke about the tribal-court case, that she supplied him with pills, and that they prayed together. He said this all took from ten minutes to less than thirty minutes, with the larger amount of time seeming to be much more consistent with what he said they did. Ms. Zotigh would thus have left his house between around 10:40 and (more likely) close to 11:00.

Because Ms. Zotigh was evidently taken to the field in her SUV, and the SUV was found parked at the trailer, this would have required a round-trip between the trailer and the field. With that roundtrip taking between ten and twenty minutes, and the fire spotted by 11:53, the murder and arson took place within a small window of time. The window for Mr. Bullcoming would have been much smaller. He was at his aunt's and

cousin's home, seeking a ride to Concho, by between 11:30 and 11:45, and their home was an eight to ten-minute walk from the trailer. It was unlikely Mr. Bullcoming, fifty-three-years old in September 2017, could have shaved any time off of this. There was no report that he was out of breath when he arrived at the home of his aunt and cousin. Mr. Bullcoming, at the time of his sentencing in this case, was six-feet tall and 235 pounds.

Agent Ware agreed that whoever killed Ms. Zotigh would have her blood on him, including in his hair, and would have wanted to clean up before going out in public. Indeed, the prosecution would later argue to the jury that Mr. Bullcoming showered at the trailer. If so, this would have given him less time still. But neither his aunt nor his cousin thought he had recently showered. They both said his hair, which Mr. Bullcoming kept long in traditional, Native American fashion, and wore in a ponytail, was not wet.

The prosecution's evidence that, it asserted, pointed to Mr. Bullcoming being the perpetrator

The prosecution relied in part to prove its case on some cuts and abrasions on Mr. Bullcoming at the time of his arrest early on September 8th, a little more than a day after the crimes. None of the many people who saw him during his journey from Hammon to the Concho area noticed them. The photographs show most of the cuts and abrasions to be quite minor. Nor did any of those people, including those who saw Mr. Bullcoming in the several hours right after the trailer fire, see any active bleeding. The prosecution pointed to some blood on his right palm and left, index finger, which it said could be seen on a frame-by-frame viewing of a video from Hutch's convenience store, where his cousin had stopped when she drove him in the direction of Concho early on September 7th so Mr. Bullcoming could buy beer.

The prosecution also cited Mr. Bullcoming's statements to his aunt and cousin, on the night of September 6th, that he had a disagreement with the Johnsons that evening, something Wendel Johnson denied. Rachel Bullcoming swore at trial that, when she saw her uncle early on the morning of the 7th as he sought her help in making his way towards

Concho, he had told her he had gotten his clothes from the trailer a week earlier. She insisted she had been mistaken in a prior statement, in which she said he had been at the trailer on the night of the 6th.

The prosecution relied too on blood and DNA evidence. Much of the blood recovered was Ms. Zotigh's, either alone or as part of a mixture in which her DNA was the major component. Mr. Bullcoming, who lived with Ms. Zotigh, could not be excluded from three minor components of DNA mixtures on her belt. A swab from her ankle was tested for male-only DNA, and Mr. Bullcoming (and all of his paternal relatives) could not be excluded from that sample.

The prosecution relied more heavily on two other pieces of DNA evidence. One involved a faint amount of blood on the dashboard of Ms. Zotigh's SUV, which matched to Mr. Bullcoming. The prosecution urged the stain was new, and was thus deposited on the night she was killed. It relied on the testimony of her son, Timothy Raya, that he had not seen the blood during the Arizona trip. But the faint stain was on a piece of the center console that was angled towards the driver, and only Ms. Zotigh drove the car during the trip. There was no proof that Mr. Raya could

have seen that part of the console from his vantage point as a passenger, and so could have reliably said whether or not the stain was there at that time.

The other DNA proof the prosecution invoked came from a pair of gray, Jordan slides that was in Mr. Bullcoming's duffel bag when he was arrested. Wendel Johnson testified Mr. Bullcoming wore gray flip flops his entire stay, and the slides are visible in the video from Hutch's convenience store. The slides contained very small amounts of blood that matched to Ms. Zotigh. The prosecution presented nothing that might be thought to show when the minimal amount of blood got on the slides, which could have been at any point while the couple was living together.

The denial of Mr. Bullcoming's request to gain access to the trailer that was a critical part of the crime scene

Before trial, Mr. Bullcoming's attorneys sought to gain access to the trailer, which was part of the crime scene. The prosecution opposed the request, as Ms. Zotigh's children did not want to give access to the man accused of murdering their mother and his representatives.

At the hearing on the motion, the defense stressed that access would work only a "very minor infringement on any possible property rights" of Ms. Zotigh's children. The trailer, counsel emphasized, was not occupied and had not been repaired or maintained since the fire. On the other hand, access was needed to vindicate Mr. Bullcoming's right to a fair trial and the effective assistance of counsel.

Counsel identified several ways access could prove helpful. One was to obtain forensic evidence, and most particularly blood evidence. The defense forensic expert, counsel represented, claimed that in over ninety percent of cases, he could recover blood from released crime scenes that was overlooked or not recovered earlier. As well, a report from a responding firefighter described a "pile of blood" at the trailer, which was not referenced in the reports of Agent Ware or of the arson investigator. If that blood contained the DNA of someone other than Ms. Zotigh and Mr. Bullcoming, it might help identify someone else as responsible for her death.

Counsel urged too that a large quantity of blood at the trailer might help establish Ms. Zotigh was killed there, and then taken to the field. The

blood in the field, counsel explained, did not prove she was killed there. If she was killed at the trailer, there could be no kidnapping or carjacking, and no felony murder, which was based on an underlying kidnapping.

Access to the crime scene would also enable counsel to look for Mr. Bullcoming's "very emotional important ceremonial items," which he had assured them he had left there, with counsel noting a medicine bag. The photographic documentation of such items (or their remains) in the trailer "would be important." It was not something that would have been front of mind for the agents who had documented the scene and looked for evidence. And such photographs would lend crucial support to the argument that Mr. Bullcoming would not have burned down the trailer, and with it his own sacred items, which was an important component of the defense.

The jury would in fact hear evidence of a ceremonial item of Mr. Bullcoming's that had been left in the trailer, but it was not found or documented by law enforcement. Instead, Ms. Zotigh's family found his pipe bag soon after the trailer was released to them. Mr. Bullcoming's brother, Wilbur, testified that their grandfather had been a chief of the

Cheyenne Arapahoe, and Wilbur recounted that he was there when the pipe bag was made and given to his brother. Wilbur Bullcoming continued that nobody but Tommy should have the pipe bag and that he had received permission from Tommy to hold onto it. The defense argued Tommy Bullcoming would not have set the trailer on fire and left his pipe bag in it.

Counsel acknowledged the law in this area was "scarce," and did not point to a case allowing access. But counsel urged that with no harm to any other interest, the balance favored Mr. Bullcoming's right to a fair trial.

The prosecution agreed that what case law there was supported the proposition that "there's a balancing that goes on between the rights of the defendant and the rights of the victim." It cited to two cases that, by its own description and unlike the uninhabited trailer, involved access to a victim's "home."

The district court denied the defense access to the vacant trailer. A11-14. Addressing only access under the criminal rules, and not as a constitutional matter, the district court said the defense had not identified

any authority allowing it "to order entry and inspection of property that is not within the government's possession, custody, or control." A14.

The jury convicts Mr. Bullcoming of all counts except intentional murder, and he is sentenced to spend the rest of his life in prison

The jury convicted Mr. Bullcoming of arson, kidnapping, carjacking and felony murder. It was unable to reach a verdict on intentional murder. The district court sentenced Mr. Bullcoming to concurrent terms of life in prison on the felony murder and kidnapping counts, and twenty-five years on the arson and carjacking counts.

The Tenth Circuit denies Mr. Bullcoming's claim of access to the trailer and affirms the judgment of the district court.

On appeal, Mr. Bullcoming argued he had the right, under the Due Process Clause of the Fifth Amendment, and also under the right to the effective assistance of counsel guaranteed by the Sixth Amendment, to access the trailer that was part of the crime scene. In doing so, he stressed that what was at issue was not discovery in the usual sense of access to material in the possession of the prosecutor. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977). And he explained that not only was the trailer

likely to contain relevant evidence for the simple reason that it was part of the crime scene, but that information provided in discovery also indicated it would. Access was necessary, he insisted, to provide him the "raw materials" he needed for an effective defense. See Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

Ignoring that Mr. Bullcoming claimed authority for access in the Fifth and Sixth Amendments, the court of appeals began by writing that he "d[id] not address whether the district court had authority to order the requested access." A7. Quoting this Court's observation in Weatherford that "'there is no constitutional right to discovery in a criminal case,'" id. (quoting Weatherford, 429 U.S. at 559), the Tenth Circuit continued that the federal rules of criminal procedure did not provide such authority either, id. The Tenth Circuit agreed that some state courts had recognized the right for which he advocated, but considered them to have done so only under broader, state constitutional provisions. Id. at 7, 8. The court found no support in the federal constitution for such a right, which it believed would "collide with a panoply of federal constitutional rights held by the third-party owner of the property." Id. at 8.

REASONS FOR GRANTING THE WRIT

This Court should decide whether an accused has the constitutional right to access a crime scene, as the prosecution ordinarily does, a right that this Court's precedents support, and that numerous state courts have accorded an accused.

As this Court has long recognized, prosecutors have "inherent information-gathering advantages." Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973). This includes situations where a crime takes place, as it often does, on private property. Law enforcement will routinely have access to the crime scene when they respond and conduct an investigation, not to mention the ability later to obtain a search warrant. But the defense ordinarily will have no access at all. It will have to rely entirely on what law enforcement -- with its very different focus and interests -- has chosen to document and to gather from the scene.

This case is a prime example. Soon after the fire at Ms. Zotigh's trailer was extinguished, Agent Ware entered to see if firefighters had overlooked a body, and in the process took pictures and gathered blood evidence. An arson investigator soon followed. He spent at least three and one-half hours in the trailer. He too took pictures and gathered blood

evidence, and he even cut out pieces of the floor and of a plastic mat that he deemed of interest.

The district court, though, refused to grant the defense any access to the trailer, which the children of Ms. Zotigh refused to allow on their own. The district court declined to do so even though the defense identified two reasons, beyond those inherent in the fact that the trailer was the scene of at least part of the crime, why there was likely to be relevant evidence in addition to what law enforcement had collected. And the court declined to do so even though the countervailing property interest was about as weak as it could possibly be. Nobody was living in the burned trailer and no efforts had been made to secure or protect it.

Several state courts have recognized that basic fairness requires that an accused also have a right to access the crime scene that is property of a third party. This helps mitigate the natural, and inevitable, imbalance in favor of the prosecution. They have also recognized that the right to the effective assistance of counsel supports access as well, as counsel is hamstrung in her ability to challenge the prosecution's case without the ability to investigate such an important repository of evidence.

This Court should grant review to decide the important question of whether the federal constitution provides a right of access to a crime scene that is private property.

A. This Court's precedents involving non-reciprocal advantages enjoyed by the prosecution, and the right of a criminal defendant to have the raw materials needed for an effective defense, support a constitutional right of access to the crime scene.

As a threshold matter, Mr. Bullcoming's claim is not about the right to discovery in the sense used in this Court's precedent. He did not seek to "search through the [prosecutor's] files." Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1980). He was not asking to learn of evidence unfavorable to him that was known to the prosecutor. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (names of prosecution witnesses). And he was not trying to obtain any "knowledge of the Government's case and strategy." Kaley v. United States, 571 U.S. 320, 335 (2014). All he wanted was to learn what he could, on his own, from the crime scene to which the prosecution had already had ample access, so that he could counter the prosecutor's theory of how the crimes occurred and develop his own.

The oft-cited proposition from Weatherford, with which the Tenth Circuit began its analysis, A7, is therefore the wrong lens through which to consider Mr. Bullcoming's claim. Because he did not seek "discovery" in the sense used in this Court's precedent, the proposition that "[t]here is 'no general constitutional right to discovery in a criminal case,'" id. (quoting Weatherford, 429 U.S. at 559), sheds no light on the question at hand.

Rather than being about discovery in the Weatherford sense, this case implicates two very different principles of due process. The first is that a non-reciprocal benefit that advantages the prosecution may offend due process. "Although the Due Process Clause has little to say regarding the amount of discovery which parties must be afforded, it does speak to the balance of forces between the accused and his accuser." Wardius, 412 U.S. at 474 (citation omitted).

In Wardius, it was an evidentiary rule that created the imbalance that this Court held to be inconsistent with due process. The defense was required to give notice of its alibi witnesses, but the state did not have to give notice of the witnesses on which it would rely to refute the alibi. Id. at 472. This lack of reciprocity offended the Due Process Clause. Id.; see also

id. at 474. It is not just such an affirmative rule that can have this effect, as this Court's reference in Wardius to Gideon v. Wainwright, 372 U.S. 335 (1963), as a rule that had such non-reciprocal operation. Wardius, 412 U.S. at 474 n.6. The lack of reciprocity inhered in the fact that the prosecution presented its case through lawyers, yet Florida did not provide a lawyer for those on trial for non-capital felonies. Gideon, 372 U.S. at 336.

Here, the lack of reciprocity arises because the prosecutor had its familiar access to part of the crime scene and the defense was denied any access to it at all. And so, Mr. Bullcoming was simply not "on an equal footing with the prosecution." State in Interest of A.B., 99 A.3d 782, 793 (N.J. 2014). Where there is such "disparate access" to a crime scene, there is a similar lack of reciprocity that this Court has found to be problematic in cases like Wardius. Due process is offended in this instance too. People in Interest of E.G., 368 P.3d 946, 957 (Colo. 2016) (en banc) (Gabriel, J., dissenting).

The second principle at work here is that an accused is entitled, also as a function of the Due Process Clause, to the tools necessary for an effective defense. This Court has typically applied this principle in cases of

indigent defendants. "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (citing numerous cases). It thus can be "fundamentally unfair" for the government to prosecute a case without ensuring a defendant "has access to the raw materials integral to the building of an effective defense." Id. at 77; see also id. at 83 (where sanity at issue, state must provide indigent assistance of a psychiatrist).

The crime scene, which may well contain important evidence about who is responsible for a crime and how the crime was committed, and which the government routinely mines for its advantage, is one such "raw material." And the fact that it is not a lack of money that results in denial of the raw material, as in Ake and those cases on which Ake is based, only magnifies the problem. It results in an unfair situation for all defendants, no matter how well-heeled they are.

The factors this Court considered in Ake as to when due process requires access to a particular raw material confirms that it does in the case

of the crime scene. The first of the three considerations, the private interest that will be affected, id. at 77, is "obvious" and "weighs heavily" in favor of access, id. at 78. This is because "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." Id.

The second factor is the governmental interest that will be affected by providing access. Id. at 77, 78. The government itself has no interest that weighs against recognizing a right of access to the crime scene. Its interest in prevailing at trial "is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." Id. at 78. And the government "may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." Id.

The third factor is the probable value of the access. Id. at 77. There is, of course, a reason that law enforcement combs over the crime scene. Reliance on what law enforcement has documented and gathered is not a substitute for defense access, because "[t]he determination of what may be useful to the defense can properly and effectively be made only by an

advocate." Dennis v. United States, 384 U.S. 855, 875 (1966). As one State Supreme Court Justice has expressed this point in the context here:

> In inspecting a crime scene, the state and a defendant generally have opposite goals. The state is attempting to solve a crime and obtain a conviction. The defendant, in contrast, is trying to uncover evidence that will help him or her avoid being convicted of a crime. That is simply the nature of our adversary system, and to allow one party access to substantial evidence while denying the other party corresponding access undermines the proper functioning of that system.

Interest of E.G., 368 P.3d at 957 (Gabriel, J., dissenting).

Not only will access to the crime scene in the usual case have probable value to the defense, but Mr. Bullcoming gave the district court specific reason to think this to be even more true *in this case*. He pointed to a "pile of blood" that a fireman saw in putting out the fire, which was apparently overlooked by law enforcement. His counsel also noted that sacred items, including a medicine bag, that belonged to Mr. Bullcoming and that he would not have set on fire, were at the scene. Although the defense was able to present at trial proof that Mr. Bullcoming's pipe bag, which was recovered by the Zotigh family, was at the trailer, proof of other sacred items that were there would have strengthened his argument that he did not set the fire, and so also did not kill Ms. Zotigh.

In short, all of the factors that this Court considered in Ake support a right of access to the crime scene.

B. The rights of the property owner are not a basis for denying any access to the crime scene whatsoever and the constitutional right to access provides the authority for ordering access.

Of course, there is an additional interest here that was not implicated in Ake or similar cases. It is the interest of the property owner who does not wish the defense to have access. The Tenth Circuit invoked the effect a right of access would have on the constitutional rights of property owners, A8, which it did not specifically outline, as a basis for denying access outright and across-the-board.

But to say there is a another right that may be affected by a constitutional right of access to the crime scene is not to say that the former must necessarily and always take precedence over the latter. The rights of a property owner are not absolute. They would need to be balanced against the constitutional right of a defendant to access. That is, such a property right does not "automatically trump[] a defendant's due process right to access a crime scene that is under a third party's control." Interest

of E.G., 368 P.3d at 957 (Gabriel, J., dissenting). The interests of the property owner can typically be accommodated by imposing time, place and manner restrictions on the access. State v. Tetu, 386 P.3d 844, 859 (Hawaii 2016). The interests of the property owner are not a basis for a blanket rule, like the one the Tenth Circuit endorsed, that there is no due-process right of access under any circumstances.

The Tenth Circuit also maintained that Mr. Bullcoming had not shown the district court had "authority to order the requested access." A7. But if Mr. Bullcoming is right on the merits, the Due Process Clause is itself that authority. There is, in that situation, no requirement that a rule or statute give a district court the power to order access. See Interest of E.G., 368 P.3d at 954 (in denying right of access, noting that neither the federal or state constitution, nor any statute, gave the state district court the authority to order access to a private home that was the crime scene). The Tenth Circuit itself seems ultimately to have recognized this point. It cited the above portion of Interest of E.G. A7 n.1. And it noted that other state courts "appear to allow" for such access under their respective state constitutions. A7.

C. The state-court decisions granting access to the crime scene show the importance of the issue here and are further support for recognizing a federal, constitutional right of access to the crime scene.

The Tenth Circuit, in rejecting Mr. Bullcoming's claim, suggested that no state case has recognized such a right of access under the federal constitution. A7. This is incorrect. In any event, the state-court cases upholding such a right of access highlight the importance of the issue here, and also support finding a basis for the right in the Sixth Amendment right to the effective assistance of counsel.

In Commonwealth v. Matis, 915 N.E.2d 212, 213 (Mass. 2006), the Supreme Judicial Court of Massachusetts recognized the right of an accused to access a crime scene that is private property, under both that state's Declaration of Rights and the United States Constitution. It identified the federal basis for the right as the Sixth Amendment. Id. Although it did not elaborate, the reason is self-evident. Without access to this important evidence, an attorney is hampered in her ability to represent the accused. Accord Tetu, 386 P.3d at 852-55 (holding right to access under state constitutional provision guaranteeing effective assistance of counsel). This points to the right Mr. Bullcoming claims as being based not just in

the Due Process Clause of the Fifth Amendment, but also in the right to the effective assistance of counsel of the Sixth Amendment.

The decisions of other state courts may likewise reflect a rooting of the right of access in the United States Constitution. At least two other courts, in addition to relying on state discovery provisions in granting access to a crime scene that is private property, invoked the constitutional right to a fair trial, without specifying whether they were referring to the due-process right under the federal or state constitution. State ex rel. Thomas v. McGinty, 137 N.E.3d 1278, 1290 (Ohio Ct. App. 2019); State v. Gonzalves, 661 So.2d 1281, 1281 (Fla. Dist. Ct. App. 1995). And the New Jersey Supreme Court, when considering a rule that gave state trial courts inherent power to order discovery where justice so requires, relied on Ake in deciding what justice requires. The state supreme court noted that "[a] criminal trial where the defendant does not have 'access to the raw materials integral to the building of an effective defense' is fundamentally unfair." Interest of A.B., 99 A.3d at 790 (quoting Ake, 470 U.S. at 77).

In any event, the existence of state court decisions that are based on the due-process clauses of state constitutions, see A7 (citing the decision of

the Hawaii Supreme Court in Tetu and Henshaw v. Commonwealth, 451 S.E.2d 415, 419 (Va. App. 1994)), is anything but irrelevant. Of course, the due-process provision of a state constitution may afford more expansive rights to a criminal defendant than the Due Process Clause of the federal constitution. But the grounding of the right of access in a state due-process provision does not mean there is not such a right under its federal counterpart.

Indeed, what the Hawaii Supreme Court concluded after looking at the state cases in this area surely bears on the significance of the issue that Mr. Bullcoming raises. That court wrote, in language that echoes Ake, that "[r]eview of the case law thus demonstrates that due process includes the right to access the crime scene to obtain the raw materials integral to building an effective defense." Tetu, 386 P.3d at 857. This predominant view in the state courts as to whether the denial of access renders a trial fundamentally unfair underscores that there is assuredly at least a good argument that there is such a due-process right under the federal constitution. It confirms that, as indicated by this Court's relevant precedents, the claim here is a substantial one.

D. This case is a good vehicle to decide whether there is a constitutional right of access to the crime scene.

This case is a good vehicle to decide the question presented. The issue was raised in the district court and the Tenth Circuit decided it on appeal.

In addition, this case presents both a strong case for access and weak interests on the other side. This makes it ideal to determine if there is the right claimed. The issue could not be avoided by the contention that there was a balance that would uphold the denial of access even if there is the claimed right.

As for the case for access, Mr. Bullcoming did not rest just on the inherent value that a crime scene has. He also pointed to blood evidence that was evidently overlooked. That it was a substantial amount -- a "pile" of blood in the words of the firefighter who saw it -- made it exceedingly unlikely it was there before the night of September 6th. If the pile of blood contained the DNA of someone other than Mr. Bullcoming and Ms. Zotigh, it would be compelling proof exonerating Mr. Bullcoming and implicating someone else. Mr. Bullcoming also pointed to the presence of his

ceremonial items that he would not have knowingly burned, and that might be found at the trailer.

As for the interest of the third-party owners, it was about as weak as possible. Although the right to exclude others is itself an important aspect of property rights, Byrd v. United States, 138 S. Ct. 1518, 1527 (2018), Ms. Zotigh's adult children did not appear to have done anything to keep others from the property or the burned trailer itself. With the trailer unoccupied, access would also not have impinged on any of the family's privacy rights.

Any balance, or accommodation of the property owners' interest, would therefore have called for the defense to be allowed some access. Whether the United States Constitution in fact requires a criminal defendant to have access to a crime scene that is private property will therefore be settled by this Court's consideration of this case.

CONCLUSION

This Court should grant Mr. Bullcoming a writ of certiorari.

Respectfully submitted,

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