No. _____

IN THE

Supreme Court of the United States

DONALD LEE SCOTT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari
To the Arizona Court of Appeals, Division 1

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 30 years, lower courts have divided over the proper standard for evaluating a claim of pre-accusation delay.

There are two primary tests: a strict two-pronged approach and a balancing test. Both tests require the defendant to prove actual prejudice. The split comes in the second prong.

Under the strict two-pronged approach, once a defendant shows prejudice, the defendant must also prove that the prosecutor intentionally delayed bringing charges for a malicious purpose.

Under the balancing test, once the defendant shows prejudice, the prosecution explains the reasons for delay. The court then balances the reasons for delay against the prejudice caused by the delay.

This case squarely presents the issue that has divided courts for three decades:

What is the proper standard for evaluating pre-accusation delay?

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INTRODUCTION

For 30 years and counting, the Nation's courts have been deeply divided regarding the proper test for resolving claims of pre-accusation delay.

There are two primary approaches: a strict two-pronged approach and a balancing test. Under both approaches, the defendant must show actual prejudice. The rub is in what comes next.

In jurisdictions that have adopted the strict two-pronged approach, once the defendant shows actual prejudice, the defendant must also prove that the prosecution intentionally delayed bringing charges for a malicious purpose.

Under the balancing test, however, once the defendant establishes prejudice, the burden shifts to the prosecutor to explain why charges were delayed. The court then balances the prejudice and reasons for delay.

This Court should grant certiorari and adopt the balancing test. The balancing test accords with the common law, expresses this Court's precedents, and fairly allocates the burden to explain the reasons for delay to the party that has access to that information—the prosecution.

PETITION FOR WRIT OF CERTIORARI

Donald Scott petitions this Court for a writ of certiorari to review the judgment of the Arizona Court of Appeals affirming the conviction in his case.

DECISIONS BELOW

The decision of the Arizona Court of Appeals is available at *State v. Scott*, 2022 WL 552055 (Ariz. App. 2022, Unpub.).[1] Although the decision is unreported, Arizona allows parties to cite to unreported decisions in several circumstances. Ariz. Supreme Ct. Rule 111(c)(1)(C).

JURISDICTION

This Petition is timely, and this Court has jurisdiction under 28 U.S.C. § 1257(a). The Arizona Court of Appeals issued its decision on February 24, 2022. Scott timely filed a Petition for Review with the Arizona Supreme Court. The Arizona Supreme Court denied that petition on August 26, 2022. Appendix 9a.

[1] The decision is also available through the Arizona Court of Appeals, Division 1 website: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CR%2021-0024%20Scott.pdf.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides, in pertinent part: "No person shall be … deprived of life, liberty, or property, without due process of law …." U.S. Const. Amend. 5.

The Fourteenth Amendment provides, in pertinent part: "... nor shall any State deprive any person of life, liberty, or property without due process …." U.S. Const. Amend. 14.

STATEMENT

Donald Scott was charged with murder more than 30 years after he found the victim's body in the desert. During that interim, at least one favorable witness died. The delay left Scott unable to present that witness's statements. Scott thus asked the trial court to dismiss the case. But because Scott could not prove the prosecutor intentionally delayed charges for a malicious purpose, the trial court denied Scott's motion. A fractured jury ultimately convicted Scott of murder.

1. Donald Scott finds a body in 1988; he is charged with murder three decades later.

In 1988, Donald Scott and his wife found a murdered body while out in the desert. *State v. Scott*, 2022 WL 552055, ¶¶ 2-3 (Ariz. App. 2022, Unpub.) (attached at Appendix 1a). He called the police and took them to the body. *Id.* at ¶¶ 3-4. After a brief investigation, police released the two of them. *Id.* at ¶ 4.

Thirty years later, in 2018, prosecutors charged Scott with the murder. *Id.* at ¶¶ 6-7. The police had originally found semen in the victim's vagina and on her jeans. *Id.* at ¶ 6. When DNA technology developed, officers created a DNA profile, but the profile didn't match any suspects, and the police entered the DNA profile in a database and waited. *Id.* The police eventually received a passive hit that matched Scott. *Id.*

2. The trial court summarily denies Scott's motion to dismiss for pre-accusation delay.

Before trial, Scott moved to dismiss the case for pre-accusation delay. Appendix 10a.

In his motion, Scott acknowledged that Arizona uses a strict two-pronged approach for deciding claims of pre-accusation delay. Appendix 13a. That approach requires the defendant to show 1) the defendant suffered actual prejudice from the delay and 2) the prosecution intentionally delayed charges to gain a tactical advantage or harass the defendant. *See State v. Broughton*, 752 P.2d 483, 486 (Ariz. 1988). This test is used in most jurisdictions.

But Scott asked the court to apply a different test—a balancing test. Appendix 20a (citing *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985)). Under the balancing test, a defendant still needs to show the delay caused actual prejudice. After doing so, the burden shifts, and the prosecutor is required to explain the reason for delay. The court then balances the prejudice against the reason for delay. Scott argued the balancing test was more consistent with the federal constitution and this Court's cases. Appendix 20a-22a.

Scott also explained why he'd been prejudiced: vital witnesses had died during the 3-decade delay. Appendix 12a. One such witness was Dianna Price, the victim's ex-girlfriend. *Id.*

One day after the prosecutor filed a response—and without holding an evidentiary hearing, hearing oral argument, or waiting for a reply—the trial court summarily denied the motion. Appendix 34a.

3. Because of the delay, Scott is left unable to present exculpatory statements of witnesses who had died.

The delay left Scott unable to present exculpatory evidence—statements made by the victim's ex-girlfriend Dianna Price that undercut several of the prosecutor's arguments. *See Scott*, 2022 WL 552055, ¶¶ 9-13.

At trial, the state's theory was that Scott kidnapped and sexually assaulted the victim before murdering her. Scott's defense was that he had consensual sex with her a day or two before, but that someone else murdered her.

In closing argument, the prosecutor Scott's defense by emphasizing three points: dirty jeans, elbow injuries, and sexual orientation. First, the victim was wearing jeans that had semen on them. The victim's sister—Peggy Levee—testified that the victim was concerned with her hygiene and would not have worn soiled pants. Appendix 46a-47a. The prosecutor claimed this proved the sexual encounter had occurred on the same day as the murder. Appendix 76a, 80a. Second, the victim had injuries the prosecutor argued were consistent with assault, particularly cuts on her elbows. Appendix 73a. And third, the victim self-identified as a lesbian. Levee also testified the victim was a lesbian and would not have slept

with men. Appendix 55a. The prosecutor used this to suggest that any sexual encounter with a man, like Scott, would have been nonconsensual. Appendix 78a.

These arguments were persuasive, however, because the delay left Scott unable to present statements made by Dianna Price. Days after the murder, Dianna Price told the primary investigator—Detective Riley—she believed the victim's brother, William McKenna, murdered the victim. Appendix 63a. And Price's statements called into question each of the prosecutor's arguments.

Price told police that the victim had worn the same pants—the pants semen was found on—two days before the murder:

> AYALA: Okay, now, I'm talking about Thursday.
>
> DIANNA: Uh, Thursday was uh, maroon sweater, pullover sweater, and I believe the blue tank top. But I'm not, I can't say for sure. And uh, that the same pair of pants, I believe on Saturday that she had on Thursday.
>
> AYALA: She was wearing the same pair of pants, she's hygiene conscious.
>
> DIANNA: Yeah, well, she doesn't have alot of clothes so she washes 'em, you know, like she'll wash everything she has and I you know, and still wear 'em, but like when, she, we used to have an ongoing argument because I had, when we moved, I had boxes and boxes and boxes of things and she had a backpack, and that was it.

Appendix 69a. Although Levee was correct that the victim was hygiene conscious, Price explained the victim didn't own many clothes. And Price told officers the victim was wearing the same pants—pants semen was eventually found on—two

days prior. This thus undercut the prosecutor's assertion that the presence of semen proved the sexual encounter occurred on the day of the murder.

Price told the police that the victim's brother—William McKenna—had caused the injuries to the victim's arms:

DIANNA:	Somebody killed her? (sobbing) She was such a good girl, I mean she was crazy, her brother did it. Her brother had to have done it. When I saw her Saturday, she had big gouges in her arms from him hitting her and beating her. And they've been doing a lot of speed, I know he did it. I know he did it.
RILEY:	The, what Saturday, what gouges are you talking about, which arm...
DIANNA:	Big scratches in this arm over here. (pointing to her right arm)
RILEY:	Right arm?
DIANNA:	I believe so.
RILEY:	What did she tell you about that?
DIANNA:	That her and her brother, she's an alcoholic. And her, she said that her and her brother had been doing alot of speed and this was after a comde down. Oh, God...You know how people get real violent sometimes?

Appendix 63a. This would have repudiated the prosecutor's claim that the injuries to the victim's elbows proved a sexual assault.

And Price explained that, although the victim identified as a lesbian, the victim engaged in consensual sex acts with men:

DIANNA: Um, I think it was about 10 or 10:15, somewhere around there. I know that she was picked up by a man and given ten dollars to perform sex acts.

AYALA: What is that?

DIANNA: She gave him some head.

AYALA: Some what?

SIWECK: Well, you can talk.

AYALA: Yeah, you can talk.

DIANNA: Oh, okay. Well, yeah she gave him some head, so, for $10 and we laughed because I said, "Oh, you're such a cheap whore, you know, one of these days, you're gonna get killed", and she just laughed, said I don't, all I know is that it was an older man.

SIWECK: Is that a normal thing for her to do?

DIANNA: I've known of doing it two times, but she never did it while she was with me, you know, right, right after we split up, um, she wasn't working, I was, and I know that she had some, did the same thing for some black man on Van Buren for a pair of tennis shoes.

Appendix 66a. This statement would have contradicted Levee's claim that the victim would not have willingly slept with men. And it would have countered the prosecutor's subsequent assertion that any sexual contact with Scott was nonconsensual.

4. Without hearing the favorable evidence, a fractured jury convicts Donald Scott.

The jury that decided Donald Scott's fate was left without complete information. The jury never learned that the victim wore the same pants—pants

that had semen on them—two days prior. The jury never learned that the victim's brother, William McKenna, had caused the very injuries that the prosecutor attributed to Scott. And the jury never learned that, while she identified as a lesbian, the victim willingly had sexual contact with men.

In a fractured verdict, the jury convicted. Appendix 85a. The state had presented two theories of guilt: premeditated murder and felony murder. One juror rejected the premeditated-murder theory; two jurors rejected the felony-murder theory. *Id.*

5. Arizona's appellate courts affirm Scott's conviction.

On appeal, Scott argued the trial court erred when it denied the motion to dismiss for pre-accusation delay. Applying the strict two-pronged approach, the lower court rejected Scott's argument. *Scott*, 2022 WL 552055, ¶¶ 15-20.

Scott filed a Petition for Review and the Arizona Supreme Court declined review. Appendix 9a.

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari to resolve the ongoing split regarding how to analyze claims of excessive pre-accusation delay. Since this Court decided the two key cases regarding pre-accusation delay—*United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977)—courts across the county have extended inconsistent protections to guard against pre-accusation delay. Because the split is entrenched, the issue has recurred time and again, and this case is an ideal vehicle to resolve the divide, this Court should grant certiorari.

1. In cases of pre-accusation delay, courts are split between two tests: a strict two-pronged approach and a balancing test.

More than 30 years ago, Justice Byron White dissented from the denial of certiorari on the very issue presented here—the proper "test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment." *Hoo v. United States*, 484 U.S. 1035, 1035 (1988) (White, J., dissenting from denial of certiorari).

While some jurisdictions have minor deviations, there are two primary approaches: the strict two-pronged approach and the balancing test.

Under the strict two-pronged approach, the defendant must show 1) that the defendant was actually prejudiced by the delay; and 2) that the prosecution

intentionally delayed filing charges for an improper reason, such as gaining a tactical advantage or harassing the defendant. *See, e.g., United States v. Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987); *United States v. Crouch*, 84 F.3d 1497, 1508 (5th Cir. 1996).

Arizona has aligned itself with the strict two-pronged approach. In *State v. Broughton*, the Arizona Supreme Court ruled that the defendant must prove "that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, *and* that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 752 P.2d 483, 486 (Ariz. 1988). The Arizona Court of Appeals applied *Broughton* here. *Scott*, 2022 WL 552055, ¶ 16.

Under the balancing test, the defendant still must show actual prejudice, but the burden then shifts to the prosecution to explain the reason for the delay. *See, e.g., United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985); *United States v. Hagler*, 700 F.3d 1091, 1099 (7th Cir. 2012). The evaluating court then balances the reasons for delay against the prejudice. *Automated Medical Laboratories*, 770 F.2d at 403-04; *Hagler*, 700 F.3d at 1099.

Our Circuit Courts are deeply divided on the proper test to apply. Nine Circuits—the First, Second, Third, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C.

Circuits—apply the strict two-pronged approach.[2] Three Circuits—the Fourth, Seventh, and Ninth Circuits—apply the balancing test.[3]

Our states are similarly divided. A survey published in 2021 concluded that thirty states had adopted a version of the strict two-pronged approach. Danielle Rang, *The Waiting Game: How Preindictment Delay Threatens Due Process*, 66 S.D. L. Rev. 143, 154-55 (2021). Thirteen states, on the other hand, had adopted some form of the balancing test. *Id.* at 155.

Additionally, jurists and commentators alike have widely recognized the continuing split:

- Judge Mwiss: "In fact, the circuits are split on this issue, with some circuits expressly rejecting [the majority] view of the teachings of *Marion* and *Lovasco*." *United States v. Reed*, 41 M.J. 449, 458 (Ct. App. Armed Forces 1995) (Mwiss, J., dissenting).

- Michael Cleary: "The Court's lack of clear guidance in both *Marion* and *Lovasco* regarding pre-indictment delay led to a split among the circuit courts of appeals that continues today." Michael Cleary, *Pre-Indictment Delay: Establishing a Fairer Approach Based on* United States v. Marion *and* United States v. Lovasco, 78 Temp. L. Rev. 1049, 1051 (2005).

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[2] *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. Ismaili*, 828 F.2d 153 (3d Cir. 1987); *United States v. Crouch*, 84 F.3d 1497 (5th 1996); *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States v. Jackson*, 446 F.3d 847 (8th Cir. 2006); *United States v. Engstrom*, 965 F.2d 836 (10th 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 and replaced in part on other grounds*, 964 F.2d 1186 (D.C. Cir. 1992).

[3] *Howell v. Barker*, 904 F.2d 889 (4th 1985); *United States v. Hagler*, 700 F.3d 1091 (7th 2012); *United States v. Moran*, 759 F.2d 777, 780-81 (9th Cir. 1985).

- Chief Justice Hodge: "There is a split among jurisdictions as to what the second prong of the pre-indictment delay test should be, which has not yet been resolved by the United States Supreme Court." *Ventura v. People*, 64 V.I. 589, 609 (V.I. 2016).

- Danielle Rang: "There is a healthy split among the states on the issue of preindictment delay, with over half of the states adopting the strict two-prong test and the other half either rejecting the strict two-prong test or lacking a clear position on the issue." Rang, *The Waiting Game*, 66 S.D. L. Rev. at 154.

This Court should grant certiorari to resolve this widely acknowledged and deeply entrenched split.

2. This is an important and recurring issue.

There are no signs of this divide closing. Four decisions issued in 2022 prove this point.

First, the New Jersey Superior Court, Appellate Division, adopted the balancing test in *State v. S.J.C.*, 274 A.3d 688, 697 (N.J. Super. 2022). This was a fundamental change because the New Jersey Supreme Court had previously embraced the strict two-pronged approach in *State v. Townsend*, 897 A.2d 316, 325 (N.J. 2006). But in *S.J.C.*, the court acknowledged that the defendant had never contested the issue in *Townsend*. *S.J.C.*, 274 A.3d at 696. The court thus adopted the balancing test, but ultimately found no prejudice. *Id.* at 698-99.

Second, the Kansas Supreme Court reaffirmed "that a defendant must show that the State intentionally delayed charging the defendant to gain a tactical

advantage or advance some other improper purpose." *State v. Shields*, 511 P.3d 931, 946 (Kan. 2022). This came about in response to the defendant's request that the court adopt the balancing test. *Id.*

Third, the Florida Supreme Court embraced the strict two-pronged approach in *Jackson v. State*, 347 So.3d 292, 306 (Fla. 2022). This was a swap in the opposite direction of New Jersey. Florida had previously used the balancing test. *Rogers v. State*, 511 So.2d 526, 531 (Fla. 1987).

And fourth, the Oregon Supreme Court reaffirmed its commitment to the balancing test in *State v. Benson*, 514 P.3d 491, 496 (Or. 2022). Notably, the Oregon Supreme Court reaffirmed its use of the balancing test even after discussing *Crouch*—the primary case that set forth the strict two-pronged approach for the Fifth Circuit. *See id.* (discussing *Crouch*, 84 F.3d at 1523).

Percolation has not provided an answer. This is not a situation where just a couple jurisdictions are adhering to vestiges of the past. Rather, this issue is recurring in courts across the country, and the divide is deepening.

A significant number of petitions have also asked this Court to resolve the issue. For example, twice in the 1990s, the Federal Government conceded a split but argued there were vehicle problems with the particular cases. The Government first took this approach in *Reed v. United States*, 516 U.S. 820 (1995). In its Brief in Opposition, the Government conceded the split existed. *Reed v. United States*,

Br. Opp., 1995 WL 17108172, pg. 7. The Government, however, argued the case was a poor vehicle because the defendant's claimed prejudice was too general, and the delay was minimal. *Id.* This Court denied certiorari. *Reed*, 516 U.S. 820 (1995). The Government repeated this tack in *Crouch v. United States*, 519 U.S. 1076 (1997), the Fifth Circuit case that has now become one of the leading authorities supporting the strict two-pronged approach. In its Brief in Opposition, the Government again conceded the split existed, but again argued the case was a poor vehicle in part because the offered testimony would not have affected the outcome. *Crouch v. United States*, Br. Opp., 1996 WL 33439685, pg. 9. This Court denied certiorari. *Crouch v. United States*, 519 U.S. 1076 (1997). More recently, this Court denied certiorari on the issue in *Shiner v. United States*, 565 U.S. 1202 (2012).

And two cases raised the issue during this Court's 2020 Term:

- *Harris v. Maryland*, 20-101. Petitioner Harris raised the issue in the Certiorari Petition. *See Harris v. Md.* Pet. Cert. 20-101, (i). After an initial waiver, this Court asked Maryland to respond. *Harris v. Maryland*, Docket 20-101, Response Requested on September 3, 2020. This Court then relisted the matter 12 times before it eventually denied certiorari on May 17, 2021. *See Harris v. Maryland*, Docket 20-101.

- *Woodard v. United States*, 20-6387. Petitioner Woodard raised the issue in the Certiorari Petition. *See Woodard v. United States* Pet. Cert. 20-6387, ii. The Government indicated its intent to respond by requesting an extension. After the response, an amicus, and a reply were filed, this Court relisted the matter 6 times before it denied certiorari on May 17, 2021. *See Woodard v. United States*, Docket 20-6387.

Commenters have also called on this Court to address the split for more than 30 years. *See* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 Wm. & Mary L. Rev. 607, 622-28 (1990); Michael Cleary, *Pre-Indictment Delay: Establishing a Fairer Approach Based on* United States v. Marion *and* United States v. Lovasco, 78 Temple L. Rev. 1049, 1051-53 (2005); Eli DuBosar, *Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 Fla. St. U. L. Rev. 659 (2013); Danielle Rang, *The Waiting Game*, 66 S.D.L. Rev. 143, 161 (2021).

The proper standard for analyzing claims of pre-accusation delay is an issue that recurs regularly. And without this Court's guidance, courts have reached inconsistent answers regarding what the Constitution requires.

3. This case is an ideal vehicle to resolve the split.

This case is well-suited to help this Court resolve the split for five reasons.

First, Scott was charged more than 30 years after he found the victim's body. This significantly exceeds the 20-year delay presented to this Court in *Harris v. Maryland*, Docket 20-101, and it dwarfs the 3-year delay in *Woodard v. United States*, Docket 20-6387. The length of delay alone places Scott's case in a unique position from other cases that have sought review.

Second, Scott preserved the issue at every court. In his motion to dismiss, Scott argued the strict two-pronged approach was unfair—particularly its requirement that Scott prove the prosecutor intentionally delayed the case for an improper purpose. Appendix 20a-22a. He cited cases from the Ninth and Fourth Circuits applying the balancing test, pointed out that the strict two-pronged approach imposed an unfair burden on defendants to prove the prosecutor's intent, and urged the trial court to employ the "fairer approach used by the minority of circuits …." *Id.* He advanced the same arguments before the Arizona Court of Appeals and the Arizona Supreme Court.

Third, the trial court's decision hinged on Scott's failure to prove the prosecutor intentionally delayed for an improper purpose. While Scott alleged significant prejudice and argued for the balancing test, he conceded Arizona applied the strict two-pronged approach. Appendix 13a. In its response, the prosecutor emphasized the prong regarding intentional delay for an improper purpose. Appendix 28a-29a. Without a hearing, oral argument, or opportunity to file a reply, the trial court summarily denied Scott's motion. Appendix 34a.

Fourth, this case is still on direct review, which is the necessary procedural posture to resolve this split. Under the Antiterrorism and Effective Death Penalty Act, habeas review is only proper if a state court issued a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). This Court has yet to clearly establish the Federal law that should govern the claim—hence the deeply entrenched split among state and federal courts. Any habeas review would thus be futile; the appropriate time to consider a question of this sort "would be on direct review, not in a habeas case governed by § 2254(d)(1)." *See White v. Woodall*, 572 U.S. 415, 427 (2014); *accord Marshall v. Rodgers*, 569 U.S. 58, 64 (2013); *Wright v. Van Patten*, 552 U.S. 120, 128 (2008) (Stevens, J., concurring). This case is on direct review—the ideal time to resolve this issue.

And fifth, the Due Process Clause provides Scott's sole protection against pre-accusation delay. Arizona has no statute of limitations for murder cases. Ariz. Rev. Stat. § 13-107(A) ("A prosecution for any homicide … may be commenced at any time."). This Court has recognized that the "primary guarantee" against overly stale prosecutions is the statute of limitations. *Lovasco*, 431 U.S. at 789; *Marion*, 404 U.S. at 322. The Due Process Clause plays a "limited role" in protecting against improper delay. *Lovasco*, 431 U.S. at 789. But because there is no statute-of-limitations protection for Scott's case, the Due Process Clause—however limited—provides the *only* guarantee protecting Scott against oppressive delay.

This again sets Scott's case apart from cases like *Woodard v. United States*, Docket 20-6387. In *Woodard*, the defendant suffered a 3-year delay, but the government had filed charges well within the 5-year statute of limitations. Because

the statute of limitations set the primary protection, *Woodard* wouldn't have been a good vehicle. But Scott's case—which has no statutory protection—is ideal.

This Court should grant certiorari because this case presents the opportune vehicle to finally resolve an issue that has divided courts for three decades.

4. The balancing test is more consistent with the history of the Due Process Clause, this Court's precedent, and fundamental fairness.

In deciding whether a defendant should be required to prove the prosecution intentionally delayed for improper purposes, this Court should look to our common-law history, this Court's precedent, and the fundamental fairness of such a test.

A. Common law—as it existed before independence and before the passage of the Fourteenth Amendment—supports the balancing test.

Foremost, the common law supports a balancing test. In *The King v. Robinson*, decided more than a decade before our Declaration of Independence was signed, Lord Mansfield set forth four factors that amount to a balancing test. *The King v. Robinson*, 96 Eng.Rep. 313, 1 Blackstone W. 541 (1764). Two factors—possible disfavor and the consequences of the information—are consistent with the examination of prejudice. *Id.* at 313. The other two factors—the "time of

application" and "suspicious state of the case"—are consistent with the examination for the reasons for delay. *Id.*

This balancing did not demand that the defendant prove the prosecutor's reasons for the delay. *See id.* Rather, Lord Mansfield explained, "if delayed, the delay must be reasonably accounted for." *Id.* In application, Lord Mansfield noted, "the delay is not accounted for." *Id.* at 314. Lord Mansfield expected the party bringing the charges to account for the delay, and their failure to do so is what Lord Mansfield found notable. *See id.*

The common law never foisted a burden upon a defendant to prove the prosecution delayed in bringing charges for malicious purposes. Our founders would have thus understood the Due Process guarantee of the Fifth Amendment to require a balancing of the prejudice and reasons for delay—reasons that would be provided by the prosecution.

Because the Fourteenth Amendment extended the Due Process guarantee to the states, we can also consider how the framers of the Fourteenth Amendment would have understood the protection. *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 Md. L. Rev. 978, 979-80 (2012). Common-law cases that addressed pre-accusation delay in the period between the approval of our Constitution and the adoption of the Fourteenth Amendment were consistent with the balancing test. *See* Goldfarb, *When Judges Abandon Analogy*, 31 Wm. & Mary

L. Rev. at 635 (discussing *The King v. Marshall and Grantham*, 13 East 322, 104 Eng.Rep. 493 (1811); *The Queen v. Hext*, 4 Jurist 339 (1840); and *The Queen v. Robins*, 1 Cox Crim.Cas. 114 (Somerset Winter Assizes 1844)).

Justice William O. Douglas recognized this common-law history in his concurrence in *Marion*. He expressly quoted Lord Mansfield's decision in *Robinson*. *See Marion*, 404 U.S. at 328 (Douglas, J., concurring). He further discussed *The Queen v. Hext*, and quoted *The Queen v. Robins*, which emphasized the unfairness of putting a person on trial after significant delay: "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial." *Id.* at 328-29 (Douglas, J., concurring) (quoting *Robins*, 1 Cox Crim.Cas. 114).

While Justice Douglas cited this history to explain why he would have ruled that the Sixth Amendment's Speedy Trial Clause protected against pre-accusation delay, the history conversely explains how our framers would have understood the protection extended by the Due Process Clause.

Thus, the Due Process guarantee extended to the states in the Fourteenth Amendment would have been understood to protect a balancing test and require the prosecution—not the defense—to explain why the prosecutor delayed the charges.

B. *Marion* and *Lovasco* support a balancing test that does not require the defense to prove the prosecution delayed for malicious purposes.

Beyond our common-law history, the balancing test is also more in line with the language and approach of *Marion* and *Lovasco*.

In *Marion*, this Court ruled that pre-accusation delays were protected by the Due Process Clause of the Fifth Amendment, not the Speedy Trial provision of the Sixth Amendment. *See Marion*, 404 U.S. at 325. In reaching this decision, this Court relied upon the Government's concession that intentional delays to gain a tactical advantage or harass the defendant would violate Due Process. *Id.* at 324. With this concession, this Court agreed that the Due Process Clause was the constitutional provision at play, not the Speedy Trial Clause. *Id.* at 324-25.

But courts that adopted the strict two-pronged approach have glossed over the fact that this intentional delay for a nefarious purpose was not a demand; it was recognition of a concession. Goldfarb, *When Judges Abandon Analogy*, 31 Wm. & Mary L. Rev. at 622-23. The result has been that several courts "have fixed the

ceiling and the floor in identical locations, requiring both actual prejudice and intentional tactical delay as the minimum showing for a due process violation." *Id.* at 623.

Moreover, in *Lovasco*, this Court expanded what qualified as a Due Process violation. There, the government conceded that reckless disregard could also support a Due Process claim. *Lovasco*, 431 U.S. at 795 fn. 17. And this Court reiterated the reckless-disregard standard when summarizing *Lovasco* in *Betterman v. Montana*, 578 U.S. 437, 441 (2016) (noting in parenthetical that the "Due Process Clause may be violated, for instance, by prosecutorial delay that is 'tactical' or 'reckless'").

Although this Court never went so far as to announce a formal test in *Lovasco*, this Court employed a balancing test. This Court ruled "that proof of actual prejudice makes a due process claim concrete and ripe for adjudication …." *Lovasco*, 431 U.S. at 789. The only burden on the defendant is actual prejudice. Once the defendant establishes prejudice, the reviewing court must balance the prejudice against the reasons for delay: "Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790.

Although this Court never set an explicit test in *Marion* or *Lovasco*, this Court's analysis in both cases supports a balancing test.

C. The balancing test provides a more equitable distribution of responsibilities because the prosecution, not the accused, knows the reasons for delay.

And finally, it is fundamentally unfair to require the defense to prove the prosecution delayed charges for a malicious purpose because the defendant lacks access to the prosecutor's motivation.

Cases that have rejected the burden have often observed just how unfair it is to require the defense to explain why the prosecution failed to act. The Tennessee Supreme Court recognized that requiring the defendant to prove malicious intent "places a daunting, almost insurmountable, burden on the accused." *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996). The Fourth Circuit noted that the burden ignores "the difficulty defendants … encounter in attempting to prove improper prosecutorial motive" and means that many defendants are unable to prove a due process violation "no matter how egregious the prejudice." *Howell*, 904 F.2d at 895. And the Supreme Court of the Virgin Islands similarly concluded "that requiring the defendant to prove the reason behind the government's decision to delay charging him with a crime would be nearly impossible, rendering the rule defunct …." *Ventura*, 64 V.I. at 609.

Academic critics of the strict two-pronged approach have decried the same unfairness. Professor Goldfarb recognized that the burden was unfair because prosecutors have "exclusive access to the information necessary." Goldfarb, *When Judges Abandon Analogy*, 31 Wm. & Mary L. Rev. at 622-28. A more recent commentator opined that "placing the burden on the defendant to prove both prongs of a pre-indictment delay claim is unreasonable considering the practical difficulties faced by defendants in showing improper motive by the prosecution." Cleary, *Pre-Indictment Delay*, 78 Temple L. Rev. at 1051-53, 1069. And just last year another commentator explained: "The problem with the required showing of prejudice in most jurisdictions is that it is unfair to shoulder a criminal defendant with the burden to prove the subjective intention of the prosecutor when only the prosecutor will have that information." Rang, *The Waiting Game*, 66 S.D.L. Rev. at 161.

Requiring a defendant to explain the reasons for delay makes little sense because the prosecution is the party with that information. The balancing test corrects this inequity by requiring the party that knows the reason for delay to provide the explanation for it.

CONCLUSION

Courts across the country remain irreconcilably divided regarding how to review claims of pre-accusation delay. This Court should grant review to resolve that split.

In doing so, this Court should ultimately adopt the balancing test. The balancing test is in line with the common law, consistent with this Court's precedents, and fairly allocates the burdens to the proper party. This Court should then remand Scott's case so that he has an opportunity to prove the prejudice in his case during an evidentiary hearing.

Respectfully submitted this 23rd day of November, 2022.

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