No. 20-____

IN THE
Supreme Court of the United States

LLOYD HARRIS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Lovasco*, 431 U.S. 783 (1977), this Court considered the prosecution's "long delay" of "more than 18 months" to indict the defendant for a crime. *Id.* at 784, 786. The Court concluded that on the facts before it, 18 months of delay for "further investigation" did not offend standards of "fair play and decency" so as to violate due process. *Id.* at 793-96. But the Court refrained from articulating "in the first instance" a general test for when prejudicial preindictment delay violates due process, instead opting to give lower courts "a sustained opportunity to consider the constitutional significance of various reasons for delay." *Id.* at 796-97.

Four decades later, all circuits, nearly every state high court, and the D.C. Court of Appeals have had the opportunity to consider the proper test for analyzing excessive preindictment delay, and they are entrenched in a well-acknowledged conflict. Applying Maryland's rigid improper-motive test, the court below held that *twenty years* of delay before indicting petitioner—including sixteen years in which, by the State's account, "no significant new evidence was developed"—fulfilled due process.

The question presented is:

Where preindictment delay has caused actual prejudice to the accused's ability to defend himself, does the Due Process Clause require (1) the defendant to prove that the delay was driven by an improper prosecutorial motive; or (2) that courts balance the particular prejudice to the defendant against the particular reasons (or lack thereof) for the delay?

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PETITION FOR A WRIT OF CERTIORARI

Lloyd Harris petitions for a writ of certiorari to review the Maryland Court of Special Appeals' judgment in this case.

OPINIONS BELOW

The Maryland Court of Appeals' order denying certiorari (Pet. App. 1a) is reported at 224 A.3d 605. The Maryland Court of Special Appeals' opinion (Pet. App. 2a-40a) is published at 219 A.3d 1. The trial court's oral ruling (Pet. App. 41a-44a) is unreported.

JURISDICTION

The Maryland Court of Appeals entered its order denying certiorari on February 28, 2020. On March 19, 2020, this Court extended the time to file any petition for certiorari to 150 days, making this petition due on July 27, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. In October 1996, a fifteen-year-old girl was reported missing. Pet. App. 2a. Over two months later, her body was discovered in a wooded area. *Id.* Petitioner, who had resided at a camp near the wooded area became the primary suspect. *Id.* Over the next four years, state prosecutors conducted their investigation and gathered evidence, including crime scene evidence, DNA tests, and interviews of petitioner and other suspects. In 1998, the State conducted its final preindictment interview of petitioner and in 2000, having collected all of its evidence, the State's Attorney's Office made the determination that it did not want to indict petitioner. Pet. App. 2a, 21a.

In the years that followed, the State did not discover any new evidence. On January 22, 2016—sixteen years after the State had collected its evidence

and decided not to charge petitioner—the State brought charges against petitioner for first-degree murder, first-degree rape, and third-degree sex offense. Pet. App. 2a-3a.

During this sixteen-year period, one of the alternate suspects for the crime, who had also resided at the campsite, died. Pet. App. 11a. The forensic analyst, who had reviewed evidence from the crime scene and concluded that it did not match petitioner, also died. Pet. App. 11a-12a. Multiple witnesses who saw the victim after she disappeared became unavailable to testify. Pet. App. 12a. And critical evidence was lost. For instance, although the prosecution waited twenty years to charge petitioner, it decided not to preserve its six-hour recorded interview of petitioner. Pet. App. 13a. It instead provided the petitioner with a one-page report on the interview. *Id.* The prosecution admitted that the recording had existed but had not been maintained, and that it "would imagine there are others" that were also lost. Pet. App. 12a. According to the prosecution, the defense could simply "[r]est assured" that "if it was, you know, helpful to them, they would have it." *Id.* The State lost or destroyed other evidence too, including the underlying data for the state's acid phosphatase test, used to determine how long before death the victim had sexual intercourse; without it, the defense could not conduct its own independent review of the state's findings. Pet. App. 15a; *see also* 2/10/17 Tr. at 27.

The prosecution's delay also deprived petitioner of meaningful ability to put forth an alibi. After not being charged for two decades, petitioner was suddenly

compelled to find witnesses who could recall and reconstruct the events surrounding a day twenty years earlier. 2/10/17 Tr. at 25.

2. Before trial, petitioner moved to dismiss the charges against him on the basis of the prosecution's delay in indicting him. Pet. App. 11a. He argued that the prosecution's delay prejudiced him and that the prosecution had advanced no reason for its delay. 2/10/17 Tr. at 27.

Pressed by the trial court to explain "[w]hat's new in your case?" the prosecution responded "[w]hat does it matter?" and "that's not the test." *Id.* at 35.[1] The State's sole argument was that in *Clark v. State*, 774 A.2d 1136 (Md. 2001), the Maryland Court of Appeals had adopted a two-pronged test for analyzing when pre-indictment delay constituted a due process violation, which required petitioner to prove (1) actual prejudice and (2) "actual prosecutorial misconduct." Pet. App. 19a.

Petitioner acknowledged that the Maryland Court of Appeals applies this two-pronged test, but argued that the State should be required to provide reasons for the delay. Petitioner argued that even when there is intentional delay to gain a tactical advantage, it would be nearly impossible for a defendant to show it. Without happening upon "some kind of e-mail" or document from the State saying "yeah, they waited

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[1] The prosecution subsequently attempted to point to "a new statement from the defendant" as part of the reason for its delay. As defense counsel pointed out and the prosecution has since conceded, the statement identified was taken *after* the prosecution indicted petitioner and thus could not explain its delay. 2/10/17 Tr. at 37.

to charge him," it would be "extremely difficult" for any defendant to show that excessive and prejudicial delay resulted from misconduct. Petitioner urged that the prejudice to his defense that accumulated over the better part of two decades stood in contrast to the prosecution's lack of any explanation for its delay, including the fact that "there's literally nothing new" and "nothing substantial that would have changed" the calculation of whether to charge petitioner. Pet. App. 16a; 2/10/17 Tr. at 27-28. Instead, the prosecution simply "did not want to charge the case because they didn't think they had enough" and then twenty years later opted to charge petitioner on the same evidence. 2/10/17 Tr. at 28. Petitioner argued "at best" the State displayed "a lack of diligence" and "[a]t worst" the "State purposefully act[ed] to gain a tactical advantage." Pet. App. 16a; 2/10/17 Tr. at 28-29. But "regardless" of the State's reason for delay, "the end result" was that the defense was left without key evidence and hamstrung in its defense. 2/10/17 Tr. at 39. Counsel urged: "They had had the same information in 1998 and 2000 that they have now here today" and that, in the absence of any justification, this was sufficient for "the court to dismiss this case for pre-indictment delay." *Id*. at 30.

The trial court held that the State's delay was consistent with due process. The court explained that "as the State indicated, *Clark v. State* puts forth the two-prong test" under which the court must ask "[n]umber one, has the defendant suffered actual prejudice from the delay; and two, [whether] the delay was the result of a purposeful attempt by the state to gain tactical advantage over the defendant." Pet. App. 42a.

The Court found: "Regarding the first prong, I think it's clear the defendant has suffered some prejudice." *Id*. Turning to the second prong, the court acknowledged that "it's difficult to show . . . that the delay was a purposeful attempt by the State to gain a tactical advantage." *Id*. Applying *Clark*, however, the court concluded: "I just don't think the Defense has met their burden in showing a purposeful attempt by the State to gain a tactical advantage." Pet. App. 43a.

Petitioner was convicted and sentenced to life in prison.

3. On appeal, petitioner did "not argue that the State purposefully delayed his indictment to gain a tactical advantage over him" and instead argued "that the abundance of prejudice resulting from the delay was sufficient to require dismissal" in the absence of any justification from the State. Pet. App. 23a. The Maryland Special Court of Appeals rejected this argument and affirmed the trial court. It explained that under the Maryland Court of Appeals' test, "[a]n accused maintains the burden of establishing both that he or she was prejudiced by the delay *and* that the State manipulated the delay to gain a tactical advantage over the accused." Pet. App. 22a (citing *Clark*, 774 A.2d at 1154-55). The court concluded that petitioner's argument "fails based upon his inability to demonstrate that the State deferred to seek the indictment to gain a tactical advantage, as required by case law." Pet. App. 23a (citing *Clark*,

774 A.2d 1136); *see also* Pet. App. 22a (setting forth the two-prong test).[2]

Petitioner filed a petition for writ of certiorari in the Maryland Court of Appeals seeking review of the prosecution's excessive preindictment delay, and the court denied discretionary review. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

Long since this Court sought to give lower courts "a sustained opportunity to consider" how the Due Process Clause applies to excessive preindictment delay, *United States v. Lovasco*, 431 U.S. 783, 796-97 (1977), lower courts have adopted two competing approaches to that question. The conflict over these standards has been acknowledged many times, including by a member of this Court and by the dozens of lower courts that have since lined up on one side or the other.

I. The Question Presented Is The Subject Of A Deep and Widely Acknowledged Split.

Approximately a decade after *Lovasco*, Justice White recognized that the federal circuits were entrenched in "continuing conflict" over "the correct 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, 1035-36 (1988) (White, J., dissenting from denial of certiorari). The issue has since percolated through virtually every state high court, resulting in

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[2] The court reserved the question of whether the Court of Appeals' second prong requiring prosecutorial misconduct would be satisfied by recklessness, finding the argument had been waived. Pet. App. 23a-24a.

a parallel conflict under the Fourteenth Amendment, which governs state prosecutions and therefore the vast majority of criminal prosecutions in this country. Today, these lower courts are divided in the following two camps:

1. Nine federal circuits, twenty-eight state high courts, and the D.C. Court of Appeals hold that due process entails a two-pronged test: A criminal defendant must show (1) that the prosecution's delay caused some actual prejudice to his defense; and (2) that the delay was occasioned by "an improper prosecutorial motive." *Hoo*, 484 U.S. at 1036 (White, J., dissenting from denial of certiorari).

To satisfy the second, improper-motive prong, a defendant must show that the prosecution's delay sounds in misconduct, whether "for the purpose of gaining a tactical advantage over appellee or for some other impermissible purpose." *State v. Krizan-Wilson*, 354 S.W.3d 808, 819 (Tex. Crim. App. 2011); *see also State v. Hales*, 152 P.3d 321, 333 (Utah 2007) (requiring a defendant to show "delay for the purpose of gaining a tactical advantage or for another bad faith motive"); *State v. McGuire*, 786 N.W.2d 227, 239 (Wis. 2010) (requiring a showing of "improper motive or purpose on the part of the State"). This generally requires the delay be "intentionally or recklessly caused by the government." *Commonwealth v. Ridge*, 916 N.E.2d 348, 369 (Mass. 2009) (quoting *Commonwealth v. George*, 717 N.E.2d 1285, 1289 (Mass. 1999); *see also, e.g.*, *United States v. Day*, 697 A.2d 31, 34 (D.C. Ct. App. 1997) (holding that a defendant must show that the prosecution's reasons for delay "rise to the level of intentional delay for the purpose of tactical advantage" or "its possible legal equivalent

of reckless[ness]"); *Commonwealth v. Scher*, 803 A.2d 1204, 1221-22 (Pa. 2002) (requiring the defendant to demonstrate prejudice and "intentional, bad faith, or reckless conduct" on the part of the state).[3]

Under this test, if the prosecution's reason for delay is anything else, the prejudice identified is irrelevant and the delay cannot have offended due process. In other words, in the years since *Lovasco*, these courts have concluded that "the constitutional significance of various reasons for delay," 431 U.S. at 797, is *zero* absent intentional or reckless misconduct.

The First, Second, Third, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits have adopted this test.[4] As have the highest courts of Arizona, Arkansas, Colorado, Connecticut, D.C., Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Utah,

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[3] Some jurisdictions, including Maryland, have reserved the question of whether recklessness suffices under the improper-motive test. *See* Pet. App. 24a; *Jackson v. State*, 614 S.E.2d 781, 784 n.2 (Ga. 2005).

[4] *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 and replaced in part on other grounds*, 964 F.2d 1186 (D.C. Cir. 1992).

Vermont, Virginia, Wisconsin, and Wyoming.[5] These courts generally justify the improper-motive requirement on the basis that this Court has not yet "recognize[d] a claim of preindictment delay absent some bad faith or improper purpose." *United States v. Crouch*, 84 F.3d 1497, 1510 (5th Cir. 1996) (en banc); *Stoner v. Graddick*, 751 F.2d 1535, 1541-42 (11th Cir. 1985) (adopting the improper-motive requirement because even though this Court "stopped short of expressly *requiring* any additional showing that the delay had arisen from a bad faith motivation by the state to gain tactical prosecutorial advantage," it "implied" and "strongly hinted" support for it).

2. Two federal circuits and twelve state courts of last resort adopt a balancing approach. These courts,

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[5] *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; *Ridge*, 916 N.E.2d at 369; *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); *Scher*, 803 A.2d at 1218; *State v. Vanasse*, 593 A.2d 58, 64 (R.I. 1991); *Krizan-Wilson*, 354 S.W.3d at 814-15, 819; *Hales*, 152 P.3d at 332-33; *State v. King*, 165 A.3d 107, 113-14 (Vt. 2016); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 52 (Va. 2002); *McGuire*, 786 N.W.2d at 237; *Remnick v. State*, 275 P.3d 467, 470-71 (Wyo. 2012).

like the jurisdictions above, "put the burden on the defendant to prove actual prejudice." *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). However, these courts then "balance the defendant's prejudice against the government's justification for delay." *Id.*

In contrast to courts applying the improper-motive test, these courts do not consider the prejudice to the defendant and the reasons for the prosecution's delay as two isolated inquiries. Instead, courts consider "the significance of the particular prejudice" proven by the defendant and "any demonstrable reasons for the delay," and do so on "a case-by-case basis." *Overton v. State*, 976 So. 2d 536, 560 (Fla. 2007). As a result, courts consider not only whether there has been some actual prejudice to the defendant, but also take into account the degree of prejudice as delay becomes more excessive. Moreover, courts consider the particular prejudice against the prosecution's reasons—or lack of reason—for delay. "In balancing, the court must determine if fundamental conceptions of justice would be violated by allowing the prosecution." *State v. Oppelt*, 257 P.3d 653, 660 (Wash. 2011).

Consider, for instance, *State v. Lee*, 653 S.E.2d 259 (S.C. 2007), in which the South Carolina Supreme Court applied balancing to a thirteen-year delay in indicting the defendant for sexual abuse of a child. After finding that the defendant "suffered substantial actual prejudice due to the pre-indictment delay," *id.* at 261, the court noted that the state had obtained all relevant information by 1988 and could "not explain the delay" for the nearly thirteen years it waited to indict the defendant, *id.* at 262. The court explained that "[w]ith the balancing test in mind,"

the fact that the prosecution had offered "no valid explanation for the delay in indicting [the defendant] . . . violated fundamental concepts of justice and the community's sense of fair play." *Id.*

Or consider *State v. Whiting*, 702 N.E.2d 1199 (Ohio 1998), and *State v. Luck*, 472 N.E.2d 1097 (Ohio 1984). In those cases, the Ohio Supreme Court considered fourteen and fifteen-year preindictment delays before indicting defendants for murder, and in both cases it quashed the indictment under *Lovasco*. In *Luck*, the court found, as the trial court did here, that the defendant suffered actual prejudice from "the deaths of witnesses, the fading of memories, and the loss of evidence." 472 N.E.2d at 1104. The court explained that under *Lovasco*'s second inquiry, "the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay." *Id.* at 1102. The court explained that "the investigation remained at a stand-still for approximately fifteen years," during which period "witnesses died, memories faded, and evidence was lost." *Id.* at 1105. And, as here, "[w]hen the state finally decided to commence its prosecution of the defendant herein, it did so without one shred of new evidence—its case being substantially the same as it had been since 1968." *Id.* On these facts, the court concluded that permitting the prosecution to try the defendant would "effectively deprive the defendant of her right to due process of law under . . . the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* at 1105-06. In *Whiting*, the court similarly found that the fourteen-year delay had caused actual prejudice, and quashed the indictment because "the state did

not present any evidence at the hearing of a justifiable reason for its delay." 702 N.E.2d at 1202.

Had these courts applied the improper-motive requirement, the prosecution's inability to offer a "valid explanation," *Lee*, 653 S.E.2d at 262, or to present "a justifiable reason for its delay," *Whiting*, 702 N.E.2d at 1202, could not have sufficed to show a due process violation, no matter the length of delay and prejudice to the defendant. The defendant would have had to unearth "actual prosecutorial misconduct." Pet. App. 19a.

Balancing courts have accordingly rejected the improper-motive requirement as unduly "formalistic and rigid," and concluded that balancing better honors "the more nuanced approach suggested by [this Court]." *Oppelt*, 257 P.3d at 657-58. These courts further reason that this Court's own adjudications of preindictment delay cases have suggested "a case-by-case inquiry based on the circumstances of each case" rather than "a black-letter test for determining unconstitutional preindictment delay." *Howell*, 904 F.2d at 895.

The Fourth and Ninth Circuits apply the balancing approach.[6] The highest courts of Florida, Hawaii, Illinois, Louisiana, Maine, Montana, New Hampshire, Ohio, Oregon, South Carolina, Washington, and West Virginia do also.[7]

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[6] *Howell*, 904 F.2d at 895; *United States* v. *Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

[7] *See Overton*, 976 So. 2d at 560; *State 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*,

II. This Case Is Worthy Of This Court's Review.

This Court first recognized that challenges to preindictment delay are governed by the Due Process Clause in *United States v. Marion*, 404 U.S. 307, 325 (1971). Five years later, in *Lovasco*, the Court rejected a due process challenge to the 18-month investigative delay and, in closing, observed that the prosecution's reasons for delay need only be considered where "defendants have established that they were prejudiced." 431 U.S. at 796-97. For that reason, the Court explained, the time since *Marion* had not provided lower courts "a sustained opportunity to consider the constitutional significance of various reasons for delay." 431 U.S. at 796-97. Now, four additional decades later, the arguments on both sides of the split have been copiously aired. Indeed, every federal court of appeal and all but two state high courts has considered the standard that applies to preindictment delay.[8]

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447 P.3d 416, 429-30 (Mont. 2019); *State v. Knickerbocker*, 880 A.2d 419, 423 (N.H. 2005); *Whiting*, 702 N.E.2d at 1201; *State v. Stokes*, 248 P.3d 953, 960-62 (Or. 2011); *Lee*, 653 S.E.2d at 260; *Oppelt*, 257 P.3d at 659-60; *State ex rel. Knotts v. Facemire*, 678 S.E.2d 847, 856 (W. Va. 2009).

[8] The Seventh Circuit continues to have an intracircuit conflict on the issue. *See Hoo*, 484 U.S. at 1036 (citing *United States v. Hollins*, 811 F.2d 384, 387-388 (7th Cir. 1987)); *compare, e.g.*, *United States v. Pardue*, 134 F.3d 1316, 1319 (7th Cir. 1998) (applying balancing*) with United States v. Wallace*, 326 F.3d 881, 886 (7th Cir. 2003) (applying improper-motive requirement).

A number of state high courts that have confronted preindictment challenges have reached their own, idiosyncratic conclusions. Tennessee, for instance, requires improper motive when

This conflicting interpretation of the Due Process Clause is well acknowledged. As mentioned, Justice White long ago identified the disagreement between federal circuits in applying the Fifth Amendment to preindictment delay in federal prosecutions. *Hoo*, 484 U.S. at 1036 (White, J., dissenting from denial of certiorari). That conflict persists today, and the disparate understandings of due process will continue until this Court intervenes: Improper-motive circuits have explicitly rejected balancing,[9] and balancing circuits

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the prosecution was aware that an offense had been committed, but the more favorable balancing approach when the prosecution "had no knowledge that a criminal offense has been committed." *State v. Carico*, 968 S.W.2d 280, 284-85 (Tenn. 1998); *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996). Delaware has applied a disjunctive test, suggesting "an actual and substantial prejudice" may alone suffice. *Watts v. State*, No. 183,1989, 1990 WL 38279 at *2 (Del. Feb. 27 1990). Oklahoma appears to have required improper motive, *Garrison v. State*, 103 P.3d 590, 598 (Okla. Crim. App. 2004), and balanced, *Williamson v. State*, 812 P.2d 384, 394-95 (Okla. Crim. App. 2004). So has North Dakota. *Compare State v. Buccholz*, 678 N.W.2d 144, 150 (N.D. 2004), *with State v. Weisz*, 356 N.W.2d 462, 464 (N.D. 1984). A few other states have confronted excessive preindictment delay and either remained unclear on the standard, *see State v. Stock*, 361 N.W.2d 280, 283 (S.D. 1985), or rested on their state constitutions to avoid the confusion under the federal Constitution, *see People v. Nelson*, 185 P.3d 49, 55 (Cal. 2008); *see also State v. Gonzales*, 156 P.3d 407, 411-12 (Alaska 2007); *People v. Decker*, 912 N.E.2d 1041 (N.Y. 2009).

Only Michigan and Alabama have yet to squarely confront a challenge. The Michigan Supreme Court granted review of the issue, but declined to decide it after argument. *See People v. Mercer*, 752 N.W.2d 470 (Mich. 2008). The Alabama Supreme Court has declined to grant review of the question, over a dissenting opinion. *See Ex parte Stoner*, 418 So. 2d 184, 185 (Ala. 1982) (Faulkner, J., dissenting from denial of certiorari).

[9] Since Justice White's statement, for instance, the Fifth Circuit

have explicitly rejected the improper-motive requirement.[10]

In the time since Justice White's opinion, the conflict on this federal question has expanded to include the forty state high courts above, and they too have acknowledged the "split of authority." *Scher*, 803 A.2d at 1217-18. Thus, under the Fourteenth Amendment, too, courts adopting the improper-motive requirement have explicitly rejected balancing,[11] and courts adopting balancing have explicitly rejected the improper-motive requirement.[12] The Maryland Court

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has reviewed its intracircuit split on the issue *en banc* and adopted the improper-motive requirement over the dissent's request to "balance the actual prejudice to the defendant against the reasons for the delay." *Crouch*, 84 F.3d at 1510, 1524 & nn.6-10; *see also United States v. Avants*, 367 F.3d 433, 441 (5th Cir. 2004).

[10] For instance, the Fourth Circuit has explicitly stated it "cannot agree with the position taken by . . . those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation," *Howell*, 904 F.2d at 895, and has done so over dissenting opinion, *see id.* at 903 (Russell, J., dissenting). It has consistently rejected government arguments to revisit that conclusion. *See Jones v Angelone*, 94 F.3d 900, 904-05 (4th Cir. 1996).

[11] *Krizan-Wilson*, 354 S.W.3d at 814 (noting that "courts have split as to the standard by which to analyze such allegations of due-process violation" and adopting the improper-motive requirement); *Scher*, 803 A.2d at 1217-18; *Hales*, 152 P.3d at 332 n.32 (same); *King*, 165 A.3d at 112-14 (same).

[12] *Knickerbocker*, 880 A.2d at 422 (noting the question presented has "engendered a split" and adopting the balancing approach); *Oppelt*, 257 P.3d at 657-58 (same); *Lee*, 653 S.E.2d at 261-62 & n.1 (same).

of Appeals did as much when it adopted the improper-motive requirement in *Clark*. 774 A.2d at 1148-56 (agreeing with the "majority" of courts that have adopted the improper-motive requirement because "the balancing test falls short of the mark" in adequately protecting due process).

Moreover, when petitioner asserted his federal due process challenge to the prosecution's gross preindictment delay in this case, the district court found it "clear" that petitioner suffered prejudice. Pet. App. 42a. As recounted above, by the time the indictment was filed, an alternative suspect had died, the forensic analyst who reviewed evidence from the crime scene had died, recordings of police interviews had been lost or destroyed, multiple witnesses who saw the victim after her disappearance were unavailable to testify, and the underlying data used to determine how long before death the victim had sexual intercourse had been destroyed.

The second inquiry mandated by *Lovasco* is thus dispositive of this case. Petitioner could not proffer evidence of misconduct and therefore failed to satisfy the improper-motive requirement. It is undisputed, however, that the prosecution waited twenty years to indict petitioner, and that it sat on all of the evidence underlying its indictment for at least sixteen years. *See supra* p. 2-3; State's Court of Special Appeals Br. 37 (conceding that "no significant new evidence was developed" during this time). And the prosecution never advanced any reason for its delay, instead asserting "[w]hat does it matter?" and "that's not the test," and insisting that petitioner prove "actual prosecutorial misconduct. *See supra* p. 4. These circumstances, in which the prosecution has "offered no

valid explanation for" excessive delay, is precisely the sort that has been held to offend "fundamental concepts of justice and the community's sense of fair play" under the balancing approach. *Lee*, 653 S.E.2d at 262; *Luck*, 472 N.E.2d at 1105 (holding that trying defendant would violate the Due Process Clause where prosecution waited fifteen years to indict defendant "without one shred of new evidence").

III. The Improper-Motive Requirement Conflicts With This Court's Precedents And The Purpose Of The Due Process Clause.

Balancing courts correctly recognize that when a defendant has shown that the prosecution's excessive delay in pursuing charges has caused actual prejudice to his ability to defend himself, he has been denied due process of law unless the prosecution's reasons for delay are sufficient to justify that prejudice. In contrast, viewing the prejudice and the reasons for delay in isolation, and limiting the universe of justifications to those which evince some "improper motive," conflicts with this Court's precedent and basic principles underlying the constitutional guarantee of due process.

"[U]nlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, it "is flexible and calls for such procedural protections as the particular situation demands." *Id*. This is no less true when it comes to the protection that the Due Process Clause affords against arbitrary and prejudicial preindictment delay. In locating challenges to preindictment delay under the Due Process Clause, this Court ex-

plained that the "sound administration of justice" requires "a delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 325. And upon evaluating such a claim in *Lovasco*, the Court explained that the task for lower courts was to apply "the settled principles of due process" to the "particular circumstances of individual cases." 431 U.S. at 797.

The Court has thus never "establish[ed] a black-letter test for determining unconstitutional preindictment delay" which would detach the inquiries of prejudice and justification, and then restrict due process to some particular showing of improper motive. *Howell*, 904 F.2d at 895. Rather, it has "made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitate[s] a case-by-case inquiry based on the circumstances of each case." *Id*. The "flexibility" afforded by the balancing approach is thus more "faithful to the Court's due process jurisprudence," which "favors multi-factor tests and balancing over bright-line rules." *State v. Stokes*, 248 P.3d 953, 962 (Or. 2011). And the "formalistic and rigid" improper-motive requirement "does not accurately reflect the more nuanced approach suggested by [this] Court." *Oppelt*, 257 P.3d at 657-58.

Courts that have adopted the improper-motive requirement have pointed to language in this Court's opinions noting that an improper motive would generally be sufficient to show a due process violation. In *Marion*, for instance, the Court noted the Solicitor General's concession that the Due Process Clause would require dismissal of charges if "delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324. And in *Lovasco*, the Court

again noted this concession and contrasted such improper motive as "fundamentally unlike" the 18 months of investigative delay under consideration. 431 U.S. at 795. Subsequent cases that summarize *Lovasco* in dicta have similarly incorporated the government's concession. *See, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (noting that "the Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him").

But by acknowledging that an improper motive to prejudice the defendant at trial will generally suffice, the Court did not purport to hold that *only* such a motive could violate the defendant's right to a fair trial. Rather, the Court "provided an illustration of one egregious situation that such a standard would likely proscribe"—that is, it "was establishing the due process ceiling to the problem." Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 622-23 (1990). In fact, upon noting the government's concession, the Court went out of its way to say that it "need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *Marion*, 404 U.S. at 324-25. And the Court later instructed lower courts to "to consider the constitutional significance of various reasons for delay" given "the particular circumstances of individual cases." *Lovasco*, 431 U.S. at 797. To the extent that this Court's subsequent characterizations of *Lovasco* and *Marion* provide guidance,

they too have "merely restat[ed] in *dicta* the established outer contour of unconstitutional preindictment delay." *Howell*, 904 F.2d at 894; *State v. Davis*, 201 P.3d 185, 198 n.14 (Or. 2008) (finding "no guidance in the Court's later characterizations of its holding in *Lovasco* and *Marion*").

As the Court set out in *Lovasco*, pre-indictment delay is unconstitutional when it violates traditional due process principles, including the "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." 431 U.S. at 790. There is no question that "impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage." *Marion*, 404 U.S. at 331 (Douglas, J., concurring, joined by Brennan and Marshall, JJ.).

For example, where the prosecution delays indicting the defendant for years and even decades, and over the course of those years it slowly destroys central interviews and evidence, it makes no difference to the defendant's right to a fair trial whether the prosecution acted with an improper motive in mind. *See Oppelt*, 257 P.3d at 658 (The "core question [of] whether the action by the government violates fundamental conceptions of justice . . . does not necessarily turn on the intent of the government actors."). Yet the improper-motive requirement holds that "no matter how egregious the prejudice to the defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred." *Howell*, 904 F.2d at 895. Such an outcome is utterly inconsistent with traditional due process principles

and "violate[s] fundamental conceptions of justice, as well as the community's sense of fair play." *Id.* Put more simply, the improper-motive requirement "places a daunting, almost insurmountable, burden on the accused" and "application of so stringent a standard would force a result we would consider unconstitutional, unwarranted, and unfair." *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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