No. 20-101

In the Supreme Court of the United States

LLOYD HARRIS, PETITIONER,

v.

STATE OF MARYLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF *AMICI CURIAE* MAINE, VERMONT, AND WASHINGTON ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici are the Maine, Vermont, and Washington affiliates of the National Association of Criminal Defense Lawyers. The organizations' primary roles are to promote high quality, constitutionally sound, professional legal representation to individuals accused of a criminal offense; to provide quality training and continuing legal education seminars, programs, and materials to lawyers and other participants in the criminal justice system; and to foster the development of fair and constitutional state and federal criminal laws and procedures.

Amici have a significant interest in this case because their members face disparate standards for determining whether pre-indictment delay violates due process, underscoring the need for this Court's review. For instance, *amicus* the Vermont Association of Criminal Defense Lawyers includes members who represent criminal defendants in the State of Vermont, which, like the decision below, applies the "improper prosecutorial motives" test to evaluate whether pre-indictment delay violates due process. *State v. King*, 165 A.3d 107, 113-14 (Vt. 2016).

By contrast, *amicus* the Washington Association of Criminal Defense Lawyers includes members who represent criminal defendants in the State of Washington, which has rejected the improper prosecutorial motives test as too "formalistic and rigid," and instead employs a "more nuanced" case-by-case balancing test. *State v. Oppelt*, 257 P.3d 653, 658 (Wash. 2011) (en banc).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief and consented to its filing.

Amicus the Maine Association of Criminal Defense Lawyers includes members who represent criminal defendants in the State of Maine, where the state courts apply the nuanced balancing test, but the federal courts follow the rigid improper prosecutorial motives standard. *Compare State v. Cote*, 118 A.3d 805, 811 (Me. 2015), *with United States v. Irizarry-Colon*, 848 F.3d 61, 70 (1st Cir. 2017). Review is needed to resolve the conflict because due process should not depend on the state where a defendant is charged or whether the delay involved state versus federal indictments.

Further, review is needed to correct the manifest error below and in other jurisdictions that adopt the improper prosecutorial motives standard. That test is out of step with the case-by-case balancing test this Court has employed in assessing the constitutionality of delays in multiple other contexts in the criminal process. It further places defendants and their counsel in an untenable and unfair position: either prove the subjective improper motives of prosecutors years or decades after the fact, or mount a defense where exculpatory evidence has eroded or been destroyed through the passage of time.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is rare that a case presents such a mature, acknowledged, and deeply entrenched conflict calling out for this Court's intervention. That is reason alone to grant review, as petitioner explains.

But this Court's review is also warranted to correct a manifest error: the court below erroneously adopted a rigid, inflexible test to evaluate whether pre-indictment delay violates due process. 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) (internal quotation marks omitted). Rather, it "is flexible and calls for such procedural protections as the

particular situation demands." *Id.* (internal quotation marks omitted).

Nevertheless, the court below held that no matter how severe the prejudice to a defendant and no matter how long the pre-indictment delay, if the defendant cannot prove prosecutors' improper subjective motive for the delay, then no due process violation has occurred. Under that wooden test, the court below concluded that the government's *twenty-year* delay in indicting petitioner—where the government had developed no new evidence over the past sixteen years—was consistent with due process, even though key witnesses had died, others were unavailable, and critical evidence had gone missing. Despite the extraordinary delay and extreme prejudice to petitioner, the court below found no due process violation solely because petitioner had not proven that prosecutors purposefully "manipulated the delay to gain a tactical advantage over the accused." App. 22a.

That standard is divorced from the demands of due process, and, critically, it is out of step with the case-by-case balancing approach that this Court has adopted in related contexts to assess whether other delays in the criminal process violate the Constitution.

To determine whether *post*-indictment delay violates the Sixth Amendment's Speedy Trial Clause, this Court adopted a balancing test that assesses the particularized circumstances of the delay. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). This balancing test is a "functional analysis" that is "necessarily relative" and "depends upon circumstances," *id.*—in other words, the opposite of a strict requirement to prove improper prosecutorial motive in all cases.

Likewise, to determine whether post-seizure delay in bringing a forfeiture proceeding violates the Fifth Amendment's Due Process Clause, the Court has again adopted a balancing test that assesses the particularized circumstances of the delay, not any rigid rule. *United*

States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency, 461 U.S. 555, 564 (1983). Granting review here would give this Court the opportunity to align the standard for due process challenges to pre-indictment delay with the standards in these related contexts.

Beyond being inconsistent with the flexible balancing approach in related contexts, the rigid rule adopted by the court below is at odds with fundamental conceptions of justice and the community's sense of fair play. As associations of criminal defense practitioners, *amici* and their members know well that mounting a defense many years, or as in this case, decades, after the alleged offense or trying to prove a prosecutor's subjective mindset are often bankrupt endeavors. Yet, under the decision below, defendants and their counsel are placed in an untenable position: satisfy the nearly insurmountable task of proving a prosecutor's improper motives, or defend against criminal charges where the hands of time have destroyed exculpatory evidence. Due process demands more, and this Court should grant review.

ARGUMENT

I. THE DECISION BELOW DEPARTS FROM THE LONGSTANDING BALANCING STANDARD EMPLOYED TO ASSESS WHETHER DELAYS IN THE CRIMINAL PROCESS ARE UNCONSTITUTIONAL

The decision below eschewed a balancing test to determine whether pre-indictment delay violates due process, instead adopting a rigid rule that requires, without exception, a showing that prosecutors "manipulated the delay to gain a tactical advantage over the accused." App. 22a. That narrow, inflexible approach is wholly out of step with this Court's Fifth and Sixth Amendment jurisprudence, which employs flexible, functional balancing tests to determine whether delays in other parts of the criminal process violate the

Constitution. There is no principled reason to treat pre-indictment delay differently.

A. This Court has adopted a flexible balancing test to determine whether post-indictment delay violates the Speedy Trial Clause of the Sixth Amendment. "Reflecting the concern that a presumptively innocent person should not languish under an unresolved charge, the Speedy Trial Clause guarantees 'the *accused*' 'the right to a speedy . . . *trial*.'" *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (quoting U.S. Const. amend. VI). "This guarantee is an important safeguard . . ." that protects several demands of the criminal justice system, including "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966).

Because "the right to speedy trial is a more vague concept than other procedural rights," it is "impossible to determine with precision when the right has been denied." *Barker*, 407 U.S. at 521. As such, "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case: The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Id.* at 522 (internal quotation marks omitted).

Thus, in *Barker*, this Court "reject[ed] . . . inflexible approaches" for evaluating a Sixth Amendment speedy trial claim and "accept[ed] a balancing test, in which the conduct of both the prosecution and the defendant are weighed," thereby "compel[ling] courts to approach speedy trial cases on an *ad hoc* basis." *Id.* at 529-30. In lieu of any "rigid approach," *id.* at 522, this Court identified non-exclusive "factors which courts should assess in determining whether a particular defendant has been deprived of his right," *id.* at 530. Those factors include the "[l]ength of delay, the reason for the delay, the

defendant's assertion of his right, and prejudice to the defendant." *Id.*

The Court recognized that "[p]rejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect," including "to limit the possibility that the defense will be impaired," which is "the most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* at 532. "If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Id.*

B. Following *Barker*, Congress enacted the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, which was intended "to give effect to the Sixth Amendment right to a speedy trial." *United States v. MacDonald*, 456 U.S. 1, 7 n.7 (1982) (internal quotation marks omitted). "With certain exceptions, the Act directs—on pain of dismissal of the charges—that no more than 30 days pass between arrest and indictment and that no more than 70 days pass between indictment and trial." *Betterman*, 136 S. Ct. at 1616 (citations omitted). If those deadlines are not met, courts weigh "specified factors" to determine whether to dismiss a case with or without prejudice, a critical determination of whether a prosecution will be forever barred. *United States v. Taylor*, 487 U.S. 326, 333 (1988). Those factors include "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(1). This Court has also found that prejudice to the defendant is "relevant for a district court's consideration." *Taylor*, 487 U.S. at 334.

C. Outside the speedy trial context, this Court similarly has adopted a balancing test, rather than any

rigid or inflexible rule, to determine whether the government's delay in bringing forfeiture proceedings after seizing property violates the Constitution. In *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. at 555, the Court found that post-seizure delay in bringing forfeiture proceedings "mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id.* at 564. Though the Sixth Amendment does not apply in the forfeiture context, the Court held that such delays could run afoul of the Fifth Amendment's Due Process Clause. *Id.* The Court thus concluded that the "*Barker* balancing inquiry provides an appropriate framework for determining whether the delay . . . violated the due process right." *Id.*

Because "due process is flexible and calls for such procedural protections as the particular situation demands," "[t]he flexible approach of *Barker*, which necessarily compels courts to approach speedy trial cases on an *ad hoc* basis is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met." *Id.* at 564-65 (citation and internal quotation marks omitted). As in the speedy trial context, "these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." *Id.* at 565.

D. The same flexible balancing approach should apply to determine whether pre-indictment delay violates due process. While this Court has held that prosecutors' improper motives in delaying an indictment can be *sufficient* to establish a due process violation, the Court has never held that such improper motive is *necessary*, nor has the Court rejected the flexible balancing approach it has adopted to assess delays in related contexts.

In *United States v. Marion*, 404 U.S. 307 (1971), the Court recognized "that even pre-arrest—a stage at which the right to a speedy trial does not arise—the passage of time 'may impair memories, cause evidence to be lost,

deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.'" *Betterman*, 136 S. Ct. at 1615 (quoting *Marion*, 404 U.S. at 321). While the Sixth Amendment does not apply pre-indictment, "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 324.

The Court did not find that these were exclusive requirements, but instead left it to lower courts to "determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *Id.*[2] The Court reasoned that "[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case," and warned that "[i]t would be unwise at this juncture to attempt to forecast our decision in such cases." *Id.* at 325.

The Court again eschewed a rigid approach to the due process inquiry in *United States v. Lovasco*, 431 U.S. 783 (1977). There, the defendant argued that under *Marion*, "due process bars prosecution whenever a defendant suffers prejudice as a result of preindictment delay." *Id.* at 789. The Court rejected that argument, finding "that proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid." *Id.* "*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due

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[2] In *Marion*, the Court was merely noting 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.

process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. The Court found that even if there was prejudice to the defendant, mere investigative delay—there, "the government's efforts to identify persons in addition to respondent who may have participated in the offenses"—was not necessarily unconstitutional. The Court contrasted investigative delay with other types of delays employed solely "to gain tactical advantage over the accused." *Id.* at 795, 796. The Court did not say that improper motive is always necessary to show a due process violation, only that it was sufficient. In other words, the Court "provided an illustration of one egregious situation that such a standard would likely proscribe." Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 Wm. & Mary L. Rev. 607, 622-23 (1990); *see Howell*, 904 F.2d at 894 (4th Cir. 1990) (*Marion* and *Lovasco* "merely restat[ed] in *dicta* the established outer contour of unconstitutional preindictment delay"). And as in *Marion*, the Court in *Lovasco* left it to lower courts to flesh out other "circumstances in which preaccusation delay would require dismissing prosecutions" under the Due Process Clause. *Lovasco*, 431 U.S. at 796.

E. This Court's jurisprudence on whether delays in the criminal process violate the Fifth or Sixth Amendments employs a flexible balancing analysis that broadly considers the circumstances surrounding the delay, rather than any rigid rule.

The decision below adopted an inflexible standard that is at odds with the "flexible" demands of due process. *Mathews*, 424 U.S. at 334 (internal quotation marks omitted). The court below and others did so based largely on a misreading of *Lovasco*. App. 22a-25a; *see, e.g.*, *Stoner v. Graddick*, 751 F.2d 1535, 1541-42 (11th Cir. 1985) (finding *Lovasco* "implied" and "strongly hinted" that improper motive is necessary to show violation). *Lovasco* did not implicitly mandate a strict requirement to prove improper

motives, but rather adhered to a balancing framework, allowing lower courts to develop relevant factors for consideration. As the Fourth Circuit has observed, "[r]ather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court [in *Lovasco*] examined the facts in conjunction with the basic due process inquiry: 'whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency.'" *Howell*, 904 F.2d at 895 (quoting *Lovasco*, 431 U.S. at 790). The Fourth Circuit properly rejected the rigid improper-motives test because "[t]aking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred." *Id.* This conclusion . . . would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive." *Id.*

To be sure, this Court has recognized that pre-indictment delay is not identical to post-indictment or post-seizure delay. "A suspect who has not been indicted retains his liberty; a claimant whose property has been seized, however, has been entirely deprived of the use of the property." *$8,850*, 461 U.S. at 564. Thus, "proof of prejudice is generally a necessary but not sufficient element of a due process claim" for pre-indictment delay, but not generally necessary for a post-indictment delay claim. *Lovasco*, 431 U.S. at 790. But that does not mean *Lovasco* threw out a balancing test for evaluating whether pre-indictment delay violates due process or strictly mandated proof of improper prosecutorial motives.

In any event, this Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Shapiro et al., Supreme Court Practice § 4.5 (11th ed.). With lower courts split, only this Court can clarify the meaning of *Lovasco* and provide a unified standard for determining the constitutionality of pre-indictment delays.

II. THE IMPROPER PROSECUTORIAL MOTIVE TEST IMPEDES A FAIR DEFENSE

The decision below and others employing the "improper prosecutorial motive" test place defendants and their counsel in an unfair and untenable position: either prove a prosecutor's improper subjective mindset, or proceed to trial with their hands tied behind their backs from the prejudice created by lengthy delay. Neither option is fair or constitutional.

A. Requiring Defendants to Prove Prosecutors' Improper Subjective Motives Amidst an Ongoing Prosecution Is Profoundly Unfair and Problematic

Even when a defendant suffers extreme prejudice to their defense as a result of pre-indictment delay, courts applying the improper-motives test require proof that the delay was "intended to gain a tactical advantage or to advance some other impermissible purpose." *State v. King*, 165 A.3d 107, 113-14 (Vt. 2016). This inflexible requirement imposes a nearly insurmountable evidentiary burden on criminal defendants and is the antithesis of the "flexible" due process inquiry. *Mathews*, 424 U.S. at 334; *see State v. Oppelt*, 257 P.3d 653, 660 (Wash. 2011) (rejecting improper-motives requirement as unduly "formalistic and rigid").

1. Absent smoking gun evidence—which is exceedingly rare—it is nearly impossible for a defendant to prove the subjective motivation behind a prosecutor's

timing for an indictment, let alone prove that prosecutors deliberately used delay to gain a tactical advantage. Courts have therefore recognized that the improper-motives "standard for pre-indictment delay is nearly insurmountable." *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997).

This is in part because, as this Court has recognized in other contexts, the government's state of mind is "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998) (internal quotation marks omitted). This Court has repeatedly rejected tests that depend on government actors' state of mind. In the Fourth Amendment context, the Court has held "that sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (internal quotation marks omitted). The same is true for inquiries into prosecutors' state of mind. In *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008), the Court rejected a test in which a defendant's right to counsel attached only when the prosecutor became aware of, or involved in, the State's "commitment to prosecute," because "determining the moment of a prosecutor's first involvement would be wholly unworkable and impossible to administer." *Id.* at 206, 207 (internal quotation marks omitted).

Accordingly, in pre-indictment delay cases, the improper-motives requirement is often the death knell for challenges to pre-indictment delay. *See, e.g.*, *United States v. DeClue*, 899 F.2d 1465, 1469 (6th Cir. 1990) (defendant could not establish delay "was an intentional device on the part of the government to gain a tactical advantage in its prosecution"); *United States v. Atisha*, 804 F.2d 920, 928 (6th Cir. 1986) (even if the delay caused prejudice, defendant failed to prove delay was "merely to gain a tactical advantage over [the defendant]"); *United States v. Greer*, 956 F. Supp. 525, 530 (D. Vt. 1997) (defendants "failed to prove that the government caused

the delay for tactical advantage or for otherwise improper purposes" because "[t]here [was] no evidence to discredit the government's assertion that the delay was caused by the continuing investigation into a complex conspiracy"); *State v. Krizan-Wilson*, 354 S.W.3d 808, 817-19 (Tex. Crim. App. 2011) (finding extreme prejudice to defendant but no evidence of improper motive).

In these cases, defendants inevitably face half-baked or conclusory explanations that delay was simply for investigative purposes. Dispelling such excuses is near impossible. Indeed, some courts—when faced with prosecutors' *ipse dixit* regarding reasons for pre-arrest delay—have simply accepted the government's justification without any actual evidence presented by the government at all. *See United States v. Thomas*, 404 F. App'x 958, 961 (6th Cir. 2010) ("Even when the government cites its own court filings rather than offering sworn testimony on the investigative reasons for the delay, we may accept the government's representations about the reason for delay."); *Rogers*, 118 F.3d at 476 (accepting government's representation that delay was result of ongoing investigation even though government "[did] not present sworn testimony on the investigative reasons for the delay, nor [did] it describe even in a general way what investigation occurred during the two-year period").

2. Even if it were possible in some cases to find clear evidence of improper motives, the requirement presents substantial discovery barriers. "Because a [government actor's] state of mind is easy to allege and hard to disprove, a subjective inquiry would threaten to set off broad-ranging discovery in which there often is no clear end to the relevant evidence." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (internal quotation marks omitted) (rejecting subjective inquiry into state of mind for retaliatory arrest suits); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) ("Judicial inquiry into subjective motivation [of government actors] therefore may entail

broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."). And without an opportunity for meaningful discovery, the requirement to prove improper motives does nothing more than pay lip service to this Court's precedent that pre-arrest delay can give rise to a constitutional violation, *see Marion*, 404 U.S. at 324-25, as defendants are left to mere speculation about prosecutors' subjective mindsets.

B. Extreme Pre-Indictment Delay Can Make It Difficult or Impossible to Mount a Meaningful Defense

The venerable principle of promoting prompt legal recourse to an accused without delay is as old as the law itself, tracing its origins to English legal jurisprudence from the Magna Carta in 1215. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). The principle emerged in the United States in early stages of the American Revolution, borrowed first by George Mason in authoring the Virginia Declaration of Rights, and then by James Madison in designing a Bill of Rights. *Id.* at 225; Darren Allen, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 Campbell L. Rev. 101, 103-04 (2004).

As amici and its members know, lengthy pre-indictment delay significantly hampers defense counsel and can make it all but impossible to mount a defense. "The passage of time by itself . . . may dangerously reduce [a defendant's] capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of his witnesses may fade." *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). These problems are well documented by studies and cases.

1. Memories Fade

"[M]emory loss about a crime or other event is highest immediately after the crime occurs and then slows over time." 7 Jones on Evidence § 61:4 (7th ed.); *see*

Psychological and Scientific Evidence in Criminal Trials § 12:14 (human memory degrades "very rapidly after an event" and continues to "fade[] along with time"). As demonstrated by German philosopher Hermann Ebbinghaus's "Forgetting Curve," "the passage of time alone significantly erodes the completeness of witnesses' testimony." Allen, *supra*, at 119. And "[w]hile the rate of erosion diminishes with time, it never ceases to persist." *Id.* at 119-20.

Even when a prosecution is timely commenced, "an infallible recollection of what actually happened will occur rarely" because "such events typically catch witnesses by surprise, which means that their capacity to correctly perceive what is happening is subject to the initial shock of being at the event in the first place." Frank B. Ulmer, *Using DNA Profiles to Obtain "John Doe" Arrest Warrants and Indictments*, 58 Wash. & Lee L. Rev. 1585, 1614 (2001). "[I]n the prosecution of old crimes, the passage of time exacerbates these normal problems of sorting out what happened." *Id.* (internal quotation marks omitted).

Further, due to "the prevalence of eyewitness testimony in American courtrooms, the effect of faded memories has the potential to wreak havoc on defendants' ability to receive fair trials." Allen, *supra*, at 118. For instance, beyond the obvious problems associated with witnesses' inability to recall events, "[s]tudies looking at memory decay over time have shown that memory for unfamiliar faces . . . decrease[s] over time." Deanna D. Caputo & David Dunning, *Distinguishing Accurate Eyewitness Identification from Erroneous Ones: Post-Dictive Indicators of Eyewitness Accuracy*, in 2 Handbook of Eyewitness Psychology: Memory for People 432 (Rod C. L. Lindsay, et al. eds., 2006). "[T]he amount of decay tends to be far greater than people expect," and research has shown that "identifications after a significant delay can be quite problematic." *Id.*

"[T]he memory loss of a prosecution witness can impair cross-examination," which is a primary tool for uncovering the truth in court. Goldfarb, *supra*, at 614 n.23. While memory decay "might be of little consequence in criminal trials if witnesses pleaded ignorance whenever their memories failed them," research has shown "that witnesses are more than willing to fill in the blanks created by memory decay" with "bias and post-event information." Allen, *supra*, at 120.

Such impairment tends to benefit the prosecution. "If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags." *Marion*, 404 U.S. at 331 n.3 (Douglas, J., concurring in the result) (internal quotation marks omitted). The inability of a defendant or defense witnesses to recall past events is likely to be unduly prejudicial to a defendant with limited impairment of the prosecution's case, since, typically, the jury in a criminal case "must contrast general denials with detailed testimony by police officers whose memories are refreshed by notes or other records." *United States v. Jones*, 524 F.2d 834, 844 n.21 (D.C. Cir. 1975).

Courts have repeatedly confronted situations where lengthy pre-indictment delay impaired the defense by causing witnesses' memories to fade. *See, e.g.*, *Oppelt*, 257 P.3d at 655, 659-60 (government's six-year delay in charging defendant prejudicial because key witness developed medical condition affecting memory); *State v. Knickerbocker*, 880 A.2d 419, 421, 424, 426-27 (N.H. 2005) (twenty-year delay in indicting defendant for murder prejudicial because two witnesses no longer recalled events as they described them to police during initial investigation); *Commonwealth v. De Rose*, 307 A.2d 425, 428-29 (Pa. Super. Ct. 1973) (nearly two-year pre-indictment delay prejudicial because defendant had no recollection of alleged bribery conversation or any of his specific activities during alleged date of crime, and

government witness could not identify other people supposedly present at time).

Likewise, here, petitioner's and other witnesses' faded memories caused by the passage of time further interfered with petitioner's ability in procuring an alibi and reconstructing the events that surrounded a day twenty years earlier. App. 14a. Compounding this unfairness, the State did not look into petitioner's alibi during its initial investigation. *Id.* at 14a-15a.

2. Witnesses Die or Become Unavailable

In addition to faded memories, the "[p]assage of time, whether before or after arrest, . . ." can "deprive the defendant of witnesses." *Marion*, 404 U.S. at 321. "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532. "Every day that passes after an allegedly criminal act occurs will probably hinder a defense to some degree." *United States v. Benson*, 846 F.2d 1338, 1342 (11th Cir. 1988). Key witnesses for the defense can die, disappear, or otherwise become unavailable. The unavailability of witnesses years after the fact can hinder the defense in numerous ways—for instance, by obstructing the ability to establish an alibi, implicate alternate suspects, flush out key details from the initial investigation performed years or generations earlier, and conduct cross-examination.

Numerous cases illustrate these problems. *See, e.g.*, *Krizan-Wilson*, 354 S.W.3d at 811, 817 (twenty-three-year pre-indictment delay resulted in death of key witnesses and unavailability of others, whose whereabouts were unknown, and defendant's original attorney and forensic investigator hired during initial police investigation died); *State v. Lee*, 653 S.E.2d 259, 261 (S.C. 2007) (defendant's original attorney could not be located after twelve-year pre-indictment delay); *State v. Hales*, 152 P.3d 321, 328 (Utah 2007) (due to fourteen-year delay between victim's initial injury and filing of murder charges, defendant unable to locate key witnesses,

including nurses and social workers closely involved in victim's care immediately following incident); *State v. Whiting*, 702 N.E.2d 1199, 1201 (Ohio 1998) (fourteen-year pre-indictment delay caused unavailability of witnesses); *State v. Luck*, 472 N.E.2d 1097, 1102, 1104-05 (Ohio 1984) (fifteen-year pre-indictment delay resulted in death of two key witnesses, including alternate suspect and doctor who treated defendant for hand injury on date of murder).

Likewise, here, during the sixteen-year period the investigation was inactive, alternate suspects and key witnesses died or became unavailable. App. 11a-12a. One of the prosecution's alternate suspects, who had previously resided in the wooded area in which the victim's body was found and from whom DNA samples had been taken during the initial investigation, died. *Id.* at 11a, 17a. The forensic analyst who reviewed hairs recovered at the crime scene and concluded that the hairs did not match petitioner's also died. *Id.* at 11a-12a. One witness who was a friend of the victim and had told detectives during the initial investigation that she had seen the victim the day after she disappeared now resided in London and was unavailable to testify. *Id.* at 12a. And another witness, who had previously claimed she had seen the victim after the victim had disappeared, could not be located by the government or petitioner. *Id.*

3. Evidence Is Destroyed or Lost

This Court has long recognized that, "when the Government has been responsible for delay resulting in a loss of evidence to the accused, . . . a constitutional violation [occurs] . . . when loss of the evidence prejudiced the defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868 (1982). With crime labs hosting boxes of evidence for many thousands of cases, evidence can be easily lost or misplaced, even unintentionally. In the modern age, periodic erasure or overwriting of video footage can occur, as can the routine deletion of emails and other electronic data.

Moreover, few states have guidelines addressing the long-term storage of evidence, and retention decisions often are made on a case-by-case basis, without consistency. Brendan Koerner, *How Long Do Cops Keep Evidence?*, Slate, Aug. 27, 2004, https://slate.com/news-and-politics/2004/08/how-long-do-cops-hang-onto-evidence.html. This can have perverse consequences, particularly in jurisdictions that lack general obstruction-of justice statutes or evidence-tampering statutes. For states that have enacted laws requiring preservation of evidence, many are limited in scope. Some are triggered only by conviction, and others "legally allow[] states to destroy old evidence attached to either innocence claims or old, unsolved cases." *Preservation of Evidence*, Innocence Project, https://www.innocenceproject.org/preservation-of-evidence (last visited Oct. 1, 2020). Some statutes limit preservation only to certain crimes. *Id.* And "[n]early every state with legislation calling for the preservation of evidence allows for its premature disposal." *Id.*

Evidence is frequently lost or destroyed as a result of delay. *See, e.g.*, *Krizan-Wilson*, 354 S.W.3d at 811, 817 (twenty-three-year pre-indictment delay resulted in defendant's original attorney dying and loss of his files; former investigator no longer recalled the case, and evidence he had collected had been lost; medical records and other relevant documents pertaining to victim destroyed); *Lee*, 653 S.E.2d at 261 (twelve-year delay resulted in loss of all records contemporaneous with alleged offenses, including relevant records from prior court proceedings; original government agency investigator unable to recall any specifics about investigation); *Hales*, 152 P.3d at 328 (fourteen-year delay between victim's initial injury and filing of murder charges resulted in loss of retinal scans showing victim's retinal hemorrhaging, audiotapes of the polygraphs administered to defendant and victim's mother, and loss of full case file of materials collected by the State for its related civil case against defendant years earlier);

Whiting, 702 N.E.2d at 1200 (fourteen-year pre-indictment delay resulted in loss of physical evidence collected by police during initial investigation); *Luck*, 472 N.E.2d at 1102 (fifteen-year pre-indictment delay resulted in loss of tape-recorded police interviews with potential witnesses and suspects).

Likewise, evidence material to petitioner's defense was lost. Recordings of police interviews, including at least one of petitioner and the victim's brother, were destroyed by the State. App. 12a. A body-wire recording and video surveillance of other interviews of petitioner were lost by the State. *Id.* Under the crime lab's practice of destroying scientific evidence "every three years," *id.* at 18a, the underlying data for the test used to determine how long before death the victim had sexual intercourse was destroyed, precluding petitioner from performing an independent review of such data, *id.* at 15a.

* * * * *

This case reflects the profound unfairness of the rigid "improper prosecutorial motives" test and highlights why courts should be able to balance the circumstances of a particular case in evaluating due process challenges to pre-indictment delay. The decision below is at odds with the "sensitive balancing process," *Barker*, 407 U.S. at 533, used in related contexts and is contrary to "fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790 (citation and internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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