No. 20-101

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Maryland courts properly reject Petitioner's claim that he was deprived of due process by preindictment delay where the Maryland courts correctly applied the conjunctive test for deciding such claims that has been adopted in a substantial majority of federal and state jurisdictions, where Petitioner never asked the lower courts to apply the minority balancing test he now advocates, and where Petitioner would not prevail even under the balancing test on the existing record?

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STATEMENT

Petitioner Lloyd Harris asks the Court to resolve a conflict among the lower courts regarding the standard for establishing a violation of due process by reason of excessive preindictment delay. The question presented is whether to apply the conjunctive test that Harris acknowledges is applied in at least nine federal circuits and over two-thirds of the states that have decided the question, Pet. 9-10 & nn.4-5, or instead to apply Harris's favored standard, a balancing test that only two circuits and a small minority of states endorse. Pet. 13 & nn.6-7. For three reasons, this Court should decline to consider the question of which test to apply in this case.

First, Harris's question presented is not preserved and, consequently, the record is inadequate to apply the balancing test that he advocates for the first time in this Court. Harris expressly stated in the lower courts that the conjunctive test applied. That test did not require the State to proffer the reasons for the delay, and the trial court correctly did not insist that the State do so. As a result, even though the State assured the trial court that there were reasons for the delay and that the prosecution had acquired new evidence, the record does not detail the reasons that might explain the delay.

Second, Harris would not prevail under the balancing test he endorses because it, like the conjunctive test, requires a showing that the defense suffered substantial, "actual prejudice" that rises to the materiality contemplated by this Court's decisions in *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977), and *United State v. Marion*, 404 U.S. 307, 326 (1971) (recognizing that "the real possibilit[ies] of prejudice inherent in any extended delay: that memories will dim, witnesses will become

inaccessible, and evidence be lost" are "not in themselves enough to demonstrate that [a defendant] cannot receive a fair trial and to therefore justify the dismissal of the indictment"). Although the deferral of Harris's indictment might have exposed him to the "possibility of prejudice inherent in any extended delay," *id.*, the only examples of purported prejudice he identified in support of his motion to dismiss were either factually mistaken or otherwise failed to establish the requisite actual prejudice because he could not "demonstrate a viable, tangible connection between the missing evidence or the unavailable witness to the defense of the case." *State v. Richardson*, 70 N.E.3d 1175, 1179 (Ohio Ct. App. 2016) (applying the balancing test).

Third, although Harris is correct that lower courts are divided on whether to apply the conjunctive test or the balancing test, the division of authority is neither so deep nor so consequential as to demand this Court's review. Indeed, the cases suggest that, in practice, the theoretical distinction between the competing tests is rarely outcome determinative.

STATEMENT OF THE CASE

A. The rape and murder

1. *Stacy Hoffmaster's disappearance*

On Tuesday, October 1, 1996, fifteen-year-old Stacy Hoffmaster disappeared. She went to school in the morning but told her best friend, Jamie Hurst, that she had decided to skip school. Tr. 10/24/17 at 106-08. Stacy walked to McCutcheon's Apple Factory, where her boyfriend, Alfred Fisher, worked and arranged to meet him during his lunch break. *Id.* at 62-63.

Fisher and Stacy ate lunch together. *Id.* at 63-65. Outside Stacy's house, they saw Harris, whom Fisher knew as "weed man." *Id.* at 66-68. Stacy asked Harris if he had any marijuana and Harris said he only had a joint. *Id.* at 70-71. When Fisher left to return to work, Stacy was standing in front of her house and Harris was sitting in a pavilion near a baseball field that was beside Stacy's house. *Id.* at 71.

At 1:30 or 1:45 p.m., Stacy's mother, Vickie Hoffmaster, drove by the house and saw Stacy sitting on the front porch. *Id.* at 34, 39-40. When Ms. Hoffmaster returned home from taking her oldest son to work, Stacy was gone. *Id.* at 40. Stacy did not meet Fisher outside McCutcheon's, as they had planned, when he got off work at 3:00 p.m. *Id.* at 65-66, 71-72. Stacy was last seen wearing a blue hooded sweatshirt and sweatpants with the logo of a volunteer fire department, and white Fila sneakers. *Id.* at 40, 79-80.

2. *The crime scene and the forensic evidence*

Almost three months later, on December 23, 1996, Stacy's naked body was discovered 30 feet inside the woods near her house, 50 yards from a makeshift campsite Harris had constructed in the woods. *Id.* at 153, 159. Her body was covered by a blue mover's blanket. *Id.* at 160-61; Tr. 10/25/17 at 88. A ligature was wrapped tightly around her neck and a sock was shoved down her throat. Tr. 10/24/17 at 193-94, 199; Tr. 10/25/17 at 87. The body was "hog-tied" with a yellow nylon rope, which was attached at one end to a railroad spike. Tr. 10/24/17 at 153, 193.

Blankets and ropes like those found with the body were found at Harris's campsite. *Id.* at 204-06. In the woods near the campsite, police found the clothing

Stacy had been wearing when she was last seen. *Id.* at 43-44, 79-80, 207, 215, 218, 221, 226-28, 233. Her underpants and bra were torn. *Id.* at 23, 207, 211, 258; Tr. 10/25/17 at 58, 64; Tr. 11/1/17 at 78.

An autopsy revealed that Stacy received a forceful blow to the right side of her forehead prior to death. Tr. 10/27/18 at 23-25. Starchy food fragments consistent with Stacy's lunch were found in her stomach and indicated that a small meal had been eaten within a few hours of death. *Id.* at 25-27. The cause of death was strangulation. *Id.* at 27-28.

Specimens collected during the autopsy, including swabs from the vaginal cavity, were submitted to the toxicology department of the Office of the Chief Medical Examiner for Maryland. Tr. 10/26/17 at 125-26; Tr. 10/27/17 at 34-35. Dr. Barry Levine, who was the chief toxicologist in 1996, testified about the standard operating procedures and quality assurance processes for the analysis of prostatic acid phosphatase that was conducted on the vaginal swabs. Tr. 10/26/17 at 121, 126-33. Although pursuant to a three-year retention policy "the actual measurements that the spectrophotometer" made had been discarded, Dr. Levine testified that he reviewed all the raw data when the analysis was conducted in 1996, he ensured that the standard operating procedures and quality controls were followed in conducting the analysis, and he determined what should be included in the final report and signed it, certifying that the results were accurate and scientifically valid. *Id.* at 127-31, 134, 138. The report was admitted in evidence without objection. *Id.* at 134. The

vaginal swab contained 430 micrograms per liter of prostatic acid phosphatase; a level of 100 or more is potentially significant. *Id.* at 133-34.

DNA testing of a vaginal swab submitted to the Maryland State Police Forensic Services Division showed that a sperm was present. *Id.* at 41-42, 54-55, 59-61. Further DNA testing of the vaginal swab by Bode Technology in 1998 concluded that Harris could not be excluded from the DNA extracted from the sperm fraction. *Id.* at 87, 92, 103-04.

Dr. Stephen Cina was accepted without objection as an expert in forensic pathology. He testified that the high level of prostatic acid phosphatase in the vagina indicated within a reasonable degree of medical probability that sexual intercourse had taken place within a few hours of death and no later than 24 hours prior to death. Tr. 10/27/17 at 36, 43, 65-66. Based on the high level of prostatic acid phosphatase in the vagina, the presence of sperm in the vaginal cavity, and the circumstances in which the body was found,[1] Dr. Cina concluded within a reasonable degree of medical probability that semen was deposited in the vagina shortly before death. *Id.* at 11, 39-40, 43.

3. *Harris's statements*

On December 24, 1996, Harris, age 33, was interviewed at the police station by then-Detective Jeff Hutchinson. Harris stated that he built the camp between

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[1] Dr. Cina explained that the crime scene—a strangled, naked, bound female in a wooded area—"just screams at you that this is a sex-related homicide." Tr. 10/27/17 at 35-36, 44.

1992 and 1993 when he separated from his wife and had lived there continuously until July 4, 1996. Tr. 10/25/17 at 96-97. Harris explained that he built the camp to get away from his mother and to smoke marijuana. *Id.* at 98. Harris said he only knew of Stacy because she lived near his mother's house and he had seen her waiting outside McCutcheon's for her boyfriend. *Id.* at 100-02.

In a second interview with Detective Hutchinson on January 28, 1997, Harris added that when he saw Stacy outside McCutcheon's, she asked for weed but he cursed at her and told her to leave him alone because Stacy's boyfriend did not want her to smoke marijuana. *Id.* at 112-17.

On December 17, 1998, the third time Detective Hutchinson spoke with Harris, Detective Hutchinson was wearing a microphone under his shirt. *Id.* at 125, 127. They were together for about six hours. *Id.* at 137. During that time, they chatted at Harris's mother's house, picked up Harris's paycheck, spent a couple of hours at a coffee shop, and walked around the woods looking at the paths, other encampments, and the railroad tracks. *Id.* at 124-25, 129-33, 177-78; Tr. 10/27/17 at 103-04. The body-wire recording could not be located by the time of trial, but Detective Hutchinson stated that the quality of a "wire" was poor back then and that the quality of this recording was "very poor" because his clothing kept rubbing against the microphone. Tr. 10/25/17 at 127-28. Much of the conversation with Harris was not relevant to the investigation, and Detective Hutchinson noted anything of significance in his report. *Id.* at 129-30.

Near the end of their time together, Detective Hutchinson asked Harris whether he had ever had sex with Stacy. Harris repeatedly denied it. *Id.* at 133, 179. But when confronted with evidence that his DNA was inside Stacy's vagina, Harris said that it was impossible because he used a "jimmy," or condom. *Id.* at 133. Harris then said that he and Stacy had gotten together on Saturday, three days before she was last seen, to smoke marijuana and have sex behind a church close to Stacy's house. *Id.* at 134-35, 184. Detective Hutchinson told Harris that he potentially could be charged with Stacy's murder, to which Harris replied, "Well, if I did kill her, it was an accident." *Id.* at 136.

A fourth interview with Harris was conducted on January 29, 2016, after his arrest. Tr. 10/27/17 at 80-81. During the video and audiotaped interview, Harris stated that a couple of weeks or days before her disappearance, Stacy traded sex for "herb." *Id.* at 99-101, 135. Harris acknowledged telling Detective Hutchinson during the 1998 interview, "If I did it, it was an accident," and he repeated that statement at least six more times during the interview. *Id.* at 104-05, 108-11, 113-16, 122. In a written statement to Stacy's family, Harris again stated, "If it were me, I can only say it must have been an accident . . . ." *Id.* at 150; State's Ex. 92.

B. The motion to dismiss for preindictment delay and the lower courts' rulings

1. *The trial court proceedings*

Harris was indicted in the Circuit Court for Frederick County, Maryland, on January 22, 2016. Pet. App. 2a-3a. The length of the preindictment delay was a little

more than 19 years.[2] Prior to trial, Harris filed a motion to dismiss for preindictment delay and the State filed an opposition. R1. 217-33, 238-47.[3]

At the outset of the hearing on the motion, Harris's trial counsel declared: "[T]he test here is actually pretty simple. It's a two-prong test. It's whether or not there's actual prejudice and whether or not the State acted to gain a tactical advantage." Tr. 2/10/17 at 14. Counsel "admit[ted]" that to prevail on the motion, both prongs of that "conjunctive test" had to be satisfied. *Id.* Harris's trial counsel then alleged that his defense was prejudiced by the delay because certain evidence was no longer available. R1. 222-26; Tr. 2/10/17 at 14-26.

The State addressed each item of allegedly unavailable evidence in its written opposition and at the hearing. R1. 241-45; Tr. 2/10/17 at 18, 31-35. The purportedly unavailable witnesses were either available or the matter about which they would have testified could be admitted in evidence by alternative means.[4] Pet. App. 17a-18a; R1. 241-42. The lost body-wire recording was of such poor quality that it likely would not have been admissible at trial and any statements of significance to the investigation were documented in the report Detective Hutchinson created at the

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[2] The trial court recognized that, despite frequent references to a 20-year delay, the length of delay was in fact closer to 19 years. Tr. 8/30/17 at 6. Stacy's body had been on December 23, 1996. Tr. 10/14/2017 at 149-53.

[3] References to Volume 1 of the Maryland appeal record are cited as "R1."

[4] In the 19 years since the offenses were committed, only two witnesses had died and only one had moved outside the country, but it does not appear that Harris sought to obtain that witness's testimony by any of the means the trial court suggested. *See* Tr. 2/10/17 at 14-18. The other witnesses mentioned in Harris's motion to dismiss lived out of state and were available to be served. R1. 228-29, 242.

time. Pet. App. 17a; R1. 242. Although the raw data for the prostatic acid phosphatase test had been discarded according to a three-year retention policy, the State's discovery obligations did not include turning over the raw data and Dr. Levine would testify that the test was accurately performed under his supervision. Pet. App. 18a-19a; R1. 241-42. Moreover, Harris did not challenge the results of the test itself at trial. Pet. App. 25a-26a. Finally, the delay did not deprive Harris of the opportunity to present an alibi. He was on notice early in the investigation that he was a possible suspect and he would have had the opportunity to memorialize an alibi then if he had one. Pet. App. 18a. Accordingly, Harris was unable to show that his defense was actually prejudiced by the delay. Tr. 2/10/17 at 30-35; R1. 241-45.

On the improper-purpose prong, Harris's trial counsel argued that no new evidence had been developed since 2000 and that the trial court should infer, based on the allegedly unavailable evidence alone, that the State purposefully delayed trial to gain a tactical advantage. Tr. 2/10/17 at 27-30. The trial court pointed out that the 19-year period included the tenure of different elected State's Attorneys and involved various investigators, but Harris's trial counsel argued that they were all complicit in a purposeful effort to gain a tactical advantage by delaying the indictment for 19 years. *Id.* at 29.

The State argued that the delay was not the result of prosecutorial misconduct. *Id.* at 35. Further, in its written response to the motion to dismiss and again at the hearing, the prosecution stated that new evidence had been developed during the ongoing investigation, which led to the 2016 indictment. R1. 217-18, 238, 243; Tr.

2/10/17 at 35-37. The State pointed out that it did not "matter" what the new evidence was, because the prosecution was not required to proffer it under the conjunctive test. R1. 243; Tr. 2/10/17 at 35-37. The prosecutor added, "quite frankly, part of it is trial strategy. And pointing out certain things" that the defense "may or may not have picked up on, I don't think I should be put in a position to do." Tr. 2/10/17 at 35. The prosecutor confirmed that the new evidence had been disclosed to the defense, but that "[w]hether or not they choose to see it as new evidence is up to them," and argued that the State should not "be put in the position of having to give strategy at this point." *Id.* at 37. Implicitly agreeing, the trial court did not require the State to further elaborate its reasons or to proffer the new evidence it had developed.

The trial court decided the motion under the conjunctive test. Pet. App. 42a. The court observed that the defense *and* the State had experienced "some prejudice" from the 19-year delay, Pet. App. 42a, but the court stopped short of finding that the prejudice proffered by Harris's trial counsel satisfied the actual-prejudice prong. Turning to the improper-purpose prong, the court observed that the "police investigation" had been "ongoing" and that the State has discretion as to when to bring charges. Pet. App. 42a-43a. The court declined to find that successive State's Attorneys colluded to purposefully delay charging Harris. Pet. App. 43a. The court found that Harris had failed to meet his burden on the second prong and denied the motion to dismiss for that reason. Pet. App. 43a-44a.

Harris renewed the motion to dismiss prior to jury selection, arguing that there had been "continued prejudice" to the defense because of witness unavailability. Tr. 10/23/17 at 35-36. The court denied the renewed motion. *Id.* at 36.

Twenty-two witnesses testified at trial and over 100 exhibits were admitted in evidence. After deliberating for less than three hours, a jury convicted Harris of first-degree premeditated murder, first-degree felony murder, first-degree rape, and third-degree sexual offense. Tr. 11/1/17 at 112-13; Tr. 1/3/18 at 8-9. Harris was sentenced to two concurrent terms of life imprisonment. Tr. 1/3/18 at 40.

2. *The appellate court proceedings*

On direct appeal to the Court of Special Appeals of Maryland, Harris argued, among other things, that the trial court erred by denying the motion to dismiss for preindictment delay. As he had in the trial court, Harris stated that the conjunctive test applied: "a defendant 'must prove (1) actual prejudice to the accused *and* (2) that the delay was purposefully made by the State to gain a tactical advantage over the accused.'" Harris's Appellant's Br. 32 (citing *Clark v. State*, 364 Md. 611, 645 (2001)). Harris asserted that the trial court had found he satisfied the actual-prejudice prong. Harris's Appellant's Br. 34. On the second prong of the conjunctive test, Harris contended that *Clark* left open whether that element could be satisfied by showing that the State's delay was reckless rather than purposeful, and he urged the intermediate appellate court to find that the State's delay was reckless. Harris's Appellant's Br. 32-37.

Applying the conjunctive test, the Court of Special Appeals held that the trial court did not err in denying the motion. Pet. App. 23a; *Harris v. State*, 242 Md. App. 655, 675 (2019). Addressing Harris's recklessness argument, the court held that it was not preserved: Harris "did not argue this point before the trial court and will not be allowed to circumvent the judgment of a trial court." Pet. App. 24a; *Harris*, 242 Md. App. at 676. The court also noted that a recklessness standard had not been adopted as part of Maryland jurisprudence. Pet. App. 24a-25a; *Harris*, 242 Md. App. at 676-77.

Harris filed a *pro se* petition for a writ of certiorari in the Court of Appeals of Maryland, which was denied. Pet. App. 1; *Harris v. State*, 467 Md. 270 (2020).

REASONS FOR DENYING THE PETITION

I.

HARRIS CONCEDED APPLICATION OF THE CONJUNCTIVE TEST IN THE COURTS BELOW AND, AS A RESULT, THE QUESTION PRESENTED IS NOT PRESERVED AND THE RECORD IS INADEQUATE TO APPLY THE BALANCING TEST HE ADVOCATES.

A. Harris's argument that the balancing test applies is not preserved.

The question Harris seeks to have this Court resolve was not raised or even mentioned in the state-court proceedings. "In the ordinary course," this Court does "not decide questions neither raised nor resolved below." *Glover v. United States*, 532 U.S. 198, 205 (2001). The Court has expressed an especially strong aversion to addressing such unpreserved questions in a case arising from state courts, due to

both "[p]rinciples of comity" and what the Court has identified as other "very practical reasons." *Webb v. Webb*, 451 U.S. 493, 499-500 (1981). Among these "practical reasons for insisting that federal issues be presented first in the state-court system" is the need to "afford[ ] the parties the opportunity to develop the record necessary for adjudicating the issue." *Id.* at 500. Because Harris did not attempt to raise the issue in the state courts, the parties lacked the necessary opportunity to develop the record in ways pertinent to the question presented, which makes this case particularly ill-suited for this Court's review.

Harris never argued in the courts below that the balancing test should be applied to the preindictment delay. To the contrary, at the motions hearing, Harris's trial counsel expressly stated that the "two-prong[ed]" conjunctive test applied. Tr. 2/10/17 at 14 ("It's whether or not there's actual prejudice and whether or not the State acted to gain a tactical advantage."). Harris "admit[ted]" that he had to satisfy "both" prongs of the "conjunctive test." *Id.*

On appeal, Harris again advanced the conjunctive test, this time arguing that the second prong could be satisfied by showing that the State's delay was reckless, rather than purposeful. Harris's Appellant's Br. 32-37. The Court of Special Appeals of Maryland held that the argument was not preserved because it had not been presented to the trial court. Pet. App. 24a.[5]

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[5] Harris likewise did not argue for the balancing test in his *pro se* certiorari petition to the Court of Appeals of Maryland. Harris Md. Cert. Pet. 16.

In this Court, Harris, represented by new counsel, makes yet another argument. Disregarding his arguments below, which all proceeded from the premise that a conjunctive standard applied, Harris now argues for a balancing test. This Court does not ordinarily decide issues that petitioners have failed to preserve in state court, and should not do so here. *See, e.g.*, *Sochor v. Florida*, 504 U.S. 427, 533-34 (1992) (holding that Court lacked jurisdiction to decide claim which state court had rejected on adequate and independent state ground of lack of preservation). Harris's failure to preserve the issue that he asks this Court to review is itself reason enough to deny his petition.

B. The record is not adequate to apply the balancing test because the State was not required to elaborate its reasons for the delay.

Harris's failure to preserve the question in the lower courts poses more than a technical impediment to this Court's review. It deprives this case of usefulness as a vehicle to decide the question he presents, because the record is inadequate for this Court to assess the reasons for the State's delay in indicting Harris. Further, without the reasons for the delay stated on the record, Harris cannot claim that he would prevail under the balancing test he prefers. *See* Pet. 17-18.

Harris expressly conceded at the motions hearing that, under the conjunctive test, dismissal is required only if "the State acted to gain a tactical advantage." Tr. 2/10/2017 at 14. Nevertheless, the State repeatedly averred that its charging decision was based not only on having "new eyes on the evidence," but also on the development

of "new evidence." *Id.* at 36-37; *see also* R1. 242-43.[6] The prosecution also stated that there was "new evidence" in addition to Harris's 2016 statement. Tr. 2/10/17 at 37. But the State resisted having to reveal trial strategy by specifically identifying that new evidence because doing so was unnecessary, given that whether new evidence existed was "not the test"; rather, as Harris acknowledged, the standard was whether the prosecution had purposefully delayed for a tactical purpose. *Id.* at 35, 37. The trial court accordingly did not insist that the State proffer exactly what new evidence had led to the 2016 indictment, but rather denied the motion because there had been no showing of "a purposeful attempt by the State to gain a tactical advantage." *Id.* at 43; Pet. App. 43a.[7]

The result is that the record in this case is inadequate to assess the strength of the State's reasons for waiting to indict Harris until it did. This deficiency in the record promises to frustrate this Court's efforts to evaluate whether the asserted due process claim is better analyzed under a balancing test rather than the conjunctive

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[6] In a footnote, the Court of Special Appeals observed that the "crux" of the State's decision to indict was "fresh eyes" on the evidence. Pet. App. 19a. The State's proffer was that it was only *part* of the reason.

[7] Harris is wrong when he asserts, based on a silent record, that there is no valid explanation for the delay. Pet. 17-18. The trial testimony reveals that police continued investigating the case, including by re-interviewing Fisher in 2015. Tr. 10/24/17 at 77-78, 85-86. While there may not have been an evidentiary "smoking gun" that was obvious to the defense, in a complicated circumstantial evidence case, small shifts in different aspects of the evidence may tip the balance toward a determination that there is enough evidence to indict, to proceed to trial, and to prove guilt beyond a reasonable doubt. This Court recognized in *Lovasco*, 431 U.S. at 791, that "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt."

test, or, indeed, whether the choice of test would make any practical difference in the outcome of the case. In the absence of a more detailed record of the State's reasons for delay, this Court would be unable to weigh those reasons against the prejudice Harris alleges. Resolution of the question presented based on such an undeveloped record would be unlikely to yield sufficiently useful guidance of the kind lower courts and litigants expect from the Court.

II.

APPLICATION OF THE BALANCING TEST WOULD NOT AFFECT THE OUTCOME IN THIS CASE.

This case is also a poor vehicle because the result does not turn on resolution of the question presented. Both the conjunctive test and the balancing test require Harris to demonstrate that his defense was actually prejudiced by the delay, and he failed to make that showing at the motions hearing. Consequently, Harris's due process claim fails regardless of which standard applies.

A. Under either the conjunctive test or the balancing test, the defendant must demonstrate actual, substantial prejudice.

The conjunctive test requires satisfying two prongs: (1) that "a pre-indictment delay caused an accused 'actual, substantial prejudice,'" and that (2) the delay was "'the product of a deliberate act by the government designed to gain a tactical advantage'" or another improper prosecutorial purpose. *Harris*, 242 Md. App. at 674-75 (quoting *Clark*, 364 Md. at 631); *see*, *e.g.*, *United States v. Crooks*, 766 F.2d 7, 11 (1st Cir. 1985) (Breyer, J.) (stating that preindictment delay violates due process

"only if the delay significantly prejudices the defendant and the government 'intentionally delayed' the indictment 'to gain an unfair tactical advantage or for other bad faith motives'") (citation omitted). Under the balancing test, in contrast, the defendant must still "prove actual prejudice" at the outset; but, if the defendant can do so, "then the court must balance the defendant's prejudice against the government's justification for delay," whatever it might be, to make an open-ended assessment of "'whether the government's action in prosecuting after substantial delay violates fundamental conceptions of justice or the community's sense of fair play and decency.'" *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (citation omitted); *accord United States v. Moran*, 759 F.2d 777, 780-82 (9th Cir. 1985).

Regardless of which test applies, however, the lower courts "have uniformly held that to obtain a dismissal under the Due Process Clause a defendant must establish that a pre-indictment delay *actually* prejudiced his defense." *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996) (emphasis in original). The prejudice "not only must be actual, rather than presumed or potential, but must also be 'substantial.'" *United States v. Crouch*, 84 F.3d 1497, 1515 (5th Cir. 1996) (en banc) (collecting cases). This is a "heavy burden": the "proof must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *Moran*, 759 F.2d at 782; *see*, *e.g.*, *State v. Mouser*, 806 P.2d 330, 337 (Alaska App. 1991) ("By actual prejudice we mean a particularized showing that the unexcused delay was likely to have a specific and substantial adverse impact on the outcome of the case.").

The "real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost," *Marion*, 404 U.S. at 326, is not by itself sufficient to demonstrate actual prejudice. *See State v. Oldson*, 884 N.W.2d 10, 62 (Neb. 2016) ("[A] defendant bears the burden to show actual prejudice, and not just prejudice due to dimmed memories, inaccessible witnesses, and lost evidence.").

Thus, a "mere loss of potential witnesses is insufficient absent a showing that their testimony 'would have actually aided the defense.'" *Crouch*, 84 F.3d at 1515 (citation omitted). The defendant must "identify the witness he would have called; demonstrate, with specificity, the expected content of that witness's testimony; establish to the court's satisfaction that he has made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources." *Jones*, 94 F.3d at 908.

Likewise, the death of a witness is not determinative of prejudice. A "defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available." *United States v. Rogers*, 118 F.3d 466, 475 (6th Cir. 1997).

Even where documentary or physical evidence has been lost or destroyed, the burden to show actual prejudice remains on the defendant: "the defendant must provide the 'expected content' of the document," must "indicate how that document . . . would have aided the defense" and must "show causation by establishing that he

could not have obtained the crucial evidence from another source and that the evidence would have been available if it were not for the government's delay in filing the charges." *State v. Hales*, 152 P.3d 321, 334 (Utah 2007); *see State v. Stokes*, 248 P.3d 953, 963 (Ore. 2011) (finding no prejudice where "the destroyed evidence in this case [including a rape kit, the victim's clothes, and the recording of a 911 call] may have supported the state's case; both parties were forced to proceed without it").[8]

The trial court's conclusion here that both Harris and the State experienced "some prejudice" due to the passage of time was not tantamount to a finding that Harris established actual, substantial prejudice. Indeed, as discussed below, Harris did not do so, and that failure would doom his due process claim regardless of whether the conjunctive test or the balancing test applies.

B. The trial court did not find that Harris satisfied the actual-prejudice prong.

Harris did not show, and the trial court did not find, that the delay caused actual, substantial prejudice to Harris's defense. The trial court focused on the improper-purpose prong early in the hearing, with the understanding that, as Harris's trial counsel conceded, Harris was required to demonstrate *both* that he was

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[8] Indeed, given that the impact on trial of lost testimony and missing evidence is inherently speculative, some courts have concluded that dismissal due to preindictment delay "*prior to trial* will rarely (if ever) be appropriate," and that except in "all but the clearest and most indisputable cases" a court should not decide such a motion until after trial when an assessment of trial prejudice can more accurately be made. *Crouch*, 84 F.3d at 1523 (emphasis in original); *accord State v. Knickerbocker*, 880 A.2d 419, 471 (N.H. 2005). Here, Harris did not renew his motion to dismiss following the trial.

actually prejudiced *and* that the State had an improper purpose for the delay. *See* Tr. 2/10/17 at 15 (asking, "Are you saying the State purposely waited until these people were dead to bring the indictment?").

During the hearing, the trial court disputed many of Harris's arguments about why particular evidence was either unavailable or its absence was prejudicial.[9] In its ruling, the trial court stated that it was applying the conjunctive test. Pet. App. 42a. It then summarily touched on the actual-prejudice prong, noting only that both Harris and the State had "suffered some prejudice." Pet. App. 42a. The court did not discuss the merits of Harris's actual-prejudice claim, which would have been the basis for any factual finding. Instead, the court quickly moved on to the improper-purpose prong, discussed it at length, and unambiguously found, "I don't believe they've met the second prong, and so I'm going to deny the motion to dismiss." Pet. App. 42a-44a.

The trial court's summary treatment of the actual-prejudice prong and its comment that Harris as well as the State had, unsurprisingly, "suffered some prejudice" due to the 19-year delay does not equate to a factual finding of substantial, actual prejudice. Rather, it is consistent with the court's earlier observation that both parties would be affected by witnesses' faded memories. Tr. 2/10/17 at 22.

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[9] *See*, *e.g.*, Tr. 2/10/17 at 17-18 (suggesting that "somebody ought to be making" a motion for a *de bene esse* deposition for potential witness in London); *id.* at 20, 38-39 (observing that the loss of the body-wire recording might be "fortuitous" for the defense and that the recording was unnecessary); *id.* at 22-23, 40 (pressing Harris's trial counsel to proffer with specificity the expected unavailable-witness testimony and suggesting a stipulation).

Harris's trial counsel likewise did not understand the court to have found actual prejudice. At the trial court's invitation, Harris's trial counsel renewed the motion to dismiss immediately before jury selection began and again argued that Harris continued to be prejudiced by the unavailability of witnesses. Tr. 10/23/17 at 35-36. Had counsel concluded that the court already found that his defense was actually prejudiced, an assertion of further prejudice would have been unnecessary. The trial court denied the renewed motion, *id.* at 36, again rejecting Harris's argument.

On direct appeal, the State argued that the factual allegations of prejudice were "weak," "deficient," and "disproved" and "were *not* essentially undisputed," as Harris had posited in his brief.[10] State's Br. of Appellee 34, 38-39. In its opinion, the Court of Special Appeals of Maryland summarized the court's ruling by stating: "The trial judge ultimately found that, although Harris *may have been* prejudiced by the delay, he had failed to prove that the State purposefully acted to gain a tactical advantage . . . ." Pet. App. 19a-20a (emphasis added).

The trial court did not make a factual finding that the actual-prejudice prong was satisfied. Further, as discussed below, the proffer made by the defense was wholly inadequate to satisfy that standard.

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[10] On appeal, the State did not challenge the trial court's finding that Harris suffered "some prejudice," State's Br. of Appellee 39, but the State did challenge the extent of the prejudice and did not concede that the trial court found the actual-prejudice prong was satisfied.

C. Harris's claim that unavailable evidence satisfied the actual-prejudice prong is misleading and meritless.

Harris's petition cites to the same six pieces of allegedly unavailable evidence that he unsuccessfully proffered to the trial court. Pet. 3-4. None of his claims satisfy his burden of showing actual, substantial prejudice to the defense.

First, Harris refers to a deceased "alternate suspect[ ]" who "resided at the campsite." Pet. 3. The defense identified James Sexton as the now-deceased person,[11] but Sexton was not a viable "alternate suspect" because, as the evidence at trial showed, he was excluded as a contributor to the DNA extracted from the sperm fraction of the vaginal swab recovered from Stacy, from the hairs on the blanket that covered her body, and from a cigarette butt found near the body. Tr. 10/26/17 at 62-63, 72-73; Tr. 11/1/17 at 91-92. In addition, to the extent that Harris could have pointed to Sexton as a potential alternate suspect despite the DNA exclusion, the evidence at trial allowed him to do so: evidence was admitted that Sexton lived in the woods where the body was found, that he had been a suspect, and that it appeared that Styrofoam taken from Harris's campsite was found at Sexton's campsite. Tr. 10/25/17 at 69-71, 75-76, 151-52, 167-68. The prejudice alleged by Harris is nonexistent.

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[11] Sexton did not live at "the campsite" with Harris, as he suggests. Sexton, along with Bruce Adcock, lived in an above-ground cement culvert, which was across the woods and about 100 yards from Stacy's body and Harris's campsite. Tr. 10/15/2017 at 68-70, 90-91.

Second, Harris states that a "forensic analyst, who had reviewed evidence from the crime scene and concluded that it did not match petitioner, also died." Pet. 3. The forensic analyst to whom Harris refers analyzed the hairs on the blanket covering Stacy's body. The hairs were available to the defense for analysis, and the parties stipulated at trial that the original DNA analysis of the hairs excluded Harris. R1. 241, 244; Tr. 2/10/17 at 34-35, 40; Tr. 11/1/17 at 91-92. The fact that the forensic analyst was deceased, therefore, did not prejudice Harris's defense.

Third, Harris states that "[m]ultiple witnesses" who saw Stacy after her disappearance were "unavailable." Pet. 3. Only two witnesses were proffered in the motion to dismiss: Jamie Hurst and Corinne Winters. Hurst, Stacy's best friend, was *not* unavailable, as evidenced by her attendance and testimony at trial.[12] Winters, a performer, had been in the state of Washington for weeks at the time of the hearing and was to return to London the following week. Tr. 2/10/17 at 16-18. The trial court encouraged the defense to make a motion for a *de bene esse* deposition to obtain Winters's testimony, but the defense failed to do so. *Id.* at 17-18. Further, defense counsel was unable to proffer what Winters's testimony would be. *Id.* at 23. At trial, another witness acknowledged that she may have told police that Stacy called her on October 10, 1996, days after Stacy's disappearance, and the defense used that testimony to support its argument that Stacy was still alive after October 1. Tr.

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[12] Hurst did not testify that she saw Stacy after October 1, 1996. *See* Tr. 10/24/17 at 110.

11/1/17 at 37-38, 96. Harris was not prejudiced by the fact that a potential witness resided in London.

Fourth, Harris alleges that the State "decided not to preserve its six-hour recorded interview of petitioner." Pet. 3. No such decision was made. The State proffered that the recording could not be located, and even Harris's trial counsel, referring to the recording, stated, "I would assume they're lost." Tr. 2/10/17 at 19, 32.

Harris's brief discussion of the lost body-wire recording includes other inaccuracies. According to Harris, two different statements—"I imagine there are other[ ]" lost recordings and "[r]est assured" that the State would have retained recordings favorable to its case—were made by the prosecution. Pet. 3. Not so. These speculative statements were made by *Harris's counsel*, Pet. App. 12a; Tr. 2/10/2017 at 19-20, who never supported them. Harris's suggestion that the State was cavalier about lost recordings is unfounded.

During the six-hour period when Detective Hutchinson was wearing a body wire, he and Harris spoke at Harris's mother's house, they picked up Harris's paycheck, they went to a coffee shop, they talked over coffee, and they walked around the wooded area at length. Although they were together for six hours, only two significant inculpatory statements were admitted at trial and, as documented in Detective Hutchinson's report, both were near the end of the interview after Harris was confronted with DNA evidence. Tr. 10/25/17 at 129-30, 133-36, 198-99.

Those who heard the body-wire recording in 1998 stated that the quality was so poor that Harris could hardly be heard and the recording likely would not have

been admitted in evidence. Tr. 2/10/17 at 31; Tr. 10/25/17 at 127-28. Even if a clear recording of Harris's inculpatory statements existed, it would not have benefitted Harris's defense for the jury to *hear* him concede that he had sex with Stacy and to say, "if I did it, it was an accident." *Cf. State v. Cote*, 118 A.3d 805, 812 (Me. 2015) (holding that defendant was not prejudiced by delay during which recording of interview of child sexual-assault victim went missing, in part because there was a "real prospect that the recording would have worked to Cote's disadvantage by allowing the jury to hear an account of the assaults in a child victim's voice").

The record also does not support Harris's suggestion that numerous recorded witness interviews were lost. As the prosecutor stated, police did not routinely record witness interviews in the mid-1990s. Tr. 2/10/17 at 38. Harris's trial counsel alleged that "several" recordings had been lost. R1. 228. Other than the body-wire recording, however, the only recording that Harris identified was that of Stacy's older brother, Michael Zittle. But Harris's trial counsel never proffered why Zittle's interview with police was important to the defense. Moreover, even though Zittle apparently was available to both parties, he was never called to testify. *Cf. State v. Davis*, 201 P.3d 185, 200 (Ore. 2008) ("The loss of the recording does not establish actual prejudice, because the asserted value of its contents is, again, entirely speculative.").

Fifth, Harris claims that the State "lost or destroyed" the "underlying data" for the acid phosphatase test. Pet. 3. The "actual measurements that the spectro-photometer" made were not discoverable material, Tr. 10/7/17 at 34, and were discarded pursuant to a three-year retention policy. Tr. 10/26/17 at 33-34.

Accordingly, even if Harris had been indicted in 1999 or 2000, the data would not have been available. In any event, Dr. Levine testified that he reviewed all the raw analytical data when the analysis was conducted in 1996, made sure that the test was conducted properly, and certified with his signature that the results were accurate and scientifically valid. Tr. 10/26/17 at 127-31, 134, 138. Moreover, the defense did not challenge the result of the test itself; rather, it disputed how the result was used by Dr. Cina to reach his opinion about the time between intercourse and death. Pet. App. 25a-26a. The defense presented its own expert witness, Dr. Karl A. Reich, who opined that an analysis of the amount of prostatic acid phosphatase was not a valid or reliable method to determine time since intercourse, particularly in a cadaver. Tr. 10/30/2017 at 17-70. The defense theory, in other words, was not that the data underlying Dr. Cina's conclusions was faulty—it was that Dr. Cina's conclusions could not legitimately be drawn from the data. The unavailability of the raw data did not prejudice Harris.

Sixth, Harris argues that he was deprived of a "meaningful ability to put forth an alibi" because he was "suddenly compelled" to find alibi witnesses years after the offenses were committed. Pet. 3-4. Harris was on notice that he was a suspect early in the investigation because he had to provide DNA samples, he was interviewed multiple times by police, and his camp was near Stacy's body. On January 15, 1997, police ascertained that Harris was not working on October 1, 1996, or any day that week. Tr. 10/25/17 at 103. If Harris had an alibi, in all likelihood he would have

memorialized it.[13] *Cf. State ex rel. Knotts v. Facemire*, 678 S.E.2d 847, 857 (W. Va. 2009) (holding that defendant's proffer "that his ability to establish an alibi with reference to some of the offenses has been hampered by the fading of memories, including his own" was too "vague" and "conclusory" to establish actual prejudice); *State v. Vanasse*, 593 A.2d 58, 64 (R.I. 1991) (stating that "the prejudice resulting from faded memories, the increased difficulty in establishing an alibi, and the unavailability of a witness" is "exactly the type of prejudice that the *Marion* Court deemed 'inherent in any extended delay'").

As the State remarked at the hearing, only two witnesses died during the 19-year delay and, except for the faded memories of witnesses, which both parties experienced, Harris's defense was not prejudiced at all. Tr. 2/10/17 at 31. The lack of actual, substantial prejudice forecloses relief to Harris in this case regardless of which test is applied. If this Court were to review this issue, it should do so in a case where the different tests would produce different outcomes.

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[13] In his allocution at sentencing, Harris stated that his ex-wife could have testified that he was home with their child on October 1, 1996, but he was waiting for the State to call her as a witness. Tr. 1/3/18 at 21.

III.

THE SPLIT OF AUTHORITY IS NOT DEEP OR CONSEQUENTIAL ENOUGH TO REQUIRE RESOLUTION BY THIS COURT.

Review of this issue, if it is to be conducted, should await a better vehicle for the additional reason that the split of authority is not as deep as Harris suggests, nor is it consequential in most cases.

A. The conflict of authority is not as deep as Harris suggests.

As Harris admits, the balancing test is currently applied in only two federal circuits and twelve state courts of last resort. Pet. 10, 13 & nn.6-7. But even that lopsided tally against the balancing test may overstate the balancing test's tenacity. Not all of the balancing jurisdictions have squarely rejected the conjunctive test.

Several jurisdictions, after they initially aligned with the balancing test, adopted the conjunctive test instead upon more mature consideration. The Fifth Circuit, for instance, initially held post-*Lovasco* that "[o]nce actual prejudice is shown, it is necessary to engage 'in a sensitive balancing of the government's need for investigative delay against the prejudice asserted by the defendant.'" *United States v. Townley*, 665 F.2d 579, 582 (5th Cir. 1982) (citation omitted). But the Fifth Circuit reevaluated the standard en banc in *Crouch*, 84 F.3d at 1514, overruled *Townley*, and squarely adopted the conjunctive test. The Fifth Circuit explained the analytic inferiority of the balancing test:

> The [balancing] test purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government's "good faith reasons" for the delay deviate from what the court believes to be

> appropriate. However, what this test seeks to do is to compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which "weighs" the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no body of precedent or historic practice to look to for guidance. Inevitably, then, a "length of the Chancellor's foot" sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own "'personal and private notions' of fairness," contrary to the admonition of *Lovasco*.

Id. at 1512. The Eighth Circuit and the state courts of Iowa and New Mexico have likewise abandoned the balancing test and adopted the conjunctive test.[14]

The consensus in favor of the conjunctive test is likely to continue to grow even without this Court's intervention. Several jurisdictions that Harris classifies as having adopted the balancing test may not truly be in conflict with the conjunctive test. Some courts, although using language that is characteristic of balancing (sometimes drawn from later-abrogated decisions in other jurisdictions), have done so without explicitly assessing the conjunctive test as an alternative standard and

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[14] *See State v. Duran*, 581 P.2d 19, 20-21 (N.M. 1978) (applying balancing test), *overruled by Gonzales v. State*, 805 P.2d 630, 631-33 & n.3 (N.M. 1991) (adopting conjunctive test); *compare State v. Williams*, 264 N.W.2d 779, 782-83 (Iowa 1978) (applying balancing test), *with State v. Brown*, 656 N.W.2d 355, 363 (Iowa 2003) (adopting conjunctive test); *compare United States v. Weaver*, 565 F.2d 129, 131 (8th Cir. 1977) (stating that court should "balance[ ] 'the reasonableness of the delay against any resultant prejudice to the defendant'") (citation omitted), *with United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006) (stating that, rather than satisfying a "balancing test," "defendants claiming a due process violation for pre-indictment delay must carry the burden of proof on two separate elements").

without confronting a case where the difference between the standards would matter.[15] Others, while nominally endorsing balancing, have cast doubt on whether anything short of deliberate or reckless delay would actually tip the "balance" in the defendant's favor.[16]

Particularly in the two federal circuits that still recognize it, the balancing test stands on uncertain ground. The Fourth Circuit, in *Jones*, 94 F.3d at 904-05, acknowledged that every other circuit but the Ninth had adopted the conjunctive test, but recognized that it could not overrule its prior panel precedent in favor of the balancing test without an en banc proceeding. It was unnecessary in that case, as the *Jones* court observed, to consider en banc review because the defendant in that case could not show actual prejudice, and thus could not establish a due process violation even under the balancing test. *Id.* at 905. The Ninth Circuit, for its part, continues to profess allegiance to the balancing test–but not once, in 43 years of reported opinions since *Lovasco* was decided, has the Ninth Circuit encountered a case where it found that delay caused actual, substantial prejudice such that

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[15] *See, e.g.*, *Rogers v. State*, 511 So.2d 526, 531 (Fla. 1987) (adopting balancing test from the Fifth Circuit's since-overruled *Townley* decision, without assessing conjunctive test).

[16] *Compare State v. Cyr*, 588 A.2d 753, 756 (Me. 1991) (stating that court must "inquire as to the reasons for the delay that may be offered by the State and determine, on balance, whether the prejudice caused by the delay remains unjustified"), *with State v. Hutchins*, 433 A.2d 419, 423 n.3 (Me. 1981) (expressing doubt that anything less than intentional, tactical delay or recklessness might qualify).

conducting any real balancing against a culpable government motive was necessary.[17]

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[17] In two early cases, the Ninth Circuit found that "moderate," non-"severe" prejudice was easily outweighed by "proper" delay to "await an evaluation of the strength of the case," *United States v. Walker*, 601 F.2d 1051, 1056-57 (9th Cir. 1979), and that "doubtful" prejudice did not outweigh "little evidence" of "culpable" delay. *United States v. Jessee*, 605 F.2d 430, 431 (9th Cir. 1979) (per curiam). In four other cases, all in the next decade, the Ninth Circuit found the evidence of prejudice sufficiently marginal that it chose to rest its decision on the ground that the delay was the result of entirely legitimate investigation. *See United States v. Sherlock*, 962 F.2d 1349, 1354-55 (9th Cir. 1989) (where showing of prejudice was "slim," finding no due process violation because "ongoing investigation was a legitimate reason for the delay"); *Moran*, 759 F.2d at 783 (although having "serious doubts whether Moran has made any showing of prejudice beyond that which the statute of limitations is designed to control," reversing dismissal of indictment because the "record in this case is absent any evidence of culpability"); *United States v. Tornabene*, 687 F.2d 312, 317 (9th Cir. 1982) (rejecting preindictment delay claim because government's "'ongoing investigation' [was] a legitimate reason for delay"); *United States v. Farris*, 614 F.2d 634, 640 (9th Cir. 1979) (rejecting preindictment delay claim where "despite lengthy motion proceedings, including an evidentiary hearing, the defense did not show negligence or intentional misconduct by the prosecution").

In every other reported decision, including each one in the past thirty years, the Ninth Circuit has found no prejudice and therefore nothing against which to balance. *See*, *e.g.*, *United States v. Corona-Verbera*, 509 F.3d 1105, 1113 n.2 (9th Cir. 2007) ("[W]e need not address the reasons for the delay because Corona-Verbera has not demonstrated actual prejudice[.]"); *United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005) (same); *United States v. DeGeorge*, 380 F.3d 1203, 1212 (9th Cir. 2004) (same); *United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2003) (same); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002) (same); *United States v. Gilbert*, 266 F.3d 1180, 1187 (9th Cir. 2001) (rejecting preindictment delay claim on basis of lack of prejudice without addressing government's reasons); *United States v. Doe*, 149 F.3d 945, 949 (9th Cir. 1998) (finding no "need . . . to address the second prong of the due process test" absent showing of actual prejudice); *United States v. Ross*, 123 F.3d 1181, 1186–87 (9th Cir. 1997) (same); *United States v. Martinez*, 77 F.3d 332, 335 (9th Cir. 1996) (same); *United States v. Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995) (same); *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995) (same); *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995) (same); *United States v. Breitkreutz*, 8 F.3d 688, 690 (9th Cir. 1993) (same), *abrogated on other grounds by Old Chief v. United States*, 519 U.S. 172, 178 (1997); *United States v. Hoslett*, 998

Post-*Lovasco* precedent from this Court lends further support to the appropriateness of the conjunctive test. In dicta in *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), *United States v. Gouveia*, 467 U.S. 180 (1984), and *United States v. $8,850*, 461 U.S. 555 (1983), the Court has described the standard consistent with the conjunctive test.[18]

F.2d 648, 659 (9th Cir. 1993) (rejecting preindictment delay claim solely because prejudice was "too speculative"); *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993) (finding no "need [to] address the second prong of the pre-indictment delay test" where defendants "did not establish actual prejudice"); *United States v. Huntley*, 976 F.2d 1287, 1290-91 (9th Cir. 1992) (reversing dismissal for preindictment delay where, "[s]ince prejudice was not established, the district court could not properly reach the second prong of the due process test, balancing the length of the delay against the reasons for it," and noting that "[t]he task of establishing the requisite prejudice for a possible due process violation is 'so heavy' that we have found only two cases since 1975 [both in other circuits] in which any circuit has upheld a due process claim"). Thus, although it is nominally a balancing jurisdiction, the Ninth Circuit has done little actual balancing.

[18] *See Youngblood*, 488 U.S. at 57 (emphasizing "the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the government," and citing *Marion* and *Lovasco* for the proposition that a due process violation is not shown where "'[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them'") (quoting *Marion*, 404 U.S. at 325); *Gouveia*, 467 U.S. at 192 ("[T]he Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense."); *$8,850*, 461 U.S. at 563 (stating that a claim of unconstitutional preindictment delay "can prevail *only* upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges") (emphasis added); *see also Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) (citing *Lovasco* for the proposition that that the Due Process Clause is a "safeguard against fundamentally unfair prosecutorial conduct" before an indictment is filed, and that it "may be violated, for instance, by prosecutorial delay that is 'tactical' or 'reckless'").

Thus, the split of authority is not as entrenched as Harris suggests, and may continue to resolve itself even without this Court's intervention.

B. The conflict of authority is not consequential.

In the meantime, the conflict of authority is tolerable because it rarely affects the outcome of cases. Of course, it is a somewhat unusual case where there is such significant preindictment delay that a due process claim is made in the first place. But even in the universe of cases where such a claim is made, many claims are denied due to the defendant's failure to satisfy the stringent actual-prejudice requirement, which is common to both the conjunctive test and the balancing test.[19]

Further, in cases where prejudicial delay is found, all jurisdictions agree that if the prosecution's reason for the delay is to obtain a tactical advantage, dismissal is required. Most jurisdictions that apply the conjunctive test and have had occasion to consider the question also agree that dismissal is appropriate if the reason for the

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[19] In addition to the cases from the Ninth Circuit cited in note 17, *supra*, there are several cases just among those cited in Harris's petition—from conjunctive and balancing jurisdictions alike—that were resolved on the basis that the defendant failed to establish actual prejudice, making it unnecessary to consider the prosecution's reasons for delay. *See State v. Laird*, 447 P.3d 416, 431 (Mont. 2019); *United States v. Irizarry-Colón*, 848 F.3d 61, 71 (1st Cir. 2017); *Cote*, 118 A.3d at 811-12; *Wyman v. State*, 217 P.3d 572, 579 (Nev. 2009); *Jackson v. State*, 614 S.E.2d 781, 784 (Ga. 2005); *Knickerbocker*, 880 A.2d at 477; *Brown*, 656 N.W.2d at 363; *Commonwealth v. Scher*, 803 A.2d 1204, 1229 (Pa. 2002); *United States v. Cornielle*, 171 F.3d 748, 753 (2d Cir. 1999); *United States v. Pardue*, 134 F.3d 1316, 1319-20 (7th Cir. 1998).

delay was prosecutorial recklessness.[20] Conversely, even balancing jurisdictions recognize that the prosecutorial reason for the delay must be somehow "culpable" or "unjustified" for dismissal to be warranted. *See*, *e.g.*, *Moran*, 759 F.2d at 783 ("our cases clearly require some showing of governmental culpability to prove a deprivation of due process"); *Stokes*, 248 P.3d at 960 (stating that "some level of government culpability" is necessary to make out a claim of unconstitutional pre-indictment delay, and that legitimate "'investigative delay' never violates a defendant's due process rights"); *State v. Luck*, 472 N.E.2d 1097, 1105 (Ohio 1984) (stating that "length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable").[21]

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[20] As Harris acknowledges, Pet. 8-9 & n.3, several jurisdictions that apply the conjunctive test recognize that the improper-purpose prong can be satisfied not only by intentional bad-faith delay, but alternatively by "'reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.'" *Lovasco*, 431 U.S. at 795 n.17 (quoting United States' concession that recklessness would suffice); *see*, *e.g.*, *United States v. King*, 560 F.2d 122, 129-30 (2d Cir. 1977); *Commonwealth v. Dame*, 45 N.E.3d 69, 79 (Mass. 2016); *Scher*, 803 A.2d at 1221-22, 1229-30; *Harrison v. United States*, 528 A.2d 1238, 1240 (D.C. 1987). *But see United States v. Rogers*, 118 F.3d 466, 476 (6th Cir. 1997) (rejecting recklessness); *United States v. Benson*, 846 F.2d 1338, 1343 n.5 (11th Cir. 1988) (same).

[21] Some courts have found dismissal appropriate where, in the face of a showing of actually prejudicial delay, the prosecution fails to proffer a reason for the delay at all. *See*, *e.g.*, *State v. Whiting*, 702 N.E.2d 1199, 1201-02 (Ohio 1998). But that is not a result of the substantive balancing test, per se, but rather is a result of a burden-shifting procedure that is ordinarily, but not exclusively, applied in balancing jurisdictions. Some jurisdictions that apply the conjunctive test also shift the burden to the prosecution to present its reason for the delay if the defense shows actual prejudice. *See*, *e.g.*, *United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1994) (en banc) (holding that "due process is only implicated if the government purposely delayed the indictment to take advantage, tactically, of the prejudice or otherwise acted in bad

Thus, the only cases where the conflict of authority is likely to make a difference to the outcome are those cases where prosecutorial delay caused substantial, actual prejudice and was negligent but was not reckless. Little wonder, then, that in the more than thirty years since Justice White identified the conflict in authority, *see Hoo v. United States*, 484 U.S. 1035, 1036 (1988) (White, J., dissenting from denial of certiorari), none of the petitions for certiorari presenting this issue has been granted.[22] The sheer rarity of cases where there is prejudicial delay that is negligent but not reckless counsels against the need to grant review.

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faith," but that "the burden shifts to the government to explain its reasons for delay after the defendant has proven prejudice"); *Gonzales v. State*, 805 P.2d 630, 633 (N.M. 1991) (adopting conjunctive test but providing for burden shifting: "if defendant makes a prima facie showing of prejudice and that the state knew or should have known delay was working a tactical disadvantage on defendant, then the burden of production shifts to the prosecution to articulate a legitimate reason for the delay"); *State v. Stock*, 361 N.W.2d 280, 282-84 (S.D. 1985) (adopting conjunctive test but placing "burden of establishing justification for preaccusatorial delay" on the prosecution). Whether such a burden-shifting procedure is appropriate is a separate issue from the substantive question that Harris presents, which is whether the conjunctive test or the balancing test applies.

[22] *See Lively v. United States*, No. 17-352, 2017 WL 4004790 (cert. pet. filed Sept. 5, 2017), *cert. denied*, 138 S. Ct. 366 (2017); *Shiner v. United States*, No. 11-808, 2011 WL 6934734 (cert. pet. filed Dec. 23, 2011), *cert. denied*, 565 U.S. 1202 (2012); *McGuire v. Wisconsin*, No. 10-536, 2010 WL 4163766 (cert. pet. filed Oct. 18, 2010), *cert. denied*, 562 U.S. 1110 (2010); *G.R.H. v. Louisiana*, No. 09-1440, 2010 WL 2132051 (cert. pet. filed May 25, 2010), *cert. denied*, 562 U.S. 834 (2010); *Robinson v. Ohio*, No. 08-1188, 2009 WL 788663 (cert. pet. filed Mar, 19, 2009), *cert. denied*, 558 U.S. 815 (2009); *Messer v. Ohio*, No. 08-237, 2008 WL 3911269 (cert. pet. filed Aug. 21, 2008), *cert. denied*, 555 U.S. 1045 (2008); *Holton v. Georgia*, No. 06-537, 2006 WL 2985283 (cert. pet. filed Oct. 12, 2006), *cert. denied*, 549 U.S. 1078 (2006); *Scher v. Pennsylvania*, No. 02-1031, 2003 WL 21698367 (cert. pet. filed Jan. 3, 2003), *cert. denied*, 538 U.S. 908 (2003); *Gaylor v. West Virginia*, No. 00-395, 2000 WL 33999536 (cert. pet. filed Aug, 30, 2000), *cert. denied*, 531 U.S. 979 (2000); *Desai v. Michigan*, No. 99-1471, 2000 WL 34013948 (cert. pet. filed Jan. 31, 2000), *cert. denied*, 531 U.S. 811 (2000); *Mulderig v. United States*, No. 97-805, 1997 WL 33549730 (cert. pet. filed

CONCLUSION

The petition for a writ of certiorari should be denied.

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Nov. 12, 1997), *cert. denied*, 523 U.S. 1071 (1998); *Manges v. United States*, No. 97-315, 1997 WL 33557786 (cert. pet. filed Aug. 19, 1997), *cert. denied*, 523 U.S. 1106 (1998); *Dunlap v. Arizona*, No. 96-1660, 1997 WL 33561890 (cert. pet. filed Apr. 14, 1997), *cert. denied*, 520 U.S. 1275 (1997); *Crouch v. United States*, Nos. 96-315 & 96-319 (petition not available on Westlaw), *cert. denied*, 519 U.S. 1076 (1997); *Michigan v. Mallory*, No. 94-1940, 1995 WL 17048483 (cert. pet. filed May 26, 1995), *cert. denied*, 516 U.S. 912 (1995); *Bennett v. Arkansas*, No. 94-1315, 1995 WL 17048847 (cert. pet. filed Jan. 31, 1995); *cert. denied*, 514 U.S. 1018 (1995); *Anagnostou v. United States*, No. 92-1245, 1993 WL 13075383 (cert. pet. filed Jan. 22, 1993), *cert. denied*, 507 U.S. 1050 (1993); *Lauver v. United States*, No. 90-1211, 1991 WL 11176621 (cert. pet. filed Jan. 11, 1991), *cert. denied*, 500 U.S. 941 (1991); *Barker v. Howell*, No. 90-336, 1990 WL 10059243 (cert. pet. filed Aug. 22, 1990), *cert. denied*, 498 U.S. 1016 (1990); *Bennett v. Arkansas*, No. 90-138, 1990 WL 10058607 (cert. pet. filed July 19, 1990), *cert. denied*, 498 U.S. 851 (1990).