No. 20-6387

IN THE

Supreme Court of the United States

DARRIN B. WOODARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE DUE PROCESS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Due Process Institute is a bipartisan, nonprofit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Institute has participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, including *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and *United States v. Haymond*, 139 S. Ct. 2369 (2019).

This case presents an important, recurring criminal law issue on which the federal courts of appeals and state courts of last resort are divided: when the prosecution's pre-indictment delay violates due process. Resolving the issue is essential to protecting defendants' ability to present a complete defense, ensuring that criminal trials continue to serve their central function of discovering the truth through fundamentally fair procedures, and safeguarding public confidence in criminal prosecutions.

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[1] Pursuant to Rule 37.2(a), counsel for *amicus curiae* provided notice of *amicus*'s intention to file this brief to counsel of record for all parties. Counsel of record for Petitioner and Respondent have both consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The federal courts of appeals and state courts of last resort have long diverged on "the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause." *Hoo v. United States*, 484 U.S. 1035, 1035 (1988) (White, J., dissenting from denial of certiorari). Some courts balance the prejudice to the defendant against the government's justification for the delay. *See* Pet. 8-10. Others, by contrast, find a due process violation only if the defendant proves that the government delayed the indictment to gain a tactical advantage over or to harass the defendant. *See* Pet. 6-8.

It is time for this Court to address "this important question of constitutional law," *Hoo*, 484 U.S. at 1036 (White, J., dissenting from denial of certiorari). Not only is there a deeply entrenched split on the issue, but also the improper-intent rule is irreconcilable with the historical and doctrinal underpinnings of the due process guarantee and produces unworkable and unfair results.

As to due process principles and precedent, Founding-era documents show that the Due Process Clause protects a defendant's right to a fair *trial*. The fairness of a trial does not turn on the prosecution's subjective intent to harm the defendant's case. Rather, it turns on how the trial is conducted—for example, what evidence is available to the defendant, how jurors are selected, and whether the defendant is compelled to stand trial in prison clothes or shackles—

and the objective justifications for any prejudicial conduct. Many trial-related due process doctrines—such as *Brady v. Maryland*, 373 U.S. 83 (1963)—do not require proof of the prosecution's subjective intent to show a due process violation. The right to a trial free from prejudicial, unjustified delay stands on the same due process footing.

Nor is there practical sense in requiring defendants to prove that the government subjectively intended to harm the defendant before a court can find that unjustified and prejudicial pre-indictment delay violated due process. A defendant will virtually never have access to the necessary evidence because he cannot require prosecutors to produce the relevant proof. And a court should not be asked to inquire into the subjective motives of individual prosecutors in this context. Not only is the inquiry into motive impractical, it is unnecessary: focusing on objective facts, rather than subjective intent, will not create a "floodgates" problem. Even without a subjective-intent requirement, the requirement that a defendant show specific, concrete prejudice from the delay screens out insubstantial claims.

The need for a viable remedy for unjustified and prejudicial pre-indictment delay has increased in recent years. With technological change, hard-copy records have been traded for more ephemeral digital data, increasing the prospect of prejudice from a dilatory prosecution. Meanwhile, jurisdictions across the country have lengthened or eliminated criminal statutes of limitations—the traditional safeguard against pre-indictment delay—leaving defendants more vulnerable than ever to lengthy delays that compromise

their basic right to a fair trial. And the past few decades have shown that the answer to the question presented is often outcome-determinative for defendants seeking relief from prejudicial pre-indictment delay.

This Court should grant the petition and reverse the Tenth Circuit's decision.

ARGUMENT

I. Fundamental Due Process Principles Establish That Proof Of Prosecutors' Subjective Intent To Harm A Defendant Should Not Be Required To Show That Pre-Indictment Delay Violates Due Process.

This Court has held that the Due Process Clause "protect[s] against oppressive delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *see also United States v. Marion*, 404 U.S. 307, 324 (1971). To effectuate that due process guarantee, this Court should hold that, if a defendant shows prejudice from pre-indictment delay, the burden then shifts to the government to provide objective evidence that it had legitimate reasons for the delay. A court can then balance the government's reasons against the prejudice to the defendant to determine whether the delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790 (internal quotation marks omitted). This approach—which does not require the defendant to prove the prosecution's subjective intent to harm the defendant by delaying prosecution—accords with the historical underpinnings of the due process guarantee and this Court's precedent.

A. The focus on prejudice to the defendant and objective reasons for delay, rather than the subjective intent of the prosecution to undermine the defense case, comports with the purpose of the due process guarantee. That guarantee derives from the Magna Carta, *see Kerry v. Din*, 576 U.S. 86, 91 (2015), which required the State to "not deny or defer to any man either justice or right." Magna Carta, ch. 29 (1225), *translated and quoted in* Sir Edward Coke, The Second Part of the Institutes of the Laws of England 45 (Brooke 5th ed. 1797). Consistent with this requirement, British justices in the "late thirteenth century . . . were visiting the countryside three times a year." *Klopfer v. North Carolina*, 386 U.S. 213, 223-24 (1967). They traveled frequently to prevent delays in both trials and indictments. *See id.* at 223 & n.10.

Sir Edward Coke, who was "read in the American Colonies by virtually every student of the law," subsequently affirmed this view of the guarantee in chapter 29 of the Magna Carta. *Id.* at 225. He explained that it promised all citizens the right to "have justice . . . fully without any denial[], and speedily without delay." *Id.* at 224 (internal citations and quotation marks omitted).

That the Magna Carta—and, in turn, the Due Process Clause—protect against pre-indictment delay makes sense: Central to the due process guarantee is the rule that a defendant must have a fair and reasonable opportunity to "prepare his defense." *United States v. Britton*, 107 U.S. 655, 661 (1883); *see also, e.g.*, *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("We have long interpreted this standard of fairness to require that criminal defendants be afforded a

meaningful opportunity to present a complete defense."). Whether a defendant has a fair and reasonable opportunity to prepare his defense turns in part on what evidence is available to him. And the longer a prosecution is delayed, regardless of the reason for that delay, the more difficult it will be for a defendant to locate and present the necessary evidence.

As stated in an English decision from roughly 53 years after the Fifth Amendment's adoption:

> It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.

The Queen v. Robins, 1 Cox Crim. Cas. 114 (Somerset Winter Assizes 1844).[2]

In other words, pre-indictment delay can violate due process because it can deprive a defendant of the evidence necessary to defend himself. That problem

[2] In *Robins*, the court applied a standard of fundamental fairness to a two-year delay occasioned by the failure of a private party to file a complaint, not by police inaction. It declined to try the defendant where no satisfactory explanation was given for the delay.

does not arise only when the prosecution has set out to harm the defendant by delaying charges for tactical reasons or malice. It arises whenever the prosecution is dilatory, as measured by objective factors, and the delay results in the disappearance of probative, exculpatory evidence. First principles of due process counsel in favor of relief because of the damage to the fairness of the trial, regardless of the good faith of the prosecutor.

B. Precedent does not demand that a due process violation invariably require proof of the prosecution's subjective bad motive. To the contrary, foundational due process doctrines recognize that "the touchstone of due process analysis [even] in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

Perhaps the most prominent example of a due process rule governing the fairness of the trial that does not require proof of the prosecution's subjective intent is *Brady*, 373 U.S. 83. In that case, the Court held that the prosecution's suppression of exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. *Brady* recognized that the aim of due process "is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." *Id.*

The Court reaffirmed this principle in *United States v. Agurs*, 427 U.S. 97 (1976), which held that a prosecutor's failure to respond to a defense request for

specific discovery is rarely excusable. *Id.* at 106. In assessing when such a failure would violate due process, the *Agurs* Court focused on the effect on the trial of the prosecution's nondisclosure, as opposed to the prosecutor's "moral culpability, or . . . willfulness." *Id.* at 110. If "suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.*; *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor [to ensure that evidence bearing on credibility is disclosed to the jury].").

Even when a defendant's access to evidence is not at issue, this Court has invalidated prosecutorial actions compromising the fairness of a trial irrespective of the prosecutor's intent. For example, this Court held in *Estelle v. Williams*, 425 U.S. 501 (1976), that the State violates a defendant's due process rights where it "compel[s]" him "to go to trial in prison or jail clothing," because that clothing is a "constant reminder of the accused's condition" that "may affect a juror's judgment." *Id.* at 504-05. In articulating this rule, the Court focused on "the fairness of the fact-finding process," *id.* at 503, not the prosecution's intent in compelling the defendant to stand trial in his prison attire. The Court's approach has been the same in numerous other due process contexts. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (prosecutor's intent irrelevant to question whether prosecution's decision to re-charge defendant with more serious offense after defendant refused a plea deal violates due process); *Doyle v. Ohio*, 426 U.S.

610, 619 (1976) (prosecution's use of defendant's silence upon arrest as impeachment evidence violated due process, irrespective of prosecutor's intent).[3]

C. By contrast, due process cases involving misconduct by police and other law enforcement officials often do require proof of subjective intent. *See*, *e.g.*, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); *Killian v. United States*, 368 U.S. 231, 242 (1961) (FBI agents' prejudicial destruction of evidence did not offend due process when the materials "were destroyed by the agents in good faith and in accord with their normal practices").

This distinction is consistent with the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Green*, 527 U.S. 263, 281 (1999). A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it

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[3] Even when prosecutorial intent is relevant to a due process analysis, a defendant need not prove subjective intent. *See, e.g.*, *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974) (prosecution's reindictment of defendant on more onerous charges after defendant's successful appeal violates due process where there is "a realistic likelihood of 'vindictiveness'"; "actual retaliatory motivation" need not be shown).

is to use every legitimate means to bring about a just one." *Id.*; *see also, e.g.*, Am. Bar Ass'n, Project on Standards for Criminal Justice, Prosecution Functions 3-1.2(f).

Because prosecutors have affirmative obligations to achieve justice, their actions may violate due process even when they are not "culpab[le]." *Smith*, 455 U.S. at 219; *see supra* pp.7-9. That principle justifies a due process test that focuses on the government's objective justifications for delay, rather than any evil motive, once the defendant has shown that pre-indictment delay caused prejudice.

II. Practical Considerations Confirm That Defendants Should Not Have To Prove Prosecutors' Subjective Intent To Establish That Pre-Indictment Delay Violates Due Process.

Pragmatic considerations also support using an objective inquiry into the government's reasons for delay, rather than saddling the defendant with the burden to prove a prosecutor's subjective intent to inflict prejudice. First, a defendant will rarely have evidence of the prosecution's subjective intent. Second, requiring proof of subjective intent is not necessary to address any "floodgates" problem; defendants seeking to mount a delay-based due process challenge must already prove prejudice from the delay, and that burden weeds out insubstantial claims.

A. A due process right conditioned on proving the prosecution's wrongful motive undercuts and devalues the right because a defendant will rarely, if ever, have access to the necessary proof. *See North Caro-*

lina v. Pearce, 395 U.S. 711, 725 n.20 (1969) ("The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case.").

The defendant has no window into the mind of the prosecutor, nor can he rely on compulsory process to fill that gap. *See* Pet. 19-21. Rule 16 of the Federal Rules of Criminal Procedure—the federal criminal defendant's principal discovery tool—is circumscribed, both in the type of information a defendant can solicit and in the prosecutor's power to deflect such requests with an assertion of privilege. *See id.* And the scope of Rule 16 discovery is confined to "the defendant's response to the Government's case in chief," excluding discovery for "any claim that is a 'sword,' challenging the prosecution's conduct of the case." *United States v. Armstrong*, 517 U.S. 456, 462 (1996). Discovery for a defendant's due process challenge falls outside the ambit of this "shield-only" construction of Rule 16. *See id.* Although some States have more permissive discovery rules, such frameworks are uncommon. *See* Pet. 21.

With compulsory process foreclosed, and little visibility into the prosecution's subjective decision-making, the defendant has no recourse but to ask politely. Yet the information the defendant seeks—a full and forthright explanation of delay that lays bare the prosecution's own potential misconduct—is unlikely to be volunteered. *See United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) ("[O]nce the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay. . . . How else is the defendant to know why the government waited so long to indict him?"). Thus,

requiring defendants to prove the prosecution's subjective intent to show that pre-indictment delay violates due process renders the right practically insignificant. It also launches courts on an intrusive and often indeterminate inquiry into the mind of a prosecutor, distracting the judicial process from the core concern: whether the defendant's trial will be fair.

B. Requiring defendants to prove prosecutorial intent to establish a due process violation is also unnecessary as a practical matter to prevent any hypothetical flood of such claims. The prejudice requirement is more than sufficient, on its own, to serve any gatekeeping function.

As this Court has recognized, only the rare defendant will be able to show prejudice from a pre-indictment delay. *See Lovasco*, 431 U.S. at 796-97 (noting that, in five years, "so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay"); *accord United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) ("An indictment is rarely dismissed because delay by the prosecution rises to the level of a Fifth Amendment due process violation. . . . The defendant's burden to show actual prejudice is heavy and is rarely met."); *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997) (similar); *Sowa*, 34 F.3d at 450-51 (similar).

The obstacles defendants face in trying to prove prejudice are already daunting without demanding proof of the prosecutor's mental state. A defendant often will not be able to prove, for example, that a key

witness would have had a better memory of the day in question had the prosecution proceeded more swiftly; after all, "what has been forgotten can rarely be shown." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). The defendant's own memory may fade, and "[h]is failure of memory and his inability to reconstruct what he did not remember [will] virtually preclude[] his showing in what respects his defense might have been more successful if the delay had been shorter." *Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965). Similarly, if delay results in "the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories," *Marion*, 404 U.S. at 331 (Douglas, J., concurring), the defendant may be unable to show just how potent that evidence was because he cannot prove what it contained or how it would have helped his case. Precisely because the prejudice requirement thus demands "a speculative inquiry into what might have occurred in an alternate universe," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), "demonstration of prejudice" is often "a practical impossibility," *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

The requirement to show prejudice may fall most heavily on the innocent defendant. "With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime," to preserve relevant documents, or to identify and maintain contact with prospective witnesses. *Nickens v. United States*, 323 F.2d 808, 813 (D.C. Cir. 1963) (Wright, J., concurring). If a showing of prejudice can nonetheless be made, the defendant should

be able to require the government to explain its justifications for delay before putting him on trial for a crime he no longer can refute.

III. Recent Technological, Statutory, and Jurisprudential Developments Make This Court's Intervention More Pressing.

Although courts have disagreed on the answer to the question presented for several decades, recent developments make this Court's intervention badly needed now. First, as technology has developed, certain evidence has become more susceptible to destruction, and thus defendants are more likely to be prejudiced by pre-indictment delay. Second, as jurisdictions extend statutes of limitations, defendants have lost the primary safeguard against pre-indictment delay, making the role of the Due Process Clause in guarding against such delay more critical. Finally, decisions from the federal courts confirm that the answer to the question presented is outcome-determinative for many defendants.

A. Recent developments in technology can accelerate the destruction of evidence and heighten the prejudice from pre-indictment delay. People create more data than ever before, leaving behind vast digital footprints as they go about each day. Yet many digital data are more ephemeral than their hard-copy predecessors. Documents that might once have been letters may now be emails subject to automatic-deletion policies. Calendars that would have been kept on paper in the past may be stored in phones, liable to be replaced or lost without adequate data backup. Cell-tower locational data, ripe for bolstering alibis, are

regularly deleted.[4] Backup data on network servers are subject to routine deletion.[5] And even setting aside the limitations of deletion policies and lost devices, digital evidence may be lost or corrupted with a simple lapse of electrical power[6] or broader server disruptions.

As the digital evidence at defendants' disposal withers with time, defendants suffer a grave disadvantage from prosecutorial delay. *See, e.g.*, *United States v. Medina*, 918 F.3d 774, 790-91 (10th Cir. 2019) (finding insufficient showing of prejudice where the defendant lost his cellphone, and cell-site location data were destroyed under 2-year retention policy, even though defendant asserted the evidence was critical to his alibi); *United States v. Jackson*, 488 F. Supp. 2d 866, 869, 872 & n.5 (D. Neb. 2007) (finding

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[4] Rob Pegoraro, *Apple and Google Remind You About Location Privacy, But Don't Forget Your Wireless Carrier*, USA Today (Nov. 23, 2019), https://www.usatoday.com/story/ tech/columnist/2019/11/23/location-data-how-much-do-wireless-carriers-keep/4257759002/ (listing cell tower location information retention policies at the four major nationwide carriers, with data retained for as little as one year).

[5] *See, e.g.*, Off. of Legal Educ., Exec. Off. for U.S. Attys., U.S. Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 139 (2009), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf ("[N]o law regulates how long network service providers must retain account records in the United States. Some providers retain records for months, others for hours, and others not at all.").

[6] *See id.* at 29 ("With some electronic devices . . . information may be lost when the device's battery dies, or new information may cause older information to be lost permanently.").

prejudice from pre-indictment delay where "the alleged audiotape is missing"; the government's computer was "wiped . . . clean during a routine upgrade"; "the defendant's computer does not have any record of the conversations;" and "no official transcripts of the conversations exist").

In a world trending more digital by the day, a defendant's capability to put on an effective defense is increasingly entwined with the timeliness of his indictment and trial. These developments underscore that the time for the Court's review of the question presented is now.

B. This Court's intervention on the question presented is all the more pressing because of recent, sweeping extensions in statutes of limitations. This Court has acknowledged that "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966); *see Marion*, 404 U.S. at 322. These limitations periods are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time," "to minimize the danger of official punishment because of acts in the far-distant past," and to "encourag[e] law enforcement officials promptly to investigate suspected criminal activity." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970).

But statutes of limitations have lengthened considerably in recent years—and in some jurisdictions, fallen away entirely. *See, e.g.*, *United States v. Briggs*,

__ S. Ct. __, 2020 WL 72500099 (Dec. 10, 2020) (interpreting the Uniform Code of Military Justice as providing no statute of limitations in rape prosecutions); *see also* Pet. 32-34. The extension of these limitations periods erodes the core safeguard on which defendants could once rely in protecting themselves against significant pre-indictment delay.

Notwithstanding the policy justifications for this trend, it undercuts the traditional rationale for placing such heavy constraints on delay-based due process challenges. As statutes of limitation extend, the Due Process Clause becomes a more essential control on otherwise-unchecked delay.

C. Recent case law confirms that this Court's intervention on the question presented is sorely needed for an additional reason. The answer is likely to be outcome-determinative for any defendant who can prove prejudice from pre-indictment delay.

If the relevant court of appeals weighs the government's reasons for delay against the prejudice to the defendant, without requiring the defendant to prove an impermissible prosecutorial intent to harm him as the motive for the delay, a defendant who shows prejudice is likely to prevail on his due process claim. For example, in *Ross*, the defendant showed prejudice from a seven-month delay where "the Government's case consisted solely of" confiscated narcotics and "a policeman's testimony that he had purchased narcotics from appellant." 349 F.2d at 212. The policeman "had no personal recollection of the incident" by the time of the trial, and the defendant "could no longer remember where he was or what he was doing" at the

time of the alleged offense. *Id.* at 212, 214. The only other defense witness "was so doubtful of her ability to recall that she decided to forego the opportunity to testify on his behalf." *Id.* at 215. The court of appeals reversed the defendant's conviction, finding that "[t]he Government's case should, at the least, have more substance . . . if it is to override the appellant's interest in earlier notification." *Id.* at 216.

Other cases applying a similar test grant relief in similar circumstances. *See, e.g.*, *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (granting habeas relief based on 27-month pre-indictment delay, where the defendant's key alibi witness could no longer be located and the government "candidly stated that [its] justification for the preindictment delay was mere convenience"); *United States v. Barket*, 530 F.2d 189, 193, 195 (8th Cir. 1976) (affirming dismissal of indictment where defendant had suffered "severe" prejudice from 47-month delay, during which six highly material defense witnesses had died, remaining witnesses had "'extreme and understandable difficulty remembering' relevant facts," and "governmental negligence render[ed] the delay unreasonable").

By contrast, where a court requires defendants to prove that the prosecution intentionally delayed to secure tactical advantage, defendants routinely lose delay-based due process claims based on similar facts:

- For example, *United States v. Benson*, 846 F.2d 1338 (11th Cir. 1988), found prejudice from an eight-year pre-indictment delay where (1) the defendant's two alibi witnesses, who would place him in a different country

during the alleged crime, were no longer available, (2) a federal agent who would have testified on the defendant's behalf had died, (3) the defendant had lost his passport, which would have corroborated his travel during the alleged crime, and (4) various other exculpatory documents had been lost. But the court denied relief because the defendant failed to show the prosecution "deliberately caused the delay to gain any tactical advantage." *Id.* at 1343 (internal quotation marks omitted).

- Similarly, *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), found prejudice from a three-year delay where two key defense witnesses had died and the materiality of their testimony was clear. But the court denied relief because the defendants had not shown "that the delay was a deliberate tactical maneuver by the government." *Id.* at 1158 (internal quotation marks omitted).

- *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983), found prejudice from a one-a-half-year delay where a key defense witness, who had confessed to the murder for which the defendant was tried, had died. But the court denied relief because the defendant did not "show that the delay was a deliberate tactical maneuver by the government." *Id.* at 1557 (internal quotation marks omitted).

In each of these cases, had the court of appeals not required the defendant to prove prosecutorial malice,

the defendant would have prevailed on a delay-based due process claim.

The same is true of petitioner here. In the three years of unexplained delay between his alleged offense and his indictment, the key defense witness committed suicide and thus could no longer corroborate petitioner's innocence. *See* Pet. 3-4. The district court found that petitioner proved prejudice from the pre-indictment delay and expressed sympathy for "the equity of" his situation. *Id.* at 4. But the court denied him relief. *Id.* Under Tenth Circuit law, petitioner was required to prove the delay was intentional or otherwise malicious. *Id.* Because he could not do so, he lost his delay-based due process challenge to his conviction. *Id.* But had his case been prosecuted in a jurisdiction that did not require him to prove the prosecution's subjective intent, he could have prevailed on his due process claim and could now be a free man.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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