No. 21-63

In the Supreme Court of the United States

TERRANCE MILES,
Petitioner,

v.

BELINDA SANCHEZ, Acting Warden,
Respondent.

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

BRIEF IN OPPOSITION

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October 22, 2021

QUESTIONS PRESENTED

1. Whether, in a speedy-trial analysis, it is clearly established law that the government should bear the responsibility for a trial delay to conduct DNA testing when the defendant initially accedes to the delay because the evidence could benefit him?

2. Whether, in a speedy-trial analysis, it is clearly established law that a trial delay unconstitutionally prejudices a defendant imprisoned on other charges when the only basis for prejudice is that the delay caused the defendant to incur more restrictive prison conditions and lose access to rehabilitation opportunities, and when the defendant does not even provide evidence of those conditions and lost opportunities?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Sixth Circuit were the Petitioner Terrance Miles and Scott Jordan, the former warden of Luther Luckett Correctional Complex where the Petitioner was incarcerated. The Petitioner is currently incarcerated at Southeast State Correctional Complex. When the Petitioner filed a petition for a writ of certiorari, Larry Chandler was the warden of that facility. Respondent Belinda Sanchez now serves as the acting warden.

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INTRODUCTION

The Petitioner seeks review of the Sixth Circuit's denial of habeas relief under the Antiterrorism and Effective Death Penalty Act for a speedy-trial claim. But AEDPA makes this case a poor vehicle to resolve the questions presented. More importantly, the Sixth Circuit correctly applied AEDPA in deferring to the Supreme Court of Kentucky's decision that the Petitioner's right to a speedy trial was not violated.

STATEMENT OF THE CASE

A jury convicted the Petitioner of murdering Michael Teasley, a bouncer at a Louisville night club, on February 25, 2005. Pet. App. 2a. The two had gotten into a fight earlier that night. *Id.* at 3a. Later, when the club was closing, Teasley was shot and killed. *Id.* at 2a–3a. An off-duty officer who heard the gunshots saw a man running from the crime scene. *Id.* at 3a. The off-duty officer recognized the fleeing man as the same person who had fought with Teasley earlier. *Id.* The fleeing man was wearing a toboggan hat. *Id.* Later, officers collected a toboggan hat from the crime scene. *Id.*

The Petitioner was indicted for Teasley's murder in March 2005. *Id.* at 258a. The court scheduled trial to start on December 13, 2005. *Id.* at 112a–13a. Shortly before that date, the Commonwealth of Kentucky explained that it was waiting on DNA testing on the toboggan hat and ballistics testing on a gun. *Id.* at 107a–08a. The Commonwealth noted that "at this point" it planned to allege that the Petitioner was wearing the hat at the time of the shooting and that the hat would

be "either inculpatory or exculpatory." *Id.* It also stated that the lab had possession of the hat "for a number of months now." *Id.* The hat, however, had been sent for testing only a month before, on November 7, 2005. *Id.* at 92a. While the Petitioner's attorney noted no objection, explaining that he "expected" the delay, the Petitioner himself interjected that the Commonwealth had the hat since February, characterized it as a "stall tactic," and asked for someone to be present during the testing. *Id.* at 108a, 110a.

On the scheduled trial date, the Commonwealth moved for a continuance because it was still waiting for the hat test results. *Id.* at 113a. It again noted that the results "could help both sides," being exculpatory or inculpatory, before clarifying that "it could be nothing or it could be inculpatory." *Id.* The court granted a continuance until April 11, 2006. *Id.* at 114a. On that date, the lab still had not tested the hat, so the Commonwealth asked for a second continuance. *Id.* at 118a, 120a. The Petitioner objected but agreed that the testing was a "crucial part of the case" that could "favor" either side. *Id.* at 122a. The court granted the request for a continuance and another in September when the testing was still incomplete. *Id.* at 93a, 121a.

The trial began on December 12, 2006, and a jury convicted the Petitioner of murder and other charges.[1] *Id.* at 92a.

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[1] The Petitioner devotes several pages to describing what occurred at trial, including several allegations of "inappropriate arguments" made by the prosecutor. Pet. 12. But the questions presented concern only the lower court's speedy-trial analysis. So the only potentially relevant comments made by the prosecutor were

The Petitioner appealed to the Supreme Court of Kentucky, raising a speedy-trial claim. *Id.* The court rejected the claim, applying the four factors this Court laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Id.* at 93a–95a. For the first factor—length of delay—it found the 21-month delay sufficient to trigger the *Barker* analysis and to presume prejudice. *Id.* at 93a.

As for the second factor—the reason for the delay—the court noted multiple considerations. *Id.* at 94a. First, the continuance requests by the Commonwealth resulted from the wait for the hat test results. *Id.* Second, the court found that there was no bad faith in the delay. *Id.* It reasoned that after the test results came back negative, the Commonwealth's decisions to proceed to trial and argue that the hat was irrelevant did not show bad faith. *Id.* The Commonwealth had been frank that the testing might hurt its case. Once that proved true, the Commonwealth did not act in bad faith by proceeding to trial and arguing that the hat was insignificant. Indeed, considering that the Commonwealth's case was supported by eyewitness evidence against the Petitioner, the Commonwealth "had no choice but to minimize the evidentiary value of the hat." *Id.* Third, the prosecutor was regularly calling

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those during his closing argument, where he stated that the police "did not think [the hat] was involved," but he asked them to send it to the lab to "make sure." Pet. App. 219a. Similarly, the prosecutor also argued that the hat "has nothing to do with this case." *Id.* But even those comments are not at issue because the Petitioner does not contest the Supreme Court of Kentucky's holding that the Commonwealth did not act in bad faith by having the hat tested. To be sure, at one point he quibbles with the bad-faith determination, *see* Pet. 24, but it is outside the questions presented.

the lab to check on the status of the testing. *Id.* Fourth, the Petitioner admitted that the hat was crucial evidence and did not object to its testing. *Id.* at 95a.

For the third factor—assertion of the right—the court observed that while the Petitioner did assert the right, his counsel at first did not object to the continuance based on the testing. *Id.*

And as to the fourth *Barker* factor—prejudice—the court held that the Petitioner was not prejudiced by allegedly losing a key witness for trial. *Id.* It reasoned that there were minimal references to the potential witness in the record, no subpoenas were issued for that witness for the earlier trial dates before the witness's death, and the Petitioner failed to show the importance of the witness's testimony. *Id.*

In balancing all four *Barker* factors, the Supreme Court of Kentucky held that the Petitioner's right to a speedy trial was not violated. *Id.*

After state post-conviction proceedings, the Petitioner filed a habeas petition in federal court. *Id.* at 27a. The district court referred the petition to a magistrate judge who recommended denying it. *Id.* at 29a, 38a. The magistrate judge reasoned that the second factor could cut both ways but favored the Commonwealth because testing the hat was a valid reason for the delay: it was important evidence that could favor either party and was not motivated by bad faith. *Id.* at 33a–34a.

And on the fourth factor, the magistrate judge found that the Petitioner had failed to show he was

prejudiced by the delay. *Id.* at 35a–36a. The magistrate judge reasoned that the "real crux" of the Petitioner's prejudice argument, the loss of a witness, was insufficient for similar reasons as those identified by the state court. *Id.* at 36a–37a.

The Petitioner made several other allegations of prejudice: that he suffered anxiety because of the delay and that he lost out on rehabilitation opportunities and less strict housing. *Id.* at 35a–36a. The magistrate judge rejected those arguments as well. The magistrate judge concluded that the Petitioner had failed to show sufficient anxiety. *Id.* at 36a. And the magistrate judge reasoned that the Petitioner failed to support his argument that his indictment caused him to be housed in a more secure facility (he was in prison on other charges) and prevented him from participating in rehabilitation programs. *Id.*

The district court adopted the magistrate judge's recommendation and denied the Petitioner's habeas petition. *Id.* at 26a.

The Sixth Circuit affirmed. It held that the district court "appropriately deferred to the Kentucky Supreme Court's reasonable resolution[]" of the speedy trial claim. *Id.* at 2a, 18a. It noted that the state court's treatment of the second *Barker* factor was not contrary to, or an unreasonable application of, a clearly established holding of this Court. *Id.* at 14a. The Sixth Circuit rejected the Petitioner's argument that the Supreme Court of Kentucky had essentially ignored the question of who bore responsibility for the delay by limiting its analysis to the issue of bad faith.

Id. Instead, the Sixth Circuit reasoned that the state court specifically noted that the Petitioner's counsel admitted the hat was crucial evidence, which could be decisive either way, and did not initially object to the testing. *Id.* at 14a–15a. It therefore held that, given the "reasonable conclusion[] that testing was at first agreeable to both sides," the state court could have rationally concluded that the delay was for a valid reason. *Id.*

The Sixth Circuit also held that the state court's application of the fourth *Barker* factor was not contrary to, or an unreasonable application of, clearly established law. *Id.* at 18a. It rejected the Petitioner's arguments that the Supreme Court of Kentucky erred in requiring him to show particularized prejudice, in ignoring presumptive prejudice, and in not considering his other prejudice concerns of anxiety and oppressive pretrial incarceration. *Id.* at 16a–18a. As for the last of those arguments, the Sixth Circuit noted that the state court did not unreasonably apply clearly established law in not expressly weighing the "two less 'serious' forms of actual prejudice." *Id.* at 17a (quoting *Barker*, 407 U.S. at 532). It then noted that the Petitioner was already incarcerated on state charges and ineligibility for certain programs in state prison was "not the type of prejudice cognizable under the Sixth Amendment." *Id.* at 17a–18a (quoting *United States v. Robinson*, 455 F.3d 602, 609 (6th Cir. 2006)).

Following the Sixth Circuit's panel decision, it denied the Petitioner's petition for rehearing en banc with no judge requesting a vote on the petition. *Id.* at

104a–05a. The Petitioner then filed a petition for a writ of certiorari.

ARGUMENT

"*Barker*'s formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,' and the balance arrived at in close cases ordinarily would not prompt this Court's review." *Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (citation omitted) (quoting *Barker*, 407 U.S. at 530). Even assuming this is a close case, there is nothing in it to prompt the Court's review. For starters, AEDPA makes it a poor vehicle to resolve the questions presented. Instead of merely determining whether there was a speedy-trial violation here, the Court must decide whether the rules asserted by the Petitioner were clearly established and then, if so, it must further determine whether the state court's holding contradicted, or was an unreasonable application of, those rules.

More importantly, the Sixth Circuit correctly deferred to the Supreme Court of Kentucky's reasonable application of the *Barker* factors. The state court did not unreasonably apply, or reach a holding contrary to, a clearly established holding of this Court. It was reasonable for the state court to conclude that the Commonwealth should not bear responsibility for a delay to test evidence when the Petitioner acceded to it because the evidence could (and here did) help him. And even if the Commonwealth should bear more of the responsibility, the state court's holding that the testing was a valid reason for the delay did not contradict clearly established law because it mirrored this

Court's decision in *United States v. Loud Hawk*, 474 U.S. 302 (1986). Similarly, it was reasonable for the state court not to credit the Petitioner's argument that he was prejudiced by facing more restrictive confinement conditions or losing rehabilitation opportunities when he offered nothing in support. And even if the Petitioner had offered support, it would not have been contrary to, or an unreasonable application of, clearly established law to find that minimal prejudice showing insufficient.

I. AEDPA makes this case a poor vehicle to resolve the questions presented.

The Sixth Circuit reviewed the state court's denial of the Petitioner's speedy-trial claim under AEDPA. Relevant here, AEDPA prevents a federal court from overturning a state court's merits decision unless that decision was contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. 28 U.S.C. § 2254(d)(1). It is a "highly deferential standard for evaluating state-court rulings." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)). That means that the Supreme Court of Kentucky's speedy-trial holding must be either opposite to one of this Court's holdings or objectively unreasonable—not just incorrect—in applying that holding. *Id.*; *Williams v. Taylor*, 529 U.S. 362, 405, 409 (2000).

It was neither. But the Court can deny the petition without even considering that. AEDPA makes this case a poor vehicle to resolve the questions presented.

It prevents the Court from being able to squarely address whether responsibility for a trial delay should fall on the government when a defendant accedes to that delay because it could help him. Rather, than simply addressing that question, AEDPA would require the Court to determine whether the responsibility should fall on the government; whether such a rule was clearly established law under this Court's precedent; and whether the state court's decision was contrary to, or an unreasonable application of, that precedent.

Similarly, the Court would not be able to directly consider whether a defendant imprisoned on other charges is prejudiced by facing more restrictive confinement conditions or losing access to rehabilitation opportunities when he does not offer evidence in support. Nor could it directly consider whether that minimal form of prejudice by itself is enough under the fourth *Barker* factor. Instead, it would have to consider whether the answers to both questions are yes; whether that was clearly established by holdings of this Court; and whether the state court's holding was contrary to, or an unreasonable application of, those holdings.

What's more, because the questions presented must be viewed through AEDPA, at bottom the Petitioner is merely asking for error correction. He is asking the Court to correct the Sixth Circuit's alleged misapplication of AEDPA. Rule 10, however, demands more: it requires "compelling reasons" to grant certiorari. And the Petitioner has identified no such reasons.

The claimed conflict of the Sixth Circuit's decision with decisions of this Court and other courts of appeals—even if true—necessarily takes a backseat under AEDPA to whether the Supreme Court of Kentucky held contrary to, or unreasonably applied, clearly established law. And the importance of the speedy-trial right alone is not enough. The Court has already said that ordinarily such ad hoc determinations are insufficient to warrant review. *Brillon*, 556 U.S. at 91. That insufficiency is only compounded by AEDPA, under which the Court cannot even directly review the ad hoc speedy-trial determination.

The point needs no belaboring: AEDPA makes this case a poor vehicle to resolve the questions presented.

II. The Sixth Circuit correctly deferred to the state court's reasonable application of the second and fourth *Barker* factors.

In any event, the Sixth Circuit did not err in deferring to the Supreme Court of Kentucky's speedy-trial decision under AEDPA. In considering a speedy-trial claim, a court balances the four non-exhaustive factors from *Barker*: the length of delay, the reason for the delay, the defendant's assertion of his speedy-trial right, and prejudice to the defendant. *Barker*, 407 U.S. at 530; *Brillon*, 556 U.S. at 90. The Petitioner challenges only the state court's application of the second and fourth factors.

A. The Second Factor

The second *Barker* factor requires a court to consider the reason for a trial delay. It asks whether the

government or defendant is more to blame for the delay and assigns different weights to different reasons. *Brillon*, 556 U.S. at 90. Deliberate delays by the government or bad faith weigh heavily; non-deliberate or more neutral reasons, "'such as negligence or overcrowded courts' weigh less heavily 'but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Id.* (quoting *Barker*, 407 U.S. at 531). And valid reasons like "a missing witness . . . justify appropriate delay." *Barker*, 407 U.S. at 531.

The Petitioner argues that the state court ignored the Commonwealth's responsibility for the delay and that the Sixth Circuit erroneously approved of that analysis. Pet. 21. That is incorrect.

First, the Sixth Circuit neither held nor implied that the state court could ignore who was responsible for the delay. The Sixth Circuit specifically noted the Petitioner's argument that the Supreme Court of Kentucky had "ignore[d] the question of who bore responsibility for the delay" before rejecting it. Pet. App. 14a. The Sixth Circuit recognized that the state court considered that the Petitioner had admitted the hat was crucial evidence, represented it could be decisive for either side, and did not initially object through counsel to waiting for the results despite the delay in beginning the testing process.[2] *Id.* at 14a–15a. The Sixth

[2] That the Petitioner himself may have disapproved of the wait, *see* Pet. App. 110a, changes nothing, s*ee Brillon*, 556 U.S. at 90–91 ("Because 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by

Circuit held that those factors supported the "reasonable conclusions" that the testing was initially agreeable to both parties and the delay was appropriate. *Id.* at 15a. In other words, the Sixth Circuit found it reasonable for the state court to conclude that the blame for testing the hat did not fall on the Commonwealth alone—meaning that there was a valid reason for the delay. And the Sixth Circuit was right about that. It is not contrary to, or an unreasonable application of, any established federal law to conclude that a delay does not weigh against the government when the delay was at first agreeable to both parties and had the potential to help both parties. The Petitioner has identified no case in which this Court found the second factor to support a petitioner when the petitioner acceded to a delay because it could help him.

Second, even if the Commonwealth should bear more blame for the delay despite the Petitioner's approval, the Supreme Court of Kentucky's holding was still not contrary to, or an unreasonable application of, this Court's precent. That is because the state court's decision tracks this Court's decision in *Loud Hawk*. There, the Court considered whether to weigh delay caused by the government's interlocutory appeal. *Loud Hawk*, 474 U.S. at 315. It noted *Barker*'s statement that a delay from overcrowded courts would be weighed less heavily and acknowledged that "was the situation here." *Id.* But it still found the delay to be a

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the defendant's counsel is also charged against the defendant." (alteration in original) (quoting *Coleman v. Thompson,* 501 U.S. 722, 753 (1991))).

valid reason: "Given the important public interests in appellate review, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay." *Id*. (citation omitted). Although the Court noted that such delays could be weighed in the speedy-trial analysis, the respondents failed to show that it should give the delay "any effective weight towards their speedy trial claims." *Id.* at 316. And the Court added that there was "no showing of bad faith or dilatory purpose" by the government. *Id.*

Loud Hawk instructs that even delays from factors like overcrowded courts might not weigh against the government. Even though such factors usually minimally weigh against the government, they might not weigh against the government at all when the government brings such factors into play for a valid reason. That is precisely what occurred here. The state court found that the Commonwealth sent the hat to the lab not in bad faith, but because it was crucial evidence. The Commonwealth did so for a valid reason. So even assuming the Commonwealth should bear the blame for the testing delay, the state court did not err in not giving it "any effective weight." *Id.* At the very least, that decision did not violate clearly established law.

That is even clearer given that the dissent in *Loud Hawk* made a similar argument as the Petitioner here. It argued that the Court's declining to give "effective weight" to the reason for the delay "virtually ignore[d] the most obvious" reason for it: that the appellate court failed to promptly decide the interlocutory appeals. *Id.* at 324–25 (Marshall, J., dissenting). And it

asserted, based on *Barker*, that the reason should weigh against the government. *Id.* at 325. In other words, the dissent argued that the government's reason implicating a factor that otherwise would weigh against the government did not matter. But that argument did not carry the day in *Loud Hawk*. So it cannot carry the day here.

Finally, to respond to some loose ends the Petitioner raises on the second *Barker* factor: first, this case is not like *Barker* or *Doggett v. United States*, 505 U.S. 647 (1992), or the courts of appeals' cases the Petitioner cites. *See* Pet. 23. The Petitioner argues that *Barker* shows that if the government is responsible for a missing witness, it bears the blame. *Id.* at 22. *Loud Hawk*, however, makes clear the inquiry is more nuanced. And *Doggett* is not inconsistent with *Loud Hawk*. In *Doggett*, the Court focused on the government's failure to diligently seek the defendant before assigning it the blame for the delay. 505 U.S. at 652. Importantly, the government did not have a valid reason for its lack of diligence. *Id.* at 652–53 ("For six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that [the defendant] was living abroad, and, had they done so, they could have found him within minutes. While the Government's lethargy may have reflected no more than [the defendant's] relative unimportance in the world of drug trafficking, it was still findable negligence. . . ."). *Doggett* therefore is not inconsistent with *Loud Hawk* and does not provide the clearly established law the Petitioner needs.

Of course, neither can the lower court opinions that the Petitioner cites.

Second, the Petitioner highlights the Commonwealth's waiting nine months to send the hat to the lab. *See* Pet. 7, 23–24. But the Petitioner fails to note that the Commonwealth still sent the hat for testing a month before the scheduled trial and that the Petitioner's counsel did not initially object to the testing even though he knew it could take some time. *See* Pet. App. 108a (the Petitioner's attorney noting that he expected the delay).

And third, the Petitioner argues that the Commonwealth should be responsible for the time the lab took to test the hat. Pet. 24. But again, the Petitioner approved of that testing. And, in any event, *Loud Hawk* instructs that courts must consider the reason for a decision implicating more neutral reasons like overcrowded courts—or here, having evidence tested—before assigning blame for the delay. 474 U.S. at 315–16.

In short, the Sixth Circuit correctly deferred to the state court's analysis of the second *Barker* factor because it was not contrary to, or an unreasonable application of, clearly established law.

B. The Fourth Factor

The same is true for the fourth *Barker* factor. This factor considers the prejudice that results from a trial delay. There are three types: oppressive pretrial incarceration, anxiety and concern, and possible impairment of a defense. *Doggett*, 505 U.S. at 654. The "most serious" of them "is the last, because the inability of a defendant adequately to prepare his case skews the

fairness of the entire system." *Id.* (quoting *Barker*, 407 U.S. at 532).

The Supreme Court of Kentucky's application of this factor was not contrary to, or an unreasonable application of, clearly established law. It reasonably concluded that the Petitioner had not suffered prejudice from oppressive pretrial incarceration.[3] The Petitioner focuses on the Sixth Circuit's statement that "being 'ineligible for certain placements and programs in the state prison' because of the charges underlying a speedy-trial claim is 'not the type of prejudice cognizable under the Sixth Amendment.'" Pet. App. 17a–18a (quoting *Robinson*, 455 F.3d at 609). Even if there is some tension with that statement and statements of this Court in *Smith v. Hooey*, 393 U.S. 374, 378 (1969), and *Moore v. Arizona*, 414 U.S. 25, 27 (1973), the Supreme Court of Kentucky did not make the statement, and the Sixth Circuit's deference to it is defensible on other grounds. *See Yeager v. United States*, 557 U.S. 110, 126 (2009) (explaining that a prevailing party can "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals" (quoting *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979))).

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[3] The Petitioner, in a footnote, raises a version of oppressive-pretrial-incarceration prejudice by noting the lost chance for sentences to run concurrently. Pet. 27 n.4. But he does not argue that the state court erred in not considering that form of prejudice here. *See id.* Indeed, he could not because he forfeited that argument by failing to raise it in the Supreme Court of Kentucky. *See* Pet. App. 239a–40a.

The Sixth Circuit correctly noted that the state court did not act contrary to, or unreasonable apply, clearly established law by not explicitly addressing the Petitioner's argument that he suffered prejudice by facing more restrictive prison conditions and losing access to rehabilitation opportunities. Pet. App. 17a. There are, for example, "instances in which a state court may simply regard a claim as too insubstantial to merit discussion." *Johnson v. Williams*, 568 U.S. 289, 299 (2013).

Here, the Petitioner did argue to the Supreme Court of Kentucky that he suffered prejudice because of his prison conditions and his lost access to rehabilitation opportunities. *See* Pet. App. 239a–40a. He did not, however, offer anything to support the claim. *See id.* He did not refer to the "Reclassification Custody Forms" on which he now exclusively relies for support. *See* Pet. 8, 18. He did not even return to this prejudice argument in his reply brief before the state court. *See* Pet. App. 255a–57a. That the state court declined to address this unsupported, less serious form of prejudice is no surprise. *See, e.g.*, *United States v. Grimmond*, 137 F.3d 823, 830 (4th Cir. 1998) (explaining that a defendant must make a "credible showing" that his current sentence is "substantially affected" by the delay). Instead, it explicitly considered the Petitioner's argument on the most serious form of prejudice and found it wanting because there too the Petitioner offered nothing in support. *See* Pet. App. 95a. It was not objectively unreasonable to conclude that the Petitioner similarly failed to show prejudice from a less serious, also unsupported, form of prejudice.

Even if the Petitioner had supported his oppressive-incarceration argument with the reclassification forms (and assuming those forms are sufficient proof of more restrictive confinement conditions and lost rehabilitation opportunities), the state court still would not have acted contrary to, or unreasonably applied, clearly established law by finding insufficient prejudice. Neither *Hooey*, *Moore*, nor any other case the Petitioner cites holds that—on its own—being housed in more restrictive conditions or losing rehabilitative opportunities is enough to constitute sufficient prejudice under the fourth *Barker* factor.

The Court in *Barker* itself, after noting that the defendant did suffer minimal prejudice but did not show the more serious form, considered the "absence of serious prejudice" in holding that the defendant was not denied his right to a speedy trial. 407 U.S. at 534. Courts of appeals have done similarly, holding that lesser forms of prejudice on their own are not enough. *See, e.g.*, *United States v. White*, 985 F.2d 271, 276 (6th Cir. 1993); *United States v. Cyphers*, 556 F.2d 630, 636 (2d Cir. 1977); *United States v. James*, 712 F. App'x 154, 163 (3d Cir. 2017).

In fact, the Fifth Circuit held similarly in *Goodrum v. Quarterman*, 547 F.3d 249, 266 (5th Cir. 2008), the main case the Petitioner cites about the application of *Hooey*. *See* Pet. 27. There, the Fifth Circuit recognized that the appellant had shown some prejudice by losing prison privileges, but "emphasize[d] how minimal that showing was." *Id.* Because it was applying AEDPA, it did not determine "whether such a modest showing of prejudice would suffice when balanced with the

other *Barker* factors," but concluded that "it would not be unreasonable to view the insubstantial and limited prejudice" as insufficient to tip the balance of the four factors. *Id.* Neither would it have been unreasonable here for the state court to view the minimal prejudice (assuming it was shown) from the heightened security and lost rehabilitation programs as insufficient to constitute the necessary prejudice to tip the balance.

The Sixth Circuit did not err in deferring to the Supreme Court of Kentucky's analysis of the fourth *Barker* factor.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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