No. 21-63

IN THE

Supreme Court of the United States

TERRANCE MILES,

Petitioner,

v.

BELINDA SANCHEZ, ACTING WARDEN,

Respondent.

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The single source of the nearly two-year delay from Terrance Miles's indictment to his trial was the prosecution's desire to test a hat for Miles's DNA. The prosecution waited almost nine months—until a month before trial was scheduled—to send the hat to the state crime lab, and the lab failed to return the (negative) results for another eleven months. The Commonwealth does not contest that the delay was negligent, nor did the Kentucky Supreme Court or the Sixth Circuit hold otherwise. Instead, both courts reasoned that, simply because there was a plausible reason *to test* the hat, the government's inordinate and two-fold delay *in testing* it was irrelevant.

This non-sequitur is not the law but rather contrary to it—the validity of the government's course of action does not excuse its negligent delay in pursuing that course. This Court repeatedly has held as much. The Commonwealth attempts to defend the courts' reasoning by claiming that *Loud Hawk* altered that clearly established rule. But *Loud Hawk* did not claim to do any such thing, and the Commonwealth offers no citation from the intervening twenty-five years to support its re-interpretation of Sixth Amendment law. The Commonwealth would also hide behind defense counsel's lack of objection to the prosecution's first motion for continuance. But that did not concern, much less absolve the prosecution of, the nine-month delay it already had caused, nor did it bless the state lab's nearly yearlong delay still to come.

The Kentucky Supreme Court and Sixth Circuit compounded their error by disregarding the effect that the serious charges had on Miles's conditions of

confinement. The Kentucky Supreme Court ignored this form of prejudice, and the Sixth Circuit held that more-oppressive prison conditions are not cognizable prejudice. The Sixth Circuit's holding is indefensible, and the Commonwealth declines to defend it. Instead, the Commonwealth contends that the Kentucky Supreme Court's silence was justifiable. That back-of-the-hand treatment does as much violence to this Court's precedent as the Sixth Circuit's simple contradiction.

Struggling on the questions presented, the Commonwealth leads with an argument that AEDPA makes this case a poor vehicle for review, but that is incorrect. While AEDPA does focus this Court's inquiry on clearly established law, it is precisely that law that needs defending here, and this Court maintains full authority to reaffirm its clearly established precedent. AEDPA does also mandate deference to the state court's decision, but that deference is not a "vehicle problem." It affects the merits of Miles's claim but not this Court's authority and need to say what clearly established precedent *is*.

On the underlying merits question, Miles is entitled to relief, because the Kentucky Supreme Court's decision was not only wrong but also unreasonable under this Court's precedents. Applied reasonably, they establish that *all four* factors under *Barker* and *Doggett* favor Miles—not merely two of the four, as that court held in denying relief.

ARGUMENT

I. THE DECISION BELOW CONTRADICTS THIS COURT'S CLEARLY ESTABLISHED PRECEDENT ON TWO OF THE FOUR *BARKER* FACTORS.

In a published decision, the Sixth Circuit muddied this Court's clear precedent on not one but two of the four factors controlling a speedy-trial analysis: It undermined this Court's settled framework for analyzing *responsibility* for delays, embracing the flawed reasoning of the Kentucky Supreme Court. And it flatly contradicted this Court's holdings on kinds of cognizable *prejudice*. While the Commonwealth points out that this Court ordinarily will not intervene to review a court's *balancing* of the *Barker* factors, in the very next sentence this Court made clear that a "*fundamental error* in [the] application of *Barker* . . . calls for this Court's correction." *Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (emphasis added). Here, just as in *Brillon*, the Sixth Circuit has made two such fundamental errors and likewise misallocated responsibility for trial delays. *See id.* at 92. These compounding errors warrant this Court's review.

A. Under *Barker* and *Doggett*, delay caused by government negligence must be charged against the government.

This Court's decision in *Barker v. Wingo*, 407 U.S. 514 (1972), has long provided the framework for assessing violations of the constitutional right to a speedy trial. The second factor—the reason for the delay—is the "flag all litigants seek to capture." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). The Constitution contemplates that the "primary burden" of ensuring speedy trials falls "on the courts

and the prosecutors." *Barker*, 407 U.S. at 529. Thus, even "more neutral reason[s] such as negligence or overcrowded courts" weigh against the government. *Id.* at 531. On the other hand, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.*

This Court has repeatedly recognized that, even if the government has a valid reason *for taking* some action, any delay from the government's negligence *in taking* that action is still chargeable to the government. Thus, in *Barker*, this Court acknowledged that, even if "some delay would have been permissible" *to pursue* the goal of trying one of the codefendants first, the government took "too long" *in pursuing* that goal. *Id.* at 534. Similarly, in *Doggett v. United States*, 505 U.S. 647 (1992), the government had an obviously valid reason *to arrest* the defendant before commencing the trial, but the government's efforts *in trying to arrest* him reflected "lethargy" and "negligence." *Id.* at 653.

In this case, the Sixth Circuit held that the Kentucky Supreme Court "could have reasonably concluded that" testing the hat for Miles's DNA "was a valid reason for the delay." Pet. App. 14a–15a. But, contra *Barker* and *Doggett*, the court's analysis stopped there. Like the Kentucky Supreme Court, the Sixth Circuit refused to account for *either* the nine months that the prosecution sat on the evidence *or* the additional eleven months it was at the state lab. That conclusion conflicts with this Court's clearly established precedent.

In response, the Commonwealth invokes *Loud Hawk*, in which the majority opinion concentrates

more on the validity of the government's decisions to take pre-trial appeals and less on the time consumed by those appeals. *See* 474 U.S. at 315–16. The Commonwealth seems to contend that *Loud Hawk* modified *Barker*'s second factor, "instruct[ing] that even delays from factors like overcrowded courts might not weigh against the government . . . when the government brings such factors into play for a valid reason." Opp. 13.

The Commonwealth's argument, although implicitly conceding *Barker*'s clarity, is otherwise wrong: *Barker* remains clearly established law. *Loud Hawk* cited *Barker* approvingly as governing precedent, and nowhere does *Loud Hawk* indicate any intent to modify *Barker*'s rule that negligent government delay is chargeable to the government. Such a major modification would surely also have appeared in *Doggett*, six years later, but it does not. On the contrary, *Doggett* reiterated that government negligence "still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution." 505 U.S. at 656–57. Nor does the Commonwealth offer a *single citation* from the past twenty-five years to support its claim that *Loud Hawk* modified *Barker*'s second factor (and that this modification escaped the Court's attention in *Doggett*). Instead, it ignores the decisions of other circuits that Miles cited as showing the clarity of this Court's precedent. Pet. 23. The Commonwealth's apparently original argument fails to call into question this Court's clearly established law.[1]

[1] The Commonwealth's expansive interpretation of *Loud Hawk* is also unconvincing. The best reading of the case on its

Like the Sixth Circuit, the Commonwealth also observes that defense counsel did not object to the prosecution's first request for a continuance, in December 2005. But by that date, the prosecution had only recently sent the hat in for testing, after waiting nine months. Defense counsel's lack of objection did not *retroactively* justify the prosecution's nine-month negligence. Nor did it *prospectively* endorse the lab's inordinate delay, which had just begun.[2] *Compare Maryland v. King*, 569 U.S. 435, 472, 479 (2013) (Scalia, J., dissenting) (test results for DNA available eighteen days after being mailed to lab). Again, even if "some delay would have been permissible" to test the DNA, *see Barker*, 407 U.S. at 534, clearly established precedent dictates that the prosecution and state lab's undisputedly negligent delays must both be attributed to the government. The approach by the Sixth Circuit and Kentucky Supreme Court undermines that rule.

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own terms is that appellate review raises unique concerns. The majority stressed that "orderly" appellate review serves "important public interests." 474 U.S. at 313–14. The dissent was less tactful, criticizing the Ninth Circuit for failing "to decide these appeals in a reasonably prompt manner" and explaining that the majority's reason for declining to shine a light into the black box of appellate review "undoubtedly" stemmed from "a reluctance to permit district courts to tell a court of appeals, or possibly this Court, that it has taken too long to decide a case." *Id.* at 324, 325 n.9 (Marshall, J., dissenting).

[2] This is especially so given that the prosecution misrepresented that the lab had had the hat "for a number of months now" and therefore "should be progressing its way." Pet. App. 108a.

B. Under *Hooey*, pending charges can inflict cognizable harm on defendants already in prison.

This Court long ago recognized that a defendant already in prison can still "suffer from 'undue and oppressive incarceration prior to trial,'" because "the conditions under which he must serve his sentence [may be] greatly worsened[] by the pendency of another criminal charge outstanding against him." *Smith v. Hooey*, 393 U.S. 374, 378 (1969) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)); *see* Pet. 26–27. Other circuits have recognized this clear rule—that "*Hooey*, in critical part, identified negative effects on the conditions of incarceration as a form of prejudice the speedy trial right was designed to protect." *Goodrum v. Quarterman*, 547 F.3d 249, 264 (5th Cir. 2008); *see* Pet. 27–29.

In direct contradiction, the Sixth Circuit instead applied its own precedent—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 (emphasis added) (quoting *United States v. Robinson*, 455 F.3d 602, 609 (6th Cir. 2006)).[3] The Sixth Circuit's position is indefensible, and the Commonwealth does not defend it.

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[3] Sixth Circuit precedent also holds that losing the possibility of having a later sentence run concurrently with an earlier one is not cognizable prejudice. *See Robinson*, 455 F.3d at 609. This similarly contradicts this Court's clearly established law. *See Hooey*, 393 U.S. at 378.

C. AEDPA poses no bar to correcting the Sixth Circuit's undermining of this Court's clearly established precedent.

Although AEDPA focuses review on this Court's clearly established precedent, it is precisely that longstanding precedent that requires the Court's defense. The Sixth Circuit's published decision contradicts this Court's clearly established case law on two of the four *Barker* factors, weakening an express constitutional right. On the fourth factor, the Sixth Circuit's error—denying that oppressive prison conditions are cognizable under the Sixth Amendment—is plain and longstanding. *See Robinson*, 455 F.3d at 609. And on the second factor, that court's error—disregarding negligent delay in pursuing a valid course of action—is equally pernicious. The second factor is the "flag all litigants seek to capture." *Loud Hawk*, 474 U.S. at 315. And the Sixth Circuit is not the only court to fall prey to the temptation to strip down the inquiry to the government's benefit: The Kentucky Supreme Court employed the same flawed analysis, as discussed below.

This Court's intervention is therefore necessary to rectify two cleanly presented and mutually compounding issues of clearly established law. Pet. 25, 29. That AEDPA also requires deference to the *state court's* application of the law imposes no burden on this Court's authority to reaffirm those clearly established principles, which is necessary in light of the Sixth Circuit's persistent misinterpretation.

II. MILES IS ENTITLED TO RELIEF.

The Sixth Circuit's misinterpretation of this Court's clearly established precedent builds on a foundation of errors laid by the Kentucky Supreme Court. The Kentucky high court's ruling is both irreconcilable with the federal law clearly established by this Court in *Barker* and *Doggett*, as explained above, and an unreasonable application of that law. Miles is therefore entitled to relief under AEDPA.

Under *Barker*'s first and third factors, the Kentucky Supreme Court correctly held that the twenty-one-month delay in bringing Miles to trial was presumptively prejudicial and that Miles had asserted his right to a speedy trial. Pet. App. 93a, 95a. Indeed, Miles vigorously and repeatedly asserted his right, beginning more than a year before his trial would ultimately commence and before the prosecution had even asked for the first continuance. Pet. App. 263a.

On the other hand, regarding the second factor—the reason for the delay—the Kentucky Supreme Court made the same analytical error that the Sixth Circuit later embraced. Miles argued that there was "no legitimate reason" for the delay and that the prosecution "did not present the court with any justification for the nine month delay" or with any evidence of contact between the prosecution and the lab "to show due diligence in trying to get [the hat] tested" once finally sent. Pet. App. 238a, 256a. And he likewise brought the prosecution's unexplained delay to the attention of the trial court. Pet. App. 265a, 267a. The Kentucky Supreme Court held that the government had a valid reason to test the DNA, but its analysis stopped there; it failed to account for the

negligent delays associated with both initiating and obtaining that testing and to charge that time to the government. Pet. App. 94a–95a. This error falls afoul of this Court's clearly established precedent: Delay caused by government negligence must be charged to the government, even if the government had a valid reason to take the course of action that it took negligently. *Supra*, Part I.A.

The Kentucky Supreme Court further unreasonably applied the fourth factor—prejudice to the defendant. *Barker* identifies three cognizable types of prejudice: oppressive pretrial incarceration, anxiety and concern of the accused, and impairment of the accused's defense. 407 U.S. at 532. "Of these, the most serious is the last," because it "skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious." *Id.* But oppressive incarceration and pretrial anxiety are also "major evils" even "apart from actual or possible prejudice to an accused's defense." *United States v. Marion*, 404 U.S. 307, 320 (1971).

The delay in trying Miles inflicted all three forms of prejudice. Between the initially scheduled and actual trial dates, a defense witness, Steven Edwards, died in a motorcycle accident—an "obvious" instance of prejudice. *Barker*, 407 U.S. at 532. Moreover, while the indictment loomed for twenty-one months, Miles was housed at a more secure facility and prevented from participating in rehabilitation and self-improvement programs. He brought this to the attention of the trial court and moved to reduce his bond, but that motion was denied. Pet. App. 267a. Finally, throughout the delay, Miles suffered the anxiety and concern of an accused awaiting trial.

Prison medical records show that by July 2005—well before the prosecution's negligence was revealed—Miles reported being "severely depressed" while fighting the murder case. Pet. App. 268a. The psychiatrist increased his psychiatric medication and added another. *Id.*

Miles presented all three forms of prejudice to the Supreme Court of Kentucky. Pet. App. 239a–40a, 257a. Yet that court ignored two and dismissed the third. Miles attempted to supplement the record regarding Edwards's death. *See* Pet. App. 231a & n.1; *see also* Pet. App. 294a (providing Edwards's missing testimony). But the court ignored his efforts. Pet. App. 95a. Furthermore, the court made no mention of Miles's oppressive incarceration or his anxiety. *Id.* The Kentucky Supreme Court therefore failed to properly address *any* of Miles's prejudice arguments, any one of which—upon adequate review—provides a basis for finding that the Commonwealth's delay prejudiced Miles.[4]

The Commonwealth attempts to defend the court's silence, conjecturing that Miles's argument was "too insubstantial" even to mention. Opp. 17. That theory is at odds with the law. This Court has warned that pending charges can lead to "greatly worsened" prison conditions and "have fully as depressive an effect upon

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[4] In addition, because the first three factors weighed heavily against the Commonwealth, Miles need not have shown any "affirmative proof of particularized prejudice," because "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655; *see* Pet. 15. Miles recognized this, but the Kentucky Supreme Court ignored this argument too. Pet. App. 95a, 240a.

a prisoner as upon a person who is at large." *Hooey*, 393 U.S. at 378–79. Miles suffered enough to require special psychiatric treatment, and that serious personal deprivation was reflected in the "strength of his efforts"—he asserted his right to a speedy trial at least eight times, beginning already in November 2005. *Barker*, 407 U.S. at 531.

The Commonwealth's comparison to the "absence of serious prejudice" in *Barker* is inapt. Opp. 18 (quoting 407 U.S. at 534). Unlike Miles, Barker *was* able to post bond, and there was "no claim that any of Barker's witnesses died." 407 U.S. at 517, 534. In addition, "Barker did not want a speedy trial." *Id.* at 534–35. Here, in contrast, Miles consistently asserted his right.

The Kentucky Supreme Court's mistreatment of fully *half* of the *Barker* factors exceeds mere error—it was an unreasonable application of this Court's clearly established precedent. On any reasonable application, *all four* factors point to a speedy-trial violation, and Miles is entitled to relief. This Court should intervene to provide that relief and rectify the Sixth Circuit and Kentucky Supreme Court's mishandling of a fundamental constitutional right.

CONCLUSION

The Court should grant the Petition.

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