No. 21-____

IN THE
Supreme Court of the United States

TERRANCE MILES,

Petitioner,

v.

LARRY CHANDLER,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Genna L. Sinel
JONES DAY
600 Brickell Ave.
Suite 3300
Miami, FL 33131

Louis K. Fisher
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
lkfisher@jonesday.com

Counsel for Petitioner

QUESTIONS PRESENTED

The decision below conflicts with decisions of this Court and of other federal courts of appeals on two important questions:

1. Where a defendant's trial is postponed because certain evidence is unavailable, does the government's responsibility for delays in obtaining that evidence weigh against the government in a Sixth Amendment speedy-trial analysis?

2. Does a defendant suffer prejudice cognizable in a Sixth Amendment speedy-trial analysis where he is imprisoned on a prior conviction and, due to charges he will face in a delayed trial, is confined under more onerous conditions and loses access to rehabilitation opportunities?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Terrance Miles and Scott Jordan, the former warden of Luther Luckett Correctional Complex, where Miles was incarcerated until he was improperly transferred to another facility during the pendency of the proceeding below (in violation of Federal Rule of Appellate Procedure 23(a), *see* Pet. App. 23a n.7). Miles is currently incarcerated at Southeast State Correctional Complex, where Respondent Larry Chandler is the warden. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

Commonwealth of Kentucky v. Terrance Miles, No. 05-CR-0740, Jefferson Circuit Court. Judgment amended Apr. 4, 2007.

Terrance Miles v. Commonwealth of Kentucky, No. 2007-SC-000298-MR, Supreme Court of Kentucky. Order entered Jan. 22, 2009.

Commonwealth of Kentucky v. Terrance Miles, No. 05-CR-0740, Jefferson Circuit Court. Order entered May 31, 2012, *amended* June 18, 2012.

Terrance Miles v. Commonwealth, No. 2012-CA-001240-MR, Commonwealth of Kentucky Court of Appeals. Order entered Aug. 22, 2014.

Commonwealth of Kentucky v. Terrance Miles, Nos. 2014-SC-000558-DG & 2015-SC-000321-DC, Supreme Court of Kentucky. Order entered Mar. 23, 2017.

Terrance Miles v. Scott Jordan, No. 3:17-cv-00558, U.S. District Court for the Western District of Kentucky. Judgment entered Mar. 14, 2019.

Terrance Miles v. Scott Jordan, No. 19-5340, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 24, 2021, *rehearing denied* Apr. 19, 2021.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The Commonwealth of Kentucky did not try Petitioner Terrance Miles for murder until almost two years after his indictment. For what reason? Ostensibly to test DNA from a hat found at the crime scene. The prosecution represented to Miles and the trial court that the DNA was crucial evidence, either inculpatory or exculpatory, because the hat had been worn by the shooter. But the Commonwealth failed to send the hat to the state crime lab for nine months, and then testing was not completed for at least another 11 months.

Meanwhile, Miles suffered significant anxiety, and a defense witness died. The conditions of Miles's confinement for a prior conviction, moreover, were substantially worsened due to the pending murder charges. Miles lost his eligibility to participate in rehabilitative programs and to be housed in a far less restrictive setting. Throughout all of this, Miles vigorously asserted his right to a speedy trial. Not just once or twice, but at least eight times, including by opposing two continuance motions that the trial court nevertheless granted.

After the DNA evidence turned out to be exculpatory, the prosecutor tried to compensate for the Commonwealth's lack of persuasive evidence. Contradicting his prior representations, the prosecutor told the jury that he never believed the hat was connected to the crime. The prosecutor also engaged in flagrant misconduct by repeatedly calling Miles "Old Gangsta" and "Cat Daddy," and he improperly introduced evidence of

a gun that had been found in Miles's bedroom but concededly was unconnected to the shooting. Miles's counsel failed to object.

Miles was convicted and pursued a direct appeal and post-conviction relief in state court. He then filed a habeas petition in federal district court, asserting violations of his constitutional rights including his Sixth Amendment right to a speedy trial. The district court denied the petition and the Sixth Circuit affirmed, concluding that the Kentucky Supreme Court had reasonably applied clearly established law.

The Sixth Circuit's speedy-trial analysis included two determinations that conflict with decisions of this Court and other federal courts of appeals. First, the Sixth Circuit determined that the Commonwealth's responsibility for the DNA testing delays—including the prosecutor's nine-month delay before even sending the hat to the lab—was entitled to no weight. Second, after noting that "Miles was already incarcerated on other state charges while he awaited trial on his murder charges," the Sixth Circuit held 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.

The petition for writ of certiorari should be granted to address these conflicts.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a–23a) is reported at 988 F.3d 916. The district court's order (Pet. App. 25a–26a) is unreported.

JURISDICTION

The Sixth Circuit entered judgment on February 24, 2021, Pet. App. 24a, and denied rehearing and rehearing en banc on April 19, 2021, Pet. App. 104a–05a. By order on March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides, in relevant part:

> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> …
>
> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254.

STATEMENT

1. Legal Background

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy … trial." U.S. Const. amend. VI; *see also Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967) (holding the "fundamental" right to a speedy trial applicable to the States through the Due Process Clause of the Fourteenth Amendment). Although the "literal sweep" of the Sixth Amendment's text "would forbid the government to delay the trial of an 'accused' for any reason at all," this Court has instructed courts to balance four factors to determine whether an unconstitutional delay has transpired. *Doggett v. United States*, 505 U.S. 647, 651–52 (1992). Those factors, known as the "*Barker*" factors, are (1) length of the delay; (2) reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant as a result of the delay. *Id.* at 651 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

The first factor—length of the delay—serves two functions. First, "uncommonly long" delay is "presumptively prejudicial" and operates as a "triggering

mechanism" that entitles the defendant to further examination of his speedy-trial claim. *Id.*; *Barker*, 407 U.S. at 530–31. Second, length of the delay is relevant to the fourth factor—prejudice. *Doggett*, 505 U.S. at 652.

The second factor—the reason for the delay—seeks to determine "whether the government or the criminal defendant is more to blame for th[e] delay." *Id.* at 651. Some reasons weigh more heavily against the government than others. For instance, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Barker*, 407 U.S. at 531. Reasons such as "negligence or overcrowded courts" are weighted less heavily but "should [still] be considered since the ultimate responsibility for such circumstances must rest with the government." *Id.*

The third factor—a defendant's assertion of his speedy-trial right—"is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 531–32.

Finally, the fourth factor—prejudice—includes harms such as "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the defense will be impaired." *Id.* at 532. Notably, "excessive delay presumptively compromises the reliability of a trial," and "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655. The "importance [of presumptive prejudice] increases with the length of delay" because "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.* at 652, 655–56.

2. Factual and Procedural Background

a. Trial Delays. In the early morning hours of February 27, 2005, Michael Teasley was shot and killed as he attempted to clear patrons from a crowded parking lot outside a Louisville night club where he worked as a bouncer. Pet. App. 90a–92a. Teasley had fought with Miles earlier in the evening, after Miles was kicked out of the club. Miles was indicted for Teasley's murder on March 5, 2005. Pet. App. 258a–61a.

The court originally scheduled trial to begin on December 13, 2005. Pet. App. 113a. As the trial date approached, Miles filed a *pro se* letter to the court stating that "I'm adamant about having a Fast and Speedy Trial." Pet. App. 262a–64a. At a pretrial hearing on December 5, 2005, however, the prosecution told the court that it would seek a continuance. Pet. App. 107a–08a.

The prosecution's asserted reason for the trial delay was to await testing of DNA from a toboggan hat,[1] which had been found at the scene on the day of the shooting. *Id.* The prosecutor maintained that the toboggan was "very substantial" evidence because "the shooter was wearing [it] at the time of the shooting." *Id.* According to the prosecution, this meant that the DNA evidence was "going to be final evidence, either inculpatory or exculpatory one way or the other." Pet. App. 108a.

The prosecutor also represented that the lab had had the hat "for a number of months now." *Id.* In reality, the police had sent the hat for testing less than

[1] In the American South, "'[t]oboggan' is one of a vast array of words used to describe a knit hat." *See* Michael Waters, *What Do You Call This Hat?*, Atlas Obscura (Jul. 24, 2017).

30 days earlier—*nine months* after collecting it at the crime scene. Pet. App. 92a; Pet. App. 188a–89a. Miles, noting that the Commonwealth had recovered the hat in February 2005, objected to the Commonwealth's "stall tactic." Pet. App. 110a.

At another hearing the next week, the prosecution moved for a continuance, telling the court that it was "not prepared to go forward without the DNA test results of that toboggan." Pet. App. 113a. Miles's counsel moved for a speedy trial, but the court granted the Commonwealth a continuance until April 2006. Pet. App. 113a–14a.

By March 2006, the month before the rescheduled trial date and more than a year after the hat was recovered, the lab had not even started testing it. Pet. App. 92a–93a. Miles wrote to the trial court about "how stressful" the prosecution's "stall tactics" were. Pet. App. 265a. Notes from a prison psychiatrist confirm that the pending murder prosecution took a severe toll on Miles, resulting in an increased Paxil dose and the addition of a new medication. Pet. App. 268a–69a.

The Commonwealth sought a second continuance in April 2006, claiming again that "we need this [DNA] evidence in our case." Pet. App. 120a. Miles's counsel objected, arguing that the case had been pending for over a year and that there had been unnecessary delay, which the prosecution had failed to explain. Counsel emphasized that "the defense is ready to go forward," "[t]here is a speedy trial motion pending," and "[m]y client would like to have his day to court." *Id.* The court nevertheless granted the prosecution's motion

for a second continuance and again reset the trial date. Pet. App. 92a.

At the April 2006 hearing and in a May 2006 *pro se* letter, Miles and his counsel explained that the pending murder charges prejudiced him even though he also was imprisoned on a prior conviction. Pet. App. 266a–67a; Pet. App. 121a–22a. Miles specified: "[The] pending indictment prevents me from going to a facility with less restrictions and is hindering me from participa[]ting in programs to better myself within the institution." Pet. App. 267a. The Commonwealth's own "Reclassification Custody Forms" for Miles show that the pending charges increased his "Final Custody Score" by eight points, resulting in Custody Level 3, medium security. Pet. App. 270a–83a. Without the pending charges, he would have had three total points in 2005 and two total points in 2006, both well within the range (eight points or less) for custody level 1 (community), 2 (minimum security), or A ("Restricted"). *Id.* The same forms also show that Miles was enrolled only in a work program and not substance abuse programs, educational or vocational programming, or individual or group counseling. *Id.* Miles requested a bond reduction, but the court denied it. Pet. App. 239a.

Miles's continued assertions of his speedy-trial right also bore no fruit. His May 2006 *pro se* letter reasserted that "[t]he delay by the commonwealth to send the toboggan to the lab for testing was an obvious stall tactic and is depriving m[e] of my right to a fast and speedy trial." Pet. App. 266a. He filed a second *pro se* motion to dismiss for failure to prosecute in September 2006. Pet. App. 34a. And, at a hearing on September 26, 2006, he opposed the prosecution's motion for a third continuance, but the court granted yet another

delay because the DNA testing still had not been completed. Pet. App. 92a–93a; Pet. App. 32a.

b. Trial. The third continuance delayed the start of trial until December 2006, a full year after the original trial date and 21 months after the indictment. By then a key defense eyewitness had died in a motorcycle accident. Pet. App. 284a–95a. Even without the exculpatory testimony from that witness, "the evidence against Miles was relatively weak"—as the Kentucky Court of Appeals later found—with "uncertainty in every supposition" that the jury needed to believe in order to convict. Pet. App. 84a–85a & n.4.

One major hole in the prosecution's case was the fact that the toboggan—which the prosecutor had said was worn by the shooter—contained no DNA matching Miles. Pet. App. 180a. This left the prosecution with "absolutely no physical evidence tying Miles to the crime." Pet. App. 85a n.4. The prosecution had obtained multiple continuances by repeatedly representing that it could not go to trial without the DNA test results. Pet. App. 32a. Yet the Commonwealth forged ahead with the prosecution when the DNA evidence proved worse for its case than not having test results at all.

At trial, the prosecution relied primarily on the testimony of Frank Hill, an off-duty police officer working security at the club. Hill witnessed Michael Teasley fighting in the club's parking lot with Miles, who had been removed from the club. Pet. App. 134a. Hill thought Miles had a "calm demeanor" when leaving the parking lot and did not hear any sort of threat, although he recalls Miles saying to Teasley: "[Y]ou got [the] best of me. You're the man. You're the winner."

Pet. App. 135a; Pet. App. 149a–50a. Hill described Miles as wearing "all dark clothing" and "maybe a toboggan." Pet. App. 136a.

Hill testified that around 3:30 a.m., when trying to clear the area after the club closed, he heard gunshots. Pet. App. 139a. He estimated there were "maybe 60, 70 people" in the parking lot at that time, and "I couldn't hardly get through because the crowds of people was running towards me." Pet. App. 139a–40a. Amidst this commotion, Hill observed a man "with all dark clothing on, running across the parking lot." Pet. App. 140a. When interviewed by police the following morning, Hill categorically told them that the suspect "had a toboggan on." Pet. App. 144a–46a.

Hill consistently testified that he never saw the face or front side of the man running through the parking lot after the shots were fired. Pet. App. 142a; Pet. App. 144a. Nevertheless, Hill said he thought the man he saw was Miles. Pet. App. 146a–47a. When pressed, Hill testified that Miles "fit the description," but that "[l]ots of people" could fit the description. *Id.* As the Kentucky Court of Appeals later put it, there was "a real danger in misidentification because the identification of the assumed fleeing shooter took place at a distance, at night, and resulted in a description of the shooter wearing a toboggan hat"—but the DNA analysis of the hat found at the scene did not match Miles. Pet. App. 85a n.4.

While Hill did not see the face of the man running through the parking lot, Crystal Teasley—the victim's widow and the prosecution's other key witness—did not see that man at all. She testified that she was working at the club that evening and recognized Miles

as a regular. Pet. App. 152a–54a. She recalled that Miles was wearing "a black Dickie outfit with a hoodie" and a "black toboggan." Pet. App. 154a. According to Crystal, after her husband fought with Miles and was pulled off of him, Miles said, "you might have whupped my ass, but I'm going to get you." Pet. App. 157a. In comparison, Hill admitted on cross-examination that "I never did hear that" alleged statement by Miles. Pet. App. 149a–50a. Crystal also testified that Hill took Miles to his police car and, upon returning to the club, told "everybody" that Miles "was nobody to play with. He would harm somebody. And he meant what he said, that he would come back and get him if that's what he said." Pet. App. 158a. In Hill's own testimony, he never mentioned having made these alleged statements.

In addition to testimony from Hill and Teasley, the prosecution offered testimony that the police had collected spent bullets, a black toboggan hat, and a cell phone from the crime scene. Pet. App. 161a–63a; Pet. App. 177a. Detective Christopher Ashby, the lead investigator on the case, testified he did not send the hat off for testing until November 7, 2005—"nearly nine months" after recovering it. Pet. App. 189a. The testing showed that the DNA from the black toboggan did not match Miles. Pet. App. 180a.

Ashby also told the jury that, when searching Miles's home, investigators collected "[s]hoes, clothing, [and] a hand gun." Pet. App. 181a. Ashby admitted that the crime-scene bullets did not match the gun and therefore that the gun was not connected to the shooting. *Id.* Nonetheless, the prosecution published a picture of the gun to the jury and asked Ashby to describe exactly where the gun was located in Miles's bedroom.

Pet. App. 182a. When the prosecutor then moved for the picture to be introduced into evidence, defense counsel finally made an objection, which the court sustained. Pet. App. 182a–83a. As for the clothing, forensic testing confirmed that there was no blood; police never tested it for gunpowder residue. Pet. App. 187a.

Lastly, a responding officer testified that she collected the cell phone from the ground outside the club. Pet. App. 163a–64a; Pet. App. 171a. Another officer provided the extracted cell number associated with the phone, which the prosecution argued matched the number Miles had provided on an Enterprise Rent-A-Car agreement. Pet. App. 174a–75a; Pet. App. 218a. There was no dispute that Miles was at the club that evening or that he lost his phone.

The defense called two witnesses, including Vernon Douglas. Douglas confirmed Miles was at the club that evening, but he testified that Miles left with him around 3:00 a.m. Pet. App. 194a–95a. On cross, the prosecutor pressed Douglas for nicknames of Miles, eliciting the aliases of "Cat Daddy" and "O[.]G[.]," which Douglas thought stood for "Original Gangster," a version of which ("Old Gangsta") would later become the centerpiece of the prosecutor's closing arguments. Pet. App. 204a; Pet. App. 220a.

During the trial, the prosecutor made numerous inappropriate arguments, most of which centered on improper propensity inferences and witness-vouching. To start, the prosecutor told the jury in opening statements that, when searching Miles's residence, investigators found "a gun under the mattress, which we later found out was not the same gun used in the murder, but *he did, in fact, have a gun*." Pet. App. 128a

(emphasis added). The prosecutor then argued in closing that Miles was "just lying. He's just lying," despite the fact that Miles did not testify in the case. Pet. App. 216a; *see* Pet. App. 100a–02a ("the comment amounted to prosecutorial misconduct"). The prosecutor also told the jury that "[Miles] gets others to lie," while assuring the jury that the victim's widow was "not lying, unlike some other witnesses that you heard from." Pet. App. 218a; Pet App. 213a.

In addition, the prosecutor repeatedly referred to Miles as "Cat Daddy" and "Old Gangsta," and he used those nicknames as evidence that Miles had a motive to kill the victim. At one point, the prosecutor argued that this was "Old Gangsta['s]" club and "[h]e was publicly humiliated" when Michael Teasley beat him. Pet. App. 208a. These were not casual references; the prosecutor intentionally made this a central theme and even projected the names onto a screen for the jury. Pet. App. 44a–46a. He repeated the nicknames "Old Gangsta" four times and "Cat Daddy" six times, including in his final lines: "The evidence points to the man with the black on, the man that had the motive, the man that fits the identification to a tee. Points to *Cat Daddy*. It points to the *Old Gangsta*. Who done it? He's sitting right there." Pet. App. 220a (emphasis added); Pet. App. 206a, 208a, 210a, 218a, 219a.

The prosecutor also argued in his closing that the toboggan hat recovered from the crime scene had "nothing to do with the case." Pet. App. 219a. Even more, the prosecutor told the jury that neither he nor the police had ever believed the hat was relevant: "It was nine months before I said, hey, send the hat off. We better make sure, at least. I know you don't think

it's involved. But let's make sure." *Id.* These assertions to the jury were directly contrary to the same prosecutor's prior representations to the court. In order to obtain multiple trial delays, the prosecutor had told the court that the toboggan was worn by the shooter and that the Commonwealth could not go to trial without the DNA testing, which was "going to be final evidence, either inculpatory or exculpatory one way or the other." Pet. App. 108a.

The Commonwealth's improper tactics worked. After the two-and-a-half day trial, Miles was convicted of all charged offenses, Pet. App. 221a–23a, and sentenced to consecutive imprisonment terms totaling 50 years. Pet. App. 92a.

c. Direct Appeal on Speedy-Trial Claim. On his direct appeal to the Kentucky Supreme Court, Miles raised the violation of his Sixth Amendment right to a speedy trial, among other claims. Pet. App. 224a–50a. The Kentucky Supreme Court acknowledged that it needed to apply the four-part balancing test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), namely: "1) length of the delay; 2) reason for the delay; 3) defendant's assertion of his right to a speedy trial; and 4) prejudice to the defendant." Pet. App. 93a.

When analyzing the second factor, however, the Kentucky Supreme Court focused on whether the government had acted in bad faith by representing that the DNA testing was vital evidence needed for trial. Pet. App. 93a–95a. In the court's view, the prosecutor's subsequent about-face did not indicate that his pretrial representations were merely a stall tactic: "Af-

ter the hat tested negative for Miles' DNA, the Commonwealth had no choice but to minimize the evidentiary value of the hat at trial." Pet. App. 94a. The court also noted that the prosecutor had stated he was "regularly calling the lab to inquire about the status of the testing," and that "[d]efense counsel admitted that the hat was crucial evidence and stated no objection to having the hat tested." Pet. App. 94a–95a. Significantly, the court failed to address Miles's additional argument that the government's delays in getting the hat tested weigh against the Commonwealth under *Barker*'s second factor. Pet. App. 90a–103a.

On the fourth *Barker* factor, prejudice, the Kentucky Supreme Court focused on particularized prejudice rather than presumptive prejudice based on the length of the delay. Pet. App. 95a. Contrary to this Court's *Doggett* decision, which the Kentucky Supreme Court did not cite, the state court considered presumptive prejudice only as a trigger for a full *Barker* analysis; the court did not address the importance of presumptive prejudice, based on the length of the delay, in weighing the *Barker* factors. *See Doggett*, 505 U.S. at 656–58.

In assessing particularized prejudice, the Kentucky Supreme Court addressed the death of an eyewitness, Steven Edwards, by stating that "Miles does not allege what Edwards' testimony would have been and why he was so crucial to his case." Pet. App. 95a. But the court did not address Miles's affidavit about Edwards, which Miles had submitted along with a motion to supplement the record. Pet. App. 231a n.1. Nor did the court address—at all—the stress, anxiety, and worsened conditions of confinement suffered by Miles as a result of the extraordinary delay. Pet. App. 93a–96a.

On the latter point, Miles had again explained that, while serving time for an unrelated conviction, "he still suffered oppressive pre-trial incarceration" because "[t]he indictment caused him to be housed at a more secure facility and prevented him from participating in programs for rehabilitation and self-improvement." Pet. App. 239a.

d. State Post-Conviction Proceedings. After the Kentucky Supreme Court affirmed Miles's conviction, he timely sought post-conviction relief under Kentucky Rule of Criminal Procedure 11.42. D. Ct. Dkt. No. 16-2 at 96–152. The trial court rejected Miles's claims, but the Kentucky Court of Appeals held that Miles's constitutional right to effective assistance of counsel had been violated. Pet. App. 71a–89a.

The Kentucky Court of Appeals concluded that counsel had performed deficiently by failing to object to the prosecutor "eliciting Miles's nickname of 'Original Gangster' or calling him 'Old Gangster' in its closing argument." Pet. App. 80a. The court had "no difficulty" determining that the "prosecutorial misconduct" was "flagrant because the remarks," which "had no legitimate purpose," "tended to mislead the jury and prejudice Miles by inviting the jury to find him guilty based on protecting his gangster reputation." Pet. App. 80a–85a. Furthermore, given the "relatively weak" evidence against Miles and "considered in conjunction with other errors," this deficient performance "rendered the trial fundamentally unfair." Pet. App. 84a–85a.

The Kentucky Court of Appeals also concluded that counsel had performed deficiently by failing to object to evidence about the gun that was found in Miles's

bedroom but was unconnected to the crime. "[T]he prosecutor's deliberate elicitation of testimony about th[e] gun, in conjunction with other inadmissible evidence about Miles's nickname, was used to paint him as a criminal and could allow a conviction based upon a gun-wielding gangster reputation." Pet. App. 86a. Accordingly, "trial counsel's failure to bring a motion in limine to exclude mention of the gun was prejudicial when considered in conjunction with other errors." *Id.*

Lastly, the Kentucky Court of Appeals concluded that counsel's failure to object to certain testimonial hearsay was unreasonable and "was not harmless when considered in conjunction with previous errors to improperly strengthen the case." Pet. App. 87a. Thus, "[c]umulative error made the trial fundamentally unfair." *Id.*

The Kentucky Supreme Court reversed. Pet. App. 57a–70a. It did not address the lower court's findings of prosecutorial misconduct and multiple instances of deficient performance by defense counsel; instead, it held that Miles failed to establish prejudice from counsel's errors when each was considered in isolation. *Id.* The Kentucky Court of Appeals had determined that counsel's errors were cumulatively prejudicial, but the Kentucky Supreme Court rejected cumulative error as a basis for relief. Pet. App. 69a–70a.

e. Habeas Petition in District Court. Miles timely filed a habeas petition under 28 U.S.C. § 2254. The magistrate judge recommended denying the petition. Pet. App. 29a–56a.

On the speedy-trial claim, the magistrate judge found that the first and third factors weighed in favor of Miles. Pet. App. 30a–38a. On the second factor, the

magistrate judge initially recognized that "three continuances, resulting in a twenty-one-month period between indictment and trial, to test one piece of evidence is problematic" and "[a]t first blush" weighs against the Commonwealth. Pet. App. 33a. But the magistrate judge concluded that the second *Barker* factor nevertheless weighs against *Miles* merely because "the results of this 'crucial evidence' could have favored either party." *Id.* As a result, the magistrate judge did not address the degree to which the testing delays, including the Commonwealth's nine-month delay before even sending the hat to the lab, weighed in Miles's favor.

On the fourth factor, prejudice, the magistrate judge repeated the Kentucky Supreme Court's threshold error. Like the state court, the magistrate judge failed to recognize *Doggett*'s holding that presumptive prejudice has importance beyond its role in triggering a full *Barker* analysis. Unlike the state court, however, the magistrate judge acknowledged this Court's precedents establishing that "delays may prejudice a defendant" who is incarcerated on other charges—"by adversely affecting the conditions of confinement, period of incarceration, or opportunities for rehabilitation." Pet. App. 36a (citing *Smith v. Hooey*, 393 U.S. 374 (1969); *Strunk v. United States*, 412 U.S. 434 (1973)). According to the magistrate judge, "Miles fail[ed] to demonstrate that had he not been indicted in this case[,] that he would have qualified for the rehabilitation privileges, such as entry into a halfway house, that he presently asserts." Pet. App. 36a. The magistrate judge did not even mention the Commonwealth's own Reclassification Custody Forms, which are undisputed and prove Miles's allegations. *See supra* 7–8.

As for the right-to-counsel violations found by the Kentucky Court of Appeals, the magistrate judge concluded that the Kentucky Supreme Court had not unreasonably applied clearly established law. In the magistrate judge's view, it was not unreasonable to conclude that counsel's errors were non-prejudicial in isolation, and the rejection of cumulative-error analysis did not contravene clearly established law. Pet. App. 43a–55a.

The district court adopted in full the magistrate judge's recommendation, denied the habeas petition, and granted a certificate of appealability on the speedy-trial claim and on some of the ineffective-assistance claims. Pet. App. 25a–26a; Pet. App. 27a–28a.

f. Sixth Circuit Decision. The Sixth Circuit affirmed. Pet. App. 1a–23a. On the two ineffective-assistance claims that Miles pressed on appeal, the Sixth Circuit concluded that AEDPA deference had not been overcome. Likewise, on the speedy-trial claim, it held that "the Kentucky Supreme Court's decision is not contrary to, or an unreasonable application of *Barker*'s second [and fourth] factors." Pet. App. 15a; Pet. App. 18a.

The Sixth Circuit agreed with the Kentucky Supreme Court that the three trial delays, totaling 21 months, could be justified because: there were "representations from both sides that the hat could be decisive either way," "Miles's counsel did not initially object to the testing (even though the testing process started months after indictment), and the prosecutor was regularly calling the lab to inquire about the status of the results." Pet. App. 14a–15a. In the Sixth Circuit's view, the Kentucky Supreme Court properly

ignored the reasons why the state crime lab did not receive the toboggan hat for nearly nine months and then took at least another eleven months to test it. Thus, the Sixth Circuit held that this factor weighs in the government's favor so long as, taking delays in obtaining evidence *as a given*, it is justifiable to await that evidence before going to trial. Under the Sixth Circuit's holding, the government's responsibility for the delays in obtaining the evidence is irrelevant.

Regarding *Barker*'s fourth factor, the Sixth Circuit concluded that "Miles was already incarcerated on other state charges while he awaited trial on his murder charges" and "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 *United States v. Robinson*, 455 F.3d 602, 609 (6th Cir. 2006)). Rather than relying on the district court's factual determination (which had overlooked key evidence), the Sixth Circuit relied on a categorical legal rule. In so doing, the Sixth Circuit acknowledged neither this Court's contrary precedents nor the district court's recognition that those precedents applied.

On April 19, 2021, the Sixth Circuit denied Miles's petition for rehearing or rehearing en banc. Pet. App. 104a–05a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision conflicts with decisions of this Court—which other federal courts of appeals have faithfully applied—establishing that a speedy-trial analysis must give weight to (1) the underlying causes of circumstances that result in trial delays, and

(2) the effect of pending charges on confinement conditions where a defendant is imprisoned on other charges. Each of these issues is important, and each conflict warrants this Court's review. Certiorari should be granted to address both conflicts.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS REGARDING ASSESSMENT OF RESPONSIBILITY FOR TRIAL DELAYS.

The Sixth Circuit concluded that, in inquiring "whether the government or the criminal defendant is more to blame for th[e] delay," *Doggett*, 505 U.S. at 651, the Kentucky Supreme Court could ignore the Commonwealth's clear responsibility for the delays in obtaining DNA test results. According to the Sixth Circuit, the state court could focus instead on whether—*given* the unavailability of test results—it was justifiable to continue the trial date (three times).

In concluding that the Kentucky Supreme Court had not "ignore[d] the question of who bore responsibility for the delay," the panel pointed to the state court's assertion that "[d]efense counsel admitted that the hat was crucial evidence." Pet. App. 14a (internal quotation marks omitted). This admission, the panel said, supported a reasonable conclusion "that there was a valid reason for the delay," which "weighs in favor of the government." Pet. App. 14a–15a. The Sixth Circuit analogized this case to one involving "a missing witness," which this Court in *Barker* had said "should serve to justify appropriate delay." 407 U.S. at 531, *quoted in* Pet. App. 15a. The panel thus endorsed a speedy-trial analysis that has nothing to do with who was responsible for underlying circumstances (here,

the unavailability of DNA test results) that delayed the defendant's trial.

The Sixth Circuit's ruling is contrary to *Barker*'s second factor, which weighs against the party responsible for circumstances that make trial delays appropriate or necessary. This Court made that clear in *Barker* itself. A "missing witness" can be "a valid reason" to delay a trial, 407 U.S. at 531, but the second factor weighs against the government when it is responsible for the witness being unavailable. In *Barker*, a key witness was being tried first, to "remove possible problems of self-incrimination" that might have impeded testimony against Mr. Barker. *Id.* at 516. This Court entertained the possibility that it would be appropriate in some circumstances to delay a defendant's trial while a witness was tried first. *Id.* at 534. But even so, the second *Barker* factor would weigh against the government where delays in trying the witness were the government's fault. *Id.* (explaining that "a good part" of the delay in trying the witness "was attributable to the Commonwealth's failure or inability to try [him] under circumstances that comported with due process"). *Barker* shows that the inquiry must focus on reasons for delays in the availability of evidence needed for trial.

Similarly, in *Doggett*, it went without saying that a trial delay was appropriate when the defendant had not been arrested or even made aware of his indictment. *See* 505 U.S. at 652–53. That, however, was hardly the end of the inquiry on the second *Barker* factor. Instead, the second *Barker* factor turned on who was more to blame for the circumstances that justified delaying the trial. This Court emphasized that the

government bore responsibility for those circumstances because it had been negligent in locating Mr. Doggett, who did not know he was being sought. *Id.* Under these facts, the second *Barker* factor was central to this Court's determination that Mr. Doggett was entitled to relief. *Id.* at 656 ("[I]f the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail.").

Lower court decisions also illustrate this point. In one recent case, for example, the Second Circuit affirmed that it was proper to hold the government responsible for delay attributable to litigation over evidence—a photo array—that the government had lost. *United States v. Black*, 918 F.3d 243, 261 (2d Cir. 2019). It did not matter whether the photo array was at least as important to the defendants as to the government; indeed, it was the defendants who pressed the issue regarding the missing evidence. What mattered was the government's responsibility for the evidence being missing in the first place. *See id.* And, as in *Doggett*, lower courts have weighed the second *Barker* factor in the defendant's favor where the government was responsible for underlying delays in extraditing or arresting the defendant—even though it obviously was justifiable to delay trial until the defendant could be present. *See United States v. Alexander*, 817 F.3d 1178, 1182–83 (9th Cir. 2016); *United States v. Velazquez*, 749 F.3d 161, 179–81 (3d Cir. 2014).

The Sixth Circuit's contrary decision here is especially significant because the Commonwealth was entirely responsible for the relevant delays—that is, the delays in obtaining DNA test results on the toboggan hat. The Commonwealth delayed nine months before

sending the hat to the lab, even though the prosecutor repeatedly represented that the DNA testing was crucial evidence without which the Commonwealth could not go to trial. Apart from the prosecutor's improper statements to the jury that he believed the hat had nothing to do with the case, the Commonwealth never has attempted to explain the delay. If the prosecutor was not acting in bad faith, then the Commonwealth was grossly negligent at the very least.[2]

And the Commonwealth, not Miles, is responsible for the fact that it took the state crime lab another eleven months or more to test the hat. *See* Pet. App. 92a (noting that toboggan was sent to Kentucky State Police forensic lab). This point also is clearly established by *Barker*. A reason "such as … overcrowded courts" is—like negligence—a "more neutral reason" that "should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531.

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[2] The Sixth Circuit's decision states in a footnote: "We note, moreover, that the only argument Miles presented to the Kentucky Supreme Court was that the prosecution had acted in bad faith by sending the hat for testing. He made no argument, as he does now, related to prosecutorial negligence." Pet. App. 14a n.5. On the contrary, Miles's briefing to the Kentucky Supreme Court (1) stated that "Miles satisfies the second prong of the [*Barker*] test based on the fact that the delays were caused by the prosecution and for no legitimate reason"; (2) pointed to the Commonwealth's failure to show "due diligence in trying to get [the hat] tested"; (3) argued that the delay in sending the hat to the lab "was not justified and, therefore, fails the neutral test"; and (4) cited a Sixth Circuit decision in which, according to Miles's briefing, "negligent delay [was] weighted against [the] government." Pet. App. 238a; Pet. App. 256a.

Even if these eleven months of the delay were due to an overburdened state crime lab rather than any lack of government diligence, they also weigh against the Commonwealth under the second *Barker* factor.[3]

In sum, the Sixth Circuit recognized that Miles's argument as to the second *Barker* factor focused on the Commonwealth's delay "in waiting to test the hat and allowing the hat to languish at the lab." Pet. App. 14a. But the Sixth Circuit deemed it reasonable to conclude that the second *Barker* factor "weighs in favor of the government" on the ground that DNA test results were important for trial (Pet. App. 15a)—regardless of the government's responsibility for nearly two years of delay in DNA testing. This is contrary to the law established in *Barker* and *Doggett*: The second *Barker* factor weighs in the defendant's favor when the government is responsible for underlying delays that cause postponement of trial. Certiorari should be granted to address the Sixth Circuit's contravention of this Court's precedents, which other circuits have faithfully followed.

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[3] The Kentucky Supreme Court, in finding "no indication that the Commonwealth acted in bad faith," noted that "the prosecutor reported that he was regularly calling the lab to inquire about the status of the testing." Pet. App. 13a. This speaks only to the prosecutor's diligence and not the state crime lab's. But even if this "supports the reasonable conclusion[] … that the government was diligent once the hat was sent to the lab," Pet. App. 15a, diligence does not eliminate the government's responsibility for inordinate delays due to an overworked state system. Neither the state court nor the panel below considered this governmental responsibility because both courts determined, contrary to this Court's precedents, that responsibility for the DNA testing delays was irrelevant.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS REGARDING COGNIZABLE FORMS OF SPEEDY-TRIAL PREJUDICE.

Miles was serving time on an unrelated conviction and, without the pending charges, would have been in a less secure or community facility and eligible for additional programs. *See supra* 7–8. Neither the Kentucky Supreme Court nor the Sixth Circuit questioned the factual basis for this assertion of prejudice by Miles. The state court, however, assigned it no weight in the prejudice analysis under *Barker*'s fourth factor. And the Sixth Circuit ruled that "the Kentucky Supreme Court's decision was not contrary to, or an unreasonable application of, *Barker*'s fourth factor." Pet. App. 18a. As its sole basis for that determination, the Sixth Circuit categorically rejected this form of prejudice as a matter of law: "[B]eing 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 (internal quotation marks omitted).

The Sixth Circuit's legal rule is contrary to this Court's clear precedents. A half-century ago, this Court rejected the notion that "a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.'" *Hooey*, 393 U.S. at 378 (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). The Court recognized that "delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." *Id.* Among other things, "the

conditions under which he must serve his sentence [may be] greatly worsened[] by the pendency of another criminal charge outstanding against him." *Id.*[4] Additionally, where a defendant is serving time for another conviction, "*no court should overlook* the possible impact pending charges might have on his prospects for parole and meaningful rehabilitation." *Moore v. Arizona*, 414 U.S. 25, 27 (1973) (emphasis added); *accord Strunk*, 412 U.S. at 439.

Other circuits have applied this straightforward precedent. The Fifth Circuit, for example, has recognized 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). In addition, the Fifth Circuit observed, "Supreme Court cases decided after *Hooey* explain that delays may prejudice a defendant by adversely affecting his prospect for rehabilitation, which facially has no bearing on the duration of his sentence." *Id.* (citing

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[4] *Hooey* also recognized another form of cognizable prejudice from delays in trying a defendant already imprisoned on other charges: "[T]he possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed." *Hooey*, 393 U.S. at 378; *see also, e.g.*, *United States v. Allen*, 664 F. App'x 574, 577–78 (7th Cir. 2016) ("the possibility that a defendant might receive a sentence at least partially concurrent with another sentence is a form of prejudice to consider under the first prong of potential prejudice"). The Sixth Circuit, however, has contradicted that related aspect of *Hooey* as well. *Robinson*, 455 F.3d at 609 ("prejudice factor relates to delay that causes impairment of the defense, not delay that prevents federal sentence from running concurrently with a previously imposed sentence"), *cited in* Pet. App. 18a.

Strunk and *Moore*). Relying on this Court's decisions, the Fifth Circuit determined that a habeas petitioner's ineligibility for educational and employment opportunities and disqualification from trustee status were cognizable forms of prejudice under the Sixth Amendment. *Id.* at 265; *see also Prince v. Alabama*, 507 F.2d 693, 703, 707 (5th Cir. 1975) (holding that habeas petitioner was prejudiced by more restrictive confinement, by loss of access to rehabilitation, parole, and work-release programs, and by loss of possibility for concurrent sentences).

Likewise the Third Circuit, after reviewing the holdings of *Hooey*, *Strunk*, and *Moore*, found merit in the defendant's assertion that he suffered cognizable Sixth Amendment prejudice by losing "access to rehabilitative programs and the opportunity for more liberal visitation privileges." *Burkett v. Fulcomer*, 951 F.2d 1431, 1442–43 (3d Cir. 1991). The Eighth Circuit and D.C. Circuits also have adhered to this Court's decisions on the issue. *Morris v. Wyrick*, 516 F.2d 1387, 1391 (8th Cir. 1975) ("During all the relevant times involved herein Morris was in prison serving the 18-year sentence which was affirmed June 8, 1970. This does not mean that he could not still suffer from undue and oppressive incarceration prior to trial for he could lose the chance of a partially concurrent sentence, his conditions of confinement could worsen, he could lose opportunities for parole, and the prospect of rehabilitation may be adversely affected by a pending criminal trial." (citing *Hooey*, *Strunk*, and *Moore*)); *United States v. Rucker*, 464 F.2d 823, 826 (D.C. Cir. 1972) ("Regarding the second type of prejudice noted in *Smith v. Hooey*, appellant offers to prove that the pending charge diminished his ability to make parole,

and also rendered him ineligible to participate in a rehabilitation program at Lorton Reformatory. … [T]hose claims clearly are cognizable to show detriment from a Sixth Amendment violation….").

Whereas other circuits properly have followed this Court's clear precedents, the Sixth Circuit's decision squarely contradicts *Hooey*, *Strunk*, and *Moore*. Certiorari should be granted to address this conflict as well.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The right to a speedy trial is "one of the most basic rights preserved by our Constitution." *Klopfer*, 386 U.S. at 226. To decide when this right has been violated, the Court has eschewed "inflexible approaches" in favor of a "balancing test[, which] necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Barker*, 407 U.S. at 529–30. This framework requires courts to "engage in a difficult and sensitive balancing process," *id.* at 533, even though the "literal sweep" of the Sixth Amendment's text "would forbid the government to delay the trial of an 'accused' for any reason at all," *Doggett*, 505 U.S. at 651–52. Accordingly, the Court has cautioned that "we are dealing with a fundamental right of the accused" and therefore "this [balancing] process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Barker*, 407 U.S. at 533. A lower court's faithful adherence to this Court's decisions always is important, indeed essential, and that is especially true when deciding the fundamental yet "slippery" (*id.* at 522) right to a speedy trial.

The Sixth Circuit's contradictions of this Court's decisions would—if allowed to stand—weaken the speedy-trial right in critical ways. First, the Sixth Circuit held that the government's responsibility for underlying delays in the availability of evidence is *irrelevant*. Under that rule, so long as the evidence is important enough to justify delaying trial, it makes no difference whether the government delays any effort to obtain that evidence or whether an overburdened system causes additional protracted delays. Second, the Sixth Circuit held that an entire category of prejudice expressly recognized by this Court—ineligibility for rehabilitative programs and less restrictive confinement on other charges—is not cognizable. That rule makes it irrelevant whether trial delays have caused a defendant to miss years of rehabilitation, and to be held for years in a high-security prison instead of a minimum security facility or even a community setting like a halfway house.

The importance of these issues is confirmed by the fact that this Court previously chose to address them in the decisions that the Sixth Circuit contradicted. And their importance is illustrated by the facts of Miles's case. It is undisputed that Miles's murder trial was delayed until 21 months after his indictment, that he asserted his speedy-trial right repeatedly and vigorously, and that he even was willing to forego the exculpatory DNA testing if necessary to promptly have his day in court. Indeed, the district court acknowledged that the first and third *Barker* factors weigh in Miles's favor. Under this Court's precedents, the second *Barker* factor also weighs in Miles's favor, not the government's, because the Commonwealth is solely re-

sponsible for the prosecutor's delays in sending the toboggan hat to the state crime lab and for the lab's delays in testing it. And, under this Court's precedents, Miles's lost opportunities for less restrictive confinement and for rehabilitation programs are cognizable prejudice under the fourth *Barker* factor.

These factors tip the balance decidedly to a finding that the Commonwealth violated Miles's fundamental constitutional right to a speedy trial. The Sixth Circuit's decision against Miles was based on rulings that contravened both sets of this Court's precedents.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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Respectfully submitted,

Genna L. Sinel
JONES DAY
600 Brickell Ave.
Suite 3300
Miami, FL 33131

Louis K. Fisher
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
lkfisher@jonesday.com

Counsel for Petitioner