No. 11-9953

IN THE

Supreme Court of the United States

JONATHAN BOYER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT

THOMAS R. MCCARTHY
WILLIAM S. CONSOVOY
BRYAN K. WEIR
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
tmccarthy@wileyrein.com

JOHN F. DEROSIER
District Attorney
CYNTHIA S. KILLINGSWORTH
First Assistant District Attorney
CARLA S. SIGLER*
Assistant District Attorney
KAREN C. MCLELLAN
Assistant District Attorney
901 Lakeshore Drive
Suite 800
Lake Charles, LA 70601
(337) 437-3400
csigler@cpdao.org

December 19, 2012

* *Counsel of Record*

245192

QUESTION PRESENTED

Whether the delays in securing funding for specially qualified lead counsel for an indigent capital defendant should be attibutable to the state for Sixth Amendment speedy trial purposes where the defendant already had constitutionally adequate counsel representing him, the defense failed to move the case forward, and the defendant failed to seriously assert his speedy trial right.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

AMENDMENTS, STATUTES AND RULES

Cited Authorities

Page

Page

OTHER AUTHORITIES

Page

INTRODUCTION

Almost all cases concerning the Sixth Amendment Speedy Trial Clause require the Court to answer the same question—"whether the government or the criminal defendant is more to blame for th[e] delay." *Doggett v. United States*, 505 U.S. 647, 651 (1992). This case is no different, as the issue here is whether the State should be held responsible for the delays that occurred in this case. Petitioner reasons that delays must be attributed to the State because, without the funding he was attempting to secure from the state, he was deprived of his constitutional right to appointed counsel and could not proceed. But this reasoning is flawed because Petitioner's right to counsel guarantees him only "an effective advocate," not "the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). At all times, Petitioner was represented by at least one, and often two, other counsel who more than met the constitutional standard for appointed counsel. Petitioner is responsible for the delays caused by his desire to be represented by his preferred counsel. Accordingly, there is no speedy trial violation.

Even aside from Petitioner's flawed premise, it is quite clear that he is "to blame" for the delays in this case. Petitioner's trial counsel, Mr. Tom Lorenzi, failed to move the case forward in any respect. Indeed, he failed to press for any resolution of the funding issue at the center of this case. Rather, he impeded resolution of the funding issue by seeking (or acquiescing in) nine continuances of the hearing on his funding motion, delaying a determination on the issue for over three years. Clearly then, Mr. Lorenzi was the cause of the delays, and they must be charged against Petitioner. *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009).

But even if the delays in securing funding for Mr. Lorenzi are attributable to the State, those delays must be excused because they were for a valid reason. Under this Court's precedent, the reason for delays is "valid" and thus "justifies delay," where "important public interests" underlie the process that results in delay. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). The entire purpose of the State's system of providing indigent capital defendants with two specially qualified attorneys is to enhance the quality of representation for the indigent in criminal cases of the utmost importance—those which may result in a sentence of death. This system thus serves among the most important public interests. Accordingly, delays relating to the funding of capital-certified lead counsel must be treated as "valid" and thus not attributed against the State for Sixth Amendment speedy trial purposes. *See id.*

Should the Court find that the reasons underlying this generous State program do not justify the delay in this case, they still should not be charged against the State because Petitioner failed to assert his speedy trial right in any more than a perfunctory manner and only after taking actions demonstrating that he had no interest in a speedy trial. *See Barker v. Wingo*, 407 U.S. 514, 535 (1972). Moreover, Petitioner actually benefited from the delay because it resulted in the State amending the indictment from capital murder to second-degree murder, thus eliminating the possibility of a death sentence. For all of the reasons above, there was no Sixth Amendment speedy trial violation in this case.

But even if there were, the "unsatisfactorily severe remedy of dismissal," *id.* at 522, should be applied only to the murder charge (which carries a sentence of life

imprisonment without parole). The armed robbery charge, which resulted in a sentence of 99 years' imprisonment without parole, would remain unaffected. That separate charge did not need to be filed at the time of the original indictment and thus started a new speedy trial clock, which did not begin running until after the funding question was mooted.

STATEMENT

A. Representation of Capital Indigent Defendants in Louisiana

1. The State of Louisiana (the "State") has long made the vigorous and effective representation of indigent capital defendants a priority. To this end, in 1994, the Louisiana Supreme Court adopted Rule XXXI, which relates to indigent counsel standards. Rule XXXI(A)(1)(a) specifically provides:

> In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant. At least two of the appointed attorneys must be certified as qualified to serve in capital cases as provided below. The court shall designate one of the appointed attorneys to be lead counsel, the other(s) as associate counsel.

La. S. Ct. R. XXXI(A)(1)(a).

The State thereafter established the Louisiana Indigent Defense Assistance Board ("LIDAB") to certify counsel as qualified for capital representation. La. Rev.

STAT. ANN. § 15:146 (2005 & Supp. 2009).[1] As set forth in Chapter 7 of the LIDAB's Standards on Indigent Defense, capital counsel (during the relevant period) was required to be familiar with criminal practice and procedure in Louisiana criminal courts, as well as the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence. *See* Louisiana Indigent Defense Assistance Board, Standards of Indigent Defense for the State of Louisiana, ch. 7-1.1, 7.1-2 (1995) ("LIDAB Standards").[2] Capital counsel also must have completed, within one year of an application for certification, at least twelve hours of LIDAB-approved training primarily involving advocacy in the field of capital defense. *See id.* at ch. 7-1.3. To maintain certification, counsel also needed to complete an additional twelve hours of such training every two years. *See id.* at ch. 7-1.4.

The Louisiana Code of Criminal Procedure requires that "[c]ounsel assigned in a capital case must have been admitted to the bar for at least five years." LA. CODE CRIM. P., art. 512. The LIDAB Standards, however, further specify the level of experience needed for certification as trial counsel. First, lead counsel must be

1. Until 1997, LIDAB was known as the Louisiana Indigent Defender Board.

2. The LIDAB Standards are published in the U.S. Department of Justice, Compendium of Standards for Indigent Defense Systems: A Resource Guide for Practitioners and Policymakers, at B12 (2004), which is available at http://www.americanbar.org/content/dam/aba/ uncategorized/Death_Penalty_Representation/Standards/National/ DOJStandards.authcheckdam.pdf. The requirements described above were in effect until 2010 when they were updated in compliance with LA. REV. STAT. ANN. 15:148 (2007).

"an experienced and active trial practitioner with at least five years of litigation experience" with "prior experience as lead counsel in no fewer than nine jury trials tried to completion, . . . at least five [of which] must have involved felonies or two [of which] must have involved the charge of murder." *Id.* at ch. 7-2.1(A), (B). Second, lead counsel must have had "prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase." *Id.* at ch. 7-2.1(C). And third, associate counsel must be "an experienced and active trial or appellate practitioner with at least three years of litigation experience," specifically with "prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial." *Id.* at ch. 7-3.1(A)-(B).

This policy of providing indigent capital defendants with two specially certified attorneys is motivated by the State's desire to ensure high-quality representation. As the Louisiana Supreme Court has explained, the concept "is premised upon one attorney [being] assigned primary responsibility for the guilt phase and the other the sentencing phase" and its belief that "[t]he presence of an additional attorney . . . decreases the chance for attorney error." *State v. Jones*, 707 So. 2d 975, 978 (La. 1998); *see also State v. Koon*, 704 So. 2d 756, 768 (La. 1997) ("This Court has long adhered to the view that the

better practice is to appoint two attorneys to defend a capital case, allocating specifically to one the principal responsibility for preparing and presenting the defense case at the penalty phase.").[3]

2. Importantly, however, this generous policy neither expands substantive or procedural "rights" nor creates an enforceable cause of action. Supreme Court Rule XXXI specifically provides:

> The intent of this Rule is to regulate the practice of law only to the extent specifically articulated above. The Rules shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution, the Louisiana Constitution, the laws of the state, and the jurisprudence of the courts.
>
> The programs, rules, procedures, and standards included in, encompassed by, and resulting from this Rule shall not form a basis for a procedural or substantive attack in any case or proceeding pending or instituted in the Louisiana criminal

3. A federal statute, 18 U.S.C. § 3005, similarly provides for two attorneys in capital cases, only one of whom need "be learned in the law applicable to capital cases." 18 U.S.C. § 3005. Like its Louisiana counterpart, "the purpose of the [federal] two counsel provision was to reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel, and to attempt to prevent mistakes that would be irrevocable because of the finality of the punishment." *United States v. Shepherd*, 576 F.2d 719, 729 (7th Cir. 1978).

> justice system on or after the date this Rule is promulgated.

La. S. Ct. Rule. XXXI(B).[4]

The Louisiana Supreme Court has confirmed this understanding. *See, e.g.*, *Jones*, 707 So. 2d at 978 ("An indigent defendant clearly has no statutory right to having two attorneys in a capital case."); *Koon*, 704 So. at 769 ("[A]s other sections of the Rule make clear, this does not give rise to an affirmative right to multiple attorneys in capital trials."); *see also State v. Perez*, 745 So. 2d 116, 179 (La. Ct. App. 1998) ("[T]he indigent defense rules are not intended to confer upon an indigent defendant substantive rights beyond those recognized by the federal and state constitutions, and enactments of the legislature, nor intended to be used to determine the validity of a conviction."). Accordingly, the failure to provide an indigent capital defendant with two certified capital attorneys "does not constitute a ground for reversal of [a] defendant's conviction." *State v. Gradley*, 745 So. 2d 1160, 1165 (La. 1998).

Moreover, indigent capital defendants may elect to decline the benefits of Rule XXXI. *See Koon*, 704 So. 2d at 769-70. Indeed, indigent capital defendants "in some

4. With respect to federal law, "the right to additional counsel" in capital cases "is created by statute, and not coterminous with the right to counsel contained in the Sixth Amendment." *United States v. Casseus*, 282 F.3d 253, 256 (3d Cir. 2002); *see United States v. Blankenship*, 548 F.2d 1118, 1121 (4th Cir. 1976) (holding that the federal statute providing for two attorneys in a capital case is "not one mandated by the Constitution").

cases may not desire a second appointed counsel." *Jones*, 707 So. 2d at 978; *see also id.* ("Because there is no right to second counsel, because a defendant may oppose the appointment, and because other unforeseen reasons may weigh against appointment of second counsel, such an appointment is left to the discretion of the trial court."). In *Koon*, for example, the indigent capital defendant opted to proceed with only one attorney. The Louisiana Supreme Court rejected Koon's challenge to his capital murder conviction on the ground "that he was denied the assistance of co-counsel." *Koon*, 704 So. 2d at 769-70.

3. At the time of Petitioner's arrest and indictment, the State had established multiple systems for providing capital counsel for indigent defendants. First, the State established local Indigent Defender Boards (IDBs) for each judicial district. *See State v. Citizen*, 898 So. 2d 325, 330 (La. 2005). Each IDB maintained a panel of volunteer attorneys licensed to practice in Louisiana, as well as a panel of non-volunteer attorneys to appoint in the event there was a shortage of volunteers. *See* La. Rev. Stat § 15:145(A)-(B).[5] During the relevant time period, the IDB in Calcasieu Parish provided counsel to indigent defendants through the public defender's office and contract attorneys. Under this system, contract attorneys usually represented indigent defendants only when the public defender was unable to do so because of workload issues or a conflict. The IDBs secured funding from several sources, including through fees assessed for all convictions above the level of a parking violation,

5. This Act was repealed by the August 2007 reform of the Louisiana Public Defender Act, but was in force prior to the reduction in charges against Petitioner.

id. § 15:146(B)(1)(a), annual state appropriations, *id.* § 15:146(C), revenues from forfeitures, *id.* § 15:571.11, and a forty-dollar application fee from defendants seeking to be screened for indigency, *id.* § 15:175(A)(1)(f).

Second, the LIDAB created Regional Capital Conflict Panels to assist those districts, like Calcasieu Parish, with public defender's offices when conflicts-of-interest arose. *See* The National Legal Aid & Defender Association, In Defense of Public Access to Justice 15 (March 2004) [hereinafter "In Defense"]; Justice Richard F. Calgero, *The Right to Counsel and Indigent Defense*, 41 Loy. L. Rev. 265, 276 (1995).[6] Those panels provide capital counsel to indigent defendants—as well as a fact and a penalty phase investigator—in each case they accept into the program. In Defense at 15. During the relevant period, these LIDAB regional panels received significant funding from the State. Indeed, notwithstanding a severe budget crisis exacerbated by Hurricanes Katrina and Rita,[7] the State appropriated no less than $7.5 million annually, *see* In Defense at 15, including an additional $10 million in funding in 2007.[8] Thereafter, LIDAB funded

6. Available at http://www.nlada.net/library/documents/la_nladaavoyelles03-2004_report.

7. *See State Budget Map*, PBS (January 10, 2003), http://www.pbs.org/now/politics/budgetmap.html#la (noting Louisiana's FY2003 budget deficit of $86 million). By FY 2005, Hurricane Katrina had devastated Louisiana, resulting in a budget deficit of nearly $1 billion dollars. *See Blanco Proposes $431 Million in Cuts*, The News-Star (Monroe, Louisiana), Nov. 6, 2005 at 1A.

8. *See* State of La. Senate, S. Fiscal Servs. Summary of the Fiscal Year 2007 Budget, State of Louisiana Senate 2 (June 30, 2006), *available at* http://senate.la.gov/FiscalServices/Publications/FY06-07/FY07%20Budget%20Summary.pdf.

then-pending capital cases in Calcasieu Parish with that additional appropriation. JA 298a n.6. One of LIDAB's regional panels, the Louisiana Capital Assistance Center, represented Petitioner through this case. R. 2528-29.

4. The process for appointing and funding counsel to represent indigent capital defendants was modified over time. Because requiring appointed counsel to represent indigent capital defendants without compensation is an "abusive extension of their professional obligations," the Louisiana Supreme Court held that a trial court should "determine before he appoints counsel that funds sufficient to cover the anticipated expenses and overhead are likely to be available to reimburse counsel . . . from the [local IDB], from the state, from one court fund or another, from the local government subdivision, . . . or from any other available source." *State v. Wigley*, 624 So. 2d 425 429 (La. 1993) (internal quotation omitted). The trial court was ordered to "hold a hearing at which the attorneys may present evidence to establish their reasonable overhead costs and reasonable expenses incurred in the course of the assigned representation." *Id.* at 429-30.

Soon thereafter, the Louisiana Supreme Court held that the trial court "can order the local government of the parish where the case is being tried to defray necessary expenses surrounding indigent defense." *State v. Craig*, 637 So. 2d 437, 439 (La. 1994). But the State legislature amended the applicable statute to abrogate that decision, prohibiting the courts from ordering a local parish to fund indigent defense. La. Rev. Stat. § 15:304. *See State v. Citizen*, 898 So. 2d 325, 332-33 (La. 2005). While the law did not forbid parishes from voluntarily funding indigent

defense, the statutory amendment validly prevented courts from ordering them to do so. *Id.* at 335.

In response, the Louisiana Supreme Court modified the procedure for seeking indigent capital counsel funding from the trial court. Instead of determining the source of funding before the appointment of counsel, the trial courts were instructed to appoint capital counsel at the indigent defendant's first court appearance to "assure[s] timely representation." *Id.* at 338. Appointed counsel should thereafter file a motion in the trial court to determine funding. *See id.*

B. Facts and Proceedings Below

1. On the evening of February 4, 2002, Petitioner and his brother, Anthony Boyer, were walking down a road in Sulphur, Louisiana when Bradlee Marsh offered them a ride in his truck. R. 711, 5000-01. Petitioner demanded money from Marsh. R. 711. When Marsh refused, Petitioner shot him three times in the head. R. 702. Petitioner then stole Marsh's money and a silver chain. R. 712. Marsh died as a result of his gunshot wounds, R. 702, two of which were "contact wounds, in that the barrel of the gun was placed against the skin in one case and the other shot wound was fired from about three-eighths of an inch away." *State v. Boyer*, 56 So. 3d 1119, 1136 (La. Ct. App. 2011).

On the night of the murder, Petitioner confessed to his mother, Barbara Boyer, that he had shot someone; he confessed to his aunt, Susan Bland, that he had shot someone in the head and that his brother Anthony was

burning the clothes they had worn at the time of the shooting; and he confessed to his grandmother, Alice Dassinger, that he had done something terrible. R. 706-07. A few days later, Petitioner told Maxi Higginbotham and his cousin Timothy Windham that he had killed someone in Sulphur. R. 708. With Windham's help, Petitioner fled to Jacksonville, Florida. R. 708; *Boyer*, 56 So. 3d at 1136.

During the investigation into Marsh's murder, Barbara Boyer, Bland, and Dassinger each volunteered information to the Calcasieu Parish Sheriff's Office giving separate statements implicating Petitioner. R. 706-07. The next day, Anthony Boyer made a statement to police implicating his brother in the shooting and later testified that his brother murdered Marsh. R. 5001-02. Police found Petitioner's fingerprints on a yellow legal pad in Marsh's truck; Petitioner admitted to police he had handled the pad during the murder. R. 5386, 5423, 5440, 5455.

The Jacksonville Sheriff's Office was informed that Petitioner had fled to that jurisdiction. *Boyer*, 56 So. 3d at 1131, 1136. When two officers encountered him walking on the street, Petitioner brandished a gun and attempted to flee again. Petitioner was ultimately apprehended by Jacksonville police and arrested for Marsh's murder. *Id.* at 1136. After his arrest, Petitioner agreed to an audio-taped interview. R. 711. He confessed to shooting Marsh and provided specific details of what had transpired. The Louisiana appellate court later described the confession as having been "freely and voluntarily made." *Boyer*, 56 So. 3d at 1138.

2. Petitioner was indicted on June 6, 2002. The Public Defender's Office was unable to represent Petitioner

because it was already representing his brother, Anthony, who had been charged with obstruction of justice. JA 35a; R. 2744. On June 10, 2002, the trial court appointed Tom Lorenzi as first-chair counsel and his law partner Walt Sanchez as second-chair counsel. JA 354a-58a. Mr. Lorenzi moved to continue the arraignment from July 1, 2002 to September 9, 2002. JA 5a.

Although Mr. Sanchez withdrew as counsel shortly thereafter, the Louisiana Capital Assistance Center ("LCAC") joined the representation of Petitioner on September 9, 2002. In particular, Stephen Singer, an attorney who previously had spent eight years with the Public Defender Service in Washington, D.C.,[9] was formally appointed as second-chair counsel. The Louisiana Capital Assistance Center had a contract with LIDAB whereby its attorneys agreed to provide funded representation for capital cases in Calcasieu Parish. Mr. Singer agreed to join the defense team pursuant to that contract. R. 2473; JA 375a. Petitioner was arraigned that same day. Trial was set for February 3, 2003. JA 7a.

On November 12, 2002, Christine Lehman, also of the Louisiana Capital Assistance Center, began assisting with the representation as well. Ms Lehman initially acted as a process server on behalf of Petitioner, R. 169-71, but her role quickly expanded into what Mr. Lorenzi described as "third-chair counsel," and she "established a significant relationship with [Petitioner] and [his] family." R. 203-04. Ms. Lehman eventually became second-chair counsel after she was certified by the trial court to act as associate counsel in capital cases and was formally

9. *See* http://law.loyno.edu/bio/stephen-singer.

appointed to replace Mr. Singer upon his withdrawal from the representation. R. 203-04, 210-12; JA 530a. Ms. Lehman remained as Mr. Boyer's counsel during the entirety of the capital proceedings.[10]

Also on November 12, 2002, more than five months after he was appointed, Mr. Lorenzi filed a Motion to Determine the Source of Funds for his fees. JA 372a. The motion related *only* to Mr. Lorenzi's fees because the Louisiana Capital Assistance Center was fully funded by the State. JA 375a. Mr. Lorenzi identified LIDAB, the local IDB, the Calcasieu Parish Police Jury ("CPPJ"),[11] and the State of Louisiana as potential sources of funding. JA 379a-401a. By Mr. Lorenzi's own admission, however, he was unable to secure funding from LIDAB because of a conflict of interest arising from the fact that his law partner served as a member of LIDAB's board. JA 618a. A hearing was set for January 17, 2003. JA 8a.

But that hearing was never held. Instead, what followed was a series of continuances of both the funding hearing and the trial, almost all of which came at the behest of Mr. Lorenzi:

---

10. Ms. Lehman withdrew on January 28, 2008 to go on maternity leave, which was after the charges were reduced to second-degree murder. JA 37a-38a; R. 2912-14; R. 1279-81. Rachel Jones and Richard Bourke from Ms. Lehman's office took over the representation at that point.

11. As Petitioner notes, Pet. Br. 12-13, a "police jury" is the locally elected body that governs most parishes. In the funding litigation matters, the police juries, such as the Calcasieu Parish Police Jury, represent the parish's interests.

January 10, 2003 (Continuance #1): Mr. Lorenzi sent a letter to the court requesting a continuance of the funding hearing, citing "[s]cheduling problems … which necessitate upsetting the consolidated hearing fixed for January 17, 2003." R. 192.

February 3, 2003 (Continuance #2): Mr. Lorenzi filed a motion to continue the trial scheduled for that same day, which the court granted. The court reset the trial date for September 29, 2003. JA 397a-398a. The reason given by Mr. Lorenzi was the pending motion to determine the source of funds. *Id.* A hearing on the funding motion was reset for August 15, 2003. JA 401a.

August 5, 2003 (Continuance #3): Mr. Lorenzi sought a continuance of the funding hearing, citing his concern that his funding motion was premature given the decision of the trial court in *State v. Winfree,* JA 401a-403a, a case in which the trial court had ruled that appointed counsel must apply directly to the local IDB for funding before filing a motion to determine the source of funds. JA 399a-400a (seeking a continuance because his funding motion otherwise "may be deemed premature pending a decision by the [local IDB] which will not meet until August 26, 2003 to consider defense counsel's statement for services rendered and a proposed agreement for payment of future fees and expenses."). The funding hearing was reset for September 19, 2003. JA 9a.

September 12, 2003 (Continuances #4 and #5): Mr. Lorenzi filed another motion to continue the funding hearing, as well as a motion to continue the scheduled September 29, 2003 trial date. The reason given was that the local IDB "[was] not scheduled to meet to make a

decision critical to the determination of a source of funds until September 30, 2003." JA 10a, 404a-05a. Following the IDB's denial of his request for funds, Mr. Lorenzi did not move to reset the funding hearing. Pet. Br. 17. Upon the State's request, the court re-scheduled the funding hearing for December 17, 2003. R. 201; JA 12a-13a.

December 15, 2003 (Continuance #6): Two days before the scheduled hearing Mr. Lorenzi filed a motion to continue the funding hearing until mid-January because "additional time [was] necessary to obtain affidavits updating the previous testimony of witnesses in order to efficiently present this matter to the Court." JA. 408a-09a. The funding hearing was reset for January 16, 2004. JA 12a.

January 16, 2004 (Continuance #7): Mr. Lorenzi filed another motion to continue on behalf of the Calcasieu Parish attorney because he was unavailable on the hearing date. The court continued the hearing on the funding motion indefinitely. JA 410a-11a. At a hearing on February 9, 2004, the court rescheduled the funding hearing for April 2, 2004. JA 13a-14a.

April 2, 2004 (Continuance #8): On the scheduled hearing date, the funding hearing was again continued. JA 14a-15a.[12] Mr. Lorenzi did not object to the continuance. A

12. Petitioner contends that the State sought to continue this hearing date. Pet. Br. 18. This is incorrect. The court transcript—which is not in the record—indicates that the hearing date was continued at the request of the court. Pursuant to Rule 32.3, Respondent has sought to lodge a copy of this non-record material with the Clerk.

new hearing date was not immediately set. Later, on June 21, 2004, Respondent requested that the court reset the funding hearing. JA 15a-16a. The court rescheduled the funding hearing for August 19, 2004. JA 16a.

August 17, 2004 (Continuances #9): Allen Smith, counsel for the CPPJ, filed a motion to continue the hearing because his daughter needed cancer treatment in Houston and because the issue whether the court could order the parish to provide funding for indigent defense was pending before Louisiana Supreme Court in *State v. Citizen,* which could moot the parish's participation in the funding hearing. JA 414a, 689a. Mr. Lorenzi agreed to the continuance. Following the issuance of the *Citizen* ruling on April 1, 2005, Mr. Lorenzi did not move to have the funding hearing rescheduled. Instead, on July 1, 2005, Respondent requested that the funding hearing be scheduled for July 15. JA 18a-19a.

July 7, 2005 (Continuance #10): Mr. Lorenzi filed another motion to continue the funding hearing, and the hearing was reset for September 22. JA 416a-17a, 20a-21a. On that same day, Mr. Lorenzi and Ms. Lehman filed a motion to quash the indictment on both state and Sixth Amendment speedy trial grounds. JA 416a, 418a.

September 12, 2005 (Continuance #11): About two weeks after Hurricane Katrina, Mr. Lorenzi filed a motion to continue "due to the lack of contact with co-counsel in New Orleans and the inability to subpoena witnesses from New Orleans as a result of Hurricane Katrina devastation." JA 433a. Then, on September 22, 2005, Hurricane Rita made landfall just west of Calcasieu Parish in east Texas. The 14th Judicial District Court was

closed from September 23, 2005 to November 25, 2005, with the exception of limited proceedings.[13]

On February 22, 2006—again, at Respondent's urging—the trial court set the funding hearing for March 27. JA 21a. The court finally held the hearing and took evidence on that date. JA 22a-24a. Two important issues arose during that hearing. First, the court inquired into the possibility left open by *Citizen*, namely whether the District Attorney's office and the judge of that court could agree to disperse the *ad valorem* surplus funds to petitioner's defense. JA 459a-71a. The CPPJ stipulated that it was willing to fund expert witnesses if the court and the District Attorney's office agreed. JA 461a-64a. However, there was a concern as to whether the District Attorney could simultaneously prosecute the defendant and provide the funding for defending that prosecution without raising a conflict of interest. JA 643a. Second, Mr. Lorenzi disclosed that he was ineligible to receive funds originating from LIDAB because of the conflict of interest arising from his law partner's service on LIDAB's board. JA 583a.

At the conclusion of the hearing, the court determined that there was no funding then available, but acknowledged that there was a proposal before the legislature regarding the allocation of significant funds to LIDAB, and by extension the local IDBs. JA 655a-57a, 696a. Mr. Lorenzi, however, failed to present evidence of his anticipated

13. Rita Order No. 3, 14th Judicial District Court (10/24/2005), at http://www.lasc.org/katrina_orders/14thJDC_Rita03.pdf.; *see also* Executive Orders Nos. KBB 2005-32, 48, & 67 (suspending court deadlines through November 25, 2005).

costs. The court thus determined that a second funding hearing would be necessary for it to hear evidence as to Mr. Lorenzi's estimated costs before it could rule on the availability of funding. JA 439a, 668a.

On October 24, 2006, Mr. Lorenzi asked the court to set the defendant's motion to quash for the next month. JA 679a; R. 233. The court scheduled the motion to quash for hearing on November 20, 2006. On that date, Petitioner withdrew his motion to quash with respect to the Sixth Amendment, electing to proceed only under the Louisiana speedy trial statute. JA 686a, 708a. The trial court denied the state speedy trial motion. JA 703a. Petitioner sought an interlocutory appeal of that ruling on January 23, 2007, JA. 291a, that was ultimately denied on August 22, 2007. JA. 287a.

During the November 20, 2006 hearing on the motion to quash, the State notified the court that it was in the preliminary stages of reducing the charges to second-degree murder in order to put an end to the funding issues. JA 694a-95a. On January 24, 2007, the state filed a motion to set re-arraignment for February 26, 2007, which the court granted. JA 26a-27a. The rearraignment was rescheduled for May 16, 2007, but Mr. Lorenzi failed to appear on that date. JA. 28a-29a. The next day, Mr. Lorenzi's law partner appeared for the rearraignment. The court advised him that re-arraignment had been scheduled for the previous day and then re-scheduled for May 21, 2007 after Mr. Lorenzi failed to appear. JA 29a-30a. On May 21, 2007, Petitioner was arraigned on the reduced charges of second-degree murder, and the court set the trial date for October 29, 2007. JA 30a-32a. Tom Lorenzi was relieved as counsel. Christine Lehman

continued with the representation, becoming lead counsel for Petitioner.[14]

The non-capital portion of the case was marked by extensive motions practice, as defense counsel filed some 40 motions between July 26, 2007 and January 22, 2008, R. 247-357, 1179-1286, including a motion to continue the trial date. R. 1279-80. One of the motions filed on January 22, 2008 was a Motion to Quash Indictment and Bill of Information Due to Violation of Speedy Trial Right. JA 710a-35a. Of note, this was the first time Petitioner formally asserted his Sixth Amendment speedy trial right and presented it to the court for decision. On January 29, 2008, the trial court heard argument on the motion to quash, as well as over 30 other outstanding motions. JA 37a-47a. The court ruled on most of the motions, but ordered Respondent to submit a written response to the motion to quash and set it for hearing, JA 43a, 47a, before eventually denying the motion, JA 53a.

---

14. Tom Lorenzi requested a future hearing date to relieve him and the court immediately relieved him as counsel. Lorenzi the requested the Court set a hearing date to rule on his funding motion and pay his expenses. The Court instructed Lorenzi to submit an invoice to the local IDB and if it was unable to pay Lorenzi for his expenses, the Court would address the issue. R. 2710-11. The court then appointed James Burks as counsel. R. 2711. However, Burks filed a motion to withdraw as counsel and that motion was heard on July 19. R. 2717-38. There, the Director of the Louisiana Capital Assistance Center, Richard Bourke, appeared and informed the court that Christine Lehmann, one of his office's attorneys, was still counsel for Mr. Boyer, having been appointed previously as second-chair capital Counsel. R. 2722. As such, the court granted Burks's motion to withdraw and Louisiana Capital Assistance Center continued as counsel. R. 2736.

At a supplemental motions hearing on July 18, 2008, Petitioner refused to appear in court and defense counsel, after speaking with him, stated that she had concerns about the defendant's competency to proceed. JA 62a. The Court ordered a sanity commission and suspended all matters until the issue was resolved. JA 62a-63a. A psychologist and a psychiatrist examined Petitioner prior to the sanity hearing. JA 66a; R. 3384-86, 3409-411. On August 6, 2008, the court held the competency hearing and found that Petitioner was incompetent to stand trial based on the testimony of the two doctors. JA 66a-67a.[15] On March 6, 2009, the court reappointed the sanity commission and set a hearing for April 15. JA 68a-69a. The court found Petitioner competent to stand trial, JA 73a, and scheduled trial to being on September 21, 2009. JA 71a.

On the day the trial was set to begin, Petitioner's counsel filed a Motion to Reconsider Denial of Speedy Trial Motion. JA 811a-839a. The motion requested that the court reopen its previous ruling. JA 812a. The court denied the motion, relying on its previous decision. R. 3809-10. The trial commenced the next day. On September 29, 2009, the jury found Petitioner guilty of second degree murder, armed robbery, and use of a firearm. (*Boyer*, 56 So. 3d at 1124) On October 14, 2009, noting his lack of remorse, the court sentenced Petitioner to life in prison

15. Contrary to Petitioner's assertions, there is no evidence in the record that his pre-trial incarceration caused his incompetence to stand trial. *Compare* Pet. Br. 61 *with* R. 3386-3419. Neither of the two doctors who testified identified incarceration as a cause of Boyer's incompetence. *See* R. 3386-3419. Quite the opposite, one of the doctors testified to his belief that Boyer was faking mental illness and was not unwell at all. R. 3386-87.

for the second degree murder conviction, 99 years for the armed robbery conviction, and five years for the use of a firearm charge. R. 5814; *Boyer*, 56 So. 3d at 1124.

Petitioner challenged the length of his sentences on appeal, but the Court of Appeals for the Third Circuit noted that his sentence was appropriate, especially given Petitioner's attempted escape from prison, battery of a police officer, the charges of criminal damage to property and taking contraband into a penal institution, and having been disciplined more than forty times while incarcerated. *See Boyer*, 56 So. 3d at 1161. Neither Petitioner's guilt nor his sentence are being challenged before this Court.

C. The Appeal

Petitioner's Sixth Amendment speedy trial claim was rejected on appeal. *See State v. Boyer*, 56 So. 3d 119 (La. App. 3 Cir. 2011). As the appellate court explained, *Barker v. Wingo*, 407 U.S. 514 (1972), sets forth four factors in considering a constitutional speedy trial claim: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice. The court found that the length of the delay was presumptively prejudicial, thus triggering an inquiry into the other factors. *Id.* at 1141. It then noted that the "largest part of the delay involved the 'funding crisis' experienced in the State of Louisiana" and that the "majority of the seven-year delay was caused by a 'lack of funding.'" *Id.* at 1142. The Court also found that Petitioner did not assert his constitutional right to a speedy trial until after the three-year statutory deadline had tolled and that his assertion of the right, made via the motions to quash, were "more perfunctory than aggressive." *Id.* at 1142-43.

As for prejudice, the court noted that, with the exception of two witnesses, "[d]efendant did not relate the substance of the missing witnesses' anticipated testimonies either at the April 19, 2008 hearing on his January 2008 motion to quash or in brief to this court." *Id.* at 1143. Ultimately, the court rejected Petitioner's claim because for the first three years the progression of the prosecution was "out of the State's control" due to the funding crisis and because there was "nothing before this court to suggest that the State acted to delay the trial to gain any advantage." *Id.* at 1145.

The Louisiana Supreme Court declined to take up Petitioner's appeal. JA 87a. This Court subsequently granted the petition for certiorari, limiting review to whether the delays in securing funding for lead counsel could be attributed to the State.

SUMMARY OF ARGUMENT

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. But the speedy trial right is unlike an accused's other constitutionally-protected rights because failing to assert it "may work to the accused's advantage." *Barker*, 407 U.S. at 521. Indeed, "[d]elay is not an uncommon defense tactic." *Id.* Moreover, because "the ordinary procedures for criminal prosecution are designed to move at a deliberate pace," a "requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *Id.* at 522 n.15 (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

Because the speedy-trial right is "consistent with delays and depends upon circumstances," it is "necessarily relative." *Id.* at 522. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Id*. at 522. The Court therefore has generally applied a multi-factor test that takes into consideration the "[l]ength of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant." *Id.* at 530. In undertaking this inquiry the Court has been keenly aware that a speedy-trial violation harshly demands the "unsatisfactorily severe remedy of dismissal of the indictment." *Id.* at 522, n.16. Indeed, "overzealous application of this remedy" infringes "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error." *Ewell*, 383 U.S. at 121.

Notwithstanding the *Barker* test's flexible nature, "[t]he flag all litigants seek to capture is the second factor, the reason for delay," *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986), because of its tendency to dominate the speedy trial analysis. Because criminal defendants—especially in capital cases—"have incentives to employ delay as a 'defense tactic,'" any "delay caused by the defense weighs against the defendant." *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009).

In contrast, the effect of delays attributable to the government will vary with the strength of the reason. "A deliberate attempt to delay the trial in order to hamper the defense" weighs "heavily" against the State. *Barker*, 407 U.S. at 531. But "[a] more neutral reason such as negligence or overcrowded courts 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." *Id.* at 531. And, finally, a "valid reason" always "justifies delay," *Loud Hawk*, 474 U.S. at 315, absent a "showing of bad faith or dilatory purpose on the Government's part," *id.* at 316. The reason for delay is valid, among other reasons, where "important public interests" underlie the process that results in delay. *Id.* at 313.

For several reasons, the delays in obtaining funding for specially qualified lead counsel should not be attributable to the State. First, the delays are attributable to Petitioner. Petitioner's claim is premised on the assumption that the funding problem deprived him of his constitutional right to appointed counsel, thus resulting in the delay that purportedly caused the speedy trial violation. *See* Pet. Br. 1 n.1. But that assumption is flawed. The State's purported inability to fund Mr. Lorenzi's representation did not deprive Petitioner of qualified counsel. At all times, Petitioner had at least one, and often two, other highly competent, well-qualified, and fully funded counsel on his capital defense team. The Sixth Amendment "guarantee[s] an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). There can be no doubt that Mr. Singer and Ms. Lehman fit the bill, and one or both of them represented Petitioner at all times during which Petitioner remained under the capital indictment.

To be sure, Louisiana law afforded Petitioner the benefit of access to an indigent capital defense program that possibly could have funded Mr. Lorenzi's

representation. And state law afforded Petitioner the option of delaying the proceeding until the funding issue was resolved one way or the other; indeed Petitioner took full advantage of this option seeking or acquiescing in no less than nine continuances, delaying resolution of the issue for over three years. Contrary to his assertion, however, Petitioner was not "force[d] … to choose between [his] constitutional right to be represented by counsel and [his] constitutional right to have a speedy trial where there were systemic delays in the appointment of counsel." Pet. Br. 55-56. Petitioner voluntarily chose to delay the proceeding out of desire to secure preferred counsel even though he could have proceeded to trial with the other fully-funded, highly competent lawyers that were already representing him. Petitioner was free to make that choice, but it cannot be attributed to the State for Sixth Amendment purposes. At bottom, Petitioner does not seek to vindicate his speedy trial right. He seeks to expand an indigent defendant's right to appointed counsel in criminal cases to include preferred counsel. Because the argument is foreclosed by controlling precedent, the appeal can be resolved on this ground alone.

But even if Petitioner had a constitutional right to delay the proceeding in an effort to secure the counsel of his choice, he is still responsible for the delays caused by his lack of diligence. As in *Vermont v. Brillon*, Petitioner's trial counsel, Mr. Tom Lorenzi, failed to move the case forward, repeatedly seeking or acquiescing in continuances and never taking any steps in an effort to proceed to trial. More particularly, Mr. Lorenzi failed to press for resolution of the funding issue at the center of this case. He was slow to file his funding motion, never properly supported it with evidence of his estimated overhead costs and reimbursable expenses, and sought

to continue (or acquiesced in a request for continuance of) any hearing on the issue for over three years. And, on top of that, his inability to obtain funding was at least in part a result of a conflict of interest arising from the fact that his law partner served as a member of LIDAB's board. Simply put, Petitioner's counsel was the cause of the delays in the resolution of the funding issue. Accordingly, these delays should be "charged against the defendant." *Brillon*, 129 S. Ct. at 1290-91.

Second, even if the delays in securing funding for Mr. Lorenzi are attributable to the State, the delays were for a valid reason. As in *Loud Hawk*, the State's system of providing indigent capital defendants with two specially qualified attorneys serves "important public interests." Enhancing the quality of representation afforded to indigent capital defendants is clearly in the public interest and certainly of sufficient importance such that that delays relating to the funding of capital-certified lead counsel be treated as "valid" and thus not attributed against the State for Sixth Amendment speedy trial purposes. *See Loud Hawk*, 474 U.S. at 315.

Third, even if the Court rejects the foregoing, the delays still should not be charged against the State because the other speedy trial factors weigh against that harsh result. Petitioner's failure to assert the speedy trial right in more than a cursory manner weighs heavily against him. *See Brillon*, 129 S. Ct. at 1290; *Barker*, 407 U.S. at 531-32. Moreover, he was not prejudiced by delay; in fact, he benefited from the delay because it resulted in the State amending the indictment from capital murder to second-degree murder, which eliminated the possibility of a death sentence. For all the above reasons, there was no Sixth Amendment speedy trial violation in this case. But if the

Court concludes otherwise, the "unsatisfactorily severe remedy of dismissal" should be applied only to the murder charge (which carries a sentence of life imprisonment without parole), not the armed robbery charge (which carries a sentence of 99 years' imprisonment without parole). When the original indictment was amended to change Petitioner's charge from capital murder to second-degree murder, Respondent separately charged Petitioner via information with armed robbery. This separate charge, which did not need to be filed at the time of the original indictment, started a new speedy trial clock. Because this speedy trial clock began running after the funding question was mooted, it is unaffected by the delays in funding and thus not at issue here.

ARGUMENT

I. THE DELAYS IN OBTAINING FUNDING FOR PREFERRED COUNSEL ARE NOT ATTRIBUTABLE TO THE STATE FOR SIXTH AMENDMENT SPEEDY TRIAL PURPOSES.

A. There Is No Speedy Trial Violation Because The Delays Are Attributable To Petitioner.

1. This Court has repeatedly held that there is no speedy trial violation if the defendant is responsible for the delay. *See, e.g.*, *Brillon*, 129 S. Ct. at 1290; *Barker*, 407 U.S. at 529. That is precisely what occurred in this case. Petitioner's argument is built on the premise that "[i]n the absence of an effective appointment of counsel, an accused cannot meaningfully demand a speedy trial without waiving his right to counsel. Such a forced choice between fundamental constitutional rights is intolerable."

Pet. Br. 55. Because of the State's purportedly inability to secure funding for Mr. Lorenzi, Petitioner thus argues that he was being "force[d] … to choose between [his] constitutional right to be represented by counsel and [his] constitutional right to have a speedy trial where there were systemic delays in the appointment of counsel." *Id.* 55-56. While Petitioner's premise may well be correct, it has absolutely no application to this case.

Petitioner was in no way forced into a "catch 22" of choosing between a speedy trial or "effective appointment" of counsel. *Id.* 1 n.1 (citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932)). At his arraignment on September 9, 2002, Petitioner was appointed second-chair, paid counsel in attorney Stephen Singer of the Louisiana Capital Assistance Center. *See* R. 2472-76. In fact, Mr. Lorenzi specifically noted at the arraignment that Mr. Singer's representation would be funded. *See* R. 2473 (explaining at the arraignment that Mr. Singer's office, LCAC, "has a contract with LIDAB to do a certain number of capital cases in this judicial district; and his office would be willing to accept this appointment as part of its contract."); *see also* JA 375a (noting that Mr. Singer was appointed in furtherance of a contract between LCAC and LIDAB). When Mr. Singer later became a professor at Loyola Law School in New Orleans, Christine Lehman, also of LCAC, replaced him as second-chair counsel on August 5, 2004. R. 208-10. Until that appointment she had been serving as petitioner's third-chair counsel. R. 203. During the relevant time period, LCAC, along with three other Regional Capital Conflict Panels, assisted parishes with conflict cases by providing attorneys for every case they accepted. In Defense at 15; R. 2528-29. With two fully funded counsel at his disposal, as well as LCAC's other

resources, Petitioner had ample representation to move forward with his case.[16]

For their part, Mr. Singer and Ms. Lehman were exceptionally qualified attorneys. Mr. Singer, a Harvard Law graduate, met the LIDAB standards for second-chair capital counsel, R. 2473, and may well have been qualified for first-chair counsel given his eight years of experience with the Public Defender Service in Washington D.C. prior to his employment at LCAC. Ms. Lehman was also certified as second-chair counsel, and brought with her other impressive credentials. *See* R. 208-09. A graduate of Yale Law School, Ms. Singer worked at the Office of the Federal Defenders in the Southern District of New York and in Washington, D.C. while a student, as well as clerked for Judge Guido Calabresi of the Court of Appeals for the Second Circuit following law school. She worked almost exclusively on capital cases up until her appointment as second-chair counsel, serving as counsel of record in seven different capital cases. R. 209. She also consulted with local IDB attorneys on capital cases to which she was not formally assigned. R. 209.

Accordingly, Petitioner cannot seriously contend that he would have a viable Sixth Amendment right to counsel claim had he been represented at trial by Mr. Singer and

16. As described above, LIDAB created Regional Capital Conflict Panels to assist in conflict cases in districts staffed by public defender offices. LCAC was one of those panels. Along with providing representation to capital defendants, LCAC provides fact and penalty phase investigators for every case they accept. In Defense 15. In fact, it is clear from the record that the LCAC's capable investigators conducted extensive investigations on petitioner's behalf. *See* e.g., JA 817a-19a, 823a-26a, 829a-30a.

Ms. Lehman. Defendants are entitled to be represented by counsel under the Sixth Amendment. *See generally Powell v. Alabama*, 284 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963). And a defendant has the "right to appointed counsel if retained counsel cannot be obtained." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But "the right to counsel is the right to the effective assistance of counsel." *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Accordingly, the Sixth Amendment only "guarantees reasonable competence, not perfect advocacy . . . ." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). Mr. Singer and Ms. Lehman, together and individually, easily satisfy what *Powell* requires.

Instead, what Petitioner seeks to vindicate is the right to his preferred counsel. Petitioner did not *need* to be represented in this matter by Mr. Lorenzi to be protect his Sixth Amendment rights—he *wanted* to be represented by Mr. Lorenzi. That is a decisive distinction. The right to counsel guarantees an effective advocate, but does not guarantee "that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988); *see also Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 624 (1989) ("The [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."). If there were, it would be nearly impossible to try an indigent criminal defendant.

This is not to suggest that Petitioner somehow was required to forego pursuit of the funding needed to

secure Mr. Lorenzi as counsel if that was his preference. In Louisiana, a defendant is afforded two capital certified counsel. La. Sup. Ct. R. XXXI(A)(1)(a). And if the state is unable to provide funding for two counsel, the "defendant *may* then file, *at his option*, a motion to halt the prosecution of the case until adequate funding becomes available." *Citizen*, 898 So. 2d at 338 (emphasis added). But it is clear that two, highly qualified counsel is a privilege under state law, and not a right. *See* La. Sup. Ct. R. XXXI(B) ("The Rules shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution . . . The programs, rules, procedures, and standards included in, encompassed by, and resulting from this Rule shall not form a basis for a procedural or substantive attack in any case . . . ."); *Koon*, 704 So. at 769 ("[Rule XXXI] does not give rise to an affirmative right to multiple attorneys in capital trials."). Indeed, the Louisiana Supreme Court has specifically noted that this rule does not prevent a defendant from demanding a speedy trial. *See Citizen*, 898 So. 2d at 338 n.1 ("Of course, we do not intend to interfere with the defendant's right to a speedy trial."). Petitioner was perfectly within his rights under state law to proceed with even just one attorney. *See Koon*, 704 So. 2d at 769 (holding that a defendant's waiver of the second-attorney component of Rule XXXI was permissible).

In sum, Petitioner was within his state-law right to stop the prosecution from going forward in order to pursue funding for Mr. Lorenzi's legal services. Or he also could have chosen to go to trial with the highly-qualified, fully-funded counsel already representing him. What Petitioner was not entitled to do, however, is to halt the prosecution in

order "to insist on representation by an attorney he cannot afford," *Wheat*, 486 U.S. at 159, and then claim a speedy trial violation. Contrary to the fundamental premise of this Sixth Amendment claim, then, Petitioner was *not* put to a choice between his right to demand a speedy trial and his right to appointed counsel. Petitioner's decision to delay these proceedings is thus not attributable to the State.

2. In any event, the delay is still attributable to Petitioner even if he had a constitutional right to be represented by preferred appointed counsel. The Court has often remarked that defendants "have incentives to employ delay as a 'defense tactic'; delay may 'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade' over time." *Brillon*, 129 S. Ct. at 1290 (quoting *Barker*, 407 U.S. at 521). This concern applies equally to defense counsel given the potential windfall that his client might obtain through delay. Thus, delay caused by defense counsel is properly "charged against the defendant" because "the attorney is the defendant's agent." *Id.* at 1290-91.

To that end, where defense counsel fails "to move the case forward," the resulting delay is charged against the defendant. *Brillon*, 129 S. Ct. at 1291-92 (citation omitted). In *Brillon*, for example, the Vermont Supreme Court had faulted the State for appointed counsel's delays: "[A] significant portion of the delay in bringing defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward." *Id.* at 1291 (quoting *State v. Brillon*, 183 Vt. 475, 494 (2008)). In rejecting that analysis, this Court explained that,

because "'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is ... charged against the defendant." *Id.* at 1290-91 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). In particular, the Court held that defense counsel's "requested extensions and continuances" should be attributed to the defendant—not Vermont. *Id.* at 1291-92.

The outcome here follows directly from *Brillon*. Mr. Lorenzi never moved the case forward. From the start, Mr. Lorenzi was mostly inactive and the few actions he did take slowed the case down. After his appointment as lead counsel for Petitioner, Mr. Lorenzi's first order of business was moving to continue the arraignment, delaying it over two months (from July 1, 2002 until September 9, 2002). Other than that, Mr. Lorenzi took no action for the first five months of the representation. After five months, on November 12, 2002, Mr. Lorenzi filed his funding motion. The court set a hearing date of January 17, 2003. From that point on, Mr. Lorenzi took no action to move the case toward trial. Rather, he sought to continue the trial date two different times. R. 194; JA 404a. And he did nothing at all to even move his funding motion forward until over three years later.

Complying with applicable state procedures is, of course, a predicate to securing funding to represent indigent defendants. Contrary to Petitioner's claims about a "lack of indigent defense funding" being the cause of delay, the chief problem was Mr. Lorenzi's failure to follow the established protocol. During the relevant time period, appointed counsel was supposed to timely file a Motion to Determine the Source of Funds and then participate in an evidentiary hearing. At that hearing, attorneys would

"present evidence to establish their reasonable overhead costs and reasonable expenses incurred in the course of the assigned representation." *Wigley*, 624 So. 2d at 429-30; *see Citizen*, 898 So. 2d at 338-39. Only at that juncture would it be incumbent upon the court to determine the source of funds. *Wigley*, 624 So. 2d at 429; *Citizen*, 898 So. 2d at 338-39. Therefore, a delay in holding the evidentiary hearing delays the entire case.

This was precisely the problem here. Although Mr. Lorenzi's funding motion identified several possible sources of funding (one of which was off limits to him because of a conflict of interest, JA 583a), Mr. Lorenzi presented no evidence of his likely reimbursable overhead costs and expenses. JA. 668a, 674a. In fact, Mr. Lorenzi never submitted evidence of his estimated or projected overhead costs and expenses during the entire five years he represented Petitioner. R. 2714-15.

In addition, Mr. Lorenzi instead sought to continue the hearing on his funding motion or acquiesced in continuances nine times before the court ultimately heard the motion on March, 27, 2006. R. 192, 196, 199, 201, 216, 232; R. 202, 213-14. As the initial January 17, 2003 hearing date approached, Mr. Lorenzi sought to continue the funding hearing because unidentified "[s]cheduling problems have arisen" and suggested that it may have been "overly ambitious" to schedule the hearing so early in the new year. R. 192-93.[17] On August 15, 2003, he sought a continuance because the motion "may be deemed premature pending a decision" by the local IDB on his

17. Petitioner's characterization of this continuance as having been requested by the State is thus contradicted by the record. *See* JA 8a.

direct application of funds. R. 196-98. On September 12, 2003, he sought a continuance for the same reason because the local IDB had not yet met. R. 199. On December 15, 2003, he sought a continuance because "additional time [was] necessary to obtain affidavits" of witness testimony. R. 201. On January 16, 2004, he filed a motion to continue on behalf of the parish attorney due that attorney's unavailability. R. 202. On August 17, 2004, he agreed to the parish attorney's continuance because that attorney's presence had the potential to be mooted by the Louisiana Supreme Court's decision in *State v. Citizen*, which was ultimately decided on April 1, 2005. JA 414a; R. 215.[18] On July 7, 2005, Mr. Lorenzi sought a continuance to allow more time to issue subpoenas for the hearing. R. 216. And, finally, on September 12, 2005, he sought a continuance because he could not contact co-counsel Christine Lehman following Hurricane Katrina. R. 232.

The court finally held the funding hearing on March 27, 2006. Two important issues arose during that hearing. First, Mr. Lorenzi disclosed that he was ineligible to receive funds originating from LIDAB. JA 583a. His law partner was on the board and therefore there was a conflict that precluded that entity from providing funds to Mr. Lorenzi, a fact that Mr. Lorenzi himself knew and elicited during the hearing. JA. 583a. Second, the court determined that there were no funds currently available, but there were indications that the legislature was set to appropriate more funds for indigent defense. JA 655a-57a, 696a. Because the court had to hear evidence on Mr.

18. The parish attorney also sought a continuance because his daughter needed cancer treatments in Houston on the day of the hearing. JA 689a.

Lorenzi's fees at a second hearing anyway, the judge abstained from entering an order declaring that no funds were available. JA 439a, 668a.

Shortly after that funding hearing, Respondent, understanding that the capital charge would not proceed absent funding Mr. Lorenzi's representation, began to take steps to reduce the charges to second-degree murder and moot the funding impediment. JA 694a-95a. It is quite possible that Mr. Lorenzi intentionally postponed a ruling on the funding motion in order to lay the foundation for his motion to quash the indictment under state law. *See Barker*, 407 U.S. at 521 ("Delay is not an uncommon defense tactic."). Indeed, the record strongly suggests just that. *See Rashad v. Walsh*, 300 F.3d 27, 40 (1st Cir. 2002) ("This pattern of avoidance is fairly strong evidence that the last thing the petitioner wanted was a trial."). In Louisiana, the prosecution must bring a capital defendant to trial within three years of the indictment, barring exceptions. La. C. Cr. P. arts. 578-80. After delaying a decision on the funding issue for three years, and less than a week after Respondent asked the court to reset the funding hearing, Mr. Lorenzi and Ms. Lehman filed the first motion to quash the indictment under La. C. Cr. P. art. 578(1). JA 418a. The timing of the motion is notable because (1) it was the first time defense counsel asserted a speedy trial claim of any kind and (2) it conveniently came as soon as the three-year period had nominally expired.

Had Mr. Lorenzi allowed the funding hearing to proceed when it was first scheduled, and the court held that there were no funds, then the state would have understood that the capital charge could not go forward and thus could have then began taking steps to reduce

the charges. If the funding issue had been decided years earlier, it could have shaved years off this case. As in *Brillon*, but for defense counsel's dilatory behavior, "no speedy-trial issue would have arisen." 129 S. Ct. at 1292.

B. Delays Related To The Funding Issue Are Not Attributable To The State Because Of The "Important Public Interests" Served By Providing Indigent Capital Defendants With Specially Qualified Attorneys.

The extent to which a delay will weigh against the State depends largely on the reason for the delay. Where "important public interests" are served by the process that results in delay, the reason is a valid one that "ordinarily … justifies delay," *Loud Hawk*, 474 U.S. at 315, at least in the absence of a "showing of bad faith or dilatory purpose on the Government's part." *Id.* at 316. That is precisely the circumstance here.

1. *Loud Hawk* is instructive. In that case, following a shootout with the Oregon State Police, several Native American activists were charged with unlawful firearms possession and the possession and transportation of explosives in commerce. *See id.* at 306. After the district court granted a motion to suppress all evidence and later dismissed the indictment, the government immediately appealed both orders, setting off a seemingly interminable appeals process. *See id.* at 307. These appeals ultimately resulted in three separate rounds of hearings before the Ninth Circuit, a rehearing en banc, two denials of petitions for rehearing, and two denials of petitions for certiorari by this Court. *See id.* at 307-08. This lengthy appellate process ultimately resulted in a seven-and-a-half year delay between indictment and trial. *Id.* at 314.

In considering whether to attribute this delay to the government, the Court considered the "important public interests in the process of appellate review." *Id.* at 313. While acknowledging that the government's pursuit of multiple appeals necessarily delayed trial, *id.*, the Court declined to attribute the delay to the government because "[t]he assurance that motions to suppress evidence or to dismiss an indictment are correctly decided through orderly appellate review safeguards both the rights of defendants and the 'rights of public justice.'" *Id.* at 313. Given these "important public interests," "it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay." *Id.* at 315. That does not signify that the government has an unrestrained right to appeal; frivolous appeals filed for clearly dilatory purposes count against the government. *See id.* at 316. But absent a "showing of bad faith or dilatory purpose on the Government's part," these important public interests preclude attributing such against the government for speedy trial purposes, even though the possibility that "the passage of time" might prejudice the defendant's case. *Id.* at 315.

2. The outcome should be the same here. There are undeniably "important public interests" underlying Louisiana's decision to provide indigent capital defendants with two attorneys who are specially qualified for capital cases. Although it is not constitutionally required, Louisiana "has long adhered to the view that the better practice is to appoint two attorneys to defend a capital case." *Koon*, 704 So. 2d at 769. The State thus has generously provided not only for two attorneys to represent indigent defendants in capital cases, but also that those two attorneys be specially certified. La. Sup.

CT. R. XXXI. Enhancing the quality of representation that appointed counsel afford to indigent capital defendants is clearly in the public interest under any reasonable definition of that phrase.

This Court has often noted that the death penalty's severity and irrevocability place it in a unique relationship to both criminal defendants and society as a whole. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.) ("From the point of view of society, the action of the sovereign in taking the life of one of its citizens ... differs dramatically from any other legitimate state action"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long"). The public at large has an interest in the provision and administration of an indigent capital defense system that goes beyond what is constitutionally required in an effort to ensure that the highest quality representation is available to indigent defendants in the most sensitive cases.

3. Given the indisputably important public interests that underlie the State's provision of multiple attorneys to represent indigent capital defendants, efforts to obtain funding for specially qualified counsel ordinarily are "valid reason[s] that justif[y] delay." *Loud Hawk*, 474 U.S. at 315. Indeed, obtaining funding for special capital-certified counsel is at least as compelling a justification for delay as an interlocutory appeal sought by the prosecution, *see id.*, given that such an appeal generally works to the benefit of the prosecution. The *Loud Hawk* Court balanced the Sixth Amendment right to a speedy trial against a competing interest that was at least as likely to hurt a

criminal defendant as to help him. Yet the Court easily concluded that an interlocutory appeal by the Government is a valid reason for delay in the absence of a "showing of bad faith or dilatory purpose." *Id.* at 316.

Moreover, the delay associated with an interlocutory appeal results from an intentional decision by the prosecution to postpone trial, whereas delays in obtaining funding are unintentional and often unforeseeable. Funding for capital defense—like the rest of a State's annual budget—is vulnerable to economic downturns and other unpredictable factors (such as natural disasters like Hurricanes Katrina and Rita) that are beyond the State's control. Indeed, in this case, funding delays resulted at least in part because of a conflict of interest involving Mr. Lorenzi. Petitioner was unable to obtain funds from LIDAB—a funding source available to capital counsel in other cases during the relevant time period, J.A. 298a—because Mr. Lorenzi's law partner was a member of the board of LIDAB. JA 583a. In short, the reasoning of *Loud Hawk* applies with even more force here.

4. The "important public interests" that are served by the State's provision of multiple capital-certified attorneys to indigent capital defendants would be undermined if the Court were to charge the State with delays in obtaining funding for counsel. This is especially true in light of the "unsatisfactorily severe remedy of dismissal" that results from a Sixth Amendment speedy trial violation. *Barker*, 407 U.S. at 522. To hold States responsible for delays in the administration of voluntary programs designed to afford indigent capital defendants with a level of representation higher than constitutionally required means that "defendant[s] who may be guilty of

serious crime[s] may go free, without having been tried," *Barker*—and all because of a gratuitous benefit offered to indigent capital defendants.

Such a rule thus risks discouraging States from providing any more than the constitutional minimum, a result this Court has previously cautioned against. *See Polk County v. Dodson*, 454 U.S. 312, 324 n.17 (1981) ("Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client. But confidence will not be improved by creating a disincentive for the States to provide postconviction assistance to indigent prisoners. To impose § 1983 liability for a lawyer's performance of traditional functions as counsel to a criminal defendant would have precisely that effect."). Indeed, States may cease funding these sorts of programs in order to preserve taxpayer resources while avoiding punishment by the courts for cases proceeding more slowly than they otherwise would. Such a result would undermine the quality of representation of capital indigent defendants and cause harm to our system of criminal justice overall.

In the alternative, States may respond to such a rule by ceasing to charge indigent criminals with capital crimes. This is a very real concern, especially given that the Calcasieu Parish District Attorney's Office has reduced charges in several cases from first-degree murder to second-degree murder in order to expedite the trial thereof. *See, e.g.*, *State v. Wilkins*, No. 19337-04 (Parish of Calcasieu, La. 14th Judicial D. Ct.). Effectively precluding States from prosecuting capital crimes against indigent defendants would thwart the will of the people whose elected officials authorized capital punishment for the most serious of crimes. Worse, it would create a two-

track system of criminal justice in which only non-indigent defendants could be prosecuted for capital crimes.

5. Moreover, to punish the State of Louisiana for delays in funding appointed counsel for indigent capital defendants would effectively convert Rule XXXI from a hortatory rule into a binding one, directly contrary to its text, *see* La. Sup. Ct. R. XXXI(B) ("The programs, rules, procedures, and standards included in, encompassed by, and resulting from this Rule shall not form a basis for a procedural or substantive attack in any case or proceeding pending or instituted in the Louisiana criminal justice system on or after the date this Rule is promulgated."), and the Louisiana Supreme Court's interpretation thereof, *see Perez*, 745 So. 2d at 179 ("[T]he indigent defense rules are not intended to confer upon an indigent defendant substantive rights beyond those recognized by the federal and state constitutions, and enactments of the legislature, nor intended to be used to determine the validity of a conviction.").

C. The Delays Should Not Be Attributed To The State Because Petitioner Failed To Seriously Assert His Speedy Trial Right.

1. Even assuming that the State was the cause of the funding delays, and is without "valid" reason for doing so, the delays should not be attributed to the State because Petitioner failed to properly assert his speedy trial right. *Barker* highlights the importance of a defendant's proper assertion of his speedy trial right. Despite a five-and-a-half year delay caused by the government's strategic decision to proceed first with the defendant's co-indictee, the Court found no violation because of the defendant's

failure—for over three years—to take any "action … that could be construed as the assertion of the speedy trial right" until the filing of his motion to dismiss the indictment on speedy trial grounds. 407 U.S. at 534-35. The Court held that this failure to assert his Sixth Amendment right—despite repeated motions by the government to continue the case—demonstrated that the defendant "did not want a speedy trial." *Id.* at 534. The Court emphasized that a failure to seriously assert the speedy trial right will result in a finding of no deprivation except perhaps in those "extraordinary" cases where the defendant was "severely prejudiced." *Id.* at 536.

2. The pattern here mirrors *Barker*. As outlined above, Petitioner took no action to move his case forward or to otherwise assert his speedy trial right until more than three years after being indicted. And when he finally did assert his speedy trial right, it was only in cursory fashion. In fact, Petitioner elected not to advance his Sixth Amendment speedy trial right until years later on January 22, 2008. JA 710a. Especially given that Petitioner sought (or acquiesced in) continuance after continuance along the way this failure to assert diligently his speedy trial right demonstrates that he "definitely did not want to be tried." *Barker*, 407 U.S. at 535.

3. The logic of *Barker* applies with even more force here, given that the government's conduct in *Barker* was unabashedly strategic. Indeed, counsel for the government stated: "it's true that the reason for this delay was the Commonwealth of Kentucky's desire to secure the testimony of the accomplice, Silas Manning" because if "Silas Manning were never convicted, Willie Mae Barker would never have been convicted. We concede this." *Id.*

at 535. Here, there is no showing that the State engaged in such strategic behavior. *Boyer*, 56 So. 3d at 1145 ("[T]here is nothing before this court to suggest that the State acted to delay the trial to gain any advantage").

4. Although *Barker* allows for the possibility that "severe[] prejudice[]" could outweigh a finding that the defendant "did not want a speedy trial," *id.* at 536, that is not a concern here. If anything, the delays here *benefited* Petitioner, as the State ultimately reduced the murder charge from capital murder to second-degree murder, thus *eliminating the possibility of a death sentence*. The significance of this reduction in charge cannot be overstated. Moreover, Petitioner's claims of prejudice are grossly overstated. The "most serious" form of prejudice is "the possibility that the defense will be impaired" by delay, *Barker*, 407 U.S. at 532, and Petitioner suggests that the disappearance or death of various individuals he intended to call as witnesses hindered his ability to defend himself.[19] But given that the burden of proof is on the prosecution in any criminal case, the loss of witnesses is more likely

19. Petitioner also contends that he was prejudiced because he lost his opportunity for a preliminary hearing and any chance at bail when he was indicted before having been afforded counsel. Pet. Br. 10. However, by statute, a post-indictment preliminary examination is permitted for purposes of fixing bail and perpetuating testimony. La. Code Crim. Pro. art. 296. As a practical matter, it is highly unlikely that Petitioner would have been entitled to bail, given the fact that he confessed to shooting Marsh and four of his relatives identified him to police as the shooter. La. Code. Crim. Pro. Art. 331 ("A person charged with the commission of a capital offense shall not be admitted to bail if the proof is evident and the presumption great that he is guilty of the capital offense.").

to harm the State, not Petitioner. *See Barker*, 407 U.S. at 521 ("If the witnesses support the prosecution, its case will be weakened [by the delay], sometimes seriously so. And it is the prosecution which carries the burden of proof.").

In any event, as the Louisiana appellate court concluded, Petitioner failed to establish prejudice. *See Boyer*, 56 So. 3d at 1143 ("Defendant did not reveal the contents of the unavailable witnesses' testimonies or how the evidence would have affected the outcome of trial."). This is unsurprising. Record evidence suggests that Petitioner's missing witnesses would not have been helpful to him. For example, Petitioner's purported star witness, Mr. Gallier, made statements to the police implicating two other men in the murder of Marsh, but one of those men had died a year earlier and the other had an alibi. R. 702. Moreover, Gallier's statements were contradicted by his brother Cory Marcenac. R. 703. And, ultimately, Gallier recanted his statements. R. 703. Another of Petitioner's purported witnesses was Alice Dassinger, his grandmother. But given that she voluntarily gave a statement to the police implicating her grandson in Marsh's murder, R. 706, it is quite difficult to see how her testimony could have advanced Petitioner's case.

Regardless, whatever their testimony, it could not have overcome the strong evidence of Petitioner's guilt—the testimony and statements of several of his family members, R. 706-07, the physical evidence tying him to the murder, R. 5386, 5423, 5440, 5455, and of course his own confession. R. 711-12.

II. EVEN IF THERE WERE A SPEEDY TRIAL VIOLATION HERE, THE REMEDY OF DISMISSAL WOULD BE LIMITED TO THE MURDER CHARGE.

Even if the delays in this case were attributable to the State and there were a Sixth Amendment speedy trial violation here, the "unsatisfactorily severe remedy of dismissal" would be limited to the murder charge. The armed robbery charge started a new speedy trial clock—after the indictment had been amended to eliminate the capital murder charge.

1. The Speedy Trial Clause "afford[s] no protection to those not yet accused," *United States v. Marion*, 404 U.S. 307, 313 (1971); *id.* ("[T]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused.'"), just as the Right to Counsel Clause, *see McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) ("The Sixth Amendment right … does not attach until a prosecution is commenced."), which is housed in the same amendment. Accordingly, the Speedy Trial Clause should be interpreted as "offense specific," in the same manner as the Sixth Amendment right to counsel. *McNeil*, 501 U.S. at 175 (1991). As this Court has construed the Right to Counsel Clause, "a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." *Texas v. Cobb*, 532 U.S. 162, 168 (2001).

2. Interpreting the Speedy Trial Clause as "offense specific" parallels its statutory counterpart, the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* "As a general rule,

new Speedy Trial Act periods begin to run with respect to an information or indictment adding a new charge not required to be brought in the original indictment." *United States v. Andrews*, 790 F.2d 803, 808-09 (10th Cir. 1986); *see also United States v. Lattany*, 982 F.2d 866, 872 n.7 (3d Cir. 1992); *United States v. Alford*, 142 F.3d 825, 829 (5th Cir. 1998).

3. Moreover, interpreting the Speedy Trial Clause such that the speedy-trial clock would begin for all later charges at the time the right first attaches with regard to an initial charge risks undercutting this Court's interpretation of the Double Jeopardy Clause. That clause "prevents multiple or successive prosecutions" for the same offense, *Cobb*, 532 U.S. 162, 173 (2001), but not for offenses with different elements, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932). If an initial charge began a speedy trial clock for all later charges, then the Speedy Trial Clause might effectively expand the scope of the Double Jeopardy Clause.

4. Under this interpretation of the Speedy Trial Clause, Petitioner's Sixth Amendment speedy trial right had not been triggered as to the armed robbery charge when the State amended the indictment to eliminate the capital murder charge. Accordingly, even if delay relating to the funding issue amounted to a Sixth Amendment speedy trial violation, it would have no impact on Petitioner's armed robbery charge.

CONCLUSION

The judgment of the Third Circuit Court of Appeal of the State of Louisiana should be affirmed.

Respectfully submitted,

THOMAS R. MCCARTHY
WILLIAM S. CONSOVOY
BRYAN K. WEIR
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
tmccarthy@wileyrein.com

JOHN F. DEROSIER
District Attorney
CYNTHIA S. KILLINGSWORTH
First Assistant District Attorney
CARLA S. SIGLER*
Assistant District Attorney
KAREN C. MCLELLAN
Assistant District Attorney
901 Lakeshore Drive
Suite 800
Lake Charles, LA 70601
(337) 437-3400
csigler@cpdao.org

December 19, 2012

* *Counsel of Record*