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IN THE SUPREME COURT OF THE UNITED STATES

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 JONATHAN EDWARD BOYER, :
 Petitioner : No. 11-9953
 v. :
 LOUISIANA :
 - - - - - x

Washington, D.C.
 Monday, January 14, 2013

The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 11:00 a.m.

APPEARANCES:
 RICHARD BOURKE, ESQ., New Orleans, Louisiana; on behalf
 of Petitioner.
 CARLA S. SIGLER, ESQ., Assistant District Attorney, Lake
 Charles, Louisiana; on behalf of Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 11-9953, Boyer v. Louisiana.

Mr. Bourke?

ORAL ARGUMENT OF RICHARD BOURKE
ON BEHALF OF THE PETITIONER

MR. BOURKE: Mr. Chief Justice, and may it please the Court:

The Louisiana Court of Appeal in this case correctly found that the majority of the delay -- the seven-year delay was caused by the lack of funding, but, when moving to assess that cause under Barker, incorrectly determined that it was a cause beyond the control of the State and, adopting its earlier ruling under the State statute, found that it was a cause beyond the control of the State, in the sense that it was beyond the control of the local district attorney's office.

JUSTICE SCALIA: Mr. Bourke, was -- was it within the control of your client?

MR. BOURKE: He was unable to fund himself, Your Honor. That is why he asked for the appointment of counsel.

1 JUSTICE SCALIA: Was he unable to get his
2 Sixth Amendment right to a speedy trial?

3 MR. BOURKE: Yes.

4 JUSTICE SCALIA: Why?

5 MR. BOURKE: That is -- he was unable to
6 move forward to trial because he was not provided with
7 counsel adequately funded to advance the --

8 JUSTICE SCALIA: He had -- he had one
9 counsel, right? During the whole time?

10 MR. BOURKE: In fact, in a sense, Your
11 Honor, he had two counsel.

12 JUSTICE SCALIA: Yes. For part of it, he
13 had two, and then there was not enough funding for the
14 second, okay? So he was faced with a choice.

15 Louisiana, as I understand it, has adopted a
16 provision, which the Sixth Amendment does not require.
17 The Sixth Amendment just requires counsel, but Louisiana
18 says, in capital cases, we are going to provide two
19 counsel, and you can't go to trial until you have two
20 counsel, okay?

21 MR. BOURKE: No, Your Honor --

22 JUSTICE SCALIA: No?

23 MR. BOURKE: -- that is not correct. That
24 is not the State of Louisiana law.

25 JUSTICE SCALIA: What is the State of

1 Louisiana law?

2 MR. BOURKE: Louisiana absolutely does not
3 provide a right to two counsel in capital cases. The
4 Louisiana Supreme Court, in Rule 31, provided that the
5 court should appoint two counsel, but, also, it provided
6 expressly that that created no procedural or substantive
7 right.

8 Similarly, there is no right --

9 JUSTICE SCALIA: Well, I don't -- I don't
10 understand that. That's not Louisiana law that you --
11 that you can't proceed without two counsel? That's not
12 the law in Louisiana? I thought that's --

13 MR. BOURKE: That is not the law in
14 Louisiana.

15 JUSTICE SCALIA: I -- you don't consider
16 supreme court rules to be law?

17 MR. BOURKE: It is a supreme court rule
18 which directs the trial judge to appoint two counsel.
19 However, it makes it clear --

20 JUSTICE SCALIA: Is it the fact that, in
21 Louisiana, you cannot proceed to trial in a capital
22 case, unless there are two counsel?

23 MR. BOURKE: No, Your Honor. That is not
24 the --

25 JUSTICE SCALIA: Then -- then you don't have

1 a case. You should have proceeded to trial.

2 MR. BOURKE: No, Your Honor. In -- in this
3 case, as the court of appeal correctly found, Mr. Boyer
4 did not have adequate funding for the case to go to
5 trial. The court of appeal did not predicate that on
6 the need for two counsel. The motion to determine
7 source of funds was not predicated on Rule 31.

8 JUSTICE GINSBURG: The one -- the one
9 counsel who was qualified, what was his name?

10 MR. BOURKE: Mr. Lorenzi was lead certified
11 counsel.

12 JUSTICE GINSBURG: Lorenzi, yes. He was
13 only one at the time who was qualified to be lead
14 counsel?

15 MR. BOURKE: Correct.

16 JUSTICE GINSBURG: And the Louisiana Supreme
17 Court said, you don't have to do this. You're his --
18 you're his attorney, but you have a right to be paid,
19 and the State has to pay you.

20 So there was no obligation on counsel's part
21 to do anything; and he kept asking, please have a
22 funding order, let me be paid, and I'll do my job.

23 MR. BOURKE: Yes, Mr. Lorenzi declined to
24 pay for Mr. Boyer's defense out of his own pocket.

25 JUSTICE SCALIA: Wasn't there, at all times,

1 one counsel who was being paid by the State?

2 MR. BOURKE: There was --

3 JUSTICE SCALIA: At all times?

4 MR. BOURKE: There was, at all times, one
5 counsel appointed as associate counsel, that is for the
6 purpose of assisting Mr. Lorenzi as lead counsel.

7 JUSTICE SCALIA: Was that counsel qualified
8 enough under our constitutional Sixth Amendment
9 jurisprudence?

10 MR. BOURKE: Well, I don't understand the --
11 the Sixth Amendment jurisprudence to place --

12 JUSTICE SCALIA: Well --

13 MR. BOURKE: -- a qualification minimum, so
14 I'm not sure I'm understanding your question.

15 JUSTICE SCALIA: Well, the question is would
16 only lead counsel under -- under the supreme court's
17 rule qualify as competent counsel, for purposes of
18 complying with the constitutional requirement? Or would
19 this certified second chair qualify?

20 MR. BOURKE: The -- there is no -- I'm
21 having trouble answering the question, Justice Scalia,
22 because the two things don't talk to each other. The
23 Sixth Amendment doesn't impose a certification
24 requirement.

25 JUSTICE SCALIA: Exactly. I'm just saying

1 can you establish that the one counsel that your client
2 had throughout this whole -- whole proceeding would not
3 satisfy the constitutional requirement?

4 Can you -- is there any basis for your
5 saying that?

6 MR. BOURKE: Yes, Your Honor.

7 JUSTICE SCALIA: What?

8 MR. BOURKE: The court of appeal twice
9 found -- knowing that associate counsel had been
10 appointed, the court of appeal twice found that the case
11 could not proceed due to a lack of adequate funding, and
12 the State --

13 JUSTICE SCALIA: Not because of a Federal
14 constitutional reason. The court found, you are not
15 complying with the supreme court rule. You can't
16 proceed without complying with the supreme court rule.

17 It seems to me your client was faced with a
18 choice: You could either demand what Louisiana, in its
19 generosity, has given to capital defendants, namely, the
20 right to two counsel -- whether it's by statute or by
21 supreme court rule, it doesn't matter -- you can either
22 demand that right; or you could demand your right to a
23 speedy trial. That was your choice.

24 And it seems to me what counsel chose was to
25 insist, all along, I want my right to two -- to two

1 counsel. You didn't have to --

2 JUSTICE KAGAN: Mr. Bourke, did anyone --

3 JUSTICE SCALIA: -- you didn't have to take
4 that right. You could have gone to the -- to the
5 supreme court and said -- you know, since it's taking so
6 long, I demand my constitutional right to a speedy
7 trial. But you didn't do that.

8 MR. BOURKE: Your Honor, if Mr. Boyer had
9 been brought into court and had been told, we've got
10 associate counsel here; they are qualified in the sense
11 that they are barred in Louisiana, and they can take
12 your case to trial and move it forward now.

13 But, if you wait, we might have funding for
14 another lawyer here, who will join him, is more senior
15 and experienced and will double your firepower. You can
16 choose, Mr. Boyer, do you want to go ahead now with this
17 guy? Or do you want to wait?

18 In that circumstance, there would not be an
19 invidious choice between the right to counsel and the
20 right to speedy trial. It would be, we are giving you
21 constitutionally adequate counsel, and you can wait for
22 better, if you wish to.

23 But that is not what occurred here. And,
24 Justice Scalia, the --

25 JUSTICE KENNEDY: Can you -- can you tell me

1 why that is not what occurred here?

2 MR. BOURKE: Because the funding problem did
3 not exist solely around Mr. Lorenzi's overhead and
4 expenditure. There was no money for investigation.
5 There was no money for experts. And the associate
6 counsel who had been appointed had been appointed solely
7 and for the limited purpose as an assistant to
8 Mr. Lorenzi, not to conduct the case in his own right.

9 If this issue had been raised in the trial
10 court, this would have been clearly explained into this
11 record. It wasn't. But the trial court and the
12 appellate court of -- the court of appeal -- Third
13 Circuit in Louisiana knew and understood that there was
14 no investigative funding. There was no expert funding.
15 There had been an assistant.

16 This isn't the case where there was a lawyer
17 appointed and they were waiting for the second lawyer.
18 It's a case where they'd found an assistant and were
19 waiting for the first lawyer.

20 CHIEF JUSTICE ROBERTS: How much money would
21 be needed for investigation and experts before you would
22 acknowledge that that would be competent representation?

23 MR. BOURKE: That's a very case-specific
24 determination, Your Honor and, in Louisiana, at that
25 time, rested with a judicial determination that the

1 investigative or expert expenses were reasonably
2 necessary to ensure a fair trial within the meaning of
3 the Due Process Clause.

4 So it -- it was a funding level tagged to
5 the constitutional minimum of due process.

6 JUSTICE SCALIA: Of course, a finding by the
7 district court -- or whichever court found it, that
8 there was not enough money to pay counsel, to
9 investigate, and to -- to do whatever else -- buy
10 stamps -- is not a finding by the district court that
11 there was not enough money to investigate and to buy
12 stamps.

13 Counsel was a part of that mix. You never
14 had a finding that there was not enough money to pay
15 counsel, right? Or -- I'm sorry -- that there was not
16 enough money to allow the counsel that has been
17 appointed to investigate and buy stamps.

18 Was there ever any such finding?

19 MR. BOURKE: There was never --

20 JUSTICE SCALIA: The -- the big tag item
21 was -- was paying counsel; wasn't it?

22 MR. BOURKE: No, Your Honor. That was one
23 of the big tag items. But, in a capital case, the
24 investigation of both the guilt phase and the full
25 mitigation and life investigation, along with the use of

1 potential expert witnesses, particularly in the case
2 where there were all the indications of mental health
3 problems and the like, are often equal to or, in some
4 cases, greater than the cost of counsel.

5 And so, no, the big -- the big tag item
6 wasn't just Mr. Lorenzi's overhead and expenses. The
7 big tag item was providing adequate funding. And to
8 return to your earlier point, Justice Scalia, just to --
9 to make it clear, the Louisiana Supreme Court cases,
10 which mandate that a case cannot go forward without
11 counsel, do not reference Rule 31 at all, or two
12 counsel.

13 They are cases which stand for the
14 proposition that the case cannot go forward without
15 constitutionally adequate counsel, counsel who can
16 provide reasonably effective assistance.

17 This case began in 2002. At that point, the
18 controlling Louisiana decision on not moving forward
19 without effective assistance was Peart -- P-e-a-r-t --
20 which we cite in our brief, which said that the court
21 will not allow a case to proceed without reasonably
22 effective counsel.

23 During the life of this case -- sorry.

24 JUSTICE BREYER: Your -- your point of view
25 in this case --

1 MR. BOURKE: Yes, sir.

2 JUSTICE BREYER: In your point of view,
3 would it satisfy you if we say, the Louisiana court of
4 appeal found the largest part of the delay involved the
5 funding crisis experienced by the State of Louisiana --
6 that meant giving you adequate money for counsel.

7 Then they said, the progression of the
8 prosecution was out of the State's control, as
9 determined by this court, which I think referred to that
10 funding crisis. And we could -- and your view would be
11 that's what they said. We don't know the underlying
12 facts, but that's what they said.

13 And, insofar as they said that the State
14 wasn't responsible for that part of the delay that they
15 are talking about, they're wrong because the State is
16 responsible for not providing enough money, even if it's
17 a problem and to say they weren't responsible is wrong,
18 okay? That's what you want us to say?

19 MR. BOURKE: Yes, Your Honor.

20 JUSTICE BREYER: Period. And send it back.

21 MR. BOURKE: Well, Your Honor --

22 JUSTICE GINSBURG: You would like us to say
23 what Judge Cook said in -- in her opinion, that
24 responsibility for funding rests with the State, not
25 with the defendant.

1 Once an attorney is appointed, it is the
2 State's obligation to ensure that adequate funds are
3 available for the defense. And I take "for the defense"
4 to mean not simply counsel, but the witnesses, the --
5 the investigation.

6 It is certainly true that none of the delay
7 due to the lack of funds was, in any way, attributable
8 to the defense. That's, essentially, what you would
9 like us to say?

10 MR. BOURKE: That is what Judge Cook said
11 and --

12 JUSTICE SCALIA: I don't think it's enough
13 that none of the delay was attributable to the defense.
14 The defense has to complain, has to demand its right to
15 a prompt trial.

16 What did your client do? Frankly, I -- I am
17 skeptical that a capital defendant who has already
18 confessed to the crime wants to be tried as soon as
19 possible. I'm skeptical about that.

20 Now, what -- what did your client do to
21 demand his right to a prompt trial?

22 MR. BOURKE: Your Honor, what Mr. Boyer did
23 was act, at all times, in full compliance with the
24 procedural mechanisms set up in Louisiana for doing
25 that.

1 At arraignment -- he -- he had already
2 identified he was indigent and asked for counsel. At
3 arraignment, he requested a jury trial.

4 JUSTICE SCALIA: Right.

5 MR. BOURKE: His lawyer was appointed, and
6 his lawyer immediately identified the funding problem
7 and said, we need money, or we can't go forward.
8 Louisiana statute bars counsel from filing a motion for
9 speedy trial without an affidavit saying, you're ready
10 to go forward. Louisiana has said, in Article 7 --

11 JUSTICE SCALIA: Well, that's -- surely,
12 that's unconstitutional. Did counsel say, I demand a
13 speedy trial? You can't condition my right to a speedy
14 trial upon my getting some affidavit or something.

15 MR. BOURKE: It's a procedural rule, Your
16 Honor.

17 JUSTICE SCALIA: I'm still waiting for --
18 for anybody telling the court, I demand a speedy trial,
19 and, if I don't get a speedy trial, you are violating
20 the Constitution, and I ought to go scot-free.

21 MR. BOURKE: Well, Your Honor, the rule I am
22 referring to is a procedural rule. It does not, in any
23 way, limit the relief from a speedy trial, but you can't
24 move for a speedy trial. You can move to quash because
25 you have been denied one, but you can't move for one.

1 It's exactly what this Court referred to
2 in --

3 JUSTICE ALITO: Isn't it true that you
4 waited three years before doing that?

5 MR. BOURKE: That was the first point at
6 which, under Louisiana procedure, he had a remedy
7 available, exactly as Judge Cook stated in her
8 abstaining opinion. That was when he could move to
9 quash. He could not move for a speedy trial in a valid
10 motion for speedy trial, without having an affidavit
11 saying, we are ready to go.

12 Louisiana has passed that rule to stop pro
13 forma requests for speedy trial.

14 JUSTICE GINSBURG: Can we clarify one point?
15 Justice Scalia said something about a defendant facing
16 the death penalty going "scot-free." There was an armed
17 robbery charge that was added in 2007.

18 Do you dispute that a new clock started in
19 2007, the first time that the robbery charge was -- was
20 made?

21 MR. BOURKE: We do, Your Honor. That armed
22 robbery charge is a lesser included offense of the
23 first-degree murder count. Mr. Boyer was originally
24 indicted on first-degree murder, which, in Louisiana, is
25 intentional killing during the course of an armed

1 robbery -- there are other varieties, of course -- but
2 intentional killing during an armed robbery. And those
3 are the elements of first-degree murder.

4 The State unpacked those two elements -- or
5 two lesser included offenses, to second-degree murder,
6 which is intentional killing, and armed robbery. And
7 the State, in fact, conceded that, had the charge
8 remained a first-degree murder charge, then the armed
9 robbery charge would have created a double jeopardy
10 problem.

11 And that's at page 3703 to '4 of the record,
12 where counsel for the State indicated that the armed
13 robbery charge could be added because the primary
14 charge, the -- the first-degree murder, had been dropped
15 to second-degree murder, and specifically said,
16 Mr Bourke is correct, that, had we filed for
17 first-degree murder, there may be double jeopardy
18 problems.

19 But, because they had unpacked that charge
20 from murder and armed robbery down to murder and, also,
21 armed robbery, there was no double jeopardy problem.
22 That is what --

23 JUSTICE KENNEDY: What about -- what about
24 the basic problem in this case, as I understand the
25 question presented, is should the State be responsible

1 when the funding problem is at a local level?

2 So suppose you have a State that says -- you
3 know, we have had problems in funding; if we give this
4 to the counties, it's going to be much better, and the
5 counties are very, very good at raising money and
6 knowing who the counsel are. So it's all handled by the
7 county.

8 Then one county has a disaster, a hurricane
9 in that county, particularly. Is that not a reason for
10 delaying? Or does the State have to immediately step in
11 and -- and supplement the funding? Can't the county
12 say, oh, we need another two years?

13 MR. BOURKE: Well, Justice Kennedy --

14 JUSTICE KENNEDY: I take it that's the issue
15 that we're trying to decide here.

16 MR. BOURKE: Well, I think it starts with
17 the proposition that it is the State, not the
18 prosecutor, who has the responsibility to ensure a
19 speedy trial, in accordance with due process.

20 And then the State can make all sorts of
21 different arrangements, and the States around this
22 country make different arrangements, but it's their
23 responsibility to make sure that they work. And, if
24 they don't work, then the State is going to have to make
25 reasonable accommodation for that, to meet its

1 responsibility.

2 And so, by assisting the cause of delay
3 against the State, but within the Barker weighing
4 framework, the courts dealing with speedy trial claims
5 would be able to deal with short-term unexpected
6 exigencies. They would be able to weigh the
7 reasonableness of the response.

8 A valid reason for delay will justify that
9 delay, as this Court said in Barker, but here --

10 JUSTICE BREYER: The answer to the
11 question -- that's what I was trying to do -- this
12 case -- the briefing is filled with whether he asked in
13 time, whether he was delaying, whether he should have
14 done some other thing, whether he should have -- but the
15 question that's asked is, simply, whether the failure to
16 fund counsel is a factor that should be weighed against
17 the State.

18 MR. BOURKE: Yes.

19 JUSTICE BREYER: And maybe it only gets very
20 little weight because maybe there was a hurricane, and
21 maybe it doesn't even matter because he didn't make the
22 right motions. But the lower court said it shouldn't be
23 weighed against the State, period. And do we have to do
24 anything other than say, if you're right, yes, it
25 should.

1 Now, how much weight it gets, well, that
2 depends. There was a hurricane and -- but -- but it's
3 something that they can't just ignore in -- in the
4 hearing. They have to figure out what happened and
5 to -- to the extent the State should have done more, it
6 weighs against the State.

7 Do you want any more than that?

8 MR. BOURKE: Yes, Your Honor.

9 JUSTICE BREYER: And what else?

10 MR. BOURKE: The first thing that we want is
11 exactly that, Your Honor, that the court below
12 incorrectly -- incorrectly failed to attribute this to
13 the State. And this Court -- I accept this Court could
14 stop there and remand to the Third Circuit to deal with
15 that in accordance with --

16 JUSTICE SCALIA: Not -- not quite. I mean,
17 the question presented is not as general as that. It's
18 much more fact-bound.

19 It says whether a State's failure to fund
20 counsel for an indigent for five years, particularly
21 where failure was the direct result of the prosecution's
22 choice to seek the death penalty, should be weighed
23 against the State for speedy trial purposes.

24 I think this is inviting us to look into the
25 facts of this case and decide whether this five-year

1 delay, particularly since the prosecution chose the
2 death penalty -- you know, I don't like having to do
3 that and -- but it seems, to me, that's what the
4 question presented at least requires.

5 MR. BOURKE: Well, Your Honor, it -- I think
6 it would be open to this Court to answer the question by
7 saying the court got it wrong at the first step by
8 failing to attribute it to the State and then remand for
9 full consideration of weighing, in light of that.

10 What we have asked in our briefing for the
11 Court to do is to also provide some guidance on the
12 weight that should be given to delay resulting from the
13 lack of funding because in this case --

14 JUSTICE ALITO: If we provide -- if we
15 provide that guidance, what do we do about the
16 continuances that Mr. Lorenzi requested that relate to
17 the funding? "January 10, 2003, Lorenzi requests a
18 continuance of funding hearing, citing scheduling
19 problems."

20 "August 5, 2003, Lorenzi moves to continue
21 hearing on motion to designate source of funds so that
22 the Indigent Defender Board can consider funding Boyer's
23 case at an August 26 meeting." So this is -- okay.

24 "Lorenzi moves to continue September 12,
25 2003. Lorenzi moves to continue hearing on motion to

1 designate funds in trial, so that the IDB may, again,
2 consider the funding defense at its next meeting.
3 December 15, Lorenzi moves to continue hearing on motion
4 to designate funds," et cetera.

5 There are many of these motions. What do we
6 do with those?

7 MR. BOURKE: Your Honor, I'd suggest that
8 this Court does exactly the same thing that the
9 Louisiana Court of Appeal did with them, which was to
10 find that it was the lack of funding, not any action by
11 Mr. Lorenzi, which caused the delay.

12 The -- the Louisiana Court of Appeal
13 declined to adopt the State's argument that it was Mr.
14 Lorenzi's fault. And the reason it did that was because
15 the lack of a funding hearing caused no delay at all in
16 the conduct of this trial.

17 The funding hearing, when conducted,
18 produced no funding, no ruling or order, and had no
19 influence on the date of the trial. And, of course, the
20 right at issue was the right to go to trial, not to --
21 the timing of pretrial hearings.

22 Furthermore, all of those continuances,
23 which were joined in by the State, were related to
24 trying to identify and find funding for this case and
25 for this man. None of them were for a dilatory purpose.

1 They were because a new procedure was
2 announced to submit bills in a different way to the IDB
3 because the Louisiana Supreme Court had accepted the
4 Citizen case. And ultimately --

5 CHIEF JUSTICE ROBERTS: Well, I mean,
6 Justice Alito's problem seemed, to me, to get back to
7 Justice Scalia's point, is that he seemed more
8 interested in the funding than a speedy trial, the
9 funding that would be provided by the State under its
10 procedures.

11 MR. BOURKE: In the absence of funding,
12 there was no trial to be had. At the funding hearing --
13 or I'm sorry -- at the motion to quash hearing in
14 November 2006, there was a colloquy between the trial
15 court and the prosecutor in which the trial court said,
16 what are we going to do with this case? They can't have
17 a defense without money.

18 This was not -- absolutely not --

19 CHIEF JUSTICE ROBERTS: And, as
20 Justice Alito pointed out on several occasions, what the
21 defense lawyer said was, let's put it off and see if we
22 can get funding, let's put it off until there's the
23 funding hearing, let's put it off and put it off, as
24 opposed to saying, I want a speedy trial, I'm entitled
25 to it now, if you don't have the money, I don't get a

1 speedy trial, I get off scot-free.

2 MR. BOURKE: Well, under Louisiana's Article
3 701, there was no filing a motion for speedy trial,
4 saying, please give me a speedy trial, set a date now.
5 And at the same time --

6 JUSTICE SCALIA: The Constitution requires
7 such a motion. I mean, I don't care whether they have
8 a -- you know, a speedy trial motion. If -- if denying
9 him the right to speedy trial violates the Constitution,
10 surely, he is entitled to bring that to the attention of
11 the Louisiana court, whether there's a specific
12 statutory or rule provision or not.

13 MR. BOURKE: Your Honor, this Court, in
14 Barker, when dealing with this very topic under the
15 issue of assertion, specifically said it would allow
16 judges to take account of assertion in accordance with
17 local procedural requirements.

18 The local procedural requirement in a State
19 that already has its own statutory prescriptive period,
20 if you don't bring second-degree murder to trial within
21 two years, you're out.

22 The -- Louisiana does not need a defendant
23 to tell them that they have to bring a speedy trial, and
24 they don't want a defendant doing it, unless they're
25 ready to go to trial themselves. They don't want the

1 sort of pro forma assertion that was rejected.

2 JUSTICE SCALIA: Now, they -- they don't
3 even want counsel to say -- you know, Your Honor, we've
4 been trying to get funding, and we're -- we're just sick
5 and tired of waiting for this. We demand a speedy
6 trial, and, if we don't get funding and, therefore,
7 don't get a speedy trial, we think there's a
8 constitutional violation, and we're going to ask that
9 the indictment be dismissed.

10 MR. BOURKE: Well, in July --

11 JUSTICE SCALIA: Nobody ever made a
12 statement like that to the Court, did they?

13 MR. BOURKE: In July of 2005 --

14 JUSTICE SCALIA: What did you say?

15 MR. BOURKE: In July of 2005, Mr. Lorenzi
16 moved to quash the indictment and said exactly that,
17 said, it's too late, no funding, no trial, speedy trial
18 is up. And it was still another two years before the
19 funding crisis was solved.

20 So there was a very lengthy period, if such
21 notice were required -- and that is not, in our
22 submission, the message from Barker and the message from
23 Article 701, they got that notice in July 2005, when
24 there was the motion to quash.

25 And returning to your question --

1 JUSTICE GINSBURG: But wasn't there
2 something about that motion was withdrawn -- the 2005
3 motion was withdrawn in 2006?

4 MR. BOURKE: If -- if I can clarify that,
5 Justice Ginsburg, Mr. Lorenzi was at pains to say he was
6 not withdrawing the motion, but dismissing the motion to
7 quash because he couldn't advance it in a successful way
8 in Louisiana without demonstrating prejudice.

9 JUSTICE SCALIA: Dismissing it, instead of
10 withdrawing it, that's the fine line he's drawing?

11 MR. BOURKE: He specifically --

12 JUSTICE SCALIA: Is that a line in Louisiana
13 law? I don't know. Does this -- this come from French
14 law or something? It seems, to me, withdrawing and
15 dismissing sound, to me, the same thing.

16 MR. BOURKE: Well, the point, Your Honor,
17 was that he was not withdrawing his claim to a speedy
18 trial, but, rather, dismissing his motion to quash on
19 the violation of that at --

20 JUSTICE SCALIA: Withdrawing his motion to
21 quash. So it was withdrawn, right?

22 MR. BOURKE: No, it was dismissed. He chose
23 dismiss, rather than withdraw is the word, and what he
24 intended by that was that he wasn't saying, I don't want
25 one; he was saying, I can't bring the type of hearing

1 Louisiana courts require to get my Sixth Amendment
2 motion to quash granted.

3 JUSTICE SOTOMAYOR: I -- I think what you --
4 let's go back to that. It was his view that, under
5 Louisiana law to assert his Sixth Amendment right, he
6 had to follow the procedure laid out in the Louisiana
7 rule?

8 MR. BOURKE: To move for a speedy trial, he
9 had to do exactly that.

10 JUSTICE SOTOMAYOR: Under the
11 Sixth Amendment, he had to comply with the
12 requirements -- the procedural requirements of
13 Louisiana.

14 MR. BOURKE: The local procedural
15 requirements for how one goes about doing that.

16 JUSTICE SOTOMAYOR: All right. So then how
17 do you -- if he couldn't do it in 2002, '03, '04, or
18 '05, how did he end up doing it in '05?

19 MR. BOURKE: The -- it's the difference
20 between moving for a speedy trial, please give me a
21 trial date, I want to go to trial next week, and moving
22 to quash because the speedy trial right has been
23 violated.

24 JUSTICE SOTOMAYOR: So why didn't he move to
25 quash earlier?

1 MR. BOURKE: He moved to quash at the first
2 moment that it became available under the State statute,
3 which was at the three-year mark. He moved one month
4 after that three-year mark, as soon as it became
5 available.

6 JUSTICE SOTOMAYOR: I'm sorry. What -- is
7 there a law or a regulation in -- in Louisiana that
8 gives it a three-year mark?

9 MR. BOURKE: Yes, Your Honor. Article 579
10 and following provides that the State must bring a
11 first-degree murder charge to trial within three years,
12 or the case is prescribed, the indictment must be
13 dismissed with prejudice. And so the State always knew
14 it had that deadline.

15 It didn't even set a trial date for a period
16 of over three years in the middle of this, didn't even
17 try to set a trial date for three-and-a-half years,
18 didn't bring Mr. Boyer into court for
19 three-and-a-half years to address his case at all.

20 And so, as soon as the remedy available
21 became open, as Judge Cook said in her opinion, defense
22 counsel filed using exactly the remedy provided for.

23 If there are no further questions, Your
24 Honor, I will reserve the remainder of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Sigler?

2 ORAL ARGUMENT OF CARLA S. SIGLER

3 ON BEHALF OF THE RESPONDENT

4 MS. SIGLER: Mr. Chief Justice, and may it
5 please the Court:

6 This Court should affirm the holding of the
7 Third Circuit Court of Appeals for three separate
8 reasons.

9 JUSTICE SOTOMAYOR: How about the
10 reasoning -- is delay because of the lack of funding
11 attributable to the State or not? Or to the district
12 attorney as agent of the State?

13 MS. SIGLER: Justice Sotomayor, I don't
14 believe that the funding -- that we can credibly argue
15 that funding is completely outside the role of the
16 State.

17 JUSTICE SOTOMAYOR: So what's wrong with
18 what's been suggested by some, to remand to tell the
19 court below to whatever extent this was the basis of
20 your decision, it was wrong. Now, redo the Barker --
21 the factors.

22 MS. SIGLER: Well, Your Honor, if you review
23 the Third Circuit Court of Appeals opinion, which is at
24 Appendix D, the other Barker factors are analyzed,
25 incredibly thoroughly, with a mind to this Court's

1 jurisprudence, and the rationale may be flawed with
2 regard to that one point in this Court's opinion, but
3 the result is not.

4 JUSTICE SOTOMAYOR: So is one factor
5 determinative always in this calculation? I thought it
6 was a weighing factor. And so, if it's a weighing
7 factor, why isn't that, in and of itself, a factor that
8 a court needs to weigh against the others?

9 MS. SIGLER: I think that this Court has
10 always acknowledged, in its *Barker v. Wingo*
11 jurisprudence, that there is no one talismanic factor;
12 all of the factors are interrelated, and all are
13 reviewed. And that is why, even if the Court disagrees
14 with that one assessment of the Third Circuit's opinion,
15 the result is sound.

16 With --

17 JUSTICE KAGAN: Well, but how do we know
18 that? How do we know that they would have reach the
19 same determination if they had gotten it right on that
20 single factor?

21 MS. SIGLER: I think, when you look at the
22 Third Circuit of Appeals opinion, they specifically --
23 and with direct quotations to *Barker v. Wingo*, go
24 through every other factor in the analysis. And they
25 discuss the fact of the repeated continuances of defense

1 counsel of his own funding motion as part of the
2 assertion of the right.

3 JUSTICE SOTOMAYOR: But wait a minute. This
4 is a --

5 JUSTICE KAGAN: Whether something is --

6 JUSTICE SOTOMAYOR: I'm sorry.

7 JUSTICE KAGAN: Whether something is the
8 State's fault is a significant factor in the analysis,
9 and we have made that very clear in our cases. And so,
10 if they got that wrong -- and -- and you, I think, quite
11 rightly, are saying we can't defend that part of it --
12 if they got that wrong, don't we at least have to say,
13 okay, well, get it right now, and do it again?

14 MS. SIGLER: Well, Justice Kagan, I don't
15 think that what I would say is they got it completely
16 wrong because, as this Court has acknowledged throughout
17 its Barker jurisprudence, there are different weights
18 you attribute to government action, whether it is
19 negligence or whether it is a deliberate attempt on
20 behalf of the State to evade giving a defendant his
21 Sixth Amendment right to counsel.

22 JUSTICE KENNEDY: I -- I would like to get
23 the structure of your argument. You began to say
24 there's three reasons. I would just like to hear those
25 three reasons, so that I can understand the framework

1 for all these questions.

2 MS. SIGLER: Yes, sir, Justice Kennedy.

3 JUSTICE KENNEDY: The three reasons that we
4 should affirm.

5 MS. SIGLER: The first reason is that, as in
6 Vermont v. Brillon, the delay occasioned in this case
7 was due to Petitioner's counsel's repeated requests to
8 continue his own funding motion, which delayed a source
9 of funding when he -- the Petitioner wished to proceed
10 with capital-certified counsel.

11 JUSTICE KENNEDY: Okay. And the second?

12 MS. SIGLER: The second reason, Your Honor,
13 would be, pursuant to Loud Hawk, even if this Court
14 determines that there was a negligence factor with
15 regard to the State of Louisiana in not properly funding
16 capital-certified counsel, there are valid public policy
17 interests at play here and the fact that Louisiana is
18 generous enough to provide specially-certified counsel
19 to capital indigent defendants, when there is no
20 constitutional requirement for it to do so.

21 And then our third argument, Your Honor,
22 would be that, based under the Barker v. Wingo
23 jurisprudence, the delay should not be attributed to the
24 State in this case because of Petitioner's failure to
25 meaningfully assert his right to a speedy trial. And --

1 JUSTICE KENNEDY: Okay. Thank you.

2 MS. SIGLER: Yes, sir.

3 JUSTICE GINSBURG: How -- on that, how could
4 it possibly be Lorenzi's fault, which is what you said
5 is your first point, when he said, pay me, Supreme Court
6 of Louisiana, you have said that my operation as counsel
7 for this indigent defendant doesn't become operative
8 till I get paid, I have a right to get paid.

9 All that counsel did was to say, again and
10 again, pay me, get the funds to pay me. I don't
11 understand how in the world it could be the fault of an
12 attorney who has not gotten one cent from the State, has
13 a right to be paid before he engages in
14 representation -- how can it be his fault?

15 MS. SIGLER: Well, Justice Ginsburg, there
16 are several reasons why it's Mr. Lorenzi's fault. The
17 first of which is he filed a motion under
18 State v. Wigley, and that is Appendix X of your Joint
19 Appendix.

20 In that motion, he identified
21 State v. Wigley, and, although he referenced wanting
22 expert resources as well, he primarily based that motion
23 on his entitlement to attorney's fees.

24 JUSTICE SCALIA: I -- I was going to ask you
25 that question. Opposing counsel said that it -- it

1 wasn't primarily attorney's fees that's at issue here,
2 but investigation costs. That makes a difference to me
3 because, if it's just attorney's fees, he could have
4 gone ahead with one attorney, as far as I'm concerned.

5 MS. SIGLER: I agree with you,
6 Justice Scalia. And, if you look at Appendix LL, which
7 is the hearing on the motion to quash, Mr. Lorenzi says,
8 point blank -- in that appendix, he says, "I was not
9 going to proceed to file substantive motions until I was
10 funded."

11 And --

12 JUSTICE SOTOMAYOR: Doesn't he say, at the
13 same time, I couldn't do the investigation to make the
14 motion required by the State? So didn't that implicate
15 the funding for investigation?

16 MS. SIGLER: Well, Justice Sotomayor, if you
17 look at Appendix LL, where Mr. Lorenzi is speaking, he
18 says, "I have done substantial investigation on my own."
19 Mr. Lorenzi had the assistance, at that time, of the
20 LCAC, with Ms. Christine Lehmann assisting him as
21 associate counsel.

22 JUSTICE SOTOMAYOR: Were there funds for
23 investigation?

24 MS. SIGLER: There were funds available in
25 2003 that Mr. Lorenzi did not avail himself of because

1 he continued his funding motion eight times.

2 JUSTICE SOTOMAYOR: Which funds? Which
3 funds?

4 MS. SIGLER: There were -- there was a
5 capital defense account that was held by the Calcasieu
6 Parish Public Defender's Office. Mr. Lorenzi identified
7 that account as a source of funding in record volume 1,
8 pages 193 to 194.

9 He says, in a letter to Judge David Painter,
10 then the presiding trial judge, that he has identified a
11 source of funds for his representation. In that same
12 letter, he moves to continue a funding hearing that was,
13 at that time, scheduled for the next month.

14 And --

15 JUSTICE SOTOMAYOR: Wait a minute. I was
16 told -- maybe I am sort of misreading this record --
17 that he was ultimately told that fund wouldn't be made
18 available.

19 MS. SIGLER: That is not correct, Your
20 Honor. If you read Appendix LL, Chief Public Defender
21 Ron Ware testifies that that fund had been used to pay
22 other capital counsel in Calcasieu Parish. It had been
23 used extensively.

24 Now, by the time we get to the funding
25 hearing, which was delayed because of Mr. Lorenzi, we

1 are in 2006. At that time, there is a backlog in
2 expenses that they are paying other capital counsel
3 because they pay their bills on a first come, first
4 served basis.

5 Had Mr. Lorenzi proceeded to hearing in
6 2003, there was an identified account that would have
7 paid him. He did not submit any bills to the public
8 defender's office to be paid.

9 CHIEF JUSTICE ROBERTS: What about --

10 JUSTICE KAGAN: Ms. Sigler, on appeal, you
11 said this, the -- the State said, because the defendant
12 was without properly funded counsel for so long, the
13 State simply could not ethically or legally bring him to
14 trial. So what did you mean when you said that, that
15 the State could not ethically or legally bring him to
16 trial?

17 MS. SIGLER: Justice Kagan, what that
18 statement meant was that we were aware of the fact that
19 the Petitioner was, at all times, urging his privilege
20 under Rule 31 to capital-certified counsel.

21 We did not want to be involved in the
22 business of questioning a Petitioner's right to counsel.
23 We did not feel that, ethically, we could do so under
24 the Rules of Professional Conduct. For us to interfere
25 with that right would have been inappropriate, in our

1 view.

2 JUSTICE KAGAN: Well, did you ever say to
3 Mr. Boyer -- you know, you can go ahead, right now, with
4 this single counsel that you have? Was -- was that ever
5 a choice put to him?

6 Or because -- the way I read all of your
7 assertions below and, indeed, the entire record below,
8 is that everybody simply assumed that the case could not
9 go forward in its present circumstances.

10 MS. SIGLER: Justice Kagan, I think that
11 that assumption was made, in part, out of a desire to
12 recognize Mr. Boyer's decision to try to pursue Rule 31
13 privileges. It's certainly -- I understand that we
14 could have --

15 JUSTICE KAGAN: Well, a decision implies a
16 choice. Was a choice ever put to him?

17 MS. SIGLER: He had a choice that was
18 implicit, Your Honor, under Louisiana law; and he knew
19 that, and his counsel certainly knew that.

20 JUSTICE KAGAN: Well, you didn't even know
21 that. You said the State could not ethically or legally
22 bring him to trial. How was he supposed to know that?

23 MS. SIGLER: Justice Kagan, our response
24 in -- in that particular phrase that you are speaking of
25 has to do with our response to how the Petitioner has

1 phrased this issue all along. The Petitioner has
2 continuously phrased this issue as if he had a right to
3 capital-certified counsel, and, in fact, in his reply
4 brief, that is what he states.

5 JUSTICE SCALIA: I thought -- I thought the
6 statement meant could not ethically or legally bring him
7 to trial while he is insisting on his right to two
8 counsel.

9 MS. SIGLER: That's correct, Justice Scalia.

10 JUSTICE SCALIA: It would have been
11 different if he had said, the devil with the second
12 counsel, I want a -- I want a prompt trial.

13 MS. SIGLER: That's correct.

14 JUSTICE SCALIA: Then you would have felt
15 that, legally and ethically, you could proceed.

16 MS. SIGLER: Yes, sir. Yes, Your Honor.

17 CHIEF JUSTICE ROBERTS: What about your
18 friend's argument that he couldn't ask for a speedy
19 trial without an affidavit saying he was ready to go to
20 trial?

21 MS. SIGLER: It's interesting that
22 Petitioner argued that here today because, under Article
23 71 of the Code of Criminal Procedure, while an affidavit
24 is listed in the statute as one requirement, as a matter
25 of course, motions for speedy trial are granted pro se

1 all the time that meet none of the requirements in that
2 statute.

3 In addition, Rule 31 does not say that a
4 defendant who is trying to avail himself of Rule 31
5 can't file a motion for a speedy trial. It says nothing
6 to that effect.

7 JUSTICE GINSBURG: Mr. Boyer was -- had a
8 limited education and a low IQ. Did anyone ever counsel
9 him about this, no, you don't have to have two lawyers,
10 you can have one? Did any judge ever tell him what his
11 rights were?

12 MS. SIGLER: Well, Justice Ginsburg, I would
13 first like to address that I do not believe the
14 petitioner has a low IQ. In fact, that was refuted by
15 our Dr. Charles Robertson at a competency proceeding.

16 In fact, the results that was given from an
17 IQ test when he was 15, the person administering it
18 specifically stated that he was malingering, which would
19 cause a 10-point drop in the IQ --

20 JUSTICE GINSBURG: What was the level of his
21 education?

22 MS. SIGLER: I believe his level of
23 education was eighth grade. But I would --

24 JUSTICE GINSBURG: And he was expected to
25 know all this about two counsel -- you have a right to

1 two counsel, but, if the State isn't going to pay them,
2 you can go forward with one counsel?

3 Did anyone ever tell this man, with an
4 eighth grade education, what his rights were?

5 MS. SIGLER: Justice Ginsburg, I don't
6 believe that that specific discussion was ever had --

7 JUSTICE SCALIA: His -- his one counsel
8 might have known.

9 MS. SIGLER: His one --

10 JUSTICE SCALIA: He did have one counsel.
11 He had one counsel because he only graduated from the
12 eighth grade. That's why we provide counsel. And that
13 counsel could have known, no?

14 MS. SIGLER: Absolutely. In fact,
15 Mr. Lorenzi was well aware of the fact that he could
16 have chosen -- the Petitioner could have chosen to
17 proceed with just one counsel.

18 But I'd also like to note, Justice Scalia,
19 that, from 2002 to 2004, he had three counsel. He had
20 Mr. Lorenzi, he had Mr. Steven Singer, and he had
21 Ms. Christine Lehman.

22 He didn't just have one; he had three.

23 JUSTICE GINSBURG: And she was not -- you
24 know, you said that, all times, he had at least two. It
25 seemed to me -- two paid counsel. Lorenzi wasn't paid,

1 so it was -- was it Singer?

2 MS. SIGLER: Yes, ma'am.

3 JUSTICE GINSBURG: And then the woman --
4 Lehman, is it? But, when she started representing him,
5 she didn't have the qualifications to be counsel.

6 MS. SIGLER: Well, Justice Ginsburg, as has
7 been alluded to before, I believe, by Justice Scalia,
8 she absolutely had the qualifications to serve as
9 counsel, as required by the Sixth Amendment. And --

10 JUSTICE GINSBURG: But she wouldn't -- she
11 couldn't be appointed counsel in a death case under
12 Louisiana's rules.

13 MS. SIGLER: She met the qualifications for
14 associate counsel. In fact, she was later certified in
15 a motion filed by Mr. Lorenzi to be associate counsel --

16 JUSTICE GINSBURG: Yes, but, in the very
17 beginning, she wasn't even qualified to do that.

18 MS. SIGLER: Well, there was a provision --
19 there is a provision in Louisiana law -- law that allows
20 someone to move for the admission and the certification
21 of somebody as capital counsel, which was the procedure
22 employed in this case. That is perfectly permissible.

23 But Miss Lehman, at that time, was a very
24 experienced attorney, and we lay out her qualifications
25 in the brief. So, while she may not have been perfectly

1 qualified under Rule 31 to serve as lead counsel, she
2 certainly was more than qualified --

3 JUSTICE SOTOMAYOR: Is -- is --

4 JUSTICE SCALIA: She was a graduate of Yale
5 law school; wasn't she?

6 MS. SIGLER: She's a very impressive
7 attorney.

8 JUSTICE SCALIA: And another of his counsel,
9 Mr. Singer -- of the three that he had -- he was a
10 graduate of Harvard law school; wasn't he?

11 MS. SIGLER: Yes, Your Honor.

12 JUSTICE SCALIA: Son of a gun.

13 MS. SIGLER: Very exceptional.

14 JUSTICE SOTOMAYOR: Is that the minimum
15 constitutional --

16 JUSTICE THOMAS: Well, there -- see, he did
17 not provide good counsel.

18 (Laughter.)

19 MS. SIGLER: I would refute that,
20 Justice Thomas.

21 JUSTICE SOTOMAYOR: Counsel, is -- do you
22 want to define constitutionally adequate counsel? Is it
23 anybody who's graduated from Harvard and Yale?

24 (Laughter.)

25 JUSTICE SOTOMAYOR: Or even just passed the

1 bar?

2 MS. SIGLER: Or LSU law.

3 JUSTICE KAGAN: I went to Harvard.

4 JUSTICE SOTOMAYOR: I would think -- no, no,
5 no. This is a very serious question which is, I don't
6 know that we have ever defined what the minimum
7 qualification is for qualified counsel.

8 But it is -- some of it has to be that
9 counsel themselves feel adequate to represent a capital
10 defendant.

11 MS. SIGLER: Well --

12 JUSTICE SOTOMAYOR: I know plenty of lawyers
13 who would never either volunteer or would resist being
14 appointed to take on that kind of case because it has
15 many differences to a normal case.

16 MS. SIGLER: I would agree with that,
17 Justice Sotomayor, but I would invite you to look at the
18 motion that moved for the certification of Ms. Lehman,
19 which is in the record. That motion --

20 JUSTICE SOTOMAYOR: She's a very experienced
21 trial counsel. There's no -- no doubt of that. But was
22 she a capital counsel?

23 MS. SIGLER: She was, Your Honor. That
24 motion specifically refers to the seven capital cases
25 she had worked on and states that, while at the LCAC --

1 the Louisiana Capital Assistance Center -- she had
2 worked on other capital cases in advisory positions. So
3 she --

4 JUSTICE ALITO: Let me -- let me give you a
5 holding -- this is an incredibly factually complicated
6 case. We don't usually take cases that are so
7 fact-bound, but we've taken it.

8 (Laughter.)

9 JUSTICE ALITO: Let me give you a rule that
10 we might adopt. If the failure to provide funding makes
11 it impossible for some period of time for a case to be
12 tried, then the delay is attributable to the State.

13 Would you agree with that?

14 MS. SIGLER: If the failure to provide
15 funding is a deliberate attempt on the State to
16 interfere with the Sixth Amendment right to counsel,
17 then I would agree with that.

18 JUSTICE BREYER: You also agree, probably on
19 this subject, that the only sentence that I can find --
20 I haven't read it totally carefully -- but, in the lower
21 court opinion, that has to do with this is the sentence
22 that I read before.

23 And it says, "The first three years he was
24 incarcerated, he was charged with first-degree murder,
25 and the progression of the prosecution was out of the

1 State's control, as determined by this Court and the
2 Supreme Court."

3 Now, when I look at those words, I am not
4 100 percent certain what they mean. So it would be
5 helpful -- but I don't want --- you're not going to do
6 it -- I'd like to -- are you -- would you concede that
7 that statement means they're saying that the State, for
8 speedy trial purposes, is not to be held accountable,
9 really, at all, for not providing the money, insofar as
10 that's a cause of the delay?

11 Is that a conceded point? Or is that
12 something I have to spend quite a lot of time going
13 through?

14 And, if you don't concede that, what is it
15 that you concede, which would spare a little time going
16 through this record.

17 MS. SIGLER: Justice Breyer, I regret to
18 inform you that I do not concede that point.

19 JUSTICE BREYER: All right.

20 MS. SIGLER: I believe that if you look at
21 the --

22 (Laughter.)

23 JUSTICE BREYER: I thought maybe you would
24 not, but --

25 (Laughter.)

1 MS. SIGLER: I believe that, if you look at
2 Appendix D, as I stated earlier, the other Barker
3 factors are discussed. And the continuance motions that
4 were filed by defense counsel are mentioned with regard
5 to the assertion of the right; they are not necessarily
6 mentioned with regard to the State.

7 JUSTICE BREYER: Yes, you are right. Most
8 of this opinion -- and almost all of it is about the
9 other factors. Now, I agree with you, that's what it
10 looked like. But we do have this sentence.

11 So how am I supposed to figure out whether
12 that sentence really means what they say? Or just is
13 something they threw in to make the opinion more
14 difficult for us to understand?

15 MS. SIGLER: I don't think that was the
16 stated -- the -- the intention of the Third Circuit,
17 Justice Breyer.

18 JUSTICE BREYER: No, I don't either. I
19 don't either. But what's the argument -- sounds as if
20 it has something to do with funding. So what's the
21 argument it doesn't?

22 MS. SIGLER: Well, I believe --

23 JUSTICE BREYER: I mean, it says, you see,
24 "as determined by this Court and the Supreme Court."
25 What were they talking about?

1 MS. SIGLER: Well, I believe what the Third
2 Circuit was referring to was this Court's
3 Barker v. Wingo jurisprudence. This Court has stated,
4 repeatedly, that even if something --

5 JUSTICE BREYER: Oh, okay. Well, then,
6 that's it. They're referring to Barker. Okay.

7 So when they say it's out of this State's
8 control, as referred to in Barker, which is our case,
9 then what they mean is that it's not something that the
10 State had anything to do with, so they shouldn't be
11 blamed for it.

12 MS. SIGLER: I think that they are
13 attempting, in some fashion, to reconcile some of this
14 Court's later statements in the Barker jurisprudence,
15 which this Court made it clear, in Vermont v. Brillon,
16 that certain actions are not going to be attributed to
17 the State for speedy trial purposes --

18 JUSTICE BREYER: When you agreed with --

19 JUSTICE KAGAN: Ms. Sigler, could you go
20 back to Justice Alito's question?

21 MS. SIGLER: I'm sorry?

22 JUSTICE KAGAN: That was a good -- that was
23 a good segue.

24 JUSTICE SOTOMAYOR: You added the word
25 "deliberate" --

1 CHIEF JUSTICE ROBERTS: Justice Alito, I
2 think, has a question pending.

3 MS. SIGLER: Okay.

4 JUSTICE ALITO: Well, you agreed with the --
5 the principle that I mentioned, except that you want to
6 draw a distinction between the failure to provide
7 funding and the deliberate failure to provide funding?
8 Is that a real difference?

9 MS. SIGLER: Absolutely.

10 JUSTICE ALITO: Can the State inadvertently
11 failed to provide funding?

12 MS. SIGLER: I think that this Court has
13 always recognized, in the Barker jurisprudence, that
14 negligence is a very different factor in how it weighs
15 against a State than a deliberate attempt to violate a
16 constitutional right to a speedy trial.

17 JUSTICE SOTOMAYOR: How can --

18 JUSTICE KAGAN: When we said in Brillon
19 delays resulting from a systemic breakdown in the public
20 defender system could be charged to the State, so that
21 suggests systemic breakdown doesn't necessarily mean
22 deliberate. It just means there has been a breakdown,
23 and the result is that the person can't get to trial.

24 And if -- I think -- if Justice Alito could
25 even read that again and if you think about it, in light

1 of this statement in Brillon, that systemic breakdowns
2 are systemic breakdowns, whether or not they are
3 deliberate.

4 MS. SIGLER: Well, Justice Kagan, I think
5 that the best evidence or the fact that there was no
6 systemic breakdown is the funding hearing itself,
7 Appendix JJ.

8 At that funding hearing, there are extensive
9 discussions about other capital cases within the State
10 that are being tried the entire time this case is
11 pending, including one case that we referred to,
12 State v. Reeves, in Calcasieu Parish, a capital case
13 that went to trial in less than four years, that
14 included a retrial.

15 JUSTICE ALITO: Well, let's say you have a
16 case where the -- the defendant wants counsel, can't
17 afford counsel, and the State says, we'd love to provide
18 counsel for you, but we're broke, we just don't have any
19 money to provide counsel, but, maybe in a year, we'll
20 have money to provide counsel.

21 Now, what do we do with the delay between
22 that point and -- and the -- the point, a year later,
23 when the money becomes available?

24 MS. SIGLER: Well, I think, from that
25 scenario, we would have to look at the State's

1 intention. I certainly think that, if the State flat
2 out said, I'm sorry, you're not getting counsel for a
3 year, then we would have to attribute that factor to the
4 State more heavily, even though it does appear that, in
5 your scenario, it's more of a negligence problem than a
6 deliberate we're not going to fund you problem.

7 JUSTICE BREYER: Suppose it is negligent.
8 For -- for a year, this person isn't represented because
9 the State keeps sending the checks to his cousin of the
10 same name. I mean -- you know, they didn't do it
11 purposely. He just happens to have a cousin, this
12 lawyer, of the same name, who doesn't tell him he's
13 getting these checks out of nowhere.

14 So he can't hire the expert. Absolute
15 negligence. I mean, that's not to be attributed to the
16 State?

17 MS. SIGLER: No, Justice Breyer. Clearly --

18 JUSTICE BREYER: Is there any authority for
19 that? I mean -- you know, maybe you'd discount it
20 because it wasn't deliberate, but no attribution
21 whatsoever?

22 MS. SIGLER: Well, you discount it,
23 Justice Breyer, and you attribute it to more of a
24 negligence standard than you would a -- an absolute
25 failure or refusal to provide counsel. And this Court

1 has done that repeatedly.

2 JUSTICE SOTOMAYOR: I'm sorry. What's the
3 difference between saying, I'm broke, and I want to pay
4 the prosecutor because they kept paying the prosecutor,
5 I want to pay for the prosecutor's investigation, but I
6 won't pay you? What -- what is the difference in
7 applying the negligence versus deliberate standard?

8 I mean, look, in the end, States are always
9 strapped, but I don't know a State who doesn't make some
10 income. They make a choice about where they want that
11 income to go. And it may be, in your judgment, a more
12 legitimate decision, but why is the situation less
13 negligent -- why is it negligent and not deliberate?

14 Why is the choice one, not the other?

15 MS. SIGLER: Because, Justice Sotomayor, I
16 believe in this Court's decisions, under
17 *Barker v. Wingo*, the choice aspect -- the deliberate
18 intent aspect has been looked at by the courts in
19 deciding how much of the blame is to be assessed against
20 the State.

21 JUSTICE SOTOMAYOR: Well, then answer the
22 question. Why isn't the choice to say, I -- I'm broke,
23 so I don't want to pay you, I'm going to pay the
24 prosecutor -- which happened, the prosecutors were being
25 paid throughout. They had enough money to investigate,

1 but we're choosing not to pay the defendants.

2 Why isn't that a deliberate choice?

3 MS. SIGLER: Well, Justice Sotomayor, that
4 choice was not made in this case. There was available
5 funds. What we're here -- we're here today --

6 JUSTICE SOTOMAYOR: Available funds to pay
7 the lawyer?

8 MS. SIGLER: There were available funds in
9 2003. I was referring to that letter in the record
10 that --

11 JUSTICE GINSBURG: The -- the court itself
12 said, repeatedly, that the cause of the delay was the
13 funding crisis, the court -- I think we have to accept
14 that as being the case, that the funding crisis -- the
15 effort to get this lawyer paid failed, time and again.
16 And it was the court determination that it is the
17 funding crisis that caused the delay.

18 MS. SIGLER: Well, Justice Ginsburg, the
19 funding crisis that the court ruled on was present in
20 2006. It was not present in 2003, when this case
21 started. Mr. Lorenzi, himself, identified a source of
22 funds -- funds to pay him.

23 And when we hear Chief Public Defender Ron
24 Ware testify at that motion for funding hearing, at
25 Appendix JJ, he says, yes, I have a special capital

1 defense account, and, yes, I have been paying capital
2 attorneys from this account throughout this time period.

3 The fact that there weren't funds readily
4 available in 2006 is directly attribute to Petitioner's
5 counsels failing to move his funding herein forward in
6 2003, when he first identified that source of funds.

7 This is not a case in which there was never any funding.

8 This was a case in which defense counsel,
9 for whatever reason, delayed a resolution of the funding
10 issue, an issue that he, himself, identified as one --
11 without any resolution, he was not going to go forward
12 with substantive motions.

13 The onus -- the -- the blame -- or more of
14 the blame in this case, on the funding problem, belongs
15 with the Petitioner, not the State of Louisiana, whether
16 we mean the prosecution --

17 JUSTICE SOTOMAYOR: I'm not going to argue
18 the funding issue because I've got to go look at the
19 record again.

20 But let's assume that the record doesn't
21 support your claim because, as I read the decisions
22 below and the record that I saw, there wasn't funding
23 available until -- I think it was 2006 or '7? And so,
24 somehow, there's a disconnect between what you're saying
25 and the record.

1 But let's assume that -- my hypothetical,
2 that there wasn't money, despite whatever you're saying.

3 What's your position then? Then it's not
4 deliberate? It's still negligence.

5 MS. SIGLER: Justice Sotomayor, I maintain
6 that position, and I believe it to be consistent with
7 this Court's repeated analysis under *Barker v. Wingo*
8 jurisprudence.

9 You do look at the intent of the State as
10 either a negligence factor, akin to more of a neutral
11 factor, a deliberate factor, or a valid reason for the
12 delay. And I would also suggest to Your Honor --

13 JUSTICE SOTOMAYOR: So there could never be
14 a systematic breakdown, in your judgment, because any
15 time the State gives resources to something else, it's
16 not deliberate -- it's not a systemic breakdown.

17 MS. SIGLER: Justice Sotomayor, I would
18 invite you to look at the motion for funding hearing
19 again. There was money allocated to indigent defense by
20 Louisiana. It has increased -- and this is public
21 record, and it's partially supported by the funding
22 hearing.

23 That money has increased from 9.4 million in
24 2006 to 20 million in 2 -- I'm sorry -- in 2005, to 20
25 million in 2006, to \$33 million today. House Bill 1 of

1 the State legislative website. That is the precise
2 amount prosecutors are awarded by the State.

3 I would, again, suggest that this is not a
4 case of systemic breakdown. And I think that, as a
5 policy matter, this Court should be reluctant to rule
6 against the State of Louisiana, which, as Justice Scalia
7 noted, has been so generous in trying to provide capital
8 indigent defendants with specially qualified counsel,
9 which is more counsel than they're even entitled to
10 under the Sixth Amendment.

11 And I would also urge this Court to be
12 cognizant of its own repeated statements in the past,
13 that this is a very severe remedy with regard to letting
14 a convicted murderer free.

15 I'd also like to address, before I sit down
16 and turn this back over to Mr. Bourke, Justice Ginsburg,
17 earlier, you had addressed the question of whether or
18 not the armed robbery was, in fact, still a valid
19 charge.

20 Contrary to Mr. Bourke's assertion before
21 Your Honor today, if you look at Appendix 254A, there is
22 a writ of opposition that was filed by the Petitioner
23 before the Louisiana Supreme Court. And, at 254A, he
24 says -- and I quote -- "Even if the murder indictment
25 were quashed, Mr. Boyer faces the armed robbery

1 prosecution."

2 The Third Circuit also rejected Mr. Bourke's
3 current double jeopardy argument and stated specifically
4 that there was no speedy trial problem with regard to
5 the armed robbery.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Bourke, you have about 3 minutes
9 remaining.

10 REBUTTAL ARGUMENT OF RICHARD BOURKE

11 ON BEHALF OF THE PETITIONER

12 MR. BOURKE: Thank you. And I have a few
13 points of clarification that I want to make, just in a
14 very quick fashion.

15 Justice Sotomayor, there was no funding in
16 2001, 2002, 2003. It was never there. If Your Honor
17 looks at the Louisiana Supreme Court opinion in Citizen,
18 it will describe the Turner case funding hearing in
19 2001. Mr. Lorenzi was stuck with that one as well.
20 There was no money.

21 Mr. Lorenzi did, indeed, submit bills in
22 2003 because a new procedure had been announced, and
23 that's at page -- Joint Appendix page 401 to '3. You'll
24 see the correspondence showing he did submit bills, and
25 there was no money.

1 JUSTICE SOTOMAYOR: There was money
2 allocated, but, if I understood the record correctly --
3 by the State -- the funding was grossly inadequate to
4 cover all the needs?

5 MR. BOURKE: Right. It was -- it was
6 underwater. It was oversubscribed. It --

7 JUSTICE SCALIA: Mr. Bourke, would you
8 respond to the last point made by -- by opposing
9 counsel?

10 MR. BOURKE: Yes, certainly.

11 JUSTICE SCALIA: You did state -- it's in
12 Appendix J -- "Even if the murder indictment were
13 quashed, Mr. Boyer faces the armed robbery prosecution."

14 MR. BOURKE: Yes, Your Honor.

15 JUSTICE SCALIA: You told us, today, that
16 that's not the case, that the armed robbery prosecution
17 goes down the drain. Which -- which is true?

18 MR. BOURKE: The passage you're referring to
19 is from a writ application purely limited to the
20 application of the State speedy trial statute, which
21 does accord a new clock to every new filing.

22 So, under Louisiana State statutory law, the
23 armed robbery started the State statutory clock again,
24 but that is not the case for the Sixth Amendment --

25 JUSTICE SOTOMAYOR: As to the murder or as

1 to the independent robbery count? It's not a lesser
2 included offense, the robbery count.

3 MR. BOURKE: The armed robbery was a lesser
4 included of first-degree murder, but it is not a lesser
5 included of second-degree murder. Our double jeopardy
6 argument was the same force was applied in both, the
7 force for the murder and the force for the armed
8 robbery, so that's completely irrelevant.

9 But that was a State statutory argument
10 about the armed robbery charge, which has no
11 application in the case in front of us.

12 JUSTICE KAGAN: Mr. Boyer -- why would --

13 CHIEF JUSTICE ROBERTS: Go ahead.

14 JUSTICE KAGAN: Why would we get to that
15 question? I mean, no courts below have dealt with it.
16 It has been briefed to us in a grand total of two
17 paragraphs, I think. There would be no reason for us to
18 get to that question.

19 MR. BOURKE: It -- it is well beyond the
20 question presented, Your Honor, I agree.

21 Your Honor, the --

22 JUSTICE KAGAN: And so -- so, from that
23 point of view, we can assume that there is a robbery
24 conviction that is still out there.

25 MR. BOURKE: He has a murder and armed

1 robbery conviction from the same incident. It's the
2 same charge as the first-degree murder. It's just
3 unpacked.

4 JUSTICE SCALIA: Or assume that there isn't,
5 right?

6 MR. BOURKE: That -- that is why this Court
7 would remand to allow the -- the local court to deal
8 with it and ensure that that's accurate.

9 Justice Breyer, the reference to our
10 earlier -- the decision of this Court and the supreme
11 court is a reference to the earlier decision on the
12 interlocutory writ application, the earlier decision
13 that a lack of adequate funds prevented the prosecution.

14 And if Your Honor looks at Joint Appendix,
15 at page 126, which is part of the opinion of the Third
16 Circuit, you will see, earlier, in their opinion, they
17 discuss their own earlier ruling in the supreme court --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:59 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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