No. 08-88

IN THE
SUPREME COURT OF THE UNITED STATES

State of Vermont,

Petitioner,

v.

Michael Brillon,

Respondent.

On Petition for a Writ of Certiorari
to the Vermont Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Michael Brillon, respectfully requests that this Court deny the petition for a writ of certiorari, which seeks review of the Vermont Supreme Court's opinion in this case. The opinion is reported at 2008 VT 35 and on Westlaw, at 2008 WL 681425.

PETITIONER'S STATEMENT OF THE CASE

The petitioner's statement of the case (Pet. 4-5) covers some of the same ground as the Vermont court's fuller, and fairer, account of the reasons behind the nearly three-year delay in the trial of this case. Pet. 17a-27a, at ¶¶ 20-34. The petitioner's version omits to mention that Mr. Brillon was incarcerated without bail during the entire period; that his first attorney announced he was unprepared for trial because of his heavy caseload before petitioner "discharged" him, Pet. 4, and that lawyers assigned subsequently did little or nothing to bring the case to trial. For several months respondent was without counsel entirely. *Id.* 26a-27a, ¶¶ 33-34.

The court held that "a significant portion" of the three-year delay should be charged to the state's criminal justice system. Although the opinion does not specify this significant time in months and days, it *excludes* a major portion of defense-counsel-caused delays, a fact which the petitioner's statement of the case also fails to report. Pet. 24a-25a, ¶ 31.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition transmogrifies a nuanced, microscopically factual, legally narrow opinion into a bizarre miscarriage, a "first in the history of American jurisprudence," Pet. 1, 15, which has "opened a Pandora's box," and "turn[ed] thirty-six years of jurisprudence" since *Barker v. Wingo*, 407 U.S. 514 (1972), "into chaos." Pet. 1, 18. Its

version of the Vermont court's holding is a straw-man, and the arguments it raises against it are raised in this Court for the first time.

1. Regarding petitioner's first question, the case neither reaches the holding petitioner objects to, nor raises the question petitioner presents.

The case does not present the question, as framed by the petitioner, "[w]hether continuances and delays caused solely by an indigent defendant's public defender can...be charged against the State" in a subsequent speedy trial motion. Pet. i. In the Vermont Supreme Court the state, through different counsel, conceded this point, equating such periods with delays caused by court congestion. Appellee State of Vermont's Brief at 23-24, 27-28, *State v. Brillon*, 2008 VT 35. Nor does it present a reviewable holding that, when a public defender or assigned counsel requests a continuance, the state will always be held responsible for the ensuing delay, as the petition asserts throughout, because the Vermont court squarely decided the contrary.

The Vermont court's *Brillon* decision held that a fourteen month period during which an indigent defendant either had no counsel at all, or only nominal counsel who took no action in the case beyond a notice of appearance and a motion to withdraw, should be charged against the state's criminal justice system and ultimately to the courts, not to the defendant. Mr. Brillon was assigned six lawyers during his three-year wait for a trial. The first was a public defender; the second and third were private lawyers on contract with the Office of the Defender General (who are paid by state funds but are not state employees, *Reed v. Glynn*, 168 Vt. 504 (1998)). Although the court agreed that none of the first three attorneys did much if anything to bring the case to trial, Pet 17a-20a, ¶¶ 20-24, it expressly *declined* to charge any of this period – July, 2001 to June 2002 –

against the court system or the state. Pet 24a-25a, ¶ 31.

The petitioner's bold and repeated statement, that this opinion means that "all delays caused by an indigent defendant or public defender are now charged against the State under the *Barker v. Wingo* test[,]" Pet. 17, see also Pet. 2 (indigent defendants need not worry about requesting a continuance because "whatever happens, it is the State's fault."), Pet. 17-18 (every delay requested by a public defender "will be charged to the state"), is demonstrably false.

The delays which the court did count began with the assignment of a contract attorney in June 2002:

> ...[W]e summarize the relevant and material facts of the two-year period between June 2002 and June 2004, keeping in mind that defendant had already been incarcerated at the *start* of that period for nearly a year on a felony charge stemming from a violation of a pre-trial condition of release. Defendant's fourth attorney, who was assigned in June 2002, stated at an August 2002 status conference that he needed an additional two months to prepare the case, and yet he apparently did little or nothing and finally conceded at a November 2002 status conference that his contract with the defender general had expired and he was giving up criminal defense work. A fifth attorney was not formally assigned until January 2003, and he was allowed to withdraw four and one-half months later without having done anything because of a change in his contract with the defender general's office. At that point, defendant had been incarcerated without a trial for approximately two years, and yet he was entirely without counsel for the next four months until the next assigned counsel took over in August 2003. Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004.

Id. ¶ 34 (court's emphasis). These periods of non-representation approximate the cases described in *United States v. Cronic*, 466 U.S. 648, 659-661 (1984), of defendants who either lacked counsel altogether, or were not provided counsel "in any substantial

sense...."

In *Barker v. Wingo* the Court wrote that delays caused by "negligence or overcrowded courts should be weighted less heavily [than deliberate delays] but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531. The Vermont Supreme Court considered that the provision of constitutionally effective defense counsel to indigent defendants was ultimately a court responsibility, and that a failure to do so was ultimately chargeable to the government.

> The defender general's office part of the criminal justice system, and ultimately it is the court's responsibility to assure that the system prosecutes defendants in a timely manner that comports with constitutional mandates.

Pet 28a, ¶ 35.

This is a statement of Vermont law. By statute the duty to provide defense services to needy persons rests initially with Vermont's defender general. 13 Vt. Stat. Ann. § 5253 (stating power of defender general to provide public defenders or contract attorneys to represent needy persons). But the Court has assumed coordinate responsibility for Vermont's trial court judges,

> to assure the availability of counsel to all persons adjudged in need thereof, confronted by proceedings which may involve potential loss of personal liberty, irrespective of their ability to pay for such representation, and under conditions in which persons having their own counsel would be entitled to be so represented. Courts should be diligent to recognize the need for counsel, and notify the public defender or assign counsel at the earliest time when persons providing their own counsel would be entitled to be represented by an attorney, unless a waiver is furnished and accepted. ...The circumstance that statutory authority of the right to representation by counsel does not appear to reach the matter involved is not to bar the exercise of the inherent

> power to provide counsel where it may be constitutionally required.

Vt. Admin. Order 4 §§ 1. See also *id.* § 3 (empowering courts to designate counsel if the public defender or contract lawyer is "unable, due to a conflict of interest or otherwise, to represent the person in question"). Attributing a failure of these responsibilities, and the ensuing lengthy delays, to the courts and the criminal justice system (of which the defender general is a part), falls easily within the *Barker* Court's category of delays caused by "negligence" and overcrowded dockets. This modest holding is distinctly not "a first in the history of American jurisprudence," Pet. 1. *State v. Stock*, 147 P.3d 885, 891-892 (N.M. 2006); *Middlebrook v. State*, 802 A.2d 268, 274-275 (Del. 2002); *State v. Magnusen*, 646 So.2d 1275, 1281 (Miss. 1994). See also *People v. Johnson*, 26 Cal.3d 557, 162 Cal.Rptr. 431, 606 P.2d 738, 747 (1980) (en banc) (reaching the same conclusion under the state's speedy trial rules).

Alternatively, if the Vermont court's recognition of the judiciary's duty does represent something beyond what *Barker* had in mind, or what the Sixth Amendment protects against, the prosecution never raised that objection in the courts below, and in fact it explicitly *conceded* the point in its brief to the Vermont Supreme Court, which admits that the period between November, 2002 and July, 2003, during which the defendant had no counsel or, for four-and-a-half months, an attorney in name only, should count against the state (albeit "less heavily" than deliberate delays would be). Pet. 26, ¶ 32; State of Vermont's Brief, at 27-28, citing *Barker* at 531. The court differed with the prosecution by including the preceding five months (June, 2002-November, 2002), as a time when the defendant's representation was also only nominal.

The question presented was therefore not only not decided by the court below; the prosecution never asked or argued it.

The Court has been adamant in its refusal to accept cases on certiorari "unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'" *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Recent cases reaffirm the basic requirement of preservation. See, e.g., *Howell v. Mississippi*, 543 U.S. 440, 444 (2005); *Adams v. Robertson*, 520 U.S. 83, 86-88 (1997). The rule applies equally to the state when, as here, the prosecution petitions for certiorari. *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

Citing *Cardinale* in *Webb v. Webb*, 451 U.S. 493 (1981), the Court emphasized the policy considerations behind its rule. First were reasons of comity: "a proper respect for state functions, ... and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* 499-500, quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971) (internal quotations omitted).

But the requirement that federal questions first be raised in state courts also has "very practical" justifications. Among other things, it "insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Webb, at* 500.

That consideration weighs strongly against review in this case. The Vermont court reached its decision as a matter of both federal and state constitutional law.

> Both the federal and Vermont constitutions guarantee defendants a right to a speedy trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the

> right to a speedy and public trial by an impartial jury...."); Vt. Const. ch. I, art. 10 (persons have a right in all criminal prosecutions to "a speedy public trial by an impartial jury").

Pet. 10a, ¶ 11. The court had "adopted" the four-part framework of *Barker v. Wingo* as the Vermont Constitutional test, *id.* 11a, ¶ 12, implying a state constitutional orientation, but it made no "plain statement," *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), that its decision rested ultimately on state grounds.

If the Vermont court had been presented with the prosecution's current claim – that construing *Barker* as it did would be turning thirty-six years of federal jurisprudence into chaos, Pet. 1, 18 – it could and likely would have relied explicitly on the Vermont constitution.

Local law and budgetary considerations play a major role in the opinion. The court was not sure "if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont. Pet 5a, ¶ 3. If the problem was inadequate resources, the court urged the state legislature to act. *Id.*; Pet 38a-39a ¶ 51. If the egregious delays did not violate the Sixth Amendment, the court was free to respond to its local problem under its local charter, as it had shown an inclination to do in previous speedy trial cases. *State v. Keith*, 160 Vt. 257, 269-271 (1993) ("It may be necessary to look to our own constitution for a satisfactory solution that has not been forthcoming under the federal test."); *State v. Dean*, 148 Vt. 510, 515-16 (1987) (Vermont constitutional speedy trial guarantees "may offer additional protection against unreasonable delay in criminal cases"). The court has been one of the most active in the nation in developing a state-constitutional jurisprudence, and it is well-aware of *Michigan v. Long*'s "plain statement" rule. *State v. Brunelle*, 148 Vt. 347 (1987) ("Although

federal cases are discussed herein, we base our decision exclusively on the provisions of the Vermont Constitution." citing *Long*); *State v. Jewett*, 146 Vt. 221, 228 (1985).

The Vermont court had both the incentive and the constitutional authority to reach the result it did under the Vermont constitution, with a plain statement to that effect. But without the prosecution claim, presented here for the first time, that a ruling for the defendant would turn *Barker* on its head and extend *Gideon v. Wainwright*, 372 U.S. 335 (1963) to the breaking point, it had no reason to do so.

> 2. Regarding petitioner's second question, the issue was never argued to or decided by the state court, and presents no federal constitutional question for review.

The prosecution's second argument, that the Vermont court exceeded the right-to-counsel rule of *Gideon* by giving indigent defendants broader rights than defendants who can afford to retain counsel, Pet. 14, was not raised in any form in any of the state courts, and not considered or ruled on by the Vermont Supreme Court.

In essence, petitioner's second point is a mere Monday-morning add-on to its first point, arguing policy reasons why the court's decision was unwise, by allowing complementarily unfair advantages and disadvantages to indigent and non-indigent defendants.

These urgent policy arguments rest ultimately on the petitioner's false premise, that all delays requested by assigned counsel will be charged against the state in a subsequent speedy trial motion – a result the opinion deliberately rejects. More to the point, however, the wisdom or unwisdom of a state court decision is not a question appropriate for certiorari. Beyond petitioner's rhetorical assertion that the decision goes beyond the requirements of *Gideon* (while at the same time badly disadvantaging

indigent defendants, Pet. 14), the petitioner's second argument does not present any federal constitutional question for review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: August __, 2008

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