No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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July 15, 2008

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QUESTIONS PRESENTED

1. Whether continuances and delays caused solely by an indigent defendant's public defender can arise to a speedy trial right violation, and be charged against the State pursuant to the test in *Barker v. Wingo*, 407 U.S. 514 (1972), on the theory that public defenders are paid by the state (with a small "s").

2. Whether the right to counsel, as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), should result in broader speedy trial rights to indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test.

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INTRODUCTION

In what appears to be a first in the history of American jurisprudence, the Vermont Supreme Court has vacated a felony conviction and barred a retrial due to speedy trial right violations that were caused *solely* by the defendant and his public defender(s). While state and federal courts across the country have ruled that delays caused by a defendant's counsel are charged against the defendant under the *Barker v. Wingo*, 407 U.S. 514, 530 (1972) test, the Vermont Supreme Court found that delays in this case were caused by the "the failure of several of defendant's assigned counsel, over an inordinate period of time, to move his case forward," App. 28, and that these failures were part of "the criminal justice system provided by the state." App. 27. Accordingly, even though the Vermont Supreme Court did not find any fault whatsoever with the prosecution, the court directed the trial court to vacate the conviction and dismiss the case with prejudice. App. 38.

This ruling turns thirty-six years of jurisprudence into chaos. Public defenders now have the incentive to delay their cases in the hope that their convicted clients may one day go free due to the delay. Indigent criminal defendants who face certain conviction and lengthy sentences, likewise, have every incentive to delay. Indeed, the defendant in this case had six different assigned lawyers because: he fired his first lawyer (App. 19), his second lawyer withdrew due to a conflict (*id.*), he fired his third lawyer (and also threatened him, forcing his withdrawal) (App. 20), he fired his fourth

lawyer (App. 20-21), and his fifth lawyer withdrew due to modifications in his contract with the Defender General's Office (App. 22-23). By firing three lawyers, Brillon essentially won the lottery with a "get-out-of-jail-free card" made entirely by his own doing.

With this decision, the Vermont Supreme Court has also extended *Gideon v. Wainwright*, 372 U.S. 335 (1963), to provide to indigent defendants far greater rights than those who retain private counsel. Delays caused by private counsel do not get charged to the State because those lawyers are not employed by the state.[1] Indigent defendants are immune from these concerns: whatever happens, it is the State's fault. As a result, the State and the trial courts are put in the untenable position of having to consider requests for continuance differently when the request is made by a public defender, because any continuance granted to a public defender will be charged as though it was the prosecution that requested it. The end result is that indigent defendants are actually worse off, for two reasons. First, the State and the trial courts will be compelled to deny requests for continuance made by public defenders, and indigent defendants may be forced to trial before their counsel is ready. Second, the State and the trial courts will be reluctant to agree to any change in assigned counsel because the delays caused by such a change are attributable to the state. In a perverse way, while affording indigent

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[1] We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. *See* App. 4.

defendants greater rights, the indigent defendant is actually made worse off by this decision.

In light of the chaos that the *Brillon* decision has created in this vital area of criminal law, this Court's authoritative direction is badly needed.

OPINIONS BELOW

The order and judgment of the District Court of Bennington County denying defendant's first speedy trial motion is reprinted at App. 74-79, and the District Court's order denying Defendant's renewed speedy trial motion is reprinted at App. 59-73. These orders are not otherwise published. The Vermont Supreme Court's decision reversing the district court is reprinted at App. 3-58 and is published at *State v. Brillon*, No. 2005-167, 2008 WL 6814252008 (Vt. Mar 14, 2008)

JURISDICTION

The Vermont Supreme Court rendered its decision on March 14, 2008, App. 3, and denied rehearing on April 16, 2008. App. 80. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

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

STATEMENT OF THE CASE

Michael Brillon was charged with felony domestic assault for striking his girlfriend in July 2001. App. 3. Because Brillon had three prior felony convictions, he was also charged as a habitual offender, making him eligible for a life sentence pursuant to 13 V.S.A. § 11. App. 4. Brillon was found guilty after a jury trial in June of 2004, and sentenced to 12 to 20 years. App. 24.

The causes of this three-year delay are not in dispute. The day before his case was scheduled for jury draw, in February 2002, Brillon discharged his public defender because he said his public defender was not ready for trial.[2] App. 19. The trial court granted the public defender's motion to withdraw, and reassigned the case to the first level conflict counsel. *Id.* The first level conflict counsel reported that he had a conflict of interest, and so the court reassigned the case to the second level of conflict counsel (Brillon's third lawyer). *Id.* Three months later, in May of 2002, Brillon tried to fire this lawyer. App. 19. Rather than simply grant Brillon's request, the trial court held a hearing during which Brillon's counsel indicated that he was prepared and

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[2] Vermont funds its public defender system on a statewide, rather than local, basis. The state legislature sets the budget for the Office of Defender General, and the Office of Defender General distributes those funds across the state, including to the Bennington County Public Defenders Office, and to private counsel who are retained under contract to serve as conflict counsel when the Public Defender is removed from a case. *See* 2008 Vt. Laws 90, Sec. 16 and 13 V.S.A. § 5251.

had ample time to go forward. *Id.* But then, during a break in the proceeding, Brillon threatened his lawyer and the lawyer was given permission to withdraw. *Id.* The trial court then assigned the case to the third level of conflict lawyer, which was Brillon's fourth lawyer. *Id.* In November 2002, Brillon requested that his fourth lawyer be fired, and a hearing was held. Brillon's fourth lawyer advised the court that he was getting out of criminal defense work, and that his contract with the Office of the Defender General had expired. App. 21.

There were delays in retaining a fifth, and then a sixth, lawyer for Brillon. Although the court first ordered the Office of Defender General to assign a new lawyer on November 26, 2002, a lawyer (Brillon's fifth) was not assigned until January 15, 2003. App. 21-22. Three months later, that lawyer sought to withdraw due to modifications in his contract with the Office of the Defender General. App. 22-23. For the following four months, Brillon was without counsel, and he filed a pro se motion to dismiss his case due to the delay in bringing his case to trial. *Id.* Brillon's sixth, and final, lawyer was assigned to the case on August 1, 2003. *Id.* On February 23, 2004, Brillon's sixth lawyer filed a motion to dismiss for lack of a speedy trial. App. 23. The trial court denied the motion on April 19, 2004, finding that much of the delay was the result of defendant's own actions and that defendant had failed to demonstrate actual prejudice. *Id.* Defendant's trial took place in June, 2004, and he received a sentence of twelve-to-twenty years in prison. App. 24.

The Vermont Supreme Court reversed, in a three-to-two, sharply divided opinion. The majority found that:

> Given these facts, we conclude that 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. The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates. While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal justice system provided by the state.

App. 27. The dissent, written by Justice Burgess, proclaimed that, "Today the majority frees a convicted woman beater and habitual offender, not because of any infirmity in the evidence or unfair prejudice in the trial by which a jury found him guilty, but because the defendant delayed the proceedings for almost twenty-two months." App. 38.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the Vermont Supreme Court has upended thirty-six years of jurisprudence by holding that

delays which are caused *solely* by a defendant and his counsel can constitute a speedy trial right violation under *Barker v. Wingo*. This is an important question of federal law which has not been, but should be, settled by this Court. In addition, the Vermont Supreme Court has decided this issue in a way that conflicts with numerous other courts.

Second, this decision impermissibly grants indigent defendants broader rights than those who can retain private counsel, and, at the same time, places indigent defendants in peril of having their cases pushed to trial before their counsel is ready, or being forced to go to trial with a lawyer who otherwise would have been permitted to withdraw.

I. Under *Barker v. Wingo*, Delays Caused by the Defense Should Not Be Charged Against the Prosecution.

In *Barker v. Wingo*, 407 U.S. at 530-31, this Court established a four-part balancing test "which courts should assess in determining whether a particular defendant has been deprived of his [speedy trial] right." The Court identified four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. The issue in this case involves only item (2), the reason for the delay.

At the time of the *Barker* decision, the issue of a delay caused by the defendant or his counsel rising to a speedy trial act violation was simply

unfathomable. Indeed, this Court noted that defendants often delay prosecution *intentionally*:

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. *Delay is not an uncommon defense tactic.* As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

407 U.S. at 521 (emphasis added). Indeed, when describing factor (2), the reason for the delay, this Court never even suggested the possibility that a speedy trial violation could be caused by a defendant or defendant's counsel. The Court only described the reasons for delay in terms of acts by the prosecution:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be

> weighted heavily against the government. 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. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. at 531. The Vermont Supreme Court quoted this language regarding "overcrowded courts," and "the ultimate responsibility for such circumstances must rest with the government," *see* App. 15-16, but failed to recognize the important distinction between overcrowded courts (where, presumably, one case among many may get lost in the shuffle), and a situation where defendant and his counsel are solely responsible for the delay.

Following *Barker*, numerous circuit courts have made clear that delays caused by defendants and/or defense counsel cannot arise to a speedy trial act violation. *See, e.g.*, *Rashad v. Walsh,* 300 F.3d 27, 34 (1st Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003) (noting that when "delay is caused by defendant, delay does not count against the state at all"); *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002), *cert. denied*, 537 U.S. 1049 (2002) (noting that, "If the delay is attributable to the defendant, 'he will be deemed to have waived his speedy trial rights entirely,'" *citing, United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995)); *Vanlier v. Carroll,* 535 F. Supp. 2d 467, 478 (D.Del. 2008) (holding in part

that, "Delays attributable to the defendant are not weighted against the Government"); *Robinson v. Whitley*, 2 F.3d 562, 571 (5th Cir. 1993) (holding that the Sixth Amendment "does not permit a criminal to take advantage of a delay that his own conduct occasioned"); *United States v. Brock*, 782 F.2d. 1442 (7th Cir. 1986) (holding that the two and one-half-year delay between defendant's guilty plea did not violate the right to a speedy trial; delay was the result of defendant's actions); *United States v. Gomez*, 67 F.3d 1515 (10th Cir. 1995), *cert. denied*, *Gomez v. U.S.*, 516 U.S. 1060 (1996) (holding that twelve and one-half month delay did not rise to the level of a constitutional violation; delay attributable to the government was weighed against it only slightly because there was no indication of an attempt to gain a tactical advantage). [3]

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[3] In addition to these cases that we have cited in the First, Third, Fifth, Seventh, Ninth and Tenth Circuits, district courts in the remaining circuits also follow this trend. *See, e.g.*, *State v. Malito*, 2008 WL 907542, at 3 (Conn. Super. March 18, 2008)(finding no constitutional speedy trial violation, in part because, "the record here unambiguously indicates that the defendant bears primary, if not sole, responsibility for the delay..."); *State v. Pittman*, 647 S.E. 2d 144, 156 (S.C. 2007) (finding that defendant's right to a speedy trial was not violated where there was no indication of prosecutorial negligence or intentional delay and defendant had contributed to the delay by asserting complex defenses); *Payne v. Rees*, 738 F.2d 118, 123 (Ky. 1984) (noting that there was no speedy trial violation where, "There was no deliberate effort by the prosecution in this case to delay the trial, rather there was a negligent failure to proceed."); *State v. Woodruff*, 2008 WL 2415316, at 2 (Minn. App. June 17, 2008)(holding that defendant's right to a speedy trial had not been violated based in part because, "there is no evidence that the state intentionally delayed the proceeding and appellant, through his defense counsel, contributed to the delay..."); *Kramer v. State*, 652 S.E.2d 843, 846 (Ga. Ct. App. 2007) (finding no speedy trial violation where, "the delay resulted from numerous continuances from the trial

State courts have tended to follow this pattern as well, *see, e.g., People v. Chavez*, 650 P.2d 1310, 1313 (Colo. App. 1982) (finding no violation where delay was based on defense counsel's inability to try case within the speedy trial deadline); *Thomas v. State*, 933 So. 2d 995, 997 (Miss. Ct. App. 2006), *cert. denied, Thomas v. State*, 933 So.2d 982 (Miss. Jul 20, 2006) (noting that "Any delays in the prosecution caused by the defendant are not counted against the State when evaluating an alleged speedy trial violation"); *People v. Simpson*, 34 A.D. 3d 934, 939 (N.Y. App. Div. 2006) (finding that there was no speedy trial violation because "Any delay in the trial was due to proceedings initiated by the defense or ongoing plea negotiations and there is no evidence that the defense was impaired by the delay."); *Davis v. State*, 133 P.3d 719, 723 (Alaska App. 2006) (finding that delay attributed to defense attorney's request for additional time would toll the speedy trial clock); *Gamble v. State*, 85 S.W.3d 520, 524 (Ark. 2002) (noting that delays resulting from the defense requesting continuances or refusing to obtain counsel should not be charged against the state for speedy trial purposes); *People v. Griffin*, 365 N.E.2d 487, 490 (finding that, "Since Griffin, through his attorney, was responsible for the continuance granted...statutory right to a speedy trial was not violated."); *Murray v. State*, 967 So. 2d 1222, 1226 (Miss. 2007) (noting that, "any delay attributable to Murray would toll the running of the 270-day statutory period."); *State v. Craig*, 739

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calendar requested by and granted to Kramer...[T]hese delays cannot be attributed to or weighted against the State.")

N.W.2d 206, 214 (Neb. 2007) (finding that delay solely attributable to the accused will toll the speedy trial period.)

Moreover, when considering the specific issue here -- delays caused by a defendant who has changed his court-appointed counsel -- the courts are unanimous in finding no speedy trial violation. *See, e.g.*, *Roberson v. State*, 864 So. 2d 379, 394 (Ala. Crim. App. 2002), *cert. denied*, (May 16, 2003) (finding no speedy trial violation where defendant was represented by five different attorneys during the pendency of the proceedings, all of whom withdrew due to defendant's uncooperative behavior); *United States v. Lagasse*, No. 06-0249-CR (2d Cir. 2008) (finding no speedy trial violation where defendant's decision twice to discharge his counsel attributed to the delay); *United States v. Sutcliffe*, 505 F.3d 944, 957 (9th Cir. 2007) (finding no speedy trial violation where defendant sabotaged his relationship "with each appointed attorney, necessitating the delays"); *United States v. Brown*, 498 F.3d. 523, 531 (6th Cir. 2007) (finding no speedy trial violation where defendant sought new counsel); *State v. King*, 580 S.E.2d 89, 93 (N.C. Ct. App. 2003) (finding no speedy trial violation where delay was "largely due to defense counsel's trial preparation and the withdrawal of several attorneys due to conflicts with defendant"); *State v. Fischer*, 744 N.W. 2d 760, 770 (N.D. 2008) (finding no speedy trial violation where delays were due to defendant's "dissatisfaction with his attorneys, which resulted in multiple changes of court-appointed counsel"); and *People v. Kaczmarek*, 798 N.E. 2d 713, 719 (Ill. 2003) (finding no speedy trial violation where

defendant was represented by six different attorneys).

Against this overwhelming backdrop, the Vermont Supreme Court chose to rely on two state court decisions that are readily distinguishable. The Vermont Supreme Court relied on dicta in *People v. Johnson*, 26 Cal. 3d 557, 571 (1980), where the California Supreme Court stated that the purpose of the speedy trial right is to protect defendants against delays caused by "not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants," but the California court nonetheless affirmed the conviction. Furthermore, under the California law at issue, a finding of a speedy trial violation would "not result in defendants' escaping trial for serious crimes they may have committed." *Id.* at 573. Clearly, the California law and the decision in *Johnson* do not support the Vermont Supreme Court decision in *Brillon*.

The Vermont Supreme Court also relied on an appellate decision from New Mexico, *State v. Stock*, 2006-NMCA-140, 140 N.M. 676, 682 (2006), where the New Mexico court of appeals dismissed a conviction due to speedy trial violations, finding that "both parties bear some responsibility for the delay." The New Mexico Court found that some of the delays were caused by "the neglect of his overworked public defenders," 140 N.M. at 676, but that the state, too, was responsible. The court found that the state acted with "bureaucratic indifference," which was worse than mere negligence, in doing nothing to move the case forward. *Id.* at 683. Unlike the

prosecution in *Stock*, here there is no dispute that the delays in Brillon's case were all caused by Brillon and his counsel.

II. The *Brillon* Decision Affords Greater Protection to Indigent Defendants Over Defendants Who Retain Private Counsel for Speedy Trial Purposes, and Yet, at the Same Time, Places Indigent Defendants at a Disadvantage of Having Their Cases Pushed to Trial Before Counsel is Ready.

The second reason for allowing the writ is that the Vermont Supreme Court has extended *Gideon v. Wainwright* to provide broader speedy trial rights to indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test. In addition, while affording indigent defendants greater rights, this ruling also puts indigent defendants at an inherent disadvantage because the State (and the trial courts) must treat every request for a change of counsel and every request for continuance as though it will be charged against the State for speedy trial purposes. Accordingly, indigent defendants are now in peril of being forced to trial before their counsel is ready, and with counsel who otherwise would have been permitted to withdraw, while defendants who can afford counsel do not face these risks.

In *Gideon v. Wainwright*, 372 U.S. at 344, this Court made clear that the right to counsel was required in order to make every defendant "equal" under the law:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Now, for the first time in the history of our nation, since *Gideon*, the Vermont Supreme Court has acted to provide indigent defendants *greater* rights than those who are able to retain counsel. While all defendants facing a certain conviction and a lengthy sentence may chose as a strategic matter to delay the trial of their case in the hope that the prosecution witnesses may move away or forget the events, such a decision of intentional delay always came with a price: the defendant would have to waive his speedy trial rights. Under the ruling in *Brillon*, however, indigent defendants no longer have this concern. If they delay by firing their assigned counsel, or if their public defender delays by doing nothing for an extended period of time, all of that delay may all be charged against the State under the *Barker v. Wingo* test. Indeed, under *Brillon*, intentional delays may succeed not only in undermining the prosecution's case, but in eliminating the case altogether by getting the case dismissed for speedy trial violations *caused by the defense*. In contrast, defendants who retain counsel do not have this right. Delays caused by private

counsel, or by a defendant who retains private counsel, are all charged to the defendant because his lawyer is not funded by the state. This kind of inequality, determined solely on who pays the lawyer, defies the fundamental purpose behind *Gideon* – which was to level the playing field.

The right to counsel is not absolute. Under *Strickland v. Washington*, 446 U.S. 668, 686 (1984), the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In *Brillon*, however, there is no claim that the result was not just. The only issue is that justice was delayed. The Vermont Supreme Court has, in effect, vacated a conviction due to ineffective assistance of counsel when, (1) there was no claim of ineffective assistance of counsel, and (2) there was no claim that the trial had a result that was not just.

It would be one thing, perhaps, if the Vermont Supreme Court had a record before it of a pattern or practice of defendants waiting three years for trial due to an overworked public defender system. It is clear, however, that there was no such record before the court. The majority stated that, "Because of the limited record before us in this case, we cannot be sure if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont." App. 5. Moreover, the dissent wrote that there was no record of a lack of public-defender resources:

> the majority's concern that delay in this case may have been due to inadequate public-defender resources is unsupported by the record. While the defender general obviously had trouble finding counsel during the fourteen months following defendant's threat to his second lawyer, this difficulty appeared no more attributable to lack of resources than to ordinary conflicts of interest, attorney retirement, contract modification, and defendant's own misconduct. None of the delay was shown to be caseload related.

App. 46.

Finally, the irony here is that, in attempting to force the state legislature to provide more public defender funding, *see* App. 5, 37, the Vermont Supreme Court has, in practice, put indigent defendants at a great disadvantage. Under the *Brillon* ruling, all delays caused by an indigent defendant or public defender are now charged against the State under the *Barker v. Wingo* test. This means that every change in assigned counsel, and every continuance, now counts against the State. As a result, the State is required to assess requests for a change in counsel and for continuance one two different tiers: one for requests made by private counsel, and another for requests made by public defenders. If the request that will result in a delay is made by private counsel, the State need not be concerned that the delay might result in a speedy trial violation. On the other hand, the State must look at every request for delay by a public defender

with close scrutiny, as every delay will be charged to the State. As a result, the State is put in the untenable position of treating indigent defendants differently solely because their counsel is retained by the state. Indigent defendants may by forced to trial before their counsel is ready, or may be denied a change in counsel, solely because those delays may one day add up to a speedy trial violation. Alternatively, private counsel will continue to have all the time they require. The net result from the *Brillon* decision is that indigent defendants are worse off, and the State is placed in the impossible (and unlawful) position of having to treat indigent defendants as less-than-equal, which is exactly what this Court was trying to eliminate when it decided *Gideon v. Wainwright.*

In sum, the Vermont Supreme Court has opened a Pandora's box, by crossing a line that no other court has dared to cross, and creating complete chaos in the legal system. This Court's direction and guidance is badly needed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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