No. 08-88

In the Supreme Court of the United States

STATE OF VERMONT, PETITIONER

v.

MICHAEL BRILLON

ON WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether delays caused solely by an indigent defendant's appointed counsel can result in the deprivation of a defendant's Sixth Amendment right to a speedy trial.

2. Whether defendants represented by appointed counsel should be afforded broader speedy trial rights than defendants who retain private counsel.

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INTEREST OF THE UNITED STATES

This case presents issues surrounding whether pretrial delays caused solely by an indigent defendant's appointed counsel are attributable to the government in determining whether the defendant has been deprived of the Sixth Amendment right to a speedy trial. This Court's analysis of those issues will affect prosecutions in federal court. Although "[t]he more stringent provisions of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, have mooted much litigation about the requirements of the Speedy Trial Clause as applied to federal prosecutions," *United States* v. *Loud Hawk*, 474 U.S. 302, 304 n.1 (1986), compliance with the Act does not bar claims under the Sixth Amendment, see 18 U.S.C. 3173. The United States accordingly has a substantial interest in this case.

STATEMENT

Following a jury trial, respondent was convicted of second-degree aggravated domestic assault. He was sentenced to 12 to 20 years of imprisonment. The Vermont Supreme Court reversed after finding a violation of respondent's Sixth Amendment right to a speedy trial and remanded with instructions to set aside the conviction, vacate the sentence, and dismiss the charges with prejudice. Pet. App. 1-59.

1. On July 27, 2001, respondent confronted his girlfriend, with whom he had a child in common, at her home. When she tried to leave, respondent struck her in the face. The police were called and respondent was arrested. Pet. App. 8-9.

On July 30, 2001, respondent was charged with domestic assault in state court in Bennington County, Vermont. J.A. 11, 12. Because respondent was, at the time of the assault, forbidden by a criminal court order from harassing his girlfriend, he was charged with second-degree aggravated assault, a felony offense. Vt. Stat. Ann. tit. 13, § 1044(a)(1) (1998). And because respondent had three prior felony convictions, he was also charged as a habitual offender under Vt. Stat. Ann. tit. 13, § 11 (1998), exposing him to a life sentence. Pet. App. 3-4, 9.

2. Respondent was ultimately tried for the offense approximately three years later, in June 2004. In the intervening period, respondent was represented by six different lawyers, all of whom were either employed by the Vermont Office of the Defender General or private counsel assigned by the Defender General's Office.[1]

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[1] The Vermont Office of the Defender General has statutory responsibility for providing legal services to indigent criminal defendants. Vt. Stat. Ann. tit. 13, § 5253(a) (1998). The Defender General's Office car-

a. *July 30, 2001, to February 25, 2002.* A public defender was assigned to represent respondent, and the public defender's office appeared with respondent at his arraignment on July 30, 2001. J.A. 13; see Resp. Vt. S. Ct. Br. 9. The state district court ordered that respondent be held without bail pending an evidentiary hearing, which was scheduled for August 15, 2001. The day before the hearing, the prosecutor and the public defender stipulated to a continuance because the public defender was moving his former private practice that day. According to the public defender, respondent had consented to the continuance. Pet. App. 17-18.

A bail hearing was convened on October 2, 2001. Before the hearing began, however, the public defender asked for another continuance so that he could file a motion to recuse the trial judge, who had presided over a family-court dispute involving respondent. The public defender stated that the delay resulting from the motion would not count toward any speedy-trial claim. The next day, respondent filed a pro se motion to recuse the trial judge. The motion was denied by the trial judge on October 9, and by an administrative judge on November 20. On December 27, the prosecutor requested that the case be set for trial not later in February 2002, noting that respondent had already been in custody for five

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ries out that responsibility by distributing funds to local public defender offices and, "where necessary or appropriate," to private counsel who are retained under contract. *Id.* §§ 5253(b), 5272. When a law enforcement officer or judge notifies the Defender General's Office that an indigent person requires counsel, a public defender is assigned. *Id.* §§ 5234, 5272. If the public defender cannot provide representation, assignment is made to another attorney, who is compensated by the Defender General. *Id.* § 5272; see Pet. 4 n.3.

months. J.A. 89-90. The court granted the request. Pet. App. 18.

The bail hearing was held on January 16, 2002, and the court denied bail that same day. Pet. App. 18. The next day, the public defender moved for a continuance of the trial date on the ground that further investigation was necessary to prepare for trial. J.A. 91-93. The court denied the motion and set the jury draw for the trial for February 26, with the trial to begin the next day. Pet. App. 18-19.

On February 22, 2002, the public defender again moved to continue the trial, citing his caseload and other legal and ethical issues affecting his representation. Pet. App. 19; J.A. 97-102. At a hearing the same day, the court denied the motion. At the end of the hearing, respondent, who was participating by telephone, told the public defender that he was fired. Pet. App. 19.

Three days later, on February 25, 2002, the public defender moved to withdraw. Pet. App. 19; J.A. 103-107. The public defender explained that respondent had terminated him as assigned counsel because of claimed failure to maintain adequate communication, failure to prepare respondent's case for trial, and "certain irreconcilable differences in preferred approach * * * as to trial strategy." J.A. 103-104. At a hearing the same day, the court warned respondent that granting the motion would mean a further delay of his trial, but respondent stated that he had no choice because the public defender was not prepared for trial. The court granted the motion to withdraw, ordered the appointment of a new lawyer, and scheduled a status conference in 30 days. Pet. App. 19.

b. *February 25, 2002, to March 1, 2002.* The court appointed a second lawyer on February 28, 2002. J.A.

21. The following day, the second lawyer reported a conflict of interest. Pet. App. 19-20.

c. *March 1, 2002, to June 11, 2002.* On March 1, 2002, the court appointed a third lawyer to represent respondent. Pet. App. 19-20.

On May 16, 2002, respondent filed a pro se motion requesting a new lawyer, claiming that his third lawyer had failed to file motions, share discovery material, and communicate with him. Pet. App. 20; J.A. 113-114. Respondent also alleged that the third lawyer had "claimed that he cannot be diligent because of heavy case load." J.A. 114; see Pet. App. 20. At a hearing on June 11, respondent complained that the third lawyer had spoken to him briefly on only two occasions. Respondent further stated that he wanted to be brought to trial. The third lawyer responded that he had spoken to respondent at length about trial strategy, and he offered to make prior deposition testimony available to respondent. The lawyer also stated that he had sufficient time before trial to file a motion in limine. Near the end of the hearing, however, the lawyer moved to withdraw, indicating that respondent had threatened him during a break in the proceedings. The court granted the motion. The court told respondent that he was not entitled to manage every aspect of his defense and warned him that appointing a new lawyer would result in further delay. *Ibid.*

d. *June 11, 2002, to November 26, 2002.* After the hearing on June 11, 2002, the court appointed a fourth lawyer to represent respondent. Pet. App. 20.

At a status conference on August 5, 2002, the fourth lawyer requested an additional 60 days to prepare for trial. Pet. App. 21. He indicated that he needed an investigator to speak to six or eight people to develop pos-

sible impeachment material concerning the victim of the domestic assault. Pet. Vt. S. Ct. Br. 22. The court ordered the defense to disclose its additional witnesses by September 16 and stated that the case would be tried in October. Pet. App. 21.

On August 28, 2002, respondent wrote a letter to the court complaining that the fourth lawyer had not contacted his witnesses and had not responded to his calls and letters. J.A. 153-154; see Pet. App. 21. Two months later, on October 22, respondent filed a motion to dismiss the fourth lawyer on the ground that the lawyer had not filed motions on his behalf, had not communicated with him, had not shared discovery materials, and "refuse[d] to create an Attorney client relationship and working dialogue." J.A. 115-116; see Pet. App. 21. Respondent requested appointment of new counsel, adding: "It is not this defendant's intention to delay or compromise the orderly running of this court. It is this defendant's intention to go to trial effectively." J.A. 116.

At a hearing on November 26, 2002, the lawyer stated that he was in the process of getting out of criminal defense work and that his contract with the Defender General's office had expired in June. He also stated that the Defender General's office had indicated to him that the case would be reassigned. The court granted respondent's motion to dismiss the fourth lawyer while instructing the Defender General to assign a new lawyer as soon as possible. Pet. App. 21-22.

e. *November 26, 2002, to January 15, 2003.* A docket entry reflects that the fifth lawyer was assigned on the day of the hearing on November 26, 2002. J.A. 24. At a status conference on January 8, 2003, however, the lawyer told the court that he had been advised in December 2002 only that he might be assigned to the case and that

he had not yet received the paperwork. The court ordered the Defender General to assign a lawyer to respondent within 14 days. Pet. App. 22. On January 15, 2003, the Defender General advised the court that the fifth lawyer had been assigned to the case. *Ibid.*

f. *January 15, 2003, to April 11, 2003.* On February 25, 2003, respondent's fifth lawyer moved to extend the discovery and motion deadlines because he had been trying a case out of state for the preceding three weeks. With the prosecutor's agreement, the court granted the motion. Pet. App. 22; Resp. Vt. S. Ct. Br. 17.

On April 11, 2003, the fifth lawyer filed a notice of withdrawal, citing modifications in his firm's contract with the Defender General's Office. He told respondent that the Defender General's Office would assign another lawyer to represent him. Pet. App. 22-23.

g. *April 11, 2003, to August 1, 2003.* On May 7, 2003, respondent filed a pro se motion to dismiss his case in the interests of justice, based on the delay in bringing him to trial. J.A. 135; see Pet. App. 23. On June 20, the Defender General's Office notified the court that it had obtained funding for a serious felony unit and would hire a new lawyer for that unit who would be assigned to represent respondent beginning on August 1. *Ibid.*

h. *August 1, 2003, to June 14, 2004.* The new lawyer, who was respondent's sixth lawyer, appeared at a status conference on August 11, 2003. Pet. App. 23. The court scheduled another status conference for September 8 to allow the sixth lawyer to review the case. At that status conference, the lawyer asked for more time to review the case file. The court set a deadline of November 7 for the lawyer to review the pending motions and to advise the court which motions required rulings. The court subsequently accepted the parties' stipulation to extend

the deadline to December 8, and then further extended the deadline by 60 days, based on the sixth lawyer's representations that the files were incomplete and additional documents were needed from the prosecutor and prior defense counsel. Finally, the court accepted the parties' stipulation to extend the deadline to February 20, 2004. *Id.* at 23-24; Pet. Vt. S. Ct. Br. 24-25.

2. The sixth lawyer filed a motion to dismiss the pending charges for lack of a speedy trial and in the interests of justice, which was docketed on February 23, 2004. Pet. App. 24. On April 19, the district court denied the motion, applying the four-factor test of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Pet. App. 75-80. The court held that, although there was "sufficient pre-trial delay to trigger further analysis," the delay was attributable to respondent's "demands for substitute counsel," as well as "delay in the Defender General locating and assigning substitute counsel at various stages of the proceedings," "time requested by substitute counsel to prepare once assigned," and respondent's trials on other charges then pending against him. Pet. App. 77. The court further noted that, although respondent had made requests for trial, counsel had not done so or indicated a readiness for trial. *Id.* at 78. Finally, the court noted that respondent had not claimed that he was actually prejudiced by the delay. *Ibid.*

After a trial beginning on June 15, 2004, the jury found respondent guilty of the domestic assault charges. Pet. App. 24; J.A. 17. Following his conviction, respondent renewed his motion to dismiss the charges for lack of a speedy trial and in the interests of justice. The district court denied the motion. Pet. App. 60-75. The court reiterated that respondent "made multiple demands for substitute trial counsel"; that "the delay expe-

rienced by [respondent] was in large part the result of his own actions during the course of his representation up to and through trial"; and that respondent had failed to demonstrate actual prejudice. *Id.* at 71-72.

3. The Vermont Supreme Court reversed by a 3-2 vote, holding that the nearly three-year delay between respondent's arrest and his trial violated respondent's Sixth Amendment right to a speedy trial and that the charges against respondent thus should have been dismissed with prejudice. Pet. App. 1-59.

Beginning with the first *Barker* factor, the court found that the length of the delay "weigh[ed] heavily in favor of [respondent]" because the three-year delay was "extreme" and the case was "not particularly complex." Pet. App. 15.

Turning to the second *Barker* factor, the court found that the reasons for the delay also weighed in respondent's favor. Pet. App. 4-5, 15-29. The court concluded that the first year of delay did not "count against the state" for purposes of the speedy-trial analysis because it had resulted from, among other causes, respondent's effort to recuse the trial judge and from his threat against his newly assigned counsel, who thus had to withdraw. *Id.* at 25.

The court ruled, however, that most of the remaining two-year delay between June 2002 and June 2004 was attributable to the "state"—which the court defined to mean "the combination of government entities that make up the criminal justice system." Pet. App. 4 n.1; *id.* at 26-29. The court explained that, between June 2002 and November 2002, respondent's fourth attorney sought a continuance but "apparently did little or nothing"; that 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"; that a sixth attorney was not appointed until August 2003; and that, "[d]espite the already significant delay, the prosecution stipulated to several more continuances" before trial. *Id.* at 27. Although the court noted that the prosecution in the case "for the most part[] actively sought to have defendant brought to trial in a timely manner," *id.* at 4 n.1, the court nevertheless concluded that "a significant portion of the delay in bringing [respondent] to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward," *id.* at 27-28.

In the court's view, "[t]he 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." Pet. App. 28. Accordingly, the court concluded, delay in the Defender General's Office counted against the state, even if it did "not weigh heavily against the state" because it was not designed to secure a strategic advantage. *Ibid.*

The court concluded that the third *Barker* factor also weighed in respondent's favor, finding that the record "plainly demonstrate[d]" that respondent had asserted his right to a speedy trial throughout the proceedings. Pet. App. 31. The court explained that, "[w]hen his attorneys did not move his case forward within a reasonable period of time, he asked the court to replace them with someone who would." *Id.* at 30. And although "[respondent] grudgingly consented to continuances to allow his attorneys to prepare his case, he did so only because it was apparent that the attorneys, by their own admission, were not prepared to go forward with a trial." *Ibid.* A "defendant," the court concluded, "cannot be

forced to choose between his right to a speedy trial and his right to effective counsel." *Ibid.*

Finally, the court ruled that the fourth *Barker* factor weighed in respondent's favor because of respondent's lengthy pretrial detention, even absent actual prejudice to his defense. Pet. App. 31-37.

Having found that all four of the *Barker* factors weighed against the state, the Vermont Supreme Court concluded that it was "compelled[] to exercise the extraordinary remedy of dismissing the charges in a case involving a habitual offender who was convicted of what we consider to be a very serious criminal offense—aggravated domestic assault." Pet. App. 38.

Two justices dissented. Pet. App. 39-59. The dissenters took the position that "the lion's share of delay" was attributable to respondent. *Id.* at 41. In their view, "[b]ut for [respondent's] repeated maneuvers to dismiss his lawyers and avoid trial through the first eleven months following arraignment, the difficulty in finding additional counsel would not have arisen." *Id.* at 44; see also *id.* at 50. Moreover, the dissenters concluded, "[t]he final eleven months before trial [are] entirely attributable to [respondent] as time during which his last assigned counsel requested repeated extensions, prepared for trial and filed motions—none of which was challenged by defendant as unreasonable or less than diligent." *Id.* at 41-42.

SUMMARY OF ARGUMENT

Delays caused by a criminal defendant's appointed counsel do not weigh against the government under this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), and thus do not support a finding that pretrial delay

violated the defendant's Sixth Amendment right to a speedy trial.

A. In *Barker*, this Court recognized that, when pretrial delay is attributable to a criminal defendant, it weighs against a defendant's claim that he was deprived of his constitutional speedy-trial right. See 407 U.S. at 529. A contrary rule would allow criminal defendants to delay their own trials but then reap the reward of dismissal of the charges against them.

B. Just as defendants cannot, by seeking delay, build a case for dismissal of the charges against them on speedy-trial grounds, neither can the attorneys who represent them create delay that counts towards a violation. By tradition and necessity, an attorney is authorized to manage the trial and to set strategy as she sees fit, and an attorney's actions are almost always binding on her client, absent a demonstration of ineffectiveness. Scheduling matters fall well within that authority. An attorney's actions that delay her client's trial, regardless of the reasons, are properly attributable to the defendant.

C. The Vermont Supreme Court held in this case that the scheduling actions of appointed counsel are attributable to government, rather than the defendant, because appointed counsel form part of the criminal justice system created by the government, and because the trial court bears ultimate responsibility for controlling its docket and ensuring that defense counsel work expeditiously to carry a case to trial. Neither proposition is tenable. As this Court has recognized, public defenders engaged in representation of indigent defendants act on behalf of those clients, and not on behalf of the government; thus, in the course of representation, they stand in precisely the same position as retained counsel. And a trial court's decision to grant appointed counsel's re-

quest for delay does not relieve the defendant of the consequences of that request.

D. Under a proper balancing of the *Barker* factors, no speedy trial violation occurred in this case. Respondent personally caused much of the delay through his own actions, and his attorneys' requests for additional delay does not count towards a violation. The government may be held responsible for at most six months of the three-year gap between respondent's indictment and trial, during which time the court failed to appoint replacement counsel in a timely fashion. That delay does not establish a violation of respondent's constitutional speedy-trial right. Because the delay was not the result of a deliberate effort to hamper respondent's defense, but rather due to difficulties in locating available counsel and an apparently inadvertent delay in confirming the appointment with one of respondent's lawyers, it does not weigh heavily toward a finding that the delay was constitutionally unreasonable. And the courts below agreed that respondent suffered no actual prejudice to his defense as a result. The Vermont Supreme Court's dismissal with prejudice of the charges against respondent should therefore be reversed.

ARGUMENT

THE VERMONT SUPREME COURT ERRED IN CONCLUDING THAT DELAYS CAUSED BY RESPONDENT'S APPOINTED COUNSEL DEPRIVED HIM OF HIS RIGHT TO A SPEEDY TRIAL

The Speedy Trial Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial." In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Court set out a four-part test for determining whether the delay be-

tween initiation of criminal proceedings and the beginning of trial violates the constitutional speedy-trial right. The test requires a court to engage in "a difficult and sensitive balancing process," *id.* at 533, that examines: (1) the length of the delay, (2) the reason for the delay, (3) the extent to which the defendant asserted his speedy trial right, and (4) the prejudice to the defendant. *Id.* at 530-533. None of the four factors describes "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Ibid.* When a court finds a Speedy Trial Clause violation, "the only possible remedy" is dismissal of the charges against the defendant. *Strunk* v. *United States*, 412 U.S. 434, 440 (1973) (quoting *Barker*, 407 U.S. at 522).

The question in this case focuses on the second *Barker* factor, *i.e.*, the reason for the delay. The Vermont Supreme Court found a violation because it believed that, for most of the last two years of the three years that it took to bring respondent to trial, his appointed lawyers took too long to move the case forward. The court reasoned that when a criminal defendant's trial is delayed "because of the inaction of assigned counsel," that delay is chargeable to the government, and thus weighs in favor of a finding that the delay violates the defendant's Sixth Amendment right to a speedy trial. Pet. App. 5.

The court erred in charging the government with responsibility for delays caused by respondent's appointed counsel as they familiarized themselves with respondent's case, prepared his defense, and filed pretrial motions on his behalf. Criminal defendants cannot cause

pretrial delay and then claim that a speedy-trial violation requires dismissal of the charges against them. A similar rule necessarily applies to the attorneys appointed to represent them. Delays caused by appointed counsel do not weigh in favor of a finding that a defendant has been deprived of his constitutional right to a speedy trial.

A. Pretrial Delays Caused By The Defendant Do Not Weigh In Favor Of Dismissal Of Charges On Speedy-Trial Grounds

As this Court has repeatedly recognized, the Sixth Amendment does not guarantee trial within any strictly defined time period. *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). Because it is impossible "definitely [to] say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker*, 407 U.S. at 521, the speedy-trial right is understood as a safeguard not against any and all events that may result in a delayed trial, but against "*unreasonable* delay." *Doggett* v. *United States*, 505 U.S. 647, 654 (1992) (emphasis added).

Because application of the Speedy Trial Clause ultimately turns on the reasonableness of pretrial delay, the second *Barker* factor, which concerns the reasons for the delay, is "[t]he flag all litigants seek to capture." *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986). As this Court has explained, the second factor asks "whether the government or the criminal defendant is more to blame" for an "uncommonly long" delay before trial. *Doggett*, 505 U.S. at 651. When either the prosecution or the court is to blame, this Court has stated that the delay will generally count against the government and thus toward a finding of a Speedy Trial Clause viola-

tion, but has cautioned that "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.

Barker, 407 U.S. at 531 (footnote omitted).

That analysis of the second factor is consistent with the concept that "the primary burden [falls] on the courts and the prosecutors to assure that cases are brought to trial." *Barker*, 407 U.S. at 529. But, the Court continued: "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Ibid.*[2]

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[2] In light of this language in *Barker*, defendant-caused delay may be analyzed either through the lens of "standard waiver doctrine" or through a determination, under *Barker*'s second factor, of whether the reason for delay counts against the defendant. The Court in *Loud Hawk* analyzed defendant-caused delay under *Barker*'s second factor—stating that an interlocutory appeal filed by a criminal defendant "ordinarily will not weigh in favor of a defendant's speedy trial claims." 474 U.S. at 316 . But "standard waiver doctrine" may also simply foreclose a speedy-trial claim based on the defendant's own delay. See, *e.g.*, *United States* v. *Howard*, 218 F.3d 556, 564 (6th Cir. 2000) (excluding from speedy-trial analysis delays caused by continuances requested by defendant, citing *Barker* for the proposition that delays attributable to the defendant are waived); *United States* v. *Abou-Kassem*, 78 F.3d 161, 167 (5th Cir.) (defendant waived "entitlement to a speedy sentencing" when, after conviction, he filed a motion

2. The rule that a defendant who delays his own trial cannot later complain of that delay is consistent with historical practice. Early state speedy-trial guarantees generally said that a defendant whose trial was delayed was not entitled to discharge if the defendant himself sought or agreed to the delay. See, *e.g.*, *Pennsylvania* v. *Sheriff & Gaoler*, 16 Serg. & Rawle 304, 305 (Pa. 1827) (under state speedy-trial legislation, defendant must be discharged from imprisonment if not tried within specified period, "unless the delay happen on the application or with the assent of the defendant") (citation omitted); *Alabama* v. *Phil*, 1 Stew. 31, 32 (Ala. 1827) (under state speedy-trial legislation, "unless the delay happen on the application or with the assent of the defendant, he or she shall be discharged from imprisonment") (citation omitted); see also *United States* v. *Provoo*, 17 F.R.D. 183, 197 & n.10 (D. Md.), aff'd, 350 U.S. 857 (1955).

The rule is also consistent with the nature and purposes of the speedy-trial right. The Speedy Trial Clause is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because, among other things, it protects not only the interests of the accused, but the "societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker*, 407 U.S. at 519. The Court explained

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for a mental evaluation), cert. denied, 519 U.S. 818 (1996); *United States* v. *Sandoval*, 990 F.2d 481, 483 (9th Cir.) (defendant waives speedy-trial rights when he seeks to avoid detection by authorities), cert. denied, 510 U.S. 878 (1993). Under either analysis, a delay caused by the defendant himself should form no part of a valid speedy-trial claim. See *Dickey* v. *Florida*, 398 U.S. 30, 48 (1970) (Brennan, J., concurring) ("A defendant may be disentitled to the speedy-trial safeguard in the case of a delay for which he has, or shares, responsibility.").

that, while society generally has an interest in limiting the period of release on bail of accused persons who are ultimately convicted and in hastening the release of persons who are confined before trial but ultimately acquitted, see *id.* at 519-521, pretrial delay is often in the defendant's interest, *id.* at 521. As the Court explained in *Barker*, "[d]elay is not an uncommon defense tactic"; as time passes, the prosecution's witnesses "may become unavailable or their memories may fade," and the prosecution's "case will be weakened, sometimes seriously so." *Ibid.* Delay also often favors defendants because the criminal justice system provides "many procedural safeguards" to a person accused of a crime, and to observe those safeguards takes time. *United States* v. *Ewell*, 383 U.S. 116, 120 (1986). Most fundamentally, the Constitution guarantees a right to a fair trial and to the effective assistance of counsel. *E.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 685-686 (1984). Delay may be sought to effectuate those rights.

Even though the Speedy Trial Clause implicates both public and private interests, this Court has recognized that the constitutional right to a speedy trial is ultimately personal to, and can be waived by, the defendant. See *Barker*, 407 U.S. at 529 (stating that defendant may waive constitutional speedy-trial right); *id.* at 530 (identifying the factors relevant to "whether a particular defendant has been deprived of *his right*") (emphasis added). The right is vindicated at the defendant's behest, and, where a violation is found, "the only possible remedy" is one that uniquely favors the defendant: the dismissal of charges without trial. *Strunk*, 412 U.S. at 440 (quoting *Barker*, 407 U.S. at 522). That remedy imposes substantial costs on society. See *id.* at 439 ("[In practice, '[dismissal] means that a defendant who may

be guilty of a serious crime will go free, without having been tried.'") (quoting *Barker*, 407 U.S. at 522).

If criminal defendants, by seeking to delay their trials, could not only reap the litigation advantages of delay but also accrue credit toward a finding of a speedy-trial violation, they could be rewarded for their dilatory conduct with the dismissal of the charges against them. Assigning responsibility for such delays to defendants, rather than the government, is a common-sense solution that avoids that result.

3. Consistent with those principles, this Court has held the government responsible for deliberate or negligent action that delays bringing a defendant to trial. See *Doggett*, 505 U.S. at 652-654 (more than eight-year delay caused by government's negligence in locating defendant); *Dickey*, 398 U.S. at 36-38 (seven-year delay resulting from government's failure, after defendant's request for a speedy trial, to secure incarcerated defendant's presence for trial); *Smith* v. *Hooey*, 393 U.S. 374, 383 (1969) (six-year delay resulting from government's failure, after defendant's requests for a speedy trial, to secure incarcerated defendant's presence for trial); *Klopfer* v. *North Carolina*, 386 U.S. 213, 218, 221-226 (1967) (18-month delay resulting from procedure that allowed state to suspend prosecution without adjudicating or dismissing charges).

In contrast, this Court has not held the government responsible for delays caused by defendants. In *Loud Hawk*, the Court held that the government was not responsible for delays resulting from the defendants' interlocutory appeals. "In that limited class of cases where a pretrial appeal by the defendant is appropriate," the Court explained, "delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy

trial claims" unless the defendant showed "an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court." *Loud Hawk*, 474 U.S. at 316; see also *ibid.* ("A defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial."). And in other cases, the Court has suggested that continuances and other delays sought by the defendant do not establish a violation of the Speedy Trial Clause. See *Reed* v. *Farley*, 512 U.S. 339, 353 (1994) (rejecting the proposition that a habeas petitioner's speedy trial rights had been violated, where, "asserting a need for more time to prepare for a trial that would be 'fair and meaningful,' * * * [the habeas petitioner] himself *requested* a delay beyond the scheduled * * * opening"); *United States* v. *MacDonald*, 456 U.S. 1, 10-11 (1982) ("The Court of Appeals acknowledged, and [the defendant] concedes, that the delay between the civilian indictment and trial was caused primarily by [his] own legal maneuvers and, in any event, was not sufficient to violate the Speedy Trial Clause."); cf. *United States* v. *Taylor*, 487 U.S. 326, 340 (1988) (holding that "[r]espondent's culpable conduct and, in particular, his responsibility for the failure to meet the timely trial schedule in the first instance" were relevant factors in deciding whether dismissal with prejudice was warranted under the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*).

The courts of appeals have likewise agreed that delays caused by a defendant are "not of the type that raises constitutional concerns." *Underdahl* v. *Carlson*, 462 F.3d 796, 799 (8th Cir. 2006), cert. denied, 127 S. Ct. 2039 (2007); see also, *e.g.*, *United States* v. *Abdush-*

Shakur, 465 F.3d 458, 465 (10th Cir. 2006), cert. denied, 127 S. Ct. 1321 (2007); *United States* v. *Hopkins*, 310 F.3d 145, 150 (4th Cir. 2002), cert. denied, 537 U.S. 1238 (2003); *Rashad* v. *Walsh*, 300 F.3d 27, 34-35, 36 (1st Cir. 2002), cert. denied, 537 U.S. 1236 (2003); *Gattis* v. *Snyder*, 278 F.3d 222, 231 (3d Cir.), cert. denied, 537 U.S. 1049 (2002).

B. Delays Caused By Defense Counsel Are Attributable To The Defendant And Not The Government

Just as the government is not responsible under *Barker* for delays caused by defendants, the government is not responsible for delays caused by defense counsel in the course of representation.

1. As this Court has repeatedly recognized, a represented defendant speaks through counsel, and, unless counsel is constitutionally ineffective, the decisions of counsel are generally binding on the defendant. "[T]he attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, and the [defendant] must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); see also *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (a party "is deemed bound by the acts of his lawyer-agent").

In matters of trial management in particular, an attorney's control flows not only from "law and tradition," *Faretta* v. *California*, 422 U.S. 806, 820 (1975), but also from "practical necessity," *Gonzalez* v. *United States*, 128 S. Ct. 1765, 1770 (2008). "The adversary process could not function effectively if every tactical decision required client approval." *Ibid.* (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988)). Thus, counsel is entrusted with making a variety of decisions concerning the

conduct of litigation, and "[a]bsent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.* at 1769 (quoting *New York* v. *Hill*, 528 U.S. 110, 115 (2000)); see *Taylor*, 484 U.S. at 418 (client is bound by trial counsel's evidentiary decisions, including non-disclosure of the identity of witnesses); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (counsel may decide what issues to press on appeal); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965) (counsel may decide what evidentiary objections to raise).

2. This Court has previously held that "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." *Hill*, 528 U.S. at 115; see also *Gonzalez*, 128 S. Ct. at 1770. In *Hill*, the question was whether a defense attorney could, without the express consent of his client, agree to a "specified delay in trial" that would effectively waive the client's statutory right to a speedy trial under the Interstate Agreement on Detainers, 18 U.S.C. App. §§ 1 *et seq*. at 1520 (2000). The Court held that the attorney's decision to agree to the delay was binding. The Court explained, that in matters of scheduling, "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case. Likewise, only counsel is in a position to assess whether the defense would even be prepared to proceed any earlier." *Hill*, 528 U.S. at 115. Under those circumstances, "[r]equiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose," and the decisions must therefore be left to the attorney's discretion. *Ibid.*

Although the question in this case concerns a constitutional, rather than statutory, right, the same principle applies. By necessity, defense counsel must be empow-

ered to make scheduling decisions on behalf of her client. And when counsel seeks a delay, that delay is attributable to the defendant, either under waiver principles (see note 2, *supra*) or the second prong of the *Barker* test. See, *e.g.*, *United States* v. *Titlbach*, 339 F.3d 692, 699 (8th Cir. 2003) (even though defendant may have been unaware that his attorney sought continuances, the resulting delays remain attributable to him); *Gattis*, 278 F.3d at 231 (delays caused by defendant's counsel do not establish violation of Speedy Trial Clause); *United States* v. *Lam*, 251 F.3d 852, 857-859 (9th Cir.) (where defense counsel sought continuances to prepare defense, delay attributable to defendant), cert. denied, 534 U.S. 1013 (2001).

C. The Vermont Supreme Court Erred In Concluding That, Under *Barker*, Delays Caused By Appointed Counsel Weighed Against The Government

The Vermont Supreme Court appeared to recognize the general principle that delay attributable to the defendant weighs against a finding of a Speedy Trial Clause violation. See Pet. App. 28. But the court declined to apply that principle to significant periods of defendant-caused delay before respondent's trial, including: a four-and-a-half-month period during which respondent's fourth lawyer was newly assigned to the case, sought a continuance to prepare, was ultimately dismissed by respondent for purported neglect, and withdrew from representation; a three-month period during which respondent's newly appointed fifth lawyer was assigned to the case, sought an extension of deadlines because he had been trying another case out of town, and ultimately withdrew; and an eleven-month period during which respondent's sixth and final lawyer

successfully sought continuances to prepare respondent's case and filed several pretrial motions, including a motion to dismiss for violation of respondent's speedy-trial rights. See J.A. 27.

In weighing those periods in favor of a speedy-trial violation, the Vermont Supreme Court offered two possible explanations for its conclusion that the "failure of * * * assigned counsel, over an inordinate period of time, to move [respondent's] case forward," was attributable to the government under the second *Barker* factor. Pet. App. 29. First, the court stated that "[t]he defender general's office is part of the criminal justice system" created by the state, *id.* at 28; see also *id.* at 4-5 & n.1. Second, the court stated that "ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates." *Id.* at 28. Neither reason justifies attributing delays sought by appointed counsel in this case to the government, rather than to the defendant.

1. To the extent that the Vermont Supreme Court rested its decision on the proposition that appointed counsel act on behalf of the government, rather than the defendant, the court erred.

Although public defenders and other appointed counsel may be paid by the government, in representing a client they act on behalf of that client, not the government. In other contexts, this Court has recognized that public defenders acting for a client do not thereby act on behalf of the government. Rather, when a public defender represents an indigent defendant, "their relationship bec[omes] identical to that existing between any other lawyer and client." *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981). And like any other defense lawyer,

the public defender "opposes the designated representatives of the State," rather than acting on the State's behalf. For those reasons, public defenders cannot be sued under 42 U.S.C. 1983 for acts undertaken in the course of representing a client, *Polk County*, 454 U.S. at 318-319, and they are not entitled to official immunity from suit under federal law, *Ferri* v. *Ackerman*, 444 U.S. 193, 202-205 (1979). For similar reasons, when appointed counsel delay a client's trial, they do so on behalf of the defendant, not the government. The resulting delay therefore is not chargeable to the government under *Barker*.

Indeed, the framers of the Sixth Amendment could not have intended application of the Speedy Trial Clause to vary depending on whether the defendant was represented by appointed counsel. At the time the Sixth Amendment was adopted, the concept of mandatory state-furnished counsel was as yet unknown. See *Betts* v. *Brady*, 316 U.S. 455, 465-467 (1942), overruled by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The "specific evil" against which the framers aimed in drafting the Sixth Amendment Assistance of Counsel Clause was "the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 153 (2006) (Alito, J., dissenting) (citing *United States* v. *Ash*, 413 U.S. 300, 306 (1973)). The framers would have been surprised to learn that the later extension of that right to persons unable to retain private counsel would saddle the government with defense-caused delay in determining observance of the speedy-trial guarantee.

As Vermont notes (Br. 36-39), charging the government with responsibility for delays caused by public defenders, but not delays caused by privately retained

counsel, would produce untenable consequences. Such a regime would create incentives for appointed counsel to drag out proceedings, thereby increasing their clients' chances of securing dismissal on speedy-trial grounds. It could also encourage courts to treat requests for continuances less favorably when made by appointed counsel. That result would ultimately harm indigent defendants whose counsel genuinely need additional time to prepare for trial.

2. To the extent that the Vermont Supreme Court reasoned that the trial court bore vicarious responsibility for allowing defense counsel to delay proceedings, see Pet. App. 7, 28, the court also erred.

It is true that the conduct of courts is relevant in the speedy-trial analysis. See *Barker*, 407 U.S. at 531 (delays caused by "overcrowded courts" weigh less heavily against the government than intentional delay designed to hamper the defense, but "nevertheless should be considered"); *Loud Hawk*, 474 U.S. at 316 ("wholly unjustifiable delay by the appellate court" might establish Speedy Trial Clause violation in case concerning filing of interlocutory appeal). And it is also true that a trial court has "ultimate control" over, and "responsibility" for, scheduling proceedings over which it presides, including the power to grant or deny continuances. Pet. App. 28; cf. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge."). But the mere fact that a trial court has the power to deny a request to delay trial does not mean that, by granting the defense's request for delay, the trial court relieves the defense of its responsibility for that conduct. To hold the government responsible for such delays would not only be contrary to this Court's guidance in *Barker*, see 407 U.S. at 529,

but would create incentives for the defense to seek unreasonable continuances in the hopes of convincing a trial court to grant them and ultimately procuring dismissal of charges.

3. A rule that holds the government responsible under *Barker* for delays caused by appointed counsel is neither a necessary nor appropriate response to the Vermont Supreme Court's concern that, because of lack of resources, appointed counsel may unjustifiably delay trial to the detriment of their clients. See Pet. App. 5, 38-39.

a. As a preliminary matter, even without reassigning responsibility to courts for pretrial delays caused by defense counsel, courts already have substantial incentives to exercise their discretion to deny counsel's unreasonable requests to put off trial: "The condition of most criminal dockets demands reasonably prompt disposition of cases," since "an unreasonable delay in one case only serves to delay other cases, and this carries the potential for prejudice to the rights of other defendants." *United States* v. *Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

Defense counsel, too, have an ethical duty to act "with reasonable diligence and promptness in representing a client." Model Rules of Prof'l Conduct R. 1.3 (2004). If the workload of assigned counsel is such that accepting additional cases will interfere with their ability to provide effective representation, then they are generally advised to refuse those additional appointments. ABA, *Standards for Criminal Justice: Providing Defense Services* Standard 5-5.3 (3d ed. 1992). And if a shortage of available counsel leads to a delay in assigning a lawyer to an indigent defendant, then such a shortage may, much like the problem of "overcrowded

courts," constitute a "neutral" reason for delay that can be charged to the government under *Barker*. See 407 U.S. at 531.

Finally, if defendants are dissatisfied with counsel's diligence, they may seek the appointment of new counsel, as respondent did here.[3] And if counsel's unprofessional delays prejudice the defense, defendants may bring claims of ineffective assistance of counsel. See *Strickland*, 466 U.S. at 687.

b. This case does not, in any event, present the question whether delays caused by a lack of public-defender resources establish a violation of the Speedy Trial Clause. As the Vermont Supreme Court acknowledged (Pet. App. 38-39), the record does not establish that respondent's appointed counsel sought delays because they were overworked or underfunded. Regardless of whether a genuine "crisis" of the sort the Vermont Supreme Court imagines (Pet. App. 5), in which a State's chronic underfunding effectively leaves a defendant without counsel despite a formal appointment, would support a claim under the Speedy Trial Clause if the other factors strongly favor the grant of relief, the general rule must be that delays arising from defense counsel's requests for delay are chargeable to the defendant in speedy-trial analysis.

D. Under A Proper Balancing Of The *Barker* Factors, Respondent Is Not Entitled To A Dismissal Of The Charges In This Case

For the reasons explained above, the Vermont Supreme Court erred in ruling that "a significant portion"

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[3] Indigent defendants have no unilateral right to discharge appointed counsel in order to secure different counsel, see *Gonzalez-Lopez*, 548 U.S. at 151, but courts have discretion to accommodate such requests.

of the two-year delay between June 2002 and June 2004 was attributable to the government for purposes of the Sixth Amendment because it resulted from defense counsel's inaction. Pet. App. 27-28. The Vermont Supreme Court thus also erred in concluding that, under *Barker*, it was required to order the dismissal of the charges against respondent. See *id.* at 38, 39.

1. The first *Barker* factor, the length of delay, "defines a threshold in the inquiry: there must be a delay long enough to be 'presumptively prejudicial.'" *Loud Hawk*, 474 U.S. at 314 (quoting *Barker*, 407 U.S. at 530). In this case, the Vermont Supreme Court correctly concluded that the three-year delay from respondent's arrest in July 2001 until his trial in June 2004 was sufficiently lengthy to trigger further inquiry. Pet. App. 15; see *Doggett*, 505 U.S. at 652 & n. 1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.").

2. The second *Barker* factor, the reason for delay, counts against the defendant periods of delay caused by him or his counsel. As discussed, the trial court found that "the delay experienced by [respondent] was in large part the result of his own actions during the course of his representation up to and through his trial." Pet. App. 72. And the record confirms that respondent and his counsel caused or requested virtually all of the delay in this case—through such acts as respondent's discharge of his counsel, his threats against one counsel, and successor counsels' withdrawal because of a variety of practice-related factors and trial-preparation needs. See pp. 3-8, *supra*. That leaves a total of approximately six months, including the periods between November 2002 and January 2003 and between April and August

2003, during which respondent was unrepresented, but had not waived his right to counsel.

Vermont persuasively argues (Br. 33) that those periods should be charged to respondent, whose efforts to discharge his lawyers led to the "shortage of lawyers" that left him unrepresented for a total of six months. Pet. App. 49. This Court need not decide, however, whether respondent bears sole responsibility for his lack of representation during those periods. Even if respondent bore no responsibility for the delay in appointing a fifth and sixth lawyer, any difficulties in securing counsel after exhaustion of the most readily-available options would constitute a "neutral" reason for delay, akin to "overcrowded courts," that should weigh "less heavily" against the government than, for example, "[a] deliberate attempt to * * * hamper the defense." *Barker*, 407 U.S. at 531.

3. The third *Barker* factor—whether a defendant asserted his speedy trial right—is in this case linked to the second. The Vermont Supreme Court found that the record "plainly demonstrate[d]" that respondent asserted his right to a speedy trial throughout the proceedings. Pet. App. 31. But respondent also repeatedly engaged in conduct inconsistent with the assertion of his speedy-trial right: he sought to dismiss three attorneys, even after the court explained that the result would be to delay trial, and he did not object when his sixth and final attorney sought multiple continuances or filed pretrial motions. See *Loud Hawk*, 474 U.S. at 314-315; see *id.* at 314 (finding third factor not satisfied where "[a]t the same time respondents were making a record of claims in the District Court for speedy trial, they consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari"). Although the

Vermont Supreme Court reasonably concluded that respondent objected to the delays resulting from the difficulties in locating replacement counsel, the court itself acknowledged that respondent consented—if only "grudgingly"—to continuances sought by his attorneys. Pet. App. 30.

4. Finally, the Vermont Supreme Court found that the fourth *Barker* factor—the prejudice to the defendant from the delay—weighed in respondent's favor. Pet. App. 31-37. The court's finding, however, was based solely a presumption of prejudice arising from "the inordinate delay in prosecuting [respondent] while he was incarcerated." *Id.* at 37. The court agreed with the trial court that respondent had not shown actual prejudice resulting from the delay, deeming respondent's claims to the contrary to be not "substantial" and "speculative." *Ibid.*

5. A balance of the four factors weighs heavily in favor of the conclusion that respondent is not entitled to a dismissal of the charges for lack of a speedy trial. Although the three-year delay between respondent's arrest in July 2001 and the beginning of trial in June 2004 was significant, most of that delay is attributable solely to respondent and the six lawyers who represented him. And even if respondent is not held responsible for the six-month period during which he waited for new counsel to be appointed, that delay does not weigh heavily in favor of a finding of a Speedy Trial Clause violation. Even assuming that respondent adequately invoked his right to a speedy trial, he has not shown sufficient prejudice—actual or presumed—from the delay to establish entitlement to the dismissal of the charges against him.

CONCLUSION

The judgment of the Vermont Supreme Court should be reversed.

Respectfully submitted.

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