No. 08-88

In the Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the
Vermont Supreme Court

REPLY BRIEF FOR THE PETITIONER

CHRISTINA RAINVILLE
Counsel of Record

ERICA A. MARTHAGE
Bennington County State's
Attorney's Office
150 Veterans Memorial Dr
Bennington, VT 05201
(802) 442-8116

Counsel for Petitioner

January 6, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

This case involves important legal questions, which the State will address below, but at its core rests a simple issue of justice: whether it is just to let a violent man, convicted of domestic assault as a habitual offender, walk free when he delayed his own trial by firing his first lawyer the day before trial, caused further delays by threatening the life of his third lawyer (forcing a withdrawal after the lawyer initially declined to withdraw), and then caused still further delays by firing yet another lawyer. Whatever delays occurred afterward, whether they were due to administrative delays or ineffective counsel, surely would never have occurred had Brillon not engaged in heinous conduct (threatening his counsel) or repeated bad conduct (firing three lawyers). Justice requires that Brillon suffer the consequences of his actions rather than the State, Brillon's victim, or the community at large – all of whom had no control over the delays. Simply stated, it would be a perversion of justice to allow a man who threatened the life of his lawyer to walk free because his trial was later delayed due to difficulties in getting or maintaining replacement assigned counsel to represent him. Indeed, such a ruling would send a dangerous message to violent defendants like Brillon, who are already predisposed to use violence to get what they want. In this case, if the Vermont Supreme Court ruling is left to stand, Brillon will have succeeded in using violence, rather than the jury trial process, to win his freedom.

Any thorough legal analysis clearly supports the same result that justice requires. The purpose of

the speedy trial right is to prevent *the government* from holding a citizen in jail for extended periods of time without a trial; not for self-inflicted delays caused by the defendant or his counsel. When a defendant intentionally and knowingly takes actions that delay his trial, he should not be permitted to plead for pity from the court because of other delays. When defense counsel delays the case by seeking continuances, or even – for the sake of argument – does "little or nothing" to represent the client, those delays cannot reasonably be attributed to the State. As discussed below, publicly-retained lawyers are not state actors, and therefore, their actions cannot give rise to a constitutional violation. Furthermore, if delays caused by public defenders and assigned counsel are attributable to the State for speedy trial analysis, the result will be a two-tiered system of criminal justice: one for the indigent, and one for those who can afford a lawyer.

While Brillon attempts to suggest that there are significant issues of fact, he admits all that is necessary for this Court to decide this case as a matter of law. He admits that he fired three lawyers, and that his last three lawyers all obtained continuances. Clearly, on this record, it is beyond dispute that all but four or six months of the delay was caused by Brillon and his counsel. The remaining time, when Brillon was without counsel, was, at most, a neutral factor which should not be weighed against the State.

Although this Court need not review the record to decide the case, it is clear that Brillon grossly misrepresents the record. Moreover, the

amici's argument that this Court should not review the findings of a state court, has no validity where, as here, the state court never should have made findings to begin with because there was no basis in law to find that delays caused by publicly-retained counsel are charged against the state, and where the record was woefully incomplete because defense counsel were never permitted to explain their actions. In any event, the record does not support the Vermont Supreme Court's findings.

ARGUMENT

I. BRILLON WAIVED HIS SPEEDY TRIAL RIGHT, BOTH WITH HIS ACTIONS, AND WITH HIS CONSENT.

Brillon has admitted all of the facts that are necessary for this Court to decide the case as a matter of law. Brillon admits that he fired Ammons on the eve of trial, Resp't Br. at 10; that he threatened Altieri and forced his withdrawal, *id.* at 12-13; that he moved to dismiss Donaldson, *id.* at 14; and that the court dismissed Donaldson from the case, *id.* at 16. That alone is enough to decide this case, but there is more. Brillon admits that, during the two-year period that the Vermont Supreme Court wrongly charged to the State, *all* of his lawyers obtained continuances. He admits that Donaldson "asked for two months" to get ready for trial, *id.* at 48; that Sleigh, too, sought and received a continuance, *id.* at 19; and that Moore sought and received three continuances, *id.* at 22-23.

Brillon's actions bar his speedy trial claim, under both the balancing test and under the waiver doctrine set forth in *Barker v. Wingo*, 407 U.S. 514, 529 (1972). In discussing the waiver issue in *Barker*, the Court stated that, "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine…." Here, any balancing of Brillon's admitted delays tips the scales in the State's favor, but Brillon also clearly waived his right to a speedy trial, both by his actions and by his knowing acknowledgment on the record.

The judge explicitly told Brillon, back on August 5, 2002, that Brillon had waived his right to a speedy trial by firing Altieri:

> The Court went through with Mr. Brillon the – the weighing out of consequences at the time that he moved to have former counsel removed and one of the things that *I was very clear about was that he's – that – that as an inevitable accompaniment to his Motion he was waiving his right to have a speedy trial.* That does not mean that he – his case goes into limbo. It just means that we now bring this case to trial consistent with defense counsel's reasonable need, new defense counsel's reasonable need to conduct additional discovery . . . and to then with the other limiting factor, of course, is the Court's calendar, but *there is no particular time frame any longer within which we are*

> *required to get Mr. Brillon's case to trial.*

Id. at 5 (emphasis added). Neither Brillon nor Donaldson objected to this instruction. Clearly, Brillon knowingly waived his speedy trial right.

In sum, Brillon's admissions show that the overwhelming cause of the delay in this case was either Brillon's conduct, or his counsel's delays. It would be a terrible perversion of justice to let a defendant whose intentional actions repeatedly delayed his trial walk free because of delays that occurred afterward, or to hold the State responsible for delays caused by defense counsel – especially when Brillon expressly waived those rights.

II. DELAYS BY BRILLON'S COUNSEL CANNOT ARISE TO CONSTITUTIONAL VIOLATIONS BECAUSE DEFENSE LAWYERS ARE NOT STATE ACTORS.

Moreover, even if one assumes for the sake of argument that Brillon's conduct and waiver are not enough to require reversal of the Vermont Supreme Court decision, the Court should still reverse the decision because the delays caused by Brillon's counsel cannot constitute speedy trial violations as a matter of law.

Brillon concedes that, "Incontestably, public defenders represent their clients, not the state, and their representation of clients is not 'state action.'" Resp't Br. at 45, *citing Polk County v. Dodson*, 454 U.S. 312 (1981). That should be the end of the legal

analysis required, because only state actors can commit constitutional violations. There is no "state invasion," as this Court required when it first applied the Sixth Amendment to the states in *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (holding that the "guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment"). Accordingly, any delays caused by Brillon's counsel cannot, as a matter of law, justify the relief granted here.

Indeed, it would create a mockery of our criminal justice system if publicly-funded lawyers could win freedom for their clients by seeking continuances, or worse, by doing absolutely nothing. The Vermont Supreme Court's ruling sends a disturbing message to assigned counsel that if they delay to the extreme or do nothing, they may actually benefit their client more than had they pursued the case diligently. As discussed at length below and also in the Solicitor General's Brief at 5-8, 23, the delays in the last two years of this case were all caused by Brillon's counsel. Not once did the prosecutor seek a continuance. And, although Brillon filed requests asking for a trial, not once did any of his counsel file a demand indicating that counsel was ready for trial, a common Vermont practice. *See*, Pet. App. 77-78.

Brillon's claim that the many requests for continuance filed by Brillon's lawyers in the last two years should be charged to the State because those

delays purportedly did not delay the trial date more than a month, *see* Resp't Br. at 48, is preposterous. Clearly, delays of any kind push back the trial date. Otherwise, this case would have been tried as initially planned in October of 2002 when Donaldson took over the case for Altieri. Instead, rather than pushing for a prompt trial at the status conference on August 5, 2002, Donaldson complained that he needed 60 days or longer just to interview the witnesses.[1] Tr. 8/5/02 at 6. Brillon then wrote a letter complaining about Donaldson, J.A. 153-54, and then moved to fire Donaldson on October 22, 2002, before the case could be scheduled for trial. J.A. 23. Then, Sleigh obtained a continuance, and Moore obtained three more.

Although Brillon purports to rely on *Powell v. Alabama*, 287 U.S. 45 (1932), *see* Resp't Brief 32-34, that case could not be more inapplicable. In *Powell,* 287 U.S. at 53*,* the court appointed "all the members of the bar" to represent three "negroes" charged in a capital case of rape, and the one lawyer who happened to show up defended all three in their trials (six days after indictment). Here, in contrast, the Defender General [herinafter DG] appointed new counsel for Brillon *the same day as his lawyers withdrew*, every time except the last time, and then the DG went to the legislature to get more funding. *See* Docket Entries dated 2/25/03 (J.A. 21); 3/1/02 (*id.*); 6/11/02 (*id.* at 23); 11/26/02 (*id.* at 24).

[1] This is undoubtedly why the trial was not scheduled until October, not because of purported "court congestion" as Brillon claims. *See* Resp't Br. at 52.

Under the Vermont Supreme Court's ruling, the State is charged when Brillon's lawyers ask for a continuance, and the State is also charged when Brillon's lawyers work diligently and remain on the case (as Moore did). Indeed, *everything* is charged to the State, from the moment Brillon threatened Altieri (June 11, 2002) until the trial (June 15, 2005). This ruling cannot be justified. Even if the law permitted delays by an assigned counsel to constitute state action (which it clearly does not), it defies all logic and reason to attribute these defense counsel delays to the State.

Moreover, Brillon's claim that "decisions finding speedy trial violations where delays occurred because of no representation or only nominal representation ... are commonplace," Resp't Br. at 39-40, is flatly false. Despite his claim that such rulings are "commonplace," Brillon has only found six such purported cases, and these cases, in fact, hold the opposite:

- In *Henderson v. State*, 662 S.E.2d 652 (2008), the Georgia Court of Appeals *found that no speedy trial violation had occurred* despite the fact that there was a 68-month delay between defendant's arraignment and the trial. In a fact scenario which is much like Brillon's (but without the threat to counsel), Henderson repeatedly changed his counsel. The court rejected Henderson's claims that neither he nor his attorney caused any of the delays, and declared that, "the leaves of absence filed by Henderson's first attorney, the various changes in appointed counsel, and the

confusion caused by Henderson's effort to employ private counsel prolonged the proceedings." 662 S.E.2d at 654. Accordingly, the court found that even though "the State's negligence delayed the proceedings in this case, Henderson prolonged that delay," and that "the trial court was authorized to find that, despite its length, the delay did not violate Henderson's right to a speedy trial." 662 S.E.2d at 656. This Court should reach the same conclusion.

- In *United States v. Denson*, 668 F. Supp. 1531 (S.D. Fla. 1987), the court found that *there was no speedy trial violation* despite a delay of 40 months between the issuance of the indictment and arraignment. The court noted that the record did not contain "even a hint of bad faith on the government's part," and ruled in the government's favor, *id.* at 1535, concluding that:

> This Court does not condone the Government's explanation that this case "fell through the proverbial cracks." … However, the Court will not "ignore the competing interests of the government." *See United States v. Mitchell*, 769 F.2d 1544, 1548 (11th Cir. 1985). Nor will this Court turn its back on society's interest in seeing that justice is served. Accordingly, upon careful consideration of all the factors outlined in *Barker* and its progeny,

> this Court concludes that the Defendant's right to speedy trial has not been violated under the circumstances.

Id. This Court should reach the same conclusion, and not "turn its back on society's interest in seeing that justice is served."

- While the Arkansas Supreme Court in *Glover v. State*, 817 S.W.2d 409 (Ark. 1991), found that a two-month period where the court failed to appoint counsel for a defendant after his first attorney withdrew due to a conflict would count against the state under the Arkansas speedy trial rule, the case is readily distinguishable from Brillon's case. In *Glover*, the defendant sought a dismissal pursuant to the Arkansas one-year speedy trial rule, and the State – having no defense whatsoever for any of the remaining time – sought to exclude the two-month period during which the court failed to appoint counsel. 817 S.W.2d at 410. The key issue of importance to the Arkansas Supreme Court was that "the petitioner in this case did nothing to cause his trial to be delayed." 817 S.W.2d at 410. In fact, this was so important that the court expressly distinguished two prior cases where the court found no speedy trial violation: *Williams v. State*, 627 S.W.2d 4 (Ark. 1982) and *Divanovich v. State*, 617 S.W.2d 345 (Ark. 1981). The court noted that the *Williams* case was different because "the delay was caused by Williams' refusal to cooperate with his

appointed counsel... and new counsel had to be appointed." *Glover*, 817 S.W.2d at 410. Clearly, even under the ruling in *Glover*, the State would not be held accountable for any delay, including the periods where Brillon had no counsel.

- Finally, in *Isaac v. Perrin*, 659 F.2d 279, 282-83 (1st Cir. 1981), the court of appeals affirmed the district court's decision that *there was no violation of defendant's speedy trial right,* even though the court found that there was a three-month delay in appointing counsel for defendant, and that that factor weighed against the state, but "less heavily than intentional delay." The Court of Appeals concluded that there was no speedy trial violation, because, among other things, the delay in assigning counsel was a "neutral" factor. *Id.* At most, this case suggests that, in a case where a defendant has done nothing wrong to cause a delay (unlike Brillon), the complete failure to appoint counsel is a neutral factor to be weighed against the government, but not heavily. Brillon's case, where he actively caused delays that set the later delays into motion, is readily distinguishable.[2]

[2] The State previously addressed the remaining cases cited by Brillon, *State v. Stock,* 147 P.3d 885 (N.M. Ct. App. 2006) and *People v. Johnson*, 606 P.2d 738 (Cal. 1980). *See* Pet'r Br. at 35.

As for the appellate cases that Brillon and his *amici* cite, those cases are irrelevant. Upon information and belief, no court has ever vacated a conviction and barred a retrial due to delays on appeal. Indeed, the most a defendant can ever obtain from counsel delays on appeal is a reinstated appeal, a waiver of the habeas exhaustion requirement, or a new trial – a right, or course, which the State has been deprived of here. Moreover, appeals are fundamentally different because, once convicted, a defendant has no motivation to delay his appeal. In contrast, as this Court noted in *Barker*, 407 U.S. at 521, "Delay is not an uncommon defense tactic" at the trial stage. Finally, because the stakes for the State and the community are necessarily much greater in a speedy *trial* claim, the bar that the defendant must reach in a speedy *trial* case must be inherently higher.

In conclusion, there really is no case law in the history of American jurisprudence that supports Brillon's position. For the reasons discussed herein, it is easy to understand why that is the case.

III. THE PARADE OF HORRIBLES IS PROVEN BY BRILLON'S ARGUMENTS.

The State's argument that the ruling creates what Brillon denounces as a "parade of horribles" is proven true by Brillon's own Brief. Shockingly, Brillon proves the point by accusing the prosecutor of "acquiescence" in the delay by *merely consenting* to Moore's requests for continuance. *See* Resp't Br. at 49.

This case is a perfect example of why Brillon's rule would indeed be horrible. While Brillon finds fault with the State for merely agreeing to the continuances requested by Moore, describing that conduct as "acquiescence in further delay," Resp't Br. at 49, Brillon fails to advise the Court that Moore requested those continuances in order to allow her time to consult with her predecessor counsel and collect their files (*see* Motion to Extend Deadlines (11/3/03)), and because her "daughter and son-in-law were in a very serious auto accident in Massachusetts…." Stipulated Motion to Extend Filing Deadline, 5/24/04. Brillon and his *amici* ask this Court to find fault with a prosecutor who believed that a lawyer should not be forced to go to trial without case files, or that a lawyer who suffered a terrible family emergency should be permitted to attend to her daughter. And, indeed, to the extent that the Vermont Supreme Court had any criticism at all of the prosecution, the court appeared to criticize the prosecutor for merely agreeing to these continuances. *See* Vermont Supreme Court's ruling at Pet. App. 37 ("Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004.")

Clearly, if there is *any possibility* that a prosecutor will be accused of delay by *merely agreeing* to continuances, prosecutors will no longer agree to requests for continuance by publicly-retained counsel. Indeed, it is difficult to imagine a more reasonable basis for a continuance than the reasons presented here – no files, and a child seriously injured in a car accident – and still, the

prosecutor has now been accused of "acquiescence in further delay" by merely consenting. The Vermont Supreme Court's ruling sends a dangerous message to prosecutors that, no matter how reasonable the request for delay, the prosecutor will be held accountable.

It is ludicrous for Brillon to suggest, *see* Resp't Br. at 49, that the Vermont Supreme Court would not treat this matter any differently if Brillon had retained private counsel. Clearly, the only basis for finding that the delays here created a speedy trial violation was the court's analysis that the State is responsible for the actions of publicly-retained lawyers. Indeed, the court expressly stated that:

> [W]e 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 …. While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal just system provided by the state.

Pet. App. 27-28. Obviously, when a privately-retained lawyer causes a delay, there is no basis to claim that the delays are caused by the system provided by the state. Moreover, it is difficult to imagine a scenario more ridiculous than a rich

defendant who hires a lawyer to delay his proceedings, and then walks free because his lawyer caused delays. It is simply absurd to claim that the Vermont Supreme Court's ruling might apply to privately-retained counsel.

Indisputably, the Vermont Supreme Court's ruling creates two classes of defendants. Indigent defendants will be pushed to trial before their counsel is ready because prosecutors must now object to every continuance, because if they consent, it will be treated as though the prosecution requested the delay and the prosecutor will be accused of "acquiescence in further delay." Defendants who can afford counsel will continue to be permitted all the time they reasonably require to prepare. The "parade of horribles" is all too real, and is proven beyond dispute even within the confines of the facts of this case, where a prosecutor has now been criticized by the Vermont Supreme Court for agreeing to a continuance when the request was due to the fact that a publicly-retained counsel's child was seriously injured in a car accident. For all of the reasons explained at length in the State's Brief on the Merits at 36-39, this two-tiered system undermines the very purpose behind *Gideon*, 372 U.S. at 344 – that "every defendant stands equal before the law" – and cannot be permitted to stand.

IV. THE VERMONT SUPREME COURT'S FINDINGS ARE NOT ENTITLED TO DEFERENCE BECAUSE THEY WERE PREMISED ON A FAULTY LEGAL ANALYSIS, WERE MADE WITHOUT A COMPLETE RECORD, AND ARE NOT SUPPORTED BY THE RECORD.

While this Court can decide this case as a matter of law based solely on any one of the legal arguments set forth above, the Court can also reverse the Vermont Supreme Court based on a full review of the record. There is no basis to give deference to the findings by the Vermont Supreme Court for three separate reasons. First, the Vermont Supreme Court should never have made any findings because such findings were based on a faulty legal premise that delays caused by state-funded lawyers are attributable to the State. Second, the findings are not entitled to deference because they were made on an incomplete record, where defense counsel were never afforded the opportunity to defend their actions. Finally, the findings are not entitled to deference because they are not supported by the record.

First, the findings are not entitled to deference because they are premised on a faulty legal premise. For all of the reasons discussed above, it was wrong for the Vermont Supreme Court to hold the State accountable for delays by Brillon's defense counsel. The Vermont Supreme Court should never have made any findings at all other than the simple finding that, because Brillon and his counsel were responsible for the delays, there was no

speedy trial violation. The case, quite simply, should end there.

Second, the findings are not entitled to deference because they were made on an incomplete record, where defense counsel were not provided an opportunity to defend themselves. It is of course fundamental that a lawyer may testify in his defense, and even reveal privileged attorney client communications when necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." *See*, *e.g.*, Vt. Rules of Prof'l Conduct R. 1.6 (c). The reason for this universal rule is that one cannot determine that counsel was ineffective merely because the client says so. Yet, the Vermont Supreme Court apparently concluded that attorneys Sleigh and Donaldson did "little or nothing" based on an empty record where neither lawyer was ever asked to defend himself. It is disturbing that the Vermont Supreme Court could reach its conclusion, and irreparably tarnish the lawyers' reputations, without affording them a fair hearing.

Finally, the Vermont Supreme Court's findings are not supported by the record. The court held the State accountable for every minute that passed after Brillon threatened Altieri on June 11, 2002 until the trial was held two years later. Pet. App. 27 (¶34). We will now discuss the factual errors in those findings, in the event that the Court deems it necessary to review them.

A. There Is No Basis to Charge The State for the Time Moore Spent on the Case (August 1, 2003 to June 15, 2004).

To begin with, there is no basis to charge the State for *any* of the time that Moore was on the case. She stayed until the end, and she worked diligently – including filing many motions. Although she obtained three continuances, she then promptly brought the case to trial. There simply is no basis to charge her nearly eleven-month period, from August 1, 2003 until June 15, 2003, against the State.

The Vermont Supreme Court charges all of this time to the State because, as best as the State can tell, the prosecutor "stipulated to several more continuances" during Moore's tenure, "[d]espite the already significant delay." Pet. App. 27 (¶34). This finding is very disturbing, not only because it is legally wrong to charge the State with delays caused entirely by defense counsel, but also because it sets up a two-tiered criminal justice system, as discussed, *supra*, at 12-15.

To overcome this obvious wrong, Brillon now attempts to argue something that even the Vermont Supreme Court refused to find – that the prosecutor *caused* these delays. As we discuss below, Brillon's new claim, that "the prosecutor's discovery delays necessitated a string of continuances from September 2003 until late April 2004," Resp't Br. at 58, is patently false.

First, it is clear that Moore's continuances had *nothing* to do with the prosecutor. For example, in

her Stipulated Request to Extend Motion Deadline filed on November 3, 2003, at J.A. 137, Moore claimed that she needed more time *solely* because of delays in receiving information and communicating with her *predecessor counsel*:

> By way of support for this request Counsel for Defendant states that she is still awaiting the transcript of the mistrial in one of the matters, and is awaiting additional deposition transcripts and case materials from prior counsel Gwen Harris[3] and Gerry Altieri. In addition, prior counsel Richard Ammons has just returned to work from an extended leave, and has been unavailable to consult with Counsel for Defendant in these matters.

Similarly, the prosecutor was not at fault for the serious car accident that befell Moore's daughter, causing the continuance in May. To claim that the prosecutor caused these delays is disingenuous.

Second, correspondence between Moore and the prosecutor shows that, on December 8, 2003, the prosecutor literally provided *open access to not only the file in this case, but also to his files in two other cases.* Six weeks later, on January 23, 2004, Moore wrote to the prosecutor that, upon review of her "notes from December 8, 2003, when I met with you in your office to review your files in Brillon and

[3] Harris represented Brillon in another matter.

Vargas,"[4] she had a list of documents that she needed:

> My notes indicate that the documents we identified that I need include the affidavits of probable cause in dockets no. 509, 957 and 959. You gave me the medical records as well as a diagram from 957. My notes also indicate that you found the deposition of Stanley, and that you were going to copy it and send it to me. Finally, my notes indicate that you were going to send me copies of the photos of the vehicle and the truck, which I do not have.

Moore's request references three different cases, but all she needed in this case (docket number 957-7-01) was the affidavit of probable cause (which Brillon received at the time of his arraignment), the medical records and diagram (which she notes the prosecutor gave her at the December 8 meeting), and possibly some photographs of the car Brillon was in when he hit his victim.

The prosecutor promptly responded to her request on February 4, 2004, by producing the affidavit of probable cause, and requesting Moore's email address so he could email the photographs. *See* Letter from Brian K. Marthage to Kate Moore, dated February 4, 2004. Moore then filed her second

[4] Pursuant to Rule 32.3, the State has submitted a letter requesting permission to lodge Moore's 1/23/04 letter and the prosecutor's 2/4/04 response.

motion for continuance, noting that she had received "items" from the State on Feburary 9 (but not explaining that the only item she received was the affidavit of probable cause, which she had first requested on January 23) and claiming that "additional time is necessary" to complete motions. *See* Stipulated Request to Extend Motion Deadline, 2/11/04. Clearly, the prosecutor's actions had nothing to do with this delay.

Third, Brillon's argument that the court had to compel discovery is another red herring. While Brillon falsely suggests that the prosecutor had failed, by April of 2004, to turn over a witness list, *see* Resp't Br. at 23 (claiming that on April 24, 2004 "the judge noted that 'obviously' the witness list should have been provided in 2001"), the witness list was turned over on August 8, 2001 – less than ten days after Brillon's arraignment.[5] Every witness who testified at trial was disclosed either on that list or at another time during Ammon's tenure, as he deposed all seven trial witnesses.[6] Brillon's claim that the court ordered the State to produce "a witness list," Resp't Br. at 58, misrepresents what happened. The court ordered the State to produce an "*updated* witness list with addresses," J.A. 33 (emphasis added), as Moore was having difficulty

[5] Pursuant to Rule 32.3, the State respectfully requests permission to lodge the witness list (dated August 8, 2001).

[6] Six of the seven trial witnesses (Michelle Tatro, Clayton Knapp, Terry Tatro, Barbara Croft, Carol Prouty, and John Behan) are on the list. These six, along with the seventh trial witness (Dorothy Powers) were deposed prior to January 15, 2002. *See* Docket Entry for 1/16/02 at J.A. 18.

locating two witnesses. For the first witness, the trial court later found that "the State did not have an address" to provide. J.A. 66. For the second witness, Moore located the witness, and subpoenaed him for trial, but he refused to comply with the subpoena. *Id.* at 68. Both witnesses had been deposed long before, by Ammons. *See* J.A. 18. The only other thing the court ordered was for the State "to notify defense whether there is a tape or transcript of the depositions of witness Phillips." J.A. 33. Phillips was a *defense* witness, whose testimony was precluded at trial because all he had to offer was inadmissible hearsay. *See* Tr. 6/17/04 at 24-27. Moreover, Brillon's prior counsel had been at that deposition and could have obtained not only the recording, but a transcript if he had desired to do so.[7] Clearly, Brillon's claim that these matters delayed the trial is nonsense.

In light of all of the evidence of this three-year prosecution, it is extraordinary that the prosecutor never did a single thing wrong. This prosecutor bent over backward to accommodate new counsel on the case, *opened* all of his files, and promptly gave her everything she requested. Even the Vermont Supreme Court (which reviewed the limited record *de novo*) found nothing wrong with the prosecutor's conduct, other than, perhaps, the fact that the prosecutor "stipulated to several more continuances

[7] It is the customary practice, to save costs, for counsel to make an audio recording of the depositions. If either of the parties desires a transcript of the deposition, the party wanting the transcript bears the responsibility of getting the tape transcribed.

before a trial was finally held" when Brillon was represented by Moore. Pet. App. 27.

B. There Is No Basis to Charge The State for the Time Donaldson Spent on the Case (June 11, 2002 to November 26, 2002).

In addition to the fact that Donaldson was not a state actor as a matter of law, there is no factual basis to charge the State for the time Donaldson spent on the case. Because Donaldson never had the opportunity to explain his actions, let alone defend them, the court relied on only a one-sided version of events from Brillon. It is pure speculation to conclude that Donaldson did little or nothing.

To begin with, it is certainly possible that Donaldson did all that the case required at that time, given that Ammons had taken twelve depositions (J.A. 18), and Altieri had filed a notice of self defense (J.A. 21). While Brillon claims that Donaldson missed deadlines by failing to disclose witnesses and failing to oppose the State's bad act evidence, Resp't Br. at 14, it is likely that the defense witnesses were previously disclosed, and Donaldson may have reasonably believed that he had no basis to object to the bad act evidence. Of course, since Donaldson has never been allowed to defend himself here, one can only speculate.

Moreover, the record shows that Donaldson got off to a diligent start. At the status conference on August 5, 2002, Donaldson discussed at length how he had met with Brillon and that Brillon

wanted him to interview witnesses that Brillon had suggested who were "pertinent, particularly to some issues of impeachment of the alleged victim …." Tr. 8/5/2002 at 3, 6. Donaldson also made clear that he had reviewed the file which was "quite big," *id.* at 4, that all witnesses had been deposed, *id.* at 7, that previous counsel had filed a notice of self-defense and that there was no other "notice of relevance" to be filed, *id.* at 8, and that he did not foresee any additional motions that needed to be filed.[8] *Id.* Donaldson may have reasonably believed that the case was ready for trial, and that nothing more needed to be done.

While there is no record of whether Donaldson interviewed Brillon's witnesses, that may well be because behind-the-scenes work like that never makes it onto the court's docket. On this record, one can only speculate. Certainly, however, there is no basis for counting the period of Donaldson's representation against the State. The record shows that Donaldson worked diligently from June 11 through August 5, and he may have worked diligently up until the end. The mere possibility that Donaldson stopped working on August 5, with no support in the record for such a theory, hardly justifies letting Brillon walk free of his crime.

Finally, Brillon's claim that "The DG assigned Donaldson to this life-imprisonment case knowing that Donaldson's contract would expire in three

[8] Although Moore filed several substantive pre-trial motions, including a motion to bifurcate and a motion in limine, they were all denied. *See* J.A. 38-39.

weeks," Resp't Br. at 38, is not supported by the record. There is no evidence that the DG *knew* that the contract would not be renewed. Indeed, as demonstrated in the Report of the Indigent Defense Task Force that Brillon cites, it was generally the lawyer who refused to renew the contract, not the DG. *See* Resp't Br. at 36 (quoting that, "About one-third of the assigned counsel contractors refuse to renew their contracts for the next year…").

Moreover, the record shows that Donaldson accepted the case (despite the fact that his contract had technically expired) and intended to work diligently toward trial. Donaldson attended the status conference on August 5, 2002 despite the fact that his contract officially expired months earlier, in June. *See* Tr. 8/5/2002. At that time, he made no mention of his contract expiring, and he was clearly planning on continuing with the case. He talked at length about how he had discussed the case with Brillon's prior counsel and with Brillon (*id.* at 4); of the witnesses he planned to interview to impeach the victim (*id.* at 3, 6); of getting the approval to retain an investigator (*id.* at 4); that all the necessary notices had been filed (*id.* at 8); that all the State's witnesses had been deposed (*id.* at 7); and that he did not foresee needing to file any additional motions (*id.*).

But already, there was a sense that something was wrong in his relationship with Brillon, and a hint of what was to come. Donaldson made the unusual statement to the court that:

> I should point out that Brillon has also indicated to me that he has some concerns of my lack of experience with similar life cases that – that he's got some reservations. While he's not saying I'm not a – a good attorney he just has concerns with he knows what my case load is like and he knows what he's potentially facing and he wanted me to address that with the Court.

Id. at 4-5. In other words, although Donaldson had promptly met with Brillon, discussed the case with his prior counsel, and developed a course of action, Brillon already was so dissatisfied with Donaldson that he instructed Donaldson to inform the court of his concerns. What happened between August 5 (when Brillon was already complaining about Donaldson) and November 26 (when Donaldson agreed to withdraw) is clear: Brillon wrote to the court complaining about Donaldson (J.A. 153-54) and then filed a motion to dismiss him. J.A. 23. One could not blame Donaldson, under the circumstances, if he chose to remove himself from the case rather than argue with Brillon (as Altieri had) and risk a violent confrontation. Again, on this record, one can only speculate, but there certainly is no basis to charge the State with his time.

C. There Is No Basis to Charge The State for the Time Sleigh Spent on the Case (From November 26, 2002 or December 2, 2002 or January 15, 2003 until April 10, 2003).

Similarly, the time that Sleigh spent on the case, whether that period begins on November 26 (when the court's docket notes his assignment, *see* J.A. 24-5), or December 2, 2002 (when the DG informed him of his assignment, *see* J.A. 156), or January 15, 2003 (when the docket again notices the assignment, *see* J.A. 25), until his withdrawal on April 10, 2003 should not be charged against the State for two reasons. First, as discussed above, *supra* at 5-12, delays by defense counsel cannot be charged to the prosecution. Second, there is no record that suggests that Sleigh failed to advance the case in the months that he was assigned. Sleigh, like Donaldson, has never been given the opportunity to defend his actions. It may be that there was nothing to do other than actually prepare for trial, or it may be that he did much behind-the-scenes work that did not result in any filings. The record is simply too limited to support the Vermont Supreme Court's finding that he did little or nothing.

D. There Is No Basis to Charge The State for the Time Brillon Was Without Counsel.

The final issue is whether the administrative delays here should be chargeable to the State. While administrative delays in assigning counsel could theoretically be state action as the Solicitor General

explains, and could in certain circumstances be chargeable to the prosecution, there is no basis to do so here for two reasons. First, as discussed above, these delays would never have happened had Brillon not engaged in the outrageous act of threatening the life of his lawyer, and his repeated bad acts of firing two additional lawyers. Second, as we will discuss below, these administrative delays were reasonable under the circumstances, as Brillon had exhausted the DG's supply of assigned counsel, and the DG worked expeditiously to get the legislature to approve additional funding to hire a new lawyer. Such delays, where there is evidence of good faith efforts by the DG, should be considered at most neutral, rather than weighed against to the State.

Of course, in *Barker*, 407 U.S. at 531, this Court stated that, "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." Because this Court has the authority to modify how "neutral" delays should be weighed, the State argues that the neutral delays in this case should not be weighed against the State at all.

Rather than conceding this period of time to Brillon (as Brillon and his *amici* claim), the State argued in its brief before the Vermont Supreme Court that the period from when Sleigh was appointed until Moore was appointed (November 27, 2002 through July 31, 2003), while "not attributable to the defendant," "should be weighed 'less heavily'

for Sixth Amendment purposes." J.A. 19. Indeed, the Vermont Supreme Court described the State's position: that the delay was "'neutral' … and thus should not be weighed heavily against the government." J.A. 26. The key issue is not whether this time is charged to Brillon, but whether it is chargeable to the State, and if so, how heavily it should be weighed. In any event, whether the administrative delays are four months or eight months is of little consequence when Brillon and his counsel delayed the case for the remaining two-plus years.

There are two periods of administrative delay at issue, and the State will discuss them in turn.

1. *The Time Period from November 26, 2002 to January 15, 2003 Should Not Be Charged to The State.*

Although Brillon claims that he was without counsel from November 26, 2002 (when the court granted Brillon's motion to dismiss Donaldson) until Sleigh was assigned in the court records on January 15, 2003, the court docket shows that Sleigh was first assigned on November 26 (*see* J.A. 24-5); then the DG informed Sleigh of his assignment, J.A. 155-56; and then the court docket shows Sleigh being assigned (a second time) on January 15, 2003. J.A. 25

Even if, for the sake of argument, the Court were to determine that Brillon was without counsel until January 15th, and that this delay was caused by the DG, it would still be wrong to charge this time

to the State. This delay was not caused by underfunding, or by deliberate non-action, or anything else that the state can control. At most, it was a misunderstanding between the DG and attorney Sleigh over whether his appointment was "official." While a full record might show that it was Sleigh's fault (and, therefore, the time should be charged to Brillon), this was a delay of only six weeks after Brillon had delayed his trial for well more than a year by firing three lawyers. Accordingly, even if charged to the State as a "neutral" event that is weighed less heavily, *see Barker* at 531, this delay is inconsequential.

2. *The Time Between Sleigh's Withdrawal on April 10, 2003 and Moore's Assignment on August 1, 2003 Should Not Be Charged to The State.*

Clearly, Brillon was without counsel for the nearly four months between April 10, 2003 and August 1, 2003. Indisputably, this was an administrative delay attributable to the DG and funding.

However, this time, too, should not be charged against the State, because the delay was not unreasonable under the circumstances, where the DG acted expeditiously and in good faith to get additional funding from the legislature, and where the legislature immediately provided the funds that were requested.

When Brillon exhausted the DG's supply of assigned counsel on April 10, 2003, the DG worked

quickly to obtain extraordinary extra funding from the Vermont legislature to hire Moore. Within two months, the DG succeeded in convincing the Vermont state legislature to provide additional funding, s*ee* June 20, 2003, letter from the DG's business manager, J.A.159, and the DG advised the court that Moore would be available as of August 1, 2003. *Id.*

It goes without saying that getting a state legislature to agree to provide funding, especially on short notice, is a Herculean task. The fact that the DG was able to obtain funding so quickly speaks well both of the DG and of the legislature. The bottom line is that, in just nine weeks after learning that Brillon was without counsel, the "criminal justice system provided by the State" provided additional funding to get him a new lawyer. Clearly, this administrative delay should not be charged against the State.

The remaining delay, from June 20 (the date of the DG letter, J.A. 159) until August 1, 2003 (when Moore officially became Brillon's lawyer) should also not be attributed to the State. There is nothing in the record that explains why Moore could not begin her work on June 20. While one can only speculate, perhaps she was on vacation (it was, after all, July), and such a delay then would be chargeable to Brillon. In any event, the DG was prepared to fill in for her in the interim. *See* Business Manager's letter dated June 20, 2003, J.A. 160 (noting that "Matt Valerio, Defender General, intends to appear at this hearing….") Clearly, these delays are, at most, neutral, and if they are to be charged to the

State at all, are significantly outweighed by the delays that Brillon and his counsel caused.

This is not to say that there could *never* be an administrative delay chargeable to a state. Rather, on this record, *these* administrative delays should not be charged to the State of Vermont.

In sum, there is nothing in the record which supports the Vermont Supreme Court's findings that the State was responsible for two years of delay, and there was no legal basis to vacate Brillon's conviction.

CONCLUSION

For the foregoing reasons, the State of Vermont respectfully requests that the Court reverse the ruling of the Vermont Supreme Court.

Respectfully submitted,

CHRISTINA RAINVILLE
Counsel of Record

ERICA A. MARTHAGE
Bennington County State's Attorney's Office
150 Veterans Memorial Dr
Bennington, VT 05201
(802) 442-8116

C*ounsel for Petitioner*