No. 08-88

IN THE

# Supreme Court of the United States

STATE OF VERMONT,

*Petitioner,*

v.

MICHAEL BRILLON,

*Respondent.*

**On Writ of Certiorari to Vermont Supreme Court**

## BRIEF OF RETIRED STATE COURT JUSTICES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Samuel Spital
*Counsel of Record*
Corrine A. Irish
Alan D. Reitzfeld
Katherine A. Steele
*Holland & Knight LLP*
*195 Broadway, 24th fl.*
*(212) 513-3200*

*Counsel for the* amici curiae

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITY

**Page**

**Cases**

**Constitution and Statutes**

## INTEREST OF AMICI[1]

Amici are retired state Supreme Court justices. Hon. Norman S. Fletcher joined the Supreme Court of Georgia in 1989 and served as Chief Judge of that Court from 2001 until 2005 when he retired from the bench. Hon. Stanley G. Feldman joined the Supreme Court of Arizona in 1982, and served as Chief Judge of that Court from 1996 through 1996. He retired from the bench in 2002. Hon. Stewart F. Hancock, Jr. joined the New York Court of Appeals in 1986 and served as an Associate Justice until 1994 when he retired from the bench. Prior to his appointment to the Court of Appeals, Judge Hancock served nine years on the Appellate Division Fourth Department in New York.

We have reviewed thousands and thousands of appeals in criminal cases, and in doing so have considered arguments advanced by both the State and individual defendants concerning many federal constitutional holdings of this Court that apply to state criminal proceedings.

Our attention was drawn to this case due to the unique procedural posture of the questions presented. It appears to us that neither of the questions presented were properly presented before the Vermont Supreme Court, and with regard to the speedy trial question, the State pressed an argument

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

before the state court that is directly contrary to the one it presents now before the Court.

## SUMMARY OF ARGUMENT

State courts have the same obligation as federal courts when federal constitutional claims are presented in state proceedings. Their task it to construe and faithfully apply federal law consistent with this Court's pronouncements. That is precisely what the Vermont Supreme Court sought to do in this case. When the speedy trial issue was before the court below, the State of Vermont conceded that some of the delay that resulted from the repeated withdrawal of appointed counsel was chargeable, pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), to the state. The State never argued before the Vermont Supreme Court, as it asserts now, that all of that time must be charged to the indigent defendant.

This case is not an appropriate one for the Court to determine when the state must assume responsibility for pretrial delays that result from indigent defense system-caused delays. The judgments of the highest state judicial tribunals should not be prone to attack by newly asserted federal issues that were neither raised nor decided below. A merits ruling in this case that overlooks or forgives the State's significant change of position will surely invite additional efforts in the future to end-run state tribunals. Therefore, the writ of certiorari should be dismissed as improvidently granted.

## ARGUMENT

Neither of the questions presented by Vermont to this Court were pressed or passed upon below. With respect to the first question presented, Vermont now argues that delays attributable to breakdowns in the public defender system, which leave a defendant without counsel, are categorically excluded from consideration under the Sixth Amendment's Speedy Trial Clause. But Petitioner took exactly the opposite position in the Vermont Supreme Court, explicitly agreeing with Respondent that such delays are relevant under the Sixth Amendment and that, in this case, eight months that was attributed to such a delay weighed in Respondent's favor under the governing rule of law set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The Vermont Supreme Court, acting consistent with state law, accepted the position the parties had agreed upon without independent analysis. Under these circumstances, this Court's precedent is clear that the first question was neither pressed nor passed upon below.

Petitioner acknowledges that it did not raise the second question presented until a motion for reargument before the Vermont Supreme Court. What Petitioner fails to acknowledge is that, absent special circumstances that plainly do not apply here, arguments raised for the first time in such a motion are insufficient to invoke this Court's jurisdiction.

Because neither of the two questions presented by Petitioner were pressed or passed upon before the state's highest court, this Court's precedent is clear that the petition for certiorari should be dismissed as improvidently granted. *See*, *e.g.*, *Howell v. Mississippi*, 543 U.S. 440 (2005) (per

curiam); *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam).

## I. The State's Change in Position

The State now asks the Court to decide both that Respondent's requested changes of counsel and the Office of Defender General's ("ODG") inability to provide counsel cannot be attributed to the State for purposes of determining whether a speedy trial violation occurred under *Barker*. *See* Brief of Petitioner at 24-36; *see also id.* at 1 (first question presented). In other words, the State is asking this Court to hold that, regardless of the circumstances, delays attributable to a breakdown in the public defender system that renders a defendant wholly without counsel are categorically excluded from scrutiny under the Speedy Trial Clause. This is not, however, the issue presented to and decided by the Vermont Supreme Court; there, the State took precisely the opposite position.

Before the Vermont Supreme Court, the State did not present the question of whether delays caused by the defense could properly serve as a basis for a constitutional speedy trial violation. Instead, the State sought to distinguish delays the State attributed to the defendant's changes of counsel from delays the State attributed to the ODG's inability to provide any counsel for the defendant. *See* Appellee State of Vermont's Br. at 25-29. As to the latter, the State explicitly conceded that this delay could serve as a basis for a speedy trial violation, stating:

> A further delay ensued from November 27, 2002 through July 31, 2003, during which time the Office of

> the Defender General assigned an attorney who later withdrew for contractual reasons, and then was unable to replace him for funding reasons until the first day of August. While this period of time cannot be attributed to the defendant, the United States Supreme Court has held that such "neutral" reasons for delay should count less heavily than situations in which the State has deliberately sought delay. "'A more neutral reason such as negligence or overcrowded courts should be weighted less heavily'. . . *This factor then should be considered to weigh against the state, but not very strongly*." *State v. Unwin*, 139 Vt. 186, 196 (1980), quoting *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

*Id.* at 27-28 (emphasis added).

And later:

> By the above analysis, the delay not attributable to the defendant, or to reasonable attorney preparation or court scheduling, extends from November 27, 2001[sic] through July 31, 2001[sic], a period of eight months. However, because these delays were unintentional, they should be weighed "less heavily" for Sixth Amendment purposes.

*Id.* at 28-29.

As to the delays that resulted from the defendant's changes of counsel, the State argued that such delays are omitted from the speedy trial calculation because they arose out of Defendant's dissatisfaction with his attorneys and so must be attributed to the defendant. Appellee State of Vt. Br. at 26-27.

The Vermont Supreme Court, therefore, rendered its ruling under the baseline assumption that the State recognized that some delays caused by ODG should be attributed to the State. The court then rejected the State's characterization of the delays resulting from Defendant's requests to change counsel as due to the Defendant's dissatisfaction, but found instead that these delays were due to the "inability or unwillingness of assigned counsel to move the case forward." Pet. App. 28 (¶ 35). In doing so, the Court determined that these delays were of the same kind as the wholesale failure of the ODG to provide counsel, *see id.* at 27-29 (¶¶ 35-37), never needing to address the baseline question of whether *any* defense counsel-caused delay, whether inability, unwillingness to move the case forward or the complete failure to provide counsel, should be attributed to the State.

## II. Because the Questions Presented by Petitioner Were Neither Pressed Nor Passed Upon Below, this Court Should Dismiss the Petition as Improvidently Granted

As this Court unanimously recognized just four years ago, "[u]nder [28 U.S.C. § 1257] and its

predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell*, 543 U.S. at 443 (2005) (quoting *Adams*, 520 U. S. at 86 and citing *Illinois v. Gates*, 462 U. S. 213, 218 (1983)). This rule applies with equal force to a failure by the State to challenge an asserted federal claim by a criminal defendant as it does to a failure by a defendant to raise the federal claim. *See Gates*, 462 U.S. at 221.

Then-Justice Rehnquist set forth the purposes underlying the important rule against this Court considering questions "not pressed or passed upon below" by the State's highest court (hereinafter, the "pressed or passed upon below" rule) in *Gates*. *Id*. at 219. First, when a question is not raised below, it is likely that the relevant facts concerning that question will not be adequately developed, as the record was not compiled with the question in mind. *Id*. at 221. Second, considerations of comity and federalism prevent this Court from upsetting a state court judgment based on an argument not raised below. "'[D]ue regard for the appropriate relationship of this Court to state courts, demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials[.]" *Id*. (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940)). Third, "by requiring that the State first argue to the state courts [that delays caused by the public defender office's failure to provide counsel are categorically excluded from scrutiny under the Speedy Trial Clause], we permit a state court, even if it agrees with the State as a matter of federal law, to

rest on its decision on an adequate and independent state ground." *Id*. at 222.

As discussed above, the State plainly did not "press" the questions it now raises to the Vermont Supreme Court. With respect to the first question presented, the State explicitly conceded that some ODG-caused delays – namely the failure to provide counsel to Defendant for an eight month period – was attributed to the State. *See* Part I, *supra*. With respect to the second question presented, the State acknowledges that it first presented this question in a motion for reargument. Brief of Petitioner at 40. However, contrary to the State's contentions, *id*. at 41-42, this Court has made clear that questions first presented in petitions for rehearing are insufficient to satisfy the "pressed or passed upon below" rule except in special circumstances, which are inapplicable here. *See*, *e.g.*, *Adams*, 520 U.S. at 90; *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *see generally*, Gressman et al., Supreme Court Practice 193-95 (9th ed. 2007).[2] Moreover, the

---

[2] This is not a case where the state's highest court addressed the merits of the question in denying the State's reargument petition. *Compare* Pet. App. 81 (order of Vermont Supreme Court unanimously denying the State's motion for reargument) *with Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 476 (1975). Nor is this a case where the Vermont Supreme Court permits new arguments to be made in a reargument petition. *Compare Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982) *with* V.R.A.P 40 (relied upon by Vermont Supreme Court in denying Petitioner's Motion for reargument at Pet. App. 81); *see also Wolfe v. Yudich*ak, 571 A.2d 592, 604 (Vt. 1989) (noting that, under V.R.A.P. 40, the Vermont Supreme Court declines to consider new theories raised for the first time in a motion for reargument); *Champlain Val. Exposition, Inc. v. Village of Essex Junction*, 309 A.2d 25, 30 (Vt. 1973) (same).

State's contention that it was surprised by the basic holding of the Vermont Supreme Court the State challenges here (namely, that delays attributable to breakdowns in the public defender system are subject to scrutiny under the Speedy Trial Clause), *see* Brief of Petitioner at 43, is disingenuous: as discussed, the State conceded precisely this principle below.[3]

As a last resort, the State contends that this Court "may have the authority to use its discretion to consider a Federal question even if the question was never raised in the state court below," because the "pressed or passed upon below" rule may not be jurisdictional. Brief of Petitioner at 47. But, even assuming the rule is prudential rather than jurisdictional, Petitioner has pointed to no circumstances that would justify an exception to the rule's application, and thus, as it has done in past cases, this Court need not decide whether or not the rule is indeed jurisdictional. *Howell*, 543 U.S. at 445-46 (citing cases). The fact that the merits of this case involve an issue of criminal law, *see* Brief of Petitioner at 48, does not justify an exception to the "passed or pressed upon below" rule. *See*, *e.g.*, *Howell*, 543 U.S. at 445-46; *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Gates*, 462 U.S. at 222.[4]

---

[3] For a similar reason, the State's argument that the second question presented is properly before the Court because it simply "enlarges" the first question presented, Brief of Petitioner at 44-47, is unavailing: as discussed herein, the first question presented was also not "pressed or passed upon" by the Vermont Supreme Court.

[4] If the issue is as consequential as the State suggests, it will surely find its way before this Court again soon in an

Moreover, the Vermont Supreme Court did not "pass upon" these questions within the meaning of *Gates*. The State asserts that the Vermont Supreme Court passed upon the first question presented, pointing to language in the second paragraph of the state court's decision stating that delays caused by inaction of the public defender or a breakdown in the public defender system can give rise to a speedy trial violation. Brief of Petitioner at 45 (quoting Pet. App. 5 (¶ 2)). The State misconstrues the "pass[ed] upon" requirement: as this Court held in *Gates*, that requirement is not satisfied when the state's highest court, without undertaking a thorough analysis of its own, simply states or applies a legal principle that has not been contested by the parties. *Gates*, 462 U.S. at 222-23 (discussing *Morrison v. Watson*, 154 U.S. 111 (1894)). And, that is precisely what happened here. The Vermont Supreme Court simply, and briefly, acknowledged a legal principle conceded by both parties to be correct: namely, that delays attributable to a breakdown in the public defender system that leaves a defendant wholly unrepresented weigh in the defendant's favor under the second *Barker* factor. *See* Part I, *supra*. Indeed, had the Vermont Supreme Court known that the State planned to abandon its concession on this point, that court would have relied on an adequate and independent state ground to reject the State's effort: under the Vermont Supreme Court's jurisprudence, a party's concession with regard to an issue is regarded as an abandonment of that issue, so that the issue is waived on appeal. *See State v.*

---

appropriate vehicle—namely, in a case where the state's highest court *did* have an opportunity to pass upon the issue.

*Cunningham*, 954 A.2d 1290, 1293, n. 2 (Vt. 2008).[5] In short, because "there was never any real contest upon the point," the Vermont Supreme Court did not "pass upon" the first question now presented by the State to this Court. *Gates*, 462 U.S. at 223, 218.

In effect, the State is inviting this Court to modify its settled precedent so that a State may concede the correctness of a legal principle to its highest court, and then, once the state's highest court adopts that principle in light of the parties' agreement, turn around and ask this Court to overrule the judgment of the state's highest court based on the State's flipping positions. For at least three reasons, this Court should decline the State's invitation.

First, as then-Justice Rehnquist recognized in *Gates*, adequate factual development on a question normally depends upon the question being litigated below. *Gates*, 462 U.S. at 221. In this case, the prosecution's agreement that breakdowns in the provision of counsel were chargeable to the state under *Barker* precluded the necessity of developing factually the extent of or reasons for that breakdown, which appears from the record to have been significant.

Second, the approach urged by the State would harm the decisional process of the state courts. State appellate courts, like this Court, depend on the

---

[5] *See also State v. Lockwood*, 632 A.2d 655, 659 n.1 (Vt. 1993) (finding party waived issue as to state constitutional question not "squarely raised" before the court); *cf. Havill v. Woodstock Soapstone Co.*, 924 A.2d 6, 10 (Vt. 2007) (finding issues not raised on appeal waived); *Persons v. Lehoe*, 554 A.2d 681, 684 (Vt. 1988) (declining to decide issues not adequately briefed).

parties for the "proper adversarial presentation" of competing positions. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment). It is these adversarial arguments "'which sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see Massachusetts*, 127 S.Ct. at 1453. Here, the State deprived the Vermont Supreme Court of such proper adversarial presentation by failing to present the basic question it has presented to this Court; indeed, as noted, the State took the opposite position on that question but argued that it should prevail on other grounds. Having lost on those other grounds, the State has reversed course on the question presented here. This type of sandbagging is inconsistent with basic notions of orderly appellate review. As Justice Scalia stated in a similar context: "The very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *Freytag v. C.I.R.*, 501 U.S. 868, 895 (1991) (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment).

Third, and most important, the State's "we are entitled to switch positions because we lost before our highest court" argument is, as then-Justice Rehnquist also recognized in *Gates*, fundamentally

irreconcilable with principles of federalism and comity. "In our federal system, state courts have primary responsibility for enforcing constitutional rules in their own criminal trials." *Withrow v. Williams*, 507 U.S. 680, 698 (1993) (O'Connor, J., joined by Rehnquist, C.J., concurring in the judgment). Just as federalism and comity demand that state courts have a fair opportunity to address federal constitutional claims raised by criminal defendants (whether on direct or postconviction review), those principles demand that state courts have a fair opportunity to address defenses to federal constitutional claims raised by the State. *See Gates*, 462 U.S. at 221. This Court's discussion of the exhaustion doctrine in *Coleman v. Thompson* is thus equally applicable here:

> [I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. As we explained in *Rose* [*v. Lundy*, 405 U.S. 509, 518 (1982)]: "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution. Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity,

> which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

501 U.S. 722, 731 (1991) (additional citations and alteration omitted).

## CONCLUSION

Neither question raised by Petitioner was "pressed or passed upon below." Therefore, consistent with well-settled jurisprudence, amici respectfully submit that this Court should dismiss the petition for certiorari as improvidently granted. To permit Petitioner to reverse positions and so that it can have a second bite of the apple before this Court would be antithetical to principles of comity and federalism.

Respectfully submitted,

Samuel Spital
*Counsel of Record*
Corrine A. Irish
Alan D. Reitzfeld
Katherine A. Steele
Holland & Knight LLP
195 Broadway, 24th floor
New York, New York
(212) 513-3200
*Counsel for Amici Curiae*