

IN THE SUPREME COURT OF THE UNITED STATES

VERMONT,

Petitioner

v.

MICHAEL BRILLON.

:

:

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:

No. 08-88

Washington, D.C.

Tuesday, January 13, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

CHRISTINA RAINVILLE, ESQ., Chief Deputy State's Attorney, Bennington, Vt.; on behalf of the Petitioner.

LEONDRA R. KRUGER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

WILLIAM A. NELSON, ESQ., Middlebury, Vt.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-88, Vermont v. Brillon. Ms. Rainville.

ORAL ARGUMENT OF CHRISTINA RAINVILLE  
ON BEHALF OF THE PETITIONER

MS. RAINVILLE: Mr. Chief Justice, and may it please the Court:

There are many reasons to reverse the Vermont Supreme Court in this case. I am going to begin by addressing four reasons as a matter of law that do not require the Court to -- to review the record. The first is, even if we assume that the public defender is an assigned counsel -- and for the purposes of argument, I am just going to use the term "public defender." If we assume that public defenders do little or nothing in a case, one cannot have a rule that that time is chargeable under the speedy trial right to the State because to do so creates chaos of constitutional proportions in the criminal justice system.

JUSTICE SOUTER: May I ask you a question that goes at least to one possible application of -- of your argument? Your argument for the State, the position that you just took, would -- would apply to the

1 period of time, as I understand it, in which the  
2 individual named, the defender named Sleigh, had been  
3 appointed to -- to represent the defendant.

4           And as I understand it, when this case was  
5 argued in the Supreme Court of Vermont, the State  
6 conceded that, in fact, some prejudice should be  
7 attributed and it should be held against the State that  
8 Sleigh in effect did nothing. They said, well, don't  
9 hold it against us quite as much as you might, but, in  
10 any case, that can be held against us.

11           Here you don't take that position, and I --  
12 I don't know whether it's open to you -- it seems to me  
13 that it's not open to you -- to take a different  
14 position with respect to Sleigh here than the Attorney  
15 General of Vermont did when it was before the Supreme  
16 Court of Vermont. And I -- I have to assume that you  
17 just see it differently from the way the Attorney  
18 General did. But would -- would you comment on -- on  
19 the position that the State took and tell me why you can  
20 take a different position here?

21           MS. RAINVILLE: Yes. Yes, Your Honor. The  
22 State did take the position that the eight-month period,  
23 which included the four months where Attorney Sleigh was  
24 involved, was a neutral factor. And under the dicta in  
25 Barker, that would allow the Court to apply it against

1 the State, although not to weigh it heavily as a -- as a  
2 neutral factor.

3 JUSTICE SOUTER: Yes.

4 MS. RAINVILLE: That was dicta in Barker,  
5 but controlling to the Vermont Supreme Court. Before  
6 this Court, however, on these facts --

7 JUSTICE SOUTER: But it was conceded, wasn't  
8 it, in the -- in the Vermont Supreme Court?

9 MS. RAINVILLE: It was conceded that it was  
10 a neutral time period.

11 JUSTICE SOUTER: Yes.

12 MS. RAINVILLE: And -- and --

13 JUSTICE SOUTER: Well, then, why isn't that  
14 concession binding here?

15 MS. RAINVILLE: I think it -- it may be  
16 binding if the Court determines it's binding. But I  
17 don't think it should be binding because this Court is  
18 considering policy that's going to affect all States and  
19 all courts. And the issue that was raised by the  
20 National Governors Association, for example, as to  
21 whether public defenders can be State actors -- and the  
22 law is clear that they cannot -- that's an important  
23 issue.

24 JUSTICE SOUTER: Well, it is, but that is  
25 not an issue that is necessarily implied by the -- by

1 the concession that the Attorney General made in the  
2 Vermont Supreme Court.

3 MS. RAINVILLE: Yes. Yes, but also if you  
4 look at the record, the three years of delay, the time  
5 period involving Mr. Sleigh is approximately four  
6 months. If you take all four months where he was  
7 appointed by the docket or two months if you take the  
8 time where he thought and understood that he was on the  
9 case, and in light of the three-year delay, that amount  
10 of time is really inconsequential.

11 CHIEF JUSTICE ROBERTS: It may have been a  
12 good concession below. I mean, it would -- as I  
13 understand it, the problem arose because of change in  
14 the contract, right?

15 MS. RAINVILLE: That's correct.

16 CHIEF JUSTICE ROBERTS: I mean, that may  
17 well have been attributable to the State.

18 MS. RAINVILLE: It -- it may well have been  
19 attributable to the defender general. And that's one of  
20 the problems in this case is that we don't have a record  
21 of why different attorneys -- Attorney No. 4, Donaldson,  
22 and Attorney No. 5, Sleigh, were never asked what they  
23 did or --

24 CHIEF JUSTICE ROBERTS: I suppose you are  
25 willing to concede that there are situations where the

1 delay would be attributable to the State because of  
2 systemic problems?

3 MS. RAINVILLE: Yes.

4 CHIEF JUSTICE ROBERTS: The State has so  
5 many cases, and it's only willing to hire one lawyer.  
6 That lawyer can't possibly handle all the cases.

7 MS. RAINVILLE: Absolutely. But that's not  
8 the case here. That might be the situation if, for  
9 example, the defender general said to every defendant:  
10 If you want a trial with a lawyer, you have to wait a  
11 year. That's not what happened here.

12 What happened here is the defender general  
13 was incredibly diligent. He appointed new counsel five  
14 times the same day. The day of the arraignment Mr.  
15 Ammons was appointed. The day Mr. Ammons withdrew,  
16 replacement counsel, Mr. Harnett, was appointed. The  
17 day Mr. Harnett withdrew, replacement counsel was  
18 appointed. The day Mr. Donaldson withdrew, the docket  
19 shows that Sleigh was appointed. Five times the same  
20 day the defender general appointed counsel.

21 The sixth time, given that we are in  
22 Vermont, a very small State with few lawyers, he had  
23 difficulty finding a sixth lawyer. But the defender  
24 general took extraordinary measures and went to the  
25 Vermont Legislature and obtained funding, and the

1 legislature came up to the plate very quickly, in a  
2 matter of weeks.

3 The last withdrawal of Lawyer No. 5 happens  
4 on April 10th. It's June 20th that there is the letter  
5 in the appendix from the defender general saying that  
6 the legislature has approved new funding. It's -- it's  
7 literally a matter of weeks before the legislature comes  
8 to the plate and provides additional funding.

9 So to the extent that -- that that is State  
10 action, the defender general has been incredibly  
11 expeditious, incredibly diligent, and went to the  
12 extraordinary length of getting additional funding for  
13 the sixth lawyer. We -- we would concede --

14 JUSTICE SCALIA: I guess when -- when the  
15 last two lawyers withdrew because their contracts had  
16 expired, I suppose the court could have refused to  
17 permit them to withdraw, couldn't it?

18 MS. RAINVILLE: It could have.

19 JUSTICE SCALIA: Couldn't it say you -- you  
20 have an ethical duty; having undertaken representation,  
21 and it being very difficult to get anybody else, you --  
22 you stay in the case?

23 MS. RAINVILLE: The -- the court could have,  
24 and certainly --

25 JUSTICE SCALIA: Does it make it not the



1 State's court -- not the State's fault no matter what?  
2 Is -- is the court's misfeasance the State's  
3 misfeasance? Do you attribute that to the State?

4 MS. RAINVILLE: The court's misfeasance  
5 would -- would certainly be attributable to the State,  
6 but we would argue that it would be a neutral factor.  
7 But here, Your Honor, Brillon would -- in terms of the  
8 fourth lawyer, Mr. Donaldson, he sought to have him  
9 fired. And, in fact, it was his letter to the court and  
10 then a subsequent motion to the court to have that  
11 lawyer dismissed. And in that colloquy when the -- when  
12 the -- the trial judge asked Brillon, do you want to  
13 have -- do you still want to have him fired despite all  
14 this delay and everything, and Brillon says yes, clearly  
15 the court with regard to Donaldson could have said to  
16 Donaldson, you stay on this case and get this case to  
17 trial. But Brillon waived that. Brillon said that he  
18 wanted a new lawyer.

19 With regard to Sleigh --

20 JUSTICE BREYER: -- with that particular  
21 period. The trouble that I have with that particular  
22 period is August 1, 2003, to June 14, 2004, isn't that  
23 right? That is Donaldson -- or that's Moore?

24 MS. RAINVILLE: That's Moore.

25 JUSTICE BREYER: All right. Donaldson was

1 the first one?

2 MS. RAINVILLE: Donaldson was actually  
3 Lawyer No. 4.

4 JUSTICE BREYER: Go ahead.

5 (Laughter.)

6 JUSTICE SOUTER: Before you start, let me  
7 just make a comment and a -- and a question based on it.  
8 The comment is I -- I'm willing to accept a lot of what  
9 you say here, there is plenty of blame to go around.  
10 But you accept, as I understand it, the proposition that  
11 the State has simply got an affirmative duty to make  
12 some kind of effective trial and representation  
13 arrangement. It -- it -- it has that duty through  
14 providing the public defender, it has that duty simply  
15 through providing a court that will keep things moving,  
16 and I think that's common ground.

17 If that, as it seems to be, is common  
18 ground, then do we have anything before us in this case,  
19 except sort of going through the list of counsel, the  
20 list of reasons, the list of delays and reviewing the  
21 Vermont Supreme Court on, in effect, the details that it  
22 assumed in applying the rule? In other words, it seems  
23 to me that there isn't an issue of principle dividing  
24 the parties here, it's a series of issues of details.  
25 Is that an unfair way to look at the case as we've got

1 it?

2 MS. RAINVILLE: You can certainly look at it  
3 in terms of details, and I think that the Vermont  
4 Supreme Court's findings are unsupported by the record.  
5 But as a matter of law, you have delays by State actors,  
6 and even if you take the two or the four months for  
7 Sleigh aside, the rest of the delay, three years of  
8 delay minus -- there's four months, of course, which he  
9 had no counsel -- but three years minus that time, is  
10 all caused by non-State actors.

11 JUSTICE SOUTER: Yeah, but if you take  
12 Sleigh, Donaldson, and the period in which there was  
13 no -- I guess, following Sleigh, in which there was no  
14 counsel appointed at all, you're already up to just  
15 about a year. And a year is -- is enough to trigger  
16 Neil v. Biggers. And so, it seems to me that what --  
17 what the fight, what the serious fight is about is,  
18 well, within the further total of two-year period, who  
19 is to blame for this, who was to blame to that, and  
20 I'm -- I'm not sure that it's of any value to just go  
21 through and second-guess the Supreme Court of Vermont on  
22 those details, because you've got enough in Neil v.  
23 Biggers before you even get to those details.

24 MS. RAINVILLE: Well, also in terms of just  
25 based on Brillon's admission, there's enough for this

1 Court to decide the case. He admits that he fired three  
2 different lawyers.

3 JUSTICE SOUTER: Right.

4 JUSTICE ALITO: Isn't there -- isn't there  
5 that very important principle involved here that doesn't  
6 simply involve calculating particular periods of delay?  
7 When you have a defendant who starts out by firing a  
8 lawyer and engineering the withdrawal of another lawyer  
9 by threatening a lawyer, is it appropriate then to go  
10 through all of the subsequent periods and attribute the  
11 delay to the defendant or to the prosecution or as a  
12 neutral factor as if those, the initial events, hadn't  
13 occurred?

14 We don't know how quickly this case would  
15 have gone to trial if the first lawyer hadn't been fired  
16 or if the third lawyer, I guess it was, had not been  
17 threatened and forced to withdraw.

18 MS. RAINVILLE: I believe you're absolutely  
19 right, Justice Alito. In this case his conduct was so  
20 unconscionable in threatening both his lawyer, and the  
21 facts there --

22 JUSTICE STEVENS: I really wanted to ask you  
23 pretty much exactly the same question. If we assume  
24 exactly the terrible way he fired the first two -- the  
25 first lawyer certainly, maybe the second, would it be

1 true that no matter how long the delay occurred after  
2 that, he could never get Sixth Amendment relief?

3 MS. RAINVILLE: I would -- I wouldn't go  
4 that far, Justice Stevens.

5 JUSTICE STEVENS: Why not?

6 MS. RAINVILLE: Because what if the State  
7 kept him for ten years without a trial? I don't think  
8 that would ever happen. Certainly on these facts  
9 there's no basis, given his conduct, to balance anything  
10 in his favor. Vermont's --

11 JUSTICE BREYER: Well, there -- as I  
12 understand it, that that first year the Vermont Supreme  
13 Court agrees with you.

14 MS. RAINVILLE: That's right.

15 JUSTICE BREYER: They said, we're not  
16 counting any of that against you.

17 Now we go into the second year, and the  
18 second year had to do with Mr. Donaldson, a lot of it.  
19 And it turns out that Mr. Donaldson actually had left  
20 the office within a few days of his having been  
21 appointed to do this and then he never did anything. So  
22 the Supreme Court of Vermont says, as far as Mr.  
23 Donaldson is concerned, we do hold that against the  
24 State for the reason that it is the equivalent of not  
25 giving him anybody. The guy they gave him wasn't even a

1 public defender, he never did a thing. All right.

2 Now we go to the third group. The third  
3 group, the State agreed they should be charged. That's  
4 Mr. Sleigh. The third one they agreed with it. They  
5 said lightly, but they agreed with it.

6 And as to the final group, Mrs. Moore, well,  
7 it looks like from the record as if the reason that was  
8 held against the State had nothing to do with her  
9 performance. It had to do with the fact that the State  
10 didn't give certain records to her, which everybody  
11 would agree, if it's true, should be chargeable to the  
12 prosecution, which is the State.

13 So we have four periods. In one of them you  
14 won; in the second one he had no lawyer at all,  
15 according to the court; in the third one you agree it  
16 should be chargeable to you; and in the fourth one it  
17 has to do possibly with prosecution errors, not defense  
18 errors.

19 Now, what are we supposed to decide? Are we  
20 supposed to decide whether my statement is, in fact, a  
21 correct statement? If so, why isn't it? I guess we  
22 have to read the record. But what else is there to  
23 decide?

24 MS. RAINVILLE: I think you can decide it  
25 without reviewing the record, based on the fact that you

1 have a defendant who fired his first lawyer six months  
2 into the case, one day before trial.

3 JUSTICE BREYER: And you won that.

4 MS. RAINVILLE: And then filed -- fired a  
5 second lawyer when the lawyer initially argued and said,  
6 no, no, it's not true, I've been working; he then  
7 threatened to kill the lawyer. Then he at that time was  
8 told: If you want a new lawyer, there's going to be  
9 inevitable delays. He said: That's okay, I still want  
10 to fire this lawyer. Then he went on and fired yet  
11 another lawyer.

12 CHIEF JUSTICE ROBERTS: I suppose -- I'm not  
13 sure that we necessarily want to get into the particular  
14 details of a very complicated record, but there are  
15 several points in the Vermont Supreme Court opinion  
16 where it says that the failure of assigned lawyers to do  
17 anything to move the case forward is attributable to the  
18 State. And I thought the fundamental principle we were  
19 debating is whether or not assigned lawyers who fail to  
20 move a case forward, whether that is attributable to the  
21 defendant or whether it is attributable to the State  
22 because they happen to work for the State.

23 And I would assume one way to dispose of the  
24 case would be to decide that general question and send  
25 it back for the Vermont Supreme Court with that guidance

1 that they were wrong, as a general matter, to assign  
2 delay caused by the counsel to the State, to sort  
3 through the record themselves.

4 MS. RAINVILLE: And I think that's a very  
5 important point, Mr. Chief Justice.

6 JUSTICE BREYER: Is that point in the case?  
7 Where -- where is that in this case? I don't know who  
8 -- I didn't see anywhere where the Vermont Supreme Court  
9 said anything, said that, except in the instance where  
10 you agreed with them.

11 Where is it in their -- where is it -- who  
12 are they are referring to when they said that? Is that  
13 Donaldson? Because I thought the claim with Donaldson  
14 was it -- it was not his attribution, nothing he did was  
15 attributed. Rather, it was the State's failure to  
16 appoint anyone, because to appoint Donaldson was to  
17 appoint no one since he had left the office and since he  
18 did nothing.

19 Now, is that what we're supposed to decide:  
20 When a State appoints a person who has already left the  
21 office and does nothing, under those circumstances is it  
22 correct to attribute to the State their failure to  
23 appoint anybody?

24 MS. RAINVILLE: Well, first let me address  
25 this point of two lawyers who did little or nothing. In



1 Strickland v. Washington, this Court said how extremely  
2 important it is when determining ineffective assistance  
3 to have a strong presumption that counsel's conduct  
4 falls within the wide range of reasonable professional  
5 assistance, and that there should be a hearing to ask  
6 counsel what they did.

7 Here the Vermont Supreme Court makes this  
8 ruling without anyone at any point ever asking Mr.  
9 Donaldson or Mr. Sleigh what they did.

10 JUSTICE GINSBURG: Ms. Rainville, underneath  
11 or between the lines there seems to be great discontent  
12 on the part of the Vermont Supreme Court with the way  
13 the public defender system is operating. And if we hold  
14 for you as a matter of the federal speedy trial right,  
15 the Vermont Supreme Court could go back and decide just  
16 the same thing under the Vermont Constitution, couldn't  
17 it?

18 MS. RAINVILLE: It could except for that we  
19 believe that this decision creates an unconstitutional  
20 situation in creating two different classes of  
21 defendant, indigent and non-indigent, in their speedy  
22 trial rights, such that henceforth the prosecution and  
23 the courts must treat every indigent defendant  
24 differently merely because they're indigent when they  
25 ask for a continuance or when they ask for change of

1 counsel. We have to oppose those. So that we make the  
2 unpleasant choice of the constitutional due process  
3 violation, that we would rather push a defendant who's  
4 indigent to trial before his counsel's ready, because  
5 the constitutional violation there is only one of due  
6 process and he'll get a new trial, versus agreeing to  
7 allow their counsel to have time to prepare, in which  
8 case we risk a speedy trial violation, where he will be  
9 able to walk free despite his guilt.

10 JUSTICE SCALIA: Ms. Rainville, you -- you  
11 began your presentation with a statement that gave me so  
12 much hope. You said you were going to give us three  
13 reasons why we wouldn't have to get into the hairy facts  
14 of the case and could decide it on -- on issues of law.  
15 Okay? You only mentioned the first. What are the other  
16 two?

17 MS. RAINVILLE: The second is --

18 JUSTICE SCALIA: Remind us of the first.

19 MS. RAINVILLE: The first is that this  
20 creates an unconstitutional situation where there are  
21 two classes of defendants treated differently by the  
22 State and by the courts.

23 The second is that the delays in this case  
24 were caused by non-State actors and as a matter of law  
25 under Polk County cannot be a constitutional violation.

1 JUSTICE SCALIA: Well, that sort of gets us  
2 into the facts at some point. I mean, that does get us  
3 into the facts.

4 What's the third?

5 MS. RAINVILLE: The third is that, based on  
6 his concessions, his admissions in the brief, he's  
7 waived it; and that's under Barker v. Wingo where the  
8 Court talks about standard waiver doctrine applies in  
9 speedy trial.

10 And the fourth is that under the balancing  
11 test based solely on his admissions, his conduct ought  
12 to weigh like a ton of bricks against whatever happened  
13 with the State.

14 and I'll reserve the rest of my time if I  
15 might for rebuttal.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 We'll hear from Ms. Kruger first.

18 MR. NELSON: Oh, excuse me.

19 CHIEF JUSTICE ROBERTS: Ms. Kruger.

20 ORAL ARGUMENT OF LEONDRA R. KRUGER

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONER

24 MS. KRUGER: Mr. Chief Justice, and may it  
25 please the Court:

1           If you look on pages 27 through 28 of the  
2 Vermont Supreme Court's opinion, it is clear that the  
3 Vermont Supreme Court decided this case on the basis of  
4 a single principle that it applied to the entirety of  
5 the final two years of the pretrial delay in this case,  
6 and that is, as the Chief Justice has noted, that the  
7 failure of defendant's series of assigned counsel to  
8 move his case to trial should be attributable to the  
9 State.

10           As the question comes before the Court  
11 today, I think the primary point of dispute is whether  
12 there should be an exception to the general rule that a  
13 defendant is responsible for his own lawyer's delays in  
14 situations in which the lawyer purportedly does little  
15 or nothing to move the case to trial; and for four  
16 reasons we think that the Court should decline to create  
17 a kind of attorney inaction exception to the general  
18 rule.

19           First of all, we think that such a rule  
20 would be inconsistent with the role of a lawyer in an  
21 adversarial system and would undermine a lawyer's  
22 authority to make day-to-day decisions about the  
23 scheduling of pretrial proceedings.

24           Second, we think that such a rule would be  
25 enormously difficult for courts to administer in

1 practice, because attorney inaction is generally  
2 difficult to discern in the midst of pretrial  
3 proceedings and the risk of error would be to deprive  
4 the defendant of the time that his lawyer may genuinely  
5 need in order to prepare an effective defense.

6           The third reason is that it would create  
7 opportunities for gamesmanship; it would create  
8 incentives for defendants to use the services of their  
9 lawyer so long as it suits them, but then to complain  
10 later that the lawyer was inactive and therefore they  
11 should not be held responsible for the lawyer's delay.  
12 And as to the lawyers themselves, it would create an  
13 incentive to unreasonably delay, with the comfort of  
14 knowing that the worst that would happen is the best  
15 possible outcome for their client, which is the  
16 dismissal of charges with prejudice.

17           And finally, we think that such a rule would  
18 create an unjustifiable distinction between the  
19 treatments of appointed counsel and retained counsel in  
20 our system.

21           JUSTICE SOUTER: With respect to that last  
22 point, let me ask you this question. Let's assume we --  
23 we have paid counsel in a criminal case and, as a result  
24 of -- of delays by the prosecution, but primarily as a  
25 result of requests for continuance after continuance

1 after continuance, the -- the case is not tried; it's a  
2 simple case and it's not tried for three years.

3 Is -- is it open to a reviewing court on  
4 constitutional grounds to say that the State has got an  
5 affirmative obligation, a non-delegable obligation, to  
6 bring cases to trial in a reasonable time? And whether  
7 the reason for the failure in this three-year case is  
8 because counsel just kept trying to -- to shove it off,  
9 or the courts were not diligent in scheduling it for  
10 trial, at some point that non-delegable obligation has  
11 been violated. Is -- is that a -- a possible  
12 constitutionally based position?

13 MS. KRUGER: I think that Barker makes clear  
14 that defendants can waive their right to a speedy trial  
15 and that indeed defendants will often desire to put off  
16 trial as long as possible. I think that in giving  
17 proper consideration to the Barker Court's explanation  
18 of the nature and purposes of the right, and in  
19 particular focusing on the fact that the only possible  
20 remedy for the speedy trial violation is a remedy that  
21 uniquely advantages defendants and poses substantial  
22 burdens on society, we think ultimately a defendant  
23 can't escape responsibility for continuances that he has  
24 requested through or without the assistance of counsel,  
25 simply by blaming the prosecution for failing to object

1 or by blaming the courts for failing to go along.

2 JUSTICE SOUTER: Well, what if the -- what  
3 if we change the facts slightly. What if the defendant  
4 himself never says anything on the record? The only  
5 thing we've got on the record are repeated requests by  
6 paid counsel for continuances, and then after three  
7 years the defendant fires paid counsel and says: I've  
8 been sitting in jail for three years awaiting trial, and  
9 I shouldn't have to wait that long. The State has  
10 failed in its non-delegable duty. Would your answer  
11 still be the same?

12 MS. KRUGER: It would still be the same. We  
13 think that fundamentally the principal safeguard against  
14 that kind of unreasonable attorney-caused delay is the  
15 attorney's ethical obligation, which creates a duty in  
16 the attorney to represent his clients with reasonable  
17 diligence and promptness. We think that a rule that  
18 would require --

19 JUSTICE SOUTER: Lots -- lots of very  
20 effective criminal trial lawyers believe that the first  
21 tactic is delay, delay, delay, delay, delay.

22 MS. KRUGER: And I think it's precisely for  
23 that reason, because a delay may ultimately be in the  
24 client's interest, that this Court should decline to  
25 fashion a rule that makes the exercise of the remedy,

1 which is again an extreme remedy that advantages the  
2 defendant alone, exercisable at the option solely of the  
3 defendant.

4           We think for that reason the defendant  
5 necessarily has to be responsible for any delays that  
6 are caused either by him or by the person who is  
7 appointed to represent him. Again, the ethical duty of  
8 the lawyer is to zealously advocate on behalf of the  
9 defendant's interests, and if the defendant desires to  
10 go to trial as quickly as possible, it's still the  
11 lawyer's duty under the ethical rules to try to  
12 accommodate that request, while at the same time doing  
13 everything he can to prepare an effective defense.

14           JUSTICE STEVENS: Let me ask you this  
15 question about your reliance on pages 27 and 28. If you  
16 describe it as delays by the lawyers themselves, I  
17 understand your comment as being right on the nose. But  
18 I understood part of that to be talking about the  
19 situation in which the defender general's office has not  
20 performed its duty with sufficient promptness.

21           And would you not agree if there were a  
22 period, say, of seven or eight months in which they just  
23 didn't get around to appointing a lawyer, that that  
24 should be charged against the State?

25           MS. KRUGER: We would agree, Justice



1 Stevens. In this case there were a period of a total of  
2 about six months during which the Respondent was not  
3 represented at all, and we think in view of the State's  
4 ultimate responsibility for providing counsel to  
5 indigent defendants, when the State doesn't comply in a  
6 timely fashion with that duty, that delay is properly  
7 attributable to the State.

8           Although in this case, because the delay was  
9 not the product of a deliberate effort to hamper the  
10 defense, we think that that period should weigh only  
11 lightly against the State; and ultimately, given the  
12 other factors at issue in this case, the absence of any  
13 actual trial prejudice in particular, we think that  
14 ultimately those six months are insufficient to  
15 establish a speedy trial violation.

16           JUSTICE STEVENS: Isn't the prejudice factor  
17 pretty much established as long as the guy has to stay  
18 in jail during this entire period?

19           MS. KRUGER: I think that that's certainly  
20 one form of prejudice, but in the Barker balancing -- in  
21 Barker itself, for example, the defendant was  
22 incarcerated for ten months during the pretrial  
23 proceedings, and the Court nevertheless found that there  
24 was no speedy trial violation. We think a similar  
25 principle applies in this case. Although incarceration

1 is obviously prejudicial to defendants, in this case  
2 there was no prejudice above and beyond that. The  
3 Vermont Supreme Court was clear in finding the absence  
4 of --

5 JUSTICE GINSBURG: Did he get to offset it  
6 against the time for the pretrial incarceration?

7 MS. KRUGER: I am not aware that he did, but  
8 this Court made clear in Strunk that getting credit for  
9 time served is not an appropriate remedy for a speedy  
10 trial violation, that the only possible remedy is again  
11 what the Vermont Supreme Court did, erroneously in our  
12 view, which is to dismiss the charges without  
13 possibility of reindictment.

14 JUSTICE SCALIA: What would you think of a  
15 rule that said where most of the delay is attributable  
16 to the defendant, he doesn't -- he doesn't walk? That  
17 seems like a reasonable rule. Whatever the delay is, if  
18 most of it is attributable to the defendant himself, it  
19 is -- it is not a basis for dismissing the indictment?

20 MS. KRUGER: We think that a defendant -- we  
21 think that that rule would make a great deal of sense.  
22 When a defendant --

23 JUSTICE SCALIA: That would make it easy to  
24 decide this case because the -- the supreme court's  
25 opinion acknowledges that most of the -- most of the

1 delay was caused by the defendant.

2 MS. KRUGER: Well, the Vermont Supreme Court  
3 thought that some of the delay was caused by the  
4 defendant and didn't charge most of that period to the  
5 State to support its finding of the speedy trial  
6 violation.

7 JUSTICE STEVENS: Would you really get by  
8 that rule if there were, say, four years of delay and  
9 two years and one month was attributable to the  
10 defendant and two years to the State?

11 MS. KRUGER: We would think that a court  
12 evaluating a speedy trial claim in that case would  
13 properly exclude any period that was attributable to the  
14 defendant and focus specifically on that period that was  
15 attributable to the State in determining whether or not  
16 the right was violated.

17 CHIEF JUSTICE ROBERTS: Counsel, I'm sure  
18 you have gone through the record and, agreeing with  
19 Justice Stevens that the periods where there wasn't a  
20 contract, the State couldn't provide somebody, do count  
21 against the State, but disagreeing with the Vermont  
22 Supreme Court that when an assigned counsel fails to  
23 move the case forward that is attributable to the State  
24 and not the defendant, what's the difference in time?

25 MS. KRUGER: The difference in time is -- I

1 think that the -- as the case comes to the court, the  
2 final 11 months of the pretrial delay is not seriously  
3 in dispute. I think that Respondent has raised a number  
4 of arguments about concurrent causes of delay unrelated  
5 to the performance of his counsel. I think that those  
6 arguments are not properly before the Court because they  
7 fall well outside the scope of the question as to which  
8 this Court granted review and because they were neither  
9 pressed nor passed on below.

10 I think that leaves the middle 14 months of  
11 the pretrial delay. And I think, given the Vermont  
12 concession, the Vermont Supreme Court focus naturally  
13 rests on the 5.5-month period during which Paul  
14 Donaldson represented Respondent. And we think, with  
15 respect --

16 CHIEF JUSTICE ROBERTS: Yes?

17 MS. KRUGER: We think with respect to that  
18 period, we think that there is no basis for shifting the  
19 responsibility for that delay that Paul Donaldson sought  
20 before going to trial from defendant to the State  
21 because, as Justice Scalia has rightly pointed out, any  
22 contract expiration didn't in and of itself end the  
23 attorney-client relationship, and Paul Donaldson  
24 remained the agent and advocate of his client during  
25 that period.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Nelson.

3 ORAL ARGUMENT OF WILLIAM A. NELSON

4 ON BEHALF OF the RESPONDENT

5 MR. NELSON: Mr. Chief Justice, and may it  
6 please the Court:

7 I apologize for jumping the gun.

8 CHIEF JUSTICE ROBERTS: Sorry to delay you.

9 JUSTICE SCALIA: But it's not going to get  
10 you off.

11 (Laughter.)

12 MR. NELSON: I would like to respond to --  
13 to Vermont's argument about there being no detailed  
14 record about why these attorneys left when they left.  
15 And I -- I think if they're right, then that augurs a  
16 remand, that suggests a remand. But the reason there  
17 was no record of those departures is because the courts  
18 who presided over those departures never requested an  
19 explanation.

20 With Paul Donaldson, the matter was a  
21 foregone conclusion. He had no contract. He was going  
22 into another line of work. So be it, he's out of there.  
23 No questioning concerning Mr. Brillon's complaints about  
24 his inaction, his failure to investigate, and so forth;  
25 nothing about are you ready to go to trial, what have

1 you done, what have you accomplished, what are you  
2 passing on, if anything, to the next lawyer in line,  
3 none of that.

4           And with Sleigh, the judicial disinterest,  
5 if that's what it was, the judicial silence is even more  
6 resounding. Sleigh did not request permission to  
7 withdraw. He put the court on notice that he was  
8 withdrawing, and this came out of the blue. I don't  
9 think there was any heads-up for the court that this was  
10 going to happen, although Sleigh had expressed some  
11 serious reluctance to take the case and hadn't done  
12 anything. He didn't -- he had a filing deadline of  
13 April 11th, and he was supposed to file motions on that  
14 date, and instead of filing motions he filed this notice  
15 of withdrawal with no response from the court.

16           CHIEF JUSTICE ROBERTS: What is the -- what  
17 is the distinction in your theory of the case between  
18 delay and failure -- failure to move a case -- what did  
19 -- what did the Vermont case say: Failure to do  
20 anything to move the case forward?

21           When do we know that that's attributable to  
22 the defendant, and when is it attributable to the State?

23           MR. NELSON: I think it -- I think it  
24 depends on the facts, and I think in each of the -- in  
25 the case of each of these two attorneys, the facts are

1 different. With Donaldson, I think the State's  
2 responsibility -- the State's involvement in a  
3 do-nothing attorney, an attorney who was really a  
4 nominal attorney, started from the beginning. It  
5 started from the appointment of -- of counsel who had  
6 been on contract with the State to perform defense  
7 services and was appointed.

8 CHIEF JUSTICE ROBERTS: Of course, if the  
9 lawyer is a do-nothing lawyer, then I suppose there's an  
10 ineffective-assistance claim?

11 MR. NELSON: Well, it might mature into an  
12 ineffective-assistance claim, but there couldn't be an  
13 ineffective assistance claim on the record here because,  
14 well, ineffective assistance is -- is something that  
15 occurs at a trial. And it can't be --

16 JUSTICE GINSBURG: It's an anomaly, though,  
17 isn't it, that easily might have matured into  
18 ineffective assistance? It wasn't yet, but if Attorneys  
19 4 and 5, Donaldson and Sleigh -- if the case were for  
20 ineffective assistance of counsel, then the defendant  
21 would get a new trial, but here the result is he walks.

22 MR. NELSON: That's -- that's a consequence  
23 of the speedy-trial clause in Barker and Strunk. A  
24 speedy-trial violation happens, by definition, before  
25 trial. Ineffective assistance happens, by definition

1 and by this Court's decisions, at trial and can't be  
2 determined until after trial. Unless there is -- is a  
3 speedy trial right and unless it's going to be enforced,  
4 this is the consequence. And that's --

5 CHIEF JUSTICE ROBERTS: In the abstract, you  
6 have a lawyer who is a public defender or hired as a  
7 public defender, and he keeps asking for continuances --  
8 continuance, continuance. How do we tell that that's  
9 the State's problem as opposed to what the defendant is  
10 doing through his lawyer?

11 MR. NELSON: I think at first you would have  
12 to assume that the continuances were sought in good  
13 faith and -- and for purposes of defense preparation.  
14 If the defendant had demanded a speedy trial, as this  
15 defendant had an early date, I think the court, looking  
16 at -- at a continuance motion, would have to look at it  
17 in that light.

18 JUSTICE ALITO: Well, what is the trial  
19 judge supposed to do? The defense attorney keeps asking  
20 for continuances for purposes of investigation. I need  
21 more time to investigate. If -- and -- and -- can the  
22 court say: You need to tell me exactly what you are  
23 doing?

24 MR. NELSON: I think, Justice Alito, that a  
25 court -- when a defendant has demanded a speedy trial,



1 that a court does have some obligation to -- to  
2 supervise, to monitor, to -- and -- and it happens all  
3 the time in criminal courts. What have you done? Have  
4 you seen your client? What -- how much time do you need  
5 for these motions? When are you going to be ready for  
6 trial? That happens all the time.

7 And as the -- as time goes by, as the months  
8 pass and -- and become years, I think a court's granting  
9 of continuances has to be more grudging. The courts are  
10 under a duty because they have a duty to assure the  
11 speedy-trial right. Because they are the -- they are  
12 the primary actors in that, the court has a duty to be  
13 --

14 JUSTICE ALITO: Aren't you giving the  
15 attorney a very perverse incentive there? I mean the  
16 delay may help the ultimate outcome of the case, and if  
17 the -- if the defense attorney can engineer enough  
18 delay, he or she may also produce a speedy-trial  
19 violation.

20 MR. NELSON: Well, I -- yes, of course,  
21 that's a -- that's a problem, and it's a problem that  
22 was recognized by Barker, and -- and it's a problem that  
23 -- that courts are well equipped to handle. They --  
24 courts are able to and commonly do. In fact, it's their  
25 pretrial business -- main pretrial business to -- to set

1 that line to make sure lawyers adhere to them and make  
2 sure that the case goes to trial. They -- courts are  
3 well equipped to deal with that.

4 But I -- I would like to point out that your  
5 hypothetical is not this case. That we are not dealing  
6 here with delays that were caused by continuance  
7 motions. In fact, if you look closely at the record,  
8 trial dates were not pushed back by continuance motions  
9 in this case. Trial dates were pushed back by attorney  
10 inaction and withdrawals.

11 JUSTICE ALITO: And by your client firing  
12 the first attorney, correct?

13 MR. NELSON: My client -- that's correct.  
14 My client fired -- fired the first attorney, which --  
15 which the State says was the bad act. But look at the  
16 record of that firing. It wasn't really a firing, of  
17 course. He had no right to fire assigned counsel. But  
18 he had just heard his lawyer telling the judge, I'm  
19 handling 150 odd cases, I cannot be ready for trial,  
20 give me more time. I -- I -- I could be ready maybe in  
21 March or April, but I can't be ready now. And that was  
22 like three or four days before trial.

23 And I would submit that any client, hearing  
24 his lawyer making those representations to a judge,  
25 would have been very upset and would, in fact, have

1 wanted another lawyer.

2 JUSTICE GINSBURG: But knowing that the new  
3 lawyer would have to start from scratch, from the  
4 beginning, so it was going to take more time. If he got  
5 a new lawyer, it was going to take more time than if he  
6 stayed with the lawyer who was already acquainted with  
7 the case but just needed a few more weeks.

8 MR. NELSON: Well, yes, but the lawyer who  
9 had been appointed wasn't going to get those few more  
10 weeks, and as Mr. Brillon said to the court, I would  
11 rather do it right the first time. Being charged with a  
12 life imprisonment offense, one can hardly blame him.  
13 Yes, he had to make a tradeoff, but he had to do it  
14 because his lawyer was not ready.

15 Now, we argued in the Vermont Supreme Court  
16 that that time could not --

17 JUSTICE SCALIA: Excuse me, is that the  
18 proper remedy? I mean, it seems to me he should appeal  
19 to the judge and say, look, this lawyer -- is -- is that  
20 the way you solve the problem of -- of an attorney who  
21 is not ready, like fire him so you can get another  
22 attorney? That seems to me very strange.

23 MR. NELSON: Counsel. Counsel moved for --  
24 moved for a continuance on February 22nd.

25 JUSTICE SCALIA: Right.

1 MR. NELSON: And --

2 JUSTICE SCALIA: And from what you told me  
3 it should have been given, right?

4 MR. NELSON: Pardon me?

5 JUSTICE SCALIA: From what you tell me, it  
6 should have been given if indeed he was unable to  
7 prepare adequately for the trial?

8 MR. NELSON: I believe so. The judge took a  
9 different view. It was fully argued. The judge was the  
10 only one who had -- the judge was the decider on that  
11 one, and she said no. You don't get it.

12 JUSTICE GINSBURG: Well, wasn't there a  
13 concern about this defendant trying avoid a particular  
14 judge? That's why he wanted the continuance?

15 MR. NELSON: The -- the State made that  
16 allegation, and it made that claim here. No court has  
17 found it. The Vermont Supreme Court found the opposite.  
18 The Vermont Supreme Court held that Brillon fired or  
19 asked for the dismissal of his first lawyer because he  
20 was not prepared to go to trial, which seems like an  
21 ample, sufficient and supported reason for the action he  
22 took. That explains the case.

23 JUSTICE GINSBURG: Not only did the Vermont  
24 Supreme Court make that finding, it does not hear the  
25 witnesses, it -- it has a record before it. I can

1 understand if you're talking about a finding made by the  
2 court of first instance, but the Vermont Supreme Court  
3 is reviewing a record, it's not making findings.

4 MR. NELSON: That's -- that's true, Justice  
5 Ginsburg. The trial court, however, also didn't make  
6 that finding, although it was asked to. And, in fact, I  
7 think any such finding would be entirely speculative.

8 It would require the court, the fact finder,  
9 to interpolate various happenings that are not of  
10 record, and that we say never happened. It would  
11 require us to assume that Brillon told Ammons, I want  
12 you to move for a continuance on whatever grounds you  
13 can think of, but the real reason is to get rid of the  
14 judge. And that Ammons would do that for his client,  
15 and, you know, for the ostensible reason that he  
16 presented to the court, namely, he was overloaded and  
17 not prepared to go to trial, his secret reason was to  
18 get rid of the judge. And I think the record doesn't  
19 warrant that kind of inference, especially since it's  
20 been presented to and not accepted by the State courts.

21 CHIEF JUSTICE ROBERTS: This is not an  
22 unusual reason for criminal defense lawyers in the  
23 private sector to ask for a continuance. It's quite  
24 common for the lawyers to go before the judge and say,  
25 look, I've got this other case going to trial next week,

1 I've got this and this, can I get more time, and judges  
2 give them the first two but not the third. And why in a  
3 case simply where you're dealing with a public defender  
4 do you presume the opposite and blame the State for  
5 what's a quite common practice in the private part?

6 MR. NELSON: Mr. Chief Justice, I -- I'm  
7 only saying that this -- on this record, the conclusion  
8 that that was what was happening, which would be  
9 significant if the court were then to say, and  
10 therefore, it was done by the defendant who wanted delay  
11 despite what he said, and therefore, this is time  
12 considered waived under Barker. There is no basis for  
13 that finding.

14 CHIEF JUSTICE ROBERTS: My point is, I  
15 guess, how do we tell? I mean, if this is normal -- I  
16 think it is normal, I think it's quite unusual for a  
17 defense lawyer to be prepared to go to trial the first  
18 time the trial date is set. If it is normal, how do we  
19 tell?

20 MR. NELSON: Well, actually, this wasn't the  
21 first -- the first request for a continuance, Chief.  
22 Ammons had moved for a continuance before, and it had  
23 been denied.

24 CHIEF JUSTICE ROBERTS: Yeah, but -- again,  
25 I assume that's -- there are probably cases in the

1 private bar where that's true as well.

2 MR. NELSON: How does one know? I think  
3 one -- I think what makes a major difference here is  
4 that Brillon had demanded a speedy trial. He had done  
5 so long before Ammons' motion for a continuance. He had  
6 done -- he did so almost every chance he got at almost  
7 every court hearing.

8 You could, and I think the State does,  
9 assume that this was all tomfoolery and an attempt to  
10 manipulate the court, but there is nothing in the record  
11 to suggest that. That was the debate between the  
12 majority and the dissent at the State court. The  
13 majority won. As in Doggett, the -- the State is now  
14 coming back and trying to refight here an essentially  
15 factual issue which it lost in -- in the courts below.

16 JUSTICE BREYER: What about Donaldson and  
17 Moore, those two periods? Those two periods, the  
18 Donaldson period and the Moore period, seem, as far as I  
19 can tell, which isn't that far, they seem to be periods  
20 when the State -- when the court below was saying that  
21 all that happened here was that the lawyers who were  
22 appointed, did a very bad job.

23 You can't say they weren't appointed. It  
24 isn't that he didn't have counsel. He had counsel, and  
25 they just didn't do very much.

1                   Now, why should that be accounted against  
2 the stayer? Is Moore special? Was there really a  
3 problem of prosecutorial behavior? Is Donaldson the  
4 same as Sleigh? I don't know.

5                   MR. NELSON: Let me start --

6                   JUSTICE BREYER: Is Donaldson a case where  
7 they -- is equivalent to having no lawyer? I don't know  
8 how to deal with it.

9                   MR. NELSON: Let me start with Donaldson,  
10 and I think in answer to your question, I don't think  
11 Donaldson is substantially different from Sleigh. I  
12 won't go over the circumstances of Donaldson's  
13 appointment, but once he was appointed, he began  
14 conversations with the defender general about getting  
15 off the case. And I think the sense -- and -- and a  
16 significant fact about those conversations is that the  
17 defender general told Donaldson he was going to be  
18 replaced.

19                   We don't know exactly when that happened,  
20 but he told him he was going to be replaced with someone  
21 who was more competent, more qualified to deal with a  
22 life imprisonment case. So this is not information  
23 which will light a fire under a lawyer to prepare a  
24 case, that he knows he's not going to try.

25                   Donaldson then asks for time. It's the only



1 request he ever made of the court. The court gave him  
2 time and set filing deadlines, and he missed them.  
3 Missing those deadlines should have been a red flag to  
4 the court in a case that was already over a year old.  
5 The court let those deadlines pass without a word.

6           The court also said, we're going to try this  
7 case in October. Get ready for trial in October.  
8 Everything should be filed by September 23rd. And for a  
9 reason, which the record has no explanation for, the  
10 October trial never happened. Donaldson was still on  
11 the case, his name was still on the case, and the  
12 October trial date passed without a murmur. It was not  
13 until late November that Donaldson came to the court and  
14 explained the situation.

15           Now the court -- I think the defender  
16 general failed in his responsibility with regard to  
17 Donaldson. That's State involvement. The court failed  
18 in not noticing the -- the missed deadlines and in  
19 allowing the trial date to pass without a trial; and I  
20 think the Court also failed in its duty in allowing  
21 Donaldson off the case, which rendered any catch-up time  
22 that he had to do pointless, without any inquiry at all.  
23 The court, it's clear from the record, deferred entirely  
24 to the defender general, and so I think the Vermont  
25 court on that record thought that there was enough State

1 involvement here to charge -- to find the State  
2 responsible and to weigh some of that responsibility  
3 against the State. The court --

4 CHIEF JUSTICE ROBERTS: What does your --  
5 your argument do to the fundamental and I think quite  
6 vital principle in Polk County that public defenders  
7 work for their clients; they don't work for the State?

8 MR. NELSON: It does nothing to Polk County,  
9 and we acknowledge that -- that Paul Donaldson's  
10 inaction by itself, if it had nothing to do with the  
11 State, if the State did not involve itself or condone --  
12 if the State had no responsibility with regard to that  
13 time, the State would have no responsibility under  
14 Barker. That's perfectly clear, and I don't think the  
15 Vermont Supreme Court's opinion, fairly read, fairly  
16 read says anything other than that. The Vermont --

17 CHIEF JUSTICE ROBERTS: Well, I guess fairly  
18 read, it does say the failure of several assigned  
19 counsel to do anything to move the case forward is  
20 attributable to the State, because they didn't do  
21 anything, I guess is the touchstone.

22 MR. NELSON: Well, I think I have two  
23 responses to that. One is that in the context of the  
24 rest of the opinion, what the court was talking about  
25 was a breakdown of the system, and the focus was on two

1 actors, both State actors, the assigning agency, the  
2 defender general, and the court and I don't think  
3 there's any dispute that both of those are indeed State  
4 actions, and that delays which can be traced to them,  
5 which they have a hand in, can be weighed against panned  
6 the State under Barker.

7 JUSTICE SCALIA: But it doesn't say that; it  
8 really does say most of the delay was caused by the  
9 inability or unwillingness of assigned counsel, not of  
10 the -- of the institution that appoints them,  
11 unwillingness or inability of assigned counsel to move  
12 the case forward. That looks to me like --

13 MR. NELSON: I think -- elsewhere in the  
14 opinion, Justice Scalia, I think the court is clear that  
15 -- that they were faulting the defender general, and to  
16 a lesser extent the court. I think we are putting more  
17 stress on the court's nonfeasance than the Vermont  
18 Supreme Court did, but in fact, the time adds up to the  
19 same. The time, we're talking 14 months from  
20 Donaldson's assignment until Moore's assignment in  
21 August.

22 CHIEF JUSTICE ROBERTS: Do you agree -- just  
23 following up --

24 MR. NELSON: Okay.

25 CHIEF JUSTICE ROBERTS: I'm sorry. Just

1 following up on your latest answer, do you agree that it  
2 has to be a systemic problem? I mean, you gave us that  
3 -- the situation where the lawyer says I've got 150  
4 cases, I need a -- need a continuance.

5 What if there's none of that? They've got,  
6 you know, 500 public defenders, and the -- but the guy  
7 still delays. He's responsible for not doing anything  
8 to move the case forward.

9 MR. NELSON: Well --

10 CHIEF JUSTICE ROBERTS: Is it still  
11 attributable to the State?

12 MR. NELSON: I don't think -- I don't think  
13 the result depends on there being a systemic problem. I  
14 think in this case there was a systemic problem, and the  
15 Court knows about that from the findings of the indigent  
16 defense task force, which --

17 JUSTICE KENNEDY: But the Chief Justice's  
18 question, I'm interested in it as well, are there  
19 instances in which a State-appointed counsel can delay  
20 and have that not attributed to the State? Is it always  
21 attributed to the State --

22 MR. NELSON: No.

23 JUSTICE KENNEDY: Just because he's State --

24 MR. NELSON: Absolutely there can be  
25 situations like that, where there is no --

1 JUSTICE KENNEDY: There is a delay, but it's  
2 not attributable to the State.

3 MR. NELSON: It's not attributable to the  
4 State, it's attributable to counsel. And just the same  
5 as -- just the same as for private counsel. We're not  
6 proposing a two-tiered system there. We're --

7 CHIEF JUSTICE ROBERTS: Well, when is that?  
8 The -- you have the same situation, the defense counsel  
9 appointed by the State does nothing to move the case  
10 forward, that's as I understand it the Vermont Supreme  
11 Court touchstone. When is that attributable to the  
12 State and when is it not?

13 MR. NELSON: It would not be attributable to  
14 the State if the assigning agency was -- had no fault,  
15 had no supervising duty that it failed to perform, that  
16 the lawyer was essentially on his own or her own; and it  
17 would also assume, I think, if the delay went on long  
18 enough, that there was no fault in the court in failing  
19 to --

20 CHIEF JUSTICE ROBERTS: Well, I --

21 MR. NELSON: -- to notice that nothing was  
22 happening.

23 CHIEF JUSTICE ROBERTS: It does sound to me,  
24 then, that you're saying there has to be some systemic  
25 problem, that the rule that I understand the Vermont

1 Supreme Court to have adopted, that when assigned  
2 counsel does nothing to move the case forward, that  
3 that's attributable to the State, you would disagree  
4 with? You would say no, there has to be a systemic  
5 problem, not the -- not just the individual lawyer, but  
6 they're not assigning enough defenders, they're not  
7 supervising them, whatever.

8 MR. NELSON: Maybe I'm not using the word  
9 systemic in the same sense you are. All I would say is  
10 say is it doesn't have to happen to a lot of people, it  
11 could happen to just one person, but it would only  
12 happen to that one person if a public, State agency was  
13 responsible for the delay.

14 JUSTICE ALITO: What if you have a situation  
15 in which the -- an attorney is appointed, the defendant  
16 threatens that attorney, the attorney withdraws. A  
17 second attorney is appointed, the client threatens that  
18 attorney, the attorney withdraws, and then thereafter a  
19 new attorney is pointed, and there is great delay.  
20 Maybe more -- two or three attorneys are appointed.  
21 There's great delay. Is -- does the -- does the chain  
22 of events that started all this get taken into account  
23 or do you just start counting the time from the  
24 appointment of the last attorney who wasn't threatened?

25 MR. NELSON: I think you can't ignore what

1 happened before, but you can -- but -- but if what  
2 you're saying or suggesting is that earlier bad actions  
3 result in a forfeiture of speedy trial rights, I would  
4 disagree. The way you -- the way it matters is that by  
5 firing, threatening, unjustifiably getting rid of a --  
6 of a lawyer, you require the next lawyer to spend some  
7 time getting up to speed on the case. And that time --

8 JUSTICE ALITO: What if a small -- I don't  
9 know how many lawyers are available for appointment in  
10 Bennington. What if it's a small jurisdiction where  
11 there aren't that many who are available to be  
12 appointed? And so you fire the public defender, you  
13 threaten the first appointed counsel, and pretty soon  
14 you don't have very many left, or the ones that you have  
15 left are busy with other cases and delay results.

16 MR. NELSON: But that's not the case here,  
17 and I think my answer to your question is that what  
18 makes this a State response -- failure of responsibility  
19 is that the State had the ability to do something about  
20 it. If the State's hands are tied, if they run out of  
21 legal talent, if there's no other way to get counsel on  
22 the case than by a broken-down contract system, which  
23 was not the case --

24 JUSTICE GINSBURG: What about the point that  
25 Ms. Rainville made? And she talked about this balancing

1 that comes out of Barker, and she said you have to weigh  
2 against the defendant very heavily, the episodes with  
3 lawyer number one and number three, because that was  
4 really bad stuff. The State is perhaps responsible for  
5 some of the other delays, but she called those "neutral"  
6 in the weighing process. Don't those two episodes,  
7 counsel number one was fired, counsel number three, who  
8 says his life was threatened by the defendant, don't  
9 those have to count very heavily against the defendant?

10 MR. NELSON: Justice Ginsburg, I don't think  
11 that Barker works that way. I think what Barker says is  
12 that time which is attributable to the defendant gets  
13 subtracted from the total delay; that that's not  
14 considered. That the rest of the time is a period which  
15 the State has to account for; and there are -- there  
16 will be segments of that time, segments of that delay  
17 which are nobody's fault, and those delays would in fact  
18 be truly neutral in the sense of they would have no  
19 weight against the State; and there are others that  
20 would count more or less heavily against the State.

21 So I think the effect of what went on with  
22 Jerry Altieri, which I think was not much more than two  
23 months of the total time that he was on board, I think  
24 the effect of that is to subtract that period, and then  
25 any catch-up period that his firing or his dismissal



1 required, subtract that period as well from the total,  
2 and weigh the rest more or less heavily or perhaps not  
3 at all against the State.

4 JUSTICE GINSBURG: Well, the rest, I  
5 couldn't find in his final counsel's representation -- I  
6 didn't see anything in her representation that would  
7 suggest any lack of diligence on her part or any reason  
8 to count that in the speedy trial calculus. That runs  
9 from August 2003 to June 2004.

10 MR. NELSON: To June 2004. That's correct.  
11 I -- I think that the opinion is not clear as to how  
12 much responsibility the Vermont court attributed to the  
13 State for that period. Vermont says they charged every  
14 second of the -- of that time to the State, and it's  
15 quite clear from the opinion that they didn't. They  
16 said that most of the remaining two years, as of  
17 Donaldson's appointment in June of '02, was attributable  
18 to the State. It's not clear how much of that time or  
19 if they actually counted it. I think that any precise  
20 calculation of that time period is impossible.

21 We argue, and the record supports, that much  
22 of that time had to do with Ms. Moore getting files  
23 together, not only from predecessor counsel but from the  
24 State, and that the State delayed for many months in  
25 providing an updated witness list with current

1 addresses. She needed that to interview the witnesses.  
2 The case was old, and she needed the State's help there,  
3 with other discovery material which the record shows --  
4 it's not in the joint appendix, but it is in the printed  
5 case, which was essentially Vermont Supreme Court's  
6 equivalent of an appendix. These materials were at  
7 issue for Moore. She needed them. The prosecutor was  
8 dilatory in providing them. And I think that that's a  
9 kind of vanilla reason to attribute some of that time to  
10 the State.

11 JUSTICE STEVENS: Mr. Nelson --

12 MR. NELSON: The court was also --

13 JUSTICE STEVENS: -- what is your judgment  
14 on how much time all together was attributable to the  
15 State?

16 MR. NELSON: I think 14 -- I think the  
17 Vermont court was clear about the 14 months from  
18 Donaldson through Moore, including the six months of no  
19 counsel. It adds up to 14 months. And then the rest of  
20 the time I don't think you can put a number on.

21 Maybe it's not time that we're trying to add  
22 up, but responsibility. And what the -- what the State  
23 court was saying was when a case is as old as this one  
24 was when Moore took it over, the court should be very  
25 vigilant and grudging in its grants of continuances, and

1 the case could have been tried sooner than in eight  
2 months.

3 CHIEF JUSTICE ROBERTS: So your 14 months,  
4 just so I understand, that includes the August 2003  
5 through June 2004, when Moore was representing him?

6 MR. NELSON: No. The 14 months goes from  
7 Donaldson on June 11th, 2002, through Moore's  
8 appointment in August 2003.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
11 Nelson.

12 Ms. Rainville, you have a minute remaining.

13 REBUTTAL ARGUMENT OF CHRISTINA RAINVILLE

14 ON BEHALF OF THE PETITIONER

15 MS. RAINVILLE: Very quickly then, Justice  
16 Ginsburg, the answer to your question, he did receive  
17 credit for his time served.

18 The important distinction that the questions  
19 raised show, what's so fundamentally wrong about this  
20 case, is the distinction between Strickland. There you  
21 ask the lawyers what they did. They're given deference.  
22 They're given the right to defend themselves. And if  
23 you prove that it would have had an effect on the  
24 outcome of the case, the defendant gets a new trial.  
25 Here the lawyers are never asked, no presumption is

1 given, and the defendant is allowed to walk free for the  
2 rest of his life. It's fundamentally wrong.

3 Letting a defendant walk free from a crime  
4 is an extraordinary remedy that should only be given in  
5 an extraordinary case, and that case is not this one.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 12:17 p.m., the case in the  
10 above-entitled matter was submitted.)

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<p style="text-align: center;"><b>A</b></p> <p><b>ability</b> 47:19  <b>able</b> 18:9 33:24  <b>above-entitled</b>  1:11 52:10  <b>absence</b> 25:12  26:3  <b>absolutely</b> 7:7  12:18 44:24  <b>abstract</b> 32:5  <b>accept</b> 10:8,10  <b>accepted</b> 37:20  <b>accommodate</b>  24:12  <b>accomplished</b>  30:1  <b>account</b> 46:22  48:15  <b>accounted</b> 40:1  <b>acknowledge</b>  42:9  <b>acknowledges</b>  26:25  <b>acquainted</b> 35:6  <b>act</b> 34:15  <b>action</b> 8:10  36:21  <b>actions</b> 43:4  47:2  <b>actors</b> 5:21 11:5  11:10 18:24  33:12 43:1,1  <b>actual</b> 25:13  <b>add</b> 50:21  <b>additional</b> 8:8  8:12  <b>address</b> 16:24  <b>addresses</b> 50:1  <b>addressing</b> 3:12  <b>adds</b> 43:18  50:19  <b>adequately</b> 36:7  <b>adhere</b> 34:1  <b>administer</b>  20:25  <b>admission</b> 11:25  <b>admissions</b> 19:6</p>	<p>19:11  <b>admits</b> 12:1  <b>adopted</b> 46:1  <b>advantages</b>  22:21 24:1  <b>adversarial</b>  20:21  <b>advocate</b> 24:8  28:24  <b>affect</b> 5:18  <b>affirmative</b>  10:11 22:5  <b>agency</b> 43:1  45:14 46:12  <b>agent</b> 28:24  <b>agree</b> 14:11,15  24:21,25 43:22  44:1  <b>agreed</b> 14:3,4,5  16:10  <b>agreeing</b> 18:6  27:18  <b>agrees</b> 13:13  <b>ahead</b> 10:4  <b>Alito</b> 12:4,19  32:18,24 33:14  34:11 46:14  47:8  <b>allegation</b> 36:16  <b>allow</b> 4:25 18:7  <b>allowed</b> 52:1  <b>allowing</b> 41:19  41:20  <b>Altieri</b> 48:22  <b>Amendment</b>  13:2  <b>amicus</b> 1:20 2:6  19:22  <b>Ammons</b> 7:15  7:15 37:11,14  38:22 39:5  <b>amount</b> 6:9  <b>ample</b> 36:21  <b>anomaly</b> 31:16  <b>answer</b> 23:10  40:10 44:1  47:17 51:16</p>	<p><b>anybody</b> 8:21  13:25 16:23  <b>apologize</b> 29:7  <b>appeal</b> 35:18  <b>APPEARAN...</b>  1:14  <b>appendix</b> 8:5  50:4,6  <b>application</b> 3:23  <b>applied</b> 20:4  <b>applies</b> 19:8  25:25  <b>apply</b> 3:25 4:25  <b>applying</b> 10:22  <b>appoint</b> 16:16  16:16,17,23  <b>appointed</b> 4:3  6:7 7:13,15,16  7:18,19,20  11:14 13:21  21:19 24:7  31:7 35:9  39:22,23 40:13  45:9 46:15,17  46:20 47:12,13  <b>appointing</b>  24:23  <b>appointment</b>  31:5 40:13  46:24 47:9  49:17 51:8  <b>appoints</b> 16:20  43:10  <b>appropriate</b>  12:9 26:9  <b>approved</b> 8:6  <b>approximately</b>  6:5  <b>April</b> 8:4 30:13  34:21  <b>argue</b> 9:6 49:21  <b>argued</b> 4:5 15:5  35:15 36:9  <b>argument</b> 1:12  2:2,10 3:4,6,15  3:24,24 19:20  29:3,13 42:5</p>	<p>51:13  <b>arguments</b> 28:4  28:6  <b>arose</b> 6:13  <b>arraignment</b>  7:14  <b>arrangement</b>  10:13  <b>aside</b> 11:7  <b>asked</b> 6:22 9:12  36:19 37:6  51:25  <b>asking</b> 17:8 32:7  32:19  <b>asks</b> 40:25  <b>assign</b> 16:1  <b>assigned</b> 3:15  15:16,19 20:7  27:22 34:17  42:18 43:9,11  46:1  <b>assigning</b> 43:1  45:14 46:6  <b>assignment</b>  43:20,20  <b>assistance</b> 17:2  17:5 22:24  31:13,14,18,20  31:25  <b>Assistant</b> 1:18  <b>Association</b> 5:20  <b>assume</b> 3:14,17  4:16 12:23  15:23 21:22  32:12 37:11  38:25 39:9  45:17  <b>assumed</b> 10:22  <b>assure</b> 33:10  <b>attempt</b> 39:9  <b>attorney</b> 1:16  4:14,17,23 6:1  6:21,22 20:17  21:1 23:16  31:3,3,4 32:19  33:15,17 34:9  34:12,14 35:20</p>	<p>35:22 46:15,16  46:16,17,18,18  46:19,24  <b>attorneys</b> 6:21  29:14 30:25  31:18 46:20  <b>attorney's</b> 23:15  <b>attorney-caused</b>  23:14  <b>attorney-client</b>  28:23  <b>attributable</b>  6:17,19 7:1 9:5  15:17,20,21  20:8 25:7  26:15,18 27:9  27:13,15,23  30:21,22 42:20  44:11 45:2,3,4  45:11,13 46:3  48:12 49:17  50:14  <b>attribute</b> 9:3  12:10 16:22  50:9  <b>attributed</b> 4:7  16:15 44:20,21  49:12  <b>attribution</b>  16:14  <b>augurs</b> 29:15  <b>August</b> 9:22  43:21 49:9  51:4,8  <b>authority</b> 20:22  <b>available</b> 47:9  47:11  <b>avoid</b> 36:13  <b>awaiting</b> 23:8  <b>aware</b> 26:7  <b>a.m</b> 1:13 3:2</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>back</b> 15:25  17:15 34:8,9  39:14  <b>bad</b> 34:15 39:22</p>
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