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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'm 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'm 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

1 position that you just took, would -- would apply to the  
2 period of time, as I understand it, in which the  
3 individual named -- the defender named Sleigh, had been  
4 appointed to -- to represent the defendant.

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

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

21           But would -- would you comment on -- on the  
22 position that the State took and tell me why you can  
23 take a different position here?

24           MS. RAINVILLE: Yes. Yes, Your Honor. The  
25 State did take the position that the 8-month period,

1 which included the four months where Attorney Sleigh was  
2 involved, was a neutral factor. And under the dicta in  
3 Barker, that would allow the Court to apply it against  
4 the State, although not to weigh it heavily as a -- as a  
5 neutral factor.

6 JUSTICE SOUTER: Yes.

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

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

12 MS. RAINVILLE: It was conceded that it was  
13 a neutral time period.

14 JUSTICE SOUTER: Yes.

15 MS. RAINVILLE: And -- and --

16 JUSTICE SOUTER: Well, then, why isn't that  
17 concession binding here?

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

1 issue.

2 JUSTICE SOUTER: Oh, it is, but that is not  
3 an issue that is necessarily implied by the -- by the  
4 concession that the Attorney General made in the Vermont  
5 Supreme Court.

6 MS. RAINVILLE: Yes. Yes, but also if you  
7 look at the -- the record, the 3 years of delay, the  
8 time period involving Mr. Sleigh is approximately 4  
9 months, if you take all 4 months where he was appointed  
10 by the docket, or 2 months if you take the time where he  
11 thought and understood that he was on the case, and in  
12 light of the 3-year delay, that amount of time is really  
13 inconsequential.

14 CHIEF JUSTICE ROBERTS: It may have been a  
15 good concession below. I mean, it was -- as I  
16 understand it, the problem arose because of a change in  
17 the contract. Right?

18 MS. RAINVILLE: That's correct.

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

21 MS. RAINVILLE: It -- it may well have been  
22 attributable to the defender general. And that's one of  
23 the problems in this case is that we don't have a record  
24 of why different attorneys -- attorney number 4,  
25 Donaldson, and attorney number 5, Sleigh, were never

1 asked what they did or --

2 CHIEF JUSTICE ROBERTS: I suppose you're --  
3 you're willing to concede that there are situations  
4 where the delay would be attributable to the State  
5 because of systemic problems?

6 MS. RAINVILLE: Yes.

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

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

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

24 The sixth time, given that we are in  
25 Vermont, a very small State with few lawyers, he had

1 difficulty finding a sixth lawyer. But the defender  
2 general took extraordinary measures and went to the  
3 Vermont legislature and obtained funding, and the  
4 legislature came up to the plate very quickly, in a  
5 matter of weeks.

6           The last withdrawal of lawyer number 5  
7 happens on April 10th. It's June 20th that there is the  
8 letter in the appendix from the defender general saying  
9 that the legislature has approved new funding. It's --  
10 it's literally a matter of weeks before the legislature  
11 comes to the plate and provides additional funding.

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

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

21           MS. RAINVILLE: It could have.

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

1 MS. RAINVILLE: The -- the court could have,  
2 and certainly --

3 JUSTICE SCALIA: Now, does it make it not  
4 the State's court -- not the State's fault no matter  
5 what? Is -- is the court's misfeasance the State's  
6 misfeasance? Do you attribute that to the State?

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

22 With regard to Sleigh --

23 JUSTICE BREYER: -- with that particular  
24 period. The trouble that I have with that particular  
25 period is August 1, 2003, to June 14, 2004, isn't that

1 right? That's Donaldson -- or that's Moore?

2 MS. RAINVILLE: That's Moore.

3 JUSTICE BREYER: All right. Donaldson was  
4 the first one?

5 MS. RAINVILLE: Donaldson was actually  
6 lawyer number 4.

7 JUSTICE BREYER: Go ahead.

8 (Laughter.)

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

20 If that, as it seems to be, is common  
21 ground, then do we have anything before us in this case,  
22 except sort of going through the list of counsel, the  
23 list of reasons, the list of delays and -- and reviewing  
24 the Vermont Supreme Court on, in effect, the details  
25 that it assumed in applying the rule?

1           In other words, it seems to me that there  
2 isn't an issue of principle dividing the parties here,  
3 it's a series of issues of details. Is that an unfair  
4 way to look at the case as we've got it?

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

14           JUSTICE SOUTER: Yes, but if you -- if you  
15 take Sleigh, Donaldson, and the period in which there  
16 was no -- I guess, following Sleigh, in which there was  
17 no counsel appointed at all, you're already up to just  
18 about a year. And a year is -- is enough to trigger  
19 Neil v. Biggers. And so, it seems to me that what --  
20 what the fight or any serious fight is about is, well,  
21 within the -- the further total of a 2-year period, who  
22 was to blame for this, who was to blame to that -- for  
23 that, and I'm -- I'm not sure that it's of any value to  
24 -- to just go through and second-guess the Supreme Court  
25 of Vermont on -- on those details, because you've got

1 enough in Neil v. Biggers before you even get to those  
2 details.

3 MS. RAINVILLE: Well, also in terms of --  
4 just based on Brillon's admissions, there's enough for  
5 this Court to decide the case. He admits that he fired  
6 three different lawyers.

7 JUSTICE SOUTER: Right.

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

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

22 MS. RAINVILLE: I believe you're absolutely  
23 right, Justice Alito. In this case his conduct was so  
24 unconscionable in threatening both -- his lawyer, and  
25 the facts there is that he moved --

1 JUSTICE STEVENS: I really wanted to ask you  
2 pretty much exactly the same question. If we assume  
3 exactly -- it was a terrible way he fired the first two  
4 -- the first lawyer certainly, maybe the second. Would  
5 it be true that no matter how long the delay occurred  
6 after that, he could never get Sixth Amendment relief?

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

9 JUSTICE STEVENS: Why not?

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

15 JUSTICE BREYER: Well, there -- as I  
16 understand it, that first year the Vermont Supreme Court  
17 agrees with you.

18 MS. RAINVILLE: That's right.

19 JUSTICE BREYER: They said, we're not  
20 counting any of that against him.

21 Now we go into the second year, and the  
22 second year had to do with Mr. Donaldson, a lot of it.  
23 And it turns out that Mr. Donaldson actually had left  
24 the office within a few days of his having been  
25 appointed to do this and then he never did anything. So

1 the Supreme Court of Vermont says, as far as Mr.  
2 Donaldson is concerned, we do hold that against the  
3 State for the reason that it is the equivalent of not  
4 giving him anybody. The guy they gave him wasn't even a  
5 public defender. He never did a thing. All right.

6 Now we go to the third group. The third  
7 group, the State agreed they should be charged. That's  
8 Mr. Sleigh. The third one they agreed with it. They  
9 said light, but they agreed with it.

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

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

23 Now, what are we supposed to decide? Are we  
24 supposed to decide whether my statement is, in fact, a  
25 correct statement? If so, why isn't it? I guess we

1 have to read the record. But what else is there to  
2 decide?

3 MS. RAINVILLE: I think you can decide it  
4 without reviewing the record, based on the fact that you  
5 have a defendant who fired his first lawyer 6 months  
6 into the case, 1 day before trial.

7 JUSTICE BREYER: And you won that.

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

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

1 because they happen to work for the State.

2           And I would assume one way to dispose of the  
3 case would be to decide that general question and send  
4 it back for the Vermont Supreme Court with that guidance  
5 that they were wrong, as a general matter, to assign  
6 delay caused by the counsel to the State, to sort  
7 through the record themselves.

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

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

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

23           Now, is that what we're supposed to decide:  
24 When a State appoints a person who has already left the  
25 office and does nothing, under those circumstances is it

1 correct to attribute to the State their failure to  
2 appoint anybody?

3 MS. RAINVILLE: Well, first let me address  
4 this point of -- of two lawyers who did little or  
5 nothing. In Strickland v. Washington, this Court said  
6 how extremely important it is, when determining  
7 ineffective assistance, to have a strong presumption  
8 that counsel's conduct falls within the wide range of  
9 reasonable professional assistance and that there should  
10 be a hearing to ask counsel what they did.

11 Here the Vermont Supreme Court makes this  
12 ruling without anyone at any point ever asking Mr.  
13 Donaldson or Mr. Sleigh what they did.

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

22 MS. RAINVILLE: It could except for that we  
23 believe that this decision creates an unconstitutional  
24 situation in creating two different classes of  
25 defendant, indigent and non-indigent, in their speedy-

1 trial rights, such that henceforth the prosecution and  
2 the courts must treat every indigent defendant  
3 differently merely because they're indigent when they  
4 ask for a continuance or when they ask for change of  
5 counsel. We have to oppose those. So that we make the  
6 unpleasant choice of the constitutional due process  
7 violation, that we would rather push a defendant who's  
8 indigent to trial before his counsel is ready, because  
9 the constitutional violation there is only one of due  
10 process and he'll get a new trial, versus agreeing to  
11 allow their counsel to have time to prepare, in which  
12 case we risk a speedy-trial violation, where he'll be  
13 allowed to walk free despite his guilt.

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

21 MS. RAINVILLE: The first -- the second is  
22 the --

23 JUSTICE SCALIA: Remind us of the first  
24 also.

25 MS. RAINVILLE: The -- the first is that

1 this creates an unconstitutional situation where there  
2 are two classes of defendant treated differently by the  
3 State and by the court.

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

7 JUSTICE SCALIA: Well, that sort of gets us  
8 into the facts at some point. I mean, that -- that does  
9 get us into the facts.

10 What's the third?

11 MS. RAINVILLE: The third is that, based on  
12 his concessions, his admissions in the brief, he's  
13 waived it; and that's under Barker v. Wingo where the  
14 Court talks about standard waiver doctrine applies in  
15 speedy -- speedy trial.

16 And the fourth is that under the balancing  
17 test based solely on his admissions, his conduct ought  
18 to weigh like a ton of bricks against whatever happened  
19 with the State.

20 And I'll reserve the rest of my time, if I  
21 might, for rebuttal.

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

24 MR. NELSON: Oh, excuse me.

25 CHIEF JUSTICE ROBERTS: Ms. Kruger.

1                   ORAL ARGUMENT OF LEONDRA R. KRUGER  
2                   ON BEHALF OF THE UNITED STATES,  
3                   AS AMICUS CURIAE,  
4                   SUPPORTING THE PETITIONER

5                   MS. KRUGER: Mr. Chief Justice, and may it  
6 please the Court:

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

16                   As the question comes before the Court  
17 today, I think the primary point of dispute is whether  
18 there should be an exception to the general rule that a  
19 defendant is responsible for his own lawyer's delays in  
20 situations in which the lawyer purportedly does little  
21 or nothing to move the case to trial. And for four  
22 reasons we think that the Court should decline to create  
23 a kind of attorney inaction exception to the general  
24 rule.

25                   First of all, we think that such a rule

1 would be inconsistent with the role of a lawyer in an  
2 adversarial system and would undermine a lawyer's  
3 authority to make day-to-day decisions about the  
4 scheduling of pretrial proceedings.

5           Second, we think that such a rule would be  
6 enormously difficult for courts to administer in  
7 practice, because attorney inaction is generally  
8 difficult to discern in the midst of pretrial  
9 proceedings and the risk of error would be to deprive  
10 the defendant of the time that his lawyer may genuinely  
11 need in order to prepare an effective defense.

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

23           And finally, we think that such a rule would  
24 create an unjustifiable distinction between the  
25 treatment of appointed counsel and retained counsel in

1 our system.

2 JUSTICE SOUTER: With -- with respect to  
3 that last point, let me ask you this question. Let's  
4 assume we -- we have paid counsel in -- in a criminal  
5 case and, as a result of -- of delays by the  
6 prosecution, but primarily as a result of requests for  
7 continuance after continuance after continuance, the --  
8 the case is not tried. It's a simple case and it's not  
9 tried for 3 years.

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

20 MS. KRUGER: I think that Barker makes clear  
21 that defendants can waive their right to a speedy trial  
22 and that indeed defendants will often desire to put off  
23 trial as long as possible. I think that in giving  
24 proper consideration to the Barker court's explanation  
25 of the nature and purposes of the rights, and in

1 particular focusing on the fact that the only possible  
2 remedy for the speedy-trial violation is a remedy that  
3 uniquely advantages defendants and poses substantial  
4 burdens on society, we think ultimately a defendant  
5 can't escape responsibility for continuances that he has  
6 requested through or without the assistance of counsel,  
7 simply by blaming the prosecution for failing to object  
8 or by blaming the courts for failing to go along.

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

19 MS. KRUGER: It would still be the same. We  
20 think that fundamentally the principal safeguard against  
21 that kind of unreasonable attorney-caused delay is the  
22 attorney's ethical obligation, which creates a duty in  
23 the attorney to represent his client with reasonable  
24 diligence and promptness. We think that a rule that  
25 would require --

1 JUSTICE SOUTER: Lots -- lots of very  
2 effective criminal trial lawyers believe that the first  
3 tactic is delay, delay, delay, delay, delay.

4 MS. KRUGER: And I think it's precisely for  
5 that reason and because a delay may ultimately be in the  
6 client's interest that this Court should decline to  
7 fashion a rule that makes the exercise of the remedy,  
8 which is again an extreme remedy that advantages the  
9 defendant alone, exercisable at the option solely of the  
10 defendant.

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

21 JUSTICE STEVENS: May I ask this question  
22 about your reliance on pages 27 and 28? If you describe  
23 it as delays by the lawyers themselves, I understand  
24 your comment as being right on the nose. But I  
25 understood part of that to be talking about the

1 situation in which the defender general's office has not  
2 performed its duty with sufficient promptness. And  
3 would you not agree if there were a period, say, of 7 or  
4 8 months in which they just didn't get around to  
5 appointing a lawyer, that that should be charged against  
6 the State?

7 MS. KRUGER: We would agree, Justice  
8 Stevens. And in this case there were a period of a  
9 total of about 6 months during which the Respondent was  
10 not represented at all, and we think in view of the  
11 State's ultimate responsibility for providing counsel to  
12 indigent defendants, when the State doesn't comply in a  
13 timely fashion with that duty, that delay is properly  
14 attributable to the State.

15 Although in this case, because the delay was  
16 not the product of a deliberate effort to hamper the  
17 defense, we think that that period should weigh only  
18 lightly against the State; and ultimately, given the  
19 other factors at issue in this case, the absence of any  
20 actual trial prejudice in particular, we think that  
21 ultimately those 6 months are insufficient to establish  
22 a speedy-trial violation.

23 JUSTICE STEVENS: But isn't the prejudice  
24 factor pretty much established as long as the guy has to  
25 stay in jail during this entire period?

1           MS. KRUGER: I think that that's certainly  
2 one form of prejudice, but in the Barker balancing -- in  
3 Barker itself, for example, the defendant was  
4 incarcerated for 10 months during the pretrial  
5 proceedings, and the Court nevertheless found that there  
6 was no speedy-trial violation.

7           We think a similar principle applies in this  
8 case. Although incarceration is obviously prejudicial  
9 to defendants, in this case there was no prejudice above  
10 and beyond that. The Vermont Supreme Court was clear in  
11 finding the absence of --

12           JUSTICE GINSBURG: Did he get -- did he get  
13 credit against the sentence for the time for the  
14 pretrial incarceration?

15           MS. KRUGER: I am not aware that he did, but  
16 this Court made clear in Strunk that getting credit for  
17 time served is not an appropriate remedy for a speedy-  
18 trial violation, that the only possible remedy is again  
19 what the Vermont Supreme Court did, erroneously in our  
20 view, which is to dismiss the charges without  
21 possibility of reindictment.

22           JUSTICE SCALIA: What would you think of a  
23 rule that said where most of the delay is attributable  
24 to the defendant, he doesn't -- he doesn't walk? That  
25 seems like a reasonable rule. Whatever the delay is, if

1 most of it is attributable to the defendant himself, it  
2 -- it is not a basis for dismissing the indictment?

3 MS. KRUGER: We think that a defendant -- we  
4 think that that rule would make a great deal of sense,  
5 that a defendant can't --

6 JUSTICE SCALIA: That would make it easy to  
7 decide this case because the -- the supreme court's  
8 opinion acknowledges that most of the -- most of the  
9 delay was caused by the defendant.

10 MS. KRUGER: Well, the Vermont Supreme Court  
11 thought that some of the delay was caused by the  
12 defendant and didn't charge most of that period to the  
13 State to support its finding of the speedy-trial  
14 violation.

15 JUSTICE STEVENS: Would you really buy that  
16 rule if there were, say, 4 years of delay and 2 years  
17 and 1 month was attributable to the defendant and 2  
18 years to the State?

19 MS. KRUGER: We would think that a court  
20 evaluating a speedy-trial claim in that case would  
21 properly exclude any period that was attributable to the  
22 defendant and focus specifically on that period that was  
23 attributable to the State in determining whether or not  
24 the right was violated.

25 CHIEF JUSTICE ROBERTS: Counsel, I'm sure

1 you've gone through the record and, agreeing with  
2 Justice Stevens that the periods where there wasn't a  
3 contract, the State couldn't provide somebody, do count  
4 against the State, but disagreeing with the Vermont  
5 Supreme Court that when an assigned counsel fails to  
6 move the case forward, that is attributable to the State  
7 and not the defendant, what's the difference in time?

8 MS. KRUGER: The difference in time is -- I  
9 think that the -- as the case comes to the Court, the  
10 final 11 months of the pretrial delay is not seriously  
11 in dispute. I think that Respondent has raised a number  
12 of arguments about concurrent causes of delay unrelated  
13 to the performance of his counsel. I think that those  
14 arguments are not properly before the Court because they  
15 fall well outside the scope of the question as to which  
16 this Court granted review and because they were neither  
17 pressed nor passed on below.

18 I think that leaves the middle 14 months of  
19 the pretrial delay. And I think, given the Vermont  
20 concession of the Vermont Supreme Court, the focus  
21 naturally rests on the 5.5-month period during which  
22 Paul Donaldson represented Respondent. And we think,  
23 with respect -- if I might finish.

24 CHIEF JUSTICE ROBERTS: Yes?

25 MS. KRUGER: We think with respect to that

1 period, we think that there is no basis for shifting the  
2 responsibility for that delay that Paul Donaldson sought  
3 before going to trial from defendant to the State  
4 because, as Justice Scalia has rightly pointed out, any  
5 contract expiration didn't in and of itself end the  
6 attorney-client relationship, and Paul Donaldson  
7 remained the agent and advocate of his client during  
8 that period.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Nelson.

11 ORAL ARGUMENT OF WILLIAM A. NELSON

12 ON BEHALF OF THE RESPONDENT

13 MR. NELSON: Mr. Chief Justice, and may it  
14 please the Court:

15 I apologize for jumping the gun.

16 CHIEF JUSTICE ROBERTS: Sorry to delay you.

17 JUSTICE SCALIA: But it's not going to get  
18 you off.

19 (Laughter.)

20 MR. NELSON: I'd like to respond to the --  
21 to Vermont's argument about there being no detailed  
22 record about why these attorneys left when they left.  
23 And I think if they're right, then that augurs a remand,  
24 that suggests a remand. But the reason there was no  
25 record of those departures is because the courts who

1 presided over those departures never requested an  
2 explanation.

3           With Paul Donaldson, the matter was a  
4 foregone conclusion. He had no contract. He was going  
5 into another line of work. So be it. He's out of  
6 there. No questioning concerning Mr. Brillon's  
7 complaints about his inaction, his failure to  
8 investigate, and so forth; nothing about are you ready  
9 to go to trial, what have you done, what have you  
10 accomplished, what are you passing on, if anything, to  
11 the next lawyer in line, none of that.

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

24           CHIEF JUSTICE ROBERTS: Do you think as a --  
25 what is the distinction in your theory of the case

1 between delay -- failure to move a case -- what did --  
2 what did the Vermont case say? Failure to do anything  
3 to move the case forward. When do we know that that's  
4 attributable to the defendant, and when is it  
5 attributable to the State?

6 MR. NELSON: I think it -- I think it  
7 depends on the facts, and I think in each of the -- in  
8 the case of each of these two attorneys, the facts are  
9 different. With Donaldson, I think the State's  
10 responsibility -- the State's involvement in a do-  
11 nothing attorney, an attorney who is really a nominal  
12 attorney, started from the beginning, started from the  
13 appointment of -- of counsel who had been on contract  
14 with the -- the State to perform defense services and  
15 was appointed --

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

19 MR. NELSON: Well, it might mature into an  
20 ineffective-assistance claim, but there couldn't be an  
21 ineffective-assistance claim on the record here because,  
22 well, ineffective assistance is -- is something that  
23 occurs at a trial. And it can't be --

24 JUSTICE GINSBURG: There's an anomaly,  
25 though, isn't there, that -- you said it might have

1 matured into ineffective assistance. It wasn't yet, but  
2 if attorneys 4 and 5, Donaldson and Sleigh -- if the  
3 case were for ineffective assistance of counsel, then  
4 the defendant would get a new trial, but here the result  
5 is he walks.

6 MR. NELSON: That's a consequence of -- of  
7 the Speedy Trial Clause and Barker and Strunk. A  
8 speedy-trial violation happens, by definition, before  
9 trial. Ineffective assistance happens, by definition  
10 and by this Court's decisions, at trial and can't be  
11 determined until after trial. Unless there is -- is a  
12 speedy-trial right and unless it's going to be enforced,  
13 this is the consequence. And that's - that's not --

14 CHIEF JUSTICE ROBERTS: In the abstract, you  
15 have a lawyer who is a public defender or hired as a  
16 public defender, and he keeps asking for continuances --  
17 continuance, continuance. How do we tell that that's  
18 the State's problem as opposed to what the defendant is  
19 doing through his lawyer?

20 MR. NELSON: I think at first you would have  
21 to assume that the continuances were sought in good  
22 faith and -- and for purposes of defense preparation.  
23 If the defendant had demanded a speedy trial, as this  
24 defendant had an early date, I think a court looking at  
25 -- at a continuance motion would have to look at it in

1 that light.

2 JUSTICE ALITO: Well, what is the trial  
3 judge supposed to do? The defense attorney keeps asking  
4 for continuances for purposes of investigation. I need  
5 more time to investigate.

6 MR. NELSON: If -- in -- in --

7 JUSTICE ALITO: Can a court say: You need  
8 to tell me exactly what you are doing?

9 MR. NELSON: I think, Justice Alito, that a  
10 court -- when the defendant has demanded a speedy trial,  
11 that a court does have some obligation to -- to  
12 supervise, to monitor, to -- and -- and it happens all  
13 the time in criminal courts. What have you done? Have  
14 you seen your client? What -- how much time do you need  
15 for these motions? When are you going to be ready for  
16 trial? That happens all the time.

17 And as - but as time goes by, as the months  
18 pass and -- and become years, I think a court's granting  
19 of continuances has to be more grudging. The courts are  
20 under a duty because they have a duty to assure the  
21 speedy-trial right. Because they are the -- they are  
22 the primary actors in that, the court has a duty to  
23 be --

24 JUSTICE ALITO: Aren't you giving the  
25 defense attorney a very perverse incentive there? Delay

1 may help the ultimate outcome of the case, and if the --  
2 if the defense attorney can engineer enough delay, he or  
3 she may also produce a speedy-trial violation.

4 MR. NELSON: Well, I -- yes, of course,  
5 that's a -- that's a problem, and it's a problem that  
6 was recognized by Barker, and -- and it's a problem that  
7 -- that courts are well equipped to handle. They --  
8 courts are able to and commonly do. In fact, it's their  
9 pretrial business -- main pretrial business to -- to set  
10 that line to make sure lawyers adhere to them, make sure  
11 that the case goes to trial. The courts are well  
12 equipped to deal with that.

13 But I -- I would like to point out that your  
14 hypothetical is not this case, that we are not dealing  
15 here with delays that were caused by continuance  
16 motions. In fact, if you look closely at the record,  
17 trial dates were not pushed back by continuance motions  
18 in this case. Trial dates were pushed back by attorney  
19 inaction and withdrawals.

20 JUSTICE ALITO: And by your client firing  
21 the first attorney. Correct?

22 MR. NELSON: My client -- that's correct.

23 JUSTICE ALITO: He threatened a third  
24 attorney.

25 MR. NELSON: My client fired -- fired the

1 first attorney, which -- which the -- the State says was  
2 a bad act. But -- but look at the record of that  
3 firing. It wasn't really a firing, of course. He had  
4 no right to fire assigned counsel. But he had just  
5 heard his lawyer telling the judge, I'm handling 150-odd  
6 cases, I cannot be ready for trial, give me more time.  
7 I -- I could be ready maybe in March or April, but I  
8 can't be ready now. And that was like 3 or 4 days  
9 before trial.

10 And I would submit that any client, hearing  
11 his lawyer making those representations to a judge,  
12 would have been very upset and would, in fact, have  
13 wanted another lawyer.

14 JUSTICE GINSBURG: But knowing that the --  
15 the new lawyer would have to start from scratch, from  
16 the beginning, so it was going to take more time, if he  
17 got a new lawyer, it was going to take more time than if  
18 he stayed with the lawyer who was already acquainted  
19 with the case but just needed a few more weeks.

20 MR. NELSON: Well, yes, but the lawyer who  
21 had been appointed wasn't going to get those few more  
22 weeks, and as Mr. Brillon said to the court, I'd rather  
23 do it right the first time. Being charged with a life  
24 imprisonment offense, one can hardly blame him. Yes,  
25 there was -- he had -- he had to make a tradeoff, but he

1 had to do it because his lawyer was not ready.

2 Now, we argued in the Vermont Supreme Court  
3 that that time should not --

4 JUSTICE SCALIA: Excuse me, is -- is that  
5 the proper remedy? I mean, it seems to me he should  
6 appeal to the judge and say, look, this lawyer - you  
7 know -- is -- is that the way you solve the problem of  
8 -- of an attorney who is not ready? Simply fire him so  
9 you can get another attorney? That seems to me very  
10 strange.

11 MR. NELSON: Counsel. Counsel moved for --  
12 moved for a continuance on February 22nd.

13 JUSTICE SCALIA: Right.

14 MR. NELSON: And --

15 JUSTICE SCALIA: And from what you told me,  
16 it should have been given. Right?

17 MR. NELSON: Pardon me?

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

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

25 JUSTICE GINSBURG: Well, wasn't there a

1 concern about this defendant trying avoid a particular  
2 judge, that that's why he wanted the continuance?

3 MR. NELSON: The -- the State made that  
4 allegation, and it made that claim here. No court has  
5 found it. The Vermont Supreme Court found the opposite.  
6 The Vermont Supreme Court held that Brillon fired or  
7 asked for the dismissal of his first lawyer because he  
8 was not prepared to go to trial, which seems like an  
9 ample, sufficient and supported reason for the action he  
10 took. That explains the case.

11 JUSTICE GINSBURG: How does the Vermont  
12 Supreme Court make that finding? It does not hear the  
13 witnesses. It -- it has a record before it. I can  
14 understand if you're talking about a finding made by the  
15 court of first instance, but the -- the Vermont Supreme  
16 Court is reviewing a record, it's not making findings.

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

21 It would require the court, the fact finder,  
22 to interpolate various happenings that are not of  
23 record, and that we say never happened. It would  
24 require us to assume that Brillon told Ammons, I want  
25 you to move for a continuance on whatever grounds you

1 can think of, but the real reason is to get rid of the  
2 judge. And that Ammons would do that for his client,  
3 and, you know, for the ostensible reason that he  
4 presented to the court, namely, he was overloaded and  
5 not prepared to go to trial, his secret reason was to  
6 get rid of the judge. And I think the record doesn't  
7 warrant that kind of inference, especially since it's  
8 been presented to and not accepted by the -- the State  
9 courts.

10 CHIEF JUSTICE ROBERTS: This is not an  
11 unusual reason for criminal defense lawyers in the  
12 private sector to ask for a continuance. It's quite  
13 common for the lawyers to go before the judge and say,  
14 look, I've got this other case going to trial next week,  
15 I've got this and this, can I get more time, and judges  
16 give them the first two but not the third. And why in a  
17 case simply where you're dealing with a public defender  
18 do you presume the opposite and blame the State for  
19 what's a quite common practice in the private bar?

20 MR. NELSON: Mr. Chief Justice, I -- I'm  
21 only saying that this -- on this record, the conclusion  
22 that that's what was happening, which would be  
23 significant if the court were then to say, and  
24 therefore, it was done by the defendant who wanted delay  
25 despite what he said, and therefore, this is time

1 considered waived under Barker. There is no basis for  
2 -- for that finding.

3 CHIEF JUSTICE ROBERTS: My point is, I  
4 guess, how do we tell? I mean, if this is normal -- I  
5 think it is normal. I think it's quite unusual for a  
6 defense lawyer to be prepared to go to trial the first  
7 time the trial date is set. If it is normal, how do we  
8 tell?

9 MR. NELSON: Well, actually, this wasn't the  
10 first -- the first request for a continuance. Ammons  
11 had moved for a continuance before, and it had been  
12 denied.

13 CHIEF JUSTICE ROBERTS: Yes, but -- again, I  
14 assume that's -- there are probably cases in the private  
15 bar where that's true as well.

16 MR. NELSON: How does one know? I think one  
17 -- I think what makes a major difference here is that  
18 Brillon had demanded a speedy trial. He had done so  
19 long before Ammons' motion for a continuance. He had  
20 done -- he did so almost every chance he got at almost  
21 every court hearing.

22 You could, and I think the State does,  
23 assume that this was all tomfoolery and an attempt to  
24 manipulate the court, but there is nothing in the record  
25 to suggest that. That was the debate between the

1 majority and the dissent at the State court. The  
2 majority won. As in Doggett, the -- the State is now  
3 coming back and trying to refight here an essentially  
4 factual issue which it lost in -- in the courts below.

5 JUSTICE BREYER: What about Donaldson and  
6 Moore, those two periods? Those two periods, the  
7 Donaldson period and the Moore period, seem, as far as I  
8 can tell, which isn't that far -- they seem to be  
9 periods when the State -- when the court below was  
10 saying that all that happened here was that the lawyers  
11 who were appointed, did a very bad job.

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

15 Now -- now, why should that be accounted  
16 against the stayer? Is Moore special? Was there really  
17 a problem of prosecutorial behavior? Is Donaldson the  
18 same as Sleigh? I don't know.

19 MR. NELSON: Let me start --

20 JUSTICE BREYER: Is Donaldson a case where  
21 they -- it's equivalent to having no lawyer? I don't  
22 quite know how to deal with it.

23 MR. NELSON: Let me start with Donaldson,  
24 and I think in answer to your question, I don't think  
25 Donaldson is substantially different from Sleigh. I

1 won't go over again the circumstances of Donaldson's  
2 appointment, but once he was appointed, he began  
3 conversations with the defender general about getting  
4 off the case. And I think the sense -- and -- and a  
5 significant fact about those conversations is that the  
6 defender general told Donaldson he was going to be  
7 replaced.

8           We don't know exactly when that happened,  
9 but he told him he was going to be replaced with someone  
10 who was more competent, more qualified to deal with a  
11 life imprisonment case. So this is not information  
12 which will light a fire under a lawyer to prepare a  
13 case, that he knows he's not going to try.

14           Donaldson then asks for time. It's the only  
15 request he ever made of the court. The court gave him  
16 time and set filing deadlines, and he missed them.  
17 Missing those deadlines should have been a red flag to  
18 the court in a case that was already over a year old.  
19 The court let those deadlines pass without a word.

20           The court also said, we're going to try this  
21 case in October. Get ready for trial in October.  
22 Everything should be filed by September 23rd. And for a  
23 reason, which the record has no explanation for, the  
24 October trial never happened. Donaldson was still on  
25 the case, his name was still on the case, and the

1 October trial date passed without a murmur. It was not  
2 until late November that Donaldson came to the court and  
3 explained the situation.

4 Now the -- I think the defender general  
5 failed in his responsibility with regard to Donaldson.  
6 That's State involvement. The court failed in not  
7 noticing the -- the missed deadlines and in allowing the  
8 trial date to pass without a trial; and I think the  
9 court also failed in its duty in allowing Donaldson off  
10 the case, which rendered any catch-up time that he had  
11 to do pointless, without any inquiry at all. The court,  
12 it's clear from the record, deferred entirely to the  
13 defender general, and so I think the Vermont court on  
14 that record thought that there was enough State  
15 involvement here to charge -- to find the State  
16 responsible and to weigh some of that responsibility  
17 against the State. The court --

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

22 MR. NELSON: It does nothing to Polk County,  
23 and we acknowledge that -- that Paul Donaldson's  
24 inaction by itself, if it had nothing to do with the  
25 State, if the State did not involve itself or condone --

1 if the State had no responsibility with regard to that  
2 time, the State would have no responsibility under  
3 Barker. That's perfectly clear, and I don't think that  
4 the Vermont Supreme Court's opinion, fairly read, says  
5 anything other than that. The Vermont --

6 CHIEF JUSTICE ROBERTS: Well, I guess fairly  
7 read, it does say the failure of several assigned  
8 counsel to do anything to move the case forward is  
9 attributable to the State, because they didn't do  
10 anything I guess is the touchstone.

11 MR. NELSON: Well, I think I have two  
12 responses to that. One is that in the context of the  
13 rest of the opinion, what the court was talking about  
14 was a breakdown of the system, and the focus was on two  
15 actors, both State actors, the assigning agency, the  
16 defender general, and the court and I don't think  
17 there's any dispute that both of those are indeed State  
18 actors, and that delays which can be traced to them,  
19 which they have a hand in, can be weighed against the  
20 State under Barker.

21 JUSTICE SCALIA: Well, but it doesn't say  
22 that. It really does say most of the delay was caused  
23 by the inability or unwillingness of assigned counsel,  
24 not of the -- of the institution that appoints them,  
25 unwillingness or inability of assigned counsel to move

1 the case forward. I mean, that looks to me like --

2 MR. NELSON: I think elsewhere in the  
3 opinion, Justice Scalia, I think the court is clear that  
4 -- that they were faulting the defender general and, to  
5 a lesser extent, the court. I think we are putting more  
6 stress on the court's nonfeasance than the Vermont  
7 Supreme Court did, but in fact, the time adds up to the  
8 same. The time -- we're talking 14 months from  
9 Donaldson's assignment until Moore's assignment in  
10 August --

11 CHIEF JUSTICE ROBERTS: Do you agree -- just  
12 following up --

13 MR. NELSON: -- of '03.

14 CHIEF JUSTICE ROBERTS: I'm sorry. Just  
15 following up on your latest answer, do you agree that it  
16 has to be a systemic problem? I mean, you gave us that  
17 -- the situation where the lawyer said I've got 150  
18 cases, I need a -- need a continuance.

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

23 MR. NELSON: Well --

24 CHIEF JUSTICE ROBERTS: Is that still  
25 attributable to the State?

1           MR. NELSON: I don't think -- I don't think  
2 the result depends on there being a systemic problem. I  
3 think in this case there was a systemic problem, and the  
4 court knows about that from the findings of the indigent  
5 defense task force, which --

6           JUSTICE KENNEDY: But the Chief Justice's  
7 question -- I'm interested in it as well -- is, are  
8 there instances in which a State-appointed counsel can  
9 delay and have that not attributed to the State? Is it  
10 always attributed to the State --

11          MR. NELSON: No.

12          JUSTICE KENNEDY: -- just because he's  
13 State-appointed?

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

16          JUSTICE KENNEDY: He's at fault. There is a  
17 delay, but it's not attributable to the State.

18          MR. NELSON: It's not attributable to the  
19 State, it's attributable to counsel. And just as --  
20 just the same as for private counsel. We're not  
21 proposing a two-tiered system here.

22          CHIEF JUSTICE ROBERTS: Well, when is that?  
23 The -- you have the same situation. The defense counsel  
24 appointed by the State does nothing to move the case  
25 forward, that's the -- as I understand it the Vermont

1 Supreme Court touchstone. When is that attributable to  
2 the State and when is it not?

3 MR. NELSON: It would not be attributable to  
4 the State if the assigning agency was not -- had no  
5 fault, had no supervising duty that it failed to  
6 perform, that the lawyer was essentially on his own or  
7 her own. And it would also assume, I think, if the  
8 delay went on long enough, that there was no fault in  
9 the court in failing to --

10 CHIEF JUSTICE ROBERTS: So it sounds --

11 MR. NELSON: -- to notice that nothing was  
12 happening.

13 CHIEF JUSTICE ROBERTS: It does sound to me,  
14 then, that you're saying there has to be some systemic  
15 problem, that the rule that I understand the Vermont  
16 Supreme Court to have adopted, that when assigned  
17 counsel does nothing to move the case forward, that  
18 that's attributable to the State, you would disagree  
19 with. You would say, no, there has to be a systemic  
20 problem, not the -- not just the individual lawyer, but  
21 they're not assigning enough defenders, they're not  
22 supervising them, whatever.

23 MR. NELSON: Maybe I'm not using the word  
24 "systemic" in the same sense that you are. All I would  
25 say is it doesn't have to happen to a lot of people, it

1 could happen to just one person, but it would only  
2 happen to that one person if a public State agency was  
3 responsible for the delay.

4 JUSTICE ALITO: What if you have a situation  
5 in which the -- an attorney is appointed, the defendant  
6 threatens that attorney, the attorney withdraws. A  
7 second attorney is appointed, the defendant threatens  
8 that attorney, the attorney withdraws. And then  
9 thereafter, a new attorney is appointed, and there is  
10 great delay. Maybe more -- two or three attorneys are  
11 appointed. There is great delay. Is -- does the --  
12 does the chain of events that started all this get taken  
13 into account, or you just start counting the time from  
14 the appointment of the last attorney who wasn't  
15 threatened?

16 MR. NELSON: I think you can't ignore what  
17 happened before, but you can -- but -- but if what  
18 you're saying or suggesting is that earlier bad actions  
19 result in a forfeiture of speedy-trial rights, I would  
20 disagree. The way you -- the way it matters is that by  
21 firing, threatening, unjustifiably getting rid of a --  
22 of a lawyer, you require the next lawyer to spend some  
23 time getting up to speed on the case. And that time --

24 JUSTICE ALITO: But what if it's a small --  
25 I don't know how many attorneys are available for

1 appointment in Bennington. What if it's a small  
2 jurisdiction where there aren't that many who are  
3 available to be appointed? And so you fire the public  
4 defender, you threaten the first appointed counsel, and  
5 pretty soon you don't have very many left, or the ones  
6 that you have left are busy with other cases and delay  
7 results.

8 MR. NELSON: But that's not the case here,  
9 and my -- I think my answer to your question is that  
10 what makes this a State -- a failure of responsibility  
11 is that the State had the ability to do something about  
12 it. If the State's hands are tied, if they run out of  
13 legal talent, if there's no other way to get counsel on  
14 the case than by a broken-down contract system, which  
15 was not the case --

16 JUSTICE GINSBURG: What about the point that  
17 Ms. Rainville made? And she talked about this balancing  
18 that comes out of Barker, and she said you have to weigh  
19 against the defendant very heavily, the episodes with  
20 lawyer number 1 and number 3, because that was really  
21 bad stuff. The State is perhaps responsible for some of  
22 the other delays, but she called those neutral in the  
23 weighing process. Don't those two episodes -- counsel  
24 number 1 was fired, counsel number 3, who said his life  
25 was threatened by the defendant -- don't those have to

1 count very heavily against the defendant?

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

13 So I think the effect of what went on with  
14 Jerry Altieri, which I think was not much more than two  
15 months of the total time that he was on board -- I think  
16 the effect of that is to subtract that period, and then  
17 any catch-up period that his firing or his dismissal  
18 required, subtract that period as well from the total,  
19 and weigh the rest more or less heavily or perhaps not  
20 at all against the State.

21 JUSTICE GINSBURG: Well, the rest, I  
22 couldn't find in his final counsel's representation -- I  
23 didn't see anything in her representation that would  
24 suggest any lack of diligence on her part or any reason  
25 to count that in the speedy-trial calculus. That --

1 what is it? From August 2003 to June 2004?

2 MR. NELSON: To June 2004. That's correct.

3 I -- I think that the opinion is not clear as to how  
4 much responsibility the Vermont court attributed to the  
5 State for that period. Vermont says they charged every  
6 second of the -- of that time to the State, and it's  
7 quite clear from the opinion that they didn't. They  
8 said that most of the remaining 2 years, as of  
9 Donaldson's appointment in June of '02, was attributable  
10 to the State. It's not clear how much of that time or  
11 if they actually counted it. I think that any precise  
12 calculation of that time period is impossible.

13 We argue, and the record supports, that much  
14 of that time had to do with Ms. Moore getting files  
15 together not only from predecessor counsel, but from the  
16 State, and that the State delayed for many months in  
17 providing an updated witness list with current  
18 addresses. She needed that to interview the witnesses.  
19 The case was old, and she needed the State's help.  
20 There was other discovery material which the record  
21 shows -- it's not in the joint appendix, but it is in  
22 the printed case, which was essentially the Vermont  
23 Supreme Court's equivalent of an appendix. These  
24 materials were at issue for Moore. She needed them.  
25 The prosecutor was dilatory in providing them. And I

1 think that that's a kind of vanilla reason to attribute  
2 some of that time to the State.

3 JUSTICE STEVENS: Mr. Nelson --

4 MR. NELSON: The court was also --

5 JUSTICE STEVENS: -- what is your judgment  
6 on how much time all together was attributable to the  
7 State?

8 MR. NELSON: I think -- I think the Vermont  
9 court was clear about the 14 months from Donaldson  
10 through Moore, including the 6 months of no counsel. It  
11 adds up to 14 months. And then the rest of the time I  
12 don't think you can put a number on.

13 Maybe it's not time that we're trying to add  
14 up, but responsibility. And what the State -- what the  
15 State court was saying was when a case is as old as this  
16 one was when Moore took it over, the court should be  
17 very vigilant and grudging in its grants of  
18 continuances, and the case could have been tried sooner  
19 than in 8 months.

20 CHIEF JUSTICE ROBERTS: So your -- your 14  
21 months, just so I understand, that includes the August  
22 2003 through June 2004, when Moore was representing him?

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

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
3 Nelson.

4 Ms. Rainville, you have a minute remaining.

5 REBUTTAL ARGUMENT OF CHRISTINA RAINVILLE

6 ON BEHALF OF THE PETITIONER

7 MS. RAINVILLE: Very quickly then, Justice  
8 Ginsburg, the answer to your question, he did receive  
9 credit for his time served.

10 The important distinction that the questions  
11 raised show -- what's so fundamentally wrong about this  
12 case, is the distinction between Strickland. There you  
13 asked the lawyers what they did. They're given  
14 deference. They're given the right to defend  
15 themselves. And if you prove that it would have had an  
16 effect on the outcome of the case, the defendant gets a  
17 new trial. Here, the lawyers are never asked, no  
18 presumption is given, and the defendant is allowed to  
19 walk free for the rest of his life. It's fundamentally  
20 wrong.

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

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

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

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| <b>weren't</b> 40:12    | 11:18 13:16,21          | <b>23rd</b> 41:22       |                        |
| <b>We'll</b> 19:23      | 13:22 41:18             | <b>27</b> 20:7 24:22    |                        |
| <b>we're</b> 13:19      | <b>years</b> 6:7 11:10  | <b>28</b> 20:7 24:22    |                        |
| 16:23 41:20             | 11:12 13:11             | <b>29</b> 2:9           |                        |
| 44:8 45:20              | 20:11 22:9              |                         |                        |
| 51:13                   |                         |                         |                        |