SUPREME COURT OF THE UNITED STATES

No. 08–88

VERMONT, PETITIONER *v.* MICHAEL BRILLON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

[March 9, 2009]

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

We granted certiorari in this case to decide whether delays caused "solely" by a public defender can be "charged against the State pursuant to the test in *Barker* v. *Wingo*, 407 U. S. 514 (1972)." Pet. for Cert. i, ¶1. The case, in my view, does not squarely present that question, for the Vermont Supreme Court, when it found Michael Brillon's trial unconstitutionally delayed, did not count such delays against the State. The court's opinion for the most part makes that fact clear; at worst some passages are ambiguous. Given these circumstances, I would dismiss the writ of certiorari as improvidently granted.

I

The relevant time period consists of slightly less than three years, stretching from July 2001, when Brillon was indicted, until mid-June 2004, when he was convicted and sentenced. In light of Brillon's improper behavior, see *ante*, at 3–4, the Vermont Supreme Court did not count months 1 through 12 (mid-July 2001 through mid-June 2002) against the State. Noting the objection that Brillon had sought to "intentionally sabotag[e] the criminal proceedings against him," the Vermont Supreme Court was explicit that this time period "do[es] not count . . . against the [S]tate." 955 A. 2d 1108, 1120 (2008).

The Vermont Supreme Court did count months 13 through 17 (mid-June 2002 through November 2002) against the State. It did so under circumstances where (1) Brillon's counsel, Paul Donaldson, revealed that his contract with the defender general's office had expired in June 2002—shortly after (perhaps before!) he took over as Brillon's counsel, App. 232–233, (2) he stated that this case was "basically the beginning of [his] departure from the contract," *ibid.,* and (3) he made no filings, missed several deadlines, did "little or nothing" to "move the case forward," and made only one brief appearance at a status conference in mid-August. 955 A. 2d, at 1121. I believe it fairer to characterize this period, not as a period in which "assigned counsel" failed to move the case forward, *ante*, at 1, but as a period in which Brillon, in practice, *had no assigned counsel*. And, given that the State conceded its responsibility for delays caused by another defender who resigned for "contractual reasons," see *infra* at 3, it is hardly unreasonable that the Vermont Supreme Court counted this period of delay against the State.

The Vermont Supreme Court also counted months 18 through 25 (the end of November 2002 through July 2003) against the State. It did so because the State conceded in its brief that this period of delay "*cannot be attributed to the defendant*." App. 78 (emphasis added). This concession is not surprising in light of the fact that during much of this period, Brillon was represented by David Sleigh, a contract attorney, who during the course of his representation filed nothing on Brillon's behalf except a single motion seeking to extend discovery. The record reflects no other actions by Sleigh other than a letter sent to Brillon informing him that "[a]s a result of modifications to our firm's contract with the Defender General, we will not be representing you in your pending case." *Id.*, at 158. Brillon was left without counsel for a period of nearly six months. The State explained in conceding its responsibil-

ity for this delay that Sleigh had been forced to withdraw "for contractual reasons," and that the defender general's office had been unable to replace him "for funding reasons." *Id.*, at 78.

Finally, the Vermont Supreme Court counted against the State the last 11 months—from August 2003 to mid-June 2004. But it is impossible to conclude from the opinion whether it did so because it held the State responsible for the defender's failure to "move the case forward," or for other reasons having nothing to do with counsel, namely the judge's unavailability, see *id.*, at 138, or the fact that "the [case] files were incomplete" and "additional documents were needed from the State," 955 A. 2d, at 1120–1121. Treating the opinion as charging the State on the basis of the defender's conduct is made more difficult by the fact that Brillon did not argue below that Kathleen Moore, his defender during this period, caused any delays. Appellant's Reply Brief in No. 2005–167 (Vt.), 2007 WL 990004, *7.

II

In sum, I can find no convincing reason to believe the Vermont Supreme Court made the error of constitutional law that the majority attributes to it. Rather than read ambiguities in its opinion against it, thereby assuming the presence of the error the Court finds, I would dismiss the writ as improvidently granted. As a majority nonetheless wishes to decide the case, I would note that the Vermont Supreme Court has considerable authority to supervise the appointment of public defenders. See Vt. Stat. Ann., Tit. 13, §§5204, 5272 (1998); see also Vt. Rule Crim. Proc. 44 (2003). It consequently warrants leeway when it decides whether a particular failing is properly attributed to assigned counsel or instead to the failure of the defender general's office properly to assign counsel. *Ante*, at 11. I do not believe the Vermont Supreme Court exceeded that

leeway here. And I would affirm its decision.

With respect, I dissent.