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The Silence of Gideon's Trumpet: The Court's Inattention to Systemic Inequities Causing Violations of Speedy Trial Rights in *Vermont v. Brillon*, 129 S. Ct. 1283 (2009)

Jordan Glaser
University of Nebraska

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Note*

The Silence of Gideon’s Trumpet: The Court’s Inattention to Systemic Inequities Causing Violations of Speedy Trial Rights in *Vermont v. Brillon*, 129 S. Ct. 1283 (2009)

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I. INTRODUCTION

Assigned counsel has become a vital component of the American legal landscape largely due to the Supreme Court’s 1963 decision in

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* Jordan Glaser, Grinnell College, B.A., History, December 2005; University of Nebraska College of Law, J.D. expected, May 2011. Obviously, I would like to thank all the *Nebraska Law Review* editors, spaders, and others who provided input on this Note. You have all been prompt, helpful, and patient during this process. I’d also like to thank a friend, Dana Hrelac, who provided some nice insights before I submitted this Note to be considered for publication.

Gideon v. Wainwright.¹ The Supreme Court's decisions regarding Sixth Amendment rights and the indigent defendant's right to counsel created a legal backdrop in which the Court may be petitioned by indigent defendants who have had their constitutional rights substantially affected by the quality of their assigned counsel. Speedy trial rights, in particular, may be vitiated or vindicated based on the quality of assigned counsel and the systems put in place to assign and supervise attorneys who represent indigent defendants. *Vermont v. Brillon*² highlights the interplay between the Court's decisions regarding speedy trial rights and indigent defense.

In *Vermont v. Brillon*, the Supreme Court held that Michael Brillon's Sixth Amendment speedy trial rights had not been violated because the factors that caused his trial to be delayed for over three years were largely attributable to Brillon and his assigned counsel.³ The ruling reversed the Vermont Supreme Court's decision⁴ that the prolonged detention violated Brillon's speedy trial rights. Brillon was initially convicted at trial of domestic felony assault and sentenced to between twelve and twenty years in prison.⁵ The key issue on appeal was whether the periods of delay caused by his assigned counsel should be attributed to Brillon and his assigned counsel or to the State.⁶ The Vermont Supreme Court attributed much of the delay to the State of Vermont and ordered the charges against Brillon dismissed due to violation of his right to speedy trial.⁷

Upon review, the U.S. Supreme Court used a four-part balancing test, as first expressed in *Barker v. Wingo*,⁸ to structure its inquiry.⁹ The Supreme Court, finding its decision to be in line with historical precedent, made clear that it viewed assigned counsel as typically not being a state actor.¹⁰ Thus, delays caused by either the assigned counsel or the defendant will be attributed to the defendant in a speedy trial analysis.¹¹ *Brillon* presented an opportunity for the Court to evaluate the relationship between vitiating constitutional rights and the quality of assigned counsel. The Court briefly discussed a contrary rule, one in which assigned counsel and private counsel are treated differently for purposes of a speedy trial analysis,

1. 372 U.S. 335 (1963).

2. 129 S. Ct. 1283 (2009).

3. *Id.* at 1287.

4. State v. Brillon, 955 A.2d 1108 (Vt. 2008), *rev'd*, 129 S. Ct. 1283 (2009).

5. *Id.* at 1113.

6. *Brillon*, 129 S. Ct. at 1290.

7. *Brillon*, 955 A.2d at 1111 (concluding that the Defender General's Office is part of the criminal justice system and thus the ultimate responsibility of the State).

8. 407 U.S. 514 (1972).

9. See *Brillon*, 129 S. Ct. 1283.

10. *Id.* at 1287 (holding that both assigned and retained counsel act on behalf of their client).

11. *Id.* at 1290-91.

and concluded that it would lead to inequities in the legal system¹²—such as the granting of possibly greater constitutional protections to indigent defendants than to defendants who retain private counsel.¹³ Instead, the Court in *Brillon* concluded that all defendants, indigent or otherwise, are generally responsible for delays caused by assigned counsel, whether assigned or private.¹⁴

In reversing the Vermont Supreme Court, the Court wrote a relatively succinct decision, but the decision is significant because the Court discussed in some detail how periods of pre-trial delay should be attributed to either the state or the defendant. The Court's decision makes clear that indigent defendants must climb a large barrier in order to attribute their assigned counsel's action, or inaction, to the state. The Court's decision displays an approach to speedy trial rights that is not particularly consistent with its *Gideon* ruling. This discussion focuses on the tension between *Brillon* and *Gideon*, along with the possible future impact of the *Brillon* decision on other courts. In Part II, this Note examines the background of contemporary speedy trial rights analysis and the role of *Gideon* in granting indigent defendants the right to counsel. This Note also briefly discusses the liberty interests protected by Sixth Amendment speedy trial rights. Part III discusses the interplay between *Gideon* and *Brillon* and how the four-part *Barker* analysis can be applied in a way that alleviates some of the inherent tension between speedy trial rights analysis and evaluation of an indigent defendant's right to counsel.

Barker v. Wingo,¹⁵ *Gideon v. Wainwright*,¹⁶ and *Vermont v. Brillon*¹⁷ discuss principles and declarations of rights that can be used effectively in future cases. However, the foregoing cases and discussion demonstrate the need for a more responsive jurisprudence regarding speedy trial rights and the indigent defendant's right to counsel. As a step towards addressing these issues, this Note proposes that future Supreme Court decisions should acknowledge the effects indigent defense systems have on the quality of legal presentation provided to indigent defendants. By doing so, the Court will help realize the promise of *Gideon* and ensure the protection of constitutional rights for indigent defendants.¹⁸

12. *Id.* at 1292.

13. *Id.*

14. *Id.* at 1290–91.

15. 407 U.S. 514 (1972).

16. 372 U.S. 335 (1963).

17. 129 S. Ct. 1283 (2009).

18. *But see* Lewis LeNaire, Comment, *Vermont v. Brillon: Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219 (2010) (agreeing with the Court's resolution of the case but discussing the many unanswered questions left in its wake).

II. BACKGROUND

A. The Sixth Amendment: The Rights to Counsel and Speedy Trial*1. Gideon v. Wainwright*

*Gideon v. Wainwright*¹⁹ dealt not with speedy trial rights but with the question of whether the Constitution entitles indigent criminal defendants to state-provided legal representation.²⁰ The petitioner in the case, Clarence Earl Gideon,²¹ was charged with a felony under Florida law.²² During an exchange in state court, Gideon asked the judge to appoint him counsel since he could not afford to hire an attorney.²³ The judge rejected his request, forcing Gideon to conduct his own defense at trial.²⁴

Gideon conducted his own defense and, based on the record, performed relatively well.²⁵ Nevertheless, he was convicted and sentenced to five years in prison.²⁶ Gideon later filed a habeas corpus petition with the Florida Supreme Court, asserting that the trial court's failure to provide him with counsel violated his constitutional rights.²⁷ The Florida Supreme Court denied all relief without issuing an opinion.²⁸ Given that Gideon could not afford the normal costs of appellate litigation, the Supreme Court appointed counsel and granted certiorari.²⁹

The Court requested that both parties discuss a particular question on appeal: Should *Betts v. Brady*³⁰ be overturned?³¹ *Betts* involved a prisoner indicted for robbery who sought habeas relief on the basis that he had been unconstitutionally denied access to legal counsel.³² The *Betts* Court held that the Sixth Amendment's right to counsel generally applied only to federal courts and that the due process clause of the Fourteenth Amendment did not incorporate that right to

19. 372 U.S. at 335.

20. *Id.* at 345.

21. Gideon's story was famously told by Anthony Lewis in 1964. Not surprisingly, the book views Gideon's struggle and eventual legal victory triumphantly. For further information, see ANTHONY LEWIS, *GIDEON'S TRUMPET* (Notable Trials Library 1991) (1964).

22. *Gideon*, 372 U.S. at 337.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1962).

31. *Gideon*, 372 U.S. at 338.

32. *Betts*, 316 U.S. at 456–57.

the states.³³ The *Gideon* Court noted the similarities between the facts of the two cases, particularly that both involved prisoners seeking habeas relief due to the trial court declining to appoint them counsel upon request.³⁴

The Supreme Court, finding the guarantee of counsel to be fundamental and essential to a fair trial, rejected the conclusion in *Betts* that the Sixth Amendment's guarantee of counsel could not be incorporated against the states.³⁵ The Court noted, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."³⁶ In perfunctory fashion, the Court thus overruled *Betts* and unanimously concluded that the Sixth Amendment applies against the states to require the appointment of counsel to indigent defendants.³⁷

The Court's decision in *Gideon* did not finally determine the fate of Clarence Gideon. Instead, on remand he was to have a new trial with a new lawyer.³⁸ A local Florida attorney, Fred Turner, represented Gideon in this new action.³⁹ After brief deliberation, a jury found Gideon not guilty.⁴⁰ In the immediate aftermath, the *Gideon* decision and Gideon's subsequent legal vindication were hailed as a "moving drama" representative of a "compassionate society."⁴¹

2. *Barker v. Wingo*

*Barker v. Wingo*⁴² introduced a four-part balancing test used by courts when determining possible violations of a criminal defendant's speedy trial rights.⁴³ The petitioner in the case, Barker, had been arrested along with another suspect in Kentucky in 1958 on suspicion of brutally murdering an elderly couple.⁴⁴ The Commonwealth of Kentucky believed that convicting the other defendant, rather than Barker, would prove easier.⁴⁵ Thus, they sought to convict the alleged co-actor first and then have him testify against Barker.⁴⁶ These stra-

33. *Id.* at 473.

34. *Gideon*, 372 U.S. at 338–39.

35. *Id.* at 342–43.

36. *Id.* at 344–45 (quoting *Powell v. Alabama*, 287 U.S. 45 (1932)).

37. *Id.* at 339.

38. LEWIS, *supra* note 21, at 226.

39. *Id.*

40. *Id.* at 237. Gideon was reportedly asked if he felt like he had accomplished something. He replied, "Well I did." *Id.* at 238.

41. Thurman Arnold, *The Criminal Trial as a Symbol*, in *CRIMINAL JUSTICE IN OUR TIME* 161 (A.E. Dick Howard ed., 1965) (discussing the "tremendously important result of the moral values implicit" in *Gideon* and other cases).

42. 407 U.S. 514 (1972).

43. *Id.*

44. *Id.* at 516.

45. *Id.*

46. *Id.*

tegic decisions led the Commonwealth to seek—over the course of five years—sixteen continuances of Barker's trial.⁴⁷

The trial of the other defendant proved more difficult than the Commonwealth had anticipated, and only after six trials did the prosecution obtain a murder conviction that stood.⁴⁸ By that point, it was 1962, and Kentucky sought further continuances before a final trial date was set.⁴⁹ During his trial, which finally occurred on October 9, 1963, Barker sought to dismiss his indictment for violation of his Sixth Amendment right to speedy trial.⁵⁰ The trial court denied the motion, and Barker was convicted of murder and sentenced to life in prison.⁵¹

Barker's petition eventually found its way to the Supreme Court, which granted certiorari.⁵² In its opinion considering Barker's appeal on Sixth Amendment grounds, the Court noted that "[t]he amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived."⁵³ The Court briefly discussed and then dismissed the application of two bright-line tests for evaluating possible violations of these rights.⁵⁴ The first test would have resulted in dismissal if the state failed to meet mandatory time limits.⁵⁵ The second test would have limited consideration of the right to those who demand a speedy trial.⁵⁶ Having duly considered and dismissed the notion of a bright-line rule, the Court moved on to delineate a four-part test to be applied on an ad-hoc basis in any case involving an alleged violation of the Sixth Amendment's guarantee to a speedy trial.

The Court then laid out four factors that must be assessed when determining a possible violation of a defendant's speedy trial rights: (1) length of delay, (2) reason for the delay, (3) the defendant's asser-

47. *Id.*

48. *Id.* at 517.

49. *Id.* at 518.

50. *Id.* Motions to dismiss had been filed before that time but had not specified the speedy trial right violation. *Id.*

51. *Id.*

52. *Id.* at 519.

53. *Id.* at 522; *see also* *Flowers v. Conn. Corr. Inst.*, 853 F.2d 131, 134 (2d Cir. 1988) (acknowledging concerns with the criminal justice system in Connecticut but finding that a greater showing is necessary for the remedy of dismissal). *But see* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 96–102 (1997) (proposing a different system for remedying violations of speedy trial rights, one in which the victim would be able to bring a suit for compensatory damages and would be credited with time served). Amar argues there is no reason that dismissal with prejudice is the logical remedy for the violation of speedy trial rights. *Id.* The current remedy, he argues, provides too much to the guilty and too little to the innocent. *Id.*

54. *Barker*, 407 U.S. at 523–24.

55. *Id.* at 523.

56. *Id.* at 524.

tion or non-assertion of his right, and (4) prejudice to the defendant.⁵⁷ The Court applied these factors to the facts surrounding Barker's confinement and concluded that his speedy trial rights had not been violated.⁵⁸ In particular, the Court focused on the defendant's failure to assert his speedy trial rights for a period of over three years.⁵⁹ The Court, in dicta, speculated that he did not assert his speedy trial rights because he thought the alleged co-actor had a chance to be acquitted.⁶⁰

The Court's explanation of the second factor, reason for delay, is most salient to the discussion of *Vermont v. Brillon*. The Court explained that different decisional weights should be attributed to different reasons for delay.⁶¹ For example, if the prosecution deliberately attempts to delay the trial, such behavior should be heavily weighted against the government.⁶² However, negligence or overcrowded courts would weigh less heavily against the government, but the responsibility for those circumstances ultimately remains with the State.⁶³ Justice White's concurrence expressed this last idea in different terms:

But unreasonable delay in run of the mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system are limited and that each case must wait its turn. As the Court points out, this approach also subverts the State's own goals in seeking to enforce its criminal laws.⁶⁴

B. *Brillon* Facts and Holding

1. *Facts and Procedural History*

Michael Brillon was arrested for striking his girlfriend on July 27, 2001,⁶⁵ and the State charged him with felony domestic assault.⁶⁶ Brillon's first counsel, Richard Ammons, filed a motion to recuse the trial judge in October 2001.⁶⁷ The motion was denied, and trial was scheduled for February 2002.⁶⁸ Citing his heavy workload, Ammons later asked for another continuance, this one four days before jury

57. *Id.* at 530.

58. *Id.* at 536.

59. *Id.* at 534.

60. *Id.* at 535 (concluding that the defendant "definitely did not want to be tried").

61. *Id.* at 531.

62. *Id.*

63. *Id.*

64. *Id.* at 538 (White, J., concurring).

65. *Vermont v. Brillon*, 129 S. Ct. 1283, 1287 (2009).

66. *Id.*

67. *Id.* at 1287–88.

68. *Id.* at 1288.

draw.⁶⁹ Brillon thereafter fired Ammons, and three days later the trial court granted Ammons's motion to withdraw.⁷⁰

On the day that Ammons withdrew as Brillon's attorney, the court appointed new counsel, but he withdrew immediately because of a conflict.⁷¹ Brillon's third attorney, Gerard Altieri, was assigned on March 1, 2002. On May 20, 2002, Brillon filed a motion to dismiss Altieri.⁷² He cited various reasons, including failure to communicate and lack of diligence.⁷³ A hearing was held to discuss these issues on June 11, 2002.⁷⁴ Altieri denied many of Brillon's allegations and later moved to withdraw from representation because of Brillon's alleged threat on his life during a break in the hearing.⁷⁵ The trial court thus granted Brillon's motion to dismiss Altieri, but it warned him that he was only prolonging his time in jail.⁷⁶

On that same day, the trial court appointed Brillon's fourth attorney, Paul Donaldson.⁷⁷ Like Ammons, Donaldson requested additional time for discovery, citing his heavy caseload.⁷⁸ A few short weeks later, Brillon complained to the court of what he considered Donaldson's inattention to his case.⁷⁹ Two months later, Brillon filed a motion to dismiss Donaldson, making many of the same complaints he raised in regard to Altieri.⁸⁰ A hearing was held on November 26, at which Donaldson informed the court that his contract with the Defender General's office had expired in June.⁸¹ The trial court released Donaldson from his responsibilities.⁸²

Brillon was without counsel for two months in between Donaldson and Sleigh's subsequent representation.⁸³ David Sleigh, Brillon's fifth attorney, was assigned on January 15, 2003.⁸⁴ Sleigh sought time extensions on discovery motions during the month of February but then withdrew from the case on April 10 due to modifications to his firm's contract with the Defender General.⁸⁵ Over the next four months,

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1288–89.

81. *Id.* at 1289.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Brillon was not represented by counsel.⁸⁶ Then, the Defender General's Office informed the court that they had newly received funding and that Brillon would be appointed a special felony unit defender.⁸⁷

Kathleen Moore, Brillon's sixth attorney, began her representation of Brillon on August 1, 2003. On February 23, 2004, she filed a motion to dismiss for lack of speedy trial.⁸⁸ The motion was denied and the case proceeded to trial beginning on June 14, 2004.⁸⁹ Brillon was convicted and sentenced to between twelve and twenty years in prison.⁹⁰ The trial court denied a post-trial motion to dismiss on speedy trial grounds, finding that the delay in bringing Brillon's case to trial was largely his own fault.⁹¹ The Vermont Supreme Court reversed in a hotly contested 3–2 decision,⁹² holding that Brillon's constitutional right to a speedy trial had been violated.⁹³

The Supreme Court granted certiorari to address (1) whether delay caused solely by indigent defense counsel can be attributed to the State, and (2) whether the Court's decision in *Gideon* results in granting broader speedy trial rights to indigent defendants than to defendants who can retain private counsel.⁹⁴ The Court more extensively addressed the first question.⁹⁵

The Court ultimately held that the Vermont Supreme Court erred by charging much of the delay in the case to the State.⁹⁶ The Court also found that the Vermont Supreme Court failed to take into account Brillon's behavior during the first year of delay, in particular his behavior toward Altieri.⁹⁷ A defendant's deliberate attempt to disrupt the proceedings against him, the Court reasoned, should weigh heavily against the defendant.⁹⁸ The Court also found that, because the Vermont Supreme Court made no factual findings as to a systemic breakdown in the public defender system, the delay caused by Brillon's assigned counsel must be charged to the defendant.⁹⁹ Finally,

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* Brillon's alleged status as a habitual offender exposed him to the possibility of a life sentence. *Id.* at 1287.

91. *Id.* at 1289.

92. *See State v. Brillon*, 955 A.2d 1108, 1126 (Vt. 2008) (Burgess, J., dissenting) (arguing that the majority freed "a convicted woman beater and habitual offender" despite "no demonstrated prejudice"), *rev'd*, 129 S. Ct. 1283 (2009).

93. *Id.* at 1111 (majority opinion).

94. *See* Petition for Writ of Certiorari, *Brillon*, 129 S. Ct. 1283 (No. 08-88), 2008 WL 2794278.

95. *See Brillon*, 129 S. Ct. 1283.

96. *Id.* at 1291.

97. *Id.* at 1292.

98. *Id.*

99. *Id.* at 1292–93.

the Court summarily addressed the question of whether indigent defendants have broader speedy trial rights than defendants able to retain private counsel: “We see no justification for treating defendants’ speedy trial claims differently based on whether their counsel is privately retained or publicly assigned.”¹⁰⁰

2. *Majority Opinion*

In the majority opinion, Justice Ginsburg focused largely on the attribution of different periods of time to either the State or the defendant.¹⁰¹ The majority opinion broke down the period of time between Brillon’s arrest and his eventual trial, concluding that many of these time periods attributed to the State by the Vermont Supreme Court were largely attributable to the defendant.¹⁰² The Court acknowledged that the Defender General’s Office is a part of the criminal justice system of Vermont but found that the assigned attorneys acted on Michael Brillon’s behalf, and not for the State.¹⁰³ The Court devoted much of the latter part of the opinion to highlighting behaviors by Brillon that, according to the Court, substantially delayed the case and account for much of the time Brillon spent waiting for trial.¹⁰⁴

3. *Dissenting Opinion*

Justice Breyer filed a dissent, in which Justice Stevens joined.¹⁰⁵ The dissent argued that the writ of certiorari had been improperly granted because the question they were called upon to review was not at issue based on the facts of the case.¹⁰⁶ The dissent argued that the Vermont Supreme Court improperly attributed delays caused solely by defendant’s counsel to the defendant and not to the State.¹⁰⁷ The dissent noted that the Vermont Supreme Court’s opinion is, perhaps, marred by ambiguities that hinder the process of interpreting their conclusions.¹⁰⁸ The dissent concluded by reemphasizing that the writ was improperly granted but, in the alternative, said the majority should have upheld the Vermont Supreme Court’s opinion since that court “has considerable authority to supervise the appointment of public defenders.”¹⁰⁹

100. *Id.* at 1292.

101. *Id.* at 1288–89.

102. *Id.* at 1288, 1291–92.

103. *Id.* at 1291.

104. *Id.* at 1291–92 (discussing Brillon’s “strident, aggressive behavior” and its substantial role in causing the delays).

105. *Id.* at 1293 (Breyer, J., dissenting).

106. *Id.* See *supra* subsection II.B.1.

107. *Brillon*, 129 S. Ct. at 1293 (Breyer, J., dissenting).

108. *Id.* (“The court’s opinion for the most part makes that fact clear; at worst some passages are ambiguous.”).

109. *Id.* at 1294.

C. Interests Protected by the Right to Speedy Trial

The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹¹⁰

The speedy trial clause protects a number of liberty interests. The Court in *Barker* outlined three of the most important: (1) preventing oppressive pre-trial incarcerations, (2) minimizing the anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired.¹¹¹ The *Barker* Court found the last liberty interest to be the most important.¹¹² Additionally, defendants awaiting trial experience detrimental effects on their personal and professional lives, including a lack of activities in prison conducive to being a productive member of society.¹¹³

Akhil Amar explains that the true wrong in violating a person's speedy trial rights is not the trial itself, but the prolonged detention, which serves as a form of verbal assault on the character of the accused.¹¹⁴ As such, an overlong detention is an "unreasonable seizure of the person."¹¹⁵ Yet, Amar has been a notable critic of the conventional remedy for a violation of these rights: dismissal with prejudice.¹¹⁶ He argues forcefully that dismissal with prejudice aids the guilty, while offering little consolation to the innocent.¹¹⁷ As an alternative, he proposes sentencing offsets, injunctive relief, and post-release compensatory damages.¹¹⁸

110. U.S. CONST. amend. VI.

111. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

112. *Id.*

113. *Id.* See also LEWIS KATZ, ANALYSIS OF PRETRIAL DELAY IN FELONY CASES—A SUMMARY REPORT 1 (1972) (discussing the historical origins of the right to speedy trial, which date to the Magna Carta).

114. AMAR, *supra* note 53, at 104 ("But public accusation threatens more than a person's body; it also assaults his good name.").

115. *Id.*

116. *Id.* at 96–102; AMAR, *supra* note 53 and accompanying text; see also Louis M. Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281 (1998) (book review) (discussing the trend away from liberal criminal procedure ideals by otherwise liberal scholars such as Amar).

117. AMAR, *supra* note 53, at 96–102.

118. *Id.* Amar is one of the leading scholars on the Fourth, Fifth, and Sixth Amendments and should be read by all those seeking to further educate themselves about such issues. See also Carol Leboo & Laura Murray-Richards, *District of Columbia Court of Appeals Project on Criminal Procedure: X. Speedy Trial*, 26 HOW. L.J. 1137, 1167 (1983) ("The right will continue to be sparingly exercised in favor of defendants, particularly those found guilty, unless some means is found for remedying breaches of the right short of dismissing charges.").

One potential problem in protecting these liberty interests and rights is that, unlike other procedural rights, courts may find it difficult, if not impossible, to determine precisely when a violation of speedy trial rights has occurred.¹¹⁹ The inability of courts to use precise doctrines and focus on specific, defining events in determining whether speedy trial rights have been violated distinguishes these rights from their companion procedural rights in the Fourth, Fifth, and Sixth Amendments.¹²⁰ Thus, it is not difficult to comprehend the struggle courts have faced in defining and protecting the important liberty interests described by Amar and others.

III. ANALYSIS

In *Vermont v. Brillon*,¹²¹ the United States Supreme Court misconstrued the holding and limited factual findings of the Vermont Supreme Court by finding that it made an error of constitutional law in ordering Michael Brillon's convictions vacated and the charges against him dismissed due to violations of his constitutional right to a speedy trial.¹²² The lower court's record fairly treated those periods of delay which were solely attributable to the respondent's counsel as not chargeable to the State.¹²³ Accordingly, the lower court only charged to the State those periods of delay fairly attributable to the criminal justice system—over which the State exercises ultimate responsibility.¹²⁴ The Supreme Court's holding will result in a weakening of speedy trial rights for indigent defendants seeking relief under the Sixth Amendment. The decision also sends a confused message to state courts seeking to vindicate speedy trial rights for indigent defendants whose legal rights are affected by the negligence of the criminal justice system and their own assigned counsel. Furthermore, the Court ignored the realities of indigent defense in the United States¹²⁵

119. *Barker v. Wingo*, 407 U.S. 514, 521–22 (1972) (noting the difficulty in fixing a point in time when speedy trial rights must be exercised and in determining when these rights are in danger, thus necessitating a “functional analysis”).

120. *Id.*

121. 129 S. Ct. 1283 (2009).

122. *Id.*

123. *State v. Brillon*, 955 A.2d 1108, 1117–19 (Vt. 2008) (discussing various time periods in 2001 and 2002 not counted against the State but instead against the defendant), *rev'd*, 129 S. Ct. 1283 (2009). The, perhaps, poor craftsmanship of the Vermont Supreme Court's opinion does not indicate an inadequate effort to wade through the facts surrounding Brillon's pre-trial delays and attempt to appropriately charge time periods either to the defendant and his counsel or to the State.

124. *Id.* at 1122; *see also* 129 S. Ct. 1283, 1293 (2009) (Breyer, J., dissenting) (discussing the Vermont Supreme Court's holding and how ambiguities may have led to the majority's conclusion that delays caused solely by defense counsel were attributed to the State).

125. *See* KATZ, *supra* note 113, at 10 (recommending a time limit in the disposition of bringing cases to trial in order to realize speedy trial rights); Robert L. Spangen-

and lost sight of *Barker's* key holding—that the ultimate responsibility for speedy adjudication of criminal proceedings rests with the state.¹²⁶

A. The Court's Flawed Analysis

The ambiguities in the Vermont Supreme Court opinion should not have prevented the majority from recognizing the distinctions drawn between delays attributable to the conduct of Brillon and conduct properly attributable to the State. Justice Ginsburg's majority opinion notes that delays sought by defendant's counsel are ordinarily attributed to the defendant.¹²⁷ *Barker* made clear that delay attributable to a defendant does not count against the state, but it noted that the state has the primary responsibility for bringing cases to trial.¹²⁸ The Vermont Supreme Court's opinion applied this principle in its own holding, only to be contradicted by the nation's highest court.¹²⁹ To put it another way, Vermont's Supreme Court applied the United States Supreme Court's own precedents more appropriately to these facts than did the United States Supreme Court.

Justice Ginsburg, for the majority, offered her first substantive critique of the decision by writing: "The State may be charged with those months if the gaps resulted from the trial court's failure to appoint replacement counsel with dispatch. Similarly, the State may bear responsibility if there is 'a breakdown in the public defender system.'"¹³⁰ The first part of this two-pronged attack is essentially the same as the second; each speaks to a breakdown in the public defender system. The Vermont Supreme Court reached a similar holding but also noted that inaction of assigned counsel can be attributable to the State.¹³¹ The inaction of Michael Brillon's assigned counsel in this case should, at least in part, be attributable to the State, particularly when the person confined to a jail cell implores the court to be tried for his alleged crimes: "I have been in jail for almost a year. I've got let-

berg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic: Balanced Allocation of Resources is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13 (1994) (discussing extremely high caseloads and severe funding shortages among public defenders).

126. See *Brillon*, 129 S. Ct. at 1291–92 (focusing on the criminal defendant gaming the system but providing little to no discussion of the shortcomings in Vermont's indigent defense system); *Barker v. Wingo*, 407 U.S. 514, 538 (1972) (White, J., concurring) ("But unreasonable delay in run of the mill criminal cases cannot be justified by simply asserting that the public resources provided by the state's criminal justice system are limited and that each case must await its turn.").

127. *Brillon*, 129 S. Ct. at 1287.

128. 407 U.S. at 529.

129. *State v. Brillon*, 955 A.2d 1108 (Vt. 2008), *rev'd*, 129 S. Ct. 1283 (2009).

130. *Brillon*, 129 S. Ct. at 1287 (quoting *Brillon*, 955 A.2d at 1111).

131. *Brillon*, 955 A.2d at 1111 (discussing how inaction of assigned counsel will be assigned to the state in some cases).

ters here directed towards the judge about waiving my 60-day-rule. I want to be brought to trial. I want to be brought to trial.”¹³²

Despite the Vermont Supreme Court's focus on the inaction of Brillon's assigned counsel, the court indicated early in its opinion that the assigned attorneys' deficiencies did not raise systemic concerns about Vermont's Defender General's Office.¹³³ The Vermont Supreme Court made no bold sweeping claims about the Defender General's office, but instead it questioned whether the case represented an aberration or a larger breakdown in the Public Defender's Office.¹³⁴ Vermont's Supreme Court recognized that it had neither the resources nor the authority to pursue a comprehensive study of Vermont's Public Defender's Office, let alone to pass judgment on its efficacy.¹³⁵ Courts generally decide only the case before them and do not undertake large, open-ended inquiries, since they have no taxing, spending, or lawmaking power.¹³⁶

The Vermont Supreme Court, in asking whether Brillon's experience constitutes an aberration, clearly implicated a systemic breakdown in the Public Defender's Office as its duties and obligations related to Brillon. The fact that the court went no further in its findings does not mean that it ignored systemic factors in evaluating possible violations of Brillon's constitutional rights. In fact, the majority opinion of the Vermont Supreme Court repeatedly discussed systemic factors in its decision to dismiss the charges against Brillon.¹³⁷

Nevertheless, Justice Ginsburg's majority opinion, after mistakenly concluding that the Vermont Supreme Court did not implicate systemic factors in holding that Brillon's constitutional rights had been violated, quickly concluded, “The Vermont Supreme Court's opinion is driven by the notion that delay caused by assigned counsel's ‘inaction’ or failure ‘to move the case forward’ is chargeable to the

132. Brief Amici Curiae of the ACLU et al. in Support of Respondent at 9, *Brillon*, 129 S. Ct. 1283 (No. 08-88), 2008 WL 5417434 (citing Joint Appendix at 23, 209, *Brillon*, 129 S. Ct. 1283 (No. 08-88), 2008 WL 4935374). Brillon made these statements during a period of time which the Vermont Supreme Court later did not count against the State of Vermont for the purposes of Brillon's speedy trial claim. See *Brillon*, 955 A.2d at 1120.

133. *Brillon*, 955 A.2d at 1111–12 (discussing but not deciding the issue of whether the State's failure in this case was systemic or aberrational).

134. *Id.* at 1112.

135. *Id.*

136. See, e.g., *Ex parte James*, 713 So. 2d 869, 911 (Ala. 1997) (holding that a local judge exceeded his proper judicial role).

137. See *Brillon*, 955 A.2d at 1111–12, 1117, 1121. Justice Ginsburg's insistence that no systemic factors were implicated by the Vermont Supreme Court's opinion probably reflects a difference in opinion about which entities and actions should represent those of the state.

state, not the defendant.”¹³⁸ Justice Ginsberg’s reasoning is flawed. The Vermont Supreme Court’s conclusions regarding the inaction of assigned counsel do not appear in a vacuum. Rather, charging such inaction to the State follows directly from the Vermont Supreme Court’s finding that the system failed Michael Brillon.¹³⁹ The inaction of many of Brillon’s assigned attorneys¹⁴⁰ did not alone compel the Vermont Supreme Court’s holding.¹⁴¹ Systemic deficiencies lie at the root of the Vermont Supreme Court’s holding, whether expressly recognized or not.

B. The Court’s Mishandling of *Barker*

Barker stands for the proposition that lack of public resources cannot justify unreasonable delays in the adjudication of criminal prosecution.¹⁴² The Vermont Supreme Court’s majority opinion acknowledged this truism throughout the opinion.¹⁴³ Various, the Vermont Supreme Court discussed inaction of state appointed counsel,¹⁴⁴ lack of funding for the Vermont Defender General’s Office,¹⁴⁵ and problems associated with “the criminal justice system provided by the state.”¹⁴⁶ Yet, rather than applying *Barker*, the Supreme Court’s majority opinion focused on the need to treat identically publicly retained counsel and privately retained counsel.¹⁴⁷ The majority feared that treating the situations differently would result in unfair outcomes for defendants with privately retained counsel¹⁴⁸ and that the relationship between counsel and client is substantially the same whether counsel is privately retained or publicly assigned.¹⁴⁹

One key difference between publicly assigned counsel and privately retained counsel is the role of the state. A private party who

138. Vermont v. Brillon, 129 S. Ct. 1283, 1291 (2009) (quoting *Brillon*, 955 A.2d at 1122).

139. See *Brillon*, 955 A.2d at 1112 (noting the court’s inability to determine whether the failure was “an aberration or a growing crisis”).

140. *Id.* at 1120–21 (discussing the periods properly attributable to the defendant, including much of his first year in detention).

141. *Id.* at 1112 (implicating the trial court and justice system as a whole in the violation of Brillon’s constitutional rights).

142. *Barker v. Wingo*, 407 U.S. 514, 538 (1972) (White, J., concurring) (noting that limited resources are not a proper explanation for why each case “must wait its turn”).

143. See *Brillon*, 955 A. 2d 1108.

144. *Id.* at 1118 (relying on one of Brillon’s prior assigned attorneys for the proposition that “there seems to be a lot of discovery that prior attorneys never got to for one reason or another”).

145. *Id.*

146. *Id.* at 1121.

147. Vermont v. Brillon, 129 S. Ct. 1283, 1291–92 (2009).

148. *Id.*

149. *Id.* at 1291.

retains an attorney does so generally without the assistance of the state—the transaction is ostensibly between two parties who independently sought out a relationship. In Vermont, as in many places, indigent persons rely on the state itself to find them adequate counsel.¹⁵⁰ The mere fact of state involvement does not prove the inadequacy of publicly assigned counsel. In fact, it is a certainty that there are both capable, dedicated public defenders and poorly trained, ineffective private attorneys.

However, substantive differences exist, and they should not be ignored by the Court. Funding problems for indigent defense services persist even after *Gideon* and its progeny recognized a constitutional right to counsel in many cases.¹⁵¹ Alarm has grown among some observers who believe that these funding disparities diminish the justice system as a whole and place incredible strains on those who represent indigent defendants.¹⁵² The American Bar Association has even issued guidelines for those who represent indigent clients in an attempt to address the problems of indigent defense and excessive caseloads.¹⁵³

The Supreme Court should have been mindful of these facts in their opinion. Engaging in a limited but probing factual inquiry would not treat speedy trial claims differently based on the status of counsel. The record in this case contained evidence of serious problems within

150. VT. STAT. ANN. tit. 13, § 5253(a) (1998). (“The defender general has the primary responsibility for providing needy persons with legal services under this chapter. He or she shall have also the duty of providing legal services to those persons in the custody of the commissioner of corrections. He or she may provide these services personally, through public defenders employed under subsection 5254(a) of this title, or through attorneys-at-law as provided by subsection (b) of this section. No other official or agency of the state may supervise the defender general or assign him duties in addition to those prescribed by this chapter. He or she may not practice law other than in the performance of his or her duties under this chapter or engage in any other occupation, except as provided in section 5203 of this title.”)

151. See, e.g., NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL: REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE ix (abr. ed. 2009), available at http://www.ojp.usdoj.gov/BJA/topics/Plenary1/J_Wallace-Justice%20Denied-AbridgedVer.pdf.

152. See Jennifer M. Allen, *The Supreme Court’s Abdication of Duty in Failing to Establish Standards for Indigent Defense*, 27 LAW & INEQ. 365, 406 (2009); see also Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systematic Obstruction of Justice*, 22 ST. THOMAS L. REV. (Criminal Law Issue) 104 (2009) (discussing the significant negative impact on the legal system’s credibility caused by lack of funding for public defenders and excessive caseloads carried by public defenders).

153. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.pdf.

the Vermont Defender General's Office and evidence from one of Brillon's appointed attorneys that he had a rather large caseload.¹⁵⁴ Incredibly, the record indicated that Brillon's attorney's caseload had recently been reduced to 174 clients with 331 charges.¹⁵⁵ Unfortunately, the Supreme Court largely ignored the facts showing the troubled condition of Vermont's Defender General's Office and thus opted to neglect the constitutional rights of indigent defendants.¹⁵⁶

C. The Possible Impact of the Decision

Gideon v. Wainwright held that state courts have a responsibility to enforce Sixth Amendment rights and, specifically, that states must provide indigent defendants with counsel upon request.¹⁵⁷ *Gideon* expresses in particular terms one of the Sixth Amendment's constitutional guarantees: the right to counsel.¹⁵⁸ To this end, the State's responsibility for the administration of the Defender General's Office was made clear by the Vermont Supreme Court,¹⁵⁹ and it's obvious that appointed counsel played a significant role in the ills that affected Michael Brillon's journey through Vermont's court system.¹⁶⁰

Gideon indicated clearly that states must take appropriate measures to insure for the provision of indigent defense services.¹⁶¹ After all, as one of the Justices who joined the majority in *Vermont v. Bril-*

154. Brief Amici Curiae of the ACLU, *supra* note 132, at 7 (citing Joint Appendix, *supra* note 132, at 98; REPORT OF INDIGENT DEFENSE TASK FORCE 12 (2001), *available at* <http://dgsearch.no-ip.biz/rnrfiles/IDTF.pdf>).

155. *Id.* (citing Joint Appendix, *supra* note 132, at 98).

156. *See* MARTIN GARBUS, *COURTING DISASTER* 46–80 (2002) (arguing that the Court has shifted rightward since the early 1970s, largely through the appointment of moderates and conservatives and very few liberals, and has accordingly ignored the rights of those with less wealth); Allen, *supra* note 152, at 365. *See generally*, LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 394 (1993) (discussing the generally-held low opinion of public defenders but noting their idealism); RUSSELL W. GALLOWAY, *THE RICH AND POOR IN SUPREME COURT HISTORY 1790–1990* at 181–86 (1991) (arguing that the poor and their advocates should stay out of the Supreme Court given its history of favoring the wealthy and should instead seek remedies in state legislatures and lower federal courts); STANLEY ROSENBLATT, *JUSTICE DENIED* 295–324 (1971) (calling for a legal system in which the poor have greater protections along with the abolition of all laws that criminalize “victimless behavior”).

157. 372 U.S. 335, 345 (1963). Many states, though not all, have responded to *Gideon* with some form of state oversight over the public defender system. Vermont is one of these states. *See* SPANGENBERG GROUP, *STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005* (2005), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsysteams2005.pdf>. The indigent defense systems in this country have received intense criticism. *See supra* note 125 and accompanying text; *supra* note 153 and accompanying text.

158. *See* U.S. CONST. amend. VI.

159. *See* *State v. Brillon*, 955 A.2d 1108, 1111 (Vt. 2008), *rev'd*, 129 S. Ct. 1283 (2009).

160. *Id.* at 1112.

161. *See Gideon*, 372 U.S. 335.

lon once said in his bid to be confirmed to the Court: "My job is to call balls and strikes and not to pitch or bat."¹⁶² If Chief Justice Roberts's analogy means anything, it surely stands for the idea that courts vindicate rights and faithfully interpret the law, while lawmakers create policies and avoid the violation of constitutional rights. Thus, protecting the liberty interests declared by the Sixth Amendment should be more important than formulating properly oriented rules.¹⁶³

When state courts vindicate the constitutional rights of criminal defendants, the Supreme Court should only reverse such decisions on the basis of an error of constitutional law. In the absence of such error, the decision should stand.¹⁶⁴ The Vermont Supreme Court vindicated the speedy trial rights of Michael Brillon when it dismissed with prejudice the charges against him. The Vermont Supreme Court did so with the support of ample factual findings and appropriate application of relevant precedents, such as *Barker*.¹⁶⁵ The United States Supreme Court engaged in something akin to outcome-based judging when it overturned the decision. Thus, an outcome-based determination may have implicitly emanated from a judicial aversion to crime and criminals—not to mention Brillon's history of abuse towards women—that militates in favor of him being in jail.

Similarly, the severe impact of corporate money on the political process can be mitigated by campaign finance laws, yet those laws were stripped away by the Supreme Court in the *Citizens United*¹⁶⁶ case. Those on the left (and right) who loathe the decision might admit that much of their dissatisfaction has less to do with the legal reasoning than with the fact that they believe limiting corporate expenditures in the political realm is beneficial to society. This is not to say that colorable arguments against *Citizens United* do not exist. They do, with the most detailed and penetrating being Justice Stevens's dissenting opinion.¹⁶⁷ Unlike Justice Stevens's constitutionally oriented dissent, the majority decision in *Vermont v. Brillon* focuses on fear of defendants manipulating the system and the formulation of a rule that will prevent this behavior.¹⁶⁸

162. *Transcript: Day One of the Roberts' Hearings*, WASH. POST, Sept. 13, 2004, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html>.

163. *See supra* section II.C. The Sixth Amendment protects the citizen's interest in being free from detention and in not having his good name assaulted by the ongoing accusation of criminal behavior. *Id.*

164. *Vermont v. Brillon*, 129 S. Ct. 1283, 1294 (2009) (Breyer, J., dissenting).

165. *See Brillon*, 955 A.2d at 1114–15.

166. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

167. *Id.* at 929–31 (Stevens, J., dissenting) (arguing that the majority opinion ignored almost a century's worth of campaign finance precedent).

168. *Brillon*, 129 S. Ct. 1283, 1291–92 (2009). FRIEDMAN, *supra* note 156, at 457 (summarizing society's complaints about the criminal justice system and disgust with criminals walking free due to "legal technicalities"). The Court's discussion of

The *Brillon* majority writes principally about outcome and not whether Vermont violated Brillon's speedy trial rights. The Justices in the majority pay particular attention to his difficult behavior, such as aggressive criticism directed at his lawyers if they failed to (in his mind) adequately perform their assigned job and his alleged violent threat against an assigned attorney.¹⁶⁹ These Justices also expressed concerns over potential inequities if the Vermont Supreme Court's holding was applied, such as indigent defendants being held to a more relaxed standard with regard to speedy trial claims than defendants who can afford privately retained counsel.¹⁷⁰

The Court, to phrase it starkly, has it backwards. Glaring inequities exist in the criminal justice system, and almost none of them indicate that indigent defendants have any advantage over defendants who can afford to retain counsel.¹⁷¹ Furthermore, the Vermont Supreme Court's reasoning, if applied in other cases, merely requires application of *Barker's* balancing test.¹⁷² Additionally, the Supreme Court and lower courts would not be burdened by doing limited factual appraisals in cases where representation by state appointed counsel becomes a relevant issue. Such appraisals would not treat any party better than another. These inquiries simply require learned judges to take into account the realities of the American criminal justice system, a reality that is universally appreciated among indigent defendants and their assigned attorneys.¹⁷³

Given the recentness of the decision, it is hard to predict how future state and federal courts will react. The Vermont Supreme Court cited the Sixth Amendment as the primary basis for its decision,¹⁷⁴ allowing the Supreme Court to properly invoke their review authority in granting certiorari.¹⁷⁵ Future courts may be wise to rely on their own state constitutions so as to avoid any conflict with the Supreme

manipulation of the system by criminal defendants hints at some of the same complaints voiced during the backlash of the 1960s and 1970s against perceived outrages in the criminal justice system. *Supra* subsection II.B.2; *see also* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 183–87 (1999) (arguing that mistrust and lack of faith in the justice system is due to weakness in the trial system, specifically because the procedural hoops and hurdles of a full trial lead most cases to be plea bargained).

169. *Brillon*, 129 S. Ct. 1283, 1292 (2009).

170. *Id.*

171. *See supra* section III.B; *supra* note 152 and accompanying text.

172. *See supra* section III.B.

173. *See supra* note 125 and accompanying text; *supra* note 156 and accompanying text.

174. *See State v. Brillon*, 955 A.2d 1108, 1114 (Vt. 2008), *rev'd*, 129 S. Ct. 1283 (2009).

175. *See Vermont v. Brillon*, 129 S. Ct. 1283, 1289–90 (2009).

Court.¹⁷⁶ The Court's decision has already been cited by a number of lower courts.¹⁷⁷ The court in *United States ex rel. Brown v. Shaw* mentions the obvious upshot from the Supreme Court's decision: courts must implement rules regarding indigent defense based on the policy consideration that rules favorable to criminal defendants will be abused by either the defendant or defendant's counsel.¹⁷⁸

Federal courts have approvingly, or without comment, cited the *Brillon* decision, an unsurprising fact.¹⁷⁹ State courts have largely done the same,¹⁸⁰ and *Commonwealth v. Baird*¹⁸¹ explains accurately that, while exceptions exist outside the systemic breakdowns of state public defender offices for speedy trial purposes, defendants must overcome a relatively high bar in order to prevail on such arguments.¹⁸² *Baird* highlights a larger issue with the "systemic breakdown exception," namely, that with the bar seemingly set so high by the Court, state courts adopting the reasoning supplied by *Brillon* will be unlikely to perform sufficient inquiry to determine a potential systemic breakdown. Instead, courts will likely conduct a perfunctory inquiry into the issue and quickly conclude that the actions of appointed counsel should normally count against the defendant and not the state.

The *Brown* court correctly summarized the holding and policy rationales of the Supreme Court. Legal observers often discuss how society mistrusts criminal defendants and their legal representation and believes that more must be done to end the charade of technicalities that seemingly accompany legal proceedings in this country.¹⁸³ The

176. *See* *Arreola v. Municipal Court*, 139 Cal. App. 3d 108, 113 (Cal. Ct. App. 1983) (reviewing possible speedy trial rights violation under California's state constitution and state statutory provisions).

177. *See, e.g.*, *United States ex rel. Brown v. Shaw*, No. 09 C 2837, 2009 WL 5166220, at *4 (N.D. Ill. Dec. 21, 2009) (discussing the "perverse incentive" that would result from a rule contrary to that adopted by the United States Supreme Court); *State v. Mumley*, 978 A.2d 6, 12 (Vt. 2009) (acknowledging the reversal on other grounds by the United States Supreme Court).

178. *See Brown*, 2009 WL 5166220 at *4 (referring to the potential for public defenders to "drag their feet" in hopes of getting a case dismissed on speedy trial grounds).

179. *See, e.g.*, *United States v. Mitchell*, No. 09-10025, 2010 WL 850241, at *7 (11th Cir. Mar. 12, 2010); *Keomanivong v. Jacquez*, No. 2:07-cv-02409-JWS, 2010 WL 843755, at *7 n.25 (E.D. Cal. Mar. 9, 2010) (mem.).

180. *See, e.g.*, *People v. Lomax*, 234 P.3d 377, 401 (Cal. 2010) (discussing how a "deliberate attempt to disrupt proceedings" should weigh heavily against the defendant) (internal quotation marks omitted); *Jakupovic v. State*, 695 S.E.2d 247, 250 (Ga. 2010).

181. 975 A.2d 1113 (Pa. 2009).

182. *Id.* at 1119 (discussing the non-exclusive nature of the exception identified in *Brillon* but concluding that its "character" indicates a "fairly high" bar).

183. *See supra* note 168 and accompanying text; *supra* note 157 and accompanying text. Such endemic mistrust and suspicion of criminal defendants is probably even stronger in the case of a defendant like Michael Brillon, a man accused of

law, however, should not be saved from the obvious outcomes dictated by its textual priorities¹⁸⁴ because criminal defendants sometimes “game” the system. Also, the Court should not send to lower courts a message that rules strengthening the rights of criminal defendants inherently lead to abuse either by defendants themselves or their attorneys. The particular facts of this case do not indicate how a contrary rule, one recognizing the fundamental differences between privately retained counsel and state appointed counsel, will lead to “perverse incentives” for assigned counsel to delay the case in order to have it overturned on speedy trial grounds.¹⁸⁵

When courts inquire, even on a limited scale, they should and almost certainly would turn up evidence of criminal defendants deceiving and manipulating the system. A competent court can recognize the difference between the state’s systemic negligence or intentional wrongdoing and assigned counsel behaving frivolously to delay the proceedings. The Court gives criminal defendants and their assigned counsel far too much credit for creative and duplicitous delaying tactics, given what is known about the indigent defense system in this country and its harmful effects on criminal defendants.¹⁸⁶ If the *Brown* decision is representative, *Brillon* will have left a sad legacy of mistrust in the public defender systems on which indigent defendants stake their lives.

D. Greater Rights in Appellate Courts?

In *Brillon*, the ACLU’s amicus brief¹⁸⁷ discusses the use of *Barker* in the appellate context, noting that the courts have been weighing breakdowns in the public defender system against the state. This line of reasoning has been applied consistently across a number of circuits—including the Second, Third, Fourth, Ninth, and Tenth. Additionally, a number of state courts and the Armed Forces Court of Appeals apply this reasoning when inquiring into appellate delays.¹⁸⁸ The appellate process is different than the pre-trial process in which

abusing women and possessing a documented record of disrespect to the court and its officers.

184. See *supra* section II.C.

185. See *Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) (speculating that assigned counsel could engineer a dismissal on speedy trial grounds after seeking an unreasonable number of continuances).

186. See *supra* notes 152–53 and accompanying text; *infra* section III.D.

187. Brief Amici Curiae of the ACLU et al. in Support of Respondent, *supra* note 132, at 18.

188. *Id.* (discussing the appellate approach to delays caused by indigent defendant’s counsel). But see *United States v. DeLeon*, 444 F.3d 41, 58 (1st Cir. 2006) (discussing the general inapplicability of the *Barker* approach to the appellate context); see also Marc M. Arkin, *Speedy Criminal Appeal: Right Without Remedy*, 74 MINN. L. REV. 437, 473–80 (1990) (arguing that *Barker*’s approach is not particularly useful in the appellate context).

speedy trial rights may be implicated. Many courts, however, have adopted the *Barker* four-part framework in the appellate context, finding similar interests implicated by both contexts.¹⁸⁹

The protection afforded to convicted defendants seeking post-trial appellate review is even more necessary in the context of a defendant not yet brought to trial. A defendant who has been processed through the criminal justice system—presumably including a constitutionally sound proceeding—has less of a claim to constitutional protections than a defendant not yet brought to trial. A defendant not yet brought to trial continues to suffer any number of indignities and affronts to his reputation through prolonged detention and accusation,¹⁹⁰ despite that such a defendant is still presumed to be innocent.

Regardless of these apparent truths, the post-trial defendant has been afforded greater protections through the *Barker* framework in those jurisdictions adopting it for the post-trial context. Courts regularly charge delays caused by ineffective state appointed counsel against the state in the appellate context.¹⁹¹ Yet, the Supreme Court's decision in *Brillon* discussed hesitancy to adopt a rule in which delays attributable to state appointed counsel regularly count against the state for speedy trial purposes. The Court's primary concern appears to be the manipulation of the system by the criminal defendant and his attorney.¹⁹² Given the existence of decisions charging delays caused by ineffective state appointed counsel to the state in appellate proceedings, the trial-level concerns of the Court in *Brillon* appear all the more inconsistent and outcome-oriented. If the rule mandated that all delays in proceedings would be attributable to the state—no matter the circumstances—gaming of the system by criminal defendants would be a valid concern.

However, there is no compelling reason that this simplistic formulation would constitute the rule. The *Barker* balancing test performs a probing inquiry, looking at the behavior of both parties as it seeks to attribute delays to one side or the other. The same should be done for determining whether the court attributes to the state a delay in proceeding to trial. For the sake of comparison, imagine one public defender (Defender A) who repeatedly requests continuances on behalf of his client (Client A) despite having a moderate case load and no

189. See *supra* note 154, at 19–24; see also Brook A. Brewer, *Rapist Goes Free After "Doing Time" at Home: Jolly v. State*, 58 ARK. L. REV. 679 (2005) (contending that the *Barker* four-part framework should also be applied to sentencing delays and that this issue invites review by the Supreme Court).

190. See AMAR, *supra* note 53, at 104; *supra* section II.C.

191. See *supra* note 154, at 18.

192. See *Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) (“A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances.”); *Barker v. Wingo*, 407 U.S. 514, 521 (1972) (“Delay is not an uncommon defense tactic.”).

pressing need to request the continuance. Whatever Defender A's intentions may be, a court looking at this behavior would be hard-pressed to attribute this delay to the state, despite the defender being part of the state's criminal justice system. Defender A's actions are attributable solely to Defender A and, vicariously, to his client. Indeed, Client A, assuming he takes no part in this legal stratagem, may well be disadvantaged by his lawyer seeking unnecessary continuances, but it is his responsibility to notify the state of deficiencies in Defender A's representation. The time a defendant spends sitting in jail before being tried should be limited but, for policy reasons, Defender A's suspicious and unnecessary continuances should not automatically be charged against the state if Defender A is independently responsible for the delays.

Now imagine another public defender (Defender B) who maintains a heavy caseload and only meets briefly with his client (Client B). In fact, Defender B will soon be leaving the public defender system in search of greater fulfillment in his legal career. He communicated his intentions the public defender's office but that information never reached the court, and the public defender's office took no action to find a suitable replacement for Client B. Due to the failure to act on Defender B's stated intention to leave the public defender's office, not to mention Defender B's heavy case load, Client B sits in jail for another four months before the court appoints a public defender to take over his case. Justice and precedent dictate that this four-month delay be attributed to the state. The heavy caseload imposed by the state, along with the lawyer's transition into another line of work, caused a lack of progress in this case. The state has a responsibility to administer the public defender system, which includes a responsibility to keep cases moving forward at an equitable pace. The described delay for Client B should not weigh as heavily against the state as intentional misconduct, but the state must take ultimate responsibility whether the context is post or pre-trial delay.

IV. CONCLUSION

Gideon declared that the Sixth Amendment makes certain the indigent defendant's constitutional right to counsel. Today, the Court must recognize the interplay between *Gideon* and possible infringement of constitutional rights, such as speedy trial rights. The inefficacy of appointed counsel may lead to infringing upon speedy trial rights, thus putting the Court in the position of evaluating the violation of speedy trial rights caused—in whole or in part—by appointed counsel pursuant to the *Gideon* decision.

If the Court chooses not to vindicate those rights, it places itself in the peculiar position of mandating the right to counsel for indigent defendants but ignoring those indigent defendants when they seek

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vindication of speedy trial rights due to the inadequacies of appointed counsel. In essence, the Court blames the inadequacy of the indigent defense system, which was mandated by the Court's decision in *Gideon*, on the defendant. In *Brillon*, the Vermont Supreme Court rightfully attributed delays caused by the inadequacies of the state-run Defender General's Office to the State of Vermont. The Supreme Court made a mistake in reversing that decision.

That is not to say that the Court must always find for the defendant when he seeks vindication of speedy trial rights. Any such decision rests on the facts of each case and the realities faced by each indigent defendant. The Court failed to close the shortfall between *Gideon's* forceful declarations of indigent right to counsel and the reality of America's broken indigent defense system when it refused to vindicate the constitutional rights of Michael Brillon.