Speedy Trial Research Data

This material contains substantive data focusing on speedy trial issues. It includes case law and Missouri regulatory schema. This material is research only, but has substantive characteristics germane to current cases and matters. There appears ample contextual law and applicable statute for review by attorneys and advocates to apply as is prudent to cases reviewing such matters as affirmative defenses or causes for defendants so situated. It is advised that reviewers carefully introspect this material for applicable items and apply effectively in briefing and argument.

Within is clear confirmation that there exists statutory federal laches of 70 days post arraignment or other recognition of a defendant being subject to law enforcement and subsequent trial. This time frame pertains to Missouri as clearly noted in Garcia and is reflected in almost all lower jurisdictions. A defendant's rights under the Speedy Trial Clause of the Sixth Amendment are triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." United States v. Marion, 404 U.S. 307, 320 (1971). [GO2 Last Page of document] Arguments that law enforcement and the courts are overburdened are not positive defenses to fulfillment. Further, pre information holding over of a person may be subject to review as violating a defendant's 5th Amendment Due Process rights.

If a continuance is motioned this automatically waves defendant's right to speedy trial recourse. This should not be a convenience of the court or an attorney representing such a defendant in particular where the defendant is adamant with respect to challenge on 6th Amendment grounds.

There are exceptions, however, where speedy trial is waved, but the exceptions are truly exceptions granted for substantial cause as in flight or other avoidance not an attorney's preparedness or inability to mount a defense as trial approaches. Good fortune to assure that justice is served.

Any substantive comments with respect to this material are welcome.

Speedy Trial Cases

Collected Materials

David T. Garcia
Taylor Bloate

Garcia Case

Collected Materials

BRIEF: ST. LOUIS COUNTY: Court orders that charges be dropped

ST. LOUIS POST-DISPATCH | Sat, Jul 17, 5:10 AM

July 17--The Missouri Supreme Court ordered on Friday that charges be dropped against a man accused in a 1998 shooting in St. Louis County because prosecutors violated his right to a speedy trial.

David Garcia was indicted in 2002 and charged with first-degree assault in a shooting at a Kirkwood restaurant.

Yet police allegedly made no effort in seven years to locate Garcia, who had moved to Chicago and was living under his own name and Social Security number.

In 2009, a Kirkwood police detective searched for Garcia and found his address in Illinois. Chicago police arrested him.

The high court said police could have located Garcia years earlier and the delay could have impaired his ability to defend himself.

Title: Man's indictment tossed over speedy trial issues by Missouri Supreme Court

Date: July 16, 2010
Publication: Missouri Lawyers Media
Author: Scott Lauck

A man accused of a shooting 12 years ago will not have to stand trial because police waited too long to track him down, the Missouri Supreme Court ruled Friday.

In a 4-3 decision, the court said David T. Garcia was prejudiced by the eight-year delay between his indictment and his arrest in connection with the 1998 attack at a Chinese restaurant in Kirkwood. The shooting seriously wounded an employee.

Based on witness accounts, Garcia was charged by indictment in 2002 with first-degree assault. However, police made "no efforts" to locate him until 2009, when a Kirkwood detective ran his Social Security number through a computer database and found he'd been living in Chicago for about 10 years.

During the intervening years, most of the key witnesses have disappeared, and the restaurant where the shooting occurred has been demolished.

"The state must show that Garcia's defense was unimpaired," Judge Michael Wolff, joined by Judges Richard Teitelman, Laura Denvir Stith and Mary Russell, wrote for the majority. "Too many witnesses and too many years have slipped away for the state to carry this burden."

But Chief Justice William Ray Price Jr. dissented, saying Garcia "is the principal cause of the police's delay in locating him" because he fled the state. Price, joined by Judges Patricia Breckenridge and Zel Fischer, said Garcia's prosecution should have been allowed to go forward - particularly since the lack of witnesses would seem mainly to hurt the prosecution, which bears the burden of proving guilt.

"The majority ignores the plain fact that police departments have limited resources," he said. "Worse, the majority creates further incentive for criminal defendants to conceal themselves from justice."

Garcia's St. Louis attorneys, Joseph F. Yeckel, of the Law Office of Joseph F. Yeckel, and Grant J. Shostak, of Shostak & Shostak, hailed the decision. Yeckel said the case was procedurally unusual in that it wasn't a post-conviction appeal but rather a pre-trial request that the Supreme Court intervene.

The state's high court agreed that Garcia's right to a speedy trial was violated and issued a writ of mandamus directing St. Louis County Judge Steven Goldman to dismiss the indictment.

Yeckel said the Court of Appeals Eastern District had summarily denied Garcia's request for a similar writ. But he wondered if the Supreme Court's decision might be seen as a "Garcia's Rule,"

encouraging the lower courts to consider such arguments in cases where there is an adequate record of the state's efforts - of lack of effort - to track down the suspect.

Shostak said that the record in the case did not support the dissent's view that Garcia fled prosecution.

"He is presumed innocent," Shostak said. "And he was living open and obvious all this time."

Prosecutor Bob McCulloch did not return a phone call. Detective Dave Smith, a spokesman for the Kirkwood Police Department, said he was unfamiliar with the case and declined to give an immediate comment.

The case is State ex rel. David T. Garcia v. The Honorable Steven H. Goldman, SC90833.

COPYRIGHT 2009 Dolan Media Newswires

This document provided by HighBeam Research at http://www.highbeam.com

THE SUPREME COURT OF MISSOURI

STATE EX REL. DAVID T. GARCIA

Relator

vs.

THE HONORABLE STEVEN H. GOLDMAN

Respondent

No. SC90833

On Alternative Writ of Mandamus
from the Supreme Court of Missouri, en banc
to the Honorable Steven H. Goldman,
Circuit Court of St. Louis County
Twenty-First Judicial Circuit

RELATOR'S BRIEF

Joseph F. Yeckel #45922
Law Office of Joseph F. Yeckel, LLC
116 E. Lockwood Ave.
St. Louis, Missouri 63119
Tel: (314) 227-2430
Fax: (314) 963-0629
jyeckel@yeckel-law.com

Grant J. Shostak #45838
Shostak & Shostak, LLC
8015 Forsyth Blvd.
St. Louis, Missouri 63105
Tel: (314) 725-3200
Fax: (314) 725-3275
gshostak@shostaklawfirm.com

Attorneys for Relator

TABLE OF CONTENTS

Table of Contents……………………………………………………………………1

Table of Authorities ……………………………………………………………...2

Statement of Jurisdiction…………………………………………………………5

Statement of Facts……………………………………………………………......6

Point Relied On…………………………………………………………………15

Argument……………………………………………………………………….16

Conclusion……………………………………………………………………...32

Certificate of Compliance………………………………………………………34

Certificate of Service…………………………………………………………...35

Appendix………………………………………………………………………..36

Table of Contents of Appendix………………………………………………...37

TABLE OF AUTHORITIES

Cases **Page**

Barker v. Wingo,

407 U.S. 514 (1972)…………………………………....15, 17, 23, 24, 28, 29, 30

Brady v. Maryland,

373 U.S. 83 (1963)……………………………….……………………….31

Crisp v. Duckworth,

743 F.2d 580 (7th Cir. 1984)……………………………………………..30-31

Doggett v. United States,

505 U.S. 647 (1992)…………………………………….…15, 16, 23, 26, 28, 29

Kloper v. North Carolina,

386 U.S. 213 (1967)……………………………….……………………..17

Rayborn v. Scully,

858 F.2d 84 (2nd Cir. 1988)………………………………………………26

Serna v. Superior Court of Los Angeles County,

40 Cal.3d 239 (1985)…………………………………..………………..20, 21

Sherrod v. Franza,

427 So.2d 161 (Fla. 1983)…………………………….………………..20, 21

State ex rel. Kelley v. Mitchell,

595 S.W.2d 261 (Mo. 1980)…………………………..……………...5, 18, 22

State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell,

426 S.W.2d 11 (Mo. 1968)………………………………………………19

Cases	**Page**

State ex rel. Mayweather v. Bondurant,

538 S.W.2d 953 (Mo.App. 1976)……………………..…………………19, 20

State ex rel. McKee v. Riley,

240 S.W.3d 720 (Mo. 2007)…………………………...5, 15, 17, 18, 22, 23, 32

State v. Bolin,

643 S.W.2d 806 (Mo. 1983)………………………………………………..22

State v. Holmes,

643 S.W.2d 282 (Mo.App. W.D.1982..)……………………………………24, 28

State v. Palacio,

212 P.3d 1148 (N.M.App. 2009)…………………………………………...27

State v. Smith,

849 S.W.2d 209 (Mo.App. E.D.1993)……………………………………..17

State v. Stock,

147 P.3d 885 (N.M.App. 2006)……………………………………………27

Strunk v. United States,

412 U.S. 434 (1973)…………………………………………………………17

United States v. Akinsola,

57 F. Supp.2d 455 (E.D. Mich. 1999)…………………………………....27. 28

United States v. Bergfeld,

280 F.3d 486 (5th Cir. 2002)……………………………………………….29

Cases **Page**

United States v. Brown,

169 F.3d 344 (6th Cir. 1999)……………………………………………24, 27, 30

United States v. Fernandes,

618 F. Supp.2d 62 (D.D.C. 2009)……………………………………………27

United States v. Mendoza,

530 F.3d 758 (9th Cir. 2008)………………………………………………26-27

Constitutional and Statutory Provisions

U.S. Const. Amend. VI…………………………………………………...16-17

U.S. Const. Amend. XIV……………………………………………………17

Missouri Const. Art. I, §18 (a)……..……………………………………...17

Mo. Rev. Stat. § 545.780…………………………………………………..18

Mo. Rev. Stat. § 547.170…………………………………………………..18

Mo. Rev. Stat. § 556.036…………………………………………………..13

Mo. Rev. Stat. § 610.100…………………………………………………..10

STATEMENT OF JURISDICTION

This Court has jurisdiction of this proceeding by virtue of Article V, Section 4.1, of the Missouri Constitution, which provides that "[t]he Supreme Court shall have general superintending control over all courts and tribunals" and "may issue and determine original remedial writs."

A party seeking relief by mandamus must establish that he or she has a clear, unequivocal, specific right to a thing claimed. *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 725 (Mo. 2007). Mandamus is appropriate when the record reveals a clear violation of the defendant's right to a speedy trial. *Id.* at 725, 731. Mandamus lies where alternative remedies are not "full, complete, and adequate." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 269 (Mo. 1980).

On March 31, 2010, Mr. Garcia petitioned the Missouri Court of Appeals, Eastern District, for the relief requested in the present action. That court issued its order directing Respondent to file suggestions in opposition to the petition by April 12, 2010. Two days later, the court issued its dispositive order denying the petition. R. at 1 (Ex. 1).

On April 22, 2010, Mr. Garcia petitioned this Court for a writ of mandamus. On May 5, this Court issued an alternative writ of mandamus directing the Respondent to vacate his order denying Mr. Garcia's motion to dismiss and to take no further action in the case until further order. This Court also ordered the parties to file briefs on or before 9 a.m. on May 17 and docketed the case for oral argument on May 18.

The authority of no other court is interposed between that of the Circuit Court and that of this Court.

STATEMENT OF FACTS

A. Procedural History

On April 9, 1998, Rigoberto Dominguez was shot while working at the Sunny China Buffet. R. at 45-50 (Ex. 6-A).[1] On February 21, 2002, the grand jury returned an indictment charging Mr. Garcia with first degree assault and armed criminal action in connection with the shooting. R. at 2-4 (Ex. 2). On February 19, 2009, seven years after the indictment and eleven years after the shooting, Mr. Garcia was arrested. R. at 26 (Ex. 5, Tr. 65).

Mr. Garcia moved to dismiss the indictment on the grounds that the delay in bringing him to trial violated his constitutional right to a speedy trial. R. at 5-6 (Ex. 3).

On February 18, 2010, the parties appeared before the trial court and filed a stipulated record.[2] Because the prosecution offered no evidence regarding the State's efforts to apprehend Mr. Garcia, the Respondent held an additional hearing on March 25,

[1] Record citations are to the exhibits that Mr. Garcia submitted with his petition for writ of mandamus. Each citation to the record lists the page number where the evidence supporting the factual assertion appears, followed by the exhibit number. Where the citation is to the hearing transcript, the specific page number of the transcript is also provided.

[2] The transcript incorrectly indicates that the hearings pertaining to the motion to dismiss took place in 2009. R. at 11, 12 (Ex. 5, Tr. 2, 9). These proceedings were conducted in 2010. R. at 10.

2010, to allow the prosecutor to present evidence on that issue. R. at 14 (Ex. 5, Tr. 14). At that hearing, the prosecutor called Sergeant Steven Guyer and former Detective Michael Bales[3] to testify regarding the Kirkwood Police Department's efforts to locate and arrest Mr. Garcia. After the officers testified, Mr. Garcia submitted additional documentary evidence, which the trial court received. R. at 29-30 (Ex. 5, Tr. 74-78); R. at 348-92 (Ex. 6-F).

B. Evidence Presented at the Hearing

On April 9, 1998, Rigoberto Dominguez was shot while he was working at the Sunny Chinese Buffet in Kirkwood, Missouri. R. at 45-50 (Ex. 6-A). The assailant entered the restaurant's kitchen through a back door, approached Mr. Dominguez, and fired a single shot into his side. *Id*. The assailant departed through the same door he had entered and was last seen driving away in a brown coupe or sedan. *Id*.

Kirkwood police officers responded to the scene. R. at 14, 22 (Ex. 5, Tr. 17, 47). Officers interviewed Meliton Gonzalez, Nabor Garcia, Manuel Castro, Jesus Rojas, and Moises Aguilar, each of whom was working in the kitchen at the time of the shooting. R. 46-49, 54-55 (Ex. 6-A). Based on the information received, the officers identified David Garcia as a suspect in the shooting. *Id.*; R. at 18 (Ex. 5, Tr. 33). The officers obtained information to assist them in locating Mr. Garcia, including his full name, date of birth, home address, and social security number. R. at 27 (Ex. 5, Tr. 66).

---

[3] Detective Bales retired from the Kirkwood Police Department in August 2008. R. at 22 (Ex. 5, Tr. 46).

Several hours after the shooting, Detective Bales conducted videotaped interviews of Nabor Garcia, who is the Relator's cousin, and Meliton Gonzalez. R. at 27 (Ex. 5, Tr. 68); R. at 61-64 (Ex. 6-A). The police department has since lost these videotaped statements. R. at 41 (Ex. 6).

Later on the day of the shooting, Detective Bales and an officer fluent in Spanish went to the apartment Nabor and David Garcia shared and searched the premises. R. at 23 (Ex. 5, Tr. 50). They did not find David Garcia. R. at 23-24 (Ex. 5, Tr. 53-54). The officers spoke with neighbors who lived in nearby apartment units. R. at 24 (Ex. 5, Tr. 54). Detective Bales testified that "we made several stops throughout the night looking for [Mr. Garcia] trying to find people that would tell us where he might be." R. at 23 (Ex. 5, Tr. 50). According to Detective Bales, people told him "that if he [Mr. Garcia] were going to leave the area . . . California or Illinois would be possible locations where he could go to."[4] R. at 24 (Ex. 5, Tr. 54). Because he began "to get a sense that maybe [Mr. Garcia] wasn't around anymore or the possibility he was going to be leaving," Detective Bales testified that we "tried to do as much as we could over the next 24 hours to see if we could find him." R. at 23, (Ex. 5, Tr. 50).

---

[4] In his police report, Detective Bales noted that he visited Mr. Dominguez at the hospital a week after the shooting. R. at 65 (Ex. 6-A). Mr. Dominguez, who had been hospitalized since the shooting, believed Mr. Garcia was no longer in the area. *Id.* He thought Mr. Garcia could be in Chicago, Kansas, or California because he has family members in these areas. *Id.*

Detective Bales could not recall any of the locations he visited after searching Mr. Garcia's apartment. R. at 25 (Ex. 5, Tr. 60). And aside from Nabor Garcia, Detective Bales could not remember the name of anyone he spoke to at the apartment complex. R. at 25 (Ex. 5, Tr. 59, 61). He did not speak to the landlord of the apartment complex to inquire into Mr. Garcia's whereabouts. R. at 25 (Ex. 5, Tr. 61).

Describing the steps he took to locate Mr. Garcia in the weeks following the shooting, Detective Bales testified that "[f]or the most part" he made phone calls "trying to follow up with people we had talked with to see if they knew or had heard of where David Garcia may have been." R. at 24 (Ex. 5, Tr. 54). According to Detective Bales, "in the weeks, the months, the years to follow," these efforts failed to generate "any solid leads." R. at 24 (Ex. 5, Tr. 55). Asked by the prosecutor for the names of people he followed up with, Detective Bales responded, "I wouldn't have that information. I do not know." R. at 24 (Ex. 5, Tr. 57).

Nearly three years after the shooting, the prosecutor's office contacted the Kirkwood Police Department. R. at 14 (Ex. 5, Tr. 17). The prosecutor's office explained that the statute of limitations was "an issue" and "wanted efforts made to locate and arrest Garcia." R. at 16 (Ex. 5, Tr. 24).

This task was delegated to Sergeant Guyer. In late February or early March 2001, Sergeant Guyer and his partner attempted to locate Mr. Garcia on three consecutive days one week and another day the following week. R. at 14-15 (Ex. 5, Tr. 17-19). According to Sergeant Guyer, the attempts amounted to "a knock and see what we could find out at the door." R. at 16 (Ex. 5, Tr. 23). At three of the residences they visited, someone

answered the door and permitted them to search for Mr. Garcia. R. at 14-15, 17 (Ex. 5, Tr. 17-18, 27). Sergeant Guyer testified that he did not recall the addresses of any of these residences or the names of anyone who answered the door. R. at 16-17 (Ex. 5, Tr. 25-26). He obtained no new leads regarding Mr. Garcia's whereabouts. R. at 15 (Ex. 5, Tr. 19).

Although Missouri law[5] and department policy required police officers to prepare reports of investigative activities, neither Sergeant Guyer nor Detective Bales prepared written reports documenting any of their purported efforts to locate Mr. Garcia. R. at 15, 26 (Ex. 5, Tr. 21, 63-64). Sergeant Guyer explained that he did not write a report because he "just didn't think it was pertinent." R. at 15 (Ex. 5, Tr. 21). Detective Bales's last report is dated April 16, 1998, one week after the shooting. R. at 26 (Ex. 5, Tr. 64); R. at 65 (Ex. 6-A).

The filing of the indictment on February 21, 2002, failed to stir anyone in the Kirkwood Police Department or the prosecutor's office. According to Detective Bales, the case had become "cold." R. at 24 (Ex. 5, Tr. 55). Detective Bales testified that if he had "received a tip or a lead that the defendant was in a certain location," he would have "[d]efinitely followed up with it." R. at 24 (Ex. 5, Tr. 56). For seven years after the indictment was returned, however, the police did not look for Mr. Garcia.

Sergeant Guyer and Detective Bales testified that the police department provided officers with substantial resources to find suspects. R. at 19, 28 (Ex. 5, Tr. 37, 70). Few

---

[5] *See* Mo. Rev. Stat. § 610.100(2).

of these resources were tapped to locate Mr. Garcia. There was no attempt to find Mr. Garcia by searching social security records, immigration records, tax records, telephone records, or utility records. R. at 19, 27 (Ex. 5, Tr. 36-37, 69). No credit bureau check was run on Mr. Garcia. R. at 19, 28 (Tr. 37, 70). The police did not reach out to the Fugitive Division of the St. Louis County Police Department, the FBI, the United States Attorney's Office, immigration officials, or social security officials. R. at 20, 28 (Ex. 5, Tr. 38, 70-71). The police did not contact the post office to ascertain whether Mr. Garcia left a forwarding address. R. at 21, 28 (Ex. 5, Tr. 45, 70). Nor was any effort made to locate Mr. Garcia outside of Missouri. R. at 28 (Ex. 5, Tr. 72).

During the entire post-indictment period, Mr. Garcia was living in an open and obvious manner, using his actual name, date of birth, and social security number—the same information that the police obtained on the day of the shooting and which the prosecutor set forth in the indictment. R. at 2 (Ex. 2); R. at 49 (Ex. 6-A).

On September 22, 2000, Mr. Garcia was hired by the Renaissance Hotel on One West Wacker Drive in Chicago, Illinois. R. at 227, 232 (Ex. 6-D). When he applied for the job and throughout the course of his employment as a valet, Mr. Garcia provided the hotel with his real name, date of birth, and social security number. R. at 185-204, 232 (Ex. 6-D). He was still employed at the hotel when he was taken into custody in 2009. R. at 76 (Ex. 6-A).

While living in Chicago, Mr. Garcia filed tax returns from 2000 to 2008. R. 80-183 (Ex. 6-C). The tax returns bore his real name and social security number and listed his Chicago address. *Id*. In addition, Mr. Garcia opened several credit card accounts,

bought appliances, registered his automobile with the city, and saw a doctor and dentist. R. at 348-92 (Ex. 6-F).

In February 2009, Detective Steve Urbeck, the Kirkwood Police Department's evidence technician, noticed that the case was "still active" and that Mr. Garcia "had in fact never been located or arrested." R. at 76 (Ex. 6-A). Detective Urbeck typed Mr. Garcia's social security number into the Accurint computer system, and he received an address listing for Mr. Garcia at 3520 W. 59th Street, Chicago, Illinois. *Id.* Detective Urbeck contacted the Fugitive Apprehension Section of the Chicago Police Department and requested assistance in locating Mr. Garcia. *Id.* Two days later, Mr. Garcia was taken into custody without incident when he reported to work at the Renaissance Hotel. *Id.*

For the purpose of the motion to dismiss, Mr. Garcia and the State stipulated to the following facts: (1) witnesses Nabor Garcia, Moises Aguilar, Manuel Castro, and Jesus Rojas cannot be found and are currently unavailable despite Mr. Garcia's diligent efforts to locate them; (2) the videotaped statements of Meliton Gonzalez and Nabor Garcia cannot be found by law enforcement and are unavailable for production to Mr. Garcia; and (3) the building known as the Sunny China Buffet was demolished approximately two years before Mr. Garcia's arrest. R. at 41-42 (Ex. 6).

C. The Respondent's Ruling

The Respondent determined that the seven-year delay between Mr. Garcia's indictment and arrest was presumptively prejudicial and concluded that Mr. Garcia asserted his right to a speedy trial within a reasonable time. R. at 8-9 (Ex. 4).

The Respondent determined that Mr. Garcia and the State were both responsible for the delay. *Id*. The Respondent found that Mr. Garcia applied for a job in Chicago on September 22, 2000, and that he filed his income tax returns from a Chicago address for the years 2000 through 2008. R. at 9 (Ex. 4). Finding that the State could have located Mr. Garcia "in 2002 or before" by performing a computer search using his social security number, the Respondent concluded that the police "did not use reasonable diligence to find Defendant." *Id*.

Despite the State's failure to employ reasonable diligence to locate Mr. Garcia, the Respondent found that Mr. Garcia was also responsible for the delay. According to the Respondent, Mr. Garcia "concealed himself from justice by fleeing his home state immediately after the charged offense and did not return" when he knew "there were witnesses at the scene, including the victim, and that police investigators would be searching for him." R. at 7-9 (Ex. 4).

The Respondent further found Mr. Garcia was not "actually prejudiced by the delay" because "there is no evidence from the reports of interviews of witnesses that unavailable witnesses or evidence would materially help Defendant." R. at 9 (Ex. 4).

Based on these findings, the Respondent concluded that the State had not violated Mr. Garcia's right to a speedy trial and denied his motion to dismiss. *Id*.

D. Post-Disposition Events

While Mr. Garcia's petition for writ of mandamus was pending in the court of appeals, the prosecutor filed an information in lieu of indictment. R. at 393-95 (Ex. 7). The Respondent had granted the State leave to file an information in lieu of indictment in

his order denying Mr. Garcia's motion to dismiss. R. at 8 (Ex. 4). Because the indictment was filed more than three years after the shooting and did not assert a basis for tolling the statute of limitations, the armed criminal action charge was time-barred as pled. *See* Mo. Rev. Stat. § 556.036(2). The information in lieu of indictment charged Mr. Garcia with the same offenses as the indictment and attempted to plead a basis for tolling the statute of limitations applicable to armed criminal action. R. at 393 (Ex. 7).

On May 5, 2010, this Court issued an alternative writ of mandamus commanding the Respondent to vacate the order denying Mr. Garcia's "motion to dismiss for violation of speedy trial rights and to dismiss Count II for violation of statute of limitations" and to "take no further action in said cause . . . until the further order of this Court." On May 6, 2010, the Respondent entered an order complying with the alternative writ of mandamus. App. at A4.

POINT RELIED ON

I.

David Garcia is entitled to an order directing the Respondent to dismiss with prejudice the charges pending against him in Cause No. 2198R-02006-01 because he has been denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that: (1) the crimes Mr. Garcia is charged with were committed on April 9, 1998; (2) the State did not file formal charges against Mr. Garcia until February 21, 2002; (3) Mr. Garcia was living openly during the entire post-indictment period; (4) seven years after his indictment police located and apprehended Mr. Garcia using information the police had obtained on the day that the alleged offense was committed; (5) the delay in bringing Mr. Garcia to trial was attributable solely to the State's failure to exercise reasonable diligence; (6) the delay in bringing Mr. Garcia to trial was inordinately long, inexcusable, and presumptively prejudicial under *Doggett v. United States*, 505 U.S. 647 (1992); (7) Mr. Garcia asserted his constitutional right to a speedy trial within a reasonable time; and (8) Mr. Garcia was prejudiced by the delay in bringing him to trial as material witnesses are no longer available, exculpatory evidence has been lost by the prosecution, and the crime scene has been torn down.

Doggett v. United States, 505 U.S. 647 (1992)

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

State ex rel. McKee v. Riley, 240 S.W.3d 720 (Mo. 2007)

ARGUMENT

I.

David Garcia is entitled to an order directing the Respondent to dismiss with prejudice the charges pending against him in Cause No. 2198R-02006-01 because he has been denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that: (1) the crimes Mr. Garcia is charged with were committed on April 9, 1998; (2) the State did not file formal charges against Mr. Garcia until February 21, 2002; (3) Mr. Garcia was living openly during the entire post-indictment period; (4) seven years after his indictment police located and apprehended Mr. Garcia using information the police had obtained on the day that the alleged offense was committed; (5) the delay in bringing Mr. Garcia to trial was attributable solely to the State's failure to exercise reasonable diligence; (6) the delay in bringing Mr. Garcia to trial was inordinately long, inexcusable, and presumptively prejudicial under *Doggett v. United States*, 505 U.S. 647 (1992); (7) Mr. Garcia asserted his constitutional right to a speedy trial within a reasonable time; and (8) Mr. Garcia was prejudiced by the delay in bringing him to trial as material witnesses are no longer available, exculpatory evidence has been lost by the prosecution, and the crime scene has been torn down.

The Nature of the Constitutional Right to a Speedy Trial

Defendants in criminal cases have a right to a speedy trial under the United States and Missouri Constitutions. U.S. Const. Amend. VI (mandating that "[i]n all criminal

prosecutions, the accused shall enjoy the right to a speedy . . . trial");[6] Mo. Const. art. I, § 18(a) (providing that "the accused shall have the right to . . . a speedy public trial"). These constitutional provisions "provide equivalent protection for a defendant's right to a speedy trial." *State ex rel. McKee v. Riley*, 240 S.W.3d 725, 729 (Mo. 2007).

The "right to a speedy trial is an important right that the courts of this state are duty-bound to honor." *Id.* at 731. *See Barker v. Wingo*, 407 U.S. 514, 515 (1972) (describing the right to a speedy trial as "fundamental") (citing *Kloper v. North Carolina*, 386 U.S. 213 (1967)). The right "exists primarily to protect an individual's liberty interest," and one of its objectives is "to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *McKee*, 240 S.W.3d at 728 (quoting *United States v. Gouveia*, 467 U.S. 180, 190 (1984)). "A criminal defendant's right to a speedy trial guarantees that the state will move quickly to assure the defendant of the early and proper disposition of crimes with which he is charged." *State v. Smith*, 849 S.W.2d 209, 213 (Mo.App. E.D.1993). The exclusive remedy for the deprivation of this right is the dismissal of the charges with prejudice. *Strunk v. United States*, 412 U.S. 434, 439-40 (1973).

Mandamus is the Proper Remedy for Violations of the Right to a Speedy Trial

A peremptory writ of mandamus directing the Respondent to dismiss with prejudice the charges against Mr. Garcia is the proper remedy in this case.

---

[6] The Sixth Amendment's speedy trial provision is applicable to the states through the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

In *McKee*, this Court concluded that speedy trial violations are enforceable by mandamus. 240 S.W.3d at 725 (citing Mo. Rev. Stat. § 545.780(2)). The Court ruled that mandamus safeguards against violations of an accused's constitutional right to a speedy trial. However, citing an inadequate pretrial record, the court asserted that it "lack[ed] sufficient information regarding the causes of the delay to reach a conclusion whether Mr. McKee's right to a speedy trial has been violated." *Id*. at 731. Unlike *McKee*, the parties created an extensive record at a hearing on Mr. Garcia's motion to dismiss. That record is sufficient to allow this Court to determine that the State violated Mr. Garcia's right to a speedy trial.

Deciding the speedy trial issue prior to trial is the only way to protect Mr. Garcia's constitutional right. Mandamus is appropriate where alternative remedies do not offer "full, complete, and adequate" relief. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 269 (Mo. 1980). It is the only adequate remedy in this case. If Mr. Garcia is convicted of first degree assault and sentenced to imprisonment, a direct appeal cannot fully protect his constitutional rights because Mr. Garcia will be incarcerated during the pendency of the appellate process. Mo. Rev. Stat. § 547.170 (stating that an individual convicted of first degree assault is ineligible for release on bail during the pendency of appeal). It would be hard to characterize the reversal of his conviction after Mr. Garcia has spent a year or more in prison as a full, complete, and adequate remedy, particularly where the penalty for transgressing the defendant's right to a speedy trial is the dismissal of the criminal charges with prejudice. Because a direct appeal is incapable of providing a remedy of equal potency, mandamus is the appropriate mechanism for determining

whether a defendant has been deprived of his or her constitutional right to a speedy trial. *See State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 15 (Mo. 1968) (stating that while mandamus ordinarily "does not lie where other remedies are available," the alternative remedies "must be adequate and equally efficient"). In addition, appellate courts are more inclined to grant an extraordinary relief when the proceeding involves a matter of "public importance." *Id*.

State ex rel. Mayweather v. Bondurant, 538 S.W.2d 953 (Mo.App. 1976), is instructive on the availability of mandamus. In *Bondurant*, Aetna sued an automobile driver who had been involved in an accident for subrogation. *Id*. at 954. The driver filed a third-party petition against Insurance Exchange, alleging this insurer was liable for all sums which she might be adjudged to owe Aetna. *Id*. Following the trial court's dismissal of her third-party petition, the driver applied for a writ of mandamus. *Id*. The court of appeals determined that a direct appeal would not provide an adequate remedy to the driver since the trial would proceed in the absence of Insurance Exchange:

> The trial of a jury case entails a heavy financial burden which should be borne by Exchange, not relator, if the Exchange policy was indeed in effect on the date of the accident. Relator should be entitled to have that issue of insurance liability determined in advance of trial so the burden of defense will be assumed by Exchange if relator is covered.

Id. Since a determination that Insurance Exchange was responsible for the cost of defense after the case had been tried "would provide no satisfactory answer to relator's

immediate financial problem," the court declared that "the remedy by appeal cannot be considered so adequate as to preempt relief by mandamus." *Id*.

A far stronger case exists for granting extraordinary relief to Mr. Garcia than to the relator *Bondurant*. While the relator in *Bondurant* sought to protect her economic interests, Mr. Garcia is attempting to vindicate a fundamental constitutional right. Allowing the criminal trial to proceed without resolving the speedy trial claim will frustrate Mr. Garcia's constitutional rights and undermine his liberty interests. If the State has violated his right to a speedy trial, there ought to be no trial. Requiring Mr. Garcia to stand trial and, if convicted, to seek redress of his right to a speedy trial while confined in the penitentiary would unduly burden Mr. Garica's constitutional rights.

Courts in other jurisdictions have concluded that speedy trial claims should be reviewed prior to trial. *See, e.g., Serna v. Superior Court of Los Angeles County*, 40 Cal.3d 239 (1985) (holding that "[e]xtraordinary writ review of a misdemeanor defendant's motion to dismiss made on speedy trial grounds is therefore necessary because appeal does not afford an adequate remedy for redress of these violations"); *Sherrod v. Franza*, 427 So.2d 161 (Fla. 1983) (holding that "[p]rohibition is an appropriate remedy to prohibit trial court proceedings where an accused his been denied his right to a speedy trial and his motion for discharged has been denied").

In concluding that a direct appeal does not provide an adequate remedy for a violation of the right to a speedy trial, the Supreme Court of California reasoned:

> [W]here the balance of interests establishes a violation of a defendant's speedy trial right because of the impact on his other interests—prolonged

> restraint, public obloquy, anxiety, stress, and disruption of everyday life—leaving him to his remedy on appeal would exacerbate the harm by prolonging the period during which he remained subject to those conditions and would offer only the Pyrrhic victory of a reversal should he ultimately be convicted.

Serna, 40 Cal.3d at 263-64. Extraordinary writ review, the court concluded, provided "an effective means by which to enforce the right to speedy trial." *Id*. at 264. According to the court, "[r]elief should be granted whenever the trial court record establishes a violation of the right to speedy trial guaranteed by the Sixth Amendment." *Id*. In this way, the defendant will receive "some redress for the violation of his interests as he will not have to undergo the strain and expense of trial" and "the public fisc will be spared the expense of a futile trial and consequent appeal." *Id*.

The Florida Supreme Court concluded that denying pretrial review of speedy trial claims leads to "a useless expenditure of time and money to engage in a trial where defendant is entitled to a discharge." *Sherrod*, 427 So.2d at 164. Because a trial "involves the time of judges, public defenders, state attorneys, jurors, witnesses, and many court officials incident to the operation of the courtroom," the court held that "the remedy by prohibition is a speedy and efficient one." *Id*.

In this case, the Respondent properly conducted an evidentiary hearing on Mr. Garcia's motion to dismiss and made detailed findings of fact and conclusions of law which allowed for review of the speedy trial claim. The evidence adduced at that hearing establishes that the State violated Mr. Garcia's right to a speedy trial. There is no

legitimate reason to put Mr. Garcia through the expense, inconvenience, and anxiety of a criminal trial where the record demonstrates that the pretrial delay caused by the State's negligence has significantly hindered his ability to mount a defense. *McKee*, 240 S.W.3d at 728 (recognizing that the purpose of the constitutional right to a speedy trial is to protect the defendant's liberty interests and to minimize the disruption of life resulting from unresolved criminal charges).

Because a direct appeal will not adequately protect Mr. Garcia's liberty interests and will waste the time and resources of the parties and the judiciary, this Court should determine in this proceeding whether the State has violated Mr. Garcia's right to a speedy trial. *See Mitchell*, 595 S.W.2d at 266-67 (stating that the objective of a peremptory writ of mandamus is "to supply the want of a legal remedy").

The State Violated Mr. Garcia's Right to a Speedy Trial

For seven years after Mr. Garcia was indicted the State made no effort to arrest him and bring him to trial. The Respondent found that had the State acted with reasonable diligence it could have apprehended Mr. Garcia at the time of his indictment and that Mr. Garcia timely asserted his constitutional rights. R. at 9 (Ex. 4). Based on these findings and in light of the extraordinary pretrial delay in this case, only one conclusion is possible under speedy trial jurisprudence: Mr. Garcia has been deprived of his right to a speedy trial.

The protections of the speedy trial provisions attached when Mr. Garcia was indicted on February 21, 2002. *State v. Bolin*, 643 S.W.2d 806, 813 (Mo. 1983). The Respondent found that the seven-year delay between indictment and arrest was

presumptively prejudicial. Ex. 4 (p. 8). This finding necessitated an analysis of the speedy trial factors identified in *Barker v. Wingo*.[7] *Doggett v. United States*, 505 U.S. 647, 651-52 (1992) (stating that the court must perform a speedy trial analysis when the defendant "allege[s] that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay") (quoting *Barker*, 407 U.S. at 530-31)).

In determining whether the defendant's constitutional right to a speedy trial has been violated, the court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant caused by the delay. *Barker*, 407 U.S. at 530. The Respondent determined that the first and third *Barker* factors favored Mr. Garcia. R. at 9 (Ex. 4). As these findings are supported by substantial evidence, the first and third *Barker* factors will not be discussed further.

A. <u>The delay was attributable solely to the State's failure to exercise reasonable diligence</u>.

The weight assigned to this factor depends on the reason for the delay. *Barker*, 407 U.S. at 531. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted more heavily against the government." *Id*. More neutral reasons such as negligence should be weighted less heavily. *Id*. Neutral reasons, however, are still

[7] Missouri courts have found "presumptive prejudice" when the delay exceeds eight months. *McKee*, 240 S.W.3d at 729.

considered "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id*. Since the extensive post-indictment delay is presumptively prejudicial, the State has the burden of explaining the reason for the delay. *State v. Holmes*, 643 S.W.2d 282, 287 (Mo.App. W.D.1982); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999).

The Respondent found that the State did not exercise reasonable diligence in attempting to find Mr. Garcia. R. at 9 (Ex. 4). There is abundant evidence supporting this finding. A few weeks or months after the shooting, the police stopped actively looking for Mr. Garcia. R. at 24 (Ex. 5, Tr. 54-55). The search resumed briefly in 2001, when the prosecutor's office asked the police to attempt to locate Mr. Garcia before the statute of limitations expired.[8] R. at 14, 16 (Ex. 5, Tr. 17, 24). Sergeant Guyer was assigned this task, and he knocked on some doors for a few days. R. at 14-15 (Ex. 5, Tr. 17-19). When no new leads materialized, the case again went cold. R. at 15, 24 (Ex. 5, Tr. 19, 55). Bureaucratic indifference took over, and the police made no effort to locate Mr. Garcia for the next eight years.

As the right to a speedy trial focuses on the delay between indictment and trial, *Barker*, 407 U.S. at 533, the State's failure to search for Mr. Garcia after he was indicted on February 21, 2002, is significant. The fact that Mr. Garcia resided in Chicago when

---

[8] It is unclear why the prosecution believed that apprehending Mr. Garcia before the expiration of the statute of limitations applicable to armed criminal action was a precondition to seeking his indictment.

the indictment was returned did not prevent the State from apprehending him and bringing him to trial. Between March 2001 and February 2009, the police were not looking for him anywhere. Had the police performed a simple search using Mr. Garcia's social security number, the Respondent found that the police could have located Mr. Garcia no later than 2002. R. at 9 (Ex. 4). The absence of post-indictment efforts to apprehend Mr. Garcia under these circumstances compels a finding that the State is solely responsible for the delay.

The Respondent concluded, however, that Mr. Garcia fled Missouri to avoid prosecution after the shooting and, consequently, shared culpability for the pretrial delay. R. at 7-9 (Ex. 4). The prosecution, however, offered no evidence that Mr. Garcia left Missouri or concealed his identity to avoid prosecution. While one or two people interviewed by the police speculated that if Mr. Garcia were to leave the area, he might go to California or Illinois, the State presented no evidence that Mr. Garcia knew of the charges against him and concealed his whereabouts to avoid prosecution. The record demonstrates the opposite is the case. During the entire post-indictment period, Mr. Garcia lived openly and held a highly visible job as a valet at a hotel in downtown Chicago.

In light of the State's indifference in locating Mr. Garcia following his indictment, the Respondent's finding that Mr. Garcia fled is immaterial. The State adduced no evidence that Mr. Garcia's alleged flight hindered its efforts to apprehend him after indictment. It is uncontroverted that Mr. Garcia was living in the same area and working at the same hotel the entire time. The Respondent's finding that the State could have

apprehended Mr. Garcia at the time of his indictment if it had exercised reasonable diligence establishes that Mr. Garcia's alleged flight was not the cause of the post-indictment delay.

Moreover, regardless as to whether or not Mr. Garcia fled, the State still had a duty to find Mr. Garcia and bring him to trial. *Doggett*, 505 U.S. at 652-53. Mr. Garcia's settling in Chicago did not relieve the State of this obligation since he was living openly and could have been found easily. *See United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (holding that "if the defendant is not attempting to avoid detection and the government makes no serious effort to find him, the government is considered negligent in its pursuit"); *Rayborn v. Scully*, 858 F.2d 84, 90 (2nd Cir. 1988) (stating that "whenever an individual has been officially accused of a crime, not only is the government charged with the burden of bringing the accused swiftly to trial, but it is under an obligation to exercise due diligence in attempting to locate and apprehend the accused, even if he is a fugitive who is fleeing prosecution").

In *Mendoza*, the defendant left the United States and went to the Philippines while he was under investigation for failing to report money on his income tax returns but before he was indicted. The court held that despite the defendant's exodus, the government had a continuing obligation to bring him to trial after indictment:

> Even though Mendoza left the country prior to his indictment, the government still had an obligation to attempt to find him and bring him to trial. After *Doggett*, the government was required to make some effort to notify Mendoza of the indictment, or otherwise continue to actively attempt

> to bring him to trial, or else risk that Mendoza would remain abroad while the constitutional speedy-trial clock ticked.

530 F.3d at 763.

In *United States v. Fernandes*, 618 F. Supp.2d 62, 71 (D.D.C. 2009), the defendant, knowing criminal charges against him were imminent, traveled to India where he lived openly. When an arrest warrant issued, the defendant did not turn himself in, nor did the government seek to secure his return. *Id*. at 71-72. The court found both parties were equally to blame for the pretrial delay. *Id*. at 72. However, since the government had the burden of providing a speedy trial, the court stated it "cannot conclude that the government carried its burden on the essential cause-of-delay factor." *Id*. *See also State v. Palacio*, 212 P.3d 1148, 1154 (N.M.App. 2009) (stating that even though both the defendant and the State were at fault for the pretrial delay, "we weigh [the reasons for delay] against the [s]tate because it is the [s]tate's responsibility to bring a defendant to trial") (quoting *State v. Stock*, 147 P.3d 885 (N.M.App. 2006)) (alterations in original).

The Respondent's finding that Mr. Garcia was unaware of the indictment or arrest warrant, R. at 8 (Ex. 4), further demonstrates the irrelevance of Mr. Garcia's alleged flight. A defendant will not be found to have evaded prosecution unless he "was aware of the issuance of the indictment and intentionally hid himself from law enforcement agents." *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999). *See also United States v. Akinsola*, 57 F. Supp.2d 455, 458 (E.D. Mich. 1999) (finding that "Defendant's transience and the use of aliases cannot be used as proof of evasion unless it can be shown that Defendant knew that a warrant for his arrest existed"). Where, as here, law

enforcement officials "had no pre-indictment contact with Defendant" there is "a presumption that Defendant was unaware of any [charges]." *Akinsola*, 57 F. Supp.2d at 458. The State presented no evidence to rebut this presumption.

Based on the Respondent's finding that the police could have quickly and easily located and apprehended Mr. Garcia at the time of his indictment, the second factor weighs heavily in favor of Mr. Garcia.

B. Mr. Garcia has suffered prejudice due to the lengthy pretrial delay.

Prejudice to the defendant is the most important factor in the speedy trial analysis. *Holmes*, 643 S.W.2d at 288. Courts have recognized three forms of prejudice: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. *Doggett*, 505 U.S. at 654. The most serious form of prejudice is the last "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*. (quoting *Barker*, 407 U.S. at 532). And "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Id*. at 652.

The Respondent determined that Mr. Garcia's alleged flight undermined his claim of prejudice. As discussed above, there is no basis for concluding that Mr. Garcia fled or, even assuming that he did, that this would relieve the State of its obligation to use reasonable diligence to try to apprehend him. Dispensing with Mr. Garcia's claim of prejudice on this basis, therefore, was improper.

The Respondent concluded that Mr. Garcia could not establish actual prejudice because the witness interviews summarized in police reports revealed that the unavailable witnesses or evidence would not materially help Mr. Garcia. R. at 9 (Ex. 4). In requiring Mr. Garcia to demonstrate actual prejudice, the Respondent incorrectly stated the law. In *Doggett*, the Supreme Court held that actual prejudice is not necessary to prevail on a constitutional speedy trial violation where the excessive pretrial delay was due to the State's negligence:

> When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review [usually one year], and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief.

Doggett, 505 U.S. at 658 (internal citations and footnotes omitted). The Supreme Court "explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Id*. at 655 (quoting *Barker*, 407 U.S. at 532).

Mr. Garcia, therefore, is not required to prove actual prejudice and may rely on the presumption of prejudice arising from the State's inordinate delay in bringing him to trial. In other words, the State had the burden of "affirmatively prov[ing] that the delay left [the defendant's] ability to defend himself unimpaired." *Id.* at 658 n.4. *See also United States v. Bergfeld*, 280 F.3d 486, 490 (5th Cir. 2002) (holding that the first three speedy-trial factors "should be used to determine whether the defendant bears the *burden* to put

forth specific evidence of prejudice (or whether it is presumed)") (emphasis in original); *Brown*, 169 F.3d at 351 (finding there was no requirement that defendant show actual prejudice "[g]iven the extraordinary [5-year] delay in this case combined with the fact that the delay was attributable to the government's negligence in pursuing Brown").

The Respondent erred in finding that Mr. Garcia had the burden of demonstrating actual prejudice. Because the prosecution offered no evidence rebutting the presumption of prejudice, the fourth factor weighs strongly in Mr. Garcia's favor.

Even if Mr. Garcia had to show actual prejudice, he satisfied this requirement. The parties stipulated that four eyewitnesses to the shooting can no longer be found. The disappearance of these witnesses establishes actual prejudice. *Barker*, 407 U.S. at 532 ("If witnesses die or disappear during a delay, the prejudice is ***obvious***.") (emphasis added).

In concluding that Mr. Garcia suffered no prejudice, Respondent improperly discounted the importance of these witnesses to the defense. Respondent assumed that the police accurately summarized the statements of these now unavailable witnesses and that they would offer testimony consistent with these summaries. And even if the police reports accurately summarized the witnesses' statements, the Respondent disregarded the possibility that the accounts provided by the witnesses (all of whom appear to be of Mexican heritage) could have been influenced, for example, by fear of the police or intimidation by outside forces. It was wholly improper for Respondent to accept, and to force Mr. Garcia to accept, the police summary of the witness statements. *See Crisp v. Duckworth,* 743 F.2d 580, 584 (7th Cir. 1984) (stating that defense counsel's review of

statements witnesses made to police cannot "generally serve as an adequate substitute for a personal interview"). The State's negligence in bringing this case to trial deprived Mr. Garcia of the opportunity to interview these witnesses and to determine for himself whether they would have offered testimony or provided other evidence favorable to his defense. Under these circumstances, it was improper to penalize Mr. Garcia for his inability to challenge the State's claim that these witnesses would provide evidence damaging to him.

Likewise, the videotaped statements of Meliton Gonzalez and Nabor Garcia may have proved useful to Mr. Garcia's defense. Detective Bales's report indicates that Nabor Garcia gave two different accounts of the incident, one favorable to the prosecution and the other favorable to Mr. Garcia. R. at 62-63 (Ex. 6-A). In his report, Detective Bales noted that before starting the video recorder, Nabor identified Mr. Garcia as the person in the kitchen with the rifle. *Id*. While being recorded, Nabor did not identify Mr. Garcia as the assailant and said he did not remember what the assailant was wearing. *Id*. Nabor's recorded statement was exculpatory under *Brady v. Maryland*, 373 U.S. 83 (1963). Its loss is prejudicial to Mr. Garcia's defense. In addition, should either Nabor Garcia or Meliton Gonzalez testify at trial, the videotaped statements could have provided valuable impeachment material.

Finally, Mr. Garcia cannot examine the crime scene because the Sunny China Buffet was demolished two years before his arrest. R. at 41 (Ex. 6). Mr. Garcia's inability to review the crime scene will hinder his defense. For example, he will be

unable to pin down witnesses on their locations to demonstrate the unreliability of their testimony.

It strains credulity to conclude that Mr. Garcia will experience no prejudice on account of the unavailability of four eyewitnesses, the loss of recorded statements which contained exculpatory evidence and possibly impeachment evidence, and the demolition of the crime scene.

CONCLUSION

All four *Barker* factors weigh heavily in favor of Mr. Garcia. There was a seven-year delay between Mr. Garcia's indictment and arrest. The sheer length of the delay gives rise to a presumption of prejudice. *McKee*, 240 S.W.3d at 729. The State's negligence is the sole cause of the pretrial delay. If the police had acted with reasonable diligence, Mr. Garcia would have been apprehended no later than 2002. R. at 9 (Ex. 4). Mr. Garcia asserted his right to a speedy trial in a timely manner. *Id.* The inordinate delay in bringing this case to trial has hindered Mr. Garcia's ability to defend the charges. In addition to the prejudice presumed from the lengthy pretrial delay, Mr. Garcia demonstrated he will experience actual prejudice to his defense as several eyewitnesses no longer available and material evidence has been lost or destroyed through no fault of Mr. Garcia.

The evidence and findings of record unequivocally establish that the State violated Mr. Garcia's right to a speedy trial. Accordingly, this Court should issue a permanent

writ of mandamus ordering the Respondent to dismiss the charges against Mr. Garcia with prejudice.

____
Joseph F. Yeckel #45992
Law Office of Joseph F. Yeckel, LLC
116 E. Lockwood Ave.
St. Louis, Missouri 63119
Telephone: (314) 227-2430
Facsimile: (314) 963-0629
joe@yeckel-law.com

____
Grant J. Shostak #45838
Shostak & Shostak, LLC
8015 Forsyth Blvd.
St. Louis, Missouri 63105
Telephone: (314) 725-3200
Facsimile: (314) 725-3275
gshostak@shostaklawfirm.com

Attorneys for Relator

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 7,679 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2007. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free pursuant to Rule 84.06(g).

____

CERTIFICATE OF SERVICE

I certify that two hard copies of this brief and an electronic copy of the brief on a CD-ROM filed pursuant to Rule 84.06 were served on counsel identified below via U.S. Mail, postage prepaid, on May 13, 2010:

The Honorable Steven H. Goldman
St. Louis County Courthouse
Division 12
7900 Carondelet Ave.
St. Louis, Missouri 63105
Telephone: (314) 615-1512
Facsimile: (314) 615-8280

David Truman
John Quarenghi
St. Louis County Prosecutor's Office
St. Louis County Justice Center
100 S. Central Ave.
St. Louis, Missouri 63105
Telephone: (314) 615-2600
Facsimile: (314) 615-2611

____

APPENDIX

TABLE OF CONTENTS OF APPENDIX

Document	**Page**
Order denying Relator's Motion to Dismiss	A1
Order vacating Order denying Relator's Motion to Dismiss	A4
U.S. Const. Amend. VI	A5
U.S. Const. Amend XIV	A6
Missouri Const. Article I, Section 18(a)	A7
Mo. Rev. Stat. § 545.780	A8
Mo. Rev. Stat. § 547.170	A9
Mo. Rev. Stat. § 556.036	A10
Mo. Rev. Stat. § 610.100	A12

GARCIA CASE
MISSOURI SUPREME COURT CASE

STATE EX REL. GARCIA v. GOLDMAN

State ex rel. David T. Garcia, Relator,
v.
The Honorable Steven H. Goldman, Respondent.

No. SC 90833.

Supreme Court of Missouri, En Banc.

July 16, 2010.

MICHAEL A. WOLFF, Judge.

INTRODUCTION

David Garcia was indicted eight years ago for a shooting that occurred 12 years ago in Kirkwood. Although he has been employed, paying taxes and living openly in Chicago for the past 10 years, the police made no serious attempt to find him until 2009, when a police officer looked him up in a computer database. After his arrest in Chicago and return to St. Louis County for trial, Garcia moved to dismiss the charge, contending that police and the prosecution violated his constitutional right to a speedy trial. The victim of the shooting was wounded seriously, but the case apparently received scant attention. In the circumstances here, the state has denied Garcia's right to a speedy trial.

FACTS

Kwan Tung Tse, the owner of the Sunny China Buffet in Kirkwood, heard a knock on the kitchen door in April 1998, opened it and let in a man who entered, talked to an employee and then left. The man returned about a minute later carrying a shotgun, shot employee Rigoberto Dominguez in the abdomen and left. Dominguez was hospitalized but survived the attack.

Meliton Gonzalez, another employee at Sunny China, followed the assailant out the door after the shooting and saw him get into a brown coupe. Gonzalez identified the assailant as David Garcia. Dominguez, the victim, and Manuel Castro, another Sunny China employee, also identified the assailant as Garcia. Dominguez told police Garcia shot him because Dominguez had been talking about Garcia's girlfriend two days earlier. Kirkwood police interviewed three other witnesses around the time of the shooting: Nabor Garcia (Garcia's cousin and housemate), Jesus Rojas and Moises Aguilar.

The police found a Mossburg pump-action 12-gauge shotgun hidden in the bushes near the doorway exiting from the kitchen area. Police took photographs of the scene and prepared a diagram of the kitchen area of Sunny China. In addition, they conducted videotaped interviews of Nabor Garcia and Gonzalez. These videotapes have been lost.

Through their investigation, police obtained Garcia's date of birth, driver's license number, social security number and address. Police then searched the apartment Garcia shared with Nabor Garcia and canvassed the apartment complex. Police were told that if Garcia were to leave the St. Louis area, he might go to California or Illinois. Detective Michael Bales testified that he could not recall any of the locations he visited after searching the Garcias' apartment and that he could not remember to whom he spoke at the apartment complex besides Nabor Garcia. Police were unable to locate David Garcia.

Nearly three years after the shooting, the St. Louis prosecuting attorney's office asked Kirkwood police to make further attempts to find David Garcia, because the statute of limitations for the crime was running out. Police received information that Garcia might be in Breckenridge Hills, St. Ann or other communities in north and central St. Louis. Kirkwood police sergeant Steven Guyer attempted to locate Garcia on four days in late February or early March 2001. Guyer was admitted into three residences but did not locate Garcia. No reports were prepared documenting these efforts to locate Garcia.

Garcia was charged by indictment in February 2002 with first-degree assault. The police made no efforts to look for Garcia during the next seven years; according to a Kirkwood detective, the case had become "cold."

In early 2009 Kirkwood Detective Steve Urbeck entered Garcia's social security number into the Accurint computer system and received a Chicago address for Garcia. Detective Urbeck contacted the Chicago police department's fugitive apprehension service and requested its assistance. Chicago police determined that Garcia was working at a Chicago hotel and arrested him in February 2009.

Garcia was living openly in Chicago, using his actual name, date of birth and social security number since at least 2002. The trial court found that the social security number could have been used to locate Garcia in 2002 or before. Garcia filed tax returns from 2000 to 2008 using his real information. He opened several credit card accounts and obtained a Missouri driver's license using his St. Louis address. Garcia's whereabouts between the April 1998 shooting and September 2000 are unknown.

Garcia filed a motion to dismiss the indictment against him, alleging a violation of his right to a speedy trial under the Sixth Amendment to the United States Constitution. The parties stipulate that witnesses Nabor Garcia, Moises Aguilar, Manuel Castro and Jesus Rojas cannot be found and are currently unavailable. They also stipulate that the videotaped statements of Nabor Garcia and Meliton Gonzalez are unavailable and that Sunny China was demolished two years before Garcia's arrest. The respondent circuit court, balancing the factors discussed below and the evidence, overruled the motion to dismiss. The court found that Garcia knew that there were witnesses at the scene of the shooting, that police would be searching for him, that he fled his home address, and that there was no evidence that Garcia was aware of the indictment or arrest warrant. The court also concluded the police did not use reasonable diligence to find Garcia.

Garcia filed a petition for writ of mandamus with this Court, which issued its preliminary writ pursuant to article V, section 4 of the Missouri Constitution.[1]

Analysis

A defendant's right to a speedy trial arises under the Sixth Amendment to the United States Constitution,[2] which applies to the states through the Fourteenth Amendment.[3]Klopfer v. North Carolina, 386 U.S. 213, 222 (1967). These constitutional provisions "provide equivalent protection for a defendant's right to a speedy trial." State ex rel. McKee v. Riley, 240 S.W.3d 720, 729 (Mo. banc 2007).

"[T]he protections of the speedy trial provisions attach when there is a `formal indictment or information' or when `actual restraints [are] imposed by arrest and holding to answer a criminal charge.'" State of Missouri v. Bolin, 643 S.W.2d 806, 813 (Mo. banc 1983) (quoting Dillingham v. United States, 423 U.S. 64, 65 (1975)). Garcia's right to a speedy trial accrued when he was indicted in February 2002.[4] The relevant inquiry in this case is whether the seven-year period between Garcia's indictment and arrest violated his speedy trial rights.

The determination of whether there has been a violation of speedy trial rights involves a balancing process. In determining whether Garcia's right to speedy trial has been violated, the Court is to consider and balance all of the circumstances and to weigh four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972).

1. The length of the delay is a "triggering mechanism" because until there is a "delay [that] is presumptively prejudicial," there is no need to discuss the other factors that are part of the balancing process. Id. Missouri courts have found that a delay of greater than eight months is "presumptively prejudicial." See McKee,240 S.W.3d at 729. The trial court found, and both parties agree, that the nearly seven-year delay in this case between Garcia's indictment and arrest is presumptively prejudicial.
2. The reason for the delay. Different weights are assigned to different reasons for a delay. Barker, 407 U.S. at 531. A deliberate attempt by the state to delay the trial is weighted heavily against the government, while "[a] more neutral reason such as negligence ... should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Id. The trial court found that the police did not use reasonable diligence to find Garcia. After the grand jury indicted Garcia in February 2002, there is no evidence that the police made any effort to locate Garcia until February 2009. This is indeed a lack of diligence and negligence on behalf of the state that weighs against the state.

   The trial court also found that Garcia fled from St. Louis after the shooting and that he "knew there were witnesses at the scene and police would be searching for him." The issue is whether this action should be weighed against Garcia. The state argues Garcia fled St. Louis and, therefore, should bear some responsibility for the delay in his apprehension and prosecution. Garcia argues that the state offered no evidence that he left Missouri or concealed his identity to avoid prosecution and, therefore, that the state's negligence was the sole responsibility for the delay.

   The police searched for Garcia on two occasions: once immediately after the shooting and a second time in early 2001. Garcia's whereabouts from the time of the shooting in April 1998 until his application for a job in Chicago in September 2000 are unknown. Although the police were informed that Garcia might go to California or Illinois, there is no evidence that anyone had actual knowledge that he left the state.

   Garcia lived openly and notoriously throughout the entire post-indictment period, albeit in Chicago, in a foreign jurisdiction. The trial court found that he could have been found using the same method that

eventually was used to find him, by inserting his social security number into Accurint, in 2002 or before. There was no evidence that Garcia knew of the indictment against him. In the absence of evidence that Garcia did something wrong, this factor — the reason for the delay — weighs against the state.

3. The third Barker factor is the defendant's timely assertion of his right. Garcia asserted his right to a speedy trial in December 2009, 10 months after he first found out about the indictment and was arrested. The trial court found Garcia's assertion to be "a reasonable time frame for [Garcia] to raise this claim." Both parties agree that this factor weighs in favor of Garcia.

4. The last Barker factor is prejudice to the defendant resulting from the delay. There are three considerations in determining whether a delay has prejudiced the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired. Bolin, 643 S.W.2d at 815 (citing Barker, 407 U.S. at 532). These three considerations represent the interests of a defendant that the right to a speedy trial is intended to protect. Barker, 407 U.S. at 532. Courts regard the third consideration as the most serious. Id. "[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." Id. (Emphasis added). This third consideration — impairment to Garcia's defense — is the only one applicable in this case.

   The impairment to his defense, Garcia argues, is threefold: (1) the disappearance of four witnesses; (2) the loss of the videotaped interviews of Nabor Garcia and Meliton Gonzalez; and (3) the demolition of the crime scene, Sunny China Buffet. The state argues, and the trial court found, that Garcia presented no evidence that he was prejudiced. Generally, prejudice must be "actual prejudice apparent on the record or by reasonable inference — not speculative or possible prejudice." *State v. Edwards,* 750 S.W.2d 438, 442 (Mo. banc 1988).

   More recently, however, the United States Supreme Court allowed a speedy trial claim to stand absent particularized prejudice. *Doggett v. United States,* 505 U.S. 647 (1992). Negligence, the Supreme Court said, is not "automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 657. In *Doggett,* the defendant was indicted in February 1980 for conspiring to import and distribute cocaine. *Id.* at 648. About one month later, police officers went to the home of Doggett's parents and found out that he had left for Colombia four days earlier. *Id.* at 649. The Drug Enforcement Administration (DEA) put Doggett's name in a computer system so that he could be apprehended on his return to the United States, but the entry expired. In September 1981, the DEA learned that Doggett had been arrested in Panama. The DEA asked for Doggett to be "expelled" to the United States, but Panama did not comply with the request. Doggett was freed in July 1982 and went to Colombia. *Id.* at 649. In September 1985, he entered the United States through customs and settled in Virginia, where he married, earned a college degree, was employed and lived under his own name. In 1982, the American embassy in Panama told the State Department of Doggett's departure to Canada, but the DEA did nothing. In 1985, the DEA discovered that Doggett went to Colombia, but it made no attempt to track him down. *Id.* at 649-650. Doggett was arrested in September 1988 after a simple credit check by the marshal's service found out where he lived and worked. *Id.* at 650. Doggett sought to dismiss his indictment, claiming it violated his right to a speedy trial.

   Using the *Barker* factors, the Supreme Court found that Doggett's rights were violated. The Court readily found that the first three factors weighed against the government.[5] In analyzing *Barker*'s fourth factor, prejudice to the defendant, the Supreme Court stated that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," as "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* at 655. The Court recognized that, although the government's negligence is not weighed as heavily as deliberate actions, it is still an unacceptable reason to delay a trial. *Id.* at 657. Further, the Supreme Court said, "[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Id.* The Court ultimately concluded that "inexcusable oversights" that

resulted in the delay of Doggett's arrest for six years entitled Doggett to relief even if he did not demonstrate actual prejudice. *Id.*

In this case, the state has not proven that the delay "affirmatively ... left [Garcia's] ability to defend himself unimpaired" as required to rebut the presumption of prejudice. *Id.* Four witnesses to the shooting, Nabor Garcia, Moises Aguilar, Manuel Castro and Jesus Rojas, have disappeared. In such a circumstance, *Barker* compels the conclusion that the prejudice to Garcia is obvious. 407 U.S. at 532. Of the seven witnesses to the shooting that police identified, four are missing and a fifth, Kwan Tung Tse, the owner of Sunny China, described the shooter but did not identify him by name. Only two witnesses, Dominguez (the victim) and Gonzalez, appear to be available to testify as to the assailant's identity. Their testimony will be to events that occurred more than 12 years ago. The state must show that Garcia's defense was unimpaired. Too many witnesses and too many years have slipped away for the state to carry this burden.

CONCLUSION

The seven-year delay between the indictment and Garcia's arrest violates his right to a speedy trial under the Sixth Amendment to the United States Constitution. The circuit court should have dismissed the indictment. The Court's preliminary writ of mandamus is made permanent.

Teitelman, Russell and Stith, JJ., concur; Price, C.J., dissents in separate opinion filed; Breckenridge and Fischer, JJ., concur in opinion of Price, C.J.

DISSENTING OPINION

WILLIAM RAY PRICE, JR., CHIEF JUSTICE.

Because Garcia deliberately fled the state, he is the principal cause of the police's delay in locating him. Therefore, he was required to show that actual prejudice resulted from the delay, and he was unable to do so. I respectfully dissent.

The United States Supreme Court set out the four-factor test for evaluating a speedy trial claim in *Barker v. Wingo,* 407 U.S. 514, 530 (1972). While the majority uses the correct test, it reaches the wrong result. The second *Barker* factor asks "whether the government or the defendant is more to blame for the delay." *Id.* On these facts, Garcia was more to blame; he left the jurisdiction. Garcia knew he was suspected of shooting Dominguez at a Chinese restaurant in front of witnesses who could identify him. He knew police would be looking for him. Still, he fled to Chicago. No one alleges here that the police acted in bad faith. *See Smith v. Hooey,* 393 U.S. 374, 383 (1969) (government only has duty to make diligent, good faith effort). Even if the Kirkwood police were not "a model of prosecutorial initiative and concern," when a defendant leaves the jurisdiction after committing a crime, he cannot later claim that his right to a speedy trial was violated. *State v. Black,* 587 S.W.2d 865, 877 (Mo. App. 1979) (government's delay is weighed against complete lack of actual prejudice to defendant resulting from it); *Reynolds v. Leapley,* 52 F.3d 762, 764 (8th Cir. 1995) (no speedy trial violation occurred where "most of the nine year delay was caused by the fact that [the defendant] fled the jurisdiction following his offense"); *United States v. Escamilla,* 244 F.Supp.2d 760, 765-6 (S.D. Texas 2003) (no speedy trial violation occurred where, even though the government's efforts to find defendant were negligent, defendant was still the principal cause of the delay).

There is no requirement that the government make "heroic efforts to apprehend a defendant who is purposely avoiding apprehension." *Rayborn v. Scully,* 858 F.2d 84, 90 (2nd Cir. 1988). The majority ignores the plain fact that police departments have limited resources. Worse, the majority creates further incentive for criminal defendants to conceal themselves from justice. *United States v. Salzmann,* 548 F.2d 395, 404 (2nd Cir. 1976) (Feinberg, J., concurring) (allowing criminal defendants who successfully escape detection to bring speedy trial claims sanctions game playing). It was Garcia, not the state, who was the principal cause of the delay.

Because the second *Barker* factor weighs against Garcia, he is not entitled to a presumption of prejudice when the Court considers the fourth factor. *Wilson v. Mitchell,* 250 F.3d 388 (6th Cir. 2001) (defendant not entitled to presumption of prejudice because he was partially responsible for the delay); *Robinson v. Whitley,* 2 F.3d 562, 570 (5th Cir. 1993) (*Doggett* presumption of prejudice not applicable to defendant who contributed two-thirds of total delay); *Reynolds,* 52 F.3d at 770; *United States v. Bergfield,* 280 F.3d 486 (5th Cir. 2002); *United States v. Cardona,* 302 F.3d 494 (5th Cir. 2002).

The Sixth Amendment contemplates three harms arising from excessive trial delay: "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the defense will be impaired." *Barker,* 407 U.S. at 532. Because Garcia was never incarcerated and because he claims he did not know about the charges against him, the "only harm to petitioner from the lapse of time was potential prejudice to his ability to defend his case." *Doggett v. United States,* 505 U.S. 647, 658-9 (1992) (O'Connor, J., dissenting). The majority concedes that *speculative* or *possible* prejudice is not enough. Majority opinion at 8 (quoting *State v. Edwards,* 750 S.W.2d 438, 442 (Mo. banc 1988); *Doggett,* 505 U.S. at 667 (Thomas, J., dissenting) (government negligence and possible prejudice not enough for a speedy trial violation).

Yet Garcia made no attempt to show actual prejudice, and for reason. He, like all criminal defendants, enjoys a presumption of innocence. According to the parties' stipulation, four witnesses are now unavailable, two videotaped witness statements cannot be located, and the Chinese restaurant where Garcia shot Dominquez no longer exists.[6] But it is *the state* that has to prove its case beyond a reasonable doubt. Absent a specific showing, it is difficult to see how the disappearance of the government's key witnesses will prejudice Garcia. At minimum, "delay is a two-edged sword." *United States v. Loud Hawk,* 474 U.S. 302, 315 (1986) (the passage of time may make it difficult or impossible for the state to carry its burden); *Barker,* 407 U.S. at 521 (unlike other constitutional rights, the deprivation of the right to a speedy trial may work to the accused's advantage). Further, the seven-year delay — in itself — does not prove prejudice. The Eighth Circuit has found even a 19-year delay to not violate the Sixth Amendment. *See United States v. Wangrow,*924 F.2d 1434 (8th Cir. 1991). It is undisputed that Garcia did not demonstrate actual prejudice. The second and fourth *Barker* factors weigh in favor of the state.

Mandamus is an extraordinary remedy. Because Garcia has not shown that he has a "clear and unequivocal right" to relief, I would quash the writ. *McKee v. Riley,* 240 S.W.3d 720, 725 (Mo. banc 2007).

1. This Court has the authority to "issue and determine original remedial writs" pursuant to Missouri Constitution article V, section 4.1. A writ of mandamus will issue to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Furlong Cos. Inc. v. City of Kansas City,* 189 S.W.3d 157, 165-66 (Mo. banc 2006). "A litigant asking [sic] relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed." *Id.* at 166.

2. "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 wherein the crime shall have been committed ...."

3. Article I, section 18(a) of the Missouri Constitution provides "[t]hat in criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury of the county."

4. *C.f. United States v. Lovasco,* 431 U.S. 783, 788-89 (1977).

5. In analyzing the "reason for the delay," the court attributed the entire reason to the negligence of the government. There was no discussion of whether Doggett's actions constituted "flight." *Doggett,* 505 U.S. at 652-53.

6. However, much evidence does still exist — among it, the gun used in the shooting, original crime scene photos, and the victim's testimony.

Bloate Case

Collected Materials

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2357

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the Eastern
	*	District of Missouri.
Taylor Bloate,	*	
	*	
Appellant.	*	

Submitted: February 13, 2008
Filed: July 25, 2008

Before RILEY, JOHN R. GIBSON, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Taylor James Bloate was convicted of one count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and one count of possession of cocaine with intent to distribute, 21 U.S.C. § 841(a)(1). The district court[1] sentenced him to 360 months' imprisonment. Bloate appeals, asserting a Speedy Trial Act violation and other trial and sentencing errors. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

---

[1]The Honorable Stephen N. Limbaugh, Sr., United States District Judge for the Eastern District of Missouri.

I.

On August 2, 2006, officers saw three vehicles, including a Nissan, driving erratically. A few minutes later, they saw the Nissan parked in front of an apartment building, and began surveillance. Witnessing numerous people coming in and out of the building, they suspected drug activity. Eventually, two individuals left in the Nissan. When the driver committed several traffic violations, the officers tried to make a stop. The driver pulled to the side of the road several times, but then drove off as the officers approached. Finally, the driver stopped completely. As the officers approached, they saw two small bags of a white substance (later determined to be crack cocaine) on the driver's lap. The officers seized the cocaine and arrested the driver, identified as Bloate.

After *Miranda* warnings, Bloate repeatedly said, "I'm done, I'm done, I'm going to the penitentiary." He also stated that he did not initially stop because he was trying to find the crack cocaine. When asked about the apartment building, he said, "I don't live there, I don't got nothing to do with that place." The passenger was identified as Shanita Boclair, Bloate's girlfriend. She admitted living in the apartment building, consented to a search (both verbally and in writing), and provided officers with a key, which they used to enter the apartment. Boclair accompanied the officers during the search; no one else was in the apartment. Officers discovered a large closet with closed doors. Inside the closet, they found: (1) men's clothing; (2) a bulletproof vest; (3) three firearms (two loaded); (4) ammunition; (5) individually packaged crack cocaine (totaling about 13.47 grams); (6) paperwork with Bloate's name; (7) Bloate's identification card; and (8) marijuana (about 10.33 grams). In the same room, officers discovered a rental agreement for the apartment, dated July 5, 2006, and signed by Bloate and Boclair.

The officers took the firearms, ammunition, bulletproof vest, drugs, and paperwork to the police station where Bloate was. When the officers entered the room

with the items, Bloate said, "that's all mine, it's not hers, she's got nothing to do with my business." The officers again administered *Miranda* warnings. Bloate admitted living at the apartment and owning the items. During booking, officers seized $1,077 cash from Bloate's person.

The case then proceeded as follows:

- August 24: Bloate was indicted for being a felon in possession of a firearm, and possession with intent to distribute crack cocaine.
- September 7: Bloate moved to extend the deadline for pretrial motions, which was granted until September 25.
- September 25: Bloate waived his right to file pretrial motions.
- October 4: A magistrate judge conducted a hearing, finding Bloate's waiver voluntary and intelligent, and granted leave to waive his right to file pretrial motions.
- November 8: Bloate moved to continue the trial date. Also, Bloate, his counsel, the Assistant United States Attorney, and two police officers met. Bloate signed a proffer agreement, and then admitted possession of the crack cocaine and firearms, and provided his sources for the drugs and firearms.
- November 9: The district court granted the motion, rescheduling the trial for December 18.
- December 13: The district court scheduled a change-of-plea hearing for December 20.
- December 20: At the hearing, Bloate decided not to change his plea to guilty, and requested new counsel. The district court rescheduled the trial for February 26, 2007.
- January 3: The district court appointed new counsel for Bloate.
- February 1: Bloate moved for leave to file pretrial motions out-of-time, and also to suppress physical evidence and statements.
- February 14: A magistrate judge denied Bloate's motions, finding he had waived his right to file pretrial motions.

- February 19: Bloate moved to dismiss due to a Speedy Trial Act violation.
- February 21: The district court denied the Speedy Trial Act motion.
- February 23: The district court rescheduled the trial for March 5.
- March 5: The two-day trial began.

At trial, the government presented the testimony of the officers at the scene of the arrest and search, the firearms examiner who tested the firearms, the forensic chemist who tested the drugs, the fingerprint examiner who confirmed Bloate's previous convictions, and an expert on crack cocaine sales and distribution. In response, Bloate presented the testimony of his landlord, his son, and his son's girlfriend. The landlord testified that, on August 2, Bloate's lease was not final because there was still money due, but that Bloate had permission to store some items there. He also stated that the backdoor to the apartment building might have been open, allowing access to the apartment. Bloate's son, Cortez, testified that he was arrested about the same time, and that officers brought him to the scene of the search and placed him in a police car with his father. Cortez's girlfriend testified that the officers first searched the apartment she was in (immediately above Bloate's apartment), and that the back door to the apartment building was open. Before its rebuttal, the government requested admission of statements Bloate made during his November 8 proffer. Over objection, the court allowed the evidence. One officer, present at the proffer, testified as to Bloate's statements admitting possession and disclosing his sources. The district court denied Bloate's motion for judgment of acquittal. The jury found him guilty of both counts.

II.

A.

In the context of the Speedy Trial Act, this court reviews the district court's findings of fact for clear error and its legal conclusions de novo. ***United States v. Lucas***, 499 F.3d 769, 782 (8th Cir. 2007) (en banc). The Act requires that a defendant's trial begin within 70 days after the indictment or the defendant's initial

appearance, whichever is later, subject to certain exclusions. *See* **18 U.S.C. § 3161(c)(1), (h)**. If a defendant is not brought to trial within this time limit, upon motion of the defendant, the district court must dismiss the information or indictment. **18 U.S.C. § 3162(a)(2)**.

Bloate asserts that the district court erred in denying his motion to dismiss due to a Speedy Trial Act violation. The indictment was filed on August 24, so the Speedy Trial Act clock began August 25. *See* **18 U.S.C. § 3161(c)(1)**. Bloate argues that only one other day is excludable, September 7, thus making the 70th day November 3. The district court rejected this reasoning, finding that the time periods between September 7 and October 4, and November 9 and February 26, excludable.

It is uncontested that the time period from August 25 to September 6 is non-excludable (13 days). The first issue is the period from September 7 – the date the district court extended the deadline for filing pretrial motions – to October 4 – the date Bloate formally waived his right to file pretrial motions, a total of 28 days.

The Speedy Trial Act excludes: "Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." **18 U.S.C. § 3161(h)(1)(F)**. Here, Bloate never filed a pretrial motion. He requested an extension of the deadline for filing pretrial motions, but at that deadline, instead of filing motions, he waived his right to do so. Thus, subsection (F) does not apply.

Even without applying subsection (F), six circuits hold that pretrial motion preparation time may be excluded, if the court specifically grants time for that purpose, because that time is "delay resulting from other proceedings concerning the defendant." *See* ***United States v. Mejia***, 82 F.3d 1032, 1035-36 (11th Cir. 1996); ***United States v. Lewis***, 980 F.2d 555, 564 (9th Cir. 1992); ***United States v. Mobile Materials, Inc.***, 871 F.2d 902, 913-14 (10th Cir. 1989); ***United States v. Wilson***, 835 F.2d 1440, 1444-45 (D.C. Cir. 1987); ***United States v. Tibboel***, 753 F.2d 608, 610 (7th Cir. 1985); ***United States v. Jodoin***, 672 F.2d 232, 238 (1st Cir. 1982). These circuits

reason "that the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through J are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" ***Lewis***, 980 F.2d at 564, *citing* ***Wilson***, 835 F.2d at 1444; ***Tibboel***, 753 F.2d at 610; ***Jodoin***, 672 F.2d at 238; *see also*, ***Mobile Materials, Inc.***, 871 F.2d at 913. One court notes that this construction eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act. *See* ***Wilson***, 835 F.2d at 1444; *see also* ***Mobile Materials, Inc.***, 871 F.2d at 913-14 ("The grant allows the district court to dispose of the difficult question of whether the defendant's interests are better served by an uninterrupted march to trial or by a pause in proceedings at the defendant's request for the preparation of pretrial motions.").

Two circuits decline to use § 3161(h)(1) to exclude time allowed for preparation of pretrial motions. *See* ***United States v. Jarrell***, 147 F.3d 315, 317-18 (4th Cir. 1998); ***United States v. Moran***, 998 F.2d 1368, 1370-71 (6th Cir. 1993). The Fourth Circuit reasons that "Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)(F) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." ***Jarrell***, 147 F.3d at 317; *see also* ***Moran***, 998 F.2d at 1370-71 ("The statute expressly excludes only the period 'from the filing of the [pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion.' The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations.") (internal citation omitted).

This court has acknowledged the circuit split, but not decided the issue. *See* ***United States v. Suarez-Perez***, 484 F.3d 537, 539 n.2 (8th Cir. 2007). This court now joins the majority of circuits in holding that pretrial motion preparation time may be excluded under § 3161(h)(1), if the court specifically grants time for that purpose. Here, the district court expressly extended the deadline for filing pretrial motions, at Bloate's request. Therefore, the 28-day period between September 7 and October 4 is excludable. The fact that Bloate did not actually file any pretrial motions is irrelevant. *See* ***Mejia***, 82 F.3d at 1036.

It is uncontested that the time period from October 5 to November 8, 35 days, is non-excludable, thus bringing the total to 48 non-excludable days. The next issue is the time period from November 9 – the date the district court granted Bloate's motion to continue the trial date – to December 18 – the scheduled trial date, a total of 40 days.

The Speedy Trial Act specifically excludes:

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). Subsection (B) then provides factors to consider in determining whether to grant such a continuance. **18 U.S.C. § 3161(h)(8)(B)**. Although the Act explicitly requires that the judge make an ends-of-justice finding before granting a continuance, it is ambiguous when that finding must be set forth in the record. *See* **18 U.S.C. § 3161(h)(8)(A)**; ***Zedner v. United States***, 547 U.S. 489, 506-07 (2006). "[A]t the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2)." ***Id.*** at 507. "Contemporaneity is not required . . . and a subsequent articulation suffices." ***United States v. Stackhouse***, 183 F.3d 900, 901 (8th Cir. 1999) (per curiam), *citing* ***United States v. Clifford***, 664 F.3d 1090, 1095 (8th Cir. 1981) ("While a court generally should make the findings required by section 3161(h)(8)(A) at the time it grants the continuance, the Speedy Trial Act does not require the court to make a contemporaneous record.").

Bloate argues that this time period is non-excludable. True, in granting the continuance on November 9, the district court did not set forth an ends-of-justice finding on the record. However, in denying Bloate's Speedy Trial Act motion on February 21, the district court stated:

> The court did not specify the reasons for the granting of defendant's request for a continuance, but in effect, did so on the basis of the motion. In the motion, defendant stated that 'Counsel needs additional time to investigate and prepare this matter for trial. Counsel believes that granting this continuance would outweigh the interests of the public and defendant to a Speedy Trial.' This should comport with the requirements of 18 U.S.C. § 3161(h)(8)(A).

This finding references one subsection (B) factor: "Whether the failure to grant such a continuance . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation . . . ." **18 U.S.C. § 3161(h)(8)(B)(iv)**. *See* ***Lucas***, 499 F.3d at 782-83 (ends-of-justice finding was sufficient, even though it could have been more detailed, where it specifically referenced one of the factors under § 3161(h)(8)(B)); ***United States v. Gamboa***, 439 F.3d 796, 803 (8th Cir. 2006) ("the district court's order provided reasons for the court's finding by following the language of the statute, thereby demonstrating that the district court was aware of what requirements had to be met before a continuance could be granted.") (internal quotation marks and citation omitted). This explicit on-the-record finding is sufficient, even though not contemporaneous with the grant of the continuance. *See* ***Stackhouse***, 183 F.3d at 901-02 (excluding time under § 3161(h)(8)(A) where the district court granted a continuance on April 23, 1998, and articulated its reasons on July 14, 1998). The 40-day period between November 9 and December 18 is excludable.

The next issue is the time period from December 20 – the date the district court continued the trial date for a second time – and February 23 – the date the district court continued the trial date for a third time, a total of 66 days. Again, Bloate asserts that this period is non-excludable. Again, the district court did not set forth an ends-

of-justice finding in the record on December 20. The court did include one in its February 21 order:

> On December 20, 2006 it was obvious to the court, although specific findings were not made, that defendant and his counsel, at that time, were not able to resolve their conflicts. Although the court was reluctant to appoint counsel for the defendant at that late date, it appeared unwise not to do so as defendant should have had at least one further opportunity to have counsel of his choice, even at the government's expense. It was therefore obvious to the court that a delay was required in order that the ends of justice could more properly be served in this continuance. To force the defendant to go to trial on a date when a plea was to be implemented, when the defendant elected not to implement the plea agreement and express severe dissatisfaction with his attorney would, in fact, create serious consequences for the defendant. Granting these continuances obviously outweighed the best interest of the public and the defendant to a Speedy Trial.

This finding incorporates one of the § 3161(h)(8)(B) factors: "Whether the failure to grant such a continuance . . . would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation . . . ." **18 U.S.C. § 3161(h)(8)(B)(iv)**. *See* ***Lucas***, 499 F.3d at 782-83. As above, this finding is sufficient, even though not contemporaneous. *See* ***Stackhouse***, 183 F.3d at 901-02. The 66-day period between December 20 and February 23 is excludable.

The final issue is the time period from February 23 – the date the district court continued the trial date for a third time – and March 5 – the date the trial commenced, a total of nine days (not counting February 23, which was excluded above). It is not necessary to decide whether this period is excludable. Even if it is not, only 58 days passed between Bloate's indictment and trial, fewer than the 70 allowed by the Speedy Trial Act.

The Speedy Trial Act was not violated. The district court did not err in denying the motion to dismiss.

B.

Bloate argues that the district court erred in refusing to hear his pretrial motions, thus violating due process. When determining if a constitutional right has been waived, this court reviews the district court's factual findings for clear error, and the ultimate determination of whether a waiver occurred de novo. ***United States v. Caldwell***, 954 F.2d 496, 504 (8th Cir. 1992). The waiver of a constitutional right must be knowing and intelligent. ***Little v. Lockhart***, 868 F.2d 989, 991 (8th Cir. 1989), *citing* ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). "A waiver is knowing and intelligent if made 'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" ***United States v. Harper***, 466 F.3d 634, 643 (8th Cir. 2006), *quoting* ***Moran v. Burbine***, 475 U.S. 412, 421 (1986).

Bloate maintains that his waiver was not knowing because he was not adequately informed of the consequences of a waiver. To the contrary, the transcript of the waiver hearing shows that the magistrate judge expressly explained the nature and consequences of a waiver in detail. The judge explained the nature of what Bloate was waiving by stating, "These types of motions often attack the actions of the police when they arrest somebody and whether they took the statements properly or took evidence or seized or searched or arrested people properly . . . ." The judge told Bloate that "once you waive these motions today you can't come back the a [sic] later time and file them . . . ." Bloate said he understood. Finally, the judge told Bloate that "what you're giving up by waiving these motions is the right to have a judge make a finding that what the police did at the inception of your case was unconstitutional." Bloate again said he understood.

Bloate knowingly and intelligently waived his right to file pretrial motions. The district court did not err in refusing to hear his pretrial motions. *See* ***United States v. Garrido***, 995 F.2d 808, 814-15 (8th Cir. 1993) (finding voluntary and knowing

agreement to withdraw pretrial motions where the court explicitly stated that the defendant was withdrawing his motions with prejudice and made it clear that the defendant would not be able to raise the motions again).

Alternatively, Bloate asserts that even if he did waive his right to file pretrial motions, the district court should have allowed them out-of-time under Federal Rule of Criminal Procedure 12(e). Rule 12(c) allows the court to "set a deadline for the parties to make pretrial motions." **Fed. R. Crim. P. 12(c)**. Rule 12(e) provides that a "party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) . . . . For good cause, the court may grant relief from the waiver." **Fed. R. Crim P. 12(e)**. This court "will reverse a decision declining to consider an untimely pretrial motion only for an abuse of that discretion." ***United States v. Salgado-Campos***, 442 F.3d 684, 686 (8th Cir. 2006).

In his motion for leave to file his untimely pretrial motions, Bloate stated "that his previous waiver of pretrial motions was not knowing or voluntary, rather, it was based on a misunderstanding between the Defendant and his previous attorney." As detailed above, Bloate's waiver was knowing and voluntary, due to the magistrate judge's explanation of the right and its consequences. Thus, Bloate offers no good cause justifying his delay. The district court did not abuse its discretion in denying his motion. *See* ***id.*** ("Because Salgado-Campos fails to show good cause justifying his delay, the district court was well within its discretion to deny his request for an extension of time in which to file pretrial motions.").

C.

Bloate asserts that the district court erred in admitting his statements during the November 8 proffer. The fourth paragraph of the proffer agreement, which he specifically initialed, states:

> [T]he government may use any statements made or other information provided by your client to rebut evidence or arguments materially different from any statements made or other information provided by

> your client. This provision is necessary to assure that no court or jury is misled by receiving information materially different from that provided by your client.

Bloate argues that he merely contested reasonable doubt, and did not offer any evidence or arguments that were materially different from the information he provided during the proffer. Rejecting this argument and allowing the evidence, the district court stated:

> While counsel indicates the defense in this matter is going to be reasonable doubt, I think it's rather obvious that the defense is that the government, of course, has to prove its case beyond a reasonable doubt but that the defendant simply was not involved with this matter, so accordingly, I think evidence of the proffer is appropriate to rebut that material. I don't think it necessarily is required under the agreement that the proffer rebut the defendant's testimony but the general nature of all of the evidence presented by the defendant as a part of his case as well as the cross-examination of the government's witnesses.

Statements made by a defendant in the course of plea negotiations, which may include proffer sessions, are usually inadmissible at trial. **Fed. R. Evid. 410**. *See also* ***United States v. Velez***, 354 F.3d 190, 194 (2d Cir. 2004) (applying plea negotiation rules to proffer sessions). However, a defendant may waive these protections, so long as there is no indication "that the agreement was entered into unknowingly or involuntarily." ***United States v. Mezzanatto***, 513 U.S. 196, 210 (1995). Here, Bloate does not assert that his waiver was unknowing or involuntary, instead focusing on whether the terms of the agreement actually allowed admission of his statements. Although he claims he only contested reasonable doubt, the heart of the testimony of two of his three witnesses – the landlord and his son's girlfriend – was that the apartment was not his and access was open. This testimony attempts to prove that Bloate did not possess the items found within the apartment, which is materially different than what he admitted during the proffer session. During the proffer, he specifically admitted possessing the drugs and firearms in the apartment.

The district court did not err in admitting statements made by Bloate during the proffer session. *See* ***United States v. Williams***, 295 F.3d 817, 820 (8th Cir. 2002) (upholding admission of proffer statement where defendant offered different testimony at trial).

D.

Bloate appeals the district court's denial of his motion for judgment of acquittal, asserting that the evidence was insufficient. Under Rule 29(a), a court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." **Fed. R. Crim. P. 29(a)**. This court "reviews the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government, resolving any conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." ***United States v. Urick***, 431 F.3d 300, 303 (8th Cir. 2005). A court should not weigh the evidence or assess the credibility of witnesses. ***United States v. Hernandez***, 301 F.3d 886, 889 (8th Cir. 2002). The standard is strict, and this court will "reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." ***United States v. Piwowar***, 492 F.3d 953, 955 (8th Cir. 2007) (internal citation and quotation marks omitted).

Bloate claims the government did not prove beyond a reasonable doubt his knowing possession of the firearms, a required element of § 922(g)(1), or his knowing possession of the cocaine, a required element of § 841(a)(1). *See* ***United States v. Claybourne***, 415 F.3d 790, 795 (8th Cir. 2005) (elements of being a felon in possession of a firearm); ***United States v. Cuevas-Arrendondo***, 469 F.3d 712, 715 (8th Cir. 2006) (elements of possession of cocaine with intent to distribute). "Knowing possession can be actual or constructive, as well as sole or joint." ***Piwowar***, 492 F.3d at 955. "Constructive possession is proven by showing that a defendant 'had ownership, dominion, or control over the contraband itself, or dominion over the premises in which the contraband is concealed.'" ***United States v. Cole***, 380 F.3d 422, 425 (8th Cir. 2004), *quoting* ***United States v. Schubel***, 912 F.2d 952, 955 (8th Cir. 1990).

Bloate stresses that a lot of people were around the apartment building, the back door was possibly open, and that he was not found inside. However, this argument relies on weighing the evidence, which this court does not do. Viewing the evidence most favorably to the government, there was sufficient evidence of Bloate's dominion over the bedroom where the firearms and cocaine were discovered. Inside the closet where the firearms were hidden, officers found paperwork with Bloate's name and Bloate's identification card. *See* ***United States v. Johnson***, 474 F.3d 1044, 1049 (8th Cir. 2007) (evidence was sufficient to show knowing possession where defendant's identification card and cable bill were found in the same room as the firearm); ***Claybourne***, 415 F.3d at 796 (evidence was sufficient to show knowing possession where defendant's identification cards, Social Security card, and telephone bill were discovered in the same bedroom as the firearms). Additionally, in the same room, officers recovered a rental agreement for that apartment, signed by Bloate. Finally, Bloate admitted possession of the firearms and cocaine. This evidence was sufficient for the jury to find him guilty beyond a reasonable doubt.

The district court did not err in denying Bloate's motion for judgment of acquittal.

E.

Bloate appeals his sentence, contending that the district court violated his Sixth Amendment right to trial by jury by enhancing his sentence based on his prior convictions. This argument is foreclosed by precedent. *See*, *e.g.*, ***United States v. Booker***, 543 U.S. 220, 244 (2005); ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000); ***Almendarez-Torres v. United States***, 523 U.S. 224, 235, 240-44 (1998); ***United States v. Levering***, 431 F.3d 289, 295 (8th Cir. 2005); ***United States v. Carrillo-Beltran***, 424 F.3d 845, 847-48 (8th Cir. 2005); ***United States v. Wilson***, 406 F.3d 1074, 1075 (8th Cir. 2005). No Sixth Amendment violation occurred.

III.

The judgment of the district court is affirmed.

Missouri State and Federal Statutes Pertaining to Speedy Trial

MISSOURI REVISED STATUTES

CHAPTER 545. PROCEEDINGS BEFORE TRIAL

SECTION 545.780 AUGUST 28, 2009

Speedy trial, when — what constitutes — failure to comply not grounds for dismissal, exception.

545.780.

1. If defendant announces that he is ready for trial and files a request for a speedy trial, then the court shall set the case for trial as soon as reasonably possible thereafter.
2. The provisions of this section shall be enforceable by mandamus. Neither the failure to comply with this section nor the state's failure to prosecute shall be grounds for the dismissal of the indictment or information unless the court also finds that the defendant has been denied his constitutional right to a speedy trial.

(RSMo 1939 § 4000, A.L. 1977 H.B. 241, A.L. 1984 S.B. 602, A.L. 1986 H.B. 1158)

Prior revisions: 1929 § 3611; 1919 § 3954; 1909 § 5161

CROSS REFERENCE:

Trial of convict in prison on request required, when, RSMo 217.460

© Copyright, bottom Missouri General Assembly

FEDERAL STATUTES

18 U.S.C. §§ 3161-3174

9-17.000 SPEEDY TRIAL ACT OF 1974

Title I of the Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, is set forth in 18 U.S.C. §§ 3161-3174. The Act establishes time limits for completing the various stages of a federal criminal prosecution. Government attorneys should comply with the time limits established by the act. For more information, see the Criminal Resource Manual at 628. [cited in Criminal Resource Manual 649]

628, SPEEDY TRIAL ACT OF 1974

1. Title I of the Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, is set forth in 18 U.S.C. §§ 3161-3174. The Act establishes time limits for completing the various stages of a federal criminal prosecution. The information or indictment must be filed within 30 days from the date of arrest or service of the summons. 18 U.S.C. § 3161(b). Trial must commence within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. 18 U.S.C. § 3161(c)(1).

   Moreover, in order to ensure that defendants are not rushed to trial without an adequate opportunity to prepare, Congress amended the Act in 1979 to provide a minimum time period during which trial may not commence. Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, Section 3, 93 Stat. 327. Thus, the Act provides that trial may not begin less than 30 days from the date the defendant first appears in court, unless the defendant agrees in writing to an earlier date. 18 U.S.C. § 3161(c)(2). In United States v. Rojas-Contreras, 474 U.S. 231 (1985), the Supreme Court held that this 30-day trial preparation period is not restarted upon the filing of a substantially similar superseding indictment.

   If the indictment is dismissed at the defendant's request, the Act's provisions apply anew upon reinstatement of the charge. 18 U.S.C. § 3161(d)(1). If the indictment is dismissed at the request of the government, the 70-day clock is tolled during the period when no indictment is outstanding, and begins to run again upon the filing of the second indictment. 18 U.S.C. § 3161(h)(6). If trial ends in a mistrial, or the court grants a motion for a new trial, the second trial must begin within 70 days "from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e).

   Certain pretrial delays are automatically excluded from the Act's time limits, such as delays caused by pretrial motions. 18 U.S.C. § 3161(h)(1)(F). In Henderson v. United States, 476 U.S. 321, 330 (1986), the Supreme Court held that § 3161(h)(1)(F) excludes "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" The Act also excludes a reasonable period (up to 30 days) during which a motion is actually "under advisement" by the court. 18 U.S.C. § 3161 (h)(1)(J). Other delays excluded from the Act's time limits include delays caused by the unavailability of the defendant or an essential witness (18 U.S.C. § 3161(h)(3)); delays attributable to a co-defendant (18 U.S.C. § 3161(h)(7)); and delays attributable to the defendant's involvement in other proceedings, including delay resulting from an interlocutory appeal. 18 U.S.C. § 3161(h)(1)(E). (Note, however, that the 30-day defense preparation period provided for in § 3161(c)(2) is calculated without reference to the Section 3161(h) exclusions).

   A defendant may not expressly waive his rights under the Speedy Trial Act. See, e.g., United States v. Saltzman, 984 F.2d 1087, 1090-1092 (10th Cir. 1993). However, if the trial judge determines that the "ends of justice" served by a continuance outweigh the interest of the public and

the defendant in a speedy trial, the delay occasioned by such continuance is excluded from the Act's time limits. 18 U.S.C. § 3161(h)(8)(A). The judge must set forth, orally or in writing, his reasons for granting the continuance. 18 U.S.C. § 3161(h)(8)(A). The government should never rely on a defendant's unilateral waiver of his rights under the Act. The government should make sure that the judge enters an "ends of justice" continuance and that he sets forth his reasons for doing so.

The Act provides a sanction of dismissal for violation of its time limits that may be with or without prejudice to reprosecution. In assessing whether dismissal should be with prejudice, the court must consider the seriousness of the offense, the circumstances leading to dismissal, and the impact that reprosecution would have on the administration of the Act and on the administration of justice. 18 U.S.C. § 3161(a)(1)-(a)(2). In United States v. Taylor, 487 U.S. 326 (1988), the Supreme Court held that a trial court must examine each statutory factor in deciding to dismiss charges with prejudice. The Court in Taylor found that a minor violation of the time limitations of the act that did not prejudice the defendant's trial preparation did not justify the dismissal with prejudice of an indictment charging serious drug offenses.

While a defendant cannot unilaterally waive his rights under the Speedy Trial Act, he can forfeit his right to obtain a dismissal of the case for a claimed violation of the Act by failing to move for dismissal prior to trial. The statute provides that "[f]ailure of the defendant to move for dismissal prior to trial * * * shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2).

2. The Speedy Trial Act is inapplicable to juvenile delinquency proceedings, which have their own speedy trial provision. See 18 U.S.C. § 5036 (speedy trial provision of the Juvenile Delinquency Act). Furthermore, the Interstate Agreement on Detainers (IAD) provides its own time limits for persons incarcerated in other jurisdictions. See 18 U.S.C. Appendix 2, § 2, Articles III-VI. In such a case, the government must comply with both the time limits of the IAD and the Speedy Trial Act.

3. Case law governing the Speedy Trial Act is found in West's Federal Practice Digest 3d, Criminal Law, at Key Numbers 577.1-586. The legislative history is found in S. Rep. No. 1021, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code. Cong. and Ad. News 7401; S. Rep. No. 212, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 390, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. and Ad. News 805. These reports are contained in a one-volume legislative history of the Act, prepared by the Federal Judicial Center, which was previously distributed to all United States Attorneys' Offices.

   Additional resource tools are 1) the Guidelines to the Administration of the Speedy Trial Act of 1974 as Amended (revised December 1979), which was prepared by the Committee on the Administration of Criminal law of the Judicial Conference of the United States (Judicial Conference Guidelines), and distributed to all United States Attorneys' Offices; and 2) the guidelines adopted by the Court of Appeals for the Second Circuit (Second Circuit Guidelines). A good overview of the Speedy Trial Act (including cases interpreting the Act), and of a defendant's constitutional speedy trial rights in general, is provided in Twenty-Fifth Annual Review of Criminal Procedure, 84 Georgetown Law Journal 1022-1039 (April 1996). Additionally, the Appellate Section of the Criminal Division is available for assistance in interpreting the Act.

4. A defendant's right to a speedy trial has constitutional and statutory underpinnings in addition to the Speedy Trial Act. Federal statutes of limitations provide a time frame within which charges must be filed. Moreover, Rule 48, Fed. R. Crim. P., grants trial courts discretion to dismiss cases that are not brought to trial promptly. See Rule 48(b), Fed. R. Crim. P. (authorizing trial court to dismiss indictment if there is "unnecessary delay" in presenting the charge to a grand jury, in filing an information, or in bringing a defendant to trial).

Even if a charge is brought within the period provided by the statute of limitations, a defendant may be able to show that preaccusation delay has violated his Fifth Amendment due process rights. To obtain a dismissal of the charges by reason of pre-indictment delay, a defendant has the burden of establishing that the government engaged in intentional delay to gain a tactical advantage, and that he suffered actual prejudice. United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307, 324 (1971).

A defendant's rights under the Speedy Trial Clause of the Sixth Amendment are triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." United States v. Marion, 404 U.S. 307, 320 (1971). (As noted above, any delay before this time must be scrutinized under the Due Process Clause of the Fifth Amendment, not the Sixth Amendment's Speedy Trial Clause. United States v. MacDonald, 456 U.S. 1, 7 (1982)). In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court set out a four-factor test for determining whether delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's Sixth Amendment right to a speedy trial. The test requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay. Barker, 407 U.S. at 530-533.

In United States v. Loud Hawk, 474 U.S. 302 (1986), where the reason for the 90-month delay (interlocutory appeals) did not weigh against the government, the Supreme Court held that the possibility of prejudice occasioned by the delay was not sufficient to establish a Sixth Amendment speedy trial violation. Moreover, the courts of appeals routinely reject Sixth Amendment speedy trial challenges in the absence of a showing of prejudice. See, e.g., United States v. Tannehill, 49 F.3d 1049, 1054 (5th Cir.), cert. denied, 116 S. Ct. 167 (1995); United States v. Baker, 63 F.3d 1478, 1497 (9th Cir. 1995), cert. denied, 116 S. Ct. 824 (1996). However, in Doggett v. United States, 505 U.S. 647 (1992), the Supreme Court held that an "extraordinary" eight-and-one-half-year delay between the defendant's indictment and arrest, which resulted from the government's "egregious persistence in failing to prosecute [him]," violated his right to a speedy trial even in the absence of "affirmative proof of particularized prejudice." Doggett, 505 U.S. at 652, 655, 657.

Where there are successive state and federal prosecutions, the general rule is that the federal constitutional speedy trial right does not arise until a federal accusation against the defendant is made. Thus, a prior state arrest based on the same facts as the subsequent federal charge does not implicate the federal constitutional guarantee. United States v. Walker, 710 F.2d 1062, 1069 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

[cited in USAM 9-17.000]