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

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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.

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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).

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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:

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APPENDIX

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