No. 10-718

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

v.

DAVID T. GARCIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant asserting a violation of his Sixth Amendment right to a speedy trial may rely on the presumption of prejudice recognized in *Doggett v. United States*, 505 U.S. 647 (1992), where the defendant left the state prior to his indictment and lived openly and notoriously in another state during the post-indictment period without knowledge of the charges pending against him, the state did not search for the defendant for seven years after his indictment, and the state could have located the defendant at the time of his indictment if it had pursued him with reasonable diligence.

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OPINION BELOW

The opinion of the Missouri Supreme Court (Pet. A1-A15) is reported at 316 S.W.3d 907.

JURISDICTION

On August 31, 2010, the Missouri Supreme Court entered an order denying petitioner's motion for rehearing. (Pet. A20). Missouri filed the petition for writ of certiorari on November 29, 2010. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

On February 21, 2002, a grand jury returned an indictment charging David Garcia with first degree assault and armed criminal action in connection with a 1998 shooting. R. at 2-4 (Exh. 2).[1] On February 19, 2009, seven years after the indictment and eleven years after the shooting, Garcia was arrested. R. at 26 (Exh. 5, Tr. 65).

Garcia moved to dismiss the indictment on the ground that the state violated his Sixth Amendment right to a speedy trial by failing to bring him to trial promptly after he was indicted. R. at 5-6 (Exh. 3). The following evidence was adduced at the hearing on the motion to dismiss.

On April 9, 1998, Rigoberto Dominguez was shot while working at the Sunny China Buffet in Kirkwood, Missouri. R. at 45-50 (Exh. 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.*

Police officers interviewed restaurant employees Meliton Gonzalez, Nabor Garcia, Manuel Castro, Jesus Rojas, and Moises Aguilar. R. at 46-49, 54-55 (Exh. 6-A). Based on these interviews, the officers identified David Garcia as a suspect in

[1] Record citations other than those to the petition or its appendix are to the exhibits submitted with Garcia's petition for writ of mandamus filed in the Missouri Supreme Court. Each citation 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.

the shooting. *Id*.; R. at 18 (Exh. 5, Tr. 33). The officers obtained information to help them locate Garcia, including his full name, date of birth, home address, and social security number. R. at 27 (Exh. 5, Tr. 66).

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

Later on the day of the shooting, Detective Bales and an officer fluent in Spanish searched the apartment Nabor and David Garcia shared. R. at 23 (Exh. 5, Tr. 50). They did not find David Garcia. R. at 23-24 (Exh. 5, Tr. 53-54). The officers spoke with neighbors residing in nearby apartments. R. at 24 (Exh. 5, Tr. 54). Detective Bales began "to get a sense that maybe [Garcia] wasn't around anymore or the possibility he was going to be leaving." R. at 23 (Exh. 5, Tr. 50). Consequently, the police "tried to do as much as [they] could over the next 24 hours to see if [they] could find him." *Id*.

Detective Bales could not recall any of the locations he visited after searching Garcia's apartment. R. at 25 (Exh. 5, Tr. 60). And other than Nabor Garcia, Detective Bales could not remember the name of anyone he spoke to at the apartment complex. R. at 25 (Exh. 5, Tr. 59, 61).

Detective Bales described the steps he took to locate Garcia after the day of the shooting. "For 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 (Exh. 5, Tr. 54). Detective Bales was told "that if [Garcia] were going to leave the area . . . California or Illinois would be possible locations where he could go to."[2] R. at 24 (Exh. 5, Tr. 54). These efforts, however, failed to generate "any solid leads." R. at 24 (Exh. 5, Tr. 55). When asked by the prosecutor for the names of individuals he followed up with, Detective Bales responded, "I wouldn't have that information. I do not know." R. at 24 (Exh. 5, Tr. 57).

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

In late February or early March 2001, Sergeant Guyer and his partner attempted to locate Garcia on three consecutive days one week and a single day the following week. R. at 14-15 (Exh. 5, Tr. 17-19). Their attempts amounted to "a knock and see what we could find out at the door." R. at 16 (Exh. 5, Tr. 23). Sergeant Guyer did not recall the addresses of any of these residences or the names of anyone who answered the door. R. at 16-17 (Exh. 5, Tr. 25-26). At three of the residences, someone answered the door and permitted Sergeant Guyer to search for

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

Garcia. R. at 14-15, 17 (Exh. 5, Tr. 17-18, 27). The police obtained no new leads regarding Garcia's whereabouts. R. at 15 (Exh. 5, Tr. 19).

Although Missouri law[3] and department policy required police officers to prepare reports of their investigative activities, neither Sergeant Guyer nor Detective Bales (the only police officers who testified at the hearing) prepared written reports documenting their purported efforts to locate Garcia. R. at 15, 26 (Exh. 5, Tr. 21, 63-64). Sergeant Guyer explained that he did not write a report because he "didn't think it was pertinent." R. at 15 (Exh. 5, Tr. 21).

On February 21, 2002, nearly four years after the alleged shooting, a grand jury indicted Garcia for first degree assault and armed criminal action. R. at 2-4 (Exh. 2). But the indictment failed to stir anyone in the Kirkwood Police Department or the prosecutor's office. The case had become "cold," although Detective Bales said 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 (Exh. 5, Tr. 55-56). For the next seven years the police did not look for Garcia anywhere, and the case became dormant.

During the entire post-indictment period, Garcia lived openly and notoriously in Chicago. In September 2000, Garcia was hired to work as a valet at the Renaissance Hotel on One West Wacker Drive in Chicago, Illinois. R. at 203, 227, 232 (Exh. 6-D). When he applied for the position and throughout the course of his

[3] *See* Mo. Rev. Stat. § 610.100.2 ("Each law enforcement agency of this state, of any county, and of any municipality shall maintain records of all incidents reported to the agency, investigations and arrests made by such law enforcement agency.").

employment, Garcia provided his real name, date of birth, and social security number—information that the police obtained on the day of the shooting and that was recited in the indictment. R. at 2 (Exh. 2); R. at 49 (Exh. 6-A); R. at 185-204, 232 (Exh. 6-D). From 2000 to 2008, Garcia filed tax returns bearing his real name and social security number and listing his Chicago address. R. 80-183 (Exh. 6-C). While residing in Chicago, Garcia engaged in numerous everyday activities using his own name. He opened credit card accounts, bought appliances, registered his automobile with the city, and sought medical treatment. R. at 348-92 (Exh. 6-F).

Although the Kirkwood police had access to substantial resources to locate suspects, few were used to find Garcia. R. at 19, 28 (Exh. 5, Tr. 37, 70). Officers did not try to find Garcia by searching social security, immigration, tax, telephone, or utility records. R. at 19, 27 (Exh. 5, Tr. 36-37, 69). No credit bureau check was run on 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 agents, or social security officials. R. at 20, 28 (Exh. 5, Tr. 38, 70-71). The police did not try to ascertain Garcia's whereabouts by speaking to his landlord or by contacting the post office to see if Garcia left a forwarding address. R. at 21, 25, 28 (Exh. 5, Tr. 45, 61, 70).

In February 2009, Detective Urbeck noticed that the case was still active and that Garcia had never been located. R. at 76 (Exh. 6-A). Detective Urbeck typed Garcia's social security number into the Accurint computer system and obtained a

Chicago address listing for Garcia. *Id.*[4] Detective Urbeck contacted the Fugitive Apprehension Section of the Chicago Police Department to seek assistance in apprehending Mr. Garica. *Id.* Two days later, Garcia was taken into custody without incident when he reported to work at the Renaissance Hotel. *Id.*

The parties stipulated to the following facts: (1) witnesses Nabor Garcia, Moises Aguilar, Manuel Castro, and Jesus Rojas cannot be found and are currently unavailable despite 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 the defense; and (3) the building known as the Sunny China Buffet was demolished approximately two years before Garcia's arrest. R. at 41-42 (Exh. 6).

- **The Trial Court's Ruling**

In determining whether the state violated Garcia's right to a speedy trial, the trial court considered the following factors the Court identified in *Barker v. Wingo,* 407 U.S. 514, 530 (1972): (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. The court decided the first and third factors weighed in Garcia's favor, finding that the seven-year delay between Garcia's indictment and arrest was presumptively prejudicial and that Garcia asserted his right to a speedy trial within a reasonable time because he was not aware of his indictment before he was arrested. Pet. A18.

[4] This is the first time the police learned that Garcia had moved out of Missouri. Pet. A7.

With respect to the second *Barker* factor, the trial court concluded that Garcia and the state shared responsibility for the pretrial delay. *Id.* The court found that Mr. Garcia did not know he had been indicted prior to his arrest. *Id.* The court determined that the police "did not use reasonable diligence to find Defendant" and could have located Garcia "in 2002 or before" if they had performed a computerized search using his social security number as was done in 2009. *Id.* The trial court found that Garcia also was responsible for the delay because he "fled from his home address" knowing "there were witnesses at the scene, including the victim, and that police investigators would be searching for him." *Id.*

With respect to the fourth *Barker* factor, the trial court found that Garcia had not demonstrated the delay caused actual prejudice to his defense because "[t]here is no evidence from the reports of interviews of witness" prepared by police officers immediately after the shooting "that unavailable witnesses or evidence would materially help Defendant." Pet. A19.

Balancing these factors, the court concluded that Garcia was not entitled to relief. *Id.*

- **The Missouri Supreme Court's Decision**

The Missouri Supreme Court concluded that the state violated Garcia's right to a speedy trial. It determined that the state was responsible for the pretrial delay due to its failure to pursue Garcia with reasonable diligence: "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." Pet. A6.

In weighing the "reason for delay" factor, Missouri Supreme Court rejected the state's argument that Garcia was responsible for the delay. It noted that without knowledge of his indictment, Garcia moved to Chicago, where he "lived openly and notoriously throughout the entire post-indictment period." Pet. A7. Garcia's presence in Chicago did not prevent the state from apprehending him, the court observed, due to the trial court's finding that the police could have found him in 2002 or before "using the same method that eventually was used to find him." Pet. A7.

With respect to the prejudice factor, the Missouri Supreme Court held that Garcia was not required to prove the delay caused actual prejudice to his defense. Pet. A9-A11. Due to the extraordinary length of the delay, the Missouri Supreme Court concluded that Garcia could rely on the presumption that the delay impaired his defense and that he would be entitled to relief unless the state "prove[d] that the delay 'affirmatively . . . left [Garcia's] ability to defend himself unimpaired' as required to rebut the presumption of prejudice." Pet. A10 (quoting *Doggett v. United States*, 505 U.S. 647, 657 (1992)). The state failed to rebut the presumption because four witnesses to the shooting were no longer available and the testimony of the other witnesses would "be to events that occurred more than 12 years ago." Pet. A11. Under these circumstances, the Missouri Supreme Court ruled that "[t]oo

many witnesses and too many years have slipped away for the state to carry [its] burden" to rebut the presumption that the delay impaired Garcia's defense. Pet. A11.

REASONS FOR DENYING THE WRIT

In determining whether a defendant's constitutional right to a speedy trial has been violated, courts must balance the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant caused by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). None of the factors are regarded as "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. Because "*Barker's* formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,'" the Court ordinarily will decline to review the balance struck by lower courts in close cases. *Vermont v. Brillon*, 129 S.Ct. 1283, 1291 (2009) (quoting *Barker*, 407 U.S. at 530).

The Missouri Supreme Court correctly held that the state violated Garcia's constitutional right to a speedy trial where, as here, the state made no effort to apprehend him for seven years after he was indicted and the state failed to rebut the presumption of prejudice arising from the extraordinary pretrial delay. The ruling is extremely narrow and provides that once a suspect is indicted, law enforcement agents must use reasonable diligence to apprehend the suspect and

bring him to trial. The court did not require the state to allocate a certain level of personnel or resources to apprehend criminal suspects.

This decision does not conflict with any of those that the State of Missouri cites in which courts have no Sixth Amendment violation. In each of those cases, the defendant was aware of the charges pending against him and evaded law enforcement agents to avoid prosecution. Garcia, in contrast, was unaware of the charges against him and did not attempt to conceal his whereabouts during the entire post-indictment period.

I. The Missouri Supreme Court correctly applied *Barker v. Wingo* and *Doggett v. United States* in holding that the state deprived Garcia of his right to a speedy trial.

Missouri bears the burden of justifying the seven-year delay between Garcia's indictment and arrest. *Barker*, 407 U.S. at 531 (explaining that the second factor focuses on "the reason the government assigns to justify the delay"); *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004) (stating that every circuit court that has addressed the issue "has held that *Barker* places the burden to explain the delay on the State") (collecting cases). The second *Barker* factor is weighted heavily in favor of the defendant when the government "deliberate[ly] attempt[s] to delay the trial in order to hamper the defense." *Barker*, 407 U.S. at 531. When a pretrial delay is caused by the government's negligence, the second *Barker* factor "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 pertinent inquiry is "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett v. United States*, 505 U.S. 647, 651 (1992).

The petitioner contends that the Missouri Supreme Court improperly expanded the speedy trial right by disregarding the "waiver-doctrine underpinnings" of this Court's Sixth Amendment jurisprudence. Pet. 9. The petitioner maintains that the court should have applied the waiver doctrine and held Garcia partially responsible for the pretrial delay because he left the jurisdiction. Pet. 8. According to Missouri, the court misapplied *Barker* and *Doggett* by eliminating "any consideration of the defendant's responsibility for the delay in his apprehension and prosecution" from *Barker's* balancing test and instead focusing on the lack of evidence that Garcia "did something wrong." Pet. 15-17, 19.

Missouri's argument suffers from several serious flaws. Missouri overlooks the significance of the timing of the indictment as well as Garcia's ignorance of the indictment prior to his arrest. The Speedy Trial Clause of the Sixth Amendment is not triggered until the defendant is indicted, arrested, or otherwise officially accused. *United States v. MacDonald*, 456 U.S. 1, 6-7 (1982) (stating that "no Sixth Amendment right to a speedy trial arises until charges are pending"); *United States v. Erenas-Luan*, 560 F.3d 772, 776 (8th Cir. 2009) (stating that the right to a speedy trial "attaches at the time of arrest or indictment, whichever comes first"). Garcia,

therefore, could not have asserted a violation of his right to a speedy trial until he was indicted in 2002, after he had already taken up residence in Chicago and the police had stopped looking for him.[5]

Moreover, since Garcia did not know of his indictment before he was arrested in 2009, he could not have waived his right to a speedy trial by failing to assert it sooner. *Barker*, 407 U.S. at 525 (stating that a waiver requires the "intentional relinquishment or abandonment of a ***known*** right") (quoting *Johnson v Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added). Moreover, "[c]ourts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights." *Id.* (internal quotations and citations omitted). Until he learned of the charges pending against him, Garcia could not have known he had a right to demand a speedy trial on those charges. *See Doggett*, 505 U.S. at 653 (stating that a defendant who was unaware of his indictment could not be faulted for not asserting his right to a speedy trial prior to his arrest). Accordingly, the waiver doctrine is inapplicable and has no bearing on Garcia's claim.

The Missouri Supreme Court correctly weighed the second *Barker* factor in Garcia's favor based on the state's complete failure to look for Garcia for seven years after he was indicted. *Doggett* involved strikingly similar circumstances and is directly on point. On February 22, 1980, Doggett was indicted for conspiracy to import and distribute cocaine. *Doggett*, 505 U.S. at 648. When officers arrived at

[5] A request for speedy trial made prior to formal commencement of a criminal case is considered premature. *Rashad v. Walsh*, 300 F.3d 27, 39 (1st Cir. 2002).

his parent's home a month later to arrest him, Doggett's mother told them that her son had left for Colombia four days earlier.[6] *Id*. at 648-49. To catch Doggett if he returned to the United States, the DEA notified all United States Customs stations and a number of law enforcement organizations of the arrest warrant and placed Doggett's name in the NCIC computer system. *Id*. at 649.

After living in South America for two and one-half years, Doggett reentered the United States on September 25, 1982, without being detected by the authorities. *Id*. He settled in Virginia and lived openly under his own name. *Id*. He married, earned a college degree, and was employed as a computer operations manager. *Id*. The government assumed that Doggett had settled in Colombia and made no effort to confirm his residency or to track him down. *Id*. at 650. In September 1988, the U.S. Marshal's Service found Doggett when it ran a simple credit check on several thousand people with outstanding arrest warrants. *Id*. Doggett's home and work addresses were obtained within minutes, and he was arrested. *Id*.

The Court concluded that the government was responsible for most of the delay between Doggett's indictment and arrest. While it did not fault the government for the two and one-half year delay resulting from Doggett's presence in South America, the Court determined that the government failed to provide a reasonable explanation for the six-year delay in apprehending Doggett after he returned to the United States. The Court observed: "For six years, the

[6] The government stipulated that there was no evidence that Doggett knew he had been indicted prior to his arrest. *Doggett*, 505 U.S. at 653.

Government's investigators made no serious efforts to test their progressively more questionable assumption that Doggett was living abroad, and, had they done so, they could have found him within minutes." *Id*. at 653.

The facts of this case are nearly identical. Like Doggett, Garcia left the jurisdiction in which he was initially sought by law enforcement officers. For years, law enforcement officers did not look for either defendant anywhere. Both defendants were apprehended quickly after simple, yet highly effective, investigative techniques revealed their whereabouts. A credit check did in Doggett; a computerized search got Garcia. In both cases, the reviewing court determined that law enforcement officers could have found the defendant years earlier if they had employed the same technique that ultimately led to the defendant's arrest. *Doggett*, 505 U.S. at 653; Pet. A7.

This case presents an even stronger example of official negligence than *Doggett* because the state did not pursue Garcia at all for many years after his indictment. The federal authorities tried to apprehend Doggett shortly after he was indicted. Moreover, Doggett moved to a foreign country where the government would have encountered difficulty not only locating him but also securing his extradition. During the entire post-indictment period, Garcia lived openly in Chicago and was always within reach of the police if only they had looked for him.

Missouri contends that *Doggett* is distinguishable because the authorities in *Doggett* "received specific information as to the possible whereabouts of their quarry

and made no attempt to follow up on that information." Pet. 17. While the federal agents did receive information regarding Doggett's location in South America, the Court did not blame the government for the post-indictment delay attributable to the two and one-half years Doggett resided outside of the United States. The Court held the government responsible for the period of the delay beginning with Doggett's return to the United States. Just as the government had to explain the reason for the six-year delay in bringing Doggett to trial after he settled in Virginia, Missouri had to justify the seven-year delay in apprehending Garcia. And Missouri had an advantage over the federal government in locating its quarry. While the federal agents did not know where Doggett may settle if he returned to the United States, the Kirkwood police received information that Garcia had relatives living in Illinois and may go there. Yet, until 2009, the Kirkwood police did nothing to follow up on that lead.

Missouri also argues that *Doggett* is distinguishable because the government stipulated that Doggett did not know he had been indicted prior to his arrest while the Missouri prosecutor did not concede that Garcia was unaware of his indictment. Pet. 14. This argument ignores the ramifications of the trial court's finding that Garcia did not learn of his indictment until he was arrested. This finding, which the state did not challenge, is entitled to deference and is analogous to the government's stipulation in *Doggett*.

Missouri maintains it has always alleged that Garcia left Missouri to avoid arrest and points to the trial court's finding that Garcia "'fled from his home address' knowing that there had been witnesses at the scene of the crime (including the victim) and that the police were looking for him." Pet. 14. The Missouri Supreme Court decided that Garcia was not responsible for the delay in light of the trial court's finding that the seven-year delay could have been avoided if the police had diligently pursued Garcia.[7]

Missouri failed to satisfy its burden of justifying the delay and did not present sufficient evidence to support a finding that Garcia fled the jurisdiction. The evidence the prosecution presented that Garcia left Missouri immediately after the shooting was that the police did not find him at his apartment on the night of the shooting and that his neighbors did not know where he was. The only other

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[7] Citing *United States v. Ingram*, 446 F.3d 1332 (11th Cir. 2006), Missouri argues that the second *Barker* factor should be analyzed differently when a suspect is accused of committing a violent offense rather than a non-violent offense. *Ingram* does support this proposition. The court did not hold that the government would not have been responsible for the pretrial delay if Ingram had been charged with a violent crime instead of a non-violent one. The court's purpose in noting that Ingram had been charged with a non-violent felony (making a false statement) was to explain why Ingram had no reason to believe that the ATF agent who interviewed him and to whom he told that he mistakenly filled out the form containing the false statement still planned on arresting him four years later. *Id*. at 1337. The court appears to be suggesting that since the crime was non-violent and required proof of Ingram's intent, Ingram could have reasonably believed the agent accepted his inculpatory explanation and declined to pursue the charges.

To overcome the consequences of the finding that Garcia was not aware of his indictment, Missouri argues "it was reasonable for the trial court to conclude that Mr. Garcia, having committed an assault with a shotgun, in a public place, in front of several witnesses, should have anticipated that police would . . . begin searching for the shooter." Pet. 14-15 n.1. Such a rule finds no support in the law, perhaps because it would allow the state to defeat the defendant's constitutional right to a speedy trial by stripping him of another fundamental right, the right to be presumed innocent. Moreover, Missouri's position has been rejected in situations where the defendant actually knows of the charges against him and goes into hiding. Even when the defendant is a fugitive, courts have held that the government still has a duty to pursue the defendant with reasonable diligence. *See, e.g., Rayborn v. Scully*, 858 F.2d 84, 90 (2nd Cir. 1988); *United States v. Mitchell*, 957 F.2d 465, 468-69 (7th Cir. 1992); *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993).

attempt to find Garcia occurred three years later, after Garcia had established his residence in Chicago. While there was some evidence that officers looked for Garcia at other locations shortly after the shooting, the police officers who testified were unable to provide any details regarding these stops. That the police did not find Garcia at his apartment on the night of the shooting and did not receive any solid leads does not provide a sufficient basis to classify him as a fugitive.

The police did not gather evidence that could support an inference that Garcia fled his home. For example, there was no evidence that Garcia's apartment appeared as if it had been recently vacated or that the police surveilled Garcia's apartment to see if he returned. The police did not attempt to ascertain where Garcia was employed and inquire with his employer as to whether he continued to report to work. After the police left Garcia's apartment on the night of the shooting, there is no indication they ever returned. Further, there is no evidence the state believed Garcia left Missouri or classified him as a fugitive before 2009. Pet. A7 ("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.").

Even if Garcia fled his home as Missouri contends, this would not have relieved the state of its duty to apprehend him and bring him to trial expeditiously. In *United States v. Blanco*, 861 F.2d 773, 778 (2nd Cir. 1988), the court held that the government had a duty to pursue a defendant who fled to Colombia with reasonable

diligence. Finding the government fulfilled that duty, the court described the government's efforts to apprehend the defendant:

> Before 1984, when Blanco was living in Colombia, the government met its duty of due diligence by having its agent, Charles Cecil, investigate Blanco's whereabouts and attempt to keep track of her through an informant. The government also made considerable efforts from the time a warrant was issued for her arrest in 1974 until the time she was spotted in California in 1984 to detect whether Blanco had entered the United States. The fugitive report on Blanco filed with the National Criminal Information System and the Treasury Enforcement Communications System, the passport and visa "lookouts" filed by the DEA for someone of her name and description, the search for her in Miami hospitals in 1977, and the search for her body in 1980 are all examples of the government having mounted diligent efforts to meet its constitutional responsibility.

Id. *See also Rayborn*, 858 F.2d at 90 (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"); *Mitchell*, 957 F.2d at 468-69 (finding that government acted with due diligence and good faith in bringing defendant to trial after he fled to Colombia); *Sandoval*, 990 F.2d at 485 ("Accepting the notion that the government has some obligation . . . to find a fugitive defendant and bring him to trial."). Thus, assuming Garcia was a fugitive, the "reason for the delay" factor still would weigh against the state because the police did not look for Garcia at all for years after he was indicted.

The petitioner asserts that the Missouri Supreme Court imposed a new requirement on the speedy trial analysis when it concluded that a pretrial delay cannot be attributed to a defendant in the absence of evidence that the defendant did something wrong. Pet. 15-16. According to the petitioner, courts have repeatedly held defendants responsible for delays in their capture and prosecution even when the defendants' actions are "completely blameless from a moral standpoint." Pet. 16. The cases upon which the petitioner relies are inapposite because they involved defendants who knew of the charges against them and engaged in litigation strategies that delayed their trials. *See United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986) (pursuing an interlocutory appeal); *Wells v. Petsock*, 941 F.2d 253, 258 (3rd Cir. 1991) (filing a motion to change venue); *Ringstaff v. Howard*, 885 F.2d 1542, 1543 (11th Cir. 1989) (requesting a mental-health evaluation); *State v. Owsley*, 959 S.W.2d 789, 794 (Mo. 1997) (requesting a mental health evaluation and moving for a change of judge); *State v. Bolin*, 643 S.W.2d 806, 813-14 (Mo. 1983) (moving to quash the indictment).

The Missouri Supreme Court did not alter the speedy trial analysis articulated in *Barker* and *Doggett*. It did not refuse to consider the effect of Garcia's conduct on the delay. Instead, it determined that Garcia's actions did not cause the delay because he was not aware of the charges and the police could have apprehended him when he was indicted if it had acted diligently. This conclusion is consistent with *Doggett* and other cases. *See Doggett*, 505 U.S. at 652-53 (noting

that the authorities could have found Doggett within minutes if it had acted diligently); *Ingram*, 446 F.3d at 1338 (holding that the delay "was caused entirely by the Government" in the absence "of any fault attributable to Ingram"); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999) (refusing to hold defendant culpable for pretrial delay where the defendant was not aware of the issuance of the indictment and did not intentionally conceal himself from law enforcement agents); *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (stating that *Doggett* requires the government to make an effort to notify the defendant that he had been indicted, or otherwise continue to actively attempt to apprehend him, or else risk that charges will be dismissed on for a speedy trial violation).

- ***Missouri did not persuasively rebut the presumption of prejudice.***

With respect to the fourth *Barker* factor, the Court recognized that "unreasonable delay between formal accusation and trial" creates "'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532) (alteration in original). Prejudice to 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). Due to the threat unreasonable delays pose to the fairness of criminal proceedings and the difficulty of definitively establishing prejudice, the Court held that a defendant does not always need to prove actual prejudice to prevail on a speedy trial claim. *Id.*

at 658. Where the government's negligence caused the extraordinary pretrial delay, the defendant is "entitled to relief" unless the defendant acquiesced in the delay or the government persuasively rebuts the presumption of prejudice. *Id*.

The petitioner argues that the Missouri Supreme Court misapplied the fourth *Barker* factor by concluding that the disappearance of four witnesses to the shooting prejudiced Garcia's defense. The Missouri Supreme Court relied on *Barker's* admonition that "[i]f witnesses die or disappear during a delay, the prejudice is obvious." Pet. A8 (quoting *Barker*, 407 U.S. at 532). The petitioner claims that because the missing persons "are witnesses for the state," their absence could only weaken the prosecution's case and, therefore, did not prejudice Garcia. Pet. 18.

Whether the missing witnesses would have testified favorably to the prosecution is unknown. The only indication as to how these witnesses would testify comes from reports prepared by police officers who interviewed the witnesses. Missouri's theory that the testimony of the missing witnesses would aid the prosecution's case necessarily assumes that the police accurately summarized the witnesses' statements and that the witnesses, if they were available, would testify consistently with the summaries. But the witnesses' unavailability makes these assumptions totally unverifiable. Even if the summaries are accurate, the witnesses (all of whom appear to be of Mexican descent) may have been influenced by the police or under duress from outside forces when they gave their statements. The state's negligence in bringing this case to trial in a timely manner deprived

Garcia of the opportunity to interview these witnesses and to determine for himself whether they would have provided evidence beneficial to his defense. Under these circumstances, Missouri should not be permitted to rely on the police summaries as affirmative proof that the delay did not impair Garcia's defense. *Cf. 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").

Missouri complains that Garcia did not "identif[y] a single witness who would have testified on his behalf but is now unavailable, or whose memory has faded." Pet. 19. But requiring Garcia to demonstrate that the missing evidence would aid his defense is contrary to *Doggett*. In cases where an extraordinary pretrial delay is caused by official negligence, the issue is not whether the defendant can specifically prove that the delay impaired his defense but whether the state can rebut the prejudice presumptively arising from the lengthy delay. *Doggett*, 505 U.S. at 657-58.

In *Doggett*, the Court recognized the difficulty in determining which side experiences greater prejudice from an extraordinary pretrial delay. *Doggett,* 505 U.S. at 656. One type of prejudice is the possibility the defense will be impaired by diminishing memories and loss of exculpatory evidence. *Id*. at 654. This is the most serious form of prejudice "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). Because impairment to the defense is exacerbated by the passage of time, "the

presumption that pretrial delay has prejudiced the accused intensifies over time." *Id*. at 652. Doggett, therefore, was permitted to rely on the presumptive prejudice arising from the eight and one-half year delay between his indictment and arrest where six years of the delay was attributable to official negligence.

The Missouri Supreme Court's conclusion that Garcia did not have to demonstrate actual prejudice and could rely on the presumptive prejudice is in accord with *Doggett*. The pretrial delay attributable to the state's negligence was one year longer than the unjustifiable portion of the delay in *Doggett*. *Doggett*, 505 U.S. at 658. Missouri finds itself in the same position as the government in *Doggett*: it did not affirmatively prove that the missing evidence and faded memories of the remaining witnesses will not impair Garcia's ability to defend himself. *Id*. at 658 n.4 (noting that the government "has not, and probably could not have, affirmatively proved that the delay left [Doggett's] ability to defend himself unimpaired"). Because the state failed to rebut the presumption of prejudice, the Missouri Supreme Court properly held that the prejudice factor weighed in Garcia's favor.

II. The Missouri Supreme Court's decision does not unduly burden law enforcement authorities or reward suspects who become fugitives.

The petitioner maintains that the Missouri Supreme Court's decision will have a detrimental effect on law enforcement because it will force law enforcement agencies to allocate scarce resources to apprehend suspects who flee the jurisdiction

or run the risk that the Sixth Amendment will bar the prosecution of these suspects. Missouri's fears are unwarranted.

The government has a duty under the Sixth Amendment to apprehend criminal suspects and bring them to trial promptly. *Barker*, 407 U.S. at 527 ("A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.") (internal footnotes omitted). Justice White observed in *Barker* that "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited." 407 U.S. at 538 (White, J., concurring). As discussed in the prior section, Missouri's contention that Garcia's relocation to Chicago relieved the state of its obligation to conduct a timely post-indictment search for Garcia is at odds with *Doggett's* reasonable diligence standard. *Id*.

The Missouri Supreme Court's ruling is extremely narrow and will not impose an undue burden on law enforcement authorities. The court held that the second *Barker* factor weighed against the state because there was no evidence the police made any effort to locate Garcia for seven years after his indictment. The court did not suggest that the state had to undertake a manhunt for Garcia or otherwise allocate substantial law enforcement personnel or resources to apprehend Garcia.[8] It reasonably held that the state failed to satisfy its obligation under Sixth

[8] The state is under no obligation to make futile efforts to locate a suspect. *See Blanco*, 861 F.2d at 778 ("Due diligence does not require the government to pursue goals that are futile."). But this is not

Amendment to provide Garcia with a speedy trial when it failed to pursue him with reasonable diligence.

Blaming Garcia for the delay would improperly reward the state for its incompetence and invite future episodes of negligence. As the Court observed in *Doggett*, "[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." 505 U.S. at 657. This reasoning is equally applicable to this case. The reason the state failed to apprehend Mr. Garcia for seven years after he was indicted is simple: absolutely no effort was made to find him. The lack of post-indictment efforts to apprehend Mr. Garcia cannot be squared with *Doggett's* reasonable diligence standard.

III. The Missouri Supreme Court's decision is not inconsistent with the federal circuit court cases cited by Missouri.

The cases that the petitioner claims conflict with the Missouri Supreme Court's decision are distinguishable and do not call the state court's reasoning into question.

In *Robinson v. Whitley*, 2 F.3d 562 (5th Cir. 1993), Robinson was arrested in Louisiana on a rape charge. Ten days later, he escaped from police custody and fled

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a case where efforts to find Garcia would have proven futile, as evidence by the finding that the police could have easily found Garcia seven years earlier using the same computerized search it eventually used to locate him. Moreover, the police did not utilize numerous other resources available to Kirkwood officers that likely would have led them to Garcia much earlier than 2009. *See supra* at 5.

to Texas, where he assumed an alias and was arrested after committing several crimes. *Id*. at 565. The court found that Robinson's decision to escape from police custody and adopt an alias caused the pretrial delay. *Robinson* is inapposite because Garcia did not have contact with the police or know of his indictment prior to his arrest and did not assume a false identity.

In each of the other cases cited by the petitioner, the court affirmed the denial of a petition for habeas corpus under the narrow standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996. Under that standard, a federal court reviewing a state court's balancing of the *Barker* factors may not grant habeas relief unless "there is no possible balancing of the factors that both supports the [state court's] ultimate decision and is not contrary to clearly established Supreme Court precedent." *Jackson*, 390 at 1266-67. The AEDPA requires federal courts to "presume that a state court's factual findings are correct unless rebutted by clear and convincing evidence." *Id*. at 1262.

In *Wilson v. Mitchell*, 250 F.3d 388, 392 (6th Cir. 2001), Wilson was charged with first-degree murder in 1973. Officers actively pursued him for six years. *Id*. The police also issued a nationwide all-points bulletin for Wilson and contacted his father, mother, and stepmother; his current and former schools; and his current employer. *Id*. After searching unsuccessfully for Wilson for six years, the police made no further attempt to locate him until shortly before he was arrested in 1995. *Id*.

Under the habeas standard, the court concluded it could not fault the government for the delay in apprehending Wilson. Because Wilson offered no evidence challenging the trial court's finding that he actively evaded the police and concealed his whereabouts for the entire twenty-two-year period between his indictment and arrest, the court had to presume the correctness of the state court's finding of active evasion: "None of Wilson's evidence calls into question the trial court's conclusion that Wilson was a fugitive who repeatedly changed his identity, name, physical appearance, and whereabouts to avoid being brought to trial on the charges." *Id*. at 395 (internal quotation omitted). Thus, the court held that "even if the police made mistakes in their search for Wilson, he is not entitled to relief" because "his active evasion 'is more to blame for that delay.'" *Id*. at 396 (quoting *Doggett*, 505 U.S. at 651).

Wilson is clearly distinguishable. After Wilson was indicted, the police pursued him without success for six years. In this case, the police made no effort to locate Garcia for seven years after his indictment. Wilson's active evasion of law enforcement authorities throughout the post-indictment period doomed his speedy trial claim. Garcia lived openly under his own name during the entire post-indictment period. Because Garcia had no knowledge of his indictment when he moved to Chicago and lived openly and notoriously in Chicago, his relocation cannot reasonably be equated with Wilson's twenty-two year campaign to evade the authorities.

In *Rashad v. Walsh*, 300 F.3d 27, 31 (1st Cir. 2002), Rashad knew the police were looking for him in connection with a rape charge. He moved out of his apartment and spent the next twenty-seven months avoiding the authorities. *Id.* When he was arrested on an unrelated charge, Rashad gave an alias and was convicted under that name. *Id.* In 1987, while he was incarcerated in Massachusetts for the unrelated crime, a grand jury indicted him on the rape charge. *Id.* After he completed the sentence for the unrelated crime, Massachusetts authorities extradited him to Texas to face other unrelated charges. *Id.* Massachusetts negligently failed to take steps to regain custody of Rashad, and the Texas prison released Rashad in August 1990. *Id.* While Rashad was incarcerated, he contacted his attorney regarding the status of the Massachusetts case. *Id.* After he was released from prison, Texas authorities informed Rashad of the charges pending against him in Massachusetts when he applied for a driver's license. *Id.*

For fifteen months after his release from the Texas prison, Rashad's whereabouts were unknown. *Id.* at 32. In November 1991, he returned to Boston and lived openly under his own name. *Id.* Although he was stopped on two occasions for traffic violations and posted bail for a friend, the pending rape charge escaped the authorities' attention. *Id.* Four months after returning to Massachusetts, Rashad was arrested. *Id.* When informed of the outstanding warrant, Rashad repeatedly denied any knowledge of the rape charges. *Id.* He later

acknowledged that he denied he was the person named in the warrant and underlying indictment to avoid prosecution. *Id*.

The court of appeals distinguished the case from *Doggett*, noting that Rashad "had been informed there were charges pending against him." *Id*. at 38. Citing the lack of evidence adduced by Rashad, the court declined to overturn the state court's finding that Rashad's evasion caused the fifteen-month delay following his release from the Texas prison:

> In the habeas context, a petitioner who fails to adduce any evidence regarding a segment of pretrial delay cannot rebut the presumption of correctness to which the state court's finding against him is entitled. The petitioner has not satisfied that burden in regard to this fifteen-month traipse. We therefore lack any basis for disturbing the Massachusetts Appeals Court's finding that the petitioner was a fugitive during that period (and, thus, responsible for the attendant delay).

Id. (internal citations omitted).

Missouri maintains the cases are similar because in each case there is a period of time where the defendant's whereabouts is unknown. There was no evidence regarding Rashad's whereabouts for fifteen months after his release from the Texas jail, and no evidence was presented regarding Garcia's whereabouts between April 1998 and September 2000. *Rashad* is distinguishable because the period occurred after Rashad had been indicted. In this case, that period was between 1998 and 2000, which preceded Garcia's indictment by approximately eighteen months. Because the Speedy Trial Clause was not triggered until Garcia

was indicted in 2002, *MacDonald*, 456 U.S. at 6-7, this period is not relevant to the speedy trial analysis.

CONCLUSION

The Missouri Supreme Court's decision is in harmony with the Court's Sixth Amendment jurisprudence. The Missouri Supreme Court found that Garcia had no knowledge of the indictment prior to his arrest, that the police failed to pursue him with reasonable diligence, and that the police could have apprehended Garcia when the grand jury indicted him had they acted diligently. Based on these findings, the Missouri Supreme Court correctly applied *Doggett* in holding that the state was responsible for the delay based on its failure to pursue Garcia for seven years after he was indicted and that Garcia could rely on the presumption of prejudice due to the extraordinary length of the pretrial delay.

For the reasons stated, the respondent respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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