No. SC93785

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

SYLVESTER R. SISCO, II,

Appellant.

Appeal from Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable Sandra C. Midkiff, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF FACTS 4

ARGUMENT 9

The trial court properly overruled Appellant's motions to dismiss based on alleged speedy trial violations 9

CONCLUSION 43

CERTIFICATE OF COMPLIANCE 44

APPENDIX ..... Filed Separately

TABLE OF AUTHORITIES

Cases

Barker v. Wingo, 407 U.S. 514 (1972) 15, 16 n.3, 17, 19, 20, 23, 34

Crawford v. Washington, 541 U.S. 36 (2004) 27 n.7

Doggett v. United States, 505 U.S. 647 (1992) 13-14,20

Garris v. State, 389 S.W.3d 648 (Mo. 2012) 40

Klopfer v. North Carolina, 386 U.S. 213 (1967) 20-21 n.5, 40

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976) 14

State v. Atchison, 258 S.W.3d 914 (Mo. App. S.D. 2008) 20, 22, 29, 36

State v. Baumruk, 280 S.W.3d 600 (Mo. 2009) 5 n.1

State v. Bolin, 643 S.W.2d 806 (Mo. 1983) 23, 35

State v. Carl, 389 S.W.3d 276 (Mo. App. W.D. 2013) 15

State v. Clinch, 335 S.W.3d 579 (Mo. App. W.D. 2011) 27-28

State v. Cunningham, 401 S.W.3d 493 (Mo. 2013) 40

State v. Davis, 903 S.W.2d 930 (Mo. App. W.D. 1995) 21-22, 26, 35, 36-37

State v. Ferdinand, 371 S.W.3d 844 (Mo. App. W.D. 2012) 13, 14, 20

State ex rel. Garcia v. Goldman, 316 S.W.3d 907 (Mo. 2010) 20

State v. Greenlee, 327 S.W.3d 602 (Mo. App. E.D. 2010) 22, 31, 35, 36

State v. Herald, 309 S.E.2d 546 (N.C. Ct. App. 1983) 41 n.10

State v. Knox, 697 S.W.2d 261 (Mo. App. W.D. 1985) 14

State v. Lamb, 353 S.E.2d 857 (N.C. Ct. App. 1987) 41 n.10

State v. Mason, 428 S.W.3d 746 (Mo. App. E.D. 2014) 13

State ex rel. McKee v. Riley, 240 S.W.3d 720 (Mo. 2007) 19, 23

State v. Morris, 501 S.W.2d 39 (Mo. 1973) 17

State v. Morton, 444 S.W.2d 420 (Mo. 1969) 21 n.5, 41

State v. Newman, 256 S.W.3d 210 (Mo. App. W.D. 2008) 22, 26

State ex rel. Norwood v. Drumm, 691 S.W.2d 238 (Mo. 1985)..... 41

State v. Owsley 959 S.W.2d 789 (Mo. 1997)..... 31

State v. Pugh, 357 S.W.3d 310 (Mo. App. W.D. 2012) 15, 16

State v. Scott, 348 S.W.3d 788 (Mo. App. S.D. 2011) 31

State v. Sharp, 341 S.W.3d 834 (Mo. App. W.D. 2011) 16

State v. Simino, 397 S.W.3d 11 (Mo. App. S.D. 2013)..... 13

State v. Taylor, 298 S.W.3d 482 (Mo. 2009) 21 n.5

State v. Washington, 9 S.W.3d 671 (Mo. App. E.D. 1999) 15 n.3

State v. Werner, 9 S.W.3d 590 (Mo. 2000) 23, 34

Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660 (Mo. 2010) 18 n.4

United States v. Lovasco, 431 U.S. 783 (1977) 42

Statutes and Constitution

Section 56.087, RSMo Cum. Supp. 2006 ..... 40, 41

Section 545.780, RSMo 2000 ..... 14, 19

Section 545.780, RSMo Cum. Supp. 1984 ..... 14, 18 n.4

Section 545.780, RSMo 1978 ..... 18 n.4

Section 565.020, RSMo 2000 5

Section 565.050, RSMo 2000 5

Section 571.015, RSMo 2000 5

Court Rules

Supreme Court Rule 83.08 14

STATEMENT OF FACTS

Sylvester R. Sisco, II is appealing his conviction and sentence for one count each of murder in the first degree, section 565.020, RSMo 2000 and assault in the first degree, section 565.050, RSMo 2000, and two counts of armed criminal action, section 571.015, RSMo 2000. (L.F. 302-04). Appellant was tried by a jury on October 5-19, 2009, before Judge Sandra C. Midkiff. (L.F. 273-81). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict,[1] the following evidence was adduced at trial:

In the early morning hours of October 16, 2006, Appellant was at a Kansas City bar called The Filling Station. (Tr. 796, 993-94). Also there were Appellant's brother, Anthony, and his girlfriend, Erin Bridges, her friend, Lucretia Neal, and two other men, Jacob Higgs and Reno Dillard. (Tr. 580, 583-84, 608, 992-94). The bar was not open to the public when those six people were there, but Dillard was a co-owner along with his parents and brothers. (Tr. 582, 749-50). Bridges and Neal arrived after the men and parked behind Appellant's white Ford Explorer. (Tr. 997, 1019). The two

---

1 *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. 2009).

women stayed at the bar for about an hour, drinking and playing pool, and then left. (Tr. 588, 610, 797, 995-96).

The jury viewed surveillance video that was recovered from the bar. (Tr. 301-06, 313, 861). After the women left, the four men continued to drink and talk for about twenty minutes. (Tr. 866-67, 871-77). Appellant and his brother then pulled out guns and began shooting Higgs and Dillard. (Tr. 877). After the shooting, Appellant and his brother poured themselves drinks but then realized that Dillard was still moving. (Tr. 877). They hit him in the head multiple times with their guns before leaving the bar. (Tr. 877-79).

Despite his injuries, Dillard managed to call the police. (Tr. 276-77). Officers arrived at the bar shortly after 3:15 a.m. (Tr. 276-77). They were unable to force open the locked doors and had to call the fire department for assistance. (Tr. 279). Higgs was declared dead at the scene. (Tr. 279-80). He had been shot seven times. (Tr. 556). One bullet entered through the right armpit and lodged at the base of the skull. (Tr. 558). The remaining wounds were also on the right side of the body, to the back, hip, buttocks, upper arm, and a graze wound to the wrist. (Tr. 559-60). Dillard was taken to a hospital. (Tr. 280-81). He had been shot in the back, the hand, and twice in the head. (Tr. 752). One of the bullets entered his bladder, and at the time of trial that injury interfered with his ability to urinate. (Tr. 752). Dillard also was

suffering at that time from numbness in his fingers, ongoing pain throughout his body, and memory impairments. (Tr. 753-54).

Kansas City police made still photographs from the surveillance video that depicted the six people in the bar. (Tr. 334). The photographs were released to the media, and the public was asked to contact police if they recognized any of the people in the photos. (Tr. 798). Bridges and Neal went to the police and identified all those depicted, including Appellant and his brother. (Tr. 590-94, 801-02, 992-93, 998-1003). The two women also provided written statements to the police that led to arrest warrants being issued for Appellant and his brother. (Tr. 575, 803, 824-25). The two men voluntarily surrendered to police four days after the shootings. (Tr. 827).

Appellant testified that he was not at the bar when the shootings occurred. (Tr. 1136-37). He identified his brother Anthony as one of the two shooters, but said that he and Anthony were not close and did not associate with each other. (Tr. 1120-21). Appellant's father testified that he saw Anthony in the video of the shootings but did not see Appellant. (Tr. 1104).

The jury found Appellant guilty on all charges. (Tr. 1278-79; L.F. 17, 264-67). In the sentencing phase of the trial, the jury returned verdicts recommending sentences of life imprisonment for assault in the first degree and thirty years imprisonment on each count of armed criminal action. (Tr. 1295-96; L.F. 268-70). The trial court imposed the mandatory sentence of life

imprisonment without parole on the charge of murder in the first degree and also imposed the sentences recommended by the jury on the remaining counts. (Tr. 1411-12; L.F. 18). The court ordered that the sentences for Counts I (murder in the first degree) and II (armed criminal action) be served concurrently to each other, that the sentences for Counts III (assault in the first degree) and IV (armed criminal action) be served concurrently to each other, and that the sentences for Counts III and IV be served consecutively to the sentences for Counts I and II. (Tr. 1411-12; L.F. 18). Additional facts specific to Appellant's claim of error will be set forth in the argument portion of the brief.

ARGUMENT

The trial court properly overruled Appellant's motions to dismiss based on alleged speedy trial violations.

Appellant claims that the trial court erred in overruling his motion to dismiss because his right to a speedy trial was violated. But Appellant has failed to demonstrate a violation of his speedy trial rights under the Sixth Amendment that would have required dismissal of the charges against him.

A. Underlying Facts.

Appellant was initially charged by complaint on October 19, 2006. (L.F. 1). A warrant was issued that same day and was served on October 20, 2006. (L.F. 1-2). An indictment was filed on October 27, 2006, and the case was assigned to Division 10 following arraignment. (L.F. 3). Defense counsel entered his appearance on November 7, 2006, and filed a request for discovery. (L.F. 4, 23). A pre-trial hearing was held on January 18, 2007, and Appellant posted bond on January 23, 2007. (L.F. 4).

The first trial date set was for August 20, 2007. (L.F. 5, 165). The State requested and received a continuance on August 14, 2007, due to a health issue involving the lead prosecutor. (L.F. 5-6, 166). The case was reset for trial on December 10, 2007, but was continued to March 24, 2008 on the court's own motion due to docket constraints. (L.F. 6, 166). The judge assigned to Division 10 was placed on special assignment to the family court,

so the case was transferred by agreement of the parties on December 18, 2007 to Division 18, and reset for trial on June 30, 2008. (L.F. 6, 7, 166).

Appellant filed a Request for Speedy Trial on June 30, 2008. (L.F. 7, 24). On that same day, State's witness Lucretia Neal indicated that she planned to invoke the Fifth Amendment if called to testify. (L.F. 166). Although Neal was granted immunity, the State expressed concern about whether she would testify, so it requested and was granted a continuance to have DNA testing performed. (L.F. 166-67). The court issued an order directing Appellant to provide a buccal swab so that his DNA could be compared to DNA found on a blue tooth device recovered at the crime scene. (L.F. 7, 29-30). Appellant filed a motion the following day asking the court to reconsider the order to provide the buccal swab. (L.F. 7, 31-35). The court withdrew that order on agreement of the parties. (L.F. 8, 36).

On August 4, 2008, the case was transferred to Division 15 by agreement of the parties after Division 18 was assigned exclusively to the domestic docket. (L.F. 8, 167). The State filed a second motion seeking a buccal swab from Appellant on September 18, 2008, and a hearing was scheduled for October 3rd. (L.F. 8, 37-40). On October 2nd, Appellant requested additional time to respond to the motion, and he filed his response on November 24, 2008. (L.F. 9, 41-42). The court issued an order on

December 9, 2008 for Appellant to provide a buccal swab on December 12th, and he provided the buccal swab on that date. (L.F. 9, 43, 167).

A new trial date was set for April 27, 2009. (L.F. 9). On April 16, 2009, Alice Dearing, the criminalist who had examined fingerprints found at the crime scene but who had since retired, contacted the prosecutor and informed him she would be unavailable to testify the week of April 27th. (L.F. 165-67). Dearing had not matched any of the fingerprints that she examined to Appellant. (L.F. 165-66). The prosecutor contacted the crime lab and asked criminalist Carl Carlson to re-examine the evidence. (L.F. 167). Carlson notified the prosecution on April 22nd that he had identified one of the prints as belonging to Appellant. (L.F. 168). Defense counsel filed a motion in limine to exclude the fingerprint evidence on April 24th, and a hearing was held that same day. (L.F. 9, 44-46, 168). After the court granted the motion to exclude the newly discovered fingerprint results, the State dismissed the case *nolle prosequi* and filed a new complaint later that day. (L.F. 9, 13, 52, 168). An arrest warrant was also issued and served that day. (L.F. 12-13). An information was filed on May 4th. (L.F. 53-56). Appellant was arraigned that day and the case was assigned to Division 13 and set for trial on July 6th. (L.F. 13, 169). Appellant filed a second request for speedy trial on May 6, 2009. (L.F. 13, 57-58).

On June 29th, Appellant filed an amended motion to dismiss the case with prejudice, claiming that his right to a speedy trial had been violated. (L.F. 14, 59-93). A second amended motion to dismiss was filed on July 1st, in which Appellant claimed that the information on which he had been arraigned on May 4th was invalid because he had not waived his right to a preliminary hearing. (L.F. 14, 169). The July 6th trial date was canceled so that Appellant could file a petition for a writ of prohibition in the Missouri Court of Appeals Western District, which he did on July 9th.[2] (L.F. 14). The writ petition was denied on July 10th. (L.F. 15). That same day, Appellant filed a motion for change of judge while the State filed an amended indictment and objections to the motion for change of judge. (L.F. 15, 98-102, 103). The request for a change of judge was granted on July 13th, and the case was assigned to Division 12. (L.F. 15, 104, 170). Appellant also filed numerous motions on July 13th – a request for discovery, a motion to dismiss and quash the information with prejudice under section 545.780, RSMo, and a motion in limine and request for sanctions due to claimed discovery violations. (L.F. 15, 105-07, 147-51).

---

[2] *See* CaseNet records for case number WD71218, *State ex rel. Sisco v. Daugherty*.

The State and Appellant appeared before the newly assigned judge that morning. (7/13/2009 Tr. 4). The trial court noted that venirepersons were present and that the court had been prepared to begin jury selection that morning, but that the trial would have to be delayed so that the State could respond to the motions filed by the defense that morning. (7/13/2009 Tr. 5). A hearing on the motions was held on July 15th. (7/15/2009 Tr. 12-197).

The trial court issued several orders on August 4, 2009. The court denied the motion to dismiss, quashed a subpeona that the defense had issued to the lead prosecutor in the case, and set aside the previous order excluding the State's fingerprint evidence. (L.F. 16, 165-76, 177). The trial was rescheduled for October 5, 2009, and it began that day. (L.F. 16, 273-74). Appellant renewed his motion to dismiss for speedy trial violations during the trial. (Tr. 14-17, 1034). He also included a claim in his new trial motion that the trial court erred in overruling his motion to dismiss for speedy trial violations. (L.F. 287-97).

B. Standard of Review.

Appellate courts review a trial court's ruling on a motion to dismiss based on an alleged speedy trial violation for abuse of discretion. *State v. Mason*, 428 S.W.3d 746, 749 (Mo. App. E.D. 2014); *State v. Simino*, 397 S.W.3d 11, 20 (Mo. App. S.D. 2013); *State v. Ferdinand*, 371 S.W.3d 844, 850 (Mo. App. W.D. 2012), *see also*, *Doggett v. United States*, 505 U.S. 647, 652

(1992) (stating that a trial court's determinations on whether the State was negligent in bringing the defendant to trial are entitled to considerable deference). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Ferdinand*, 371 S.W.3d at 850.

Appellant contends that the abuse of discretion standard is inappropriate, and that speedy trial claims should be subject to *de novo* review. That is a different standard than the one advanced in Appellant's brief in the Court of Appeals. *See* Supreme Court Rule 83.08(b). Appellant contended in that brief that his claim was reviewable under the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). That standard applies to court-tried civil cases, and the Court specifically stated that the term *de novo* was inappropriate in reviewing such cases. *Id.* at 32. Appellant also cited to a case in which the Western District applied the *Murphy v. Carron* standard to a speedy trial claim. *State v. Knox*, 697 S.W.2d 261, 263 (Mo. App. W.D. 1985). But that case construed a prior version of the speedy trial statute that, unlike the present version of the statute, did not require the trial court to find a constitutional speedy trial violation before dismissing an indictment or information under the statute. *Id.* at 262-63; *compare* § 545.780, RSMo Cum. Supp. 1984 *with* § 545.780, RSMo 2000. The court

thus did not conduct a Sixth Amendment analysis and did not discuss the factors outlined in *Barker v. Wingo*, 407 U.S. 514 (1972), that will be discussed in greater detail below.

In addressing Appellant's new proposed standard of review, Respondent acknowledges that the Western District has, in a recent case, stated that whether the Uniform Mandatory Disposition of Detainers Law (UMDDL) requires dismissal of Appellant's criminal case and whether an appellant's Sixth Amendment right to a speedy trial has been violated are both questions of law that are reviewed *de novo*. *State v. Carl*, 389 S.W.3d 276, 281 (Mo. App. W.D. 2013). Respondent respectfully suggests that language is overly broad and that *de novo* review is inappropriate for review of Sixth Amendment speedy trial claims. The court cited *State v. Pugh*, 357 S.W.3d 310 (Mo. App. W.D. 2012), as authority for the *de novo* standard of review.[3] *Pugh*, however, stated only that whether a case should be dismissed

---

[3] The Court also cited *State v. Washington*, 9 S.W.3d 671 (Mo. App. E.D. 1999). *Carl*, 389 S.W.3d at 281. But that case discussed the standard to be applied to the denial of a motion to suppress based on a violation of the Sixth Amendment right to counsel. *Washington*, 9 S.W.3d at 675. The United States Supreme Court has noted that "The right to a speedy trial is generically different from any of the other rights enshrined in the

under the UMDDL is a question of law, and it made no reference to the Sixth Amendment. *Id.* at 313. The Court, in fact, never conducted a Sixth Amendment review in *Pugh* because it found that the defendant was not entitled to the protections of the UMDDL since no detainer had been filed. *Id.* Furthermore, in articulating the *de novo* standard of review, the Court cited to *State v. Sharp*, a case where the defendant claimed a UMDDL violation, but abandoned any claim of a Sixth Amendment violation. *State v. Sharp*, 341 S.W.3d 834, 836 n.2, 837 (Mo. App. W.D. 2011). *Sharp* also involved an earlier version of the UMDDL that did not require a defendant to establish a constitutional speedy trial violation to be entitled to dismissal under the UMDDL. *Id.* Even in articulating the *de novo* review standard for UMDDL violations, the Court stated, "To the extent the application of the law is based on the evidence presented, the facts are viewed in the light most favorable to the judgment, with due deference given to the trial court's factual findings." *Id.* at 837.

When the cases are read together it appears that whether the procedural requirements of the UMDDL have been met is a question of law

---

Constitution for the protection of the accused." *Barker*, 407 U.S. at 519. The Court specifically distinguished the Sixth Amendment speedy trial right from the Sixth Amendment right to counsel. *Id.* at 521.

subject to *de novo* review since resolution of that issue will depend entirely on the existence or non-existence of certain historical facts. The UMDDL is not implicated in this case and the sole question for determination is whether Appellant's Sixth Amendment right to a speedy trial has been violated. *De novo* review is not appropriate for that issue. The United States Supreme Court has described the right to speedy trial as a more vague concept than other procedural rights and has stated that it is "impossible to determine with precision when the right has been denied." *Barker*, 407 U.S. at 521. The Court therefore rejected calls to set an inflexible standard for determining speedy trial claims, instead adopting a balancing test in which the conduct of both the prosecution and the defendant are weighted. *Id.* at 529-30.

In conducting that balancing test, the circuit court must necessarily use its discretion, especially in assessing the reasons behind any delays in the trial and in weighting the responsibility for those delays against either the State or the defense. This Court, relying on *Barker* and other Supreme Court precedents, has noted that the right of a speedy trial is necessarily relative and depends on the facts and circumstances of the case, and that the denial of a speedy trial contrary to the constitutional protection cannot be quantified into a specified number of days or months. *State v. Morris*, 501 S.W.2d 39, 41-42 (Mo. 1973). Because the Sixth Amendment speedy trial analysis is so fact-

specific, an abuse of discretion standard is appropriate for reviewing how the trial court applied the facts to the *Barker* factors.

C. Analysis.

1. Appellant is not entitled to dismissal for alleged Sixth Amendment speedy trial violation.

Appellant claims that he is entitled to dismissal under the provisions of section 545.780, RSMo. (Appellant's Sub. Brf., p. 61). That statute reads as follows:

> 1. If a defendant announces that he is ready for trial and files a request for a speedy trial, then the court shall set the case for trial as soon as reasonably possible thereafter.[4]

---

[4] On pages 61 and 62 of his substitute brief, Appellant notes that the statute once contained a specific deadline for bringing a case to trial but was amended to remove that deadline and replace it with the "as soon as reasonably possible" language. *Compare* § 545.780, RSMo 1978 *with* § 545.780, RSMo Cum. Supp. 1984. Appellant then calls on this Court to enact a specific deadline. That request ignores the well-settled rule that this Court enforces statutes as they are written and that the Court will not supply what the legislature has omitted from a statute. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667-68 (Mo. 2010).

> 2. The provisions of this section shall be enforceable by mandamus. Neither the failure to comply with this section nor the state's failure to prosecute shall be grounds for the dismissal of the indictment or information unless the court also finds that the defendant has been denied his constitutional right to a speedy trial.

§ 545.780, RSMo 2000. The statute's self-evident purpose is not to expand the constitutional right to a speedy trial, but rather to provide a mechanism for bringing a case to trial when a defendant seeks a timely resolution of his or her case. *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 726 (Mo. 2007). Because Appellant's claim is that the charges against him should have been dismissed, and because the statute limits that remedy to only those cases where there is a constitutional violation, the question this Court must answer is whether such a violation occurred. *See id.*

The United States and Missouri Constitutions provide equivalent protection for a defendant's right to a speedy trial. *Id.* at 729. To assess whether the constitutional right to a speedy trial has been respected or denied, the Court must balance four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Id.* (citing *Barker*, 407 U.S. at 533).

a. Length of delay.

The delay in bringing a defendant to trial is measured from the time of arrest or indictment. *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907, 911 (Mo. 2010). Missouri courts have found that a delay of greater than eight months is presumptively prejudicial. *Id.* Both the United States Supreme Court and Missouri courts have recognized that the term "presumptively prejudicial" as applied to the first prong of the *Barker* analysis does not indicate the existence of prejudice under the fourth prong. *Doggett*, 505 U.S. at 652 n.1; *State v. Atchison*, 258 S.W.3d 914, 919 (Mo. App. S.D. 2008). It instead marks the point below which a court need not even consider the other *Barker* factors. *Id.*; *Barker*, 407 U.S. at 530. The record shows that Appellant was initially arrested on October 20, 2006 and went to trial on October 5, 2009, with only a brief period on April 24, 2009 where he was not facing charges. (L.F. 1-2, 12-13, 16). *See Ferdinand*, 371 S.W.3d at 852 (period between voluntary dismissal of charges and their re-filing does not count in determining Sixth Amendment speedy trial violations).[5] The nearly thirty-six

[5] Appellant contends that cases not including the period between dismissal and refiling are in disagreement with the United States Supreme Court decision in *Klopfer v. North Carolina*, 386 U.S. 213 (1967). The Court considered in *Klopfer* what it described as "an unusual North Carolina

month period between Appellant's initial arrest and the beginning of his trial is sufficient to trigger an analysis of the remaining *Barker* factors.

b. Reason for the delay.

The second factor is the reason for the delay.[6] "Pretrial delay is often both inevitable and wholly justifiable." *State v. Davis*, 903 S.W.2d 930, 936 (Mo. App. W.D. 1995). Accordingly, different weight is given to different

---

criminal procedural device known as the '*nolle prosequi*' with leave." *Id.* at 214. That procedure discharged the defendant but did not discharge the indictment or dismiss the charges, and did not toll the statute of limitations. *Id.* By contrast, a *nolle prosequi* in Missouri terminates a prosecution and requires the filing of a new case in order to bring the charges at a later date. § 56.087.3, RSMo Cum. Supp. 2006. *Klopfer* is thus distinguishable and Appellant's reliance on it is misplaced. *See State v. Morton*, 444 S.W.2d 420, 425 (Mo. 1969) (stating that *Klopfer* is neither controlling nor persuasive due to differences between North Carolina and Missouri procedures).

[6] Appellant claims that the reason for delay is a legal issue reviewed *de novo*. None of the cases he cites support that proposition. The only one of those cases that discusses questions of law and *de novo* review does so in a general way and in the context of an evidentiary issue, not a speedy trial issue. *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009).

justifications. *State v. Newman*, 256 S.W.3d 210, 214 (Mo. App. W.D. 2008). A deliberate attempt to delay the trial in order to hamper the defense should be weighted against the government. *Id.* A more neutral reason such as negligence or overcrowded court dockets should be weighted less heavily, but neverthless should be considered since the ultimate responsbility for such circumstances must rest with the government rather than the defendant. *Id.* A valid reason, such as a missing witness, should serve to justify delay. *Id.* Finally, delays attributable to the defendant weigh heavily against the defendant. *State v. Greenlee*, 327 S.W.3d 602, 612 (Mo. App. E.D. 2010); *see also Atchison*, 258 S.W.3d at 919 (subtracting from the total period of delay the changes of judge and continuances obtained by the defendant). A defendant who contributes to the delay cannot later successfully allege the denial of his rights to a speedy trial. *Greenlee*, 327 S.W.3d at 612.

Appellant's discussion of the delays that occurred in this case largely consist of a series of accusations that the State sought continuances for improper purposes. The underlying thread of the argument is that the State had a weak case and sought continuances to bolster the evidence. As an initial matter, it should be noted that the trial court, which had the opportunity to observe the prosecutor and assess his credibility, did not find any bad faith or improper motives. That determination is entitled to

deference. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. 2000). Furthermore, the facts do not support the allegations of bad faith.

i. October 19, 2006 through August 20, 2007.

Appellant initially discusses the period between October 19, 2006 and the first trial setting of August 20, 2007. Appellant did not address that period in his Court of Appeals brief and therefore did not rely on it to demonstrate the existence of either a speedy trial violation or prejudice. The record demonstrates that the August 20, 2007, trial setting was made at a counsel status hearing held on March 21, 2007, and there is no indication in the record that Appellant objected to that setting. (L.F. 5). In fact, Appellant had not invoked his right to a speedy trial at the time of the initial trial setting. That failure to assert the right makes it difficult for Appellant to prove that he was denied a speedy trial. *Barker*, 407 U.S. at 532. Delays caused by unobjected-to continuances will not be weighed heavily against the State. *State v. Bolin*, 643 S.W.2d 806, 815 (Mo. 1983), *overruled on other grounds by*, *Riley*, 240 S.W.3d at 727.

ii. August 20, 2007 through December 10, 2007.

Appellant next claims that the August 20, 2007 to December 10, 2007 delay occasioned by the continuance granted due to the prosecutor's medical condition was actually obtained to avoid a trial because the State lacked sufficient evidence to obtain a conviction. That claim is totally lacking in

evidentiary support and contrary to defense counsel's concession to the trial court that the continuance was legitimate. (4/27/2009 Tr. 59-60). In fact, the claim of a weak case is mainly based on the lack at that time of fingerprint and DNA evidence. But Appellant overlooks that the State was not able to present at trial evidence of the fingerprint found at the scene that matched Appellant, and that the DNA evidence that was presented did not generate a match to Appellant within a reasonable degree of scientific certainty. (Tr. 690-705, 903-04, 958). The State was able to obtain a conviction despite the absence of fingerprint evidence or strong DNA evidence, so the State's case at the time of the first delay was not as weak as Appellant contends. It is also notable that Appellant does not go so far as to actually question the legitimacy of the medical condition that led to the request for a continuance. His request to substitute the trial court's assessment of the validity of the delay and to weigh the delay heavily against the State should be summarily rejected. *See* (L.F. 171).

iii. December 10, 2007 through June 30, 2008.

Appellant agrees that the delays covering the period from December 10, 2007 to June 30, 2008 were caused by court scheduling and docket assignments. Appellant continues to make unsupported allegations that the State's evidence was weak, but he presents no facts to contradict the trial

court's finding that the delay should be weighed against the State, but not heavily. (L.F. 171).

iv. June 30, 2008 through April 27, 2009.

The next period that Appellant discusses runs from June 30, 2008 to April 27, 2009. Trial was set to begin on June 30, 2008, which was also the date that Appellant first invoked his right to a speedy trial. (L.F. 6, 7, 166). Appellant filed that motion after the State indicated that it planned to seek a one month continuance. (6/30/2008 Tr. 5-6). In support of the continuance request, the prosecutor advised the court that he had subpeonaed Lucretia Neal, one of the women present in the bar shortly before the shooting, to testify for the State, that he had talked with Neal the prior week about her testimony, and that she gave no indication at that time that she was reluctant to testify. (6/30/2008 Tr. 13). Defense counsel stated that Neal subsequently contacted him for advice about her rights and that he advised her to obtain counsel. (6/30/2008 Tr. 14).

Neal appeared in court with counsel that morning. (6/30/2008 Tr. 14). A hearing was held in which Neal expressed her intention to invoke her Fifth Amendment right and remain silent if called to testify. (6/30/2008 Tr. 22-26). At the State's request, the court granted Neal immunity. (6/30/2008 Tr. 35-36). Prior to the immunity hearing, the prosecutor had also expressed a desire to have DNA testing performed on a blue tooth device found at the bar

and said the testing could be completed in about three weeks. (6/30/2008 Tr. 15). Following an in-chambers conference that does not appear on the record, the court granted the State's request for a continuance, but indicated that it was not available to try the case in the thirty day period suggested by the prosecutor. (6/30/2008 Tr. 37-38).

Delays occasioned by DNA testing are weighed against the State, but not heavily. *Davis*, 903 S.W.2d at 936. Part of the delay is also attributable to the court's schedule, which again is not weighed heavily against the State. *Newman*, 256 S.W.3d at 214.

v. April 27, 2009 through July 6, 2009.

In assessing this period, Appellant accuses the prosecutor of misleading the court about the availability of criminalist Alice Dearing, who examined fingerprints recovered from the crime scene while employed at the Kansas City Crime Laboratory. The record does not support the claim of misrepresentation. At an April 24, 2009 hearing, the prosecutor stated that Dearing had retired from the police department, that she had indicated the previous week that she was available to testify at trial, but then subsequently called the prosecutor to inform him that she had taken a job with a private defense contractor and would be in Iraq when the trial was set to begin. (4/24/2009 Tr. 27-28). Appellant extrapolates from those statements that the State was misrepresenting that Dearing had recently retired from

the police department when she had actually retired some years before. The prosecutor, in fact, made no representations about when Dearing had retired and his statements to the court reflect nothing more than that he had expected her to be available to testify, but that her plans had suddenly changed and she was no longer available.

Once the prosecutor learned of Dearing's unavailability, he determined that under *Crawford v. Washington*[7] he would have to have the fingerprint evidence examined by another criminalist in order to be able to introduce the testing results into evidence. (4/24/2009 Tr. 27). The prosecutor therefore contacted the head of the laboratory's fingerprint unit, Carl Carlson, and asked him to re-examine the prints. (4/24/2009 Tr. 28-29). Carlson, in conducting the re-examination, matched a fingerprint recovered from the scene to Appellant. (4/24/2009 Tr. 29). The trial court excluded the fingerprint evidence because it had come to light so soon before trial. (4/24/2009 Tr. 43-47). The State dismissed the case *nolle prosequi* and refiled it that same day. (L.F. 9, 13, 52, 168).

Appellant is critical of the prosecutor for dismissing the charges, but Missouri courts have found no error in the State filing a *nolle prosequi* following adverse pretrial rulings and then refiling the charges. *State v.*

---

[7] 541 U.S. 36 (2004).

Clinch, 335 S.W.3d 579, 583 (Mo. App. W.D. 2011). The court in *Clinch* rejected an argument that the prosecutor entered a *nolle prosequi* in bad faith to avoid an adverse ruling on the wording of an instruction. *Id.* at 583-84. The prosecutor's action was found to be within his broad discretion to dismiss charges and refile so long as jeopardy has not attached, and the court declined the defendant's invitation to place limits on that discretion. *Id.* at 583-84.

Appellant contends that the prosecutor misled the court about the timing and circumstances of the retesting of the fingerprint evidence, but it is Appellant who is misstating the record. First, he notes that Carl Carlson testified in a deposition that the prosecutor requested that the fingerprints be re-examined in 2008 because Dearing had indicated that she would be unavailable for trial. But he fails to mention that Carlson also testified that the request for re-testing was laid aside after the trial was continued and that he did not actually conduct his re-examination of the fingerprints until April 16, 2009. (Supp. L.F. 1390, 1460). Appellant also refers to testimony by Carlson that an examiner named Barbara Banks had re-examined the fingerprints and made matches to two other individuals, one of whom was victim Reno Dillard. There is also testimony indicating that the prosecutor was not informed of those matches until April 21, 2009. (Supp. L.F. 1460,

1479). Those identifications by Banks did not result in any delays in the trial and have no bearing on the claim before this Court.

The same allegations of misconduct were placed before the trial court in the motion to dismiss heard on July 15, 2009. (7/15/2009 Tr. 29-30, 39-54, 87-96, 119-27). The State responded to those allegations. (7/15/2009 Tr. 56-83, 96-117). In particular, the lead prosecutor stated that the first continuance was due to a degenerative disk in his back, that he never believed that he had a weak case, that he had requested a re-examination of the fingerprints in June of 2008 but later called that re-examination off after the case was continued and had forgotten about it until it came out in Carl Crawford's deposition. (7/15/2009 Tr. 96-100). The prosecutor also stated that he did not think that DNA evidence was necessary until it became apparent that Lucretia Neal was not going to testify, and that was what prompted the request for DNA testing. (7/15/2009 Tr. 101). In *Atchison*, the Southern District found that delays caused by uncooperative witnesses should only be weighed slightly against the State, if at all. *Atchison*, 258 S.W.3d at 919-20.

While Appellant argues that the grant of immunity to Neal made the continuance unnecessary, the prosecutor's concerns about her cooperation and that of Erin Bridges, who also was granted immunity after indicating her intent to invoke the Fifth Amendment, proved to be well-founded. Both Neal and Bridges invoked the Fifth Amendment when called to testify. (Tr. 572,

632). Neal had to be questioned outside the presence of the jury, where she was repeatedly ordered to answer the prosecutor's questions. (Tr. 574-600). Bridges was jailed for contempt for refusing to respond to the prosecutor's questions and had to be called to the stand a second time after she decided to purge herself of the contempt by testifying. (Tr. 631-57, 992-1019).

The prosecutor also reiterated that his request to have Carl Carlson re-examine the fingerprints in 2009 was the result of Alice Dearing suddenly becoming unavailable for trial and that he did not know at the time of the request that Barbara Banks had already examined the fingerprints. (7/15/2009 Tr. 102-03). The prosecutor said if he had known that, he would have asked Banks to testify and would not have asked Carlson to re-examine the prints. (7/15/2009 Tr. 103). The prosecutor also said that he did not learn about the matches to Reno Dillard or the other individual until the Tuesday before trial, and learned the following day that a print had been matched to Appellant. (7/15/2009 Tr. 103-04). The prosecutor said he immediately notified defense counsel upon learning of the additional matches. (7/15/2009 Tr. 104-05).

vi. July 6, 2009 through October 5, 2009.

Appellant discusses for the first time in his substitute brief the period between July 6, 2009 and October 5, 2009, and claims that delays during that period should be attributed to the State. Appellant filed numerous motions

during this period that had to be adjudicated. Those included motions to dismiss filed on June 29th and July 1st, a motion for a change of judge filed on July 10th and granted on July 13th, and a request for discovery, a motion to dismiss and quash the information, a motion in limine and request for sanctions due to alleged discovery violations, all filed on July 13th. (L.F. 14, 15, 59-93, 98-102, 104, 105-07, 147-51, 169, 170). The time required to adjudicate motions filed by the defendant are attributable to the defendant. *State v. Owsley*, 959 S.W.2d 789, 794 (Mo. 1997). Delays attributable to the defendant weigh heavily against the defendant. *Greenlee*, 327 S.W.3d at 612; *Atchison*, 258 S.W.3d at 919. Additionally, the July 6th trial date was canceled so that Appellant could file a writ of prohibition in the Court of Appeals, which he did on July 9th. (L.F. 14). Delay that is the result of an appeal is generally attributable to the defendant. *State v. Scott*, 348 S.W.3d 788, 796 (Mo. App. S.D. 2011).

vii. Trial court acted within its discretion in assigning weight to the various delays.

In its August 4, 2009, order overruling Appellant's motion to dismiss, the trial court examined the delays in the case, the underlying reasons for those delays, and how the responsibility for those delays should be apportioned between the parties:

The first trial setting was August 20, 2007, 10 months after the defendant was first charged. This was the soonest the Court could schedule a trial taking its own calendar into consideration as well as the calendar of the defense attorney and that of the State. The State was granted a continuance from that setting because the State's lead counsel had a personal medical issue which needed attention. That delay is attributed to the State, but the Court finds the delay caused by the medical condition of the State's attorney was a valid delay.

The case was then reset to December 10, 2007, but the Court continued that setting on its own motion. The delay weighs against the State because the State bears the ultimate responsibility to bring a defendant to trial, but the Court does not weigh this delay heavily against the State. The case ultimately was not reset until June 30, 2008, so the Court must weigh that six month period against the State. But because that delay was due to the transfer of the case from Division 10 to Division 18, and said delay was beyond the control of the State, the delay is not weighted heavily against the State. From December 12, 2008 to February 27, 2009, 2 ½ months elapsed while the State completed DNA testing and that time is charged against the

State, however, the Court finds such delay was reasonable to allow the State the opportunity to perform scientific testing necessitated by the anticipated unwillingness of one of the State's witnesses to testify.

The February 27, 2009 to April 27, 2009, delay is attributable to the defendant because of his request for time to do his own examination of the State's DNA results. Defendant had a right to make such a request so the Court does not weigh the resulting delay heavily against defendant. The April 27, 2009 to July 6, 2009, delay is weighed against the State because of its dismissal and re-filing of the case. The Court finds, however, that this delay was reasonable in that it allowed the defendant time to examine the new fingerprint results, to obtain depositions of the State's expert witnesses, and to obtain a defense expert if it so desired. As such, this delay is not weighed heavily against the State, because defendant's objections to the new fingerprint evidence was based on his needing time to prepare with the new evidence at trial. The State was prepared for trial on July 6, 2009. Delays from that point have been the result of hearings necessitated by the defendant's motions. The Court does not

question the right of the defendant to file his motions, but the result is that the delay is attributable to him.

(L.F. 171-72) (internal citations omitted). The court could also have attributed to Appellant the delays caused by his request for additional time to respond to the State's second request for a buccal swab. (L.F. 9, 41-42).

By denying the motion to dismiss and finding that the delays attributable to the State were either valid or reasonable, the court necessarily rejected the misconduct allegations and found the State's explanations credible. (L.F. 171-72). Deference is given to the trial court's factual findings and credibility determinations. *Werner*, 9 S.W.3d at 595. The court's allocation of responsibility for the various delays are consistent with the principles outlined by Missouri courts in the cases cited herein and represent a proper exercise of the trial court's discretion.

c. Invocation of the right to a speedy trial.

Appellant was initially indicted on October 27, 2006, but did not file his first speedy trial request until June 30, 2008, which was the same date that his trial was due to begin. (L.F. 3, 7, 24). While there is no bright line rule as to when a defendant must invoke his right to a speedy trial, the failure to assert the right is a factor that the court can consider. *Barker*, 407 U.S. at 528. Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. *Id.* at 532. Delays for periods when

continuances are granted without objection and when the defendant has not demanded a trial will not be weighed heavily against the State. *Bolin*, 643 S.W.2d at 815.

d. Prejudice to Appellant.

The fourth and final factor, the possible prejudice to the defendant from the delay, is evaluated in light of three concerns: (1) the oppressiveness of pretrial incarceration; (2) the heightened anxiety and concerns of the accused; and (3) the possible impairment of the defense. *Davis*, 903 S.W.2d at 937. To require reversal, any claimed prejudice resulting from delay must be actual prejudice apparent on the record or by reasonable inference. *Id.* Failure to present evidence of actual prejudice weighs heavily in favor of the State. *Greenlee*, 327 S.W.3d at 613.

Appellant admits that he was incarcerated for only three months before being released on bond, but says that he remained under electronic home shackling for thirty-three months and was under house arrest when he was not working. In *Greenlee*, the defendant spent an extended period of time incarcerated before trial, but because he was sentenced to life imprisonment he had no claim that he served additional jail time because of any delay in bringing him to trial. *Id.* Appellant was sentenced to life without parole and likewise cannot claim that any delays in his trial caused him to serve additional jail time.

The only claim of anxiety and concern that Appellant raises is that he faced a pending charge of murder in the first degree and a possible sentence of life without parole.[8] While the pendency of charges would certainly be a source of anxiety, anxiety alone does not establish prejudice absent the showing of specific instances that weighed heavily on the defendant. *Id.* The defendant in *Greenlee* alleged that he had been beaten in jail and feared being killed by another inmate. *Id.* The Court first noted that there was no evidence to support those allegations. *Id.* It went on to hold that even if the allegations were true, any anxiety suffered by the defendant was outweighed by the lack of impairment to his defense. *Id.* Appellant's claims fall far short of those in *Greenlee* and are likewise insufficient to establish prejudice, especially given the lack of impairment to his defense.

On the issue of impairment of his defense, Appellant only claims that the case did not go to trial when it was scheduled to. Prejudice cannot be presumed solely from a delay in the trial. *Atchison*, 258 S.W.3d at 920. Appellant does not allege that any of his witnesses became unavailable or that evidence was lost so as to prevent him from presenting a defense. *Davis*,

---

[8] While Appellant also mentions that the death penalty is an authorized punishment for murder in the first degree, there is no indication in the record that the State ever sought the death penalty in this case.

903 S.W.2d at 937. Instead, he reiterates his claim that the State obtained continuances in order to gain a tactical advantage by testing DNA and fingerprints. As the trial court correctly noted, "[I]mpairment goes to the defendant's ability to defend his case, not to his ability to keep the State from using evidence that defendant would prefer be excluded." (L.F. 173). *See id*. (noting that impairment of defense analysis focuses on whether the delay prejudiced the defendant's ability to make a defense). And in this case, the additional testing of which Appellant complains did not even yield any evidence that was used at trial against Appellant. The results obtained from the additional fingerprint testing were excluded. (Tr. 958). The DNA evidence presented by the State could not be conclusively matched to Appellant. (Tr. 690-705, 903-04). Appellant has thus failed to present evidence of actual prejudice, which weighs heavily against his claim. *Atchison*, 258 S.W.3d at 920.

Rather than present evidence that his defense was actually impaired, Appellant instead tries to convert his speedy trial claim into a request for sanctions for what he alleges are discovery violations. If Appellant wanted to raise a claim that the trial court erred in not imposing sufficient sanctions for

discovery violations than he should have done so directly.[9] Application of the correct standards for determining the existence of a speedy trial violation shows that the trial court did not abuse its discretion in determining that dismissal of the charges was not warranted. Appellant's point should be denied.

2. Appellant's proposed limitations on the State's use of the *nolle prosequi* procedure are contrary to statute.

Appellant asks this Court to limit the State's ability to use the *nolle prosequi* procedure to dismiss and then refile a case. (Appellant's Sub. Brf., pp. 63-69). That suggestion directly conflicts with the statute governing the prosecutor's ability to dismiss charges without the consent of the court:

> 1. The prosecuting or circuit attorney has the power, in his or her discretion, to dismiss a complaint, information, or indictment, or any count or counts thereof, and in order to exercise that power it is not necessary for the prosecutor or circuit attorney to obtain the consent of the court. The dismissal

---

[9] Appellant claims that certain evidence was not disclosed and that he did not become aware of the non-disclosure until after his trial. Even if the allegations were true, any non-disclosure of evidence would not have caused a delay in the trial.

may be made orally by the prosecuting or circuit attorney in open court, or by a written statement of the dismissal filed by the prosecuting or circuit attorney and filed with the clerk of the court.

2. A dismissal filed by the prosecuting or circuit attorney prior to the time double jeopardy has attached is without prejudice. A dismissal filed by the prosecuting attorney or circuit attorney after double jeopardy has attached is with prejudice, unless the criminal defendant has consented to having the case dismissed without prejudice.

3. A dismissal without prejudice means that the prosecutor or circuit attorney has complete discretion to refile the case, so long as it is refiled within the time specified by the applicable statute of limitations. A dismissal with prejudice means that the prosecutor or circuit attorney cannot refile the case.

4. For the purposes of this section, double jeopardy attaches in a jury trial when the jury has been impaneled and sworn. It attaches in a court-tried case when the court begins to hear evidence.

§ 56.087, RSMo Cum. Supp. 2006. The provisions of the statute render inapposite *State v. Cunningham*, 401 S.W.3d 493 (Mo. 2013), cited by Appellant in his brief, which deals with dismissals entered in civil cases.

Appellant does not mention the statute in his brief, but does argue that Missouri's *nolle prosequi* procedure is contrary to the Supreme Court's decision in *Klopfer v. North Carolina* (discussed above in the *Barker* analysis concerning the length of the delay). The Court considered in *Klopfer* what it described as "an unusual North Carolina criminal procedural device known as the '*nolle prosequi*' with leave." *Klopfer*, 386 U.S. at 214. That procedure discharged the defendant but did not discharge the indictment or dismiss the charges and did not toll the statute of limitations. *Id.* The Court concluded that because the *nolle prosequi* with leave allowed a criminal prosecution to be indefinitely postponed, it violated the defendant's Sixth Amendment speedy trial rights. *Id.* at 222. Appellant did not challenge the constitutionality of the *nolle prosequi* procedure in the trial court and his argument should thus be considered waived. *See Garris v. State*, 389 S.W.3d 648, 651 (Mo. 2012) (noting the well settled rule that constitutional violations are waived if not raised at the earliest possible opportunity). But even if the argument is properly before the Court, it is not well taken.

In contrast to the North Carolina procedure, the entry of a *nolle prosequi* under Missouri law "terminates the proceedings and releases the

defendant." *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 239 (Mo. 1985). The Missouri procedure is further distinguished from the North Carolina procedure by the statutory provision that requires the refiling of charges, rather than the reinstitution of a pending prosecution, and the continued running of the statute of limitations during the period in which charges are not pending. § 56.087.3, RSMo Cum. Supp. 2006. This Court has stated that the North Carolina procedure is so unlike the effect of the Missouri procedure that the *Klopfer* opinion is neither controlling nor persuasive.[10] *Morton*, 444 S.W.2d at 425. Not only does *Klopfer* provide no authority for Appellant's proposed change to Missouri's long-established procedures, but the Supreme

---

[10] North Carolina has subsequently amended its statutory *nolle prosequi* procedure so that it more closely resembles the Missouri procedure, in that no indictment is left pending in the wake of a dismissal, the defendant is no longer subject to prosecutorial control, and the prosecutor has to initiate subsequent charges within the statute of limitations to bring the defendant to trial. *State v. Herald*, 309 S.E.2d 546, 548 (N.C. Ct. App. 1983); *State v. Lamb*, 353 S.E.2d 857, 862 (N.C. Ct. App. 1987). The North Carolina Court of Appeals has cited those features in finding that the new statutory procedure did not suffer from the infirmities found in the procedure invalidated in *Klopfer*. *Id.*

Court has expressly declined to impose categorical limits on a prosecutor's discretion in deciding when to bring charges. *United States v. Lovasco*, 431 U.S. 783, 790-91 (1977). Appellant's proposed restrictions on the *nolle prosequi* are not constitutionally mandated and are in direct conflict with controlling statutes. The Court should thus decline to adopt them.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 9,106 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 2nd day of July, 2014, to:

Patrick W. Peters
Clayton E. Gillette
600 East 8th Street, Suite A
Kansas City, MO 64106

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI