

IN THE
MISSOURI SUPREME COURT
EN BANC

STATE EX REL.)
CHARLES SIMSHAUSER,)
)
PETITIONER,)
) No. SC88089
v.)
) ST. LOUIS CIRCUIT COURT
THE HONORABLE) Case No. 22051-04080-01
EDWARD SWEENEY, JR.)
DIVISION 16,)
CIRCUIT COURT OF THE)
CITY OF ST. LOUIS,)
)
RESPONDENT.)

ON PRELIMINARY WRIT OF MANDAMUS
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HONORABLE EDWARD W. SWEENEY, JR.,
CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT

PETITIONER'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This is an original proceeding in mandamus pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusively. On October 23, 2006, Charles Simshauser filed a Petition for Writ of Mandamus requesting this Court grant his motion to dismiss for violation of statutory and constitutional right to a speedy trial, or in the alternative, to direct the St. Louis Circuit Court to dismiss with prejudice the case for violation of his statutory and constitutional rights to a speedy trial. On December 22, 2006, Respondent filed an Answer and Suggestions in Opposition to Mr. Simshauser's Petition for Writ of Mandamus. On January 18, 2007, this Court sustained Mr. Simshauser's Petition for Writ of Mandamus, ordered an alternative writ to issue, and set the cause for briefing.

Jurisdiction over this matter lies in this Court under the Missouri Constitution, Article V, Section 4(1), and Missouri Supreme Court Rules 84.22 to 84.26, 94.01 to 94.07, and § 545.780.2, RSMo, 2000.¹

¹ All statutory references are to RSMo 2000, unless otherwise indicated.

STATEMENT OF FACTS

On December 12, 2005, Petitioner Charles Simshauser was arrested and charged in the St. Louis City Circuit Court with the class C felony of tampering in the first degree in violation of § 569.080, RSMo, and the class A misdemeanor of driving while license revoked in violation of § 302.321, RSMo 2000, in State v. Simshauser, cause no. 22051-4080 (A7-A8).² The next day, Mr. Simshauser appeared and the charges against him were read in open court (A1). The Public Defender's office entered its appearance on Mr. Simshauser's behalf, and at the request of the state the cause was continued to February 9, 2006 (A1, A10). Mr. Simshauser was indicted by a grand jury for committing the class C felony of tampering in the first degree in violation of § 569.080, RSMo, and the class A misdemeanor of driving while license revoked in violation of § 302.321, RSMo, on January 26, 2006, and his bond was set (A2, A11-A12). Defense counsel requested a bond reduction, but that motion was denied (A2). On February 9, 2006, Mr. Simshauser was formally arraigned, and Brocca Smith, Assistant Public Defender, entered her appearance on Mr. Simshauser's behalf (A2-

² Mr. Simshauser will cite to the Appendix to this petitioner's brief and the pages are numbered consecutively beginning with A1.

A3, A14). The cause was set for an initial appearance on March 13, 2006 (A3). On March 9, 2006, Neal Posdamer, Assistant Public Defender, withdrew Ms. Smith as Mr. Simshauser's attorney and entered his appearance on Mr. Simshauser's behalf (A3, A16). On March 14, 2006, the cause was continued for want of time by the court to June 19, 2006 (A3).

On May 25, 2006, Mr. Simshauser filed his motion for a speedy trial.³ On that day, the state filed a Memorandum with the court acknowledging receipt of Mr. Simshauser's request for a speedy trial pursuant to § 545.780, RSMo, and requesting that "all motions for continuances be conducted in open court in the presence of the defendant" (A3, A17). On June 5, 2006, the case was given a trial setting for June 19, 2006 (A4). On June 20, 2006, Mr. Simshauser's trial was continued by the court and re-set for trial to begin on August 14, 2006 (A4, A18). On July 5, 2006, Mr. Simshauser filed a *pro se* motion to dismiss (A4).⁴ Defense counsel Neal

³ The circuit court's file does not contain a copy of Mr. Simshauser's motion for a speedy trial of May 25, 2006, however, the docket entry on June 20, 2006, references "a speedy trial request" filed on 5/26/06 (A4).

⁴ The circuit court's file does not contain a copy of Mr. Simshauser's motion to dismiss, but the docket sheets indicate the motion was filed on July 5, 2006.

Posdamer requested one continuance on August 14, 2006, in order to obtain a fingerprint order to determine if the identity of Fred Simshauser, the defendant in cause no. 041-3500A, was the same person as Mr. Simshauser in this case, cause no. 22051-4080 (A19, A20-A21).

On August 24, 2006, Mr. Simshauser filed a second motion to dismiss for violation of his right to a speedy trial (A4).⁵ On September 8, 2006, Mr. Simshauser's was set for trial to begin on October 16, 2006 (A4). On September 26, 2006, Mr. Simshauser filed a notice of filing petition for writ of mandamus in the circuit court (A5). On October 23, 2006, Mr. Simshauser filed a Petition for Writ of Mandamus, requesting this Court grant his motion to dismiss for violation of statutory and constitutional right to a speedy trial, or in the alternative, direct that the circuit court of the City of the St. Louis to dismiss for violation of statutory and constitutional rights to a speedy trial with prejudice.⁶ In the Petition, Mr.

⁵ The circuit court's file copy of this motion is file-stamped August 23rd, 2006, however, the docket sheets indicate the motion to dismiss was filed on August 24, 2006.

⁶ On September 26, 2006, Mr. Simshauser filed a Petition for Writ of Mandamus in the Missouri Court of Appeals, Eastern District, in State ex

Simshauser argued that since the date of indictment his case has repeatedly been set and reset for trial. At every trial setting, he answered ready. He has in no way made himself unavailable for trial, nor requested any continuances, but has in fact continually expressed his readiness to proceed to trial. Mr. Simshauser also informed this Court he asserted his right to a speedy trial on May 25, 2006.

On October 27, 2006, Mr. Simshauser's cause received a new trial setting of November 13, 2006 (A5). On November 6, 2006, Heather Megan Sandison, Assistant Public Defender, withdrew Mr. Posdamer as Mr. Simshauser's attorney and entered her appearance on Mr. Simshauser's behalf (A5). On November 22, 2006, Respondent denied Mr. Simshauser's *pro se* motion for a speedy trial on the grounds that a he may not proceed on a motion filed *pro se*, and the filing of any said motion while he has been represented by counsel is improper, and the court need not even consider such a motion (A5, A25-A26).⁷ Respondent ruled that dismissal

rel. Charles Simshauser v. State of Missouri, cause no. ED88715. The Eastern District denied Mr. Simshauser's writ on January 3, 2007.

⁷ The Order references Mr. Simshauser's "*pro se* motion for a speedy trial" filed on August 23, 2006. However, according to the docket entries, Mr. Simshauser filed his "motion to dismiss for violation of statutory and

of Mr. Simshauser's *pro se* motion to dismiss for violation of statutory and constitutional rights to speedy trial was appropriate because he was represented by counsel and had been represented by counsel throughout the pendency of the action (A26). Respondent dismissed Mr. Simshauser's motion without taking into consideration the merits of his claims and without an evidentiary hearing on the matter (A26).

In an Answer and Suggestions in Opposition to Mr. Simshauser's Petition for a Writ of Mandamus of December 22, 2006, Respondent argued this Court should reject Mr. Simshauser's claim as the delay of bringing the matter to trial, in large part, was a result of the his own actions. Respondent relied on Myszka v. State, 16 S.W. 3d 652, 658 (Mo. App. W.D. 2000) and State v. Morris, 668 S.W.2d 159 (Mo. App. E.D. 1984) to support its argument that delay which are caused by the defense "weigh heavily against" Mr. Simshauser's claim that his right to a speedy trial was violated. Respondent claimed that Petitioner failed to provide evidence of actual prejudice as required in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, (1972). Respondent also argued this Court should deny Mr. Simshauser's Petition for a Writ of Mandamus because Mr. Simshauser

constitutional right to speedy trial" on August 24, 2006, and his formal request for a speedy trial on May 25, 2006.

'failed to exhaust his remedies with the trial court before seeking relief in this Court; and further, he has been responsible for a continuance in the matter and failed to demonstrate actual prejudice as a result of the delay of which he complains, and there is no evidence that any of the delays were brought on by Respondent or were purposefully oppressive.'

On January 18, 2007, this Court sustained Mr. Simshauser's Petition for Writ of Mandamus, ordered an alternative writ to issue, and set the cause for briefing. To avoid unnecessary repetition, additional facts may be set forth in the Argument portion of this brief.

POINT RELIED ON

Petitioner Charles Simshauser is entitled to an order compelling the Honorable Edward W. Sweeney, Jr., to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, to direct the Respondent to dismiss the charges against him, in cause no. 22051-4080, with prejudice, because Petitioner was denied his constitutional and statutory rights to a speedy trial without due process, in that:

(1) Respondent exceeded his jurisdiction and authority, and abused his discretion in dismissing Petitioner's request for a speedy trial and/or motion to dismiss without ruling on the merits of his claims and without an evidentiary hearing on the matter; and

(2) In view of the balancing process set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972), Petitioner has suffered an unreasonable trial delay that is not attributable to his own actions, and as a result, he has been prejudiced. Thus, Mr. Simshauser is entitled to the sanction of dismissal with prejudice of the charges against him, in cause no. 22051-4080, under § 545.780.1, RSMo.

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972);

State v. Bolin, 643 S.W.2d 806 (Mo. banc 1983);

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

State v. Ivester, 978 S.W.2d 762 (Mo. App. E.D. 1998);

§ 545.780, RSMo;

Mo. Const., Article I, Section 10 and 18(a);

U.S. Const., Amends. VI and XIV.

ARGUMENT

Petitioner Charles Simshauser is entitled to an order compelling the Honorable Edward W. Sweeney, Jr., to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, to direct the Respondent to dismiss the charges against him, in cause no. 22051-4080, with prejudice, because Petitioner was denied his constitutional and statutory rights to a speedy trial without due process, in that:

(1) Respondent exceeded his jurisdiction and authority, and abused his discretion in dismissing Petitioner's request for a speedy trial and/or motion to dismiss without ruling on the merits of his claims and without an evidentiary hearing on the matter; and

(2) In view of the balancing process set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972), Petitioner has suffered an unreasonable trial delay that is not attributable to his own actions, and as a result, he has been prejudiced. Thus, Mr. Simshauser is entitled to the sanction of dismissal with prejudice of the charges against him, in cause no. 22051-4080, under § 545.780.1, RSMo.

Standard of Review

Mandamus is an extraordinary remedy and cannot compel a discretionary act. State ex rel. Sanders v. Kramer, 160 S.W.3d 822, 824 (Mo. App. W.D. 2005) citing State ex rel. Burns v. Gillis, 102 S.W.3d 66, 68 (Mo. App. W.D. 2003). This Court issues the writ to prevent the exercise of powers exceeding judicial jurisdiction or to correct an abuse or judicial discretion. Kramer, *supra* at 824 citing State v. Saffaf, 81 S.W. 526, 528 (Mo. banc 2002). The writ is both to compel a court to do what is required by law and to undo what is prohibited by law. Kramer, *supra* at 824 citing State ex rel. Leigh v. Dierker, 974 S.W.2d 505, 506 (Mo. banc 1998). Under § 545.780, subsection 2, a defendant's statutory rights to a speedy trial "shall be enforceable by mandamus." RSMo.

Argument

The speedy trial statute is intended to require the state to diligently pursue the prosecution of the case, and the state may not place the burden of such pursuit upon the defendant, nor may it through inertia, negligence or intent delay trial. State v. Hulsey, 646 S.W.2d 881, 882 (Mo. App. E.D. 1993). "The trial court bears the burden of preventing delay by the state under its obligation to deny continuances requested by the prosecution in the absence of compelling reasons, and its obligation not to continue cases

because of general congestion of the docket.” Id. citing § 545.780, RSMo 1978. Under § 545.780, subsection 1, once a defendant files his motion for speedy trial, the trial court is required to “set the case for trial as soon as reasonably possible thereafter.” RSMo. “Neither failure to comply with this section nor the state’s failure to prosecute shall be grounds for dismissal of the information *unless the court also finds that the defendant has been denied his constitutional right to a speedy trial.*” State v. Bell, 66 S.W.3d 157, 164 (Mo. App. S.D. 2001) quoting § 545.780, RSMo; State v. Bohannon, 793 S.W.2d 497 (Mo. App. S.D. 1990) citing State v. Loewe, 756 S.W.2d 177, 181 (Mo. App. E.D. 1988) (Emphasis added). The protection of the right to a speedy trial attached at the point a formal indictment or arrest. Bell, *supra* at 164 citing State v. Fleer, 851 S.W.2d 582, 596 (Mo. App. E.D. 1993).

In the present case, on December 12, 2005, Mr. Simshauser was arrested and charged in the St. Louis City Circuit Court with the class C felony of tampering in the first degree in violation of § 569.080, RSMo, and the class A misdemeanor of driving while license revoked in violation of § 303.370, RSMo 2000, in State v. Simshauser, cause no. 22051-4080 (A1, A7-A8). On February 9, 2006, Mr. Simshauser was formally arraigned and the cause was set for an initial appearance on March 13, 2006 (A3). On March 14, 2006, the cause was continued for want of time by the court to June 19,

2006 (A3). On May 25, 2006, Mr. Simshauser filed his formal request for a speedy trial. See State v. Davis, 903 S.W.2d 930, 936 (Mo. App. W.D. 1995) and State v. Smith, 849 S.W.2d 209, 214 (Mo. App. E.D. 1993) (a formal request is required to assert right to a speedy trial). After his case was continued for several unexplained reasons, Mr. Simshauser filed two *pro se* motions to dismiss for violation of his right to a speedy trial, one on July 5, 2006, and the second on August 24, 2006 (A4, A23, A24).

On November 22, 2006, Respondent denied Mr. Simshauser's *pro se* motion for a speedy trial on the grounds that he was represented by counsel so he cannot also represent himself without leave of court (A5, A25-A26). Since Mr. Simshauser could not proceed on a motion filed *pro se*, and the filing of any said motion while he had been represented by counsel was improper, the court concluded it did not have to consider the motion (A25-A26). Respondent ruled as follows:

A defendant who is represented by counsel cannot also represent himself without leave of Court. Herein, said leave has not been granted. Therefore, Defendant may not proceed on a motion filed *pro se*, and the filing of any said motion(s) while Defendant has been represented by counsel is improper, and the

Court need not even consider such motion. (citations omitted).

Because at the time Defendant filed his *pro se* Motion(s) to Dismiss for Violation of Statutory and Constitutional Right to Speedy Trial, the Defendant was represented by counsel, and has been represented by counsel throughout the pendency of this action, this Court dismisses said Motion(s) (A26).

Respondent's ruling is against the logic of the circumstances, is arbitrary and unreasonable. Respondent relies on State v. Hurt, 931 S.W.2d 213 (Mo. App. W.D. 1996) in support of his ruling. The Western District in Hurt held that a defendant does not have a right to proceed to trial both *pro se* and through counsel. 931 S.W.2d at 214. The issue presented in Hurt was whether the trial court had to consider the defendant's request for a continuance where the defendant's attorney did not join in the request. Id. Respondent's reliance on Hurt is misplaced. The issue presented in Mr. Simshauser's case is not whether he wanted to proceed both *pro se* and through counsel nor is it whether defense counsel joined in his request for a speedy trial.

The issue presented in Mr. Simshauser's case involves his right to a speedy trial. Mr. Simshauser has not been brought to trial in thirteen months (from the date this Court issued its preliminary writ) and Respondent has not shown reasons to justify the delay. Mr. Simshauser did not express an interest in proceeding to trial *pro se* only that he wished to receive a speedy trial. Moreover, Mr. Simshauser's defense attorneys, respectively, have expressly objected to his request for a speedy trial. In addition, Missouri courts have consistently considered a defendant's *pro se* request for a speedy trial and any motion to dismiss on the merits. Smith, 849 S.W.2d at 214; Joos, 966 S.W.2d at 352-353; State v. McNeal, 699 S.W.2d 457, 461 (Mo. App. E.D. 1985); State v. Granger, 680 S.W.2d 258, 262 (Mo. App. E.D. 1984).

The circuit court had an obligation to consider Mr. Simshauser's motion to dismiss regardless of whether he was represented by counsel or not. Instead, Respondent dismissed Mr. Simshauser's motion without ruling on the merits of his claims and without an evidentiary hearing on the matter. Mr. Simshauser's case was continued *five times* by the court, and these continuances were not conducted in Mr. Simshauser's presence in open court. Mr. Simshauser was not given an explanation as to why the court continued his case nor was he given an opportunity to object to the

continuances. Respondent's decision not to review Mr. Simshauser's motion to dismiss on the merits is against the logic of the circumstances, is arbitrary and unreasonable because Respondent conceded Mr. Simshauser's case was continued because the trial divisions were occupied with other cases and the conversion of the 22nd Circuits docketing system (A26). Even if the Respondent did not believe Mr. Simshauser's constitutional and statutory rights to a speedy trial were violated as a result of the reasons stated above, Mr. Simshauser should have been allowed the opportunity to offer evidence to support the claims raised in his motion to dismiss.

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) of the Missouri Constitution also guarantee a criminal defendant the right to a speedy trial. State v. Ivester, 978 S.W.2d 762, 764 (Mo. App. E.D. 1998) citing Fleer, 851 S.W.2d at 595. To determine whether a defendant has been denied his constitutional right to a speedy trial, Missouri has adopted the balancing process set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972). Ivester, *supra* at 764; State v. Bolin, 643 S.W.2d 806, 813-16 (Mo. banc 1983). The process requires the balancing of four factors: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4)

prejudice to the defendant. Barker, 407 U.S. at 530-532, 92 S. Ct. 2192-2193; Bolin, *supra* at 813; Ivester, *supra* at 764 citing Davis, 903 S.W.2d at 936.

The application of these factors must be considered on a case-by-case basis. State v. Williams, 34 S.W.3d 440, 447 (Mo. App. S.D. 2001) citing State v. Raine, 829 S.W.2d 506, 512 (Mo. App. W.D. 1992).

(1) Length of pretrial delay.

In applying the first factor of the four-factor test to the facts of the case, the length of pretrial delay is to some extent a “triggering mechanism,” for unless the delay is presumptively prejudicial, there is no need to inquire into the other three factors. State v. Darnell, 858 S.W.2d 739, 745 (Mo. App. W.D. 1993) citing State v. Nelson, 719 S.W.2d 13, 18 (Mo. App. 1986); State v. Robinson, 696 S.W.2d 826, 831 (Mo. App. W.D. 1985). Missouri courts have held that a delay of eight months or more is presumptively prejudicial. Myszka v. State, 16 S.W.3d 652, 658 (Mo. App. W.D. 2000) citing State v. Joos, 966 S.W.2d 349, 352-353 (Mo. App. S.D. 1998); Dillard v. State, 931 S.W.2d 157, 162 (Mo. App. W.D. 1996); State v. Farris, 877 S.W.2d 657, 600 (Mo. App. S.D. 1994). In the present case, Mr. Simshauser was arrested and charged with tampering in the first degree and the class A misdemeanor of driving with license suspended on December 12, 2005. As of January 18, 2007--the date this Court issued its

preliminary writ, Mr. Simshauser has been confined for thirteen (13) months still awaiting trial. A thirteen-month delay is presumptively prejudicial; therefore, this Court should proceed to determine whether the other three factors will weigh in favor of finding a violation of Mr. Simshauser's right to a speedy trial. See Darnell, 858 S.W.2d at 745 citing State v. Ingleright, 787 S.W.2d 826, 831 (Mo. App. S.D. 1990).

(2) Reason for delay.

The second factor weighed is the reason for delay and if it was justifiable. Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Bolin, 643 S.W.2d at 814; State v. Knox, 697 S.W.2d 261, 263 (Mo. App. W.D. 1985). The burden is on the state to accord the accused a speedy trial and, if there is delay, the state must show reasons which justify that delay. Ingleright, 787 S.W.2d at 831 citing Robinson, 696 S.W.2d at 832; State v. Holmes, 643 S.W.2d 282, 287 (Mo. App. W.D. 1982). Delay attributed to the state's negligence or overcrowded court dockets are weighed against the state. Davis, 903 S.W.2d at 936 citing Raine, 829 S.W.2d at 512. Delays attributable to the defendant, such as asking for and being granted continuances, weight heavily against the defendant. Ingleright, 787 S.W.2d at 831 citing Robinson, 696 S.W.2d at 832; State v. Harris, 673 S.W.2d 490, 494 (Mo. App. E.D. 1984). In determining the length of delay, any delays attributable to

the defendant are subtracted from the total delay between the time of trial and the time a defendant is formally charged or actual restraints were imposed by arrest and being held to answer criminal charges. Joos, 966 S.W.2d at 352-353 citing Fleer, 851 S.W.2d at 596.

In Joos, the Southern District found that even though the defendant contributed to the total delay in various ways, the state had the responsibility to bring the defendant to trial. 966 S.W.2d at 353 citing Davis, 903 S.W.2d 936 and Bohannon, 793 S.W.2d at 503. The excuses suggested by the state for its failure to more quickly bring defendant to trial were not persuasive, and the length of delay and the reasons for it weighed against the state. Joos, *supra*.

The delay in this case was not caused, in large part, by the actions of Mr. Simshauser, but by an overcrowded court system. Respondent stated, in his Order denying Mr. Simshauser's *pro se* motion for a speedy trial, the reason for the delay in Mr. Simshauser's trial was because "the trial divisions were occupied with other cases" and "the conversion of the 22nd Circuits docketing system" (A26). Respondent conceded the reason for the delay was not because of Mr. Simshauser's own actions, but because the court had too many pending cases. A delay primarily the result of an overcrowded court is weighed against the state because the ultimate

responsibility for such circumstances must rest on the government rather than with the defendant. See Barker, 407 U.S. at 531, 92 S. Ct. at 2192. The ultimate responsibility for an overcrowded circuit court and a new docketing system should not fall on Mr. Simshauser. According to the docket entries, the court continued Mr. Simshauser's case a total of *five times* – on March 14, 2006, June 20, 2006, September 1, 2007, October 27, 2006, and December 27, 2006, on its own motion (A3, A4, A5, A15, A18, A22).⁸ Four of these continuances were *after* Mr. Simshauser had filed his request for a speedy trial on May 25, 2006. According to the record, Mr. Simshauser was not given an opportunity to object to these continuances.

On February 9, 2006, the case was set for an initial appearance on March 13, 2006 (A3). On March 14, 2006, the cause was continued for want of time by the court to June 19, 2006 (A3, A15). On June 5, 2006, the case was set for trial to begin on June 19, 2006 (A4). On June 20, 2006, Mr. Simshauser's trial was continued by the court and re-set for trial to begin on August 14, 2006 (A18).

Defense counsel Neal Posdamer subsequently requested one continuance on August 14, 2006, in order to obtain a fingerprints order to

⁸ The five continuances requested by the circuit court all occurred before this Court issued its preliminary writ on January 18, 2007.

determine if the identity of Fred Simshauser, the defendant in cause no. 041-3500A, was the same person as Mr. Simshauser in this case, cause no. 22051-4080 (A19-A21). However, Mr. Simshauser knew nothing of this continuance nor was he given an opportunity to object, in open court, even though the state requested that all motions for continuances be conducted in open court in Mr. Simshauser's presence (A3, A19).⁹ Moreover, the reason defense counsel gave for a continuance should not have impinged on his ability to defend Mr. Simshauser at trial because determining if Mr. Simshauser was the same defendant in an unrelated case was not relevant to Mr. Simshauser's defense in cause no. 22051-4080. Especially, in light of the fact that defense counsel could have simply asked Mr. Simshauser if he was the defendant in cause no. 041-3500A and if he used his brother's name.

Mr. Simshauser would have objected to a continuance based on the reason given by defense counsel had he been brought into open court and

⁹ On May 25, 2006, the state filed a Memorandum with the court acknowledging receipt of Mr. Simshauser's request for a speedy trial pursuant to § 545.780, RSMo, and requesting that "all motions for continuances be conducted in open court in the presence of the defendant" (A19).

given the opportunity. Because Mr. Simshauser did not know Mr. Posdamer had requested a continuance and had he known he would have strenuously objected, the continuance requested on June 22, 2006, should not be attributed to his actions or weighed against him. See Darnell, 858 S.W.2d at 745. However, if this Court determines the continuance requested by defense counsel is attributable to Mr. Simshauser's own actions, and subtracts about two months from the total delay, there still remains an eleven-month delay attributable to Respondent. That is, the delay between the time Mr. Simshauser was formally charged and arrested and him brought before the court to answer criminal charges, and there remains a seven-month from the time Mr. Simshauser filed his formal request for a speedy trial. See Joos, 966 S.W.2d at 352-353. Respondent has not articulated a justifiable reason for a delay of thirteen months (or for that matter a delay of eleven months or even seven months) in bringing Mr. Simshauser to trial for the ordinary, run-of-the-mill, street crimes for which he was charged. See Barker, 407 U.S. at 531, 92 S. Ct. at 2192. This factor should weigh against Respondent and in favor of finding a violation of Mr. Simshauser's right to a speedy trial.

(3) Mr. Simshauser's assertion of his right to a speedy trial.

The third factor for consideration is when and how Mr. Simshauser asserted his right to a speedy trial. Darnell, 858 S.W.2d at 745. There is no fixed requirement for when the right must be asserted; rather, “the circumstances surrounding the assertion or failure thereof” comprise the factor to be weighed. Id. citing Nelson, 719 S.W.2d at 19. Here, Mr. Simshauser filed a motion for speedy trial on May 25, 2006, approximately six months after he was charged and arrested. Mr. Simshauser put his defense attorney, the court, and the state on notice he wanted a speedy trial (A4, A17, A23, A24). There is nothing in the record to suggest Mr. Simshauser attempted to avoid having a speedy trial. The record suggests quite the opposite (A4, A17, A23, A24). After filing his *pro se* motion for a speedy trial on May 25, 2006, Mr. Simshauser filed two *pro se* motions to dismiss for violation of his right to a speedy trial, one on July 5, 2006, and the second on August 24, 2006 (A5, A24). Also, as previously discussed, Mr. Simshauser was not given the opportunity to object to the one continuance requested by Mr. Posdamer. Moreover, the one continuance requested by defense counsel does not establish Mr. Simshauser was responsible for much of the delay when the court continued the cause *five times* on its own motion, four of which were *after* Mr. Simshauser filed his formal request for a speedy trial.

In Ivester, the Eastern District found the complete absence of any explanation as to why the trial court would not provide a trial on the request of the defendant for a speedy trial, the failure to honor or explain a dishonor of the request weighs against the state. 978 S.W.2d at 766. Here, Respondent's explanation for dishonoring Mr. Simshauser's request for a speedy trial was because he was not allowed to proceed on a motion filed *pro se*, and the filing of any said motion while represented by counsel was improper, and the court concluded it was not required to even consider the motion. Respondent dismissed Mr. Simshauser's motion without ruling on the merits of his claims and without an evidentiary hearing on the matter. The court did not provide a justifiable explanation for the decision not to honor Mr. Simshauser's request for a speedy trial. On these facts, Mr. Simshauser asserted his right to a speedy trial and the failure to honor or even explain the decision not to honor his request should weigh against Respondent and in favor of finding a violation of Mr. Simshauser's right to a speedy trial.

(4) Prejudice to Mr. Simshauser.

A fourth factor is prejudice to Mr. Simshauser. Barker, 407 U.S. at 532, 92 S. Ct. 2193; Williams, 34 S.W.3d at 447. Prejudice, of course, should be assessed in the light of the interests of a defendant that the speedy trial

right was designed to protect. This factor is assessed in light of the interested protected by the speedy trial right. Darnell, 858 S.W.2d at 745-746. These interests include: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Barker, 407 U.S. at 532, 92 S. Ct. 2193; Darnell, *supra* at 746. “Any claimed prejudice resulting from delay must be actual prejudice apparent on the record or be reasonable inference.” Williams, 34 S.W.3d at 447 quoting Darnell, *supra* at 746. In the present case, Mr. Simshauser has suffered oppressive pretrial incarceration since December 12, 2005, and anxiety and concern resulting from an unexplained, continuing delay attributable to Respondent. Presently, Mr. Simshauser has been incarcerated for over fourteen months awaiting trial on the charges of the class C felony of tampering in the first degree and the class A misdemeanor of driving while license revoked.

Mr. Simshauser has been deprived of his life and liberty without due process of law. Mr. Simshauser has not been provided with an explanation as to why it takes over thirteen months for trial to begin on the ordinary, run-of-the-mill street crimes for which he was charged. As a result this delay, Mr. Simshauser is unable to work, spend time with his family and friends, and is forced to spend “dead time” in jail. See Barker,

407 U.S. at 533, 92 S. Ct. 2193. Mr. Simshauser does not assert he could prove his defense has been impaired, or that witnesses have disappeared or became otherwise unavailable, however, he has suffered actual prejudice because the circuit court has deprived of his freedom without due process of law. Since filing his formal request for a speedy trial on May 25, 2006, and two subsequent motions to dismiss, the Respondent has not provided Mr. Simshauser with reasons, if any exist, to justify the continuing trial delay. See Robinson, 696 S.W.2d at 832; Holmes, 643 S.W.2d at 287. Based on these facts, this factor should weigh against Respondent and in favor of finding a violation of Mr. Simshauser's right to a speedy trial.

Under the circumstances of this case, Respondent exceeded his jurisdiction and authority, and abused his discretion in denying Mr. Simshauser's *pro se* motion for a speedy trial and/or motion to dismiss without ruling on the merits of his claims and without an evidentiary hearing on the matter. See Knox, 697 S.W.2d at 263 (holding that the sanction of dismissal is available to the trial court in a proper case of unreasonable trial delay, if based on the facts, including evidence the defendant may offer, the delay is unjustified). Mr. Simshauser has a fundamental constitutional and statutory right to a speedy trial. Mr.

Simshauser's right to a speedy trial is not subject to his defense counsel's approval nor does it require defense counsel join in the formal request for a speedy trial. Missouri case law does not suggest a defendant's request for a speedy trial, and subsequent motion to dismiss, must be joined by counsel before the court will review the motion on the merits.

Mr. Simshauser is entitled to an order compelling the Honorable Edward W. Sweeney, Jr., to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, direct the Respondent to dismiss the charges against him, in cause no. 22051-4080, with prejudice. Because Mr. Simshauser was denied his constitutional and statutory right to a speedy trial, he respectfully requests this Court to make permanent its preliminary writ of mandamus and order the Honorable Edward W. Sweeney, Jr., to dismiss with prejudice the charges against him in State of Missouri v. Charles Simshauser, in cause no. 22051-4080, and discharge him.

CONCLUSION

For the reasons set forth herein, Petitioner Charles Simshauser prays this Honorable Court make permanent its preliminary writ of mandamus and order the Honorable Edward W. Sweeney, Jr., to dismiss with prejudice the charges against him in State of Missouri v. Charles Simshauser, in cause no. 22051-4080, and discharge him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2007, a true and correct copy of the attached brief and diskette containing a copy of this brief was mailed, postage pre-paid to:

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I hereby certify that two true and correct copies containing a copy of this brief was mailed, postage pre-paid to:

The Honorable Edward Sweeney, Jr., 22nd Judicial Circuit Court,
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Maleaner Harvey

CERTIFICATE OF COMPLIANCE

I, Maleaner Harvey, hereby certify the following. Pursuant to Missouri Supreme Court Rule 84.06(b), this brief was prepared using Microsoft Word, Office 2002, in Book Antigua, 13 point font, and includes the information required by Rule 55.03. The brief does not exceed 31,000 words and 2,200 lines. The word-processing software identified that this brief contains 6,571 words, 697 lines, and 37 pages, including the cover page, signature block, and certificates of service and of compliance.

The diskette filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee Anti-Virus software, which was updated in December 2006, and found virus-free.

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APPENDIX

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