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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, or show cause before the Supreme Court on or before January 29, 2007. On January 29, 2007, Respondent filed its Answer and Suggestions in Opposition to Petitioner's Application for a Writ of Mandamus. On February 28, 2007, the Petitioner filed its Statement, Brief and Argument.

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, following Petitioner's arrest, Petitioner was charged in the Missouri Circuit Court for the Twenty-Second Judicial Circuit with the Class C felony of Tampering in the First Degree and the Class A Misdemeanor of Driving while License Revoked, where it was alleged that on December 12, 2005, in the City of St. Louis, Petitioner knowingly and without the consent of the owner possessed an automobile and operated a motor vehicle on a highway, the 1600 block of N. 7th St., during a time when Petitioner's operator's license was revoked under the laws of this state and knew that Petitioner's operator's license was revoked. (A1-A3). Later that day, Petitioner was served with an arrest warrant which ordered that Petitioner be held on a bond in the amount of \$10,000.00 secured. (A5-A7).

On December 13th, 2005, the District Defender entered his appearance as attorney for Petitioner in Cause No. 051-4080. (A9). On December 22, 2005, the State filed an amended Complaint charging Petitioner in the Missouri Circuit Court for the Twenty-Second Judicial Circuit with the Class C felony of Tampering in the First Degree and the Class A Misdemeanor of Driving while License Revoked, where it was alleged that on December 12, 2005, in the City of St. Louis, Petitioner knowingly and without the consent of the owner possessed an automobile, a 1994 Ford F150 and operated a motor vehicle on a highway, the 1600 block of N. 7th St., during a time when Petitioner's operator's license was revoked under the laws of this state and knew that Petitioner's operator's license was revoked. (A11-14). On December 23, 2005, the Defense counsel filed a motion to reduce bond which was denied on December 29, 2005 by Judge Iris

Ferguson of the 22nd Circuit. (A15-16)

On January 26, 2006, the Grand Jury returned an indictment with one felony count of Tampering in the First Degree and one misdemeanor count of Driving while License Revoked. Petitioner's bond was set at \$9000 secured plus \$1000 cash by Judge Edward Sweeney of the 22nd Circuit. (A18-25) On February 9, 2006, Petitioner was arraigned by Judge Michael Mullen of the 22nd Circuit. Additionally, the State of Missouri filed a Request for Disclosure and Defense counsel filed its Request for Discovery. (A-26-A29) Assistant Public Defender Brocca Smith entered for Petitioner and the undersigned Assistant Circuit Attorney entered on behalf of the State. (A-26-A29) Also, the case was assigned to Division 16 for its initial appearance on March 13, 2006. (A30)

On Mach 14, 2006, the case was set for trial on June 19, 2006 by Judge Sweeney. (A-31) Additionally, Assistant Public Defender Neal Posdamer entered his appearance as attorney for Petitioner. (A32) On May 15, 2006, Petitioner filed a motion for speedy trial. The State received a copy of such motion, however, the court file does not have the filing. On May 25, 2006, the State filed a memorandum to the court requesting that the case to be set on a special docket and be assigned to a trial division at the earliest possible opportunity. (A-33) In addition, the State requested that all motions for continuances be conducted in open court in the presence of Petitioner. (A33)

On June 20, 2006, the case was continued for want of time by the court. The case was pre-assigned to Division 9 for trial on August 14, 2006. (A-35) On August, 14, 2006 defense counsel requested a continuance because he needed additional time for

investigation because additional unrelated charges were filed against Petitioner. (A-36) Additionally, defense counsel requested additional time to order a fingerprint examination to confirm the identity of Petitioner on the new case. (A-36) On August 25, 2006, a Fingerprint Order was signed by Judge Michael Mullen ordering the Sheriff's department to transport the defendant to the St. Louis Metropolitan Police Department Fingerprint Section for a fingerprint comparison (A-47). The fingerprint comparison revealed that the fingerprints matched. (A-46)

On August 23, 2006, Petitioner filed a motion for speedy trial. (A-37) On September 8, 2006, Petitioner case was set for trial in Division 16 on October 16, 2006. (A-39) The "Motion to Dismiss" which Petitioner attached to his application for a writ of mandamus, which Petitioner alleges in his application was filed in September 26, 2006. (A-42) On October 27, 2006, the case was continued for want of time by the court. (A-42) On November 6, 2006, Assistant Public Defender Heather Heffner entered her appearance as attorney for Petitioner. (A-42)

On November 22, 2006, Respondent denied Petitioner's pro se Motion for Speedy trial. (A-43) On December 22, 2006, Respondent filed an Answer and Suggestions in Opposition to Petitioner's Writ of Mandamus. (A-43)

At no time in the course of the proceedings has a motion to dismiss for failure to comply with the speedy trial statute been raised before the trial court. (B-1: Affidavit of Assistant Circuit Attorney Steven J. Capizzi).

POINT RELIED ON

Petitioner Charles Simshauser is not 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 not denied his constitutional and statutory rights to a speedy trial without due process, in that:

(1) Petitioner was represented by counsel throughout this proceeding and the record is absent of any attempt by his counsel to raise a motion in open court; 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 not suffered an unreasonable trial delay.

State v. Joos, 966 S.W.2d 349, 352 (Mo. App. S.D. 1998)

Myszka v. State, 16 S.W.3d 652, 658 (Mo.App. W.D. 2000).

State v. Morris, 668 S.W.2d 159(Mo.App. E.D. 1984)

State v. Holt, 695 S.W.2d 474 (App. E.D. 1985)

575.780, RSMo.

ARGUMENT:

While a proceeding in mandamus can be an appropriate remedy in speedy trial cases, Petitioner's application does not appear appropriate at this time in this case because the trial court has never denied or even been presented with a motion by Petitioner to dismiss the case for failure to comply with §545.780 RSMo., the speedy trial statute Petitioner cites in his application.

While subsection 2 of §545.780 RSMo. prescribes mandamus as a remedy in speedy trial matters, it does not expressly prescribe mandamus as the remedy of first resort. “The general rule is that a court will issue a writ of mandamus only where it is shown that one requesting the writ has a clear and unequivocal right to the relief requested and a corresponding present, imperative, unconditional duty imposed on the respondent which the respondent has breached.” Naugher ex rel. State v. Mallory, 631 S.W.2d 370, 374 (App.1982)(citing State ex rel. Sprague v. City of St. Joseph, 549 S.W.2d 873 (Mo. Banc 1977)). While mandamus operates to enforce an existing duty, it should not be brought where that omission of duty is not actual, but only anticipated. State ex rel. University Park Bldg. Corp. v. Henry 376 S.W.2d 614, 618. (Mo. App.1964)(citing State ex rel. Star Publishing Company v. Associated Press, 159 Mo. 410, 60 S.W. 91, State ex rel. Onion v. Supreme Temple Pythian Sisters et al., 227 Mo.App. 557, 54 S.W.2d 468; State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S.W.2d 12.) “There must, therefore, appear a refusal to act before the writ will go”. Id. Here, the record is bereft of any attempt by Petitioner to raise his motion before the trial court.

Though Petitioner's application for a speedy trial was made *pro se*, Petitioner has nonetheless been represented by counsel since early on in the proceedings. Petitioner's counsel could have ensured the motion was filed or brought the matter to the trial court's attention via oral motion. But the trial court record is absent of any oral motion on the matter. (B1)

It appears contrary to principles of judicial economy to permit a litigant to leapfrog the trial court and apply to the Supreme Court of the State of Missouri where that litigant could have more simply applied for relief in the trial court. Moreover, to allow Petitioner to proceed here demanding dismissal for failure to secure a speedy trial, while at the same time requesting a continuance of his trial setting in the court below could set a precedent giving future litigants a perverse incentive in that they could delay their trials below in the hopes that a key state's witness might perish or otherwise become unavailable², while at the same time hedging their bets on the outside chance a higher court will dismiss their case for lack of a speedy trial. Until a motion to dismiss is sought and denied by the trial court, an application to this Court seeking that relief does not seem appropriate for a writ of mandamus.

But beyond procedural considerations, Petitioner's application for a writ of mandamus should be denied because much of the delay in bringing Petitioner's case to trial has been brought on by Petitioner's own requests for continuances which, by law, undercut Petitioner's demand for a speedy trial in this matter.

² Baker is illustrative of a case where a Petitioner complained of a speedy trial violation and simultaneously requested continuances in the hopes a key state's witness – a co-actor in the crime – would become unavailable for trial. Baker at 535-536.

In his application, Petitioner cites §545.780 RSMo, which states: “If Petitioner 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.” Four factors determine whether a Petitioner's Constitutional right to speedy trial has been violated: “Length of the delay, the reason for the delay, Petitioner's assertion of his right to a speedy trial, and the prejudice to Petitioner.” Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 22 L.Ed.2d 101 (1972).

While courts have held that a delay of eight months in bringing a criminal case to trial can be considered presumptively prejudicial, State v. Joos, 966 S.W.2d 349, 352 (Mo. App. S.D. 1998)(citing State v. Farris, 877 S.W.2d, 657, 660 (Mo. App. 1994)), the delay in trial alone is not dispositive of a violation of a Constitutional right to a speedy trial, but it is instead merely the threshold which must be crossed before a full analysis of the facts pursuant to the four-point balancing test set out in Barker is made. In this case, the complaint was filed on December 12, 2005, the Petitioner filed his Motion for Speedy trial on May 15, 2006, six months since the Petitioner’s arrest, and this Writ of Mandamus on September 26, 2006, ten months since Petitioner's arrest. In Joos, the Missouri Court of Appeals for the Southern District found that a fifty-three-month delay between Petitioner's incarceration and trial presumed that an inquiry into the delay was in order, but the court then found from its further inquiry into the facts that Petitioner himself contributed to that delay in various ways, Id. at 355,

Here, as in Joos, much of the delay in bringing this matter to trial has been brought on by Petitioner himself. In addition to the continuances granted in part because

Petitioner had over the course of this case three different trial counsel, on August 14, 2006, this case has been continued at the request of Petitioner's counsel. Petitioner's counsel requested the continuance for two reasons: first because the case needed additional investigation and second a new case has arisen attributed to the Petitioner. In addition, the order reads that Petitioner's counsel needs additional time to order a fingerprint order to confirm the identity of the Petitioner in both counts. (A36) Delays which are caused by the defense "weigh heavily against" a Petitioner's claim that his right to a speedy trial have been violated. Myszka v. State, 16 S.W.3d 652, 658 (Mo.App. W.D. 2000). In Myszka, Petitioner requested a number of continuances which the Missouri Court of Appeals for the Western District held were chargeable against Petitioner when it rejected his claim that his speedy trial right had been violated, despite the fact that Petitioner claimed those continuances were made by Petitioner's counsel without Petitioner's permission. Id. The court reasoned that Petitioner should have been charged with those continuances requested by his counsel because the trial record contained no protests by Petitioner when those continuances were made by his counsel. Id. Here, as in Myszka, there is no record of Petitioner's objection to the continuance request made by defense counsel in his case, and therefore Petitioner's request for continuances in this matter should be weighed heavily against Petitioner and as a key factor in the rejection of his claim of a speedy trial violation made here.

In another case with similar facts to the instant case, State v. Morris, 668 S.W.2d 159(Mo.App. E.D. 1984), this Court rejected a Petitioner's claim that his speedy-trial right was violated. In Morris, four continuance requests were filed before Petitioner

filed his *pro se* motion to dismiss for failure to obtain a speedy trial, and one continuance after he filed that motion to dismiss. *Id.* At 163. There, citing Barker (*supra*), this Court stated: “...an inordinate delay in asserting the right should weigh against a Petitioner. Appellant's assertion of his right came after he, himself, had repeatedly delayed the trial”. *Id.* Here, a continuance request on the behalf of Petitioner was made before and after his requests for a speedy trial. As in Morris, this Court should reject this Petitioner's claim as the delays in bringing this matter to trial, in large part, are a result of the defense's own actions.

But even beyond the fact that Petitioner here has undercut his speedy trial complaint by delaying the proceedings himself, Petitioner has failed to provide evidence of actual prejudice as required in Barker. Actual prejudice and its effect are the “determinative factor” in the speedy trial balancing test Joos at 354 (citing State v. Davis, 903, S.W. 2d 930, 936 (Mo.App. 1995)). Joos held that Petitioner's claim that he: “...suffered anxiety and weight loss awaiting trial” was insufficient for the requisite showing of actual prejudice for a finding of a Constitutional violation of Petitioner's right to a speedy trial. *Id.*, and further, that Petitioner failed to show that he had suffered actual prejudice as a result of the delay. Here, as in Joos, Petitioner has failed to allege actual prejudice as required under the Barker balancing test. Petitioner's sole allegation concerning prejudice is contained in his petition for a writ of mandamus, where he states: “...the undue delay prejudices Petitioner by delaying his rights to liberty”. That bare allegation is clearly insufficient to show prejudice under Joos as delay alone is not dispositive on the issue of speedy trial, but merely the threshold to commencement of the

inquiry. Id. at 352. There is no evidence in the record that Petitioner has been impeded in preparing his defense; in fact, to the contrary, the record indicates Petitioner has continued to work on his trial as evidenced by Petitioner's continued pro se filings, such as his request for a copy of the docket sheet in his case.

Lastly, there is no evidence that any delays in Petitioner's case were a direct result of actions by the State to delay Petitioner's trial. (B1: Affidavit of Assistant Circuit Attorney Steven J. Capizzi). In State v. Holt, 695 S.W.2d 474 (App. E.D. 1985), this Court rejected another Petitioner's claim that his speedy trial right was violated and there again made a finding that much of the delay there was the result of continuances brought on by the defense. Id. at 478. Additionally in Holt, this Court commented on the fact that the record there contained no evidence of any attempt by the State to delay the trial or that it was “purposefully oppressive” Id. Similarly here, there is no evidence the State has sought delay.

As the Respondent has not sought delay in this matter, but, rather, the delays have in large part been caused by the actions of the defense itself, Petitioner should not be able to claim violation of his right to a speedy trial.

CONCLUSION

For the reasons set forth herein, Petitioner prays this Honorable Court deny Petitioner's writ of mandamus and affirm the Honorable Edward W. Sweeney, Jr., order denying Petitioner's Motion to dismiss in State of Missouri v. Charles Simshauser, in cause no. 22051-4080.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2007, two 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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And

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

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CERTIFICATE OF COMPLIANCE

I, Steven J. Capizzi, 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 3,581 words, 468 lines, and 20 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 March 2007, and found virus-free.

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APPENDIX

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