IN THE MISSOURI SUPREME COURT
EN BANC

STATE OF MISSOURI EX REL.	)	
ROBERT WOLFRUM	)	
& BEVY BEIMDIEK	)	
RELATORS,	)	
VS.	)	NO. SC88294
	)	
THE HON. MELVYN W. WIESMAN,	)	
	)	
RESPONDENT.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HON. MELVYN W. WIESMAN, CIRCUIT JUDGE OF ST. LOUIS COUNTY. TWENTY-FIRST JUDICIAL CIRCUIT, STATE OF MISSOURI

BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

The Missouri Court of Appeals, Eastern District, denied Relator's Petition for Writ of Prohibition on February 1, 2007. On February 5, 2007, Relators filed in this Court a Petition for a Writ of Prohibition precluding Respondent, the Honorable Melvyn W. Wiesman, from convening a trial in State v. Stanley Johnson, St. Louis County Circuit Court Cause No. 06CR-4034. On February 9, 2007, this Court requested Respondent to file suggestions in opposition on or before February 14, 2007. This Court issued a Preliminary Writ of Prohibition on February 16, 2007. The Court has jurisdiction of this matter under Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

On September 6, 2006, a Complaint was filed in St. Louis County Associate Circuit Court charging Stanley Johnson with one count of murder in the first degree and one count of forcible rape based on events allegedly occurring on May 5, 1994. (Complaint, Relator's Exhibit A, A1).

On September 25, 2006, defendant, Stanley Johnson, while confined in the Missouri Department of Corrections, filed a Request for Final Disposition of Indictments, Informations or Complaints pursuant to Section 217.450, RSMo, the Uniform Mandatory Disposition of Detainers Law (hereinafter UMDDL) (Relator's Exhibit B, A3) (Section 217.450 RSMo and Section 217.460 RSMo, Relator's Exhibit O, A39).

An Indictment charging Mr. Johnson with these offenses was filed on November 20, 2006. (Indictment, Relator's Exhibit C, A4). Mr. Johnson was not brought from the Department of Corrections to court in St. Louis County and arraigned on these charges until December 13, 2006. The docket sheets do not reflect a request for counsel at the December 13, 2007 arraignment. (Docket Sheets, Relator's Exhibit E, A7). Defendant's arraignment on December 13, 2006, occurred 79 days after defendant's Request for Final

Disposition of Detainers was filed. On December 13, 2006, this matter was assigned to St. Louis County Circuit Court, Division 2 and the defendant was instructed to appear in Division 2, before Judge Maura McShane, on January 4, 2007, with counsel. (Order dated December 13, 2006, Relator's Exhibit D, A6). On December 18, 2006, Judge McShane recused herself from this case and the matter was reassigned to Division 3. (Docket Sheet, Relator's Exhibit E, A8.) On December 21, 2006, defendant, while confined at Potosi Correctional Center, executed an Application and Affidavit for Public Defender Services from the Public Defender's Office. (Application for Public Defender Services, Relator's Exhibit N, A38, leave granted by this Court on April 3, 2007 to supplement the record with this document). On December 22, 2006, Relator Robert Wolfrum entered his appearance as counsel for defendant and filed a Request for Change of Judge and a Request for Discovery. (Docket Sheet, Relator's Exhibit E, A8, and Entry of Appearance, Relator's Exhibit F, A10). On January 2, 2007, this cause was reassigned to Division 19, Respondent, Melvyn W. Wiesman. (Docket Sheets, Relator's Exhibit E, A8).

On January 19, 2007, Relator Wolfrum appeared in open court, in the presence of the defendant, and filed with the Court a

Scheduling Memorandum in Connection with Entry. (Relator's Exhibit G, A11). On that date, Relator Wolfrum informed the Court that additional time was needed to prepare defendant's case for trial. (Transcript of January 19, 2007, hearing, Relator's Exhibit H, A21-23).

In support of his request for additional time to prepare for trial, Relator Wolfrum cited the fact that he had been on the case less than thirty days. (Transcript of January 19, 2007 hearing, Relator's Exhibit H, A21). Wolfrum pointed out that he had not yet received any discovery from the State, and aggravating circumstances had not been filed, although the State had indicated they may be filed. Id. Wolfrum stated that based on the complaint in the file, he understood that the case involved DNA evidence, and that would require hiring experts. Id. A21-22. He cited the geographic distances from his office in St. Louis to capital cases handled by his office. Id. Also cited were the other cases that he and co-counsel had already set for trial. Id. He cited ethical concerns about trying a case without adequate time to prepare. Id. at 23 (page 9 of the transcript). The scheduling memorandum explicitly cited Sixth Amendment concerns, and that issue was discussed by Relator and Respondent on the record. (Relator's

Exhibit G, A11-19, Relator's Exhibit H, A20-25).

At this same hearing, defendant, Stanley Johnson, objected to any additional time for counsel to prepare for trial and restated his request for a speedy trial. (Relator's Exhibit H, Transcript of 1/19/07 hearing, A23). Relator Wolfrum outlined, on the record, the specific problems with proceeding to trial on March 12, 2007, the date set by Respondent. Relator noted for the court the caseload and trial schedules of various lawyers in the Eastern District, Capital Division of the Public Defender's Office. (Relator's Exhibit H, A21-24). One reason stated by Relator Wolfrum for the need for additional time was the scheduled trial in Stoddard County of State v. Chipman. That matter was settled on January 22, 2007. While it no longer exists as a reason for additional time to prepare, it did consume substantial amounts of Relator Wolfrum's time until the matter was settled on January 22, 2007. In addition, at the time of the hearing on January 19, 2007, Relator Wolfrum indicated that Assistant Public Defender Robert Steele would also likely be assigned to Mr. Johnson's case. Due to the caseload and schedule of Mr. Steele (he tried State v. Kenneth Baumruk in February, 2007, and State v. Kevin Johnson in March, 2007, both cases in which the death penalty was sought) he was not assigned to this case. The

case has now been assigned to Relator Bevy Beimdiek. At the conclusion of the hearing, Respondent denied Relator's request for additional time to prepare for trial and set the matter for trial on March 12, 2007. (Order dated January 19, 2007, Relator's Exhibit I, A28).

Relator Wolfrum cited defendant's request for counsel at the hearing on January 19, 2007, and the need for counsel to have time to prepare.

> MR. WOLFRUM: Judge, my position is that because an attorney has been requested in this case, that reasonable requests for additional time should be accommodated by the Court. Now, I believe this is nothing but a reasonable request. Within reason, I think the attorneys are in the best position to give an accurate picture of their abilities to be ready to try a case. You know, I have at this time had this case for less than thirty days. As the Court is aware, capital cases take a substantial amount of time to prepare. I'm not able to recall any capital case that has gone to trial in recent history in less than a year of the entry of counsel, and most take much longer than that. Given

everything I've talked about, it is our position that there is good cause for this Court to refrain from setting a trial date and to find that additional time for counsel's preparation is needed. I would cite --

THE DEFENDANT: It appears --

THE COURT: Just a moment. Give him a chance to finish.

MR. WOLFRUM: I would cite to the Court State v. Sallee, 624 S.W. 2d 184, which says that continuances of time for attorneys to prepare are reasonable and not applicable. I'll hand the Court a copy of the case. I don't want to misstate what the case says.

THE DEFENDANT: Can I have a copy?

MR. WOLFRUM: Sure. May I give it to you, Your Honor?

THE COURT: You may.

THE DEFENDANT: Your Honor –

THE COURT: Just a moment.

MR. WOLFRUM: And Statute 217.460 also allows the Court to make a finding of good cause for additional time. I would ask the Court to do so. Any attorney in

this case would ask for additional time. I think the question is simple. If –

THE DEFENDANT: Your Honor –

THE COURT: Just a moment

MR. WOLFRUM: If Mr. Johnson is to have effectively prepared counsel, additional time is needed.

THE DEFENDANT: This testimony by Mr. Wolfrum is ludicrous.

THE COURT: What he is saying is that in order for him to adequately represent you, he needs more time.

THE DEFENDANT: Well –

THE COURT: And you're objecting to that?

THE DEFENDANT: I'm telling you I object to that. It's not a good show of cause because Mr. Wolfrum is not sleeping on no concrete bed right now. Mr. Wolfrum is not having hardship by his family members right now. I'm subjected to that. That should be my right under the Uniform Mandatory Detainer Law and not an attorney to say that he wants a toll because he has trials in other agencies or vicinities around the Missouri area. Why should I be subjected to him being

> – as I stated to him before, the docket is not a good cause because he have other cases to represent people in. That's not on me, Your Honor. I don't think it's a good cause for me to be subjected to an extension of toll time because he wants to be somewhere and represent somebody else at a certain time. Why should I be subjected to that. I'm sleeping on a concrete bed. I can't go out but once a week. I'm subjected because I'm a level five for this case. So hardship is not on Mr. Wolfrum. It's on me. I'm the one that's sleeping on the concrete bed.

(Relator's Exhibit H, A23 – 24, transcript pages 12-15).

On January 29, 2007, the State of Missouri, through Assistant Prosecuting Attorney Douglas Sidel, and Relators, Wolfrum and Beimdiek, appeared in open court before Respondent. At this hearing, Respondent made additional findings regarding the hearing on January 19, 2007. In his written findings, Respondent found that Relators' request for additional time "would be reasonable given that Counsel from the Capital Division of the Public Defender office entered on the case on December 22, 2006, fewer than 30 days prior to the request for additional time." (Findings Regarding Court Order

Dated January 19, 2007, Relator's Exhibit J, A30). However, Respondent refused to grant additional time for preparation because the defendant refuses to consent to additional time and the Respondent "finds no Missouri case law clearly and specifically allowing a trial court to grant additional time to defense counsel to prepare over defendant's objection, even when the request of defense counsel is reasonable, when the accused refuses to consent to the additional time." (Relator's Exhibit J, A30-31).

At that proceeding, Respondent said:

> I'm not putting it in my written findings, but you know, the Court is caught between a rock and a hard place with regard to this. If I deny the request for extension of time to prepare, I think there is a likelihood, possibility that if there is a conviction, that it will be overturned for lack of adequate representation of counsel. Although there's a possibility that the Supreme Court could find if there's a conviction, that given the amount of time defense counsel has had an opportunity to prepare, that the quality of representation is consistent with that of a comparable attorney under the same or similar

circumstances.

On the other hand, if I deny – if I grant the extension of time and the appellate courts later on determine I did not have the authority to grant that, the State would be forever barred from prosecuting the case. And the Court is opting to take the safer route and run the risk of a conviction being overturned rather than the conviction – rather than prosecution forever being barred.

(Relators Exhibit H, A26, transcript pages, 21-22).

On January 30, 2007 Relator Bevy Beimdiek entered her appearance as co-counsel for Stanley Johnson (Relator's Exhibit K, A32).

Relators Wolfrum and Beimdiek are employed by the Missouri State Public Defender System, Capital Litigation Division. Lawyers in the Capital Litigation Division in general are carrying personal and office caseloads well in excess of accepted capital case standards that present a significant impediment to prompt and speedy disposition of this case. Relator Wolfrum currently has a caseload of five (having just settled a sixth case on January 22, 2007). Relator Beimdiek has a caseload of six. All cases being

handled by both Relators are cases in which the death penalty is being sought. In addition to his duties regarding his assigned cases, Mr. Wolfrum also carries management responsibilities within the Public Defender System. The Eastern Capital Litigation office, consisting of seven trial lawyers, currently has 20 murder first degree cases pending. Each of those 20 cases, with only three exceptions, is a case in which the State is still actively seeking the death penalty. (In fact, since these Writ proceedings began, another case, venued in Scott County, has come to Relators' office and awaits the assignment of counsel.) While Relators are not counsel of record in all of these cases, the current caseload is relevant to this Writ because the Eastern Capital Office has only one investigator to work on all cases pending in that office. In addition, the Eastern Capital Office currently has only two mitigation specialists to assist with investigation of evidence in mitigation for all capital cases pending in the office. (Relator's Exhibit G, A13-14, Relator's Exhibit H, A22).

In 2003, due to a budget cut of $2.1 million made to the Public Defender budget by the Missouri legislature, the Eastern Capital Office was reduced in size by two attorneys. The Capital Division overall lost five attorneys, three investigators, and one secretary due

to this same budget cut. The Division has had to make do with less staff to manage a caseload that has increased over the last few years. (Relator's Exhibit G, A14)

The Eastern Capital Office, physically located in St. Louis, handles capital cases in which the State of Missouri is seeking the death penalty in jurisdictions as far away as Kansas City, Springfield, Waynesville, Poplar Bluff, and Caruthersville. Clients of this office are incarcerated in state correctional institutions in Potosi, Jefferson City and Charleston and various county jails throughout the State of Missouri. Undersigned Relators personally have cases that occurred or are venued in the following jurisdictions: Waynesville, Springfield, Caruthersville, Ellington, Fredericktown, Poplar Bluff, Salem, Cape Girardeau and St. Louis County. (Relator's Exhibit G, A14).

Relators Wolfrum and Beimdiek received partial discovery in this case on January 19, 2007. Relators had not contacted witnesses, conducted depositions, and filed motions addressing the conditions under which the case will be tried, various evidentiary matters, instructional matters, and matters related to capital litigation. If this case is to be tried as a capital case in which the state is seeking the death penalty, much still remains to be done

that has not been done due to the caseloads listed above and the extremely limited time that Relators have had this case. (Transcript of January 19, 2007 hearing, Relator's Exhibit H, A21-24).

On January 31, 2007, undersigned Relators filed a Petition for Writ of Prohibition, or in the Alternative, Petition for Writ of Mandamus in the Missouri Court of Appeals. On February 1, 2007, The Missouri Court of Appeals, Eastern District denied Relator's Petition issuing a three page order on the merits. (Relator's Exhibit L, A33-35). In addressing the merits of Relators' Petition, the Court held, in part: "Further the statutes do not provide an outlet for defense counsel to request an extension of the date against the wishes of the defendant; only the prosecutor may do so." (Relator's Exhibit L, A35).

On February 1, 2007, the State of Missouri filed a Notice of Intent to Seek the Death Penalty and Aggravating Circumstances (Relator's Exhibit M, A36-37).

On February 5, 2007, Relators filed with this Court, a Petition for Writ of Prohibition, or in the Alternative, Petition for Writ of Mandamus. On February 9, 2007, this Court ordered Respondent to file Suggestions In Opposition not later than February 14, 2007. (See file in current proceedings.)

On February 14, 2007, Relators supplemented their petition by stating that on February 8, 2007 Relators received records from the St. Louis City Schools from the late 1960's and early 1970's which appear to list IQ scores of the defendant on various dates of 74, 80, 60, 71, 79, 72 and 70.

On February 16, 2007, this Court issued a Preliminary Writ of Prohibition ordering Respondent to take no further action in this case except to grant Relators' request for additional time to prepare for trial, until the further order of this Court.

On March 9, 2007, defendant filed a pro se request to waive counsel. Additional such requests have been filed by defendant with this Court.

Defendant, Stanley Johnson, objects to, and does not join in, this matter.

POINT RELIED ON

Relators are entitled to an order prohibiting Respondent from compelling a trial within 180 days under the Uniform Mandatory Disposition of Detainers Law (Section 217.450 et. seq. RSMo) without granting Relators reasonable or necessary time for good cause shown to prepare for the underlying capital trial to fulfill their duties as counsel requested by defendant, under the Sixth Amendment to the United States Constitution and Article I, Section 18 of the Missouri Constitution, because the plain language of Section 217.460 allows for additional time beyond 180 days upon a showing of "good cause," and Relators had been attorney of record for less than 30 days at the time of the request for additional time, and Respondent has found the need for additional time to prepare in this capital case would be reasonable *but for* the Defendant's refusal to consent to an extension beyond 180 days. In refusing additional time beyond 180 days based only on the defendant's refusal to consent, Respondent has improperly added a condition not found in the statute, in that "good cause"

extensions of time beyond 180 days under Section 217.460 do not require the consent of the defendant.

McMann v. Richardson, 397 U.S. 759 (1970)

State v. Sams, 980 S.W. 2d 294 (Mo. Banc 1998)

State v. Woods, 143 Wash. 2d 561 (2001)

State v. Sallee, 624 S.W. 2d 184 (Mo. App. S.D. 1981)

Section 217.460, Revised Statutes of Missouri

6th Amendment to the United States Constitution

Rule of Professional Conduct, 4-1.1

Argument

The Sixth Amendment to the United States Constitution guarantees a defendant accused of a felony the right to be represented at trial by counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Article I, Section 18(a) of the Missouri Constitution provides a similar right "to appear and defend in person and by counsel." Because of the vital importance of counsel's assistance, the United States Supreme Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972). That Court has also recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The government cannot force counsel on an accused. In *Faretta v. California*, 422 U.S. 806 (1975), the United States Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense.

In the case at bar, Stanley Johnson requested appointed counsel. While he has now requested to represent himself, he had not asserted his right to do so at the time of this Court's order staying proceedings on February 16, 2007. He requested counsel by a written "Application and Affidavit for Public Defender Services," signed on December 21, 2006. (Relator's Exhibit N, A38). While this Court may be reluctant to fully address the issue before it because defendant has, subsequent to February 16, 2007, filed motions requesting to represent himself, this matter must still be finally resolved by this Court. The trial court, barred by this Court from taking any action in this case, other than to give Relators additional time to prepare, has not ruled on defendant's request to represent himself. The trial court may or may not grant defendant's request to represent himself. The trial court might find that the request to represent himself is equivocal. See *State v. Garrison*, 928 S.W.2d 359, at 362 (Mo. App. S.D. 1996). The court might order Relators to serve as standby counsel. In addition, even if defendant were to be allowed to represent himself, there is no guarantee that defendant might not later change his mind and request counsel. In that event, the issue of counsels' time to prepare would again arise in this case. This issue must be resolved, not just in this case, but to offer guidance to future courts facing this issue.

The State of Missouri has enacted a statute, Section 217.460, Revised Statutes of Missouri that provides:

> Within one hundred eighty days after the receipt of the request and certificate, pursuant to sections 217.450 and 217.455, by the court and the prosecuting attorney *or within such additional necessary or reasonable time as the court may grant, for good cause shown in open court,* the offender or his counsel being present, the indictment, information or complaint shall be brought to trial. The parties may stipulate for a continuance or a continuance may be granted if notice is given to the attorney of record with an opportunity for him to be heard. If the indictment, information or complaint is not brought to trial within the period, no court of this state shall have jurisdiction of such indictment, information or complaint, nor shall the untried indictment, information or complaint be of any further force or effect; and the court shall issue an order dismissing the same with prejudice.

Emphasis added. (Relator's Exhibit O, A39).

Prior to his December 21, 2006, request for counsel, Mr. Johnson, on September 25, 2006, filed a request under the Uniform Mandatory Disposition of Detainers Law, Sections 217.450-460, Revised Statutes of Missouri. (Relator's Exhibit B, A3).

Nothing in Section 217.460, Revised Statutes of Missouri, either eliminates or purports to eliminate an accused's right to effective counsel in the event of an exercise of rights under that state statute. In fact, even if state legislators enacting this statute had so intended, those legislators could not have repealed the federal or state constitutional rights to effective assistance of counsel. Given that fact, this Court should hold that the two rights are compatible if a trial court heeds the plain language of Section 217.460.

Additionally, nothing in the plain language of Section 217.460, Revised Statutes of Missouri, requires that a defendant *who has requested the assistance of counsel*, consent to reasonable requests by that counsel for additional time to prepare to effectively represent the accused. Respondent improperly added that condition that appears nowhere in the plain language of the statute.

Rule of Professional Conduct, 4-1.1, provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation." (Relator's Exhibit P, A40)

Nothing in Section 217.460, Revised Statutes of Missouri, either eliminates or purports to eliminate the ethical duties of counsel representing an accused in a criminal case. Given that fact, this Court should hold that the rights granted by the statute are compatible with the ethical duties of attorneys representing an accused in a criminal case.

Defendant's federal and state constitutional rights, his state statutory rights, and the ethical obligations of counsel can all exist harmoniously under the most reasonable reading of Section 217.460, Revised Statutes of Missouri.

Rule of Professional Conduct, 4-1.2, provides, "A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued." (Relator's Exhibit P, A40-41). Under the Rules of Professional Conduct, 4-1.2, Relators assert that the matter of scheduling and time for preparation is a "means" of representation about which they are required to consult with the client. It is not an "objective" of representation on which they are required to abide by the client's decision. Rule 4-1.2 further states:

"In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." The Rule does not require counsel to abide by the client's insistence on a speedy trial when counsel cannot be ready to provide effective assistance of counsel.

The need for an effective, prepared attorney can become at odds with a request that elevates speed over substance and effectiveness. This Court should rule in a manner that recognizes the importance of, and realities of, thorough, prepared, competent representation in capital cases. Because scheduling of a trial is a means, rather than an objective, of representation, and because an attorney is the best judge of the time that he or she needs to effectively prepare, this is an area where counsel is ethically required to assert the need for necessary time for preparation, and where the law of this State should allow circuit courts to grant reasonable time needed for preparation. It is qualitatively different from the "objectives of representation" issues identified in the ethical rule about which an attorney must abide by the wishes of the client.

In the event that an accused truly wants to elevate speed of trial above all other factors, *Faretta* gives that client a means to do so.

Undersigned Relators also want it to be clear that they, like any counsel, are sensitive to the requests of *any* client for as prompt a disposition as possible of *any* case. But in the real world such a desire can collide with the realities of caseloads, case complexity, the need to prepare for both a guilt phase and a potential penalty phase, investigation resources, witness location, and, probably, a multitude of other real-life factors. Time and resources are finite. This case includes the additional fact that, through no fault of appointed counsel, the accused did not request counsel until approximately 88 days (September 25 to December 21, 2006) of the UMDDL statutory clock had run.

Because the federal right to counsel under the Sixth Amendment includes the right to effective counsel, this Court should hold that the election of an accused to be represented by counsel necessarily compels a holding that necessary or reasonable time for that attorney to effectively prepare is good cause under Section 217.460, Revised Statutes of Missouri.

In "Respondent's Suggestions in Opposition to Relator's Writ of Prohibition or in the Alternative Mandamus," the State does not follow its position through to the logical conclusion. Would the State really propose that a trial be held in a case where diligent counsel did not

have time to effectively prepare, and then that, in the event of a conviction, the case proceed on through direct appeal and post-conviction proceedings, and then perhaps on through an appeal of those post-conviction proceedings, and then, in the event that counsel is found ineffective, a second trial be held? Is that position preferable to simply allowing a trial court to get it right the first time-- to find that time for attorney preparation is good cause for granting additional time under the statute? Unless Section 217.460, Revised Statutes of Missouri, repeals the Sixth Amendment to the United States Constitution, that is the logical conclusion of the State's position, and also of the "Order" of the Missouri Court of Appeals, Eastern District. (Relator's Exhibit L, A33-35.)

What if the defendant had been arraigned and counsel appointed in this case after 178 days rather than after 79 days and 88 days respectively? Would the State still take the position that defense counsel was powerless to request additional time? Should defense counsel really only have two days to prepare? What if discovery from the State was still incomplete on the 179th day? Would the State still take the position that, absent consent of the client, defense counsel was required to proceed to trial?

The State's position stated in "Respondent's Suggestions in Opposition to Relator's Writ of Prohibition or in the Alternative Mandamus," is a recipe for inefficiency and waste of resources. This Court should take a larger view.

A ruling that additional time for an attorney to prepare is good cause under Section 217.460, Revised Statutes of Missouri, does not deprive a defendant of all rights under the statute. It merely recognizes that a counsel for a defendant who chooses to be represented by counsel needs reasonable time to prepare to perform up to accepted standards, and that such time is good cause for tolling of the time under the statute. A finding of reasonableness or necessity for the additional time made by the Court would still be necessary. The defendant still maintains rights under the statute. But the time that counsel reasonably needs for preparation is excludable from the 180 day period. Undersigned Relators are not, as the Eastern District wrote in its order, "requesting that he be prohibited from exercising his rights under the Uniform Mandatory Disposition of Detainers Act." (Relator's Exhibit L, A35.) He would still maintain rights under that statute subject to the reasonable time that counsel, requested by the defendant, needs to prepare. Relators are merely asking for reasonable time to prepare for a trial, time that the plain language of the statute

allows the Court to grant for good cause. And Relators ask this Court to clarify the law for trial courts.

The "Order" of the Missouri Court of Appeals, Eastern District, suggests that trial courts are powerless to grant reasonable extensions of time reasonably needed by defense attorneys for trial preparation in a capital case. If a request for counsel has been made by an accused facing the death penalty, what better constitutes "good cause" under the statute than ensuring that a defendant receives effective assistance of counsel? The Eastern District's Order suggests this result even when the trial court finds, as did the trial court below, that "the request for additional time would be reasonable given that counsel from the Capital Division of the Public Defender Office entered on the case.... fewer than 30 days prior to the request for additional time." (Relator's Exhibit J, A30). It suggests this result even when disclosure from the State to the defense is not complete, as it was not at the time the request for additional time was made in this case. It suggests this result even when substantial disclosure of DNA materials remains to be made. Respondent did not find that recently entered counsel had been dilatory. Respondent found that the request "would be reasonable given that counsel from the Capital Division of the Public Defender

Office entered on the case…. fewer than 30 days prior to the request for additional time." Id.

The Missouri Court of Appeals, Eastern District, cited *State ex rel. Clark v. Long*, 870 S.W.2d 932, 940 (Mo. App. S.D. 1994), for the proposition that "[t]he burden to show that the time should be extended, however, is on the State." The *Clark* case did not involve a situation where defense counsel was requesting reasonable time to prepare and where a Court found that the request would be reasonable. In *Clark,* there had been no finding of good cause for additional time prior to the expiration of 180 days, and the State had taken no steps to have the matter set for trial. In that instance, the Court of Appeals found that the burden was on the State to show why the time should be extended in light of the State's complete inaction. *Clark* does *not* stand for the proposition that *only* the State can request an extension of time.

The decision of the Missouri Court of Appeals says that "Johnson's counsel explained the heavy caseload of the Public Defender's Capital Division, the need to retain experts and other reasons that 180 days was not enough time to prepare for trial." (Relator's Exhibit L, A34). While that is true enough, the fact is that counsel was not even being given 180 days to prepare for trial in this capital case. From the date of

entry to the scheduled court date, counsel would not even have had half that amount of time.

Nothing in the plain language of section 217.460, RSMo, requires, or allows, counsel that reasonably needs additional time to prepare for a capital case, even if that need arises from both an excessive caseload and the complexities of a capital case, to proceed to trial prior to readiness to try the case.

Even *State v. Sams*, 980 S.W.2d 294 (Mo. banc 1998), cited by the Missouri Court of Appeals, Eastern District, in its Order, concerned a request by counsel for time to prepare which extended the time beyond the 180 day limit imposed by the motion that defendant Sams had filed. "However, even if defense counsel had speculated that the state was not fully prepared, it would have been a very risky strategy to refuse to stipulate to a continuance and risk a trial date within two days when he knew that he was not prepared," this Court wrote. *Sams* at 296. *Sams* betrays the Eastern District's conclusion that only the prosecutor may request an extension. Further, nothing in the plain language of section 217.460, RSMo, says that *only* the prosecutor may request an extension of the trial date against the wishes of the defendant, as the Eastern District held in its order.

The 180 day limit is not absolute, as the *Sams* case, cited by the Eastern District, says. "[T]his one hundred eighty-day requirement is not absolute. The time limitation can be extended for 'such additional necessary or reasonable time as the court may grant, for good cause shown.'" *Sams,* 980 S.W.2d at 296. A ruling that additional time is good cause does not deprive a defendant of all rights under the statute. It merely recognizes that counsel for a defendant-- as opposed to a pro se defendant-- needs reasonable time to prepare as determined by an attorney trying to meet accepted standards, and that such time is good cause for tolling of the time under the statute. The defendant still maintains rights under the statute. But the time that counsel reasonably needs for preparation is excludable from the 180 day period. Undersigned Relators are not, as the Eastern District wrote, "requesting that he be prohibited from exercising his rights under the Uniform Mandatory Disposition of Detainers Act." Relators are merely asking for reasonable time to prepare for a trial, time that the plain language of the statute allows the court to grant for good cause, and for this court to clarify that for trial courts.

In "Respondent's Suggestions in Opposition to Relator's Writ of Prohibition or in the Alternative Mandamus," the State suggests reasoning this Court should be wary of adopting. The State, on behalf

of Respondent, writes that Respondent "is simply ruling that when a tension exists between a defendant's right under the plain language of the statute which conflicts with his attorneys' desire and obligation to effectively represent him, the defendant's right prevails because it is in fact his right." Respondent's Suggestions, at page 5. What that reasoning seems to suggest is that this case involves a conflict of a client's right against his attorneys' rights, or his attorneys' desires and obligations. That is simply not an apt description of the situation. If there is a tension, it is in fact between two rights that both are the defendant's—his constitutional right to effective assistance of counsel and his state statutory rights under the UMDDL. Relators do not claim to have any rights in this matter. Relators are simply trying to protect all of the defendant's rights.

By defendant's voluntary request for counsel on December 21, 2006, just prior to counsel's entry, he indicated his desire to exercise his right to counsel. As cases above indicate, that right to counsel includes the right to effective counsel. That right, like the statutory right under Section 217.460, Revised Statutes of Missouri, is a right of the defendant.

Waiver of federal constitutional rights like the right to counsel requires a knowing and intelligent waiver. *Johnson v. Zerbst*, 304 U.S.

458 (1938). There has been to date no court-approved waiver of counsel, and thus no waiver of effective counsel, in this case. As stated in *Johnson v. Zerbst*, "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." Id at 464. "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." Id at 465. There is no Missouri law finding an implied waiver of the right to effective assistance of counsel by the filing of a request under Section 217.460, Revised Statutes of Missouri. Given *Johnson v. Zerbst*, and also Section 600.051, Revised Statutes of Missouri, which provides for a waiver of counsel under certain conditions, it seems unlikely that finding an implied waiver of effective counsel is proper. (Section 600.051 RSMo, Relator's Exhibit Q, A42-43).

In fact, if Section 217.460, Revised Statutes of Missouri, is interpreted or read to deprive an accused of his or her right to effective counsel, is it constitutional? One of the things trial courts must sometimes do is balance rights. Respondent has failed to balance defendant's constitutional right to effective assistance of counsel

against his statutory right under the UMDDL. Regarding his exercise of rights under the UMDDL, the trial court did tell the accused that, "Okay. You understand that that creates a major problem for your attorneys in terms of preparing their defense in representing you, do you understand that?" (Relator's Exhibit H, A21 (transcript page 3).) Later, the trial court said to the accused, "You're prepared to go to trial without him being prepared to go to trial in this case?" The defendant responded that he was. (Relator's Exhibit H, A23 (transcript page 12).) But the trial court found no waiver—explicit or implied-- of any rights. The trial court also said, "What he is saying is that in order for him to adequately represent you, he needs more time… And you're objecting to that?" The defendant replied that he was. (Relator's Exhibit H, A24 (transcript page 14).) The trial court, in its ruling, effectively added the condition not found in the statute, that the defendant consent to time for an attorney that he had requested to prepare. (Relator's Exhibit H, A26 (transcript page 20).) And, finally, the trial court failed to engage in any examination of how the two rights interact, saying that he was "between a rock and a hard place." Erroneously, Respondent seemed to deny that there was any balancing to be done or any interaction between the two rights, saying that there was "a likelihood, a possibility that if there is a conviction, that it will be overturned for lack of

adequate representation of counsel." (Relator's Exhibit H, A26 (transcript page 21).) This discussion seemed to suggest that the accused could have two trials, a quick one following a UMDDL request before counsel had time to prepare, then another when any conviction from that trial was "overturned for lack of adequate representation of counsel." Id.

There is caselaw that—while not directly on point -- is analogous to the situation at bar. Actions by a defendant can cause a tolling of the statutory time under Section 217.460, Revised Statutes of Missouri. For instance, the filing of motions by the defense and the time for their disposition can toll the time. *State v. Smith*, 686 S.W.2d 543 (Mo. App. S.D. 1985). This Court should hold that a request for counsel by a defendant impliedly consents to reasonable time being granted for attorney preparation. By implication, *State v. Galvan*, 795 S.W.2d 113 (Mo. App. S.D. 1990), says this. "Time during which an accused is not ready for trial is excluded from the period during which he is required to be tried under Section 217.490. RSMo 1986, the 'Agreement on Detainers.'" *Galvan*, at 119. It would not make sense to allow a defendant to request counsel, then, by virtue of an inflexible time limit that may bear no relation to the time actually needed to do the job, impede that attorney's ability to do a good job.

Though not dealing with a situation where an accused objects to additional time, other Missouri cases have discussed the issue of attorney time for preparation in the context of the disposition of detainers law. In *State v. Sallee*, 624 S.W.2d 184, at 186 (Mo. App. S.D. 1981), the Court wrote, "A continuance granted at the request of defendant's attorney tolls the 180-day period of the agreement on detainers." In that case, the attorney had told the judge "I was not prepared on the case and that I needed to get some out-of-state witnesses and that I was not anxious to have the case set for trial right away." Id.

Courts in other states have dealt with this type of issue. Courts in the State of Washington have held that a trial court "may grant a continuance to allow the defense counsel opportunity to prepare for trial over the express objections of a defendant." *State v. Luvene*, 127 Wash.2d 690, 699, 930 P2d 960 (1995). In *State v. Woods*, 143 Wash.2d 561, 23 P3d 1046 (2001), the Supreme Court of Washington found that the trial court did not abuse its discretion when it continued the trial of a death penalty case, over the objection of the defendant, where the State's DNA testing was not to be disclosed to the defense until three weeks before trial. The Washington Court found that "it was reasonable for the court to conclude that a mere 21 days would not

have been enough time for the defense to review the State's test results, or obtain an independent analysis of the DNA evidence." *Id.* at 580. The Court further found that a second continuance necessitated by further delay in the handling of the DNA evidence and heavy caseloads being handled by counsel for the accused was not error. *Id.* at 581. The *Woods* Court concluded: "In short, we are loath to find that the trial court acted in a manifestly unreasonable fashion by refusing to require a defendant charged with a capital offense to proceed to trial without affording his counsel an adequate opportunity to explore the State's scientific evidence." In the matter before this Court, Relators not only need to explore the State's scientific evidence, they need to prepare for *every part of a trial.* See, for example, *Wiggins v. Smith*, 539 U.S. 510 (2003), regarding duties of counsel to prepare for a possible second stage in a capital case.

During the January 19, 2007, hearing, before Respondent, Relator raised the issue of the caseload of his office in addition to Mr. Johnson's case. Relators urge this Court to specifically hold that a trial court should be allowed to consider, in addition to the requirements to prepare for the instant case, the other cases and schedules of the attorneys making the request for additional time in determining reasonableness or necessity of additional time under the statute. If an

attorney—particularly an appointed attorney—lacks the power to set aside other cases and work only on the case at bar, then the fact that Capital Case X requires a great deal of his or her time for preparation should be an allowable factor for the trial court to consider in the determination of the reasonableness of a request for additional time in Capital Case Y.

It is a fair reading of Respondent Judge Wiesman's concerns to say that he believes that a request for additional time in this case is reasonable, that he thinks a grant of additional time would be proper, yet he is worried that the statute does not explicitly tell him that time for attorney preparation can constitute good cause under the statute. Absent clear law on the matter, he feels he is "caught between a rock and a hard place" in deciding Relators' request for additional time. He fears that if he denies "the request for additional time to prepare…there is a likelihood, possibility that if there is a conviction, that it will be overturned for lack of adequate representation of counsel." On the other hand, he fears that if he grants "the extension of time and the appellate courts later on determine that [he] did not have the authority to grant that, the State would be forever barred from prosecuting the case." (Relator's Exhibit H, A26). Respondent researched Missouri case law in search of clear support for granting additional time to

Relators but found none. (Relator's Exhibit H, A26, Relator's Exhibit J, A30-31).

In his written findings, Respondent found that Relators' request for additional time "would be reasonable given that Counsel from the Capital Division of the Public Defender office entered on the case on December 22, 2006, fewer than 30 days prior to the request for additional time." (Findings Regarding Court Order Dated January 19, 2007, Relator's Exhibit J, A30). However, Respondent refused to grant additional time for preparation because the defendant refuses to consent to additional time and the Respondent "finds no Missouri case law clearly and specifically allowing a trial court to grant additional time to defense counsel to prepare over defendant's objection, even when the request of defense counsel is reasonable, when the accused refuses to consent to the additional time." (Relator's Exhibit J, A30-31).

In fact, Respondent's position renders the statute, Section 217.460, Revised Statutes of Missouri, a nullity. The statute, on its face, does not identify *any* particular fact situation as constituting "good cause." If Respondent's position is taken to its logical conclusion, then nothing would ever constitute "good cause" for additional time because the statute does not specifically identify what facts and circumstances

qualify. Respondent, by his statement, is refusing to make such a determination for fear he will later be found to have erred.

Relators urge this court to hold that, under Section 217.460, Revised Statutes of Missouri, if a trial court finds that a request for additional time for trial preparation by an attorney representing a client is reasonable or necessary for effective preparation and to insure that the defendant receives his Sixth Amendment right to effective counsel, that finding constitutes "good cause" for additional time, and to hold that time so granted will not be included in any calculation of the 180-day period within which a trial must be held. Relators urge this Court to hold that trial court grants of additional time to prepare, when such requests are necessary or reasonable to achieve articulable tasks required of attorneys representing an accused who has requested an attorney's representation, can safely be granted by trial courts under Section 217.460, Revised Statutes of Missouri. Relators urge this Court to hold that this is the case regardless of the position of the accused regarding the additional time in cases where the defendant has (1) either requested an attorney be appointed, or retained the attorney, who is making the request, and (2) the request by the attorney is found by the Court to be reasonable or necessary.

The Sixth Amendment establishes that the defendant has a right to effective assistance of counsel. In this capital case, this Court should direct that Respondent not hold a trial when additional time for counsel to effectively prepare is reasonable or necessary. This Court should hold that such additional time granted, after a finding by the trial Court of reasonableness or necessity, is to be excluded from the 180-day calculation under the statute, and that Respondent may safely grant such time. This Court should hold that the plain language of the statute does not mandate that counsel go to trial in a capital case without reasonable, necessary, and adequate time to prepare.

Respondent has, in effect, refused to apply the law to the situation at bar due to a fear that the State might later be forever barred from prosecuting the defendant if some higher court later found that he lacked the power to find that time for attorney preparation constitutes "good cause" under the statute. Relators move this Court to direct Respondent that he both *may* make such a finding under the law, and that he *should* make such a finding if it is necessary to ensure the right of the accused to effective assistance of counsel under both the United States Constitution and the Missouri Constitution.

CONCLUSION

For the foregoing reasons, Relators are entitled to an order prohibiting Respondent from compelling a trial in this cause without granting Relators necessary additional time to prepare for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 8929 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using the McAfee VirusScan 7.1.0 program which was updated on March 9, 2007 and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were delivered, this 10th day of April, 2007, to counsel for respondent, Mr. Douglas Sidel, Assistant Prosecuting Attorney, 100 South Central, 2nd floor, St. Louis, Missouri, 63105, (314) 615-2600, fax (314)615-7658 and an email containing a copy of said brief was sent to aforesaid counsel for respondent at dsidel@stlouisco.com, and a true and correct copy was delivered to Respondent, The Hon. Melvyn W. Wiesman, St. Louis County Courts Building, Division 19, 7900 Carondelet, Clayton, Missouri 63105 (314) 615-1519, fax (314) 615-7658. A true and correct copy of the attached brief was mailed, first-class

postage prepaid, to the defendant, Stanley Johnson, #1517 8-B-8, St. Louis County Jail, 100 South Central, Clayton, MO 63105.

_____
Bevy Beimdiek
Relator