

**No. SC 90833**

**IN THE SUPREME COURT OF MISSOURI**

**STATE EX REL. DAVID T. GARCIA,**

**Relator,**

**V.**

**THE HONORABLE STEVEN H. GOLDMAN,**

**Respondent.**

**ORIGINAL PROCEEDING IN MANDAMUS  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 12  
THE HONORABLE STEVEN H. GOLDMAN, JUDGE**

**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT**

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**TABLE OF CONTENTS**

	PAGE
TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	2
JURISDICTIONAL STATEMENT .....	4
STATEMENT OF FACTS .....	5
POINT RELIED ON .....	11
ARGUMENT: Claim that Relator is entitled to an Order dismissing the charges against him due to the violation of his Sixth Amendment right to a speedy trial .....	12
CONCLUSION.....	34
CERTIFICATE OF COMPLIANCE AND SERVICE .....	35

## TABLE OF AUTHORITIES

### Cases

<u>Barker v. Wingo</u> , 407 U.S. 514 (1972).....	passim
<u>Crawford v. Washington</u> , 541 U.S. 36 (2004).....	30
<u>Doggett v. United States</u> , 505 U.S. 647 (1992).....	passim
<u>Furlong Cos. v. City of Kansas City</u> , 189 S.W.3d 157, 166 (Mo. banc 2006) .....	12
<u>Goodrum v. Quarterman</u> , 547 F.3d 249 (5 <sup>th</sup> Cir. 2008), <i>cert. denied</i> , 129 S.Ct. 1612 (2009) ....	27
<u>Reynolds v. Leapley</u> , 52 F.3d 762 (8 <sup>th</sup> Cir. 1995).....	15
<u>Robinson v. Whitley</u> , 2 F.3d 562 (5 <sup>th</sup> Cir. 1993), <i>cert. denied</i> , 510 U.S. 1167 (1994) .....	27
<u>State ex rel. McKee v. Riley</u> , 240 S.W.3d 720, 725 (Mo. banc 2007) .....	12, 13, 14, 33
<u>State ex rel. Wickline v. Casteel</u> , 729 S.W.2d 56 (Mo.App. S.D. 1987).....	14
<u>State v. Atchison</u> , 258 S.W.3d 914 (Mo.App. S.D. 2008).....	14, 27
<u>State v. Black</u> , 587 S.W.2d 865 (Mo.App. E.D. 1979) .....	32
<u>State v. Blankenship</u> , 830 S.W.2d 1 (Mo. banc 1992) .....	29
<u>State v. Bolin</u> , 643 S.W.2d 806 (Mo. banc 1983) .....	13
<u>State v. Drudge</u> , 296 S.W.3d 37 (Mo.App. E.D. 2009).....	14
<u>State v. Edwards</u> , 750 S.W.2d 438 (Mo. banc 1988).....	13, 20, 29
<u>State v. Farris</u> , 877 S.W.2d 657 (Mo.App. S.D. 1994).....	14
<u>State v. Garza</u> , 212 P.3d 387 (N.M. 2009) .....	28
<u>State v. Ingleright</u> , 787 S.W.2d 826 (Mo.App. S.D. 1990) .....	15
<u>State v. Loewe</u> , 756 S.W.2d 177 (Mo.App. E.D. 1988).....	32
<u>State v. Morris</u> , 668 S.W.2d 159 (Mo.App. E.D. 1984).....	15, 16

<u>State v. Perry</u> , 275 S.W.3d 237 (Mo. banc 2009).....	30
<u>State v. Reynolds</u> , 813 S.W.2d 324 (Mo.App. E.D. 1991).....	15
<u>State v. Rodden</u> , 728 S.W.2d 212 (Mo. banc 1987), <i>cert. denied</i> , 499 U.S. 970 (1991) .....	18
<u>State v. Shaw</u> , 945 S.W.2d 590 (Mo.App. E.D. 1997).....	18
<u>State v. Weeks</u> , 982 S.W.2d 825 (Mo.App. S.D. 1998).....	15, 18
<u>United States v. Escamilla</u> , 244 F.Supp.2d 760 (S.D. Tex. 2003).....	16
<u>United States v. Forrester</u> , 837 F.Supp. 43 (D.Conn. 1993), <i>reversed on other grounds</i> , 60 F.3d 52 (2 <sup>nd</sup> Cir. 1995).....	25
<u>United States v. Sandoval</u> , 990 F.2d 481 (9 <sup>th</sup> Cir 1993), <i>cert. denied</i> , 510 U.S. 878 (1993) .....	25
<u>Wilson v. Mitchell</u> , 250 F.3d 388 (6 <sup>th</sup> Cir. 2001) .....	26
 <b>Statutes</b>	
Section 491.074, RSMo .....	29
 <b>Rules</b>	
Supreme Court Rule 84.23.....	4

## **JURISDICTIONAL STATEMENT**

This action is an original proceeding in mandamus. This Court has jurisdiction to hear such petitions for original writs pursuant to Supreme Court Rule 84.23. Relator previously filed a petition for a writ of prohibition in the Missouri Court of Appeals, Eastern District. That petition was denied by the Court of Appeals on April 14, 2010.

## STATEMENT OF FACTS

On April 9, 1998, at approximately 6:23 p.m., Rigoberto Garcia Dominguez was working in the kitchen of the Sunny China International Buffet restaurant, located at 1257 South Kirkwood Road in Kirkwood, Missouri, when he was shot at close range with a shotgun (Rel.Exh. 45, 48, 57-58).<sup>1</sup> The single shot struck Dominguez in the abdomen (Rel.Exh. 59, 61, 65). Dominguez was hospitalized but survived the assault (Rel.Exh. 46, 60, 65).

Three eyewitnesses, including Dominguez himself, identified David Tena Garcia, Relator herein, as the shooter (Rel.Exh. 46, 59, 65). Meliton Gonzalez, also an employee of Sunny China, told police that he had been working that evening when somebody knocked on the door leading from the kitchen to the outside of the restaurant (Rel.Exh. 47). Gonzalez reported that Relator, whom he had known for six years, was admitted to the kitchen area, “walked around for a couple of minutes,” but did not speak to anyone, rather “just looked to see who was there.” (Rel.Exh. 47, 61.) Gonzalez said that a few minutes later, Relator re-entered the kitchen, armed with a long-barreled firearm, and approached Dominguez (Rel.Exh. 48, 61). Gonzalez said he approached Relator and asked “what are you doing?” (Rel.Exh. 48.) Relator did not respond, Gonzalez said, but proceeded to a few feet from Dominguez (Rel.Exh. 48, 61). Relator said something to

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<sup>1</sup>The record on this appeal consists of Relator’s Petition for Writ of Mandamus and Suggestions in Support thereof (“Rel.Pet.”) and 395 pages of Exhibits filed by Relator with his Petition (“Rel.Exh.”).

Dominguez, Gonzalez said, and before Dominguez could respond, Relator shot him and then fled out the exterior door (Rel.Exh. 48, 61). Gonzalez followed Relator out the door and saw Relator, no longer in possession of the firearm, get into a brown coupe or sedan and drive away (Rel.Exh. 48-49, 61-62).

Manuel Castro, who was working at one of the stoves in the kitchen, told police he saw Relator walk behind him and approach Dominguez; he said to Dominguez “I told you, Berto.” (Rel.Exh. 54.) Relator then lifted a long rifle, Castro said, and shot Dominguez, then turned and ran out the door he had come in (Rel.Exh. 54).

Dominguez, for his part, told police that Relator pointed the gun at his head and then shot him in the side; he believed Relator shot him in retaliation because Dominguez had been talking about Relator’s girlfriend at Relator’s apartment two days earlier (Rel.Exh. 65).

Kwan Tung Tse told police he had heard the knock on the kitchen door, unlocked it and admitted somebody to the kitchen, although he did not identify the person by name (Rel.Exh. 52, 55). He saw the man come in, talk to one of the employees and then leave; within a minute, the man re-entered the kitchen carrying a shotgun or rifle (Rel.Exh. 52, 55). Tse said he saw the man shoot Dominguez and then leave out the door through which he entered (Rel.Exh. 52, 55). He described the shooter as having brown hair, wearing a black shirt and pants, and estimated his weight at 160-180 pounds and his height at 5’9” to 5’10” (Rel.Exh. 52). Tse’s description of the shooter’s clothing and height was consistent with descriptions other eyewitnesses provided of Relator’s height and the clothing he was wearing, although the other witnesses estimated Relator’s weight at 200

pounds (Rel.Exh. 47, 62). Two other witnesses, Jesus Rojas and Moises Aguilar, who were working in the kitchen at the time, told police that they did not witness the shooting, but heard the shot fired and then saw the shooter run out of the restaurant (Rel.Exh. 54-55).

Nabor Garcia, Relator's cousin and housemate, told police that he saw Relator in the kitchen with the shotgun, but did not witness the actual shooting (Rel.Exh. 62-63). He said he saw Relator come into the kitchen carrying the gun and saw him leave with it, but did not see him shoot the weapon (Rel.Exh. 63). Nabor Garcia said he recognized the weapon because he had seen it before at the apartment he shared with Relator (Rel.Exh. 63). Nabor Garcia also told police there had been an argument between Relator and Dominguez, who he said had known each other for seven years at their apartment two days earlier, and that the next morning two of the tires on Relator's car had been slashed (Rel.Exh. 63-64). According to Nabor Garcia, Relator suspected Dominguez was responsible for slashing his tires and told Nabor Garcia he was going to confront Dominguez about it (Rel.Exh. 63-64).

Kirkwood police found a Mossburg pump-action 12-gauge shotgun, partially hidden in some bushes between a fenced-in area containing the restaurant's dumpsters and the parking lot (Rel.Exh. 57-58, 71). The shotgun was found just north of the doorway exiting from the kitchen area, and its location was consistent with having been thrown over the fence surrounding the dumpsters (Rel.Exh. 57). The shotgun contained one spent shotgun shell; firearm analysis confirmed that the shell had been fired in that shotgun (Rel.Exh. 57-58, 75). In addition, police took photographs of the scene and

prepared a diagram of the kitchen area indicating the location of Dominguez, his assailant and various witnesses (Rel.Exh. 56, 60, 69-70).

The police, through their investigation, had obtained Relator's date of birth, driver's license/Social Security number and address shortly after arriving at the scene of the crime, and issued a "wanted" for Relator for the offenses of assault in the first degree and armed criminal action (Rel.Exh. 49; 26 p. 65-66; 18-19 p. 33-34)<sup>2</sup>. Later that evening, Kirkwood police, with Nabor Garcia's permission, searched the apartment shared by Nabor Garcia and Relator in an unsuccessful attempt to locate Relator (Rel.Exh. 64; 26 p. 58, 60). Police also canvassed the apartment complex and made "several stops through the night looking for him, trying to find people that would tell us where he might be." (Rel.Exh. 23 p. 50, 53-54; 25 p. 58-61). In the days and weeks following the shooting, numerous members of the Kirkwood Police Department spoke to several people, all of whom were acquainted with Relator and with each other, in an attempt to find Relator's whereabouts (Rel.Exh. 23-24 p. 51-52, 54; 25 p. 61). Several individuals told the police that if Relator were to leave the St. Louis area, he might go to California or Illinois

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<sup>2</sup>Pages 10-31 of Relator's Exhibits consist of a condensed transcript of hearings held by Respondent on Relator's Motion to Dismiss the indictment; as such, each page in this section contains up to four smaller pages of the transcript. Accordingly, Respondent, when referring to this portion of Relator's Exhibits, will use two numbers: the first corresponding to the pagination of the collected exhibits before this Court, and the second (preceded by "p.") corresponding to the internal pagination of the transcript.

(Rel.Exh. 24 p. 55). In the weeks and months following the shooting, police continued to follow up, via phone calls, with the various people they had contacted, in an unsuccessful attempt to obtain leads or other information as to Relator's location.

In January 2001, Kirkwood police were contacted by representatives of the St. Louis County Prosecuting Attorney's office and asked to make further attempts to locate Relator's whereabouts, due to concerns that the statute of limitations might run out with respect to potential charges against Relator (Rel.Exh. 14 p. 17; 16 p. 24). Police had received information that Relator might be in the vicinity of St. Ann, Breckenridge Hills, and/or other communities in north and central St. Louis County, and followed up on that information in early 2001 (Rel.Exh. 14-15 p. 17-19; 16 p. 23-25). On at least three occasions they were admitted to certain residences and searched those residences but did not locate Relator, nor did they receive any leads or other information as to his whereabouts (Rel.Exh. 15 p.18-19; 16-17 p. 24-27).

On February 21, 2002, the St. Louis County Grand Jury handed up an indictment charging David Tena Garcia with assault in the first degree, alleging that on April 9, 1998, he knowingly caused serious physical injury to Rigoberto Dominguez by shooting him, and armed criminal action, alleging that he committed that assault in the first degree by, with and through the use of a deadly weapon (Rel.Exh. 2-3).

In early 2009, Det. Steve Urbeck of the Kirkwood Police Department learned that the case against Relator was still active and that Relator had yet to be located or arrested (Rel.Exh. 76). He entered Relator's Social Security Number into a computer system called Accurint, and received a listing indicating an address for Relator of 3520 West 59<sup>th</sup>

Street in Chicago, Illinois (Rel.Exh. 76). Det. Urbeck contacted the Chicago Police Department's Fugitive Apprehension Section and requested their assistance in locating Relator (Rel.Exh. 76). Although it was subsequently determined that the address provided by Accurint was about 3-4 months out of date, Chicago police were able to determine that Relator worked at the Renaissance Hotel, located at 1 West Wacker Drive in Chicago (Rel.Exh. 76). On February 11, 2009, Chicago police arrested Relator on the indictment when he arrived for work at the Renaissance Hotel (Rel.Exh. 76).

On or about December 7, 2009, Relator filed a Motion to Dismiss the indictment against him, alleging violation of his right to a speedy trial under the Sixth Amendment to the U.S. Constitution (Rel.Exh. 5-6). Respondent, the Honorable Steven H. Goldman, sitting in Division 12 of the Circuit Court of St. Louis County, heard evidence on Relator's motion on February 18 and March 25, 2010 (Rel.Exh. 10-31). On March 26, 2010, Respondent entered an Order denying Relator's Motion to Dismiss (Rel.Exh. 7-9).

On or about April 22, 2010, Relator filed a Petition for Writ of Mandamus with this Court. This Court issued a preliminary alternative writ of mandamus on May 5, 2010, and directed the parties to file briefs by 9 a.m. on May 17, 2010.

**POINT RELIED ON**

**RELATOR IS NOT ENTITLED TO AN ORDER DIRECTING  
RESPONDENT TO DISMISS THE CHARGES AGAINST HIM BECAUSE  
RELATOR'S RIGHT TO A SPEEDY TRIAL WERE NOT VIOLATED IN THAT  
RELATOR WAS PARTIALLY RESPONSIBLE FOR THE DELAY IN HIS  
APPREHENSION, AND IN ANY EVENT RELATOR WAS NOT PREJUDICED  
BY THE DELAY.**

## ARGUMENT

**RELATOR IS NOT ENTITLED TO AN ORDER DIRECTING RESPONDENT TO DISMISS THE CHARGES AGAINST HIM BECAUSE RELATOR’S RIGHT TO A SPEEDY TRIAL WERE NOT VIOLATED IN THAT RELATOR WAS PARTIALLY RESPONSIBLE FOR THE DELAY IN HIS APPREHENSION, AND IN ANY EVENT RELATOR WAS NOT PREJUDICED BY THE DELAY.**

In this original proceeding in mandamus, Relator seeks an order from this Court directing Respondent to dismiss, with prejudice, the charges against Relator because his Sixth Amendment right to a speedy trial was purportedly violated by the delay in apprehending him and bringing him to trial (Rel.Pet. 22). However, because Respondent properly analyzed the relevant case law and applied it to the facts of Relator’s case, Relator has not demonstrated that his speedy trial right was violated, and thus his petition for mandamus must be denied.

In order to obtain relief by mandamus from this Court, Relator “must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.” State ex rel. McKee v. Riley, 240 S.W.3d 720, 725 (Mo. banc 2007) (quoting Furlong Cos. v. City of Kansas City, 189 S.W.3d 157, 166 (Mo. banc 2006)).

Relator’s allegation that his Sixth Amendment right to a speedy trial would be violated by a trial on these charges is subject to a four-factor balancing test, first set forth by the U.S. Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), and subsequently endorsed by this Court. *See, e.g., State v. Bolin*, 643 S.W.2d 806, 810 n.5 (Mo. banc

1983); State v. Edwards, 750 S.W.2d 438, 441 (Mo. banc 1988); McKee, *supra* at 729.

Those factors are: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. Barker, *supra* at 533.

Respondent will address the four factors in turn.

### **The Length of the Delay**

Nearly seven years to the day elapsed between the indictment handed up against Relator on February 21, 2002, and his arrest in Chicago on February 11, 2009.<sup>3</sup> Missouri courts have consistently held that delays in excess of eight months are “presumptively prejudicial” to the defendant. McKee, *supra* at 729. *See also* State v. Farris, 877 S.W.2d

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<sup>3</sup> Respondent's Order indicates that Relator was arrested on February 19, 2009 (Rel.Exh. 8). The February 19 date also appears in various pleadings filed by Relator, including his Motion to Dismiss filed below and his Petition filed before this Court (Rel.Exh. 5; Rel.Pet. 2). However, the police report prepared by Det. Urbeck indicates that Chicago police, after confirming that Relator worked at the Renaissance Hotel, also confirmed that he was “next scheduled to work on at 06:30 hours on Wednesday, 02-11-2009.” (Rel.Exh. 76.) The report goes on to state that Det. Charles Garcia (no relation to Relator) of the Chicago Police Department told Det. Urbeck that he, Det. Garcia, would be at Relator's workplace on that date and time (February 11) to arrest Relator (Rel.Exh. 76). Finally, the report states, Kirkwood police detectives traveled to Chicago and were present when Relator was taken into custody (Rel.Exh. 76). Thus, it appears that February 11, 2009 is the correct date of arrest for Relator.

657, 660 (Mo.App. S.D. 1994) (collecting cases). Accordingly, Respondent's order denying Relator's Motion to Dismiss found that the length of the delay in Relator's case was presumptively prejudicial.

It bears mentioning that, as the U.S. Supreme Court observed in Barker, that “[t]he length of the delay is to some extent a triggering mechanism.” Barker, *supra* at 530. Unless a reviewing court has found a delay in a certain case that is presumptively prejudicial, there is no need to review the remaining three factors of the Barker analysis. *Id.* See also Doggett v. United States, 505 U.S. 647, 651-52 (1992); State ex rel. Wickline v. Casteel, 729 S.W.2d 56, 59 (Mo.App. S.D. 1987). The length of the delay, once past the level of presumptive prejudice, can and should be considered when analyzing the fourth factor (prejudice to the accused) but does not foreclose by any means a detailed analysis of whether the defendant has been prejudiced by the delay. See State v. Drudge, 296 S.W.3d 37, 42 (Mo.App. E.D. 2009) (“we must again examine the length of delay when analyzing prejudice to the defense, a consideration in the fourth factor”). By contrast, “[p]resumptive prejudice for first-prong analysis raises no such fourth-prong presumption; it is just a threshold below which a court need not even consider Barker's other factors.” State v. Atchison, 258 S.W.3d 914, 919 (Mo.App. S.D. 2008).

In any event, as the delay in this case easily exceeds the limits set forth by Missouri courts to establish presumptive prejudice, the remaining three factors should then be addressed.

### **The Reason for the Delay**

This portion of the Barker analysis considers the reasons cited by the prosecution for the delay in bringing the accused to trial. As the Barker Court itself pointed out, “different weights should be assigned to different reasons.” Barker, supra at 531. For example, a deliberate attempt by the government to delay a trial in order to hamper the defense would weigh heavily against the government, while a more neutral reason, such as negligence on the part of the government in bringing the case to trial, would receive less weight. *Id.* Delays that can be attributed to the defendant weigh heavily against the defendant in this analysis. State v. Ingleright, 787 S.W.2d 826, 831 (Mo.App. S.D. 1990). A defendant’s flight from the jurisdiction may be considered and attributed to the defendant. State v. Weeks, 982 S.W.2d 825, 834-35 (Mo.App. S.D. 1998) (holding that delay resulting from defendant’s escape from county jail and subsequent flight to Arkansas should be weighed against defendant). *See also* Reynolds v. Leapley, 52 F.3d 762, 764 (8<sup>th</sup> Cir. 1995) (observing that most of the nine-year delay “was caused by the fact that Reynolds fled the jurisdiction following his offense and became incarcerated elsewhere”). *But see* State v. Reynolds, 813 S.W.2d 324, 326 (Mo.App. E.D. 1991) (analyzing same facts, same defendant, and weighing delay against the State due in part to the State’s negligence in locating defendant in federal penitentiary and bringing him to Missouri for trial).

In State v. Morris, 668 S.W.2d 159 (Mo.App. E.D. 1984), the defendant was arrested and charged with assault immediately after an altercation in February 1979 that left the victim unconscious and confined to a hospital; no warrant was issued for the defendant at that time and he was released from custody. *Id.* at 161. The victim

subsequently died of his injuries in December 1979, and in January 1980 the defendant was indicted for murder in the second degree. *Id.* However, the defendant was not arrested on that charge until August 1981, because he had moved to Waukegan, Illinois, and law enforcement authorities could not locate him for some time. *Id.* In analyzing the second factor of the Barker test, the court in Morris found that the defendant was responsible for the delay between his indictment and his arrest because he had moved from the area and the police were unable to find him. *Id.* at 163. Although the court in Morris specifically found that no part of the delay in that case could be attributable to the state, either by deliberate conduct or by negligence, *id.*, Morris is nevertheless applicable to this case because it stands for the proposition that courts may consider whether a defendant has fled or otherwise left the area, and the impact such behavior may have in delaying their prosecution, in analyzing the second Barker factor and determining whether the delay is attributable to the state, the defendant or a combination of the two. *See also* United States v. Escamilla, 244 F.Supp.2d 760, 768-69 (S.D. Tex. 2003) (distinguishing Doggett, *supra*, and holding that even if government was negligent, “the defendant is still the principal cause of the delay ... because the defendant ... precipitated the delay by fleeing to Mexico”).

In this case, Respondent found that both the State and Relator were responsible for the delay. For the State’s part, Respondent found that “investigating officers did not use reasonable diligence to find Defendant.” (Rel.Exh. 9.) In reaching that conclusion, Respondent cited evidence presented below that indicated that Relator had applied for a job at a Marriott Hotel in Chicago in September 2000; that he had paid income tax from a

Chicago address for tax years 2000-2008; and that he had applied for a Missouri driver's license (from a St. Louis address) on December 31, 2001 (Rel.Exh. 9). In addition, Respondent noted that the process by which Relator was ultimately located in February 2009 – a computer search using Relator's Social Security number – “could have been done in 2002 or before.” (Rel.Exh. 9.)

As for Relator, although Respondent found no evidence to indicate he was aware of the indictment returned against him in February 2001 or the accompanying warrant for his arrest, he also observed that Relator “fled from his home address,” and found there was sufficient evidence to indicate that Relator “knew there were witnesses at the scene, including the victim, and that police investigators would be searching for him.” (Rel.Exh. 8-9.) Uncontroverted evidence showed that Relator was living in Chicago from at least 2000 onward; thus, Respondent properly concluded that Relator had fled the jurisdiction and should bear some responsibility for the delay in his apprehension and prosecution. Accordingly, Respondent properly concluded that both the State and Relator were responsible for the delay and weighed this factor against both parties.

Relator, for his part, claims that the State is solely responsible for the delay, and goes so far as to claim that his “alleged” flight is irrelevant to the issues at hand (Rel.Pet. 13-15). First, Relator argues that the State did not provide any evidence that he left Missouri to avoid prosecution (Rel.Pet. 14-15). While it is true, as Relator states, that no evidence was presented that he knew he had been charged in Missouri, the evidence abundantly showed that Relator abruptly disappeared from his residence in greater St. Louis immediately after Dominguez was shot, and that numerous friends and family

members, including his cousin with whom he shared an apartment, had no idea where he was. More fundamentally, several witnesses placed Relator at the scene of the shooting, armed with a firearm (even though not all of them said they saw him fire any shots) and told police that he then fled the scene of the crime. It is well-established that evidence of flight from the scene of a crime is admissible to show an accused's consciousness of guilt. *See, e.g., Weeks, supra* at 833; *State v. Rodden*, 728 S.W.2d 212, 219 (Mo. banc 1987), *cert. denied*, 499 U.S. 970 (1991); *State v. Shaw*, 945 S.W.2d 590, 592 (Mo.App. E.D. 1997). Likewise, it was certainly reasonable for Respondent to conclude, from the evidence presented, that Relator fled the scene of the shooting, and subsequently the St. Louis area, in order to avoid prosecution for the shooting of Dominguez.

Moreover, there was no evidence presented to Respondent by either party as to Relator's whereabouts between April 9, 1998 and September 22, 2000, when he applied for a job at a Marriott Hotel in Chicago. Thus, while Relator argues over and over again that the evidence showed that he "lived openly" in Chicago during the entire post-indictment period (Rel.Pet. 7-8, 15), he fails to acknowledge that no evidence showed him to be living openly, anywhere, between the shooting and his emergence in Chicago some 2½ years later.<sup>4</sup> In light of the evidence that *was* presented to Respondent – that

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<sup>4</sup> Interestingly, when Relator applied for employment with Marriott in September 2000, he indicated (under "Employment Experience") that he had been employed by Gaona Landscaping in Franklin Park, Illinois, from sometime in 1996 until September 1, 2000, working as a landscaper and performing apartment repair for \$2000 per month in cash

Dominguez had been shot in front of several witnesses, many of which were longtime acquaintances of Relator's who could (and did) identify him to law enforcement as the man who shot Dominguez – it was reasonable for Respondent to conclude that Relator fled the area to avoid capture.

Relator's desire to draw this Court's attention away from his sudden absence from the St. Louis area is understandable; nevertheless, it was wholly proper for Respondent to consider this matter and to hold it against Relator. While Relator should not shoulder all the blame for the delay in his apprehension, neither is he wholly blameless in the matter. Respondent properly found that both parties were responsible for the delay, and to the extent this factor weighs against the State, it should not weigh strongly against the State, despite Relator's argument to the contrary.

#### **Relator's Assertion of His Speedy Trial Rights**

This factor addresses the timing and nature of an accused's assertion of his right to a speedy trial. Respondent found that Relator asserted his right to a speedy trial in

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(Rel.Exh. 205-06). This information is curious in light of the abundant evidence that, as of April 1998, Relator had been living, and apparently working, for some time in St. Louis. More to the point, his failure to inform a potential employer of his connection to the St. Louis area can be interpreted as an attempt to forestall any inquiries by his prospective employers as to why he left St. Louis so suddenly, and in that light is further evidence that Relator left the area to avoid potential prosecution for Dominguez' shooting.

December 2009, which Respondent found was “a reasonable time frame for Defendant to raise this claim, if he did not know of the indictment and arrest warrant until February 19 [sic], 2009.” (Rel.Exh. 9.) Respondent properly found this factor weighed in Relator’s favor, and counsel for Respondent will not discuss this element any further here.

### **Prejudice to Relator Resulting from the Delay**

Finally, and most fundamentally, this Court must analyze the extent to which any prejudice resulted to Relator from the delay in his apprehension and prosecution in this case. As this Court has observed, “prejudice to require reversal must be actual prejudice apparent on the record or by reasonable inference – not speculative or possible prejudice.” State v. Edwards, *supra* at 442.

In his petition, Relator contends that the U.S. Supreme Court’s decision in Doggett, *supra*, relieves him of the obligation to prove actual prejudice, and therefore that Respondent erred in holding him to such a burden and finding he did not meet it (Rel.Pet. 18-19). Accordingly, before addressing whether or not Respondent correctly found that Relator was not prejudiced by the delay, counsel for Respondent will discuss Doggett and its potential application to this case.

In Doggett, the defendant was indicted in February 1980 on federal charges of conspiring to import and distribute cocaine. Doggett, *supra* at 648. Approximately one month later, police officers working for the federal Drug Enforcement Agency attempted to arrest Doggett at his parents’ house in North Carolina; Doggett was not there, and his mother informed the police that he had left for Colombia several days earlier. *Id.* at 648-49. DEA agents placed Doggett’s name in a computer system in hopes that he could be

apprehended in the event he returned to the United States, but the entry expired several months later “and Doggett’s name vanished from the system.” *Id.* at 649. In September 1981, DEA agents learned that Doggett had been arrested in Panama, but rather than making a formal request that he be extradited to the United States, merely asked Panama to “expel” him to this country. *Id.* Panama, however, did not comply with this request, and when their criminal proceedings were concluded the following summer, Doggett was released from custody and allowed to go to Colombia. *Id.* Doggett returned to the United States in September 1982 – “pass[ing] unhindered through Customs in New York City” – and settled in Virginia, where he married, earned a college degree, found employment and otherwise lived openly under his own name. *Id.*

In the meantime, the American Embassy in Panama had informed the U.S. State Department that Doggett had left for Colombia, but the DEA was never informed of that fact. *Id.* DEA agents never followed up with Panamanian officials, apparently assuming that Doggett was serving time in Panamanian prison, and only learned by the “fortuitous assignment” of the lead DEA agent investigating the conspiracy to Panama in 1985 that Doggett was, in fact, no longer there and had left for Colombia three years earlier. *Id.* at 649-50. Even then, the agent in question “simply assumed Doggett had settled” in Colombia and made no effort to confirm his actual whereabouts or to track him down. *Id.* at 650. “Thus Doggett remained lost to the American criminal justice system until September 1988,” when he was located by the Marshal’s Service using a simple credit check on thousands of people subject with outstanding arrest warrants. *Id.* Doggett was

arrested on September 5, 1988, almost six years after he had returned to the United States and 8½ years after he was indicted. *Id.*

Doggett's subsequent claim that his Sixth Amendment speedy trial rights had been violated was denied, first by a federal magistrate, then by the U.S. District Court, and finally by a divided panel of the U.S. Court of Appeals for the 11<sup>th</sup> Circuit, all of which applied the four-factor test set forth in Barker. *Id.* at 650-51. Significantly, all three courts to rule on Doggett's case prior to the U.S. Supreme Court found that the delay was attributable to negligence on the part of the government, but ruled that Doggett was not entitled to relief because he had failed to prove any actual prejudice resulting from the delay. *Id.*

The Supreme Court, in addressing Doggett's claim, also applied the Barker test. The Doggett Court easily found, as to the first factor, that the delay was presumptively prejudicial, so as to trigger the rest of the analysis. *Id.* at 651-52. The Court then addressed the second factor, the reason for the delay, and made short work of the government's claim that they had sought him with diligence. "For six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and, had they done so, they could have found him within minutes." *Id.* at 652-53. The Court went on to find there was no evidence from which to conclude that Doggett knew he had been indicted or even that the police had come looking for him. *Id.* at 653. Thus, the third factor (defendant's assertion of his speedy trial right) was also weighed in his favor, because he only asserted his speedy trial right once he had finally been arrested. *Id.* at 653-54.

Finally, the Doggett Court considered the argument that had carried the day for the government in the lower courts: “that Doggett fails to make out a successful speedy trial claim because he has not shown precisely how he was prejudiced by the delay between his indictment and trial.” *Id.* at 654. The Court observed that proving prejudice by demonstrating the impairment of a trial defense can be difficult “because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown.’” *Id.* at 655 (quoting Barker, *supra* at 532).

And though time can tilt the case against either side ... one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria ... it is part of the mix of relevant facts, and its importance increases with the length of delay.

*Id.* at 655-56 (internal citations omitted). The Court went on to discuss three hypothetical cases of pretrial delay. First, the Court observed that some pretrial delay is inevitable and justifiable, in that the government “may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down.” *Id.* at 656. In such cases, when a defendant has been pursued “with reasonable diligence” from indictment to arrest, the Court observed, a speedy trial claim will generally fail “however great the delay, so long as [a defendant] could not show specific prejudice to his defense.” *Id.* On the other end of the spectrum is the case in which a defendant can show bad faith

on the part of the government, in that the government had intentionally failed to pursue or prosecute him “to gain some impermissible advantage at trial.” *Id.*

The Court then addressed the middle ground of official negligence in bringing an accused to trial. “While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate how it has prejudiced him.” *Id.* at 656-57. Citing the government’s “egregious persistence in failing to prosecute Doggett,” the Court held that Doggett’s speedy trial rights had been violated even though he had not identified any prejudice resulting from the delay. *Id.* at 657-58.

In the nearly two decades since Doggett was decided, countless defendants have sought to apply its holding to their cases, and Relator is no exception. However, Doggett is inapplicable to this case for a variety of reasons. First, there is no comparison between the negligence on the part of the government in Doggett and the admitted failure of law enforcement in this case to locate Relator more promptly than they did. In this case, whenever law enforcement authorities received leads on Relator’s whereabouts (as in early 2001) they followed up on those leads, to no avail. There simply is no parallel to the inaction by the authorities in Doggett, who on several occasions received specific information as to the possible whereabouts of their quarry and made no attempt to follow up on that information.

In United States v. Forrester, 837 F.Supp. 43 (D.Conn. 1993), *reversed on other grounds*, 60 F.3d 52, 60-65 (2<sup>nd</sup> Cir. 1995), the district court, in rejecting a speedy trial claim, distinguished Doggett by noting that while the defendant in Forrester had lived and

worked openly under his own name and frequently traveled to Connecticut from New York City, “the facts of this case do not even remotely approach the record of Doggett, where the Government actually knew where the defendant was and failed to make even the minimal efforts or inquiry in order to obtain him.” Forrester, *supra* at 45-46. *See also United States v. Sandoval*, 990 F.2d 481, 485 (9<sup>th</sup> Cir 1993), *cert. denied*, 510 U.S. 878 (1993) (noting “no requirement that law enforcement officials make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension”). Similarly, in this case there is no evidence that Kirkwood police ever knew precisely where Relator was living or working until February 2009; they may well have been negligent in failing to determine his location, but their negligence did not rise to the level of the government agents in Doggett, who were aware of the defendant’s location and failed to act to secure his arrest and prosecution.

In Wilson v. Mitchell, 250 F.3d 388 (6<sup>th</sup> Cir. 2001), the U.S. Court of Appeals for the Sixth Circuit addressed what it termed a question unanswered by Doggett: “the extent to which a defendant’s attempt to evade discovery affects the Sixth Amendment analysis.” *Id.* at 395. Wilson addressed a case in which the defendant evaded capture for 22 years, partially due to, among other active measures on his part, using 13 different variations on his name, five different addresses and two Social Security numbers. *Id.* at 392. However, while there was evidence that the police actively pursued Wilson for the first six years he was at large, “there is no evidence that there was any attempt to locate Wilson thereafter” until shortly before he was arrested, some 16 years later. *Id.* Therefore, the court observed, “[w]e have an active wrongdoer (Wilson) and a passive wrongdoer

(the state), both of whom are at fault for a 22-year delay between Wilson's indictment and arrest." *Id.* at 395. Accordingly, the Sixth Circuit held Wilson primarily responsible for the delay in bringing him to trial and, more relevant to this case, held that Wilson was not entitled to a presumption of prejudice under Doggett because he was partially responsible for the delay, and instead denied his claimed speedy trial violation because he had not proven actual prejudice. *Id.* at 395-96.

Wilson, therefore, distinguished Doggett by pointing out that in that case, little (if any) responsibility for the delay lay with Doggett himself; "the longer the delay that is traceable to the state's conduct, the more prejudice that will be presumed." *Id.* at 396 (citing Doggett, *supra* at 657). Other federal circuits have followed a similar analysis. *See, e.g., Robinson v. Whitley*, 2 F.3d 562, 570 (5<sup>th</sup> Cir. 1993), *cert. denied*, 510 U.S. 1167 (1994) (holding Doggett presumption of prejudice did not apply to a defendant who escaped from police custody and who was held responsible for approximately two-thirds of the total delay). As the Fifth Circuit observed in Robinson: "Any threat to the fairness of his trial occasioned by a delay in its commencement was obviously a risk Robinson was willing to take." *Id.* In this case, while there is no evidence that Relator actively tried to avoid capture to the same extent that the defendant in Wilson did, or that he escaped from police custody as the defendant in Robinson did, he nonetheless contributed to the delay in his apprehension by fleeing the St. Louis area. Accordingly, he should not be entitled to a presumption of prejudice under Doggett.

Other cases have distinguished Doggett simply because the delay in question was less than the 8½ years involved in that case. *See State v. Atchison*, *supra* at 920 n.7. In

this case, the post-indictment delay was nearly seven years, less than the delay at issue in Doggett.<sup>5</sup> “At least when the delay results from official negligence, Doggett therefore does not clearly establish that prejudice is presumed except where length of the delay is exceptional.” Goodrum v. Quarterman, 547 F.3d 249, 261 (5<sup>th</sup> Cir. 2008), *cert. denied*, 129 S.Ct. 1612 (2009). Even the Supreme Court in Doggett declined to establish a bright-line rule in this regard, holding that “on the facts before us” it was reversible error for the Eleventh Circuit to require Doggett to show actual prejudice. Doggett, *supra* at 657.

Finally, a wide variety of courts have construed Doggett to hold that prejudice is not presumed unless the other three Barker factors weigh heavily in the defendant’s favor. *See State v. Garza*, 212 P.3d 387, 400 (N.M. 2009) (citing cases). As was discussed above, the first and third Barker factors should be weighed heavily in Relator’s favor, but the second factor (the reason for the delay) should be weighed against both the State and Relator (as Respondent found in denying Relator’s motion) and not heavily against either party in any event. For all the foregoing reasons, Respondent submits that Doggett does not apply to Relator’s case, and the issue of actual prejudice to Relator should be addressed.

Relator does address the issue of actual prejudice in his petition, certainly not conceding that Doggett does not apply but perhaps out of an abundance of caution.

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<sup>5</sup> It should be mentioned that numerous federal courts have construed Doggett to hold that the presumption of prejudice applies when the delay is at least five years. *See, e.g., Goodrum v. Quarterman*, 547 F.3d 249, 261 (5<sup>th</sup> Cir. 2008).

Incredibly, however, he notes that the parties stipulated that “four eyewitnesses to the shooting can no longer be found” – Nabor Garcia, Moises Aguilar, Manuel Castro and Jesus Rojas (Rel.Exh. 41-42) – and then claims that their disappearance as a result of the pretrial delay constitutes actual prejudice to Relator (Rel.Pet. 19). Quite the contrary, when police respond immediately to the scene of a shooting and identify numerous witnesses who either saw the shooting itself or observed an individual with a gun and heard a subsequent shot, and several years later four of those witnesses are nowhere to be found, the prejudice is to the State, not the defendant.

Relator criticizes Respondent for assuming that the witnesses would testify consistently with their statements contained in the police reports, and claims that the delay cost Relator “the opportunity to interview these witnesses and determine for himself whether they would have offered testimony or provided other testimony favorable to his defense.” (Rel.Pet. 20.) In the first place, Relator is not permitted to speculate about what these witnesses might have said in attempting to prove prejudice. State v. Edwards, *supra* at 442. Moreover, if these witnesses were somehow available to testify at trial, and they did so in a manner that helped Relator’s defense, their prior statements to police would be admissible nevertheless as prior inconsistent statements. *See* § 491.074, RSMo.; State v. Blankenship, 830 S.W.2d 1, 8 (Mo. banc 1992). More fundamentally, Relator is complaining that the delay prevented him from interviewing witnesses who will apparently now not testify at his trial, should one be held. If Relator’s trial were to go forward, and any or all of the missing four witnesses were to materialize, Relator would certainly have the opportunity to interview or depose those witnesses prior to their

testimony. In short, Relator has not been prejudiced in the slightest by the disappearance of these witnesses, and the State's case is indisputably weaker for their absence.

Relator also complains that the loss of two videotaped statements (of Meliton Gonzalez and Nabor Garcia) during the intervening time period caused him prejudice (Rel.Pet. 20.) He complains that in Nabor Garcia's videotaped statement, he failed to identify Relator as the shooter and could not remember what the shooter was wearing (Rel.Pet. 20; Rel.Exh. 62-63). In Relator's mind, these statements constitute exculpatory evidence (Rel.Pet. 20); however, he only reaches that conclusion by ignoring the police reports that indicate that before *and* after the videotaped statement, he told police that he saw Relator, his cousin, with the gun, and that after the videotaped statement, he admitted to police that he was nervous and had not been telling them everything he knew (Rel.Exh. 62-63). More fundamentally, this evidence, even if preserved, could only have been presented if Nabor Garcia were to testify at trial. *See Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004); *State v. Perry*, 275 S.W.3d 237, 241 (Mo. banc 2009). In light of the fact that Nabor Garcia is no longer available, Relator is once again complaining about witnesses who would not testify at his trial. Even if Nabor Garcia were to resurface and testify against Relator, the substance of the videotaped statement is summarized in the police report, and Garcia could be cross-examined using the report. (Relator could even call the police officers who were present for the interview to present evidence of a prior inconsistent statement by Garcia.) As for the videotape of Meliton Gonzalez, Relator offers only the speculative claim that the tape "could have provided valuable impeachment material" should Gonzalez testify at trial (Rel.Pet. 20.) Here again, the

contents of Gonzalez' videotaped statement were summarized in the police reports (Rel.Exh. 61-62), and to the extent they are inconsistent with other statements he made to the police, he could be cross-examined at trial without the use of the videotaped statement itself. Accordingly, there is no prejudice to Relator from the absence of these videotapes.

Finally, Relator complains that the delay prevented him from examining the crime scene, because the Sunny China restaurant was demolished two years before he was finally arrested (Rel.Pet. 21). Here again, he ignores crucial pieces of evidence that have been maintained, chiefly the photographs of the scene but also the diagram prepared by police (Rel.Exh. 56, 60, 69-70). He has failed to articulate any reason why his inability to view the scene of the crime would hinder his defense.

In short, there was ample evidence from which Respondent could conclude that the delay in Relator's apprehension did not prejudice his defense.<sup>6</sup> Indeed, it is clear that if any party has been prejudiced by the passage of time in this case, it is the State. As the Supreme Court specifically noted in Barker, one difference between a defendant's right to

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<sup>6</sup>The Supreme Court in Barker, in explaining the fourth-factor prejudice analysis, identified three interests that the speedy trial right was designed to protect: oppressive pretrial incarceration; anxiety and concern on the part of the accused; and impairment of the defense. Barker, *supra* at 532. Inasmuch as Relator was not confined until his arrest in 2009, and claims he was unaware of the charges against him (thus reducing or eliminating anxiety and concern on his part), these two interests are not at issue here, and Relator does not argue them in his petition.

a speedy trial and the other rights afforded under the Constitution is that “deprivation of the right [to speedy trial] may work to the accused’s advantage.” Barker, *supra* at 521.

“As the time between the commission of the crime and the trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused’s ability to defend himself.

*Id.* See also State v. Loewe, 756 S.W.2d 177, 181 (Mo.App. E.D. 1988) (noting that Sixth Amendment speedy-trial right does not only protect defendants, but also protects society “by keeping defendants from using long pre-trial delays to their advantage”). To the extent Relator’s speedy trial right can be said to have been deprived, he was not prejudiced by this violation, and the State should be permitted, as best it can, to go forward with a case that is demonstrably weaker than it was at the time Dominguez was shot. As the Eastern District of the Missouri Court of Appeals observed over three decades ago in denying another speedy trial claim, “we are disturbed by the state’s delay in securing an information, but this must be weighed against the complete absence of actual prejudice to defendant resulting from the delay.” State v. Black, 587 S.W.2d 865, 877 (Mo.App. E.D. 1979). “[T]hus, we conclude defendant’s Sixth Amendment right to a speedy trial was not denied, even though the delay in question is not a model of prosecutorial initiative or concern.” *Id.*

This Court should do likewise, and deny Relator's request for an order dismissing his case for violation of his speedy trial rights, because an analysis of the Barker factors shows that both Relator and the State were responsible for the delay in his capture and prosecution, and the record is devoid of any prejudice to Relator resulting from the delay. At the very least, Relator has not proven that he has a "clear, unequivocal, specific right" to an order dismissing the charges against him, McKee, *supra* at 725, and thus his petition for mandamus should be denied.

## **CONCLUSION**

In view of the foregoing, respondent submits that this Court's preliminary alternative writ of mandamus should be dissolved and Relator's petition for writ of mandamus should be denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7,520 words, excluding the cover and this certification, as determined by Microsoft Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and

3. That a true and correct copy of the attached brief were delivered, by hand delivery or electronic mail, this 14<sup>th</sup> day of May, 2010, to:

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