IN THE SUPREME COURT OF MISSOURI

SC 93785

STATE OF MISSOURI,
RESPONDENT

v.

SYLVESTER R. SISCO, II,
DEFENDANT and APPELLANT

On Appeal
From The Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 1
Honorable Sandra Midkiff
Case No. 0616-CR06361-02

SUBSTITUTE APPELLANT'S BRIEF OF SYLVESTER R. SISCO, II

Clayton E. Gillette
600 E 8th Street, Suite A
Kansas City, Missouri 64106
Tel: (314) 330-4622
ceg@claygillette.com
Attorney for Appellant
Sylvester R. Sisco, II

Patrick W. Peters
600 E 8th Street, Suite A
Kansas City, Missouri 64106
Tel: (816) 474-3600
peters@peters-lawyers.com
Attorney for Appellant
Sylvester R. Sisco, II

June 11, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

This appeal stems from a criminal trial in Jackson County, Missouri. Appellant Sylvester R. Sisco, II ("Sylvester")[1] was found guilty of Murder in the First Degree, Section 565.020 RSMo (Count I), Armed Criminal Action, Section 571.015 RSMo (Count II), Assault First Degree, Section 565.050 RSMo (Count III), and Armed Criminal Action, Section 571.015 RSMo (Count IV). Sylvester was sentenced to life in prison without parole on Count I and thirty years imprisonment each on the remaining Counts (App., A13-A14).

After an Opinion from the Missouri Court of Appeals, Western District affirming his conviction, Sylvester timely filed a Request for Rehearing and a Request for Transfer. Both were denied. Sylvester filed an Application for Transfer in this Court under Rule 83.04, which this Court granted. This Court has jurisdiction under Article V, Section 10 of the Missouri Constitution.

[1] This case relates to Sylvester R. Sisco, II and his brother, Anthony Sisco. For ease of identification the Sisco brothers will be referred to by their forenames.

STATEMENT OF FACTS

In the early morning hours of October 16, 2006, there was a shooting at The Filling Station Bar ("The Bar") in which Jacob Higgs ("Higgs") was killed and Reno Dillard ("Dillard") was seriously injured. Later that day, the Kansas City Police Department ("KCPD") seized hundreds of hours of footage from nineteen security cameras at The Bar. Supp. Tr. (12/7/06 & 1/18/07), pp. 46-52.[2] The Jackson County Prosecutor's Office (the "Prosecutor") never produced this footage to Sylvester in a useable format. SC Supp. L.F. vol. 3, pp. 720-24;[3] vol. 6, pp. 1553-55; Supp. Tr. (3/21/07), p. 5. The Prosecutor did not request that the State's video expert analyze the footage until February 27, 2009. Supp. Tr. (4/24/09 & 4/27/09), p. 20.

In October 2006, KCPD additionally seized various items from which fingerprint and DNA analysis could be performed. Supp. Tr. (12/7/06 & 1/18/07), pp. 46-52. The State requested that three different employees of the KCPD Regional Crime Lab ("RCL") review fingerprint "lifts" before one of these employees identified Sylvester's print on April 22, 2009. SC Supp. L.F. vol. 3, pp. 1443-69; vol 7, pp. 2049-52, 2055-56. The second exculpatory analysis was performed on November 5, 2008 (also identifying another individual) and was not disclosed to Sylvester. SC Supp. L.F. vol. 3, pp. 1443-69;

[2] Several Transcripts were filed in this case for myriad hearings. This Brief cites the Transcripts by date as "Tr. [or Supp. Tr.] (12/7/06), p. #".

[3] The Legal File is cited herein as L.F. vol. #, p. #, while the Supplemental Legal File is cited as SC Supp. L.F. vol. #, p. #.

vol 7, pp. 2049-52, 2055-56. The November 2008 report was unwittingly disclosed to Sylvester in May and June of 2009. SC Supp. L.F. vol. 3, pp. 1443-69. The State made a conscious strategic decision not to analyze any potential DNA samples from The Bar. Supp. Tr. (11/25/08), pp. 5, 11-12; SC Supp. L.F., vol. 1, p. 23 (App., A29). The State admitted that this was "the wrong decision." Supp. Tr. (11/25/08), pp. 5, 11-12.

I. Sylvester is charged the first time.

Sylvester was charged by way of Complaint with Murder First Degree, Assault First Degree, and two counts of Armed Criminal Action and taken into custody on October 19, 2006. SC Supp. L.F., vol. 6, p. 1201. Sylvester was indicted on October 27, 2006. *Id*. Sylvester was arraigned on November 6, 2006. *Id*. Sylvester's trial counsel entered on November 7, 2006, and filed Defendant's Request for Discovery on that same day. SC Supp. L.F. vol. 5, pp. 1203-05. Sylvester's trial counsel ultimately selected a misidentification defense, because the surveillance footage was too blurry to identify Sylvester. SC Supp. L.F., vol. 6, pp. 1553-55. Sylvester's trial counsel was never permitted to see all of the footage, which showed Higgs and Dillard menacing the individual purported to be Sylvester with an AR-15 assault rifle moments before the shooting. *Id*.; Supp. Tr. (11/25/08), p. 4.

II. December 7, 2006 and January 18, 2007 bond hearings.

At the direction of the Prosecutor, after indictment by the grand jury, Sylvester's bond was set at "$250,000.000, 10% with the court." Supp. Tr. (12/7/06 & 1/18/07), pp. 3-10. "[M]ost defendants who are charged with murder with these kinds of bonds fail to make bond." *Id*. at 7. Sylvester attempted to post bond in November, but due to a

typographical error the bond was listed both as "$250,000.000" and "$300,000.000." *Id*. at 3-10, 54-56. If not for this error, Sylvester would have been permitted to post bond and return home **without any additional conditions**. *Id*. at 54-56. At the December 7, 2006 bond hearing, the Prosecutor sought "to raise [Sylvester's] bond based on the only evidence is that the Defendant can make the bond." *Id*. at 58, 84-89 (decision of trial court). The trial court found this request offensive and denied the motion. *E.g.*, *id*. at 58, 66, 72, 84-89.

The trial court conditioned Sylvester's release after the January 18, 2007 hearing upon house arrest as well as setting an "immovable" trial date. *Id*. at 83-95. To set an absolute trial date, the trial court questioned investigators and the attorneys regarding the status of the case file and investigation. *See generally id*. at 3-95. The State described its discovery file as complete "minus a couple of reports." *Id*. 47-48. In response to a direct inquiry regarding DNA testing the State represented "we have identified what we want tested." *Id*. at 51. The State made a strategic decision not to test the DNA samples in Sylvester's case. Supp. Tr. (11/25/08), p. 5. The State announced that due to the "high quality digital videotape" of the shooting, that this was an unusually strong case for which the chances of conviction based upon the evidence already collected was high. Supp. Tr. (12/7/06 & 1/18/07), pp. 52-53.

When the hearing reconvened on January 18, 2007, based upon the representations of the State regarding the completeness and strength of the case, a trial date of August 20, 2007, was set. *Id*. at 83. The trial court noted that "discovery for the most part [was] complete" as of January 18, 2007. *Id*. at 88. The parties agreed that they would be ready

for the trial date. *Id*. at 82. The trial court announced that the matter would not be continued from the August 20, 2007 trial date by either side for any reason. *Id*. at 82-84. The trial court ordered the attorneys to clear that week and the following week so the case could take precedence. *Id*. Finally, the trial court ordered the parties to engage in frequent pre-trial hearings to ensure discovery was proceeding in a timely fashion. *Id*.

At the March 21, 2007 status hearing, Sylvester's attorney noted that the State provided a single CD-R purporting to contain over 150 hours of footage seized from The Bar.[4] Supp. Tr. (3/21/07), p. 5. Sylvester's attorney further noted that the footage would not play. *Id*. While Sylvester's attorney attempted a solution to the video footage issue, the State promised that otherwise Sylvester "received all discovery." *Id*. at 7. Believing that discovery was complete, the trial court set a cutoff date for discovery of August 1, 2007. *Id*. at 8. The parties agreed to this cutoff date. *Id*. at 7-8.

The trial court directly ordered the Prosecutor to contact KCPD to be sure that the Prosecutor had everything and be sure that Sylvester had the entire KCPD file:

---

[4] In April 2009 the State produced the footage in a format that ***Anthony's*** attorney could process into a useable format in 2011. This footage was provided to the Western District on a USB drive (which was transferred to this Court). The footage is contained in the folder "Court of Appeals USB Drive" in the "Video Disks for Court of Appeals" folder. The unconverted footage is 5.04GB of data. The footage converted to a viewable Microsoft Video Player format is 6.28GB of data. A CD-R disk has a maximum capacity of approximately 0.64GB.

> Would you contact the police. Make sure you have everything. Make sure there is nothing in the master file relevant to this case that you don't have… And then, assuming if there is stuff, get it to Mr. Ross. If there is not, send him a letter to the effect that you have checked the file and you… have everything.

Id. at 9-10. The State represented that it "did that prior to running the discovery that [Sylvester] now has. I will do it again…" *Id*. at 10. In 2011, during Anthony's trial, it would be revealed that a number of documents such as (1) a police report indicating that the reason for the shooting was an "argument"; (2) an ATF report of an AR-15 assault rifle found at the scene; and (3) an NCIC printout of Higgs' criminal record were in the possession of the State by March 21, 2007, but were never produced to Sylvester. SC Supp. L.F. vol. 3, pp. 716-18, 770; vol. 7, pp. 2005-48.

On April 6, 2007, the State produced an exculpatory fingerprint analysis by Alice Dearing of the RCL which does not identify Sylvester's fingerprints on any of the items tested. SC Supp. L.F., vol. 7, pp. 2049-52. Dearing examined ten fingerprint "lifts" which produced four "prints of value" matching Anthony, but none which matched Sylvester. *Id*. It was not disclosed in Dearing's report, but her supervisor stated in depositions – in May and June of 2009 – that Dearing likely conducted a visual examination that also did not identify Sylvester. SC Supp. L.F., vol. 6, pp. 1393, 1443-69.

III. Continuance of the first trial date (August 20, 2007).

Leading up to the August 20, 2007 trial date, the State's evidence consisted of:

- The purportedly "unusually strong" video evidence. Supp. Tr. (12/7/06 & 1/18/07), pp. 52-53; (3/21/07), p. 11. The State would later admit that the video evidence was too blurry to make a positive identification of the man alleged to be Sylvester. Supp. Tr. (11/25/08), p. 4;
- Ten fingerprint "lifts" which did not identify Sylvester. SC Supp. L.F., vol. 6, pp. 1458-59, 1469;
- DNA evidence which the State had purposefully decided not to analyze. Supp. Tr. (11/25/08), p. 5; SC Supp. L.F., vol. 1, p. 23 (App., A29); and
- Seven Witnesses. SC Supp. L.F., vol. 5, pp. 1198-1200. The witnesses were three KCPD employees; Higgs (deceased); Dillard (a "victim" that failed to identify Sylvester); and two women who spent time at The Bar on October 16, 2006, Erin Bridges and Lucretia Neal. *Id*. at 1200. The State did not subpoena or contact Bridges or Neal until May 2008. Supp. Tr. (6/30/08), pp. 13-20.

Faced with a case decidedly lacking in relevant or useful evidence, the State moved for a continuance on August 14, 2007. SC Supp. L.F., vol. 5, pp. 1207-09. This continuance was granted, despite the trial court's previous admonitions that there would be "no continuances." Supp. Tr. (12/7/06 & 1/18/07), pp. 82-84. The State asserted that the continuance was necessary for "medical reasons" even though the State had – in its attempt to increase Sylvester's bond – asserted to the trial court that the case was complete and the video evidence was so strong that it was almost a certainty to obtain a conviction. Supp. Tr. (12/7/06 & 1/18/07), pp. 52-53. Rather than employ the assistance

of one of the numerous other competent prosecutors in Jackson County, the State opted to subvert Sylvester's right to a speedy trial.

The trial court re-set the matter for December 10, 2007.

IV. Continuance of the second (December 10, 2007) and third (March 24, 2008) trial dates.

On September 4, 2007, a little over a month before the next trial date, Dearing – author of the exculpatory fingerprint report – retired from the RCL. SC Supp. L.F., vol. 6, p. 1428. Dearing's retirement was not disclosed. In fact, discovery Responses served by the State continued to identify Dearing as an RCL employee. SC Supp. L.F. vol. 5, pp. 1213-20 (June 11, 2008 Responses); 1242-49 (June 29, 2009 Responses). Sylvester did not learn the date of Dearing's retirement until May and June of 2009. SC Supp. L.F., vol. 6, p. 1428. The next two trial dates were continued due to the trial court:

> Because of Court docket constraints the Court continued the case on December 4, 2007. While no motion was filed by either party for the continuance, the Court documents it as a joint continuance… Division 10 then set the case for trial on March 24, 2008. On December 17, 2007, the case was transferred from Division 10 to Division 18, because Division 10 was beginning a two-year term in the juvenile courts. Division 18 set the case for a pretrial conference on February 14, 2008, and subsequently the case was set for trial on June 30, 2008, because Division 18 could not accommodate the March 28, 2008 trial date set by Division 10.

SC Supp. L.F., vol. 1, p. 23 (App., A29). The Orders setting the case for trial on March 28, 2008, and transferring the matter to Division 18, stated that "[n]o continuances will be granted." SC Supp. L.F., vol. 5, pp. 1211-12.

Sometime in May or June of 2008, the State made its first attempts to contact and subpoena Bridges and Neal. Supp. Tr. (6/30/08), pp. 13-20. The State made contact with Neal but not Bridges. *Id*. On June 11, 2008, more than 18 months after discovery was served on the State and almost one year after the trial court's discovery cutoff ***and 19 days before trial***, the State served its first written Responses on Sylvester. SC Supp. L.F. vol. 5, pp. 1213-20. The list of witnesses the State "intended to call" at trial expanded from seven to 67 (this Response continued to list the deceased "victim" as a witness the State "intended to call" at trial). *Id*.

Gregory Middleton and Walter Carter, were not identified in any police report, but were chosen to identify Sylvester from the surveillance video. Supp. Tr. (6/30/08), p. 12. The witnesses were deposed the weekend before trial, and the State never indicated any intention to continue the trial. *Id*. at 12-13. After **21 months** of preparation, the State offered two witnesses to identify Sylvester: Carter denied knowing or recognizing Sylvester, while Middleton stated that his basis of identification of Sylvester was having seen him **15 years** earlier while Sylvester was in sixth grade and Middleton was a sophomore. SC Supp. L.F., vol. 3, pp. 9-10. He had not seen Sylvester since that time. *Id*.

V. Continuance of the fourth trial date (June 30, 2008).

On the morning of the June 30, 2008 trial setting Sylvester announced "ready for trial" and filed his Request for a Speedy Trial. SC Supp. L.F., vol. 5, pp. 1221-22; Supp.

Tr. (6/30/08), p. 5. Neal appeared pursuant to the subpoena, represented by independent counsel, and asserted her Fifth Amendment right to remain silent. *Id*. at 24-25. At the State's request, Neal was granted immunity and ordered to testify at trial that day. *Id*. at 35-36. There was no indication that Neal would have refused to comply with the Order. *Id*. 22-36. The State made no indication that Carter and Middleton were unavailable for trial that day. *See generally id*. at 5-40.

The State asserted that it was unfair that Neal asserted her Fifth Amendment right. *Id*. at 13-14. The State asserted that it was unfair that the State had assumed Sylvester planned to assert self-defense and not a "misidentification" defense. *Id*. at 15. The State asserted that it was unfair that Sylvester planned to discredit the State's witnesses, while asserting that there are "numerous other people that can be quickly found, promptly endorsed, that could identify [Sylvester]." *Id*. at 14-15. Faced with this perceived "unfairness" wrought by the State's own trial strategy, ***the State made two strategic decisions which it later admitted were specifically designed to bolster its case and cover up previous strategic mistakes***, despite the fact that such strategic decisions thwarted Sylvester's attempts to obtain a speedy trial:

- First, as admitted by the State in a later motion: "Because of the last minute uncertainty of Ms. Neal's testimony at trial, the State made the decision to orally seek a continuance on June 30, 2008. ***This decision was one of trial strategy*** that the State had no choice but to make at the last minute." SC Supp. L.F. vol. 1, p. 23 (App., A29) (emphasis added); and

- Second, despite the State's initial strategic "decision not to perform DNA testing on evidence collected at the scene," the State sought a strategic second chance to perform DNA testing. SC Supp. L.F. vol. 1, p. 23 (App., A29).

Relating to the DNA, the State later admitted the fallacy of its trial strategy. Supp. Tr. (11/25/08), p. 5 ("…in this case we probably made the wrong decision."). None of the State's reasons for a continuance were based upon newly discovered evidence, it was simply to rectify prior mistakes in preparing to attempt to sentence Sylvester to life in prison. Supp. Tr. (6/30/08), pp. 13-18.

The State represented to the trial court that the DNA testing would take three weeks while requesting the one-month continuance. *Id*. at 15. Despite Sylvester's readiness for trial, Sylvester's Speedy Trial Motion, the trial court admonition that the June 30, 2008 trial date would not be continued, and the fact that the problems with the State's case resulted entirely from the State's strategic decisions, the trial court granted the continuance. The trial court did not re-set a trial date. *Id*. at 40.

A. An unstated reason for the State's continuance was the State's intention to re-examine Dearing's exculpatory fingerprint analysis.

Because of Dearing's undisclosed retirement, the State requested that the RCL re-examine the ten fingerprint "lifts." On November 5, 2008, Barbara Banks of the RCL, authored an exculpatory fingerprint report which does not identify Sylvester's fingerprints from the crime scene and identifies the prints of another individual: Quartez Lewis. SC Supp. L.F., vol. 6, pp. 1443-69. ***This exculpatory report – which also***

inculpates a different individual – was not disclosed to Sylvester until it was mentioned by Banks' supervisor during his depositions in May and June 2009.

Banks may have been approached to review Dearing's work as early as June 11, 2008, because she was identified as a potential witness in the State's Responses to Discovery Requests at that time. SC Supp. L.F. vol. 5, pp. 1213-20. Sylvester had no reason to believe that Dearing had retired, based on the State's Responses. Regardless, Banks' exculpatory report, which confirmed the previous exculpatory report in all respects – except to inculpate a new third party – was never voluntarily produced to Sylvester.

B. The State analyzes the DNA.

Twenty-one months after obtaining the DNA evidence from The Bar, the State, on July 1, 2008, first sought to have this evidence analyzed. SC Supp. L.F. vol. 5, p. 1206; vol. 6, pp. 1488-91, 1501-07 (deposition of Scott Hummel of the RCL). The State did not know if the evidence from The Bar would produce a DNA profile, yet still requested Sylvester's DNA on June 30, 2008. L.F. vol. 1, pp. 29-30 (App., A35-A36). Despite the fact that this Court's Rules and the Local Rules of the trial court permit all parties the opportunity to respond to all motions, the State's request for Sylvester's DNA was summarily granted. L.F. vol. 1, pp. 31-35. Sylvester filed a Motion for Reconsideration, given that Missouri law holds that such requests are an unreasonable and irrelevant intrusion into the privacy of defendants when there is no DNA profile with which to compare a defendant's DNA. *Id*. The trial court withdrew the Order. *Id*. at 36.

Despite the State's representation that DNA analysis would take three weeks, the State obtained preliminary results from the analysis of the DNA collected from The Bar one month later, on August 1, 2008. L.F. vol. 1, p. 39. ***The State waited approximately one and half months*** and re-requested Sylvester's DNA on September 18, 2008. *Id*. at pp. 37-40. This Motion was granted. L.F. vol. 1, p. 43

C. The case is transferred before Division 18 re-set a trial date.

Division 18 was assigned an exclusive "domestic docket" and on August 4, 2008, the case was transferred to Division 15. On November 25, 2008, a hearing was held regarding Sylvester's case. Sylvester requested that the case be set for immediate trial and that the State be afforded no more time to undertake the DNA testing it represented would take a mere "three weeks." Supp. Tr. (6/30/08), pp. 13-18. The State admitted that it failed to prepare witnesses for the August 20, 2007 trial date. Supp. Tr. (11/25/08), p. 4. The State further admitted that it had miscalculated its trial strategy regarding DNA:

> [T]he defense's argument here is that the State should have made this request [for DNA] a long time ago. I'm not going to argue with the Court that that's untrue. The State likely should have … we look at cases, we evaluate them based on the other evidence, and we make decisions, and in this case we probably made the wrong decision…

Id. at 5. The State asserted that "[b]ut for the DNA test this case is ready to go." *Id*. at 7. This was despite the fact that as of the November 25, 2008 hearing, the State had not disclosed Dearing's retirement, nor had the State produced Banks' November 5, 2008 exculpatory fingerprint report.

The State additionally asserted that Sylvester's DNA was not necessary because his defense was "ridiculous" due to the strength of the State's case, without the DNA:

> This argument that the State is after the wrong man and is doing anything they can to put him at the scene of the crime is ridiculous. There is an abundance of other evidence that this defendant was at the crime scene. It's on the video. Again, the State's reliance has always been on the witnesses. Mr. Ross is not privy to our trial strategy… We've changed our strategy.

Id. at 11-12. Over Sylvester's objections, the case was re-set for April 27, 2009 – giving the State ***five more months*** to prepare DNA analysis and bolster witness testimony.

VI. "Continuance" of the fifth trial date (April 27, 2009).

Scott Hummel, a DNA specialist at the RCL, performed the DNA testing in this case. SC Supp. L.F. vol. 6, pp. 1490-91. All evidence analyzed by Hummell was collected from The Bar on or before October 19, 2006. He testified that there would be no reason to obtain Sylvester's DNA prior to analyzing the evidence from The Bar to see if useable DNA samples had been gathered. *Id*. at 1500. Hummell further testified that based on the comparisons of Sylvester's DNA to the DNA found on items at the crime scene, there was no match for Sylvester at the crime scene. *Id*. at 1508-18. Hummell's report excluded Sylvester as a potential contributor of the DNA collected from all items at The Bar, other than a muddled analysis of a blue tooth device:

> Reno Dillard and Sylvester Sisco are both included as potential contributors to the mixture of genetic information previously developed from the swab

> of the blue tooth … The expected frequency of potential contributors to the alleles present in this mixture is one in 33 unrelated individuals.

SC Supp. L.F. vol. 7, p. 2053. Hummell clarified that this meant that the DNA collected from the blue tooth was not suitable for search purposes or for making an identification. SC Supp. L.F. vol. 6, pp. 1502-03. Thus, despite the wording of Hummell's report, there were no matches for Sisco's DNA discovered at The Bar.

Despite the fact that the State had obtained two exculpatory fingerprint reports (disclosing only the first), on April 14, 2009, the State made an undisclosed request to Carl Carlson to re-re-examine the fingerprint "lifts." SC Supp. L.F. vol. 6, pp. 1451-52. The State later justified this surreptitious request by asserting that "Banks might retire" even though Banks had not expressed any intent to retire. *Id*. The "Banks might retire" reasoning is further undercut by two facts:

- The **fifth** trial setting was scheduled for 13 days after this request was made, making it unlikely that Banks would retire before the trial commenced; and
- The State later asserted that the re-re-examination was ***actually*** necessary because Sylvester's attorney would not sign a fingerprint stipulation. Supp. Tr. (7/2/09), pp. 5-7. This "reason" does not explain why Carlson would need to review Banks' report and the State was ultimately forced to admit that it had never provided Sylvester with any such stipulation. *Id*. Additionally, the actual stipulations were served on Sylvester the day after the State asked Carlson to re-re-examine the fingerprint "lifts." SC Supp. L.F. vol. 5, pp. 1228-35.

On April 21, 2009, Sylvester was told for the first time that Quartez Lewis' prints were discovered through an analysis of the fingerprint "lifts" by Carlson – not Banks. On April 22, 2009 – ***five days*** before the ***fifth trial setting***, more than ***20 months*** after the close of discovery, the State commenced an evidence dump upon Sylvester, producing:

- Carlson's fingerprint report identifying Lewis' ***and*** Sylvester's prints;
- 113 pages of documents relating to the surveillance footage; and
- Several DVDs consisting of over 150 hours of enhanced surveillance footage.

Supp. Tr. (4/24/09 & 4/27/09), pp. 5-6. In addition to being produced so close to the trial date that Sylvester's attorney did not have enough hours to watch all 150 hours of footage, the footage did not work because it was produced to Sylvester in an undisclosed proprietary format.[5] *Id.*; SC Supp. L.F. vol. 3, pp. 720-24; vol. 6, pp. 1553-55.

A. Sylvester's Motion in Limine and for Sanctions.

Sylvester filed a Motion in Limine and for Sanctions, which was argued on April 24, 2009, and April 27, 2009. SC Supp. L.F. vol. 5, pp. 1225-27.

1. Motion in Limine regarding the fingerprint analysis.

Sylvester complained of the surprise in that the April 2007 report did not identify Sylvester and then – ***five days before the fifth trial setting*** – a report was produced inculpating Sylvester. This new analysis used "some new technology or something that allowed them to identify prints that they couldn't have done a year or two ago or

[5] As discussed in Sylvester's Consolidated Motion to Remand, the footage was produced on discs in a proprietary format, which cannot play in any widely available video player.

whatever." Supp. Tr. (4/24/09 & 4/27/09), p. 30 (Prosecutor's statement). Sylvester complained of ongoing violations of his right to a speedy trial. Supp. *Id*. at pp. 5-6, 8-12, 60-62. Sylvester additionally complained that the reasons for this continued re-analysis of the fingerprints were spurious. *Id*. at 10.

The State had more than five months to prepare for the April 27, 2009 trial setting, yet waited until the week of April 14, 2009 to ascertain Dearing's availability. *Id*. at 27. Further, the State ***twice*** represented to the trial court that Dearing had only recently retired and ***that*** was the reason Carlson re-examined the fingerprints:

- "I spoke with [Dearing] a few weeks ago, notified her of the trial date… Then I got a call back from her… and in my conversation with her, she has retired from the police department and she is soon to be off to Iraq…" Supp. Tr. (4/24/09 & 4/27/09), pp. 27-28; and
- "We remind the Court that several weeks ago I contacted [Dearing] who did the initial fingerprint work on this case with the [RCL]. [Dearing] has since retired from the police department." *Id*. at 56.

The State also asserted that it "immediately called the crime lab and spoke to [Carlson] … and asked that the fingerprint evidence be re-tested." *Id*. at 57. Essentially no mention is made of the Banks' report during these hearings – no justification is given for having Carlson re-examine her fingerprint lift analysis.

The State falsely blamed ***Sylvester*** for the need to re-analyze the fingerprints, asserting that his attorney would not sign a fingerprint stipulation. Supp. Tr. (4/24/09 & 4/27/09), p. 28. The State would later (***in July***) admit that this was a "misstatement" and

that no fingerprint stipulation had been served. Supp. Tr. (7/2/09), pp. 5-7; SC Supp. L.F. vol. 5, pp. 1228-35. Some non-fingerprint stipulations were sent to Sylvester the day after the State asked Carlson to re-re-examine the fingerprint "lifts." *Id*.

The State did not disclose to the trial court or to defense counsel that Dearing had retired in 2007. Nor did the State disclose that it requested the first re-examination in 2008. This information would not become available until the deposition of Carlson in May and June of 2009. SC Supp. L.F., vol. 6, p. 1428. The trial court was extremely concerned about the actions of the State:

> I can't get over the fact that we're sitting here two days before trial and just now getting reports and indications that there is now a match of a fingerprint on a piece of evidence at the location of the homicide. ***That floors me***… I'm ***extremely, extremely troubled*** by this new evidence related to the fingerprint. ***It just doesn't pass the smell test***… I just think that's just basically unfair.

Supp. Tr. (4/24/09 & 4/27/09), pp. 40-41 (emphasis added). The trial court took a recess to analyze the issue and ruled to exclude the fingerprint analysis of Carlson. *Id*. at 46. The State then asked whether it would be granted a continuance due to this exclusion and was told that the case needed to be tried on April 27, 2009. *Id*. at 47.

2. Motion in Limine regarding the surveillance footage, PowerPoint, and timeline.

The April 22, 2009 evidence dump included over 150 hours of enhanced footage as well as a timeline and PowerPoint prepared by Ann Mallot, the State's video expert.

Supp. Tr. (4/24/09 & 4/27/09), pp. 5-6. The State asserted that this late disclosure occurred because it uses "new technology [that] wasn't available back when this video was first retained by the police in 2006." *Id*. at 15 (Prosecutor's statement). The Jackson County Prosecutor's Office provided Sylvester with 150 hours of video approximately 146 hours before trial. Even if this surveillance video was viewable (it was not) it was impossible for Sylvester's attorney to view all of the surveillance footage before the trial – especially considering that other documents were produced.

Mallot's review of the 150 hours of footage to create her timeline and PowerPoint started on March 30, 2009, and finished around April 21, 2009. Supp. Tr. (4/24/09 & 4/27/09), p. 20. Mallot's timeline notes the sequence of "key" events while her PowerPoint shows approximately 116 stills from the surveillance footage supposedly "representative" of the night's events. *Id*. at 20-23; SC Supp. L.F. vol. 2, p. 599 – vol. 3, p. 714 (PowerPoint spans two volumes); vol. 5, pp. 1261-75 (timeline). The Prosecutor asked Mallot to begin analyzing the footage on February 27, 2009 – ***Approximately 18 months after the original trial date and discovery cutoff, the Prosecutor asked the State's video expert to begin reviewing the surveillance tapes***. Supp. Tr. (4/24/09 & 4/27/09), p. 20. The State acknowledged that this analysis "simply took [] a long time." *Id*. at 22. Though it would be impossible for Sylvester's attorney to view all this footage, the State argued that this was irrelevant because "***this timeline and the things that she's done are actually to his benefit***." *Id*. (emphasis added). The State specifically argued that Sylvester's attorney should not and need not even look at the video footage because the PowerPoint and timeline "show everything":

> [T]he timeline is to his advantage again, because he's not going to have to spend time looking at this 150 hours. [Mallot] has created a timeline of every single thing that happened…

Id. at 23 (emphasis added).

This footage, had it not been produced on such short notice and if it had been produced in a format which Sylvester's counsel could view, would reveal that Higgs and Dillard handled an AR-15 assault rifle throughout the night of October 16, 2006. SC Supp. L.F. vol. 6, pp. 1553-55; *see also* Video Footage Provided on USB drive.[6] The footage additionally would reveal that moments before the shooting Higgs and Dillard menaced the individual purported to be Sylvester with the assault rifle. SC Supp. L.F.

---

[6] A USB drive was provided to the Western District (and thereafter transferred to this Court as part of the Legal File) which contains the surveillance footage from The Bar. The footage originally provided by the State is accessable by opening the USB Drive, navigating to the folder "Court of Appeals USB Drive," then the folder "Video Disks for Court of Appeals," and finally the folder "Original Disks Provided in Sisco." Unless this Court happens to have installed proprietary security camera software, these files will not play. The footage processed into a format widely available for viewing can be accessed from the folder "Court of Appeals USB Drive," then the folder "Video Disks for Court of Appeals," and finally the folder "Converted Video in Windows Media Format." This is the footage in a format that should work on any Windows Computer – and in the format which the State ***should have*** been required to produce the footage.

vol. 6, pp. 1553-55; *see also* Video Footage Provided on USB drive. Unfortunately for Sylvester, the PowerPoint shows ***absolutely no stills from the footage of an AR-15 assault rifle and the timeline does not mention the weapon in any respect***. SC Supp. L.F. vol. 2, p. 599 – vol. 3, p. 714; vol. 5, pp. 1261-75.

It was later discovered that Mallot noted the presence of the AR-15 assault rifle in the video, Tr. (10/7/09), pp. 395-402, Mallot even discussed the presence of the weapon with prosecutors, SC Supp. L.F. vol. 6, p. 1748, but nothing ever prepared by Mallot included any mention of the weapon, SC Supp. L.F. vol. 6, p. 1767. Yet, ***the State urged Sylvester's attorney to not even look at the video*** because Mallot's timeline included "every single thing that happened" in the video. Supp. Tr. (4/24/09 & 4/27/09), p. 23.

The trial court found that the production of 150 hours of enhanced surveillance footage five days before trial (which Sylvester could not view) did not prejudice Sylvester and the trial court refused to exclude that evidence. Supp. Tr. (4/24/09 & 4/27/09), pp. 46-55.

B. The State uses its *nolle prosequi* powers to gain a strategic advantage.

On April 27, 2009, the trial court reiterated its decision to exclude the new fingerprint evidence. The State argued that it would be fair to grant a continuance for Sylvester to review the evidence. The trial court, noting the impermissibility of forcing a defendant to choose between two constitutional rights, denied a continuance. *See Simmons v. U.S.*, 390 U.S. 377 (1968). The State dismissed and refiled the case immediately, explicitly, and unabashedly to overrule these two decisions of the trial court:

> On April 27, 2009, the State once again requested a continuance from the Court and once again, the State's request was denied. Upon the second denial, the State dismissed the case against the defendant so that time would be available for defense counsel to depose the State's expert witnesses and hire its own expert if so desired, thus allowing the State to proceed with the new fingerprint evidence.

SC Supp. L.F., vol. 1, p. 17 (App., A23) (State's Response Motion). The State also admitted that it disagreed with the trial court and believed that a continuance would be appropriate to permit the new evidence against Sylvester. Tr. (7/15/09), p. 109. The State, shockingly, admitted to threatening the trial court over the "mistaken" ruling:

> And [the trial court] would not allow that and we told him that we'd have no choice but to dismiss and refile the case.

Id. *Nolle prosequi* is "a prosecutor's formal entry on the record indicating that he or she will no longer prosecute a pending criminal charge." *State v. Clinch*, 335 S.W.3d 579, 583 (Mo. App. W.D. 2011). Yet the State's dismissal explicitly noted "Case to be refiled," L.F. vol. 1, p. 52, and the case was immediately refiled on the same allegations:

> I then dismiss the case and we refiled it the same day, as was – as we told them we were going to do and as was expected… That afternoon – we had refiled a complaint, exact same charges as we – as were pending and were still pending. The charges in the case have never changed.

Tr. (7/15/09), p. 110.

C. Sylvester learns the extent of the fingerprint re-re-examinations while deposing Carlson.

On May 27, 2009, and July 17, 2009, Sylvester deposed Carlson regarding his fingerprint analysis. SC Supp. L.F. vol. 6, pp. 1386-1487. At this deposition, Carlson identified his "Time Line Notes," SC Supp. L.F. vol. 5, p. 1224, and Sylvester learned a number of facts regarding the various fingerprint analyses:

- Dearing likely conducted a visual examination of fingerprints that did not identify Sylvester. SC Supp. L.F., vol. 6, pp. 1393, 1443-69;
- Dearing retired September 4, 2007. SC Supp. L.F. vol. 5, p. 1224; vol.6, p. 1428;
- The State was aware of Dearing's retirement at least by June 27, 2008 when the Prosecutor called Carlson to order a re-examination of the fingerprint lifts due to her retirement. SC Supp. L.F. vol. 5, p. 1224; vol. 6, pp. 1390, 1428-29, 1478-79;
- On November 5, 2008, Banks authored an exculpatory fingerprint report which did not identify Sylvester's fingerprints but identified the prints of another individual: Quartez Lewis. SC Supp. L.F., vol. 6, pp. 1443-69; and
- Banks had not expressed any intent to retire even though the State asserted that "Banks might retire" as a reason for ordering a re-examination of her analysis ***less than two weeks*** before the trial date. SC Supp. L.F. vol. 6, pp. 1451-52.

Carlson also stated that if the trial had occurred any time prior to April 22, 2009, there would not have been any evidence from the RCL placing Sylvester at the crime scene. SC Supp. L.F. vol. 6, p. 1459.

VII. Sylvester's "ridiculous technicality" of asking that the State follow Missouri law when filing a charging document seeking to sentence Sylvester to life in prison and Sylvester's Motion to Designate the State's *nolle prosequi* with prejudice.

Sylvester was charged by way of complaint and re-arrested on identical charges on April 27, 2009. Tr. (7/15/09), p. 110. Sylvester was arraigned by information on May 4, 2009. L.F. vol. 1, pp. 53-56. The matter was specifically set for trial on July 6, 2009. SC Supp. L.F. vol. 1, p. 17 (App., A23). Sylvester filed ***another*** request for discovery on May 6, 2009, SC Supp. L.F. vol. 5, pp. 1235-41, along with a Motion to Dismiss for Speedy Trial Violations, L.F. vol. 1, pp. 54-94 (amended motion), and Sylvester's Second Motion for a Speedy Trial, L.F. vol. 1, pp. 57-58.

During this time, the State filed additional Responses to Sylvester's Request for Discovery on June 29, 2009. SC Supp. L.F. vol. 5, pp. 1242-1249. These Responses nearly doubled the amount of witnesses the State "intended to call" at trial to 121 witnesses. *Id*. The Responses continued to indicate that the State "intended to call" the deceased "victim" at trial. *Id*. The Responses also identified Dearing as an employee of the RCL. *Id*.

The State failed to conduct a preliminary hearing or obtain a waiver from Sylvester for a preliminary hearing, so on July 2, 2009, the trial court held argument on Sylvester's Motion to Dismiss for lack of jurisdiction. Supp. Tr. (July 2, 2009), pp. 1-32. The trial court found that a proper charging document had not been filed and that Sylvester had not waived a preliminary hearing. *Id*. at 25. The trial court ordered a preliminary hearing to be conducted. *Id*. The State objected that this was inconvenient

and declared it would simply indict Sylvester on July 10, 2009. *Id*. at 23. Sylvester filed a Petition for Writ of Prohibition in the Western District asking that court to prohibit the State from proceeding under a defective charging document on July 9, 2009. *Sisco v. Honorable J. Daugherty*, WD 71218. After Sylvester was indicted on July 10, 2009, the Petition was denied. Sylvester was arraigned, bond was reinstated, and the matter was assigned for trial. On July 13, 2009, Sylvester filed his Motion and Suggestions that the State's Dismissal be Designated with Prejudice. L.F. vol. 1, pp. 105-149.

At the hearing on Sylvester's Motion to Designate the State's Dismissal with Prejudice the State "analyzed" which parties should be assigned blame for delays during the pendency of this matter. The State asserted that Sylvester's attempt to avoid being deprived of his liberty by the State of Missouri for the remainder of his life under an improper charging document was a "ridiculous technicality":

> And now he made this assertion [that] the Court … had no jurisdiction because of this. This was a situation completely of his – of his own manufacture, trying to create some type of ***ridiculous technicality*** to avoid facing the charges in this case and the evidence before the defendant.

Tr. (7/15/09), p. 110 (emphasis added). The State also informed the trial court that when defense attorneys request information beyond the bare minimum required of Rule 25.03, the Jackson County Prosecutor's Office does not bring this dispute to the trial courts, but rather it simply ignores those requests:

> [Defense counsel likes] to make a discovery request which goes far beyond what is mandated by the rule. Our discovery response is aimed at

> addressing what is ordered by the rule and not ever – they want witnesses – they want all kinds of things that they're not allowed to get, and have requested. ***Those are routinely ignored***.

Tr. (7/15/09), p. 160 (emphasis added). The State's reason why other discovery Responses were served so late was that it "forgot." *Id*. at 161.

The State's Response to this Motion included a number of admissions regarding the State's *nolle prosequi* and the seriousness with which the State views its constitutional burden to provide defendants with a speedy trial. *See e.g.*, *State v. Goldman*, 316 S.W.3d 907, 911 (Mo. banc 2010):

- The State specifically admitted that it disagreed with the trial court's ruling regarding the fingerprint evidence and continuance and the reason it dismissed and refiled the case was to overrule these decisions. SC Supp. L.F., vol. 1, p. 17 (App., A23);
- The State admitted that the June 30, 2008 request to continue the trial date was "one of trial strategy" because the State had not prepared witnesses. *Id*. at 23 (App., A29);
- The State admitted that it consciously decided ***not*** to analyze the DNA found at The Bar and that this trial strategy was a mistake which required the State to request a continuance to remedy. *Id*. at 23 (App., A29); and
- The State put the burden on Sylvester to obtain a speedy trial. *Id*. at 27 (App., A33) ("[Sylvester at no time sought to move the trial date forward…").

At this hearing the State also asked the trial court to make effective the State's veto of the trial court's previous ruling and admit the fingerprint evidence of Carlson.

On August 4, 2009, the trial court ***denied*** Sylvester's Motion to Designate the *nolle prosequi* with prejudice. L.F. vol. 1, pp. 165-76 (App., A1-A12). The trial court noted that the charges had been pending for approximately 32 months, obviously in excess of the eight-month presumptive prejudicial time, and conducted an analysis regarding the "blame" for the various delays. *Id*. at 170-72 (App., A6-A8):

- The 10 months between when Sylvester was charged and August 20, 2007, were charged to the State;
- The time between August 20, 2007, and June 30, 2008, was also weighed against the State as the trial court was unable to set the case for trial any earlier;
- The 5.5 months between June 30, 2008 and December 12, 2008 were attributed to Sylvester because ***Sylvester required the State to have some relevant reason to acquire his DNA before Sylvester would provide that DNA*** (even though the State had approximately 20 months leading up to June 30, 2008 to analyze the DNA and specifically chose not to and even though the State specifically admitted it sought a continuance in June 2008 to gain a strategic advantage over Sylvester);
- The 2.5 months between December 12, 2008, and February 27, 2009, were not weighed heavily against the State because the trial court found it was "reasonable to allow the State the opportunity to perform scientific testing" (even though the State ***chose not to do this testing and had over two years to conduct this testing***);

- The 2 months between February 27, 2009, and April 27, 2009, were assigned to Sylvester, because the ***trial court felt this was time Sylvester needed to reanalyze the DNA analysis that did not identify Sylvester***;
- The time between April 27, 2009, and July 6, 2009, was weighed against the state but ***not weighed heavily against the State*** because the trial court felt it was reasonable time to allow Sylvester to examine the new fingerprint evidence (***even though the State specifically admitted that this delay was done to gain a strategic advantage over Sylvester***);
- The delay from July 6, 2009, through August 4, 2009, was assigned to Sylvester because Sylvester moved to dismiss the case, because of a faulty charging document (again, even though the ***State specifically admitted that the defective charging document only existed as part of a plan to gain a strategic advantage***).

Id. at 170-72 (App., A6-A8). Approximately 24 months of delay was assigned to the State. Even though the State admitted that much of this delay was specifically to obtain a strategic advantage over Sylvester and even though this is ***three times*** the presumptively prejudicial amount, the trial court found that Sylvester was not prejudiced by the delay. *Id*. at 172-74 (App., A8-A10).

The trial court ***affirmed*** the Prosecutor's veto power over the judiciary, admitting the fingerprint evidence excluded in April 2009. *Id*. at 174-76 (App., A10-A12).

VIII. Sylvester's trial occurs thirty-six months after he was arrested.

On September 21, 2009, the trial was set for October 5, 2009. Sylvester received a fax from the Prosecutor on September 28, 2009, ***endorsing another fingerprint expert***.

Tr. (10/5/09), p. 219. This time, the State sought to use a fingerprint expert from Johnson County, Kansas. *Id*. The trial court ultimately excluded this witness. *Id*. On October 5, 2009, the matter was transferred to Division 1 for trial. On October 8, 2009, Sylvester renewed his Motion to exclude the fingerprint evidence, which the new trial division granted on October 13, 2009. L.F. vol. 2, pp. 204-14. On October 23, 2009, Sylvester was found guilty of all charges (App., A13-A14). The jury in Sylvester's trial never saw any video from The Bar which included the AR-15 assault rifle.

Sylvester renewed his motion to dismiss for speedy trial violations during the trial, Tr. (10/5/09), at pp. 14-17; Tr. (10/16/09), at p. 1034, and included this claim in his Motion for New Trial, L.F. vol. 2, pp. 287-97.

POINT RELIED ON

I. The trial court erred in denying Appellant's Motions to Dismiss for the State's failure to comply with Appellant's request for a Speedy Trial, or to designate the State's *nolle prosequi* be with prejudice because those rulings violated §545.780, the Missouri Constitution, and the United States Constitution, and denied Appellant his rights to Due Process and a Speedy Trial as guaranteed by §545.780, Article 1, §10 and §18(a) of the Missouri Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution, in that 36 months of delay between arrest and trial violates Appellant's Speedy Trial rights and Appellant filed his request for a Speedy Trial on June 30, 2008, which was 300 days before the trial setting of April 27, 2009, for which the State entered a *nolle prosequi* specifically to overrule a decision of the trial court and deprive Appellant of a Speedy Trial,

thereby resulting in an additional 161 days of delay before Appellant's trial. As a result of the delay, Appellant's ability to pursue his defenses was hindered particularly in light of the State's repeated continuances to rectify trial strategy mistakes and regardless, prejudice should be presumed based on the inordinate delay in bringing Appellant to trial and the egregious use of *nolle prosequi* to gain a strategic advantage over Sylvester and to overrule decisions of the trial court, this Court, and the Missouri General Assembly.

State v. Taylor, 298 S.W.3d 482 (Mo. banc 2009)

McKee v. Riley, 240 S.W.3d 720 (Mo. banc 2007)

Doggett v. United States, 505 U.S. 647 (1992)

Klopfer v. North Carolina, 386 U.S. 213 (1967)

ARGUMENT

The American criminal justice system is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319 (1977) (citing *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1077 (1970) (Harlan, J., concurring)). This framework requires that defendants are afforded advantages in a criminal trial. For Sylvester, these advantages were inverted as the State obtained limitless continuances in the face of Sylvester's Speedy Trial Motion, the Prosecutor repeatedly and surreptitiously ordered reviews of evidence, and the Prosecutor wielded boundless authority to overrule decisions of the trial court. This denied Sylvester his right to a speedy trial and was fundamentally unfair, both procedurally and substantively, on a Constitutional level.

I. The trial court erred in denying Appellant's Motions to Dismiss for the State's failure to comply with Appellant's request for a Speedy Trial, or to designate the State's *nolle prosequi* be with prejudice because those rulings violated §545.780, the Missouri Constitution, and the United States Constitution, and denied Appellant his rights to Due Process and a Speedy Trial as guaranteed by §545.780, Article 1, §10 and §18(a) of the Missouri Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution, in that 36 months of delay between arrest and trial violates Appellant's Speedy Trial rights and Appellant filed his request for a Speedy Trial on June 30, 2008, which was 300 days before the trial setting of April 27, 2009, for which the State entered a *nolle prosequi* specifically to overrule a decision of the trial court and deprive Appellant of a Speedy Trial, thereby resulting in an additional 161 days of delay before Appellant's trial. As a result of the delay, Appellant's ability to pursue his defenses was hindered particularly in light of the State's repeated continuances to rectify trial strategy mistakes and regardless, prejudice should be presumed based on the inordinate delay in bringing Appellant to trial and the egregious use of *nolle prosequi* to gain a strategic advantage over Sylvester and to overrule decisions of the trial court, this Court, and the Missouri General Assembly.

A. Standard of Review.

At some point the Courts of Appeals, particularly the Western District, began mistakenly holding that review of a trial court's decision on a motion to dismiss for speedy trial violations is under the "abuse of discretion" standard. *See e.g., State v.*

Ferdinand, 371 S.W.3d 844, 850 (Mo. App. W.D. 2012); *Clinch*, 335 S.W.3d at 583. This misstated standard of review has resulted in critical constitutional issues decided in arbitrary and contradictory fashions: 105 days of delay can be found to violate a defendant's speedy trial rights, while delays of several *years* can be found to *not* violate this right. *See State v. Knox*, 697 S.W.2d 261, 263 (Mo. App. W.D. 1985). Further, it ignores the fact that this Court has ***never*** held that Courts of Appeals should defer to trial courts on questions of law – particularly constitutional issues. *See e.g.*, *State v. Taylor*, 298 S.W.3d 482, 492, 503-04 (Mo. banc 2009).

This Court should defer to a trial court only as it relates to ***factual findings***. *Id*. at 492. No deference to the trial court is warranted on legal issues and this Court should review such ***legal conclusions*** *de novo*. *Id*. In a unanimous Opinion from 2009, this Court explained the standard of review for "mixed" questions of law and fact:

> For instance, appellate review of the trial court's legal determination of whether a statement is hearsay is given no deference and is reviewed *de novo* … Once a statement is classified as hearsay, the court must determine whether a hearsay exception applies. The trial court's findings as to the factual underpinnings of a hearsay exception are subject to deferential review, ***but whether those findings qualify as an exception to the hearsay rule is a legal question subject to*** **de novo** ***review***.

Id. at 492 n.4 (emphasis added); *see also Brown v. Carnahan*, 370 S.W.3d 637, 653 (Mo. banc 2012); *Pearson v. Koster*, 367 S.W.3d 36, 43-45 (Mo. banc 2012).

To determine whether a defendant has been denied his constitutional right to a speedy trial, Missouri has adopted the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). *State v. Edwards*, 750 S.W.2d 438, 441 (Mo. banc 1988). The *Barker* analysis requires a trial court to make ***factual findings*** regarding the length of delay in bringing a defendant to trial. *Edwards*, 750 S.W.2d at 441. Next, the trial court (and now this Court) must make ***legal conclusions*** regarding the reasons for delay; the defendant's assertion of his right to a speedy trial; and the prejudice to the defendant resulting from the delay. *Id*.; *see also Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686 (1992); *Barker*, 407 U.S. at 530-32.

The *Barker* analysis is a mixed question of law and fact and this Court "review[s] the [trial] court's findings of fact on whether a defendant's right to a speedy trial was violated for clear error but review[s] its legal conclusions *de novo*." *United States v. Aldaco*, 477 F.3d 1008 (8th Cir. 2007); *Taylor*, 298 S.W.3d at 492 n.4. The length of delay in bringing Sylvester to trial is reviewed for clear error, but Sylvester's assertion of his speedy trial rights, which party is to blame for the delay, and the legal effect of that delay (including prejudice to Sylvester) are reviewed *de novo* by this Court.

B. Sylvester's right to a speedy trial was violated due to the State's unreasonable delay in bringing Sylvester to trial which warrants immediate reversal of Sylvester's conviction.

"The United States and Missouri Constitutions provide equivalent protection for a defendant's right to a speedy trial." *McKee v. Riley*, 240 S.W.3d 720, 729 (Mo. banc 2007); *See also* U.S. Const. amend. VI; Mo. Const., art. I, §18(a). The right to a speedy

trial is fundamental and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. *Barker*, 407 U.S. at 515 (citing *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S.Ct. 988 (1967)). "The speedy trial right exists primarily to protect an individual's liberty interest, to minimize the possibility of lengthy incarceration prior to trial and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *McKee*, 240 S.W.3d at 728 (quoting *United States v. Gouveia*, 467 U.S. 180, 190, 104 S.Ct. 2292 (1984)).

Under both the United States and Missouri Constitutions, a violation of a defendant's speedy trial right warrants dismissal. *Doggett*, 505 U.S. at 658. To determine whether a defendant has been denied his constitutional right to a speedy trial, Missouri has adopted the balancing process set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972). *McKee*, 240 S.W.3d at 729 (citing *Edwards*, 750 S.W.2d at 441). This process balances four factors: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *McKee*, 240 S.W.3d at 729; *Barker*, 407 U.S. at 530-532. The application of these factors must be considered on a case-by-case basis. *Barker*, 407 U.S. at 514. None of these four factors are regarded as either "necessary or sufficient" to find the deprivation of the right to a speedy trial. *Id*. at 533. A number of clear constitutional holdings guide the analysis:

- "[D]elays longer than eight months are presumptively prejudicial to the defendant." *McKee*, 240 S.W.3d at 729. "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 658;

- Even valid, innocuous delays by the State will be counted against the State, as it is the State's burden to assure that the defendant is afforded a speedy trial. *Barker*, 407 U.S. at 527 ("A defendant has no duty to bring himself to trial; the State has that duty…"); *Goldman*, 316 S.W.3d at 911; *McKee*, 240 S.W.3d at 729;
- Delay by the State "***must not be purposeful***." *Pollard v. United States*, 352 U.S. 354, 361, 77 S.Ct. 481 (1957) (emphasis added). Deliberate actions resulting in delays count "heavily" against the State. *Barker*, 407 U.S. at 531; and
- It is the duty of the State to rebut the presumption that a defendant was prejudiced by delay. *Goldman*, 316 S.W.3d at 911, 913-14.

Each court should balance the four *Barker* factors in light of the guidance provided in these cases elucidating this right to a speedy trial.

1. The Barker *balancing test reveals that Sylvester was denied his constitutional right to a speedy trial.*

The facts in this case reveal that: (a) the delay in bringing Sylvester to trial was unnecessary, deliberate, and uncommonly long; (b) most of the delay bringing Sylvester to trial resulted from improper strategic decisions of the Prosecutor; (c) Sylvester repeatedly asserted his right to a speedy trial; and (d) Sylvester was prejudiced and this Court can presume prejudice under *Doggett*.

a. The Delay In Bringing Sylvester to Trial was Unnecessary, Deliberate, and Uncommonly Long.

The first issue for the *Barker* balancing test, the length of delay, is a question of fact reviewed for an abuse of discretion. *Taylor*, 298 S.W.3d at 492; *McKee*, 240 S.W.3d

at 729; *Barker*, 407 U.S. at 530-532. This issue is a triggering mechanism because until there is a presumptively prejudicial delay, there is no need to discuss the other factors of the balancing process. *Goldman*, 316 S.W.3d at 911. A delay greater than eight months is "presumptively prejudicial." *Id*. (citing *McKee*, 240 S.W.3d at 729). Lower courts of appeals have asserted that a delay of over three times the presumptive period is "alarming." *State v. Ivester*, 978 S.W.2d 762, 764-765 (Mo. App. E.D. 1998).

The delay in bringing a defendant to trial is measured from the time of arrest, not from the time the right is asserted. *United States v. MacDonald*, 456 U.S. 1, 6, 102 S.Ct. 1497 (1982); *McKee*, 240 S.W.3d at 729 (citing *State v. Bolin*, 643 S.W.2d 806, 813 (Mo. banc 1983)). The presumption that pretrial delay prejudices a defendant increases over time, and courts must remain conscious of the length of delay when analyzing prejudice to the defense and the deliberateness of the State's actions in causing the delay. *Doggett*, 505 U.S. at 652-58.

A prosecutor's *nolle prosequi* does not restart the count for delay in a speedy trial analysis. *Klopfer*, 386 U.S. at 216; *State v. Sumpter*, 655 S.W.2d 726, 729 (Mo. App. E.D. 1983). The time before dismissal is added to the time after the refiling of the case to ascertain the total amount of time charges have been pending. There is dispute amongst the lower courts of appeals regarding whether the time between a *nolle prosequi* and refiling counts towards the delay. *State v. Black*, 587 S.W.2d 865 (Mo. App. E.D. 1979); *State v. Buchli*, 152 S.W.3d 289, 307 (Mo. App. W.D. 2004). To the extent that such cases do ***not*** include the time between dismissal and refiling, they are in disagreement with United States Supreme Court case law. *Klopfer*, 386 U.S. at 216-23.

Here, the trial court correctly noted that Sylvester's arrest date of October 19, 2006, was the start date. L.F. vol. 1, pp. 165, 170 (App., A1, A6). It is unclear whether the trial court disregarded the time between the *nolle prosequi* and the refiling of the "exact same charges." Tr. (7/15/09), p. 110; L.F. vol. 1, p. 170 (App., A6). However, that time period was minutes long as the State immediately refiled the charges. The time between Sylvester's arrest and the trial court's analysis on August 4, 2009 was 34 months. Although the trial court correctly noted the appropriate dates, it clearly erred in stating that the delay had been 32 months instead of 34. *Id*. Sylvester's trial began two months later, on October 5, 2009. Tr. (10/5/09). Thus, the total delay between Sylvester's arrest and trial for purposes of this speedy trial analysis is 36 months.

A delay of 36 months is more than sufficient to trigger a speedy trial analysis and is ***four and a half times the presumptively prejudicial allotment of eight months***. The State will no doubt remind this Court that "presumptively prejudicial" in this context is a triggering mechanism and not a statistical probability of prejudice. *Doggett*, 505 U.S. at 658 n.1. However, "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Id*. at 658. The State's actions are viewed more harshly as time wears on without a trial. This is particularly important in light of the State's use of *nolle prosequi* after thirty months (nearly ***four times*** the triggering amount) with the express intention of overruling two decisions of the trial court. Tr. (11/25/08), p. 5. This voluntary dismissal resulted in six additional months of delay – nearly the "presumptively prejudicial" amount in its own right.

b. The Delay in Bringing Sylvester to Trial Resulted from Improper Strategic Decisions of the Prosecutor.

The second issue for the *Barker* balancing test, the reason for the delay, is a question of law reviewed *de novo* by this Court. *Taylor*, 298 S.W.3d at 492; *McKee*, 240 S.W.3d at 729; *Barker*, 407 U.S. at 530-532. It is the State's burden to afford the defendant a speedy trial and, therefore, the burden rests with the State to show any and all delays are either valid and reasonable ***or*** attributable to the defendant. *Barker*, 407 U.S. at 527; *Goldman*, 316 S.W.3d at 911; *McKee*, 240 S.W.3d at 729; *State v. Ingleright*, 787 S.W.2d 826, 831 (Mo. App. S.D. 1990) ("[I]f there is delay, the state must show reasons which justify that delay."). The State does ***not*** meet this burden when it delays a trial for tactical advantage – such delays weigh heavily against the State. *Barker*, 407 U.S. at 531 n.32 (citing *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455 (1971)); *Bolin*, 643 S.W.3d at 814.

Some delay can be tolerated for complex crimes like conspiracies. *Barker*, 407 U.S. at 531. The record demonstrates that this was not a "complex" matter – the State asserted on multiple occasions that this case was ***particularly simple***, due to the unusual amount of surveillance footage obtained from The Bar.[7] Supp. Tr. (12/7/06 & 1/18/07),

[7] The State would eventually describe the footage as being of such poor quality that Sylvester could not be identified – ***when the State was attempting to obtain a continuance due to the poor quality of the footage***. Supp. Tr. (11/25/08), p. 4. However, when it suited the State to assert that the footage was of high quality – ***while***

pp. 52-53; (3/21/07), p. 11. The record shows that this case was delayed because the State miscalculated the strength of some evidence and affirmatively chose not to meet with witnesses or prepare alternative means of presenting its case (resulting in a weak case). The State did not adequately prepare Sylvester's case for trial – due to trial strategy decisions – and was repeatedly granted inappropriate continuances to rectify those decisions. SC Supp. L.F. vol. 1, p. 23 (App., A29); Supp. Tr. (11/25/08), p. 5.

The evidence ***collected*** by the State never changed. In October 2006 the State collected hundreds of hours of surveillance footage, ten fingerprint "lifts," and a number of DNA samples from The Bar. Supp. Tr. (12/7/06 & 1/18/07), pp. 46-52. In October 2006 the State also planned to use witnesses to identify Sylvester from the footage. *Id*.; SC Supp. L.F., vol. 5, pp. 1198-1200. All delays in bringing Sylvester to trial stemmed directly from the State's constant revamping of its trial strategy and the State's seemingly endless attempts to find someone at the RCL that could place Sylvester at The Bar based on either the fingerprint or DNA evidence. The delay is analyzed below:

October 19, 2006 through August 20, 2007 (10 months). August 20, 2007, was the earliest the trial court could set Sylvester's case for trial. Delays due to a trial court's docket are weighed against the State, because it is the State's burden to provide a speedy trial. *Barker*, 407 U.S. at 531; *McKee*, 240 S.W.3d at 730. This 10-month delay is

---

inappropriately seeking to increase Sylvester's bond because he could afford to post bond – the State asserted that the footage was "high quality" such that conviction was nearly certain. Supp. Tr. (12/7/06 & 1/18/07), pp. 52-53; (3/21/07), p. 11.

weighted against the State, but not heavily. However, it ***is*** appropriate for this Court to consider the State's behavior – and statements – during this 10-month period. Such actions shed light on prejudice to Sylvester and elucidate the inappropriateness of delays ***later*** in the case.

Discovery during this 10-month period.

Sylvester served his First Request for Discovery on November 7, 2006. SC Supp. L.F. vol. 5, pp. 1203-05. The "clear, unambiguous, and well-known mandates" of Rule 25.02 require the State to respond to discovery within 10 days. *State v. Prokes*, 363 S.W.3d 71, 76 (Mo. App. W.D. 2011). Further, at the time of Sylvester's arraignment on November 6, 2006, the Prosecutor was under an even greater burden to produce all evidence in the State's possession ***immediately***:

> In all criminal cases on the day of arraignment … the prosecuting attorney shall without a prior written demand provide copies of all documents and other evidence regarding the charge against the defendant, then in the possession of the prosecuting attorney, to the defendant or his/her attorney of record. The prosecuting attorney shall have an ongoing duty to provide copies of any additional documents or evidence obtained after that time… within seven days following receipt of the new document or evidence. Failure to comply with this rule shall result in sanctions…

Mo. 16th Cir. R. 32.5 (App., A85-A87). As discussed in greater length in Sylvester's Motion for Remand, the State failed to produce exculpatory evidence in violation of these Rules (and Missouri Rule of Professional Conduct 4-3.8(d)) including, but not limited to

the complete surveillance footage in viewable format. *See e.g.*, SC Supp. L.F. vol. 3, pp. 716-18, 770; vol. 7, pp. 2005-48.

As it relates more directly to Sylvester's speedy trial analysis, the State made no effort to Respond to Sylvester's Discovery Requests prior to the August 20, 2007 trial setting. SC Supp. L.F. vol. 5, pp. 1213-20. The State would later admit that it "routinely ignores" discovery requests from Sylvester's trial counsel:

> [Sylvester's counsel likes] to make a discovery request which goes far beyond what is mandated by the rule … ***Those are routinely ignored***.

Tr. (7/15/09), p. 160 (emphasis added). Among other remedies, Rule 25.18 provides that the trial court may exclude evidence for failure to comply with discovery rules, particularly ***willful*** violations, such as the State ***intentionally ignoring*** discovery.

There is also a constitutional element to discovery. In addition to the constitutional duties to disclose ***all*** evidence to criminal defendants under *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that:

> [I]f the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge… When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

United States v. Agurs, 427 U.S. 97, 106 (1976). The State did not bring any discovery disputes to the trial court. The State deemed itself the final arbiter of when discovery

requests are overbroad and ignored Sylvester's Discovery Requests. The State did not ask for any extensions of time to respond to discovery, either.

Thus, as of August 20, 2007, the Missouri and Federal Constitutions and this Court's Rules would have required exclusion of most of the State's evidence used at trial in October 2009 – because it had not been disclosed in any discovery Responses.

Trial preparation by the State during this 10-month period.

During this time, the State produced an exculpatory fingerprint analysis which does not identify Sylvester's fingerprints on any items seized at The Bar. SC Supp. L.F., vol. 7, pp. 2049-52. The State did not disclose the full extent of the exculpatory report. SC Supp. L.F., vol. 6, pp. 1393, 1443-69. More importantly, during this time the State made the conscious strategic decision ***not*** to analyze the DNA samples seized from The Bar.[8] Supp. Tr. (11/25/08), p. 5; SC Supp. L.F. vol. 1, p. 23 (App., A29).

The decision not to test the DNA samples meant that "the State's reliance has always been on the witnesses." Supp. Tr. (11/25/08), pp. 11-12 (State's explanation). The

[8] While the State later admitted this conscious strategic decision, it is also obvious from the State's contemporaneous statements on the Record. At the first bond hearing, the State explicitly stated in response to a question from the court regarding DNA that it had "identified what [it] want[ed] tested." Tr. (12/7/06 & 1/18/07), p. 51. Given that the State did not begin DNA analysis until July 1, 2008, the State ***chose*** not to test the DNA during this period. Sylvester can only speculate as to why the State made this decision, but the analysis did not place him at The Bar. *See e.g.*, SC Supp. L.F. vol. 6, pp. 1490-1503.

State did not contact either Bridges or Neal during this time, even though they were described as essential to the State's case to identify Sylvester at The Bar on October 16, 2006. Supp. Tr. (6/30/08), p. 13-20. It is not known what other efforts the State may have taken to prepare for trial during this time, but no additional witnesses were disclosed to Sylvester during this 10-month period. Additionally, the State did not notice any depositions or subpoena any witnesses for the August 20, 2007 trial.

Finally, despite the State's reliance on the video surveillance, the Prosecutor did not ask the State's video expert to begin analyzing the footage until February 27, 2009. Supp. Tr. (4/24/09 & 4/27/09), p. 20.

Representations to Sylvester and the trial court during this 10-month period.

During the bond hearings – occasioned by the State's typographical error in originally setting Sylvester's bond – the trial court conditioned Sylvester's release upon the setting of an "immovable" trial date Supp. Tr. (12/7/06 & 1/18/07), pp. 83-95. The trial court questioned the State regarding the status of the case file and investigation. *See generally id*. at 3-95. The State described its discovery file as complete "minus a couple of reports." *Id*. 47-48. In response to a direct inquiry by the trial court as to the status of forensic testing, including DNA, the State represented "we have identified what we want tested." *Id*. at 51. The trial court noted that "discovery for the most part [was] complete" as of January 18, 2007, and the parties agreed that they would be ready for the August 20, 2007 trial date. *Id*. at 82-88.

At the March 21, 2007 status hearing, the State reiterated that discovery was complete – stating that Sylvester had "received all discovery." Supp. Tr. (3/21/07), p. 7.

Based upon these representations, the trial court set a discovery cutoff date of August 1, 2007. *Id*. at 8. The parties agreed to this cutoff date and reiterated that both would be ready and prepared for trial on August 20, 2007. *Id*. at 7-8. The trial court instructed the attorneys to clear two weeks and stressed that the trial date would not be moved for any reason. The State had not completed discovery and the State was not prepared for trial on August 20, 2007.

August 20, 2007 through December 10, 2007 (3.5 months). Leading up to the August 20, 2007 trial date, the State's evidence consisted of:

- Video surveillance too blurry to positively identify the person alleged to be Sylvester. Supp. Tr. (11/25/08), p. 4;
- A fingerprint analysis which did not identify Sylvester. SC Supp. L.F., vol. 6, pp. 1458-59, 1469; and
- Seven witnesses: Three KCPD employees; Higgs (deceased); Dillard (a "victim" that failed to identify Sylvester); Bridges; and Neal. SC Supp. L.F., vol. 5, pp. 1198-1200. The State did not contact or subpoena either Bridges or Neal before the August 20, 2007 trial date. Supp. Tr. (6/30/08), pp. 13-20.

The State moved for a continuance on August 14, 2007, for "medical reasons." SC Supp. L.F., vol. 5, pp. 1207-09. This continuance was granted, despite the trial court's previous admonitions. Supp. Tr. (12/7/06 & 1/18/07), pp. 82-84. Despite representations that the case was complete and so unusually strong that it was a certainty to obtain a conviction, Supp. Tr. (12/7/06 & 1/18/07), pp. 52-53, the State opted to continue the matter, rather than employ the assistance of another prosecutor in Jackson County.

The continuance of the August 20, 2007 trial date may have been for the medical condition of State's counsel, but it occurred on a date when the State was not prepared to make a submissible case against Sylvester. The delay of the August 20, 2007 trial date was an improper tactical decision to avoid a defense verdict, based upon the lack of preparation by the State. This delay to obtain tactical advantage should be weighed strongly against the State. *Barker*, 407 U.S. at 531 n.32.

It also reveals some of the State's motive to note that Dearing – author of the exculpatory fingerprint report – retired during this time, but this was not disclosed until 2009. Even if the delay is not deemed one of unfair tactical strategy by this Court, the delay weighs against the State because it is the burden of the State to protect the defendant's right to a speedy trial. *Barker*, 407 U.S. at 531; *McKee*, 240 S.W.3d at 730.

December 10, 2007 through June 30, 2008 (6.5 months). The December 10, 2007 trial date was continued by the court, due to docket constraints, to March 24, 2008. Division 10 then transferred Sylvester's case to Division 18, because Division 10 was beginning a two-year term in the juvenile courts. SC Supp. L.F., vol. 1, p. 23 (App., A29) (State's Motion). All Orders relating to the transfer and the March 24, 2008 trial date stated that "[n]o continuances will be granted." SC Supp. L.F., vol. 5, pp. 1211-12. In Division 18, the trial court continued the trial to its ***fourth*** trial setting on June 30, 2008, because Division 18 could not accommodate the March 24, 2008 trial setting.

In *Barker*, the United States Supreme Court specifically noted that delays due to docket constraints must be weighed against the State. *Barker*, 407 U.S. at 531-38; *see also McKee*, 240 S.W.3d at 730; *Bolin*, 643 S.W.3d at 815. This 6.5-month delay must be

weighed against the State, even if this Court does not weight it heavily. However, because both of these continuances stem from the State's improper tactical continuance of the August 20, 2007 trial date, this delay should ***also*** weigh heavily against the State. Had the State not improperly delayed the first trial setting, the second and third trial settings would not have been continued.

The State's actions during this 6.5-month period also elucidate later delays by the State. First, the State ***still*** did not contact or subpoena Neal or Bridges before the second or third trial setting. Instead, in May or June of 2008, the State made its first attempts to contact and subpoena Bridges and Neal. Supp. Tr. (6/30/08), pp. 13-20. The state also engaged in abusive discovery practices during this delay: More than 18 months after discovery was served on the State ***and 19 days before trial***, the State served written discovery responses on Sylvester. SC Supp. L.F. vol. 5, pp. 1213-20. The list of witnesses the State "intended to call" at trial expanded from 7 to 67. *Id*. Adding ***60 people*** to a 7-person witness list 19 days before trial is abusive in that no counsel could prepare for that many new witnesses in that amount of time.

Sylvester's counsel did prepare for these new witnesses, even deposing two lay witnesses, Middleton and Carter, the weekend before the trial. These witnesses were chosen to identify Sylvester from the footage. Supp. Tr. (6/30/08), p. 12. Carter denied knowing or recognizing Sylvester, while Middleton stated that his basis of identification of Sylvester was having seen him **15 years** earlier while Sylvester was in sixth grade and Middleton was a sophomore. SC Supp. L.F., vol. 3, pp. 9-10. Middleton had not seen Sylvester since that time. *Id*. at 10.

The State's evidentiary case remained undeniably weak. After nearly two years of preparation, the State merely added two identification witnesses – neither of which appeared to be able to identify Sylvester. Noting this weakness, the State made an undisclosed request of the RCL to reexamine the fingerprint lifts on June 27, 2008. SC Supp. L.F. vol. 5, p. 1224; vol.6, pp. 1390, 1428-29, 1478-79.

June 30, 2008 through April 27, 2009 (10 months). On June 30, 2008, Sylvester announced "ready for trial" and filed his Request for a Speedy Trial. SC Supp. L.F., vol. 5, p. 1221-22; Supp. Tr. (6/30/08), p. 5. Due to the State's lack of preparation, it was purportedly blindsided by the fact that Neal appeared and asserted her Fifth Amendment right to remain silent. *Id*. at 24-25. Neal's right to remain silent was quashed by the trial court and she was ordered to testify. *Id*. at 35-36. There was no indication that Neal would have refused to comply with the Order. *Id*. 22-36. Regardless, the State orally moved for a continuance. *Id*.

In its oral motion to continue the case, the State inverted constitutional case law regarding speedy trials: The State asserted that its complete indifference to Sylvester's speedy trial rights was irrelevant in the face of the State's lack of preparation. The State asserted that it was unfair that Neal asserted her Fifth Amendment right. *Id*. at 13-14. The State asserted that it was unfair that Sylvester planned to discredit the State's witnesses, while asserting that there are "numerous other people that can be quickly found, promptly endorsed, that could identify [Sylvester]." *Id*. at 14-15. Finally, the State asserted that it was unfair that the State had assumed Sylvester planned to assert self-defense and not a "misidentification" defense. *Id*. at 15.

None of these realities were "unfair" to the State. The State did not know that Neal intended to assert her Fifth Amendment rights, because the State did not contact Neal until nearly two years after filing this case. It is not "unfair" that of the "numerous people" that could identify Sylvester, the State chose to select two individuals that could not actually identify Sylvester. Finally, a defendant bears no responsibility to inform the State of its intended defenses at trial.

This entire 10-month delay must be heavily weighed against the State, because the trial was unabashedly continued to obtain an unfair tactical advantage and to correct prior strategic mistakes of the State. *See e.g.*, *Barker*, 407 U.S. at 531; *McKee*, 240 S.W.3d at 730. The State admitted on the record on June 30, 2008, that it had selected terrible witnesses and needed time to endorse better ones. Supp. Tr. (6/30/08), pp. 14-15. The State also represented that it needed three weeks to conduct DNA analysis which the State consciously chose not to analyze nearly two years prior. *Id*. at 15. The State would later admit in hearings and pleadings that this was a strategic decision made to gain an unfair advantage over Sylvester:

- "[T]he State made the decision to orally seek a continuance on June 30. 2008. ***This decision was one of trial strategy*** …" SC Supp. L.F. vol. 1, p. 23 (App., A29) (emphasis added); and
- Despite the State's initial strategic "decision not to perform DNA testing on evidence collected at the scene," the State sought a strategic second chance to perform DNA testing. SC Supp. L.F. vol. 1, p. 23 (App., A29); *see also* Tr. (11/25/08), pp. 11-12 ("We've changed our strategy.").

Despite the many continuances, the State still moved slowly to prepare its case. On July 1, 2008, the State issued its first request to analyze the DNA evidence. SC Supp. L.F. vol. 5, p. 1206; vol. 6, pp. 1488-91, 1501-07. Preliminary results from the analysis of the DNA actually took one month (not three weeks). L.F. vol. 1, p. 39. ***The State waited approximately one and half months*** to seek Sylvester's DNA for comparison on September 18, 2008. *Id*. at pp. 37-40. Some delay stems from the transfer of the trial to another division, due to an assignment to an exclusive domestic docket; however, ***none of these delays would have been necessary had the State not sought this improper strategic advantage on June 30, 2008***. The State explicitly admitted that it had miscalculated its trial strategy regarding the DNA analysis:

> [T]he defense's argument here is that the State should have made this request [for DNA] a long time ago. I'm not going to argue with the Court that that's untrue. The State likely should have … in this case we probably made the wrong decision…

Supp. Tr. (11/25/08), p. 5. At this November 2008 hearing, Sylvester continued to assert his speedy trial rights and object to any further continuances.

As part of the trial court's ruling on Sylvester's later Motion to Dismiss on Speedy Trial grounds, the court incorrectly weighed this time period "not heavily" against the State. L.F. vol. 1, pp. 171-72 (App., A7-A8) ("[T]he Court finds such delay was reasonable to allow the State the opportunity to perform scientific testing necessitated by the anticipated unwillingness of the State's witnesses to testify."). It is a mistake to weigh this 10-month period anything other than heavily against the State:

- Going back to August 20, 2007, none of these delays would have occurred if not for the State's strategic continuance on that date;
- There is no evidence that Neal would not have testified – given the Court's Order – on June 30, 2008;
- Any "surprise" regarding Neal's testimony is the State's own fault for failing to contact her sooner; and
- It is inappropriate to ignore the fact that the State had nearly two years to perform this scientific testing. The State's DNA expert testified that the analysis could have been done at any time after the samples were gathered in October 2006. SC Supp. L.F. vol. 6, pp. 1490-1500.

Further, this Court analyzed a similar situation in which the State waited unreasonably long to perform scientific analysis "necessary" for trial in *McKee*. The State asserted that various plea negotiations forestalled analysis, but still did not conduct the necessary scientific analysis after it was clear that the case was not going to "plea out." *McKee*, 240 S.W.3d at 730-31.

> It does not appear reasonable on this record for the prosecution to have delayed pursuit of this evidence after the January plea negotiations failed. Certainly when the plea agreement allegedly failed again in July 2007, the prosecution had no basis to further delay taking steps to secure scientific evidence it apparently felt might identify the culprit. A speedy trial is not only for the benefit of the defendant, it "is also for the benefit of society."

Id. at 731. Under *McKee*, such delays ***must*** weigh heavily against the State.

Further, the State continued to hide its request for the RCL to reexamine the fingerprints. Even after Barbara Banks of the RCL provided the State with her report on November 5, 2008, the State did not disclose her reexamination. This is especially troubling, given that her report ***also*** does not identify Sylvester's fingerprints from the crime scene but ***did*** identify the prints of another individual. SC Supp. L.F., vol. 6, pp. 1443-69.

Finally, the trial court assigned some of this delay to Sylvester so that he could obtain his own analysis of the DNA evidence. L.F. vol. 1, p. 172 (App., A8). However, under *McKee*, this is inappropriate: If the State had obtained DNA evidence during the first two years, Sylvester would have obtained any necessary re-analysis at that time. This finding also ignores the fact that the RCL's DNA analysis ***does not place Sylvester at The Bar***. SC Supp. L.F. vol. 6, pp. 1502-03; vol. 7, p. 2053. It is spurious to assert that Sylvester would reexamine exculpatory evidence.[9]

April 27, 2009 through July 6, 2009 (2.5 months). It was in April 2009 that Sylvester first learned the extent to which the State was undertaking extraordinary actions to hinder the defense and gain tactical advantage. Despite the fact that the State had ***two*** exculpatory fingerprint reports, the State made an undisclosed ***third*** request of the RCL to

[9] The State later attempted to place the burden on Sylvester to "move the trial date forward." SC Supp. L.F., vol. 1, p. 17 (App., A23). This ignores the fact that it is clearly and completely the burden of the State to afford Sylvester a speedy trial. *Barker*, 407 U.S. at 527 ("A defendant has no duty to bring himself to trial.").

re-re-examine the fingerprints on April 14, 2009. SC Supp. L.F. vol. 6, pp. 1451-52. The State later justified this undisclosed request by asserting that "Banks might retire" even though Banks had not expressed any intent to retire and the trial was in less than two weeks. *Id*. The next day, the State served trial stipulations on Sylvester. SC Supp. L.F. vol. 5, pp. 1228-35. The State represented to the court that the re-re-examination was ***actually*** necessary because Sylvester's attorney would not sign a fingerprint stipulation. Supp. Tr. (7/2/09), p. 5-7. The State would later be forced to admit that they had never provided Sylvester with a fingerprint stipulation. *Id*.

On April 22, 2009, a mere five days before the fifth trial setting, the State provided Sylvester with the third fingerprint report, authored by Carl Carlson of the RCL, which purported to identify Sylvester. Supp. Tr. (4/24/09 & 4/27/09), pp. 5-6. The State ***still*** had not disclosed the second report or the date of Dearing's retirement. The State also provided Sylvester with approximately 113 pages of documents and 150 hours of enhanced surveillance footage.[10] Sylvester moved to exclude the fingerprint evidence and new footage. Hearings were held on Sylvester's Motion at which the State admitted that Carlson's report was partially the result of "new technology." *Id*. at 30. The State also made misleading assertions to the trial court regarding the date of Dearing's retirement. *Id*. at 27-28, 56. The assertions suggest that she retired within the last "several weeks" – not in September 2007. *Id*. The State also falsely asserted that it immediately contacted

[10] Even if it were temporally possible to view this video – the State provided it in a format which would not play in any widely available video player.

Sylvester's attorney when it learned of the "hit" on the fingerprint of Quartez Lewis on April 21, 2009. However, the State first learned of the Lewis print on November 5, 2008, when he was identified in the second, undisclosed report. SC Supp. L.F., vol. 6, pp. 1443-69. The trial court had enough of the State's unfair practices:

> I can't get over the fact that we're sitting here two days before trial and just now getting reports and indications that there is now a match of a fingerprint on a piece of evidence at the location of the homicide. ***That floors me***… I'm ***extremely, extremely troubled*** by this new evidence related to the fingerprint. ***It just doesn't pass the smell test***… I just think that's just basically unfair.

Supp. Tr. (4/24/09 & 4/27/09), pp. 40-41 (emphasis added). After the court excluded the Carlson report, the State was warned that it would not receive a continuance of the April 27, 2009 trial date. *Id*. at 46-47.

It is additionally unfair that the State produced 150 hours of enhanced video footage on April 22, 2009. The State did not request that its video expert begin analyzing this footage until February 27, 2009. Supp. Tr. (4/24/09 & 4/27/09), p. 20. Further, the expert's timeline and PowerPoint were prepared in a way that hid the "victims" threatening the individual purported to be Sylvester moments before the shooting. SC Supp. L.F. vol. 2, p. 599 – vol. 3, p. 714; vol. 5, pp. 1261-75; *see also* Video Footage Provided on USB drive.

On April 27, 2009, the State threatened the trial court over the "mistaken" ruling while reiterating its request for a continuance. Tr. (7/15/09), p. 109. The trial court,

noting the impermissibility of forcing a defendant to choose between two constitutional rights (a speedy trial and a fair trial), denied a continuance. *See Simmons*, 390 U.S. at 377. The State dismissed and refiled the case immediately, explicitly, and unabashedly to overrule these two decisions of the trial court and gain an unfair tactical advantage over Sylvester:

> [T]he State dismissed the case against the defendant so that time would be available for … the State to proceed with the new fingerprint evidence.

SC Supp. L.F., vol. 1, p. 17 (App., A23) (State's Response Motion). The case was immediately refiled on the exact same allegations. Tr. (7/15/09), p. 110.

Dismissing and refiling a case to obtain a better ruling on a motion to exclude evidence is unequivocally an improper advantage. No defendant has the power to overrule the trial court. The State should have filed a writ if it so strongly disagreed with the trial court. *See e.g.*, Mo. Rev. Stat. §547.200 (App., A44). Under *Doggett* this Court must view delays by the State as time wears on with even greater suspicion. 505 U.S. at 658. Particularly in light of the egregious nature of the dismissal and refiling expressly to obtain a different result on the trial court's ruling – and this heightened suspicion – all delays after April 27, 2009, must be severely weighed against the State. *Barker*, 407 U.S. at 531; *Marion*, 404 U.S. at 325; *McKee*, 240 S.W.3d at 730.

Finally, it continues to elucidate the State's inappropriate strategy that the State filed a second response to Sylvester's Discovery Requests on June 29, 2009. SC Supp. L.F. vol. 5, pp. 1242-1249. These Responses ***nearly doubled*** the amount of witnesses the State "intended to call" at trial to 121 witnesses. *Id*. The Responses continued to indicate

that the State "intended to call" the deceased "victim" at trial and continued to identify Dearing as an employee of the RCL. *Id*.

July 6, 2009 through October 5, 2009 (3 months).[11] Any remaining delay after April 27, 2009, must weigh against the State due to the abusive *nolle prosequi*. However, the trial court weighed this 3-month period against Sylvester, ***due to the State's inability to follow Missouri law when refiling against Sylvester***. L.F. vol. 1, p. 172 (App., A8). In violation of Missouri law, the State failed to conduct a preliminary hearing or obtain a waiver from Sylvester. Supp. Tr. (July 2, 2009). The State rectified ***this*** mistake by indicting Sylvester on July 10, 2009.

Any attempt to place the delay for this time period on Sylvester ignores case law holding that it is unconstitutional to force a defendant to choose between two constitutional rights. *Simmons*, 390 U.S. at 377. It is not a "ridiculous technicality" – as the State asserts – for Sylvester to be tried under a constitutionally sufficient charging document. Tr. (7/15/09), p. 110. Blaming Sylvester for this delay ignores the burden on the State to bring Sylvester to trial in a timely fashion ***and*** the fact that the improper charging document only existed because of the State's unfair strategy in abusing a *nolle prosequi* on April 27, 2009.

Finally, it reveals the State's intentions that it attempted to endorse ***another*** fingerprint witness on September 28, 2009. Tr. (10/5/09), p. 219. The State clearly felt

[11] Sylvester rounded these dates conservatively for each section, thus the total adds up to 35.5 months, rather than 36 months.

that its case was weak on October 5, 2009, as the State continued to grasp at new ways to try to place Sylvester at The Bar on October 16, 2006.

The State's delay (approximately 36 months). The State is responsible for 36 months of delay. The first ten months weigh lightly against the State. The next ten months should weigh heavily against the State, while the following ten months should weigh ***very*** harshly against the State. The final 5.5 to 6 months should weigh ***severely*** against the State. Any other weighting ignores the State's burden in affording Sylvester a speedy trial. *E.g.*, *Barker*, 407 U.S. at 527. Delay by the State "must not be purposeful." *Pollard*, 352 U.S. at 361. The State has unabashedly admitted that its delays were purposeful and intended to rectify its strategic mistakes. It is plain error and an abuse of discretion to permit the State to trample Sylvester's speedy trial right to cover up the State's mistakes in preparation.

c. Sylvester Repeatedly Asserted his Right to a Speedy Trial.

The third issue for the *Barker* balancing test, defendant's assertion of his right to a speedy trial, is a mixed question of law and fact. *Taylor*, 298 S.W.3d at 492; *McKee*, 240 S.W.3d at 729; *Barker*, 407 U.S. at 530-532. This Court reviews the facts surrounding Sylvester's assertion of his speedy trial right for an abuse of discretion, but reviews the legal sufficiency *de novo*. *Taylor*, 298 S.W.3d at 492.

Sylvester demanded a speedy trial in writing on June 30, 2008 SC Supp. L.F., vol. 5, p. 1221-22, orally on November 25, 2008, and April 27, 2009, Supp. Tr. (11/25/08), pp. 63-64; (4/24/09 & 4/27/09), pp. 61-62, and again in writing on May 6, 2009, L.F. vol. 1, pp. 57-58. Sylvester filed motions to dismiss for speedy trial violations on May 6,

2009, June 29, 2009, and July 13, 2009. L.F. vol. 1, pp. 57, 59, 105. Sylvester renewed his motion to dismiss for speedy trial violations during the trial, Tr. (10/5/09), pp. 14-17; (10/16/09), p. 1034, and in his Motion for New Trial, L.F. vol. 2, pp. 287-97.

There is no evidence that the Sylvester ever sought to delay this matter. Any delay in filing Sylvester's first written motion for a speedy trial was due to the State's assurances that they were ready for trial on August 20, 2007. Supp. Tr. (12/7/06 & 1/18/07), p. 82. Additionally, Sylvester was assured numerous times by the trial court that there would be no continuances for any reason. *Id*. at 82-84. The trial court, particularly at the first bond hearing, repeatedly noted that trying this matter quickly was a key responsibility of the court for the families of the alleged victims. *See generally* Supp. Tr. (12/7/06 & 1/18/07). A defendant's speedy trial right is not just for the defendant, it is for all of society. *E.g.*, *Barker*, 407 U.S. at 527; *McKee*, 240 S.W.3d at 731.

Sylvester factually asserted his speedy trial right – as acknowledged by the trial court – and these repeated assertions were legally sufficient. *E.g.*, L.F. vol. 1, p. 172 (App., A8); *Barker*, 407 U.S. at 527-29.

d. Sylvester was Actually Prejudiced and this Court can Presume Prejudice from the Uncommonly Long Delay.

The fourth issue for the *Barker* balancing test, prejudice to the defendant, is a question of law reviewed *de novo* by this Court. *Taylor*, 298 S.W.3d at 492; *McKee*, 240 S.W.3d at 729; *Barker*, 407 U.S. at 530-532. It is the duty of the State to rebut the presumption that a defendant was prejudiced. *Goldman*, 316 S.W.3d at 911, 913-14. It is not Sylvester's duty to prove prejudice; "[t]he [S]tate must show that [Sylvester's]

defense was unimpaired." *Id*. at 913-14. This presumption becomes more difficult for the State to rebut as time passes. *Doggett*, 505 U.S. at 658. Due to this presumption, it is possible for Sylvester to prove prejudice without any particularized harm suffered. *Garcia*, 316 S.W.3d at 912 ("[T]he United State Supreme Court allowed a speedy trial claim to stand absent particularized prejudice.").

In *Barker*, the United States Supreme Court agreed with a lower court's holding that far less delay is tolerable in cases dealing with eyewitness testimony. 407 U.S. at 531 n.31. A delay of nine months was deemed "overly long," given that the most difficult method to prove prejudice is the fading memories of witnesses. *Id*. In Sylvester's case "the State's reliance has always been on the witnesses." Supp. Tr. (11/25/08), pp. 11-12. The State denied Sylvester's chance to question the witnesses while October 16, 2006 was fresh in their minds, for ***thirty-six months*** – four times the amount found prejudicial in the case cited in *Barker* for eyewitness testimony.

Even without the presumed prejudice, as set forth in *Barker* and *Doggett*, Sylvester was prejudiced:

> The factors to be assessed in determining whether delay results in prejudice to the defendant are (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired.

Bolin, 643 S.W.3d at 815. Sylvester was incarcerated for three months before being released on bond – this would have been sooner if not for the State's typographical error in the original document setting bond. Sylvester would also ***not*** have been required to

remain on house arrest, if not for the error. Sylvester was under electronic home shackling for 33 months. Sylvester's liberty was significantly curtailed. "[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints to his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker*, 407 U.S. at 533.

As to the second consideration, Sylvester waited 36 months to face his charges for First Degree Murder. The charges carried a risk of the death penalty or life without parole upon conviction. Prior to these charges, Sylvester had no criminal history and was 27 years old. Supp. Tr. (12/7/06 & 1/18/07), p. 43. On June 30, 2008, and April 27, 2009, Sylvester believed he was going to trial, only to have the trial avoided by actions of the State ***on the day of trial***. As of the writing of this Substitute Brief, Sylvester has been incarcerated ***for over four years*** despite the fact that suppressed video surveillance footage shows that – even if he was at The Bar – the two "victims" threatened him with an AR-15 assault rifle moments before the shooting.

The last consideration, impairment of the defense, is the most serious form of prejudice. *Barker*, 407 U.S. at 532. Pursuant to statutes and the United States and Missouri Constitutions, this matter was set for trial ***five times***. Each time, the State failed to prepare its case. To be repeatedly denied the chance to try his case in this situation is prejudicial to Sylvester: At a minimum the constant "false starts" for trial are crippling to criminal defendants and their attorneys, due to cost. Attorneys will spend weeks (or more) preparing for an upcoming trial. Regardless of whether a trial has been previously continued, certain tasks must be repeated and most attorneys will spend some number of

days reviewing the evidence so it is fresh in their minds. Each time the trial was re-set, it increased the cost of Sylvester's defense. Sylvester was re-set for trial as many as six times. This is six weeks (or more) of unnecessary cost. At some point no defendant can afford to pay for repeated attempts at trial – and attorneys are forced to withdraw or continue *pro bono*. The State, as "the biggest law firm in Missouri," wins the war of attrition. This is unjust gamesmanship and severely prejudicial to a defendant.

Sylvester stood in an advantageous position at each of the first ***five*** trial settings. The State prejudiced Sylvester by improperly destroying this advantage. Additionally, most – if not all – of the State's evidence would have been excluded at any of the first ***five*** trial settings, due to the State's failure to respond to discovery. The State's constant extensions unfairly prejudiced Sylvester by giving the State more time to respond to Sylvester's discovery requests. Further, as time passed, the State utilized more and more experts and advanced techniques – which did not exist during the first ***five*** trial settings – in order to attempt to place Sylvester at The Bar. That these repeated "do overs" on the scientific evidence were granted added additional stress to Sylvester's situation – how many fingerprint experts would the State ultimately be permitted to employ? Even when the trial court attempted to curtail this abuse, the State simply dismissed and refiled the case to continue seeking more experts.

Under these circumstances it is impossible for the State to show that Sylvester's case has not been impaired and prejudiced. *Garcia*, 316 S.W.3d at 911-14. The trial court mistakenly re-assigned this burden to Sylvester: "[T]he defense has failed to establish that [Sylvester] has been prejudiced by the delay in this case." L.F. vol. 1, p. 174 (App.,

A10). Reversing the burden of proof was clear and plain error. Furthermore, even if this Court intends to reverse this burden of proof, Sylvester ***did*** prove prejudice as shown above. Therefore it was plain error and an abuse of discretion for the trial court to find that Sylvester was not prejudiced by the State's delay.

2. Sylvester was denied his right to a speedy trial under Missouri Revised Statute Section 545.780.

Missouri Revised Statute Section 545.780 provides that if a defendant announces "ready for trial" and files a request for speedy trial, then the case can be dismissed for failure to set the case for trial as soon as practical. This statute requires a denial of a defendant's constitutional right to a speedy trial before relief can be granted. Mo. Rev. Stat. §545.780 (App., A43). Sylvester asserted his right to speedy trial repeatedly in writing. *E.g.*, L.F. vol. 1, pp. 57-59, 105, vol. 2, pp. 287-97; SC Supp. L.F., vol. 5, p. 1221-22. As set forth above and incorporated herein by reference, Sylvester's constitutional right to a speedy trial was completely eviscerated. Sylvester was and is entitled to dismissal of the case against him under Section 545.780. Failure to dismiss under Section 545.780 was plain error and an abuse of discretion by the trial court.

3. Amendment of Missouri Revised Statute Section 545.780 set the lower courts adrift when deciding speedy trial cases.

Missouri Revised Statute Section 545.780 provided, until its amendment in 1984, that "[w]hen a plea of not guilty is entered at an arraignment the trial shall commence within one hundred eighty days of arraignment." Mo. Rev. Stat. §545.780 (1977). Section 545.780 was amended to require only that the accused be brought to trial "as soon as

reasonably possible." Mo. Rev. Stat. §545.780 (App., A43). Missouri Revised Statute Section 217.460 continues to require "one hundred eighty days" for the trial of defendants currently serving time on another sentence (App., A45).

As this Court is likely aware, for many attorneys, deadlines are the reason anything is ever completed. This amendment removed any deadline from a defendant's speedy trial right and now the lower courts of appeals have found that delays up to seventeen years do not violate a defendant's speedy trial right. *See e.g.*, *Ferdinand*, 371 S.W.3d at 844. Under federal law, a defendant is required to be brought to trial within seventy days. 18 U.S.C. §3161. The laws of ***most*** states, including seven of Missouri's eight border-states, specify ***some*** deadline. Ark. R. Crim. Proc. 28.1 (9 months); Ill. Comp. Stat. §5/103-5 (120 to 160 days); Iowa Ct. R. 2.33 (45 to 90 days); Kan. Stat. Ann. §22-3402 (90 to 180 days); Ky. Rev. Stat. Ann. §421.510 (only for underage victims); Neb. Rev. Stat. §29-1207 (6 months); Okla. Stat. Ann. §812.1 (12 to 18 months); Tenn. R. Crim. P. 48 (no time specified) (All provisions provided in Appendix from A46 through A78 in alphabetical order.).

While Missouri is not bound by any other state's laws in this regard, the advantage to defendants and ***society as a whole*** is clear when there are definite deadlines: Everyone can work towards that deadline. Such rules result in more orderly and expeditious resolution of cases at both the federal and state level. *See e.g.*, *State v. Shipler*, 758 N.W.2d 41 (Neb. Ct. App. 2008). Speedy trial rights cry out for deadlines and this Court should provide such for the orderly administration of justice in Missouri.

C. Sylvester's right to a speedy trial was violated due to the State's abusive use of *nolle prosequi* to thwart Sylvester's right to a speedy trial and to gain an unfair strategic advantage over Sylvester which warrants immediate reversal of Sylvester's conviction.

The constitutional provisions discussed above are at loggerheads with the Prosecutor's supposedly limitless authority to control litigation. *Clinch*, 335 S.W.3d at 582-83. Even without the egregious delays set forth above, the right to *nolle prosequi* cases in Missouri ***must*** be curtailed by this Court in order to protect the speedy trial rights provided to all citizens under the United States and Missouri Constitutions. The State admitted that it sought continuances as a strategy. L.F. vol. 1, p. 23 (App., A29). As part of the State's attempts to "rectify" earlier strategic missteps, the State also made a mockery of this Court's Rules of Criminal Discovery. The trial court felt that the State's endless parade of fingerprint experts did not "pass the smell test." Supp. Tr. (4/24/09 & 4/27/09), pp. 40-41. The trial court grew weary of the State's discovery abuses and strategic continuances and excluded certain fingerprint evidence while denying the State any further continuances. *Id*. at 47. The State overruled the trial court:

> Upon the second denial, the State dismissed the case against the defendant so that time would be available for defense counsel to depose the State's expert witnesses and hire its own expert if so desired, thus allowing the State to proceed with the new fingerprint evidence.

SC Supp. L.F., vol. 1, p. 17 (App., A23) (State's Response Motion). The State even admitted to threatening the trial court over its "mistaken" rulings:

> And [the trial court] would not allow that and we told him that we'd have no choice but to dismiss and refile the case.

Tr. (7/15/09), p. 109. The State originally succeeded in overruling the trial court's evidentiary ruling and obviously succeeded in overruling the trial court's decision regarding its strategic "continuance." *E.g.*, L.F. vol. 1, pp. 174-76 (App., A10-A12).

There are statutes which specifically provide means for the State to obtain ***judicial*** review of trial court decisions suppressing evidence. *See e.g.*, Mo. Rev. Stat. §547.200 (App., A44). This Court has specifically held that:

> Neither the prosecution nor the defense has the authority to knowingly overrule a direct ruling by the trial court or to intentionally disobey this Court's rules designed to protect the integrity of the process.

Taylor v. State, 262 S.W.3d 231, 242 (Mo. banc 2008) (*Taylor II*). The State posits that *nolle prosequi* powers grant:

- Unrestricted authority to ***veto decisions of any trial court***;
- Unrestricted authority to ***veto any of this Court's Rules***; and
- Unrestricted authority to ***veto Acts of the Missouri General Assembly***.

Use of *nolle prosequi* to overrule trial courts runs contrary to case law as well-established as *Marbury v. Madison*, 5 U.S. 137 (1803).

In *Clinch*, the State dismissed and refiled a complaint specifically to overrule a trial court's motion *in limine*. 335 S.W.3d at 582-83. The Western District held that this was an appropriate use of the State's *nolle prosequi* powers. *Id*. *Clinch* reached this erroneous decision by misinterpreting the very definition of *nolle prosequi* and

misreading this Court's decision in *State v. Honeycutt*, 96 S.W.3d 85 (Mo. banc 2003). First, "[a] nolle prosequi is a prosecutor's formal entry on the record indicating that he or she will ***no longer prosecute a pending criminal charge***." *Clinch*, 335 S.W.3d at 583 (emphasis added). The State clearly desired to continue prosecuting Sylvester and the defendant in *Clinch*. Here, the State's dismissal explicitly noted "Case to be refiled." L.F. vol. 1, p. 52. At no point did the state "no longer intend to prosecute." Tr. (7/15/09), p. 110. ***The State never even considered that the charges ceased pending; it viewed the* nolle prosequi *as a six-month continuance***. *Id*. ("…exact same charges as we – as were pending and were still pending.").

Second, to the extent that *Honeycutt* can possibly be interpreted to hold that the State has limitless veto power over the judiciary and legislature, it is in conflict with constitutional rulings of this Court and the United States Supreme Court. *See e.g.*, *Taylor v. State*, 262 S.W.3d at 231. To the extent this conflict exists, *Honeycutt* must be overruled, limited, or otherwise clarified. Alternatively, to the extent that *Honeycutt* holds that the judiciary cannot restrain the use of *nolle prosequi*, or convert such dismissal to a dismissal "with prejudice," it must be overruled at least in situations wherein a defendant has filed a Motion for Speedy Trial or when a defendant has waited an excessive amount of time for his trial.

1. The offensive use of nolle prosequi *as done in Sylvester's case violates* State v. Cunningham, *401 S.W.3d 493 (Mo. banc 2013).*

This Court recently ruled that the strategic use of a plaintiff's right to dismiss a case to obtain an unfair advantage is not permissible in civil cases. *State v. Cunningham*,

401 S.W.3d 493, 497 (Mo. banc 2013). The plaintiff was victorious at trial, but ultimately received an unfavorable ruling at the appellate level. *Id*. This unfavorable ruling foretold defeat on retrial, so the plaintiff moved to dismiss its case. *Id*. This Court held:

> [If the plaintiff] were allowed to voluntarily dismiss its litigation after a determination on the law as set forth by the court of appeals or this Court, this precedent would thwart the intent of this Court's rules. Prospectively, any plaintiff who received an adverse adjudication by an appellate court would be able to voluntarily dismiss its action, thereby negating all law of the case and obtaining an undue advantage by later refiling its cause of action. This result not only would waste precious judicial resources but also would unjustly tip the scales of justice in favor of a plaintiff.

Id. at 497. If Missouri civil plaintiffs are not permitted this unfair advantage, Missouri prosecutors should not have an unfair advantage over criminal defendants. Especially in light of the advantages in criminal proceedings ***the defendant*** should receive. *See e.g.*, *Patterson*, 432 U.S. at 208.

2. United States v. Klopfer, 386 U.S. 213 (1967) addressed a similar situation to Sylvester's contrary to the trial court's decision.

In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), the United States Supreme Court ruled that a *nolle prosequi* procedure preventing the accused from demanding a trial or final discharge, yet allowing the state discretion to refile the charge at any time, violated the accused's right to speedy trial. There is no functional difference between the *nolle prosequi* procedure at issue in *Klopfer* and Missouri's procedure for *nolle prosequi*.

In *Klopfer*, under North Carolina law a "*nolle prosequi* with leave" did not discharge the indictment against the defendant. *Id*. at 218. The charges remained pending against the defendant and were reinstated by application of the prosecutor. *Id*. at 214. During the interim, the defendant could not bring himself to trial or have the case dismissed. *Id*.

Missouri courts have stretched to find that Missouri's *nolle prosequi* procedure is "different" from North Carolina's. However, they are functionally identical and are equally unconstitutional in application. Courts misapprehend a difference by mistakenly noting that a Missouri *nolle prosequi* shows the prosecutor's lack of intention to prosecute the matter further. *Clinch*, 335 S.W.3d at 583. As noted above, the State views *nolle prosequi* as a continuance. In fact, the State does not consider that the charges ***ever*** cease to be pending when a *nolle prosequi* is filed. Tr. (7/15/09), p. 110. Courts have held that they do not have the authority to convert a *nolle prosequi* to one "with prejudice." Therefore a defendant has no means to bring himself to trial or dismiss the charges.

In *Klopfer*, the *nolle prosequi* amounted to indefinite prosecution, because the case was never dismissed. Similarly, a Missouri *nolle prosequi* amounts to indefinite prosecution because:

- A *nolle prosequi* tolls the statute of limitations provided the same offense is charged. *E.g.*, *State v. Corley*, 251 S.W.3d 416, 418 (Mo. App. S.D. 2008); and
- Most serious felonies in Missouri do not even have a statute of limitations.

Missouri courts note that the North Carolina *nolle prosequi* permitted the prosecutor to restart the case with an application. Missouri courts misinterpret the "hurdle" that re-filing a case presents to a prosecutor in Missouri. This is quite clear in Sylvester's case.

First, the State itself admitted that it viewed the refiling of the case against Sylvester as a "ridiculous technicality":

> … trying to create some type of ***ridiculous technicality*** to avoid facing the charges in this case and the evidence before the defendant.

Tr. (7/15/09), p. 110 (emphasis added). The State never considered that Sylvester's charges were even dismissed. Tr. (7/15/09), p. 110. Further, in Sylvester's case the State violated Missouri law in refiling the charging documents and rather than prevent the State's case from moving forward, the State simply re-indicted Sylvester.

At best, the requirement to re-file the charging documents to restart a case after a *nolle prosequi* is a speedbump. In fact, the North Carolina procedure provided citizens with ***more*** protections than Missouri's procedure, because it required the prosecutor to obtain judicial approval ***before*** filing a *nolle prosequi*. *Klopfer*, 386 U.S. at 214-16. No such approval is required in Missouri. Under *Klopfer*, the use of *nolle prosequi* herein violates the United States and Missouri Constitutional right to a Speedy Trial.

3. At least one other state has restrained the prosecutor's right to nolle prosequi *to protect its citizens.*

As early as 1976, the State of Florida recognized that when a prosecutor enters a *nolle prosequi*, and the time for a speedy trial has run, the case cannot be refiled. *Bucolo v. Adkins*, 424 U.S. 641, 642, 96 S.Ct. 1086 (1976). The Supreme Court of Florida succinctly spelled out the abuses which would otherwise result:

> To allow the State to unilaterally toll the running of the speedy trial period by entering a *nol pros* would eviscerate the rule – a prosecutor with a weak

> case could simply enter a *nol pros* while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case.

State v. Agee, 622 So.2d 473, 475 (Fla. 1993) (App., A79-A84); *see also State v. Wiliams*, 791 So.2d 1088, 1091 (Fla. 2001); *Genden v. Fuller*, 648 So.2d 1183, 1183-84 (Fla. 1994).

Florida provides a useful framework for a rule which respects the original intent of a *nolle prosequi* – to permit a prosecutor to dismiss cases it no longer has reason to prosecute – while protecting a defendant's speedy trial right. This rule prohibits the use of *nolle prosequi* ***only*** when a prosecutor seeks to dismiss a case and refile it. Under Missouri common law "[a] nolle prosequi is a prosecutor's formal entry on the record indicating that he or she will ***no longer prosecute a pending criminal charge***," thus a rule similar to Florida's would ***never*** prohibit a prosecutor from using a *nolle prosequi* in its originally intended way. *Clinch*, 335 S.W.3d at 583 (emphasis added). The State has morphed a right which requires ***an intent to no longer prosecute*** into an ***offensive tool used to prosecute defendants unfairly***. This Court can and should curtail this abuse and limit the State's use of *nolle prosequi*.

CONCLUSION

The trial court erred in denying Sylvester's Motions for Dismissal, and in denying Sylvester's Motion that the State's *nolle prosequi* be designated with prejudice. The court misapplied the law and its decision was against the weight of the evidence and should be

reversed and remanded. Sylvester's speedy trial right was violated and the case against him should be immediately dismissed. Further, this Court can and should take this opportunity to curtail the State's use of *nolle prosequi* as its use herein clearly and unabashedly violated the United States and Missouri Constitutions and prior case law.

Respectfully submitted,

GILLETTE LAW OFFICE, LLC

/s/ Clayton E. Gillette

Clayton E. Gillette 57869
Gillette Law Office, LLC
600 E 8th Street, Suite A
Kansas City, MO 64106
Tel: (314) 330-4622
Email: ceg@claygillette.com
Attorney for Appellant Sylvester R. Sisco, II

Patrick W. Peters (34017)
PETERS & PETERS, PC
600 E 8th Street, Suite A
Kansas City, MO 64106
Tel: (816) 474-3600
Fax: (816) 474-3074
Email: peters@peters-lawyers.com
Attorney for Appellant Sylvester R. Sisco, II

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document, has a word count of 20,774 using Microsoft Word's tools calculated in accordance with the Missouri Supreme Court Rules and is otherwise in compliance with this Court's Rules and was filed via this Court's Electronic Filing System on June 11, 2014, and thereby served upon the following counsel of record:

Daniel Neal McPherson
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Fax: (573) 751-5391
Attorney for Respondent

/s/ Clayton E Gillette