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 REPLY 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

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I. The State's Supplemental Response Brief makes the fundamental error of analyzing the issues in this case in a vacuum.

The State's Supplemental Response Brief ("State's Response") analyzes the issues of this case individually and in a vacuum. This is improper. This Court and the Supreme Court of the United States require that the issues be analyzed together in their totality for a speedy trial analysis. *E.g.*, *Vermont v. Brillon*, 129 S.Ct. 1283 (2009); *Doggett v. United States*, 505 U.S. 647 (1992); *State v. Taylor*, 298 S.W.3d 482 (Mo. banc 2009); *McKee v. Riley*, 240 S.W.3d 720 (Mo. banc 2007). This is particularly egregious in the State's Response to Appellant Sylvester Sisco's ("Sisco") Argument regarding the delay in this case and the State's perceived weakness of its case against Sisco before trial.

A. The State improperly reviews the delay in this case – particularly regarding the DNA analysis – in a vacuum.

The Supreme Court of the United States holds that the totality of the facts must be considered and balanced in a speedy trial analysis. *Barker v. Wingo*, 407 U.S. 514, 533 (1972). Such analysis is "necessarily relative" as a court must "approach speedy trial cases on an *ad hoc* basis" and engage in a "sensitive balancing process." *Id*. at 520, 530-33. This Court's speedy trial case law is in accord. *Taylor*, 298 S.W.3d at 482; *McKee*, 240 S.W.3d at 720. The Supreme Court of the United States specifically explained this totality of the circumstances analysis in *Vermont v. Brillon*, 129 S.Ct. 1283 (2009).

In *Brillon*, a criminal defendant engaged in a course of conduct which substantially delayed his trial. *Id*. at 1288-89. The defendant repeatedly and randomly

demanded leave to fire his attorneys. *Id*. If leave was denied, he would threaten his attorney's lives, resulting in their withdrawal. *Id*. This caused difficulties in the public defender system's ability to find counsel to represent the defendant. *Id*. Thus, there were several months that the defendant was unrepresented. *Id*. at 1288-89, 1292 n.9.

The defendant's sixth attorney filed a motion to dismiss for speedy trial violations, based upon the state's failure to appoint the defendant an attorney for nearly six months. *Id*. at 1289. This motion was denied by the trial court but the Vermont Supreme Court reversed and ordered the case dismissed on speedy trial grounds. *Id*. at 1283. The Supreme Court of the United States held that the Vermont Supreme Court made two errors in its analysis. First, the lower court erred in assigning delays of appointed counsel in moving the case forward to the State rather than the defendant (because appointed counsel is the agent of the defendant and not the State). *Id*. at 1291-92.

Next – and most important for this analysis – "the Vermont Supreme Court further erred by treating the period of each counsel's representation discretely." *Id*. at 1292. The Court noted that the *Barker* analysis requires courts to review the totality of all circumstances and balance the reasons for delays. *Id*. "[T]he Vermont Supreme Court failed appropriately to take into account [the defendant's] role during the first year of delay in ***the chain of events that started all this***." *Id*. (emphasis added). The Court held that absent the deliberate efforts to force the withdrawal of his first and third attorney, the speedy trial issues would not have arisen. *Id*.

The effect of these earlier events should have been factored into the court's analysis of subsequent delay.

Id. (emphasis added). In a footnote the Court stated that even if the six-month period that the defendant went without an attorney were attributable to the State, the defendant's prior behavior leading up to that delay would cause the delay to weigh far less heavily on the State. *Id*. at 1292, n.9.

Thus, it is explicitly improper for courts to analyze delays in a vacuum. One party's actions in deliberately slowing the proceedings ameliorates delays attributable to the other party later in the proceedings. Pages 38 through 56 of Sisco's Substitute Opening Brief analyze the delays under this "chain of events" analysis, as set forth in *Brillon*. 129 S.Ct. at 1292. The State's Response urges this Court to ignore this required analysis and review the delays in a vacuum. A few examples reveal the State's error:

- The State argues that the continuance sought at the June 30, 2008 trial setting was valid, due to the its "concerns" regarding the willingness of Lucretia Neal to testify. Supp. Resp.'s Br., pp. 10, 29. However, the State bears this fault as it chose not to contact Neal until May or June of 2008. Supp. Tr. (6/30/08), p. 13-20. The totality of the circumstances reveal that the State brought these "concerns" upon themselves by failing to prepare witnesses for any of the earlier trial settings.[1]

[1] The State cites to *State v. Atchison*, 258 S.W.3d 914, 919-20 (Mo. App. S.D. 2008), for the proposition that delays related to uncooperative witnesses should be weighed slightly against the State. Again, this ignores the "chain of events" surrounding Neal: if the State contacted Neal sooner, then the State would not have been "surprised." The State should not benefit from its failure to prepare witnesses for trial.

- The State continues to rely on language from the trial court which asserts that the State was given a reasonable amount of time to perform DNA testing after the June 30, 2008 continuance. Supp. Resp.'s Br., p. 33. In a vacuum perhaps the time granted the State for this analysis was reasonable; however, such analysis ***ignores*** the totality of the circumstances. The State had ***nearly two years*** prior to June 30, 2008, to perform the DNA testing. The State made a strategic decision ***not*** to perform the DNA testing – and even promised the trial court repeatedly that the DNA testing was complete and that the State was ready for trial. The "chain of events" reveal that it was ***not*** reasonable to grant the State additional time to conduct DNA analysis under these circumstances.
- Finally, the State's continued attempts to blame Sisco for delays ***after*** the State's egregious tactics to delay the trial (including the abusive use of *nolle prosequi*), ignores the teachings of *Brillon*. Even if some later delays are theoretically attributable to Sisco, such delays can either be ignored or attributed to the State "***[i]n light of [the State's] own role in the initial periods of delay***." *See Brillon*, 129 S.Ct. at 1292 n.9.

Thus, the State's and trial court's analysis is defective for its failure to consider the "chain of events" in Sisco's trial. This Court should engage in *de novo* review of the trial court's analysis to correct these mistakes. Further, even if the State is correct that the analysis of this case is under an "abuse of discretion" standard, the *Brillon* case makes it clear that the trial court abused its discretion regarding the analysis of the delay in Sisco's case by ignoring the totality of the circumstances.

B. The State improperly reviews Sisco's Argument regarding the State's perceived weakness of its case against Sisco in a vacuum.

Sisco's Supplemental Opening Brief notes that one of the many improper reasons the State sought to delay his trial was that the State's case was weak. *See e.g.*, Supp. App.'s Br., pp. 39, 47. The State mistakenly asserts that this reasoning is erroneous by examining the results of the trial in a vacuum. *E.g.*, Supp. Resp.'s Br., p. 24. The State asserts that it "won," so the case "was not as weak as Appellant contends." *Id*. This is beside the point. When the facts of this case are examined in their entirety, they reveal that the State ***thought*** its case was weak and improperly sought numerous continuances to avoid trying a weak case. That the State may have been mistaken as to the strength of its case does not suddenly morph the State's improper purpose into a proper purpose.

The State fallaciously asserts that Sisco's Brief "presents no facts" that the State perceived its case as weak. *Id*. However, Sisco's Supplemental Opening Brief is replete with facts which demonstrate that the State felt its case was weak:

- The State asserted that its case had been eviscerated by Neal's uneasiness about testifying, in order to obtain an extension to analyze the DNA. Supp. Tr. (11/25/08), pp. 11-12.
- The State described its video footage as being of such poor quality that you could not identify Sylvester. Supp. Tr. (11/25/08), p. 4.
- The State ***repeatedly*** sought to endorse numerous fingerprint experts to try and place Sisco at the scene – as late as September 28, 2009, the State attempted to endorse another fingerprint expert. Tr. (10/5/09), p. 219.

- The State ***repeatedly*** sought extensions days before trial (or the day of trial).

A party that feels its case is strong does not assert that its case has been eviscerated and its evidence is of poor quality, expend money and time to hire more and more experts, or continually seek extensions. Analyzing the facts surrounding the State's behavior, as *Brillon* requires, reveals that the State felt its case was weak. 129 S.Ct. at 1292.

The facts further reveal that the State's perceived weakness of its case was a result of the State's trial strategy gone awry. SC Supp. L.F. vol. 1, p. 23. Under these circumstances, it is improper for the State to have "deliberately hampered" the progress and speediness of the case against Sisco. *See e.g.*, *State v. Newman*, 256 S.W.3d 210, 214 (Mo. App. W.D. 2008) (cited on page 22 of Respondent's Brief.). Under both a *de novo* and an abuse of discretion standard it is error for the trial court to have ignored the State's improper motive in delaying Sisco's trial.

II. The State's argument regarding the purported lack of "bad faith" found by the trial court reveals the importance of *State v. Cunningham*, 401 S.W.3d 493 (Mo. banc 2013) and public policy regarding the use of *nolle prosequi* authority.

The State's Response continually attempts to allege that the trial court did not find that the State was acting in bad faith as a shield for the State's egregious delays in Sisco's trial. *E.g.*, Supp. Resp.'s Br., pp. 22, 34. It is arguable that the trial court's comments in April 2009 are a finding of bad faith on the part of the State. *See e.g.*, Supp. Tr. (4/24/09 & 4/27/09), pp. 40-41. Regardless, the trial court's comments are a clear indication that the trial court was at its wit's end with the tactics of the State in Sisco's trial, such that the trial court was – at a minimum – at the precipice of a bad faith finding:

> 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.

Id. (emphasis added).

A. The State avoided a finding of bad faith through its *nolle prosequi*.

As noted by the Western District, trial courts will often show an incredible amount of restraint regarding sanctioning the State for delays and discovery violations. *See e.g.*, *State ex rel. Jackson County Prosecuting Attorney v. Prokes*, 363 S.W.3d 71, 79 (Mo. App. W.D. 2011) (en banc). While this restraint is likely warranted, given the workloads of the attorneys involved, the State's *nolle prosequi* authority reveals the flaw in *too much* restraint. Sisco's trial was spread out among a number of trial judges over its four years in Jackson County. Each judge only saw a few issues and each judge exercised restraint. However, this Court, under *Brollin*, can look at the totality of the circumstances and the totality of the State's improper tactics.

Further, Judge Schieber's warning to the State in April 2009 highlights the unjustness of the State's *nolle prosequi* authority. Judge Schieber had clearly seen enough of the State's tactics, granted a motion to exclude fingerprint evidence, denied the State's request for a continuance, and warned the State that its tactics did not pass the "smell test." Supp. Tr. (4/24/09 & 4/27/09), pp. 40-41. The State exercised its veto power

over the judiciary regarding the fingerprint evidence and continuance by dismissing and refiling the case. After the case was refiled, a new judge was assigned. This judge exercised restraint in sanctioning the State (all over again) and reversed Judge Schieber's Order regarding the exclusion of the fingerprint evidence. L.F. vol. 1, pp. 174-76 (App., A10-A12). The unfairness is obvious: anytime a trial judge is near a ruling of bad faith regarding the State's delay or discovery violations, the State can simply dismiss and refile the case with a clean slate and a new trial judge.

B. The trial court committed clear error by failing to find that the State's lack of compliance with this Court's Rules was done in bad faith.

In *Taylor v. State*, 262 S.W.3d 231, 242 (Mo. banc 2008) (*Taylor II*),[2] this Court found a number of *Brady* violations by the State. A particular witness sent "a lot" of letters to the lead investigator. *Id*. at 240-41. The lead investigator also met with that witness and prepared a memorandum regarding that meeting. *Id*. at 241. This Court noted that under its Rule 25.03(A) "the state is obligated to disclose the written and recorded statements of witnesses it intends to call as well as memoranda reporting or summarizing part or all of a witness's oral statements." *Id*. at 240. This Court further noted that the defendant sought "all witness statements." *Id*.

The State did not disclose the witness's letters and, in fact, stated that it had "no idea how many letters were received" because the lead investigator had destroyed them.

[2] Although this is the first of the two *Taylor* cases chronologically, it was referred to as *Taylor II* in Appellant's Substitute Opening Brief.

Id. at 240-41. The State also did not disclose the lead investigator's memorandum from his meeting with the witness. *Id*. at 241. This Court held that it was "self-evident" that the State was required to disclose these letters and the memorandum. *Id*. The trial court held a hearing regarding this evidence and committed "clear error." *Id*. at 242.

> Despite this evidence, ***the motion court adopted the prosecution's self-serving finding that his failure to disclose this memorandum was made in good faith. This was clear error***. 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…The prosecutor's purposeful decision not to comply with the order or reveal his decision not to produce the document to the court simply is not an error that can be made in good faith.

Id. (emphasis added). The trial court in *State ex rel. Jackson County Prosecuting Attorney v. Prokes*, 363 S.W.3d 71 (Mo. App. W.D. 2011) (en banc), was initially hesitant to find that the prosecutor acted in "bad faith." However, after consideration of this Court's ruling in *Taylor II*, the trial court felt

> compelled to rule that the disregard of this Court's order of June 2, 2010 compounded by the history of the Office of the Jackson County Prosecutor, as it pertains to St v Buchli, in its failure to comply with Supreme Court Rule 25.03, Local Rule 32.5, and this Court's June 2, 2010 order does constitute bad faith.

Signed Order in *Prokes* (App. To Sub. Reply Br., at A113).

Thus, it was clear error for the trial court herein to fail to find that the State acted in bad faith. This Court warned, in *Taylor II*, that the prosecutor has no authority to disobey the Rules of this Court, yet this Court's Rules were repeatedly and intentionally ignored by the State in Sisco's trial.

C. The totality of the circumstances reveals the State's bad faith in failing to comply with this Court's Rules.

Under *Vermont v. Brillon*, 129 S.Ct. 1283, 1292 (2009), this Court can review the totality of the circumstances surrounding Sisco's case. Furthermore, the State's treatment of this Court's Rules in previous cases is relevant to this Court's decision as to whether these mistakes are made in bad faith. *See id*. Appellant's Consolidated Motion to Remand is replete with examples of this behavior repeated time and again in Jackson County and Appellant incorporates that Motion herein.

D. Public policy requires limitation of the State's *nolle prosequi* authority.

It is well-settled that litigants generally get a single bite at the apple. *See e.g.*, *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700 (Mo. banc 2011). The State's limitless *nolle prosequi* not only violates the most basic system of checks and balances (by providing the prosecutor with veto power over this Court and the Missouri General Assembly), but it provides the State with ***infinite*** bites at an ***infinite*** apple.

Unfettered *nolle prosequi* authority means that the State is never required to stomach an unfavorable ruling: In this case alone, the State used *nolle prosequi* authority ***explicitly*** to overrule several trial court rulings. SC Supp. L.F., vol. 1, p. 17 (App., A23). The State also avoided a finding of bad faith, by having the case assigned to a new judge

when it was refiled. There appears to be no limit to the chances the State could be afforded to obtain a more favorable ruling. In fact, the State's unfettered *nolle prosequi* authority explicitly ***punishes*** a defendant for hiring a competent defense attorney. Whenever a defendant successfully suppresses evidence, the State can simply *nolle prosequi* the case and "try again," ultimately achieving nothing for the defendant beyond wasted time and effort. This increased and needless cost was addressed in Sisco's Supplemental Opening Brief with regards to prejudice to a defendant.

This Court explicitly found that this manner of gamesmanship with strategic dismissals violated public policy in *State v. Cunningham*, 401 S.W.3d 493, 497 (Mo. banc 2013). No party should be permitted to evade the ruling of a trial court simply by dismissing and refiling its case. This is especially true for the State in criminal trials.

E. The State ignores similar statutes at issue in *State v. Cunningham*, 401 S.W.3d 493 (Mo. banc 2013) to distinguish that case.

The State erroneously asserts that *State v. Cunningham*, 401 S.W.3d 493 (Mo. banc 2013) is inapposite simply because there is a statute which describes the State's *nolle prosequi* authority. Supp. Resp.'s Br., pp. 39-40. Again, the State's argument is beside the point. First, *Cunningham* simply highlights and reiterates case law holding that public policy forbids litigants from using gamesmanship to gain an undue advantage. *See e.g., Senior Citizens Bootheel Services, Inc. v. Dover*, 811 S.W.2d 35, 40 (Mo. App. E.D. 1985). Second, Missouri Revised Statute Section 510.130 and Missouri Supreme Court Rule 67.02 ***both*** describe the authority of a plaintiff to dismiss and refile a case in civil trials. (App. To Sub. Reply Br., at A89). This Court did not find that this Statute and Rule

provided any impediment to the ultimate holding of *Cunningham*. The Statue cited by the State does not provide any impediment to curtailing the State's misuse of its *nolle prosequi* authority.

III. The State's analysis of the fingerprint evidence is misleading and requires this Court to ignore Missouri and United State Supreme Court case law.

Throughout the State's Response, it either skips over the Barbara Banks fingerprint analysis and the Alice Dearing retirement,[3] *e.g.*, Supp. Resp.'s Br., pp. 11, 26-27, or asserts that the State simply did not know about Barbara Banks' analysis, *e.g.*, *id.* at pp. 28-29. The State's analysis is erroneous for a number of reasons.

First, the State asserts that it was not informed of the results of Banks' analysis until April 21, 2009, and then cites to sections of the Supplemental Legal File wherein Carl Carlson[4] describes the dates on which he informed the State of the results of ***his*** analysis. *Id*. (citing SC Supp. L.F. vol. 6, pp. 1460, 1479). Further, the State's assertion that it simply did not know about the Barbara Banks analysis until April 2009 is controverted by testimony of its own witness. *E.g.*, SC Supp. L.F. vol. 5, p. 1224; vol. 6, pp. 1390, 1428-29, 1478-79. Carlson specifically stated that the prosecutor called to

[3] The State's reason for Dearing's unavailability also fails in that it asserted that she was about to deploy to Iraq, yet approximately six months later she attended Sisco's trial.

[4] Carlson is the supervisor of the RCL. He was the ***third*** individual to examine the fingerprints. Dearing was the first (her report exculpated Sisco) and Banks was second (her report exculpated Sisco and identified another individuals prints at the scene).

inform Carlson that, due to Dearing's retirement, the RCL needed to re-analyze the fingerprint evidence:

> Q: Did [the prosecutor] ever expressly ask you to re-examine the work of any fingerprint examiner in this case?
>
> A: We (sic)[5] had asked that we re-examine this work at one time.
>
> Q: And that commenced back in June of 2008?
>
> A: Yes.
>
> Q: Okay. Is that when he expressly asked that the work be re-examined?
>
> A: That's correct.

E.g., SC Supp. L.F. vol. 6, pp. 1478-79. The ***testimony*** explicitly controverts the State's assertion that it did not know about the re-analysis, ***because the prosecutor requested it***.

Finally, even if the State truly had no idea that Barbara Banks re-examined the fingerprint evidence until April 2009, ***this Court and the Supreme Court of the United States have explicitly held that such lack of knowledge is irrelevant***. *E.g., Kyles v. Whitley*, 514 U.S. 419 (1995); *Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009). First, *Kyles* held that the United States Constitution requires that:

> the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

[5] This sentence begins with "We" whereas "He" is the only pronoun which makes sense in this sentence. Counsel presumes this was a typographical error.

514 U.S. at 437. The Court rejected any argument that the prosecutor could bury his head in the sand to willfully ignore the presence of exculpatory or favorable evidence because such assertions:

> boil[] down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Id. at 438. Therefore, under the United States Constitution, the State's argument that it simply did not know about the Barbara Banks re-analysis fails.

The State fares even worse under *Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009). In *Merriweather*, this Court acknowledged that the Federal Constitution requires the prosecutor to be aware of the actions of other State actors in an investigation. 294 S.W.3d at 54. However, the Court held that Missouri Supreme Court Rule 25.03 goes beyond the federal requirement and adds an "affirmative duty … to take action to discover information which it does not possess." *Id*. at 55-56. Therefore, the State finds no safe harbor in its assertion that it did not know about the Barbara Banks re-analysis – the State had an affirmative duty under the Missouri and Federal Constitutions (and under Rule 25.03) to ***learn*** about Barbara Banks' re-analysis before April 2009.

IV. The State makes at least two serious factual misstatements which are relevant to the outcome of this case and must be clarified.

The first serious misstatement comes on page 6 of the State's Response. The State asserts that "[t]he jury viewed surveillance video that was recovered from the bar." Supp. Resp.'s Br., p. 6. The State uses this misstatement to assert that the jury saw Sisco and his

brother simply "pull[] out guns and beg[i]n shooting." *Id*. As discussed in Sisco's Supplemental Opening Brief and more completely in Sisco's Consolidated Motion to Remand, the jury viewed ***selected portions*** of the surveillance tape and ***selected screenshots*** from the surveillance tape, which are edited together to make it appear that Sisco and his brother just randomly started shooting. The distinction is important, because the edited out portions of the surveillance tape show that the purported "victims" of the shooting were threatening and menacing the man purported to be Sisco and his brother with an assault rifle moments before the purported "random" shooting.

The second serious misstatement of the facts relates to Neal's testimony. The State asserts that ***on June 30, 2008***, it was "apparent that [Neal] was not going to testify." Supp. Resp.'s Br., p. 29. The State asserts that this justified the continuance to obtain DNA evidence. *Id*. As discussed above, this analysis considers Neal's reluctance in a vacuum, contrary to the holding of *Brollin*. Further, it ignores the fact that there was ***no evidence*** on June 30, 2008, that Neal would fail to follow the Order of the Court and that she would refuse to testify. The State seemed to agree that there was no evidence that Neal would refuse to testify in its Statement of Facts, where it admitted that there existed only a "concern" that she would not testify:

> Although Neal was granted immunity, the State expressed concern about whether she would testify, so it requested and was granted a continuance to have DNA testing performed.

Supp. Resp.'s Br., p. 10. The fact remains that there is ***no evidence*** as to what Neal ***would have done*** had the State not improperly sought a continuance. The State makes much ado

that Neal disobeyed the Court's Order ***over a year later*** (due to the State's multiple continuances). However, that does not bear explicitly on the June 30, 2008 trial date ***and*** Neal ultimately ***did*** abide by the Court's Order. *E.g.*, Supp. Resp.'s Br., p. 30.

V. The standard of review for the denial of a motion to dismiss for a violation of the defendant's speedy trial rights is a mixed question of law and fact for which the questions of law are reviewed *de novo*. The State's attempt to argue to the contrary highlights the need for *de novo* review of legal issues in this situation.

Sisco's Supplemental Opening Brief outlines the correct standard of review for cases regarding a denial of a motion to dismiss for speedy trial violations. Supp. App.'s Br., pp. 31-33. The State's attempt to continue to argue for the incorrect, abuse of discretion, standard of review inadvertently proves Sisco's point.

A. Missouri and federal courts hold that a defendant's speedy trial right is a mixed question of law and fact.

Sisco's Supplemental Opening Brief deals with each aspect of the *Barker* analysis individually with regard to the standard of review. For this Brief, it suffices to reiterate 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 specifically set forth the method of review for mixed questions of law and facts in *Taylor*. *Id*. at 492 n.4. This Court will defer to the trial court's findings regarding the factual underpinnings of such questions but will review the legal issues *de novo*. Further, federal courts have explicitly held that speedy trial analysis is a mixed question of law and fact. *United States v. Aldaco*, 477 F.3d 1008

(8th Cir. 2007) (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*."). This Court will generally follow federal courts on federal constitutional issues. *See e.g.*, *McKee v. Riley*, 240 S.W.3d 720 (Mo. banc 2007).

The State's contrary argument is that speedy trial issues are "impossible to determine with precision." Supp. Resp.'s Br., p. 17. It is axiomatic to assert that speedy trial analysis is difficult and decidedly fact-based. *Barker*, 407 U.S. at 521. However, it is also irrelevant: all mixed questions of law and fact are difficult and decidedly fact-based. *See e.g.*, *Taylor*, 298 S.W.3d at 492. This Court will not decline to follow well-settled law regarding the review of mixed questions of law and fact, especially in this extremely serious area of criminal law, simply because it is "difficult."

B. Even if the standard of review is the abuse of discretion standard, the State's Response makes it clear that the trial court abused its discretion.

While it is important for this Court to clarify the standard of review for later, closer cases, this is not a close case. Even under the abuse of discretion standard, Sisco should prevail. Sisco's Supplemental Opening Brief outlined four key constitutional holdings for a speedy trial analysis. Supp. App.'s Br., pp. 34-35. Two important issues mentioned therein are also reiterated on page 22 of the State's Response:

1. It is the State's burden to assure that the defendant is afforded a speedy trial. *Barker*, 407 U.S. at 527; *see also* Supp. Resp.'s Br., p. 22; and
2. Deliberate delays by the state will not be tolerated. *Pollard v. United States*, 352 U.S. 354, 361 (1957); *Barker*, 407 U.S. at 531; *see also* Supp. Resp.'s Br., p. 22.

Sisco's Supplemental Opening Brief discusses the many improper delay tactics used by the State ***as well as providing citations to the record wherein the State explicitly admits its improper purposes***. *E.g.*, SC Supp. L.F. vol. 1, pp. 17, 23 (App., A23, A29). The State does nothing to rebut these improper strategic decisions in its Response other than to assert that its *nolle prosequi* power is limitless. Even if this Court agrees with the State regarding its limitless *nolle prosequi* powers, the State engaged in other continuances and delays which it explicitly admitted were simply to gain a strategic advantage or cover up earlier strategic mistakes. Under these circumstances – especially considering that it was the State's burden to bring Sisco to trial in a timely fashion – it was a clear abuse of discretion for the trial court to fail to grant Sisco's Motions to Dismiss.

C. Sisco preserved the constitutional argument regarding the State's *nolle prosequi* authority.

The State asserts that Sisco did not preserve his argument regarding the unconstitutionality of the *nolle prosequi* procedure. Supp. Resp.'s Br., p. 40. As the State merely included this assertion towards the end of its Brief, the State does not appear to believe this issue has much merit. Thus, Sisco simply reiterates that he:

- Filed a number of speedy trial motions, *e.g.* L.F. vol. 1, pp. 57-58;
- Filed a number of motions to dismiss or deem the *nolle prosequi* with prejudice for speedy trial violations, *e.g.*, L.F. vol. 1, pp. 54-94; and
- Preserved the error regarding those motions orally at trial and at hearings and in writing in his Motion for New Trial, *e.g.*, Tr. (10/5/09), at pp. 14-17; Tr. (10/16/09), at p. 1034; L.F. vol. 2, pp. 287-97.

Sisco asserted a constitutional violation of his right to a speedy trial and, once the State improperly exercised its *nolle prosequi* authority, Sisco included that fact within his motions asserting constitutional violations. The matter is preserved.

VI. The State's attempts to distinguish *United States v. Klopfer*, 386 U.S. 213 (1967) ignores the similarities between the North Carolina *nolle prosequi* procedure decried therein and the State's use of its *nolle prosequi* authority herein.

The State's attempts to distinguish *United States v. Klopfer*, 386 U.S. 213 (1967), from Sisco's case is unpersuasive and ignores the realities of Sisco's case. As set forth more completely in Sisco's Supplemental Opening Brief, the distinction is without a difference. The only distinction that can be made between the "*nolle prosequi* with leave" used in North Carolina and the *nolle prosequi* used herein is that the North Carolina procedure did not dismiss the charges against the defendant. *See e.g.*, Supp. Resp.'s Br., p. 20 n.5. In Missouri, the charges are technically dismissed against the defendant. *Id*. However, as made obvious in Sisco's case, this is largely irrelevant.

The case was dismissed against Sisco and immediately refiled. The State's assertion that a technical discharge is some great relief to a defendant is further undercut by the fact that the case ***can loom over a defendant forever***, as shown in *State v. Ferdinand*, 371 S.W.3d 844 (Mo. App. W.D. 2012). In *Ferdinand*, over ***15 years*** passed between a *nolle prosequi* and the re-filing of the case. *Id*. at 844. Given that most serious crimes in Missouri have no statute of limitations, it is no relief that a case is dismissed when the State has unfettered rights to re-file the cases ***decades*** in the future. A Missouri

defendant – just as in *Klopfer* – has charges floating in the aether for which he cannot seek disposition.

Further, The State does not consider a *nolle prosequi* an "actual dismissal." Tr. (7/15/09), p. 110. It is viewed as a continuance by the State. Even if the State ***does*** procedurally default in the refiling of the charging document – as the State did herein – this, too, is no bar to prosecution as the State can simply amend or re-file ***again***. There may be actual distinctions between the *nolle prosequi* procedure in *Klopfer* and the *nolle prosequi* herein; however, they make no difference ***in practice***. The *nolle prosequi* procedure used herein is equally offensive to the Missouri and Federal Constitutions as the *nolle prosequi* procedure discussed in *Klopfer*.

CONCLUSION

The trial court erred in denying Sisco's Motions for Dismissal, and in denying Sisco'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

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
Attorneys for Sylvester R. Sisco, II

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document, has a word count of 6,301 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 July 17, 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