

IN THE  
MISSOURI SUPREME COURT  
EN BANC

STATE EX REL. )  
TRACY MCKEE, )  
 )  
PETITIONER, )  
 ) No. SC88867  
v. )  
 ) ST. LOUIS CIRCUIT COURT  
THE HONORABLE ) Case No. 0622-CR00039  
JOHN J. RILEY )  
DIVISION 7, )  
CIRCUIT COURT OF THE )  
CITY OF ST. LOUIS, )  
 )  
RESPONDENT. )

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ON PRELIMINARY WRIT OF MANDAMUS  
FROM THE SUPREME COURT OF MISSOURI, EN BANC  
TO THE HONORABLE JOHN J. RILEY,  
CIRCUIT COURT OF THE CITY OF ST. LOUIS  
TWENTY-SECOND JUDICIAL CIRCUIT

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PETITIONER'S STATEMENT, BRIEF, AND ARGUMENT

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## JURISDICTIONAL STATEMENT

This is an original proceeding in mandamus pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusively. On October 15<sup>th</sup>, 2007, Tracy McKee filed a Petition for Writ of Mandamus requesting this Court grant his motion to dismiss for violation of statutory and constitutional right to a speedy trial, or in the alternative, to direct the St. Louis Circuit Court to dismiss with prejudice the case for violation of his statutory and constitutional rights to a speedy trial. On November 2<sup>nd</sup>, 2007, Respondent filed Suggestions in Opposition to Mr. McKee's Petition for Writ of Mandamus. On November 6<sup>th</sup>, 2007, this Court sustained Mr. McKee's Petition for Writ of Mandamus, ordered an alternative writ to issue, and set the cause for briefing.

Jurisdiction over this matter lies in this Court under the Missouri Constitution, Article V, Section 4(1), and Missouri Supreme Court Rules 84.22 to 84.26, 94.01 to 94.07, and § 545.780.2, RSMo, 2000.<sup>1</sup>

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<sup>1</sup> All statutory references are to RSMo 2000, unless otherwise indicated.

## STATEMENT OF FACTS

On June 4<sup>th</sup>, 2006, Petitioner Tracy McKee was arrested and the next day charged in the St. Louis City Circuit Court with the class C felony of tampering in the first degree in violation of § 569.080, RSMo (Count1), the class C felony of stealing over \$500 in violation of § 570.030, RSMo (Count 2), the class A misdemeanor of assault in the third degree in violation of § 565.070, RSMo (Count 3), the class A misdemeanor of resisting and arrest in violation of § 575.150, RSMo (Count 4), the class B misdemeanor of property damage in the second degree in violation of § 569.120, RSMo (Count 5), and the class B misdemeanor of trespass in the first degree in violation of § 569.140, RSMo (Count 6), in State of Missouri v. Tracy McKee, cause no. 061-1829 (A14-A18).<sup>2</sup> On June 5<sup>th</sup>, 2006, Mr. McKee's bond was set by Judge Michael Mullen (A17-A18). The Public Defender's office entered its appearance on Mr. McKee's behalf, and at the request of the prosecutor the cause was continued to July 19<sup>th</sup>, 2006 (A1, A19). On July 19<sup>th</sup>, 2006, the cause was continued by the Court to August 23<sup>rd</sup>, 2006 (A1). On August 15<sup>th</sup>, 2006, the grand jury's indictment was filed on

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<sup>2</sup> Mr. McKee will cite to the Appendix to this petitioner's brief and the pages are numbered consecutively beginning with A1.

Counts 1, 3, 4, 5, and 6, and Mr. McKee's bond was set by Judge Edward Sweeney (A3, A23-A28).<sup>3</sup> The state also entered a Memorandum of Nolle Prosequi for the reason that the grand jury found insufficient evidence from which the state could pursue a conviction on Count 2 – stealing over \$500 (A22). On August 23<sup>rd</sup>, 2006, the cause was continued by the court to September 13, 2006. On September 13<sup>th</sup>, 2006, Mr. McKee was arraigned on the charges against him (A2, A30-A31). On September 19<sup>th</sup>, 2006, Mr. McKee filed a *pro se* motion requesting a speedy trial (A32-A34).<sup>4</sup> On October 17<sup>th</sup>, 2006, Assistant Public Defender Geralyn Ruess entered her appearance on Mr. McKee's behalf (A35). On November 14<sup>th</sup>, 2006, Mr. McKee's case was set for trial to begin on January 29<sup>th</sup>, 2007 (A4, A36). On January 29<sup>th</sup>, 2007, the cause was continued to February 9<sup>th</sup>, 2007 (A4). On January 31<sup>st</sup>, 2007, the state filed a substitute information in lieu of

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<sup>3</sup> According to the docket sheet entry, the Indictment was filed on August 8<sup>th</sup>, 2006, however, the Indictment is file-stamped August 15, 2006. Mr. McKee's bond issuance was signed and dated August 8<sup>th</sup>, 2006, by Judge Edward Sweeney.

<sup>4</sup> According to the docket sheet entry, Mr. McKee filed his request for a speedy trial on September 13<sup>th</sup>, 2006, however, the motion is file-stamped September 19<sup>th</sup>, 2006.

indictment (A37-A39). On February 9<sup>th</sup>, 2007, a jury trial was scheduled for April 30, 2007 (A5, A40). On May 9<sup>th</sup>, 2007, the cause was continued and a jury trial scheduled for July 2<sup>nd</sup>, 2007 (A6). On July 11<sup>th</sup>, 2007, the cause was continued to September 20<sup>th</sup>, 2007 (A8). On July 18<sup>th</sup>, 2007, and on August 2<sup>nd</sup>, 2007, Mr. McKee filed two *pro se* motions requesting a speedy trial (A8, A48, A52). On August 14<sup>th</sup>, 2007, Mr. McKee filed a motion to dismiss for violation of his statutory and constitutional rights to a speedy trial (A10, A53-A55).

On September 4<sup>th</sup>, 2007, Mr. McKee filed a notice of filing petition for writ of mandamus in the circuit court (A11, A56). On October 15<sup>th</sup>, 2007, Mr. McKee filed a Petition for Writ of Mandamus, requesting this Court to enter an order compelling the Honorable John J. Riley to grant his motion to dismiss for violation of statutory and constitutional right to a speedy trial, or in the alternative, direct that the St. Louis City Circuit Court to dismiss for violation of statutory and constitutional rights to a speedy trial with prejudice.<sup>5</sup> In the Petition, Mr. McKee argued that since he has

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<sup>5</sup> On August 24<sup>th</sup>, 2007, Mr. McKee filed a Petition for Writ of Mandamus in the Missouri Court of Appeals, Eastern District, in Tracy McKee v. State of Missouri, cause no. ED90182. The Eastern District denied Mr. McKee's writ on August 27<sup>th</sup>, 2007 (A10, A57).

suffered an unreasonable trial delay that is not attributable to his own actions, but based upon continuances of the cause, he is entitled to the dismissal of the charges against him, in cause no. 0622-CR00039. Mr. McKee also informed this Court he asserted his right to a speedy trial in October of 2006, and it has been ignored and/or denied.

On September 20<sup>th</sup>, 2007, the cause was continued to October 17<sup>th</sup>, 2007 (A11). On October 17<sup>th</sup>, 2007, the cause was continued to December 3<sup>rd</sup>, 2007 (A12). On October 25<sup>th</sup>, 2007, the state filed a motion to compel Mr. McKee to provide blood and saliva samples (A12, A59-A60). On November 6<sup>th</sup>, 2007, Assistant Public Defender Courtney Harness entered her appearance (A13).

In its Suggestions in Opposition to Petitioner's Application for a Writ of Mandamus ("Suggestions in Opposition") filed on November 2<sup>nd</sup>, 2007, the state argued this Court should reject Mr. McKee's claim as the delay of bringing the matter to trial, in large part, was a result of the his own actions. Respondent relied on Myszka v. State, 16 S.W. 3d 652, 658 (Mo. App. W.D. 2000) and State v. Joos, 966 S.W.2d 349, 352 (Mo. App. S.D. 1998) to support its argument that Mr. McKee contributed to the delay in various ways himself. Respondent also argued this Court should deny Mr. McKee's Petition for a Writ of Mandamus because Mr. McKee "failed to

exhaust his remedies with the trial court before seeking relief in this Court; and further, on a substantive basis, he has been responsible for a continuance in the matter and failed to demonstrate actual prejudice as a result of the delay of which he complains, and there is no evidence that any of the delays were brought on by Respondent or were purposefully oppressive.”

Respondent asserted that “to allow [Mr. McKee] to proceed here demanding dismissal for failure to secure a speedy trial, while at the same time delaying his own trial could set precedent giving future litigants a perverse incentive in that they could delay their trials below in hopes that a key state’s witness might perish or otherwise become unavailable” (footnote omitted).

On November 6, 2007, this Court sustained Mr. McKee’s Petition for Writ of Mandamus, ordered an alternative writ to issue, and set the cause for briefing. To avoid unnecessary repetition, additional facts may be set forth in the Argument portion of this brief.

**POINT RELIED ON**

**Petitioner Tracy McKee is entitled to an order compelling the Honorable John J. Riley to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, to direct the Respondent to dismiss the charges against him, in cause no. 0622-CR00039, with prejudice because Petitioner was denied his constitutional and statutory rights to a speedy trial without due process in view of the balancing process set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972). Petitioner has suffered an unreasonable trial delay that is not attributable to his own actions, and as a result, he has been prejudiced. Thus, Petitioner is entitled to the sanction of dismissal with prejudice of the charges against him, in cause no. 0622-CR00039, under § 545.780.1, RSMo.**

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972);

State v. Bolin, 643 S.W.2d 806 (Mo. banc 1983);

State v. Knox, 697 S.W.2d 261 (Mo. App. W.D. 1985);

State v. Ivester, 978 S.W.2d 762 (Mo. App. E.D. 1998);

§ 545.780, RSMo;

Mo. Const., Article I, Section 10 and 18(a);

U.S. Const., Amends. VI and XIV.

## ARGUMENT

**Petitioner Tracy McKee is entitled to an order compelling the Honorable John J. Riley to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, to direct the Respondent to dismiss the charges against him, in cause no. 0622-CR00039, with prejudice because Petitioner was denied his constitutional and statutory rights to a speedy trial without due process in view of the balancing process set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972). Petitioner has suffered an unreasonable trial delay that is not attributable to his own actions, and as a result, he has been prejudiced. Thus, Petitioner is entitled to the sanction of dismissal with prejudice of the charges against him, in cause no. 0622-CR00039, under § 545.780.1, RSMo.**

### *Standard of Review*

Mandamus is an extraordinary remedy and cannot compel a discretionary act. State ex rel. Sanders v. Kramer, 160 S.W.3d 822, 824 (Mo. App. W.D. 2005) citing State ex rel. Burns v. Gillis, 102 S.W.3d 66, 68 (Mo. App. W.D. 2003). This Court issues the writ to prevent the exercise of

powers exceeding judicial jurisdiction or to correct an abuse or judicial discretion. Kramer, *supra* at 824 citing State v. Saffaf, 81 S.W. 526, 528 (Mo. banc 2002). The writ is both to compel a court to do what is required by law and to undo what is prohibited by law. Kramer, *supra* at 824 citing State ex rel. Leigh v. Dierker, 974 S.W.2d 505, 506 (Mo. banc 1998). Under § 545.780, subsection 2, a defendant's statutory rights to a speedy trial "shall be enforceable by mandamus." RSMo.

### *Argument*

The speedy trial statute is intended to require the state to diligently pursue the prosecution of the case, and the state may not place the burden of such pursuit upon the defendant, nor may it through inertia, negligence or intent delay trial. State v. Hulsey, 646 S.W.2d 881, 882 (Mo. App. E.D. 1993). "The trial court bears the burden of preventing delay by the state under its obligation to deny continuances requested by the prosecution in the absence of compelling reasons, and its obligation not to continue cases because of general congestion of the docket." Id. citing § 545.780, RSMo 1978. Under § 545.780, subsection 1, once a defendant files his motion for speedy trial, the trial court is required to "set the case for trial as soon as reasonably possible thereafter." RSMo. "Neither failure to comply with this section nor the state's failure to prosecute shall be grounds for

dismissal of the information *unless the court also finds that the defendant has been denied his constitutional right to a speedy trial.*" State v. Bell, 66 S.W.3d 157, 164 (Mo. App. S.D. 2001) quoting § 545.780, RSMo; State v. Bohannon, 793 S.W.2d 497 (Mo. App. S.D. 1990) citing State v. Loewe, 756 S.W.2d 177, 181 (Mo. App. E.D. 1988) (Emphasis added). The protection of the right to a speedy trial attached at the point a formal indictment or arrest. Bell, *supra* at 164 citing State v. Fleer, 851 S.W.2d 582, 596 (Mo. App. E.D. 1993).

In the present case, even though Mr. McKee requested a speedy trial on September 19<sup>th</sup>, 2006, he has not been brought to trial in sixteen (16) months (from the date he was arrested to the date this Court issued its preliminary writ), and the trial delay is not attributable to Mr. McKee's own actions. Mr. McKee's case has been continued at least ten times by the court and these continuances were not conducted in Mr. McKee's presence in open court. There is nothing in the record to suggest Mr. McKee's defense counsel requested any continuances on his behalf. In addition, Mr. McKee was not given an explanation as to why the court continued his case nor was he brought in open court and given the opportunity to object to the significant number of continuances in his case.

On June 4<sup>th</sup>, 2006, Petitioner Tracy McKee was arrested and the next day charged in the St. Louis City Circuit Court with the class C felony of

tampering in the first degree in violation of § 569.080, RSMo (Count1), the class C felony of stealing over \$500 in violation of § 570.030, RSMo (Count 2), the class A misdemeanor of assault in the third degree in violation of § 565.070, RSMo (Count 3), the class A misdemeanor of resisting and arrest in violation of § 575.150, RSMo (Count 4), the class B misdemeanor of property damage in the second degree in violation of § 569.120, RSMo (Count 5), and the class B misdemeanor of trespass in the first degree in violation of § 569.140, RSMo (Count 6), in State of Missouri v. Tracy McKee, cause no. 061-1829 (A14-A18).

On June 5<sup>th</sup>, 2006, Mr. McKee's bond was set by Judge Michael Mullen (A17). The Public Defender's office entered its appearance on Mr. McKee's behalf, and at the request of the prosecutor the cause was continued to July 19<sup>th</sup>, 2006 (A1, A19). On July 19<sup>th</sup>, 2006, the cause was continued by the court to August 23<sup>rd</sup>, 2006 (A1). On August 15<sup>th</sup>, 2006, the grand jury's indictment was filed on Counts 1, 3, 4, 5, and 6, and Mr. McKee's bond was set by Judge Edward Sweeney (A3, A23-A28).<sup>6</sup> The state also entered a Memorandum of Nolle Prosequi for the reason that the grand jury found insufficient evidence from which the state could pursue a

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<sup>6</sup> See footnote 3. Also, the case was assigned a new cause number, 0622-CR00039.

conviction on Count 2 – stealing over \$500 (A29). On August 23<sup>rd</sup>, 2006, the cause was continued by the court to September 13<sup>th</sup>, 2006 (A29). On September 13<sup>th</sup>, 2006, Mr. McKee was arraigned on the charges against him (A2, A30-A31). On September 19<sup>th</sup>, 2006, Mr. McKee filed his formal request for a speedy trial (A32-A34). See State v. Davis, 903 S.W.2d 930, 936 (Mo. App. W.D. 1995) and State v. Smith, 849 S.W.2d 209, 214 (Mo. App. E.D. 1993) (a formal request is required to assert right to a speedy trial). After his case was continued for several unexplained reasons, Mr. McKee filed two *pro se* motions for speedy trial on July 18<sup>th</sup>, 2007, and on August 2<sup>nd</sup>, 2007 (A8, A48, A52). Mr. McKee also filed a motion to dismiss for violation of his right to a speedy trial on August 14<sup>th</sup>, 2007 (A10, A53-A55).

The Sixth Amendment of the United States Constitution and Article I, Section 18(a) of the Missouri Constitution also guarantee a criminal defendant the right to a speedy trial. State v. Ivester, 978 S.W.2d 762, 764 (Mo. App. E.D. 1998) citing Fleer, 851 S.W.2d at 595. 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). Ivester, *supra* at 764; State v. Bolin, 643 S.W.2d 806, 813-16 (Mo. banc 1983). The process requires the

balancing of 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. Barker, 407 U.S. at 530-532, 92 S. Ct. 2192-2193; Bolin, *supra* at 813; Ivester, *supra* at 764 citing Davis, 903 S.W.2d at 936.

The application of these factors must be considered on a case-by-case basis. State v. Williams, 34 S.W.3d 440, 447 (Mo. App. S.D. 2001) citing State v. Raine, 829 S.W.2d 506, 512 (Mo. App. W.D. 1992).

(1) Length of pretrial delay.

In applying the first factor of the four-factor test to the facts of the case, the length of pretrial delay is to some extent a "triggering mechanism," for unless the delay is presumptively prejudicial, there is no need to inquire into the other three factors. State v. Darnell, 858 S.W.2d 739, 745 (Mo. App. W.D. 1993) citing State v. Nelson, 719 S.W.2d 13, 18 (Mo. App. 1986); State v. Robinson, 696 S.W.2d 826, 831 (Mo. App. W.D. 1985). Missouri courts have held that a delay of eight months or more is presumptively prejudicial. Myszka v. State, 16 S.W.3d 652, 658 (Mo. App. W.D. 2000) citing State v. Joos, 966 S.W.2d 349, 352-353 (Mo. App. S.D. 1998); Dillard v. State, 931 S.W.2d 157, 162 (Mo. App. W.D. 1996); State v. Farris, 877 S.W.2d 657, 600 (Mo. App. S.D. 1994). In the present case, Mr. McKee was officially charged on June 5<sup>th</sup>, 2006. As of November 6<sup>th</sup>, 2007--

the date this Court issued its preliminary writ, Mr. McKee has been confined for sixteen (16) months awaiting trial. A sixteen-month delay is presumptively prejudicial; therefore, this Court should proceed to determine whether the other three factors will weigh in favor of finding a violation of Mr. McKee's right to a speedy trial. See Darnell, 858 S.W.2d at 745 citing State v. Ingleright, 787 S.W.2d 826, 831 (Mo. App. S.D. 1990).

(2) Reason for delay.

The second factor weighed is the reason for delay and if it was justifiable. Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Bolin, 643 S.W.2d at 814; State v. Knox, 697 S.W.2d 261, 263 (Mo. App. W.D. 1985). The burden is on the state to accord the accused a speedy trial and, if there is delay, the state must show reasons which justify that delay. Ingleright, 787 S.W.2d at 831 citing Robinson, 696 S.W.2d at 832; State v. Holmes, 643 S.W.2d 282, 287 (Mo. App. W.D. 1982). Delay attributed to the state's negligence or overcrowded court dockets are weighed against the state. Davis, 903 S.W.2d at 936 citing Raine, 829 S.W.2d at 512. Delays attributable to the defendant, such as asking for and being granted continuances, weight heavily against the defendant. Ingleright, 787 S.W.2d at 831 citing Robinson, 696 S.W.2d at 832; State v. Harris, 673 S.W.2d 490, 494 (Mo. App. E.D. 1984). In determining the length of delay, any delays attributable to

the defendant are subtracted from the total delay between the time of trial and the time a defendant is formally charged or actual restraints were imposed by arrest and being held to answer criminal charges. Joos, 966 S.W.2d at 352-353 citing Fleer, 851 S.W.2d at 596.

In Joos, the Southern District found that even though the defendant contributed to the total delay in various ways, the state had the responsibility to bring the defendant to trial. 966 S.W.2d at 353 citing Davis, 903 S.W.2d 936 and Bohannon, 793 S.W.2d at 503. The excuses suggested by the state for its failure to more quickly bring defendant to trial were not persuasive, and the length of delay and the reasons for it weighed against the state. Joos, *supra*.

The delay in this case was not caused by the actions of Mr. McKee, but by an overcrowded court system. A delay primarily the result of an overcrowded court is weighed against the state because the ultimate responsibility for such circumstances must rest on the government rather than with the defendant. See Barker, 407 U.S. at 531, 92 S. Ct. at 2192. The ultimate responsibility for an overcrowded circuit court and a new docketing system should not fall on Mr. McKee. According to the docket entries, the court continued Mr. McKee's case a total ten times. Most of these continuances were *after* Mr. McKee had filed his request for a speedy

trial on September 19<sup>th</sup>, 2006. According to the record, Mr. McKee was not brought in open court and given the opportunity to object to the significant number of continuances in his case.

On September 13<sup>th</sup>, 2006, Mr. McKee was arraigned on the charges against him (A2, A30-A31). On September 19<sup>th</sup>, 2006, Mr. McKee filed a *pro se* motion for speedy trial (A2, A32-A34). On October 17<sup>th</sup>, 2006, Assistant Public Defender Geralyn Ruess entered her appearance on Mr. McKee's behalf (A35). On November 14<sup>th</sup>, 2006, Mr. McKee's case was set for trial to begin on January 29<sup>th</sup>, 2007 (A4, A36). On January 29<sup>th</sup>, 2007, the cause was continued to February 9, 2007 (A3). On January 31<sup>st</sup>, 2007, the state filed a substitute information in lieu of indictment (A37-A39). On February 9<sup>th</sup>, 2007, a jury trial was scheduled for April 30, 2007 (A5, A40). On May 9<sup>th</sup>, 2007, the cause was continued and a jury trial scheduled for July 2<sup>nd</sup>, 2007 (A6). On July 11<sup>th</sup>, 2007, the cause was continued to September 20<sup>th</sup>, 2007 (A8, A48, A52).

On September 20<sup>th</sup>, 2007, the cause was continued to October 17<sup>th</sup>, 2007 (A11). On October 17<sup>th</sup>, 2007, the cause was continued to December 3<sup>rd</sup>, 2007 (A10). On October 25<sup>th</sup>, 2007, the state filed a motion to compel Mr. McKee to provide blood and saliva samples (A11, A59-A60). On

November 6<sup>th</sup>, 2007, Assistant Public Defender Courtney Harness entered her appearance (A13).

In its Suggestions in Opposition, the state argued this Court should reject Mr. McKee's claim because the delay of bringing the matter to trial, in large part, was a result of his own actions. Respondent also argued this Court should deny Mr. McKee's Petition for a Writ of Mandamus because Mr. McKee "has been responsible for a continuance in the matter and failed to demonstrate actual prejudice as a result of the delay of which he complains, and there is no evidence that any of the delays were brought on by Respondent or were purposefully oppressive." However, there is nothing in the record to suggest Mr. McKee was responsible for the trial delay or that his defense attorney requested continuances on his behalf. In addition, Mr. McKee was not brought in court and given an opportunity to object to the significant number of continuances in his case.

In its Suggestions in Opposition, the state also brings this Court's attention to two dates--January 31<sup>st</sup>, 2007, and July 27<sup>th</sup>, 2007. According to the state, Mr. McKee's attorney requested the cause be set for a plea of guilty on these dates, but it never happened "because of the actions by [Mr. McKee]." The state has not provided a description of Mr. McKee's alleged "actions" or an explanation as to how these actions prevented the

state from proceeding with its prosecution. Moreover, there is uncertainty that January 31<sup>st</sup>, 2007, and July 27<sup>th</sup>, 2007, were actual court settings. In reviewing the docket sheet entries, there was a trial setting for January 29, 2007, which was continued to February 9, 2007, and there was no court setting at all on or around July 27<sup>th</sup>, 2007. On January 31<sup>st</sup>, 2007, however, the state did file a substitute information in lieu of indictment (A37-A39).

While the state asserts that Mr. McKee is responsible for much of the delay, it fails to set forth evidence to show how Mr. McKee contributed to the trial delay. In addition, there is nothing in the record to suggest Mr. McKee played a role in the state's decision to wait so long to request his blood and saliva samples for DNA testing as suggested by the state in its Suggestions in Opposition. Generally, the state has discretion as to when it chooses to request DNA samples from defendants and when to file, if necessary, a motion to compel. In this case, the state decided to file its request for Mr. McKee's blood and saliva samples on September 11<sup>th</sup>, 2007, well over a year after Mr. McKee had been indicted.

The state has also failed to articulate a justifiable reason for a delay of sixteen (16) months in bringing Mr. McKee to trial for the ordinary, run-of-the-mill, street crimes for which he was charged. See Barker, 407 U.S. at 531, 92 S. Ct. at 2192. Moreover, the state has failed to show just how Mr.

McKee has contributed to the trial delay. This factor should weigh against Respondent and in favor of finding a violation of Mr. McKee's right to a speedy trial.

(3) Mr. McKee's assertion of his right to a speedy trial.

The third factor for consideration is when and how Mr. McKee asserted his right to a speedy trial. Darnell, 858 S.W.2d at 745. There is no fixed requirement for when the right must be asserted; rather, "the circumstances surrounding the assertion or failure thereof" comprise the factor to be weighed. Id. citing Nelson, 719 S.W.2d at 19. Here, Mr. McKee filed a motion for speedy trial on September 19<sup>th</sup>, 2006, about three months after he was arrested and charged. Mr. McKee put his defense attorney, the court, and the state on notice he wanted a speedy trial (A4, A17, A23, A24). There is nothing in the record to suggest Mr. McKee attempted to avoid having a speedy trial. The record suggests quite the opposite (A4, A17, A23, A24). After filing his *pro se* motion for a speedy trial on September 19<sup>th</sup>, 2006, Mr. McKee filed two more requests for a speedy trial, and a motion to dismiss for violation of his right to a speedy trial (A8, A48, A52). Over the last sixteen months, Mr. McKee also wrote Judge Riley numerous letters expressing his desire for a speedy trial (A1-A13, A41, A42, A46-A47, A51).

In Ivester, the Eastern District found the complete absence of any explanation as to why the trial court would not provide a trial on the request of the defendant for a speedy trial, the failure to honor or explain a dishonor of the request weighs against the state. 978 S.W.2d at 766. Here, Respondent has not provided any explanation for dishonoring Mr. McKee's request for a speedy trial filed on September 19<sup>th</sup>, 2006. On these facts, Mr. McKee asserted his right to a speedy trial and the failure to honor or even explain the decision not to honor his request should weigh against Respondent and in favor of finding a violation of Mr. McKee's right to a speedy trial.

(4) Prejudice to Mr. McKee.

A fourth factor is prejudice to Mr. McKee. Barker, 407 U.S. at 532, 92 S. Ct. 2193; Williams, 34 S.W.3d at 447. Prejudice, of course, should be assessed in the light of the interests of a defendant that the speedy trial right was designed to protect. This factor is assessed in light of the interests protected by the speedy trial right. Darnell, 858 S.W.2d at 745-746. These interests include: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Barker, 407 U.S. at 532, 92 S. Ct. 2193; Darnell, *supra* at 746. "Any claimed prejudice

resulting from delay must be actual prejudice apparent on the record or be reasonable inference.” Williams, 34 S.W.3d at 447 quoting Darnell, *supra* at 746. In the present case, Mr. McKee has suffered oppressive pretrial incarceration since June 4<sup>th</sup>, 2006, and anxiety and concern resulting from an unexplained, continuing delay attributable to Respondent. Presently, Mr. McKee has been incarcerated for sixteen (16) months awaiting trial on the charges of a class C felony of tampering in the first degree and several class A and B misdemeanors.

Mr. McKee has been deprived of his life and liberty without due process of law. Mr. McKee has not been provided with an explanation as to why it has taken over sixteen (16) months for his trial to begin on the ordinary, run-of-the-mill street crimes for which he was charged. As a result this delay, Mr. McKee is unable to work, spend time with his family and friends, and is forced to spend “dead time” in jail. See Barker, 407 U.S. at 533, 92 S. Ct. 2193. Mr. McKee does not assert he could prove his defense has been impaired, or that witnesses have disappeared or became otherwise unavailable, however, he has suffered actual prejudice because the circuit court has deprived of his freedom without due process of law. Since filing his formal request for a speedy trial on September 19<sup>th</sup>, 2006, two subsequent requests for a speedy trial, and motion to dismiss, the

Respondent has not provided Mr. McKee with reasons, if any exist, to justify the continuing trial delay. See Robinson, 696 S.W.2d at 832; Holmes, 643 S.W.2d at 287. While Mr. McKee's case received trial settings, they were continuously cancelled and rescheduled (A1-A13). Based on these facts, this factor should weigh against Respondent and in favor of finding a violation of Mr. McKee's right to a speedy trial.

Under the circumstances of this case, Mr. McKee is entitled to an order compelling the Honorable John J. Riley, to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, direct the Respondent to dismiss the charges against him, in cause no. 0622-CR00039, with prejudice. See Knox, 697 S.W.2d at 263 (holding that the sanction of dismissal is available to the trial court in a proper case of unreasonable trial delay, if based on the facts, including evidence the defendant may offer, the delay is unjustified).

Mr. McKee has a fundamental constitutional and statutory right to a speedy trial. Because Mr. McKee was denied his constitutional and statutory right to a speedy trial, he respectfully requests this Court to make

permanent its preliminary writ of mandamus and order the Honorable John J. Riley to dismiss with prejudice the charges against him in State of Missouri v. Tracy McKee, in cause no. 0622-CR00039, and discharge him, or order such relief this Honorable Court deems just and fair.

## CONCLUSION

For the reasons set forth herein, Petitioner Tracy McKee prays this Honorable Court to make permanent its preliminary writ of mandamus and order the Honorable John J. Riley to dismiss with prejudice the charges against him in State of Missouri v. Tracy McKee, in cause no. 0622-CR00039, and discharge him, or order such relief this Honorable Court deems just and fair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of November, 2007, a true and correct copy of the attached brief and diskette containing a copy of this brief was mailed, postage pre-paid to:

Charles Billings, Attorney for Respondent, St. Louis Circuit  
Attorney's Office, 1114 Market Street, Room 401, St. Louis, MO 63101; and  
Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri  
65102.

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

The Honorable John J. Riley, Jr., 22<sup>nd</sup> Judicial Circuit Court, Division  
Sixteen, 1114 Market Street, St. Louis MO 63103; and  
Petitioner Tracy McKee, St. Louis City Justice Center, 200 S. Tucker,  
St. Louis, MO 63102.

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## CERTIFICATE OF COMPLIANCE

I, Maleaner Harvey, hereby certify the following. Pursuant to Missouri Supreme Court Rule 84.06(b), this brief was prepared using Microsoft Word, Office 2002, in Book Antigua, 13 point font, and includes the information required by Rule 55.03. The brief does not exceed 31,000 words and 2,200 lines. The word-processing software identified that this brief contains 5,998 words, 604 lines, and 32 pages, including the cover page, signature block, and certificates of service and of compliance.

The diskette filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee Anti-Virus software, which was updated in December 2006, and found virus-free.

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