No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

DAVID T. GARCIA,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a defendant who flees from the scene of a crime, and remains at large for a period of years as a result of that flight, nevertheless claim that his right to a speedy trial under the Sixth Amendment has been violated, without proving that he was prejudiced as a result of the delay in his apprehension?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, represented by the office of the St. Louis County Prosecuting Attorney, is the plaintiff in the underlying criminal proceeding; the respondent, David T. Garcia, is the defendant. Respondent was the relator below in an action in mandamus brought before the Supreme Court of Missouri against the Honorable Steven H. Goldman, Judge of the Circuit Court of St. Louis County. Petitioner, State of Missouri, represented Judge Goldman (respondent) below and seeks relief before this Court from the judgment of the Supreme Court of Missouri.

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The Missouri Supreme Court's opinion, entered on July 16, 2010, is reported at *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907 (Mo. 2010), and is reprinted in the Appendix at A1.

The order of the Missouri Court of Appeals, Eastern District, denying respondent's petition for a writ of mandamus, was entered on April 14, 2010, and is included in the Appendix at A16.

JURISDICTION

The Supreme Court of Missouri denied petitioner's motion for rehearing on August 31, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ....

Constitution of the United States, Amendment XIV:

... No State shall ... deprive any person of life, liberty or property without due process of law ....

STATEMENT OF THE CASE

This petition seeks to clarify whether a defendant who flees from the scene of a crime and remains at large for a period of years may claim that his right to a speedy trial under the Sixth Amendment has been violated without proving that he was prejudiced as a result of the delay.

On April 9, 1998, Rigoberto Dominguez was working in the kitchen of the Sunny China International Buffet restaurant in Kirkwood, St. Louis County, Missouri. App. A2. Kwan Tung Tse, the owner of the restaurant, opened the kitchen door in response to a knock and let in a man who entered, talked to an employee and then left. App. A2. About a minute later, the man returned carrying a shotgun; he approached Dominguez and shot him in the abdomen at close range. App. A2. Dominguez was hospitalized but survived the assault. App. A2.

Meliton Gonzalez, another employee at Sunny China, followed the shooter outside and saw him get into a brown car. App. A2. Police responded immediately to the scene and interviewed the witnesses. App. A2. Gonzalez and two other witnesses, including the victim, identified the assailant as David T. Garcia, respondent herein. App. A2. Nabor Garcia, who is David Garcia's cousin and who shared a residence with him at the time of the shooting, said he saw his cousin come into the kitchen with the gun but did not witness the actual shooting. App. A2.

Police found a Mossburg pump-action 12-gauge shotgun discarded just north of the doorway exiting

from the kitchen. App. A2. They photographed the scene and created a diagram of the restaurant's kitchen area. App. A2.

Through their interviews of the witnesses, police obtained not only Mr. Garcia's name, but his address, birthdate and Social Security number. App. A2. Through that evening and into the early morning, they searched Mr. Garcia's residence and canvassed his apartment complex but were unable to locate him. App. A2-A3. In the weeks and months that followed, numerous members of the Kirkwood Police Department spoke to several people, all of whom were acquainted with Mr. Garcia and with each other, in an unsuccessful attempt to find Mr. Garcia's whereabouts. App. A18.

In January 2001, Kirkwood police were contacted by representatives of the St. Louis County Prosecuting Attorney's office and asked to make further attempts to locate Mr. Garcia, due to concerns that the statute of limitations might soon expire. App. A3. Police had received information that Mr. Garcia might be in any of a number of communities in north and central St. Louis County, and followed up on that information in early 2001. App. A3. On at least three occasions, they were admitted to certain residences and searched them, but did not locate Mr. Garcia, nor did they receive any leads or other information as to his whereabouts. App. A3.

On February 21, 2002, the St. Louis County Grand Jury handed up an indictment charging Mr. Garcia with assault in the first degree, alleging that on April 9, 1998, he knowingly caused serious

physical injury to Rigoberto Dominguez by shooting him, and armed criminal action, alleging that he committed that assault in the first degree by, with and through the use of a deadly weapon, to-wit, a shotgun. App. A3.

Mr. Garcia's whereabouts between the night of the shooting in April 1998 and September 2000, when he applied for a job in Chicago, remain unknown. App. A4, A7. He filed income tax returns, using his own name and a Chicago address, for tax years 2000 through 2008, and generally lived openly under his own name, date of birth and Social Security number from late 2000 onward. App. A3-A4, A7, A18.

In early 2009, Detective Steve Urbeck of the Kirkwood Police Department learned that the case against Mr. Garcia was still active and that Mr. Garcia had yet to be located or arrested. App. A3. He entered Mr. Garcia's Social Security number into a computer system called Accurint, and received a listing indicating an address of 3520 West 59th Street in Chicago. App. A3. Although this address turned out to be several months out of date, through the assistance of the Chicago Police Department's Fugitive Apprehension Section, police discovered that Mr. Garcia was working at the Renaissance Hotel in Chicago. App. A3. On February 11, 2009, Chicago police arrested Mr. Garcia on the St. Louis County indictment when he arrived for work. App. A3.

On or about December 7, 2009, Mr. Garcia filed a motion to dismiss the indictment against him, alleging violation of his right to a speedy trial under

the Sixth Amendment. App. A4. The trial court heard evidence on the motion in February and March, 2010, and considered a voluminous record of documents entered by stipulation. App. A17. The parties also stipulated that four witnesses endorsed by the state could not be located and are unavailable to testify; that videotaped statements of two witnesses (one of whom is still available, one of whom is not) have been lost; and that the Sunny China restaurant was demolished two years before Mr. Garcia was arrested. App. A4.

On March 26, 2010, the trial court entered an Order denying Mr. Garcia's Motion to Dismiss. App. A17-A19. The trial court applied the four-factor balancing test set forth by the Court in *Barker v. Wingo*, 407 U.S. 514 (1972). App. A17-A19. This test directs courts addressing a claim of a speedy-trial violation to consider the length of the delay; the reasons for the delay; the defendant's assertion of his right; and prejudice to the defendant. *Id.* at 533. In this case, the trial court found the length of the delay to be presumptively prejudicial, and also found that Mr. Garcia had asserted his speedy-trial rights in a reasonably timely manner; thus, the trial court weighed the first and third *Barker* factors in Mr. Garcia's factor and against the state. App. A17-A18. As to the second factor (the reason for the delay), the trial court found that while "investigating officers did not use reasonable diligence to find Defendant, Defendant fled Missouri. This factor goes against both the State and Defendant." App. A18. Finally, in considering the fourth factor, the trial court found that Mr. Garcia "is not actually prejudiced by the delay," and after balancing all four of the *Barker*

factors, denied Mr. Garcia's motion to dismiss. App. A19.

Mr. Garcia filed a petition for a writ of mandamus before the Missouri Court of Appeals, Eastern District, seeking relief from the trial court's order. The petition for writ was denied by the Court of Appeals on April 14, 2010. App. A16.

Mr. Garcia then filed a petition for a writ of mandamus before the Supreme Court of Missouri. App. A4. The Missouri court applied the same four-factor *Barker* test employed by the trial court; both the state and Mr. Garcia agreed that the first factor (the length of the delay) and the third factor (the timely assertion of the right) should be weighed in Mr. Garcia's favor. App. A5-A8.

In considering the second factor, the Missouri court rejected the state's argument that "Garcia fled St. Louis and, therefore, should bear some responsibility for the delay in his apprehension and prosecution." App. A7. Instead, the court accepted Mr. Garcia's argument that "the state offered no evidence that he left Missouri or concealed his identity to avoid prosecution" and held the state solely responsible for the delay. App. A7. The court noted that there was no evidence that Mr. Garcia was aware of the indictment against him. "In the absence of evidence that Garcia did something wrong, this factor – the reason for the delay – weighs against the state." App. A7.

The Missouri court then considered the issue of prejudice, the final factor in the *Barker* analysis. In doing so, it relied on the Court's opinion in *Doggett v.*

United States, 505 U.S. 647 (1992), in which the Court held that a defendant's speedy trial rights had been violated even though he had not identified any prejudice resulting from the delay. Applying *Doggett* and presuming that the delay had prejudiced Mr. Garcia, the Missouri court held that the state had not proven that the delay had left Mr. Garcia's "ability to defend himself unimpaired" and therefore had not rebutted the presumption of prejudice. App. A8-A11. In a 4-3 decision, the Missouri Supreme Court held that the seven-year delay between Mr. Garcia's indictment and his arrest violated his Sixth Amendment right to a speedy trial. App. A11.

In dissent, Chief Justice William R. Price Jr., argued that the majority had used the correct test (the four-factor *Barker* test) but reached the wrong result. App. A12. Justice Price noted that the second factor "asks 'whether the government or the defendant is more to blame for the delay.'" App. A12 (quoting *Barker*, *supra*, 407 U.S. at 530). "On these facts, Garcia was more to blame; he left the jurisdiction," Justice Price observed, noting that Mr. Garcia knew he was suspected of shooting the victim in front of multiple witnesses who could identify him. App. A12. Justice Price went on to argue that the *Doggett* presumption of prejudice should not be applied if the second factor is weighed against Mr. Garcia. App. A13-A14. In such a case, with the burden of proof on Mr. Garcia (to prove prejudice) rather than on the state (to overcome a presumption of prejudice), Justice Price argued that Mr. Garcia had not affirmatively proven that the delay had prejudiced him. App. A14-A15. "Absent a specific showing, it is difficult to see how the disappearance

of the government's key witnesses will prejudice Garcia." App. A14-A15.

The Petitioner, State of Missouri, seeks review of the Missouri Supreme Court's decision because it distorts the Court's analysis in *Barker* relating to whether a defendant's conduct has waived a claim that his right to a speedy trial has been violated. By relieving Mr. Garcia of any responsibility for any delay in his apprehension, the Missouri court's decision expands the rights afforded by the Sixth Amendment and will allow criminal defendants to obtain dismissal of the charges against them even if they were partially responsible for the delay in their prosecution and even if they have not been actually prejudiced by the delay. Such a rule is unfair to the state, and it hinders the orderly administration of justice.

REASONS FOR GRANTING THE PETITION

The right to a speedy trial, set forth in the Sixth Amendment, is, as the Court has observed, "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo*, *supra*, 407 U.S. at 519. Among the several reasons why this is so is that deprivation of the right – that is, a trial that is *not* speedy – often works to the benefit of the accused, in contrast to the denial of other constitutional rights afforded the defendant.

Accordingly, courts determining whether this right has been violated have properly been directed to examine not only the conduct of the government – the chief if not exclusive focus of inquiries into whether other constitutional rights have been violated – but also the conduct of defendants, to see whether their actions have contributed to the delay in their prosecution and, if so, whether those actions have served to waive any claim of a speedy-trial violation.

This petition should be granted for three reasons. First, the Missouri Supreme Court, having declined to hold Mr. Garcia responsible for the delay in his arrest and prosecution because there was no evidence that he "did something wrong" in fleeing the St. Louis area following the shooting, has expanded the right to a speedy trial under the Sixth Amendment by removing the waiver-doctrine underpinnings from the Court's Sixth Amendment jurisprudence. Second, this expansion of the speedy trial right will require police departments and other law enforcement authorities to expend scarce

resources to track down and apprehend suspects who have deliberately and voluntarily fled to other jurisdictions, at the risk that their failure to do so will result in the dismissal of charges against those suspects. Third, the Missouri court's decision directly conflicts with a number of decisions by several different federal circuits, among them the United States Court of Appeals for the Sixth Circuit in *Wilson v. Mitchell*, 250 F.3d 388 (6th Cir. 2001) and the United States Court of Appeals for the Fifth Circuit in *Robinson v. Whitley*, 2 F.3d 562 (5th Cir. 1993).

I. By refusing to follow *Barker v. Wingo* and *Doggett v. United States* and holding that a defendant who has shown himself to be partially responsible for the delay in his arrest and prosecution may establish a speedy-trial violation irrespective of whether he was prejudiced by the delay, the Missouri court has expanded the right to a speedy trial under the Sixth Amendment beyond the limits set forth by the Court.

When the Court in *Barker v. Wingo*, established its four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial had been violated, it identified three primary ways in which the right to a speedy trial differs from other constitutional rights. First, society has an interest in providing speedy dispositions of cases that, the Court noted, exists "separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, *supra*, 407 U.S. at 519. Second, unlike other constitutional rights, the deprivation of the right to a speedy trial may work to the *advantage* of the

defendant, because witnesses and evidence may become unavailable to the prosecution as time passes between the commission of a crime and a trial of the accused. *Id.* at 521. Third, the Court noted perhaps the most fundamental difference between the speedy-trial right and other constitutional rights:

> ...the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

Id. In crafting its four-factor balancing test, the Court rejected two more rigid approaches "urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right" to a speedy trial. *Id.* at 522-23. The Court first rejected the suggestion that it require, as a matter of constitutional right, that a criminal defendant be offered a trial within a certain specified period of time. "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Id.* at 523.

The second alternative, which the *Barker* Court called the "demand-waiver" doctrine, would have restricted consideration of speedy-trial claims to those cases in which the defendant had requested a speedy trial. *Id.* at 524-25. In rejecting this approach, the Court explained the reasoning behind what would become the four-factor *Barker* test:

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application.

Id. at 528. Significantly, the *Barker* Court explained that the uniqueness of the speedy-trial right requires that the defendant bear some responsibility in asserting a claim that the right has been violated because of the uncertainty in ascertaining whether the speedy-trial right had been violated, in contrast to other constitutional rights in which the government must show that any waiver of the right was knowingly and voluntarily made. *Id.* at 529.

Therefore, while the *Barker* Court's four-factor test "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial," *id.*, the *Barker* test allows for, and even requires, an examination of the defendant's conduct as well. "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Id.*

The *Barker* Court's admonition that standard waiver doctrine should still be considered in the speedy-trial analysis, notwithstanding its rejection of the rigid demand-waiver rule, was rooted in a

recognition that delay may, owing to the specific details of the case, impair a defendant's ability to prepare and present a defense, or *benefit* the defendant, as in those cases when the unavailability of witnesses or evidence makes it more difficult, or impossible, for the government to meet its burden of proof. Because of the indisputable incentives for criminal defendants to delay their arrest and prosecution, their actions in causing that delay must be considered in determining whether the right to a speedy trial has been violated. *See Vermont v. Brillon*, 129 S.Ct. 1283, 1290 (2009).

Twenty years after *Barker*, the Court decided *Doggett v. United States*, and again the defendant's responsibility (or lack thereof) for the delay was at the forefront of the speedy-trial analysis. In *Doggett*, the Court considered whether the defendant was deprived of his right to a speedy trial as the result of a delay of nearly 8½ years between his indictment in a drug conspiracy and his arrest on that indictment. *Id.* at 648-50. The indictment was handed up in February 1980, and nearly a month later, law enforcement officers attempted to arrest Doggett at his parents' house, only to be told that he had left the country for Colombia four days earlier. *Id.* at 648-49. Doggett would not return to America for another 2½ years, and would not be arrested until six years after that. *Id.* at 649-50.

In addressing whether Doggett bore any responsibility for the delay, the government suggested to the Court that Doggett "knew of his indictment years before he was arrested." *Id.* at 653. If this had been true, or at least arguable from the record, the result would have been that the second

and third *Barker* factors (the reason for the delay and the timely assertion of the right, respectively) would have weighed against him. Unfortunately for the government, it had stipulated (at Doggett's conditional guilty plea) to the absence of any information that Doggett was aware of his indictment before he left the country or at any time prior to his arrest. *Id.* at 653. Nevertheless, as the Court observed in *Doggett*, the analysis of the second prong of the *Barker* test centers on "whether the government or the criminal defendant is more to blame for [the] delay," *id.* at 528, and its finding that Doggett himself was *not* to blame for the delay does not undermine that principle.

In this case, although the State did not offer proof that Mr. Garcia knew of the indictment returned against *him*, neither did it concede the fact, and more to the point has always maintained that Mr. Garcia fled from the St. Louis area specifically to avoid arrest and prosecution. The trial court, in turn, found no evidence that Mr. Garcia was aware of his indictment or the warrant for his arrest, but also found that Mr. Garcia had "fled from his home address" knowing that there had been witnesses at the scene of the crime (including the victim) and that the police would be looking for him.[1] App. A18.

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[1] The 11th Circuit has noted a distinction, for purposes of evaluating the second *Barker* factor, between violent crimes and non-violent crimes (such as making a false statement). *See United States v. Ingram*, 446 F.3d 1332, 1337-38 (11th Cir. 2006) (holding government responsible for two-year delay in the absence of evidence defendant knew of indictment or arrest warrant when "[h]is offense was not a violent crime"). At the very least, it was reasonable for the trial court to conclude that Mr. Garcia, having committed an assault with a shotgun, in a

Accordingly, the trial court found that the State (because of its lack of reasonable diligence in pursuing Mr. Garcia) *and* the defendant (because of his flight from Missouri) should bear responsibility for the delay in Mr. Garcia's arrest and prosecution, and thus the second *Barker* factor was weighed against both parties. App. A18. The trial court's analysis is further supported by the fact that, as the Missouri court noted in its opinion, "Garcia's whereabouts between the April 1998 shooting and September 2000 are unknown." App. A7. This tends to indicate not only that Mr. Garcia fled from the St. Louis area to avoid prosecution, but also that he then "lay low" for a period of time, and once he had concluded that the trail had cooled sufficiently, he resurfaced, albeit in the foreign and much larger jurisdiction of the Chicago area.

By rejecting the trial court's analysis[2] and holding the State solely responsible for the delay, the Missouri court ignored the clear direction of *Barker* and *Doggett*, which require courts to consider the extent to which defendants' own actions may cause the delays in their prosecutions in addressing the second prong of the *Barker* analysis. In its place, the Missouri court added a new requirement: a delay cannot be attributed to the defendant (and therefore weighed against the State) "in the absence of

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public place, in front of several witnesses, should have anticipated that police would promptly respond to the scene and immediately begin searching for the shooter.

[2] *Doggett* suggests the Missouri court should have granted more deference to the trial court's determination that both parties were responsible for the delay. *Doggett*, *supra*, 505 U.S. at 652. *See also United States v. Walker*, 92 F.3d 714, 718 (8th Cir. 1996).

evidence that [defendant] did something wrong." App. A7.

This new requirement is without basis in Sixth Amendment jurisprudence, whether before this Court, the federal courts or the courts of Missouri. To the contrary, courts applying the *Barker* test have repeatedly held defendants responsible for delays in their capture and prosecution even when the actions taken by the defendants (resulting in the delay) are completely blameless from a moral standpoint. To mention only a few examples, defendants have been held responsible for delays resulting from their pursuit of interlocutory appeals, *United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986); the filing of a motion for a change of venue, *Wells v. Petsock*, 941 F.2d 253, 258 (3rd Cir. 1991); and a defendant's request for a mental-health evaluation, *Ringstaff v. Howard*, 885 F.2d 1542, 1543 (11th Cir. 1989).[3] Surely there is nothing "wrong" with the defendants in those and other cases requesting more time to prepare a defense, or asserting other important trial-related rights, and yet those defendants have still properly been held responsible for the attendant delays in their trials.

The effect of the Missouri court's finding that the state was solely responsible for the delay was significant in that it allowed the court to follow *Doggett* and presume that Mr. Garcia had been

[3] Missouri courts have likewise held defendants responsible for delays resulting from these and other morally blameless reasons. *See, e.g., State v. Owsley*, 959 S.W.2d 789, 794 (Mo. 1997) (defense requests for mental-health evaluations and motion for change of judge); *State v. Bolin*, 643 S.W.2d 806, 813-14 (Mo. 1983) (defense motions to quash indictment).

prejudiced as a result of the delay. Before Doggett's case reached this Court, every court to consider the matter had found that the delay in his prosecution was attributable to negligence on the part of the government, but had ruled that Doggett was not entitled to relief because he had failed to prove any actual prejudice resulting from the delay. *Doggett, supra*, 505 U.S. at 650-51. The Court, however, observed that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," and held that prejudice can be presumed in cases of prolonged delay owing to the negligence of the government. *Id.* at 655-56. "While not compelling relief in every case ... neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 657. Citing the government's "egregious persistence in failing to prosecute Doggett," the Court held that prejudice should have been presumed and, since the government had not "affirmatively proved that the delay left his ability to defend himself unimpaired," Doggett's speedy trial right had been violated. *Id.* at 657-58 and n.4.

In this case, the Missouri court also applied *Doggett* and presumed that Mr. Garcia had been prejudiced by the delay in his prosecution, a conclusion that was only possible if the court found the state completely responsible for the delay. Thus, the Missouri court improperly equated the failure of law enforcement, despite their efforts, to locate Mr. Garcia more promptly with the inaction by the authorities in *Doggett*, who on several occasions received specific information as to the possible whereabouts of their quarry and made no attempt to follow up on that information.

The Missouri court's finding that prejudice should be presumed, in turn, placed the burden upon the state to rebut the presumption of prejudice, rather than upon Mr. Garcia to prove he was *not* prejudiced. This allowed the Missouri court to conclude that the state had not proven that the delay left Mr. Garcia's "ability to defend himself unimpaired" as required by *Doggett*, *supra*, when prejudice is presumed. The Missouri court reached this conclusion, in part, by misquoting *Barker*. Noting that four witnesses to the shooting had disappeared while Mr. Garcia was at large, the Missouri court declared that "[i]n such a circumstance, *Barker* compels the conclusion that the prejudice to Garcia is obvious." App. A10. Viewed in its proper context, however, the language at issue makes clear that the *Barker* Court was referring to *defense* witnesses who die or disappear during a delay. *See Barker*, *supra*, 407 U.S. at 532. The Missouri court went on to note that only two of the original seven witnesses interviewed by police are currently available to identify Mr. Garcia as the shooter, and "[t]heir testimony will be to events that occurred more than 12 years ago," suggesting that their memories may be faulty owing to the passage of time. App. A10-A11. The Missouri court concluded: "Too many witnesses and too many years have slipped away for the state to carry this burden." App. A11. However, the only witnesses that have slipped away are witnesses for the state. Countless courts have applied *Barker* and held, in the prejudice analysis, that prejudice from missing witnesses, and/or witnesses with faded memories, results only when those witnesses are defense witnesses. *See United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) (citing cases). "The failure of a prosecution

witness's memory does not support a claim that the Sixth Amendment was violated." *Id.* Neither Mr. Garcia nor the Missouri court has identified a single witness who would have testified on his behalf but is now unavailable, or whose memory has faded, owing to the delay. *See United States v. Dirden*, 38 F.3d 1131, 1138 (10th Cir. 1994). Yet Mr. Garcia's claim that his speedy-trial rights were violated was successful because the Missouri court presumed he was prejudiced, and found the state had not overcome that presumption even though the *state*'s case had become demonstrably weaker with the passage of time.

In short, the Missouri court's decision expands the right to a speedy trial beyond the limits established by the Court, in that it removes from the balancing test set forth in *Barker* any consideration of the defendant's responsibility for the delay in his apprehension and prosecution.

II. The Missouri court's expansion of the speedy trial right will place an undue burden on law enforcement authorities and reward defendants who have deliberately and voluntarily fled to other jurisdictions.

The Missouri court's opinion will also have a detrimental effect on law enforcement, in that it requires police agencies to commit manpower and resources to hunt down and apprehend defendants who have voluntarily fled the jurisdiction, or run the risk that their failure to do so will result in the dismissal of the case. It also creates an incentive for defendants to flee the jurisdictions in which their crimes are committed, and further draws an

inappropriate distinction between those who flee and then, once in a foreign location, live openly, and those who take more affirmative steps to conceal their identity and whereabouts.

By weighing the second *Barker* factor (the reason for the delay) against the State, owing to what it termed "a lack of diligence and negligence" on the part of the Kirkwood police, the Missouri court has created a significant burden for police and other law enforcement agencies. The record before the Missouri court showed that police made a determined yet unsuccessful effort, in the weeks and months following the shooting, to locate Mr. Garcia. Subsequent to that initial effort, whenever they received information as to Mr. Garcia's whereabouts, they followed up on those leads, to no avail. Finally, Mr. Garcia was located through the efforts of one police detective who discovered that the case had gone cold and, on his own initiative, found Mr. Garcia in Chicago. None of this police work would have been necessary had Mr. Garcia not fled the scene of the crime, hid himself in parts unknown, and then made his way to Chicago where, some 2½ years later, he began to live openly. Yet the Missouri court held the police effort to find Mr. Garcia lacking, and absolved Mr. Garcia of any responsibility for the actions that made it necessary to find him in the first place.

In order to comply with the Missouri court's new standard, then, police departments and other law-enforcement agencies across the state (large and small) will have to divert scarce resources from their regular duties in order to locate defendants who have voluntarily absented themselves from the

jurisdiction. Furthermore, the Missouri court's opinion makes it clear that the police will have to do more than the Kirkwood police did in this case in order to meet this new obligation. The Ninth Circuit has observed that "[t]here is no requirement that law enforcement officials make heroic efforts to apprehend a defendant who is purposely avoiding apprehension." *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993) (quotations and citation omitted). The Missouri court's opinion, however, will require law enforcement to become a bit more heroic in their pursuit of those who avoid apprehension by fleeing the scene of the crime. If defendants remain at large despite this increased effort, or if police make the reasonable choice not to expend undue time and resources to find fugitive defendants, the effect will be the same: when the defendants are ultimately apprehended, they will be able to claim a violation of their speedy trial rights in spite of their own actions, simply because the police did not find them quickly enough.

Thus, the incentive for any defendant to absent himself from the charging jurisdiction, present enough in any case, is increased when a defendant cannot be held responsible for the delay that results from his flight. Furthermore, by focusing on the fact that (after the first 2½ years) Mr. Garcia lived openly in Chicago under his own name, the Missouri court has drawn an illogical distinction between those who flee and (eventually) make no attempt to conceal themselves in their new homes and those who take further affirmative steps, beyond the mere flight, to conceal themselves and avoid capture.

In *United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008), Judge Bybee, concurring in the result, noted a similarly perverse result from the majority's decision. The Ninth Circuit in *Mendoza* had applied the Court's decision in *Doggett*, *supra*, and held that the eight-year delay between the defendant's indictment and his arrest was attributable solely to the government's negligence. *United States v. Mendoza*, *supra* at 764-65. Significantly, the government not only knew that Mendoza had fled to the Philippines, but also had specific information as to his whereabouts there and contact information for his relatives; nevertheless, they failed to act on that information and merely put out a warrant for Mendoza's arrest so he would be arrested if he ever returned to the United States. *Id.* at 763. Because, following *Doggett*, the majority presumed that Mendoza was prejudiced by the delay and that the government had not rebutted that presumption, the Ninth Circuit held that Mendoza's speedy trial rights were violated. *Id.* at 765. Judge Bybee, concurring in the result, noted that only the *Doggett* presumption of prejudice compelled the result reached by the majority. *Id.* at 767-68 (Bybee, J., concurring). In concluding his concurrence, Judge Bybee observed:

> As the government closed in on Mendoza, he fled to the Philippines and hampered efforts to investigate and indict him. Today, however, *Mendoza* proves that under *Doggett*, you can still claim your right to a speedy trial has been violated if you run, but you don't hide.

Id. at 768. *Cf. United States v. Wanigasinghe*, 545 F.3d 595, 598 (7th Cir. 2008) (declining to apply *Doggett* presumption of prejudice when defendant

fled to Sri Lanka and left deceptive information behind as to where he was going).

The Missouri court's decision provides a similar incentive for defendants not only to flee the jurisdiction but to take further steps, once in a new location, to avoid prosecution. If Mr. Garcia, whenever he arrived in Chicago, had lived under an assumed name and a counterfeit Social Security number, presumably the Missouri court would have held him responsible for the attendant difficulties in locating and arresting him. It makes no sense to hold those who run *and* hide responsible for the delay in their capture, but not those who run and don't hide; in both cases the government will have to make efforts to locate the defendants, wherever they might be, and to bring them to justice.

In sum, the Missouri court's decision has simultaneously created an incentive for defendants to flee in order to avoid capture, and increased the burden on law enforcement to prove their diligence in attempting to locate those who are motivated by that incentive. The result will be a disruption in the orderly administration of justice.

III. The Missouri court's decision conflicts with decisions by several different federal circuits, among them the United States Courts of Appeals for the Fifth and Sixth Circuits.

The Missouri court's decision also conflicts with decisions by several federal courts.

In *Wilson v. Mitchell*, 250 F.3d 388 (6th Cir. 2001), the U.S. Court of Appeals for the Sixth Circuit

addressed what it termed a question unanswered by *Doggett*: "the extent to which a defendant's attempt to evade discovery affects the Sixth Amendment analysis." *Id.* at 395. The defendant in *Wilson* evaded capture for 22 years, partially due to, among other active measures on his part, using 13 different variations on his name, five different addresses and two Social Security numbers. *Id.* at 392. However, while there was evidence that the police actively pursued Wilson for the first six years he was at large, "there is no evidence that there was any attempt to locate Wilson thereafter" until shortly before he was arrested, some 16 years later. *Id.* Therefore, the court observed, "[w]e have an active wrongdoer (Wilson) and a passive wrongdoer (the state), both of whom are at fault for a 22-year delay between Wilson's indictment and arrest." *Id.* at 395. Accordingly, the Sixth Circuit held Wilson primarily responsible for the delay in bringing him to trial and, more relevant to this case, held that Wilson was not entitled to a presumption of prejudice under *Doggett* because he was partially responsible for the delay, and instead denied his claimed speedy trial violation because he had not proven actual prejudice. *Id.* at 395-96.

The United States Court of Appeals for the Fifth Circuit followed a similar analysis in *Robinson v. Whitley*, 2 F.3d 562 (5th Cir. 1993), holding the *Doggett* presumption of prejudice did not apply to a defendant who escaped from police custody and who was held responsible for approximately two-thirds of the total delay. "Any threat to the fairness of his trial occasioned by a delay in its commencement was obviously a risk Robinson was willing to take." *Id.* at 570. In this case, while there is no evidence that Mr.

Garcia actively tried to avoid capture to the same extent that the defendant in Wilson did, or that he escaped from police custody as the defendant in Robinson did, he nonetheless contributed to the delay in his apprehension by fleeing the St. Louis area. Contrary to the holdings in *Robinson* and *Wilson*, however, the Missouri court declined to hold Mr. Garcia responsible for this contribution to the delay, and, in turn, applied the *Doggett* presumption of prejudice where the Fifth and Sixth Circuits had not.

In *Rashad v. Walsh*, 300 F.3d 27 (1st Cir. 2002), the United States Court of Appeals for the First Circuit addressed a delay of five years and eight months between indictment and arrest in ruling on a petition for a writ of habeas corpus. For 15 of those months, following the defendant's release from jail in Texas, his whereabouts were unknown to the prosecuting authorities in Massachusetts, who concededly were aware that the defendant was incarcerated in Texas and had negligently failed to lodge a detainer against him. *Id.* at 37-38. About where he went once he was released, the court observed, "we know very little. For aught that appears, the petitioner vanished into the Bermuda Triangle." *Id.* at 38. "Consequently, we cannot estimate how easy it would have been for the Massachusetts authorities to locate him. *Id.* at 38. The First Circuit held that the Massachusetts Appeals Court had properly held this portion of the delay against the defendant. *Id.*

Following this 15-month period, the defendant returned to Massachusetts and lived under his own name; during the four months that followed, he was

stopped twice by the police for traffic violations and once posted bail for a friend, but was not arrested on his outstanding warrant for kidnapping, rape and assault until the warrant was discovered during a sweep by the Immigration and Naturalization Service. *Id.* at 32. Nevertheless, the First Circuit declined to weigh this four-month period against the government. "Although it was incumbent upon the Commonwealth to seek the petitioner with diligence ... even a diligent investigator might have taken months to uncover the fact that the petitioner had quietly returned to Massachusetts." *Id.* at 39. Similarly, in this case Mr. Garcia disappeared for a time (far longer than the 15 months unaccounted for in *Rashad*) and then quietly reappeared in Chicago, where he lived openly for several years. While the First Circuit had no problem allocating responsibility between the government (owing to its negligence in failing to lodge a detainer) and the petitioner, the Missouri court's opinion placed the entire responsibility for the delay on the police's lack of diligence without considering the fact that Mr. Garcia's actions made it much more difficult to find him.

The conflict between the Missouri court's decision and the decisions of these and other federal circuits raise a question that the Court should answer: whether a defendant who has taken affirmative steps to make his capture difficult can later claim a speedy trial violation based on a delay in his arrest by law enforcement.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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